NATIONAL CROP INSURANCE SERVICES ANTITRUST COMPLIANCE MANUAL

Objective

National Crop Insurance Services ("NCIS") and its member companies are committed to strict compliance with federal and state antitrust laws. These laws establish the rules by which companies compete and are intended to prevent and eliminate any agreements and individual conduct that would unreasonably interfere with the operation of the competitive marketplace. It is essential that everyone who may encounter potential antitrust issues be advised of the fundamentals of antitrust laws and NCIS's firm resolve that its employees and member companies comply with them fully.

These Guidelines are intended to avoid even an appearance of any impropriety, and therefore they may impose restrictions that go beyond the requirements of state or federal laws. Compliance with these Guidelines is nonetheless required of all participants in any NCIS activities or meetings.

Responsibility for Antitrust Compliance

While the General Counsel's Office provides guidance on antitrust matters, you bear the ultimate responsibility for assuring that your actions and the actions of any of those under your direction comply with antitrust laws.

We're Here to Help

Whenever you have any question about whether particular NCIS activities might raise antitrust concerns or your responsibilities under antitrust laws, please contact the General Counsel's Office (913.685.5432) (chuckl@ag-risk.org) or your company legal counsel.

Antitrust Tips

- **DO** your best to terminate a conversation immediately if you believe it involves a sensitive antitrust issue. If the discussion nonetheless continues, end the meeting and be certain your exit from the meeting is, if applicable, noted in the minutes.
- **DO NOT** exclude companies from membership if doing so would put that company at a competitive disadvantage.
- **DO NOT**, ***without prior review from counsel***, have discussions with member companies about prices, terms of sale, or contract provisions.
- **DO NOT**, ***without prior review from counsel***, have discussions with member companies about any competitive employment information including wages, salaries, or benefits; terms of employment; or even job opportunities.

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A. Introduction

It is the policy of National Crop Insurance Services ("NCIS") and its member companies to comply with all laws, including federal and state antitrust laws that apply to NCIS's operations and activities. The procedures discussed below formalize NCIS's continuing antitrust compliance program and are to be observed by all NCIS members, directors, officers, committee members and employees.

The Antitrust Compliance Manual ("Manual") should aid NCIS members, directors, officers, committee members and employees on general antitrust questions and issues. As these guidelines do not address every situation where potential antitrust concerns may arise, NCIS employees confronted with potentially sensitive antitrust issues should consult with NCIS's legal counsel. Those who are not NCIS employees should consult with their own company's legal counsel.

It is important to recall that federal regulators recognize the generally procompetitive benefits of trade associations. As noted by the Federal Trade Commission:

> Most trade association activities are procompetitive or competitively neutral. For example, a trade association may help establish industry standards that protect the public or allow components from different manufacturers to operate together. The association also may represent its members before legislatures or government agencies, providing valuable information to inform government decisions. When these activities are done with adequate safeguards, they need not pose an antitrust risk.

At the same time, however, antitrust enforcers and plaintiffs frequently look to trade associations as being potential sources or opportunities for anticompetitive conduct. Accordingly, it is imperative in the trade association setting to avoid even any appearance of impropriety.

B. Overview of Antitrust Laws

Violators of antitrust laws can be prosecuted both criminally and civilly. Criminally, the U.S. Department of Justice is authorized to prosecute Sherman Act violators as felons, who may be severely fined and, in the case of individuals, imprisoned. Civilly, the Department of Justice, state attorneys general and private parties may bring suits and recover money damages from NCIS or member companies and individual employees who have violated the federal antitrust laws. Additionally, the Federal Trade Commission has its own statutory authority to enforce antitrust laws through civil and administrative proceedings.

Antitrust laws are designed to promote fair competition and to provide American consumers with the best combination of price and quality. This Manual focuses primarily on the federal antitrust and trade regulation laws created by the Sherman Act, Clayton Act, Robinson Patman Act and Federal Trade Commission Act ("FTCA"). Most states and the District of Columbia have their own antitrust laws, which frequently parallel the federal laws.

C. Why is Compliance with Antitrust Law Important?

Aside from NCIS's commitment to abiding by the laws of all jurisdictions in which it operates, the penalties for violations of antitrust laws can be very severe – for NCIS, NCIS

member companies and individual employees.

For Members:

- Under U.S. antitrust laws, corporations can be fined up to $100 million per violation. Courts also can impose an "alternate fine" of up to twice the gain to the perpetrator or twice the loss to the victim as a result of an illegal behavior.
- Courts or government antitrust agencies can impose permanent restrictions limiting corporate activity.
- Private actions – Damages in private antitrust actions are automatically tripled, and class actions are available in some circumstances. As a result, customers, competitors, or suppliers who can show they were harmed by the perpetrator's actions can obtain massive damage verdicts.

For Individuals:

- The Department of Justice charges agreements between horizontal competitors as felonies.
- The government has determined that the most powerful deterrent for "hard-core" antitrust offenses is to charge the individuals responsible for anticompetitive agreements individually, and to seek lengthy prison sentences for responsible individuals. Sentences for criminal antitrust violations can be up to ten years in prison, fines up to $1 million, or both, per violation.

For NCIS:

- Injunctions or other orders issued by the courts may prevent NCIS from pursuing association business.
- On occasion, courts have ordered trade associations to disband.

Dealing with a government antitrust investigation or a private antitrust lawsuit is expensive, time-consuming and distracting. In addition, an investigation or lawsuit can seriously damage the reputation of NCIS, its members and individuals. NCIS depends upon its reputation with government agencies to carry out its mission for members; thus, any appearance of impropriety could severely hinder NCIS's ability to effectively represent members.

It is important to emphasize that these penalties, damages and distractions are entirely avoidable – by understanding in very basic terms what antitrust laws require and by consulting with legal counsel whenever you are in doubt about what the laws require.

D. Agreements

A core premise of antitrust law is that each company must make its business decisions independently of other competitors. Agreements among competitors to fix prices, to reduce price competition by allocating customers or markets or to exclude other competitors from the market are the most serious antitrust offenses. These agreements are almost always held to be illegal *per se,* which means that they are condemned automatically, without any opportunity to offer justifications or show competitive benefits.

What Constitutes an Agreement

For antitrust purposes, an "agreement" is defined extremely broadly. An agreement between competitors in violation of antitrust laws includes not only an express written or oral agreement, but also any conscious commitment to a common scheme to restrain trade. This can include even an implicit understanding. It is enough if there is a "meeting of the minds" between two actors as to a course of action to be taken, even if it is not spelled out. Furthermore, agreements can be inferred from circumstantial evidence (e.g., two competitors had a meeting and later engaged in parallel conduct that cannot be explained as independent action). Therefore, it is essential that your statements, actions and writings are as clear and unambiguous as possible to avoid misinterpretation after the fact. Never give the impression that an illegal agreement has been reached with a competitor or that inappropriate information has been exchanged.

Agreements Between Competitors Raise the Most Severe Antitrust Risks

While any agreement with a competitor can raise antitrust concerns, the following are some of the activities involving competitors that are most likely to give rise to severe antitrust risks.

- ***Price Fixing and Bid Rigging Agreements***

  Agreements between competitors on prices charged to others for products, assets or services are generally deemed *per se* violations, and are often charged as criminal violations by the Department of Justice. Every direct price fixing agreement is illegal, whether it is meant to raise, lower or just stabilize prices. Furthermore, the definition of "price-fixing" is extremely broad—it covers not only an agreement on actual prices charged, but also any terms and conditions that affect prices, such as agreements on discounts, promotional allowances, standardization of customer or delivery services and uniform credit terms and billing practices.

  In addition, it is often *per se* unlawful for competitors to agree on the prices they will pay for products or services sold by other persons or to engage in collusive bidding practices (or bid rigging). There are circumstances in which competitors may buy together in a purchasing collective, but any joint buying agreements should be reviewed in advance by counsel to ensure that they do not constitute an unlawful agreement.

- ***"No-Poach" Agreements and Wage-Fixing***

  The Department of Justice recently announced that it will pursue agreements among competitors to suppress wages or not to hire one another's employees (so-called "no-poach" agreements) as criminal antitrust violations. There has also recently been a spike in class action litigation targeting no-poach agreements or wage-suppression agreements among competitors. Accordingly, companies should avoid any agreement among employers to limit or fix the terms of employment for potential hires, or any other agreement that constrains individual company decision-making with regards to wages, salaries, or benefits; terms of employment; or even job opportunities.

- ***Agreements to Allocate Markets, Customers, Territories or Products***

  Agreements among competitors to divide or allocate customers or territories are generally deemed *per se* unlawful. An agreement among competitors is also illegal if it provides that they will refrain from selling a certain product generally, in any geographic territory or to any category of customer.

- ***Group Boycotts***

  If two or more companies agree with one another not to deal with another company (or to collectively pressure another person), the agreement may be deemed a group boycott. Group boycotts may be *per se* unlawful if they are entered into by horizontal competitors that have market power. This is distinguishable from a lawful, unilateral refusal to deal, where a company decides on its own, and without consulting any other company, that it does not want to buy or sell to another company.

- ***Agreements to Control Production***

  Agreements among competitors to limit services or production levels are treated equivalently to agreements to fix price, and therefore they raise serious antitrust concerns. The same is true of agreements among competitors that do any of the following: limit the quality of production, restrict the products or services sold to a particular customer, refrain from introducing new products or services, eliminate existing products or services, or accelerate the introduction or withdrawal of a product or service. These types of agreements should be avoided.

- ***Information Exchanges***

  Agreements among competitors to exchange information can be problematic, depending on the circumstances. In some cases, an exchange of confidential, competitively sensitive information can by itself be deemed an antitrust violation. And in other circumstances, an exchange of such information without a legitimate business justification can be interpreted as evidence of a *per se* unlawful price-fixing agreement. On the other hand, there are many circumstances in which an information exchange (particularly in the insurance industry) may be procompetitive and therefore lawful. Because of the potential for dramatically different outcomes under the antitrust laws, it is important to consult with counsel ***before*** exchanging confidential, competitively sensitive information with any competitors.

E. Agreements with Customers or Suppliers May Raise Antitrust Concerns in Some Circumstances

Agreements by a company with another company at a different level of the supply chain (*i.e.*, with a supplier or customer) are referred to as "vertical" agreements. In general, a company generally is free to choose its suppliers and customers, and to refuse to do business with any particular company, and it may freely determine the terms on which it does business with suppliers or customers. However, as discussed below, some vertical agreements may raise antitrust concerns. Vertical agreements are not prosecuted as criminal antitrust violations. Nor are they deemed *per se* unlawful; instead, the procompetitive and anticompetitive consequences of the arrangement are balanced, and

the agreement is deemed unlawful if the anticompetitive effects substantially outweigh any procompetitive benefits. Nonetheless, the consequences of a violation may be severe (including civil damages to private plaintiffs), so risky vertical agreements should be avoided.

- ***Minimum Resale Price Agreements***

  A minimum resale price agreement is an agreement between a supplier and a reseller to set the price (or to set a minimum price) at which the reseller will resell a product to its downstream customer. The legal rules in this area are complicated, both with regard to the conduct that may constitute an agreement, and what types of resale pricing agreements are unlawful. For example, a seller may suggest a resale price so long as it is completely clear that the reseller is free to accept or reject the suggestion and will not be penalized if it decides to disregard the suggestion. As another example, it may be problematic to prohibit a reseller from selling below a particular price, but it may be lawful to prohibit a reseller from advertising below a particular price (so-called minimum advertised pricing (or "MAP") agreements). Because of the complicated nature of the legal rules in this area, it is important to consult with counsel before entering into any restriction on resale pricing.

- ***Tying Arrangements***

  A "tie in" or "tying" arrangement permits a buyer to purchase one (tying) product or service only if it agrees to buy a second, distinct (tied) product or service from the seller. This might happen, for example, if a utility were to refuse to sell natural gas to a manufacturer unless the manufacturer also purchased proprietary software owned by the utility. There are many circumstances, however, in which two products may be bundled together to satisfy customer demand and without raising antitrust concerns. For example, if two products may be purchased separately, it is not a tying arrangement to give customers an option to purchase the products together. Because the legal rules in this area are complicated and the analysis is heavily fact-dependent, it is important to consult with counsel ***before*** bundling products together.

- ***Exclusive Dealing***

  Exclusive dealing arrangement***s*** can be lawful or unlawful, depending on the circumstances. In particular, there are many circumstances in which an agreement by one company to deal exclusively with another may enhance competition and benefit consumers; therefore***,*** such agreements are not considered per se unlawful. On the other hand, there are circumstances in which exclusive dealing may harm competition without a business justification, in which case such agreements raise antitrust concerns. Accordingly, it is important to consult with counsel ***before*** entering into any exclusive agreement.

- ***Reciprocity***

  Reciprocal dealing arrangements are a particular type of exclusive dealing arrangement, in which a customer makes purchases from a supplier only on the condition that the supplier will buy products or services from the customer. Such reciprocal arrangements may be particularly troublesome when one of the parties is

openly or implicitly coerced. It is important to consult with counsel ***before*** entering into any reciprocal dealing arrangement.

F. Antitrust Matters of Particular Concern to Trade Associations

It is perfectly lawful for firms (including competitors) to be part of trade associations. But trade associations are often viewed by antitrust enforcers as potential sources of illegal competitor collaboration. Moreover, antitrust plaintiffs often point to trade association meetings as purported proof of unlawful conspiratorial activity (even in the absence of evidence of wrongdoing). For example, if a trade association meeting is followed by parallel action among competitors, such as an increase in prices or a reduction in output, an antitrust plaintiff may argue for an inference that improper activity took place at a trade association meeting. It is thus very important to avoid even an appearance of impropriety at a trade association meeting or event.

Furthermore, this antitrust guidance applies not only in formal meetings, but also in any associated social events, activities, lunches/dinners, hallway conversations, or any side meetings associated with any trade association meeting.

While virtually all antitrust issues generally applicable to individual companies apply to trade associations as well, there are some special antitrust issues that are raised by specific types of trade association activities.

Summary of Trade Association Tips

- ☐ **DO** insist that NCIS meetings have agendas that are circulated in advance.
- ☐ **DO** take minutes of all meetings, ensure they properly reflect the actions taken at the meeting and circulate them to participants.
- ☐ **DO** your best to terminate a conversation immediately if you believe it involves a sensitive antitrust issue. If the discussion nonetheless continues, end the meeting and require that your exit be noted in the minutes.
- ☐ **DO NOT**, ***without prior review by counsel***, have discussions with member companies about prices, market allocations, refusals to deal, and the like.

<u>Membership</u>

Trade associations are permitted to adopt reasonable standards for membership. Exclusionary membership practices that affect a market participant's ability to compete, however, may raise antitrust issues. For example, if a company is denied membership or discriminated against in membership terms, that company may claim that it is unfairly placed at a competitive disadvantage if membership is necessary to compete in the

industry on equal terms. Accordingly, before denying membership or expelling a member, it is important to consult with counsel.

In addition, if certain benefits or services provided by the association are essential or material to compete effectively, then a non-member may claim a need to have access to those benefits to effectively compete in the industry. In any such circumstances, you should consult with counsel about whether access to the benefits is required, and/or what conditions may be placed on access (*e.g.*, payment of a reasonable fee).

Information Exchange, Data Collection and Dissemination

As noted above, information exchanges among competitors may raise antitrust concerns in certain circumstances. On the other hand, it has long been recognized that the distribution of marketplace information can enhance the efficiency of markets and therefore benefit competition and customers. This is particularly true in the insurance industry, in which it can be critically important (and perfectly lawful) for members to have access to industry information (such as data on loss experience).

It is therefore important to consult with counsel ***before*** participating in any information exchange among competitors. Broadly speaking, the farther removed the data are from prices and costs, the less company-specific they are, the more historical they are and the wider their public dissemination is, the less likely it is that they will raise antitrust problems.

Furthermore, the following points apply to information exchanges that have been approved by counsel:

- **Do** clearly articulate the purpose and procompetitive benefits of the information exchange program and keep it closely focused on those criteria.
- **Do** ensure member participation in any statistical reporting program must be voluntary.[1]

[1] This admonition does not apply to collection of data by NCIS in its role as an insurance statistical organization. In 1944, the United States Supreme Court ruled in the *Southeastern Underwriters Association* case that the selling of insurance was interstate commerce and, therefore, was governed by federal laws regulating interstate commerce. Specifically, the court applied federal antitrust laws to the business of insurance. The decision created uncertainty about the legality of all joint activities within the insurance industry.

Congress recognized that the nature of insurance pricing made it necessary to combine premium and loss experience. This was especially important to companies that did not have access to a base of experience large enough to develop credible data on their own. In 1945, Congress passed the McCarran-Ferguson Act, which provided certain antitrust exemptions for the business of insurance to the extent that the states regulated the business.

In most situations, state insurance departments designate statistical agents to collect statistical data on their behalf. Historically, statistical agents have developed detailed instructions called statistical plans, which define the data elements (e.g., line of business, coverage, class, state, territory, premium, etc.) as well as the formats and time frames for company reporting. These statistical plans instruct insurers how to code and submit their premium and loss data to the statistical agent.

This category of data collection is immunized from antitrust scrutiny under the "business of insurance" exception that is at the heart of the McCarran-Ferguson Act.

- **Do** ensure published data is reported in an aggregated form so that information relating to individual transactions is not disclosed and cannot be figured out.

Standard Setting

Reasonable industry codes, standards and certification programs may promote valid interests, including the protection of safety, health and the environment and the maintenance of high standards of ethics and conduct. You should nonetheless be alert for anticompetitive effects that a particular standard may cause. For example, a product standard that is unreasonably biased in favor of one company's product at the expense of another's may raise significant antitrust problems. Care should therefore be used in creating and applying codes, standards and certification criteria, as well as influencing other organizations as they undertake these activities.

Meetings

NCIS meetings regularly bring together representatives of member companies that are potential or actual competitors. It is important, therefore, that certain ground rules be followed to eliminate any suspicion that a meeting might be used for anticompetitive purposes. These ground rules apply both in formal meetings and in any information setting associated with the meetings (hallways, dinner/drinks, the golf course, etc.).

- **Do** prepare an agenda for meetings.
- **Do** note the NCIS Antitrust Notice at the beginning of every meeting.
- **Do**, if reasonably possible, have an NCIS staff member attend or participate in the meeting.
- **Do** invite legal counsel to attend if the meeting might involve matters having to do with sensitive antitrust subjects.
- **Do** follow the agenda at your meeting.
- **Do** keep accurate minutes that contain the broad topics discussed at the meeting.
- **Do not** discuss any subjects that might raise antitrust concerns (including prices, market allocations, refusals to deal and the like) unless you have received specific clearance from counsel in advance. Specifically, to avoid even an appearance of any impropriety:
    - **Do not** discuss current or future prices, price quotations or bids, pricing policies, discounts, rebates, or credit terms.
    - **Do not** discuss cost information such as input costs, operating costs, or wage and labor rates.
    - **Do not** discuss profits or profit margins, including what is a "fair" profit margin.
    - **Do not** discuss allocating markets, territories, or customers.
    - **Do not** discuss current or future production or purchasing plans, or limits on output.
    - **Do not** discuss refusing to deal with any suppliers, customers, or

competitions (or any class or types of suppliers or customers).

- **Do not** require or pressure any supplier, customer, or competitor to adopt any particular actions or policies.
- **Never** agree on any aspect of future pricing or output

- **What to do if a sensitive antitrust topic is raised:**
  - Stop the discussion immediately.
  - This is not the time to stay silent out of a sense of politeness – silence can later be considered acquiescence in the discussion.
  - Interrupt the conversation and suggest that legal counsel be consulted before continuing.
  - If the speaker will not stop the discussion, get up and leave. Ask to have your departure from the meeting noted in the minutes.
- **What to do if you are not sure if a subject is acceptable or not:**
  - Stop the discussion immediately.
  - Seek advice from legal counsel **before** moving forward with the discussion, reaching any agreements, or taking any actions.

G. Other Conduct That May Raise Antitrust Concerns Even Without an Agreement

You should also be aware of antitrust law concerns that may arise even where there is no agreement among competitors or anyone else. The most common issues of that type are briefly discussed here.

Monopolization

When any enterprise enjoys a dominant market position for a particular product, it may face questions of monopolization. Monopolization requires (1) a firm with market power (or a dangerous probability of acquiring market power), and (2) anticompetitive conduct that enhances or protects that market power. Absent anticompetitive conduct, it is not a violation for a firm to obtain a dominant market position – after all, winning in the marketplace is a fundamental (and lawful) goal in our market economy. However, concerns may arise if a firm achieves or maintains a dominant market position not through superior business acumen, greater efficiency, or by providing a better product or service, but rather by engaging in conduct that unfairly stifles competition. Firms that may be deemed to enjoy a dominant position in any line of business should consult with their counsel for further guidance in this area.

Price Discrimination

The Robinson Patman Act and some state antitrust laws restrict a seller from charging different prices for its goods to competing customers at the same point in time. Those laws also forbid sellers in certain circumstances from discriminating when they offer promotional materials, services or other inducements to individual customers in an effort to have the customers engage in in-house promotions or advertising. Buyers, in turn, are prohibited from knowingly inducing or receiving a discriminatory price, promotional

allowance or service. These general prohibitions have several exceptions, which are too complex to be discussed here.

Unfair Competition

The FTC Act (and similar state laws in most states) prohibits all "unfair methods of competition" and "unfair or deceptive acts or practices." The FTCA covers antitrust violations like those discussed above, but also forbids conduct that falls short of those violations. Specifically, the FTCA prohibits all forms of deceptive or misleading advertising and trade practices, such as disparaging a competitor's product, harassing a customer or competitor, and stealing trade secrets and customer lists.

H. Record Keeping

When we talk about "records," we are referring to any of the various communications people record in some tangible form every day – documents, email, videotapes, audio recordings (such as voice mail), Facebook©, Twitter©, LinkedIn© and other forms of social media. These records are sometimes inaccurate, often less precise or artful than we would like, and all too frequently subject to misinterpretation. You should prepare every record with the thought that it might someday have to be produced to government officials or plaintiffs' lawyers who will interpret your language in the worst possible way. The following guidelines may help you avoid problems in matters involving competition:

- **Do** avoid creating unnecessary records.
- **Do** use language that is clear, simple and accurate.
- **Do** avoid language that might be misinterpreted to suggest that NCIS condones or is involved in any anticompetitive behavior.
- **Do**, as much as possible, limit yourself to facts and avoid offering opinions.
- **Do not** use joking or aggressive language (*e.g.*, "Let's kill our competitors").
- **Do not** use language that might inappropriately arouse suspicion or suggest a guilty conscience (*e.g.*, "for limited distribution," "destroy after reading," "don't tell the lawyers, but…").
- **Do not** speculate about the legality of specific conduct.
- **Do not** keep records longer than necessary for business or legal purposes, consistent with NCIS's document retention requirements (unless you are subject to a legal hold).
- **Do not** hesitate to consult counsel about any nonroutine correspondence requesting an NCIS member company to participate in projects or programs, submit data for such activities or otherwise join other member companies in NCIS actions.

I. Reporting Channels

To fulfill NCIS's commitment to comply with antitrust laws, we all have an obligation to report any of the following:

- a violation of the law;
- conduct that might be a violation of the law; or
- questionable conduct that might indicate a violation.

A report may be made to the following:

- Charles D. Lee, General Counsel
- chuckl@ag-risk.org
- 913.685.5432

NCIS does not permit any retaliation of any kind for any report made in good faith of an actual or potential instance of illegal or unethical misconduct.

J. Questions?

If you have any Questions about potential antitrust concerns, contact the General Counsel's Office or your company's legal counsel. We look forward to working with you to ensure that NCIS, its directors, officers and employees, and the representatives of its member companies strictly comply with the letter and spirit of antitrust laws.

K. Conclusion

This Manual is intended as an aid to assist you in understanding and fulfilling your responsibility to comply with antitrust laws. It is not intended to make you an expert, but rather to help you identify antitrust issues that could arise in the course of your job responsibilities. The practices described above do not encompass every type of arrangement, agreement or instance which has been held to constitute an antitrust violation. Anyone confronted with potential antitrust issues should contact their company's appropriate legal counsel.

SIGNATURE PAGE FOLLOWS

Acknowledgement of Receipt and Review

I acknowledge that I have read the NCIS Antitrust Compliance Manual, and that I will exercise my best good faith efforts to comply fully with it.

_____

Signature

_____

Printed Name

_____

Date