

**WATER SYSTEMS COUNCIL**  
**ANTITRUST PRINCIPLES AND GUIDELINES**  
**(April 2016)<sup>1</sup>**

**Introduction**

The Water Systems Council (“WSC”) serves the water well industry and its members by (i) promoting the industry’s services to the public; (ii) protecting groundwater resources; (iii) collecting and disseminating data and information relating to the industry, including the cost-effectiveness and efficiency of modern well-systems; (iv) presenting industry views to consumers, community leaders, and governmental bodies; and (v) developing product performance standards for the industry.

WSC is committed to ensuring that its members fully comply with the WSC’s statement of Antitrust Principles and Guidelines and the underlying, relevant antitrust laws. The following principles and guidelines have been revised and adopted by the WSC Board of Directors, in order to assist its members and their respective representatives in understanding the relevance of antitrust to their businesses, inform them of prohibited and legitimate activities under the laws, and to provide them with guidance on how to avoid any potential conflicts, both at WSC meetings and activities and beyond.

It is, however, the responsibility of each member and its representatives to familiarize themselves with these principles and guidelines and the antitrust laws. WSC members are active competitors who often come in close contact and communication. A risk exists that such contacts may result in unlawful competitive behavior, violating WSC’s commitment to compliance with the law. Please be aware that these guidelines cannot address every potential area or fact pattern of antitrust concern for WSC members. Whenever there is any doubt, members should seek the assistance of legal counsel experienced in antitrust matters.

**Penalties**

Trade associations are a group of competitors joined together for a common business purpose. Because of this, they are particularly vulnerable to scrutiny and challenge by federal and state antitrust enforcers. Enforcement actions may be civil or criminal and may be pursued by the Federal Trade Commission, the Department of Justice, the Attorney General of one or more states, and private parties.<sup>2</sup>

Antitrust compliance is important to all members because the consequences are severe. On June 22, 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act. The act dramatically increased the criminal penalties for businesses and individuals that commit violations under Section 1 or 3 of the Sherman Act or a violation of any similar state law. The maximum corporate fine is raised to \$100 million from \$10 million. The maximum individual fine is raised to \$1 million from \$350,000. The maximum prison sentence is now 10 years, up from 3 years. The Department of Justice may seek permission to pursue an alternative fine which could total twice the gain or loss resulting from the illegal conduct. The DOJ has been able to obtain fines up to \$500 million.

---

<sup>1</sup> These Antitrust Principles and Guidelines supersede the Antitrust Compliance Statement of the Water Systems Council amended and revised as of November 2004, adopted and approved by Resolution of the Board of Directors November 2004. Reviewed in April 2016, no changes at this time.

<sup>2</sup> There is also a growing concern with enforcement actions pursued in foreign states, such as the European Economic Community and Canada.

Civil violations of the Sherman and Federal Trade Commission Act can result in issuance of a cease and desist order or dissolution of the association. Failure to obey such an order can result in substantial civil penalties.

Members, their companies, and the association may face private actions for treble damages brought by either competitors or consumers. They are authorized to sue to recover up to three times actual damages, plus attorney's fees.

### **Basic Principles of Antitrust Law**

The basic policy and objective of the U.S. antitrust laws is the preservation of competition. The basic federal statutes are the Sherman Act, the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act.

The most important antitrust statutes for trade associations are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade. Actions restraining trade include: tampering with or fixing any aspect of price, including sales prices, discounts, rebates and terms of credit; restricting production; allocating customers and/or territories; bid rigging; and engaging in boycotts. Since by definition, a trade association is a combination of competitors, it needs to be extremely cautious about activities that may unreasonably restrain trade.

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce." This statute reaches anticompetitive acts committed by single persons or companies, whether or not there is any agreement or "combination," as well as joint acts between competitors. The FTC has broad powers to determine what constitutes an unfair method of competition or unfair or deceptive act or practice under any given circumstances.

The Clayton Act prohibits a series of specific anticompetitive acts such as exclusive dealing, "tying" arrangements, interlocking directorates, and certain mergers. The Robinson-Patman Act of 1936, which amended the Clayton Act, prohibits price discrimination, generally, requiring equal treatment of customers as to price and price-related terms of sale.

Most states have also enacted statutes similar to the federal antitrust statutes. Because most of these statutes parallel the federal laws, the courts generally rely on federal decisions as precedent.

### **Antitrust Concerns for Trade Associations**

The five traditional problem areas for trade associations are: information exchanges, agreements to divide customers or territory, membership restrictions, lobbying, and standardization and certification.

**Information Exchanges** – Information exchange systems provide a great benefit to association members; however, such exchanges may run the risk of creating price signals, i.e., an attempt to stabilize prices or suppress competition. The prohibition against price fixing is the most likely to be violated by association members and strictly enforced by federal agencies. A violation may be inferred from similar price behavior among members, even in the absence of a written or oral agreement.

WSC has adopted the following guidelines:

- Participation in the program is voluntary, and does not require audits of the information submitted.
- Data is collected, organized and distributed by an independent and experienced third party.

- Only past or historical prices or pricing formulas, production, inventories and fee schedules will be gathered; no current or anticipated future data will be requested, gathered or reported.
- All data will be kept strictly confidential and will be destroyed as soon as compiled and aggregated for distribution.
- Disclosures will only be of aggregate data, and not information that specifically identifies individual companies or transactions.
- The information provided by individual respondents is not to be discussed among competitors.

No comments should be made as to either non-reporting entities or to reporting entities' financial conditions. It is up to the individual companies as to how data in the survey reports is put to use.

**Agreement to Divide Customers or Territory** – An agreement among members to divide customers is a violation. An agreement by one member to stay out of another's territory also constitutes a violation.

**Membership** – The denial of membership to an applicant or the denial of access to services to nonmembers may constitute a restraint of trade if it results in limiting competition. Membership criteria must be reasonable and clearly set forth in the bylaws of the WSC.

**Lobbying** – Trade associations may legally participate in lobbying efforts to influence legislation or other governmental regulation and to petition departments of government, including administrative agencies and courts. However, there are important limitations on lobbying efforts. Actions must be reasonably necessary for lobbying purposes. The activities must not have a direct effect in the marketplace. In addition, associations must not engage in "sham" petitioning (i.e., lying to a court or quasi-judicial entity, using the process rather than the result). It could be an antitrust violation if the concerted lobbying activity was undertaken with the purpose of influencing action for the purpose of directly interfering with the business relationship of a competitor. It is also important to note that lobbying efforts can be used against associations as evidence of a broader conspiracy.

**Standardization and Certification** – Voluntary uniform product standards and product certification are generally considered lawful if undertaken to improve product quality, increase safety, or comply with government rulings and requests. All voluntary industry standards must be carefully developed and reasonably applied. Where, however, the codes and standard-setting mechanisms have been shown to have been used by association members and officials to harm an existing or potential competitor, associations have been found liable for antitrust violations.

WSC has adopted the following guidelines:

- All reasonable efforts will be made to insure that those affected by the proposed standards or certification are notified and consulted.
- All objections to a proposed standard based on an alleged anti-competitive motive or effect will be promptly considered by the WSC Board of Directors in consultation with WSC staff and counsel. A written record will be made and kept as to how such an objection was resolved.

### **Guidelines for Avoiding Antitrust Problems**

Proof of a conspiracy to violate the antitrust laws can, and often does, rest on circumstantial evidence of an agreement or understanding between its competitors. Therefore, it is critical to avoid even the appearance of impropriety. It is beyond the scope of these guidelines to catalogue all practices and activities which violate the antitrust statutes. These guidelines are not a substitute for the advice of WSC's legal counsel or each member's own counsel.

**WSC Procedures and Meetings** – In order to minimize antitrust risks, the following procedures will apply to all WSC affairs and meetings. Any departure from these procedures must be approved in advance by WSC’s Board of Directors in consultation with counsel.

- All WSC members, their representatives, and industry speakers at any WSC event should be provided a copy of the association’s antitrust policy statement, detailing what can and cannot be discussed and done at association meetings and events.
- WSC’s counsel periodically updates members concerning antitrust problems.
- The WSC Board of Directors, after consultation with counsel, approves in advance all new association programs or changes in existing programs that may have potential antitrust implications. Special attention is given to statistical reporting programs and equipment standards.
- WSC meetings will be regularly scheduled. All annual and other plenary meetings of the membership, all Board of Directors meetings and committee meetings of the Board are attended by legal counsel for WSC. WSC staff are responsible for the preparation and maintenance of accurate minutes.
- WSC counsel will be advised in advance of all WSC committee meetings and other meetings where WSC business is to be discussed in order to determine whether he or his designated representative should attend the meeting.
- Final drafts of the minutes of all WSC meetings are reviewed for accuracy by the Executive Director and counsel, and must be, thereafter, approved by the WSC Board of Directors.
- Agendas are prepared for each WSC meeting and/or event, reviewed by counsel, and distributed prior to the meeting. This insures that legally risky topics are avoided at all costs.
- Any action by WSC or its Board of Directors that has the effect of rejecting a membership application should not become final without advice of counsel.
- WSC has a formal record retention program.
- No staff member or contracted representative of WSC has the authority to communicate with officials of the FTC or the Antitrust Division of the DOJ without prior notice to and approval by the Board of Directors in consultation with WSC counsel.

**Membership Policy:**

- WSC will not exclude eligible companies, associations or individuals from WSC membership in order to maintain a competitive advantage for its members.
- WSC will not restrict members from dealing with nonmembers.
- WSC will not limit access to information developed by the association, unless such limitation is firmly grounded upon the need to protect trade secrets and/or unless reasonably compensated in fairness to WSC members.

**Members Should Avoid Discussing:**

- Current or future prices
- Production plans
- What constitutes a “fair” profit level
- Possible increases or decreases in prices
- Standardization or stabilization of prices
- Pricing procedures
- Cash discounts
- Credit terms
- Control of sales
- Allocation of markets

- Refusal to deal with a corporation because of its pricing or distribution practices
- Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice

Member representatives should not participate in any WSC meetings that do not follow established procedures and bylaws. Remember also to avoid discussion of any of the above in any social gatherings.

### **Conclusion**

WSC expects its members to abide by its Antitrust Principles and Guidelines and hopes this document instills in members a heightened awareness of the antitrust laws. Members are urged to refer to WSC Board Members, the Executive Director and/or counsel any questions they may have regarding these guidelines and any WSC program or activity. A continuing and informative dialogue between WSC and its members will insure compliance with the law as well as a competitive and prosperous industry.

After reviewing these principles and guidelines, each member of the WSC Board of Directors and/or Executive Committee and each representative of each member of WSC is requested annually to sign and return the attached Pledge to WSC's counsel. Each new member shall sign the following Pledge upon admission to, and as a condition of, membership and annually thereafter.