



## Antitrust Compliance Guide for FCCA Members and Staff

# FCCA

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## **FCCA Antitrust Guidelines**

It is the policy of the FCCA membership and staff to comply fully with the antitrust and competition laws that apply to their operations and the activities of the association. The various antitrust and competition laws exist to promote vigorous and fair competition and to combat restraints of trade. Compliance with such laws is a condition of membership; unlawful anticompetitive activity is contrary to the best interests of the industry and shall constitute just cause for expulsion from FCCA membership.

All meetings or events held by FCCA are intended to provide legitimate information and training that is available to all and produced in a manner that is professional and educational. FCCA meetings and events in large part deal with the issues of tourism development, ports, tour operations, safety, security and other cruise industry issues. These issues are generally important to further the interests of the public good. Discussions of methods, techniques, and procedures to further these goals do not generally invoke concern relating to antitrust or competition. FCCA, as a trade association for the cruise industry and its partners, works with the governments, ports and all private/public sector representatives to maximize cruise passenger, cruise line and cruise line employee spending, as well as enhancing the destination experience and the amount of cruise passengers returning as stay-over visitors. Such common positions and the discussions related to reaching such positions that benefit the industry are generally permitted under our competition laws.

FCCA has filed an agreement among the member lines with the Federal Maritime Commission as required under the Shipping Act. The Act provides limited antitrust immunity for ocean carriers, including cruise lines, engaging in activity covered by such a filed agreement. However, the agreement does NOT authorize FCCA member lines to discuss competitive issues such as product pricing, operational plans or capacity allocations, credit and other policies for dealings with travel sellers or suppliers, and similar subjects involving competition among the cruise lines. Therefore, such matters ARE NOT IMMUNIZED from the antitrust laws, and should never be discussed between member lines' representatives.

FCCA seeks to promote a strong industry while not compromising on the goals of a safe, healthy, and sustainable vacation experience for our guests. Each member of the FCCA staff, as well as all members and their employees, have a responsibility to ensure that these goals are upheld and the appropriate antitrust and competition laws are adhered to.

Those FCCA meetings or events that touch on issues such as pricing, capacity or trends are more sensitive in nature. The following guidelines are intended to assist us all in meeting our responsibilities.

- a. Future sales, marketing, or research and development plans of individual competitors should not be discussed between competitors.
- b. Any complaints or business plans relating to specific customers, specific suppliers, specific geographic markets or specific production, should not be discussed between

competitors. In addition, members should not discuss or agree to allocate geographic markets, customers, or suppliers.

- c. Purchasing plans or bidding plans of companies in competition should not be discussed (except privately between two parties with a vertical commercial relationship such as supplier and customer). Members should not engage in bid rigging, bid rotation, or otherwise distorting the bid process.
- d. Current and future price information and pricing plans, bidding plans, refund and rebate plans, discount plans, credit plans, specific product costs, profit margin information and terms of sale should not be discussed between competitors. In addition, fees paid or fee plans for agents should not be discussed by competitors. All of the above are elements of competition.
- e. Issues relating to current or future capacity of individual competitors or specific capacity trends within the cruise industry should not be discussed between competitors.
- f. Members should not discuss or agree to include or exclude competitors, suppliers or customers, or discuss admission of affiliated travel sellers, Executive Partners or any other relationship between FCCA, the member lines and any third party except through the formal process provided in FCCA's Federal Maritime Commission agreement and bylaws.

Any questions regarding the legality of a discussion topic or business practice should be brought to the attention of the member's legal counsel.

## **Introduction**

Trade associations are recognized as valuable tools of American business. Nevertheless, since FCCA is by its nature a combination of competitors and customers, FCCA and its members must ensure that their activities do not constitute an illegal restraint of trade, or even create the appearance of such an anticompetitive restraint.

All FCCA members, directors, officers, and employees must be aware of the ever-present threat of antitrust liability – at formal and informal meetings of the group, trade shows, educational events, cocktail parties, dinners, and social events; and in telephone and on-line conversations and correspondence.

FCCA believes that competitive markets are necessary for the continuing success of its members and for the long-term viability of the industry. The nation's antitrust laws are designed to promote competition by prohibiting certain kinds of behavior. For these reasons, FCCA expects all of its members, directors, officers, and employees to comply with the applicable federal and state antitrust laws.

The FCCA Antitrust Compliance Guide should aid FCCA members, directors, officers, and employees on general antitrust questions and issues. This Guide focuses on the laws of the United States, but other jurisdictions also have similar laws. As these guidelines do not address every situation with antitrust consequences that may arise, FCCA advises those confronted with sensitive antitrust issues to consult with their own company counsel.

## Summary of Antitrust Dos and Don'ts

The intent of this Guide is not to make you an antitrust lawyer but to give you enough information about the law so you will know a dangerous area when you see it. The following are some of the most critical “Do's and Don'ts” for antitrust compliance:

### Don'ts:

- **DON'T** discuss prices, fees or rates, or features that can impact (raise, lower, or stabilize) prices such as discounts, costs, salaries, terms and conditions of sale, warranties, or profit margins.
- **DON'T** share data concerning fees, prices, production, sales, bids, costs, salaries, customer credit, or other business practices unless the exchange is made pursuant to a well-considered plan that has been approved by FCCA's Member Lines' legal counsel.
- **DON'T** agree with competitors as to uniform terms of sale, warranties, or contract provisions.
- **DON'T** agree with competitors as to restrictions on production or other output.
- **DON'T** agree with competitors to divide customers, markets, or territories.
- **DON'T** agree with competitors not to deal with certain suppliers, customers, or others.
- **DON'T** try to prevent a supplier from selling to your competitor(s).
- **DON'T** discuss your customers with your competitors.
- **DON'T** agree to any association membership restrictions, standard-setting, certification, accreditation, or self-regulation programs without consultation and approval by FCCA's Member Lines' legal counsel.

### Dos:

- **DO** insist that FCCA meetings have agendas that are circulated in advance, and that minutes of all meetings properly reflect the actions taken at the meeting.
- **DO** leave any meeting (formal or informal) where improper subjects are being or will be discussed. Tell everyone why you are leaving.
- **DO** ensure that only FCCA staff sends out all written and electronic correspondence on behalf of FCCA and that FCCA officers, directors, committee members, or other members do not hold themselves out as speaking or acting with the authority of FCCA unless they do, in fact, have such authority.
- **DO** seek legal advice from your own counsel if you have questions regarding the antitrust laws or your responsibilities under these laws.

## Overview of the Antitrust Laws

Broadly stated, the basic objective of the antitrust laws is to preserve and promote competition and the free enterprise system. These laws are premised on the assumption that private enterprise and free competition are the most efficient ways to allocate resources, to produce goods at the lowest possible price, and to assure the production of high quality products.

The U.S. antitrust statutes of principal concern to companies and individuals that participate in trade association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. These laws prohibit all contracts, combinations, and conspiracies that unreasonably restrain trade.

In addition, all U.S. states have adopted laws that address antitrust and fair trade matters. State laws usually are interpreted and applied in a similar fashion to the federal laws. In general, strict compliance with the federal antitrust laws will result in compliance with the state laws.

Some activities are regarded as unreasonable by their very nature and are, therefore, considered illegal "*per se*," which means that they are conclusively presumed to be unlawful. Practices in the "*per se*" category include naked agreements between competitors to fix prices; agreements to agree not to deal with or pressure others to not deal with competitors, suppliers, or customers (group boycott) outside the scope of the decisions by FCCA; and agreements to allocate markets or limit production. Conduct that does not unambiguously injure competition is not "*per se*" unlawful, but rather is analyzed under the "rule of reason." Under the "rule of reason," courts will analyze agreements or conduct by examining all of the facts and circumstances that surround the conduct in question to determine whether the actions unreasonably restrain trade.

## Why is Compliance with the Antitrust Laws Important?

Aside from the fact that FCCA is committed to abiding by the laws of all jurisdictions in which it operates, the penalties for violations of the antitrust laws can be very severe – both for FCCA members and for individuals.

### 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 illegal behavior.
- Courts or government antitrust agencies can impose permanent restrictions limiting corporate activity.
- Private actions – by customers or competitors who can show they were harmed by the perpetrator's actions – can result in damages many times the size of a government-imposed fine.

### Risks of Noncompliance with the Antitrust Laws

- Civil and criminal penalties
- Limitations on association activities
- Private lawsuits
- Imprisonment

## Key Points

### Interaction with Competitors

Competition requires independent business decisions.

- **NEVER** discuss prices, pricing methods, pricing strategies, margins, costs, price increases, credit terms, or terms and conditions of sale with a competitor.
- **DON'T** agree with a competitor to divide territories or customers.
- **DON'T** agree with a competitor on a method for dividing up bids/jobs.
- **DON'T** enter into an agreement with a competitor, supplier, or customer not to deal with others.

### For Individuals:

- Violations of the Sherman Antitrust Act are felonies.
- Individuals can be imprisoned for up to ten years, fined up to \$1 million, or both, per violation.

### For FCCA:

- Injunctions or other orders issued by the courts may prevent FCCA 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 FCCA, its members, and individuals. It is important to emphasize that these penalties, damages, and distractions are entirely avoidable – by understanding in very basic terms what the antitrust laws require, and by consulting with legal counsel whenever you are in doubt.

## Interaction with Competitors

The basic premise of the antitrust laws is that competition entails every company making its business decisions **independently of the others**. Each of the offenses highlighted below, as well as other antitrust law violations, have at their core some form of “agreement” among otherwise independent companies. It is important to understand that an “agreement” in antitrust terms rarely means a written agreement signed by all of the “parties” to the agreement. More often than not, agreements are inferred, by judges or juries, from facts and circumstances that suggest the existence of an understanding. Agreements can be direct or indirect, explicit or tacit. Plaintiffs can prove an agreement with all sorts of evidence, including, most typically, circumstantial evidence.

In the discussion that follows, bear in mind that an “agreement” is a very flexible concept under the antitrust laws. For this reason, it is important that your statements, actions, and writings be as clear and unambiguous as possible, so as to avoid misinterpretation or misconstruction after the fact. Never give the impression that any illegal agreement has been reached with a competitor or that inappropriate information has been exchanged.

The following outlines some of the activities involving competitors that can lead to violations of the antitrust laws:

### *Price Fixing*

In the United States, any agreement with a competitor establishing, altering, or relating to sales prices, or terms and conditions of sale, is unlawful, regardless of the circumstances. Price fixing is considered unlawful under the antitrust laws regardless of the reasons why it is undertaken (*per se* unlawful). You should not communicate with a competitor to obtain their prices, or have any discussions with competitors on pricing methods, pricing strategies, margins, costs, price increases, credit terms, or terms and conditions of sale under any circumstances.

### *Allocating Markets*

Unlawful agreements allocating markets occur when competitors divide territories or customers among themselves. Customer or market allocation is *per se* unlawful in the United States. For example, two competitors cannot agree that one will sell into one geographic market or to a group of customers, and the other will sell in a different geographic market or to a different group of customers.

### *Bid Rigging*

Any agreement with a competitor on any method by which prices or bids will be determined is *per se* unlawful. Illegal bid rigging also includes agreements or understandings among competitors to (1) rotate bids or contracts; (2) determine who will bid and who will not bid, or who will bid to which customers, or who will bid high and who will bid low; (3) fix the prices that individual competitors will bid; or (4) exchange information about the value or terms of bids between competitors in advance of submitting bids.

### *Group Boycotts*

An unlawful group boycott occurs when competitors, suppliers, or customers agree with each other (or pressure another person) not to deal with others. This should be distinguished from a unilateral refusal to deal, where a company decides on its own, and without consulting any other company, that it does not want to buy from or sell to another company, which is usually lawful (except, for example, in certain cases where the supplier has a dominant market position).

## **Dealing with Customers or Suppliers**

### *Refusals to Deal*

Generally, companies have the right to select their customers and suppliers and may refuse to deal with anyone for any reason or for no reason at all. However, in some circumstances, companies must be able to show objective reasons for refusing to sell to a customer or to purchase from a supplier.

Situations that may present antitrust risks occur when competitors agree or confer with each other about refusing to deal with others outside of the FCCA context. This can transform a unilateral decision into an unlawful group boycott. To the extent a member individually decides not to deal with a particular customer or supplier or not to sell in a particular market, the decision should be made for independent business reasons and not because of an agreement or understanding with another member.

### **Key Points**

#### **Dealing with Customers or Suppliers**

Decisions not to deal with customers or suppliers must be made unilaterally.

## Key Points

### Monopolization

- **DON'T** use market position to prevent effective competition.
- **DO** compete fairly.

## Monopolization

An entity has “monopoly power” or a “dominant position” if it has the power to control market prices or exclude competition. Relevant factors in determining whether an entity has a dominant market position include: its market share; the entity’s position relative to that of its competitors; the existence of barriers to entry into the market; the dependence of customers on a particular product or service; and the extent of any vertical integration.

Note that for purposes of antitrust analysis, an entity may be either a single company or an association of competitors such as FCCA.

An attempt to monopolize also may be unlawful. This is the case, for example, when an entity engages in anticompetitive practices (1) with the specific intent to eliminate competition, and (2) where the entity has such a large market share that it has the power to eliminate competition or set prices.

Even entities with monopoly power or a dominant market position may continue to compete fairly to increase the size of their business. It is not an offense to be dominant; problems arise with the abuse of such dominance. Entities cannot use their market position to further entrench their monopoly power or abuse their dominant position. Determining whether these restrictions apply to particular markets, and whether particular business practices may create problems in this regard, are complex issues that must be discussed with legal counsel.

The following is a non-exhaustive list of the kinds of activities which can cause problems if an entity has a dominant market position:

- *Refusal to supply* – there must be objective reasons for refusing to sell to customers/resellers.
- *Imposing unfair purchase or selling prices, or other unfair trading conditions* – for example, imposing excessively high prices or onerous contract terms that the entity only can obtain as a result of holding a dominant position.
- *Predatory pricing* – pricing below a specified measure of costs with the intention of driving a competitor out of the market.

## Monopsony Power

Joint purchasing, by definition, means greater purchasing power by the group than each of the buyers might have individually. This generally is procompetitive because it results in lower prices. If a buying group can reduce purchase prices below competitive levels by reducing the total quantity purchased in the entire market, however, it may raise antitrust concerns. Where prices are set through the artificial manipulation of powerful buyers rather than by competitive forces, suppliers may leave the market and consumers may be harmed by the resulting loss of choice. This power to eliminate suppliers is known as monopsony power.

To determine whether there is a monopsony risk, it is first necessary to determine whether the entity has market power in the relevant market. If the group has market power (typically defined as more than 35% of the relevant market), legal counsel should be consulted to determine the potential for monopsony issues.

## Key Points

### Monopsony Power

If the group controls more than 35% of the relevant market, consult with counsel about potential monopsony issues.

## Antitrust Issues Specific to Trade Associations

### Membership

Membership must be based on clearly articulated, objective and reasonable criteria.

### *Membership*

Trade associations are permitted to adopt objective and reasonable standards for membership. Exclusionary membership practices that affect a market participant's ability to compete, however, may raise antitrust issues. Similarly, denial of membership or discrimination in membership terms may place competitors at a disadvantage if membership is necessary to compete in the industry on equal terms. A trade association that does not have market power generally is free to limit its membership in any way consistent with achieving the efficiency goals of the group. However, even a trade association without market power should be aware that antitrust concerns may arise from excluding or expelling a firm that competes with members if the purpose is to raise the excluded firm's costs or cause other competitive harm.

Thus, membership criteria must be clearly articulated and based on neutral, objective factors calculated to promote efficiency-enhancing and pro-competitive goals. This is a particular concern in those markets where the trade association has a significant share and membership may be necessary to be an effective competitor. It is permissible to require members to fund a share of the trade association's capital requirements in order to prevent "free riders."

### Information Exchanges

Articulate a rationale for exchange.

Limit information shared to that information that is reasonably necessary to achieve procompetitive goals.

Information should be collected by CLIA or a third party.

Company-specific information should be masked and data should be aggregated.

Do not share future pricing or forecasts.

### *Information Exchanges, Data Collection, and Dissemination*

Structured properly, an information exchange program is a legitimate and necessary function of a trade association. Compilations of reasonably-available public information and other data collection and statistical reporting, conducted under reasonable guidelines, will not run afoul of the antitrust laws. Nonetheless, because of the risk that information collected as part of an information exchange could be used for unlawful purposes (for example, as the basis for an agreement to fix prices or restrict output between competitors), a number of precautions must be taken:

- Clearly articulate the purpose and procompetitive benefits of the information exchange program, and keep it closely focused on those criteria.
- Limit the types of information provided by members to FCCA. Only information reasonably necessary for the group to function efficiently should be submitted. Confidential non-public information regarding matters beyond the scope of the trade association should not be shared.
- The information should be collected by FCCA staff or other independent third-party collectors. Participating members should not be involved in the collection or compilation of the raw data.
- The third party should treat specific information provided by participating members confidentially and should not disclose it in its raw form to any other participant or a third party.
- Published data should be reported in an aggregated form so that information relating to individual transactions is not disclosed and cannot be determined. Such data should be masked or aggregated so that individual member information is not revealed.
- The report should not include information about future prices or other future forecast information.

### Standard Setting

- Consider all relevant opinions.
- Articulate sound technical basis.
- Reasonably related to goals.
- No more extensive than necessary.
- Revise positions as necessary.
- Voluntarily disclose proprietary interests.

### Certification and Self-regulation

- Based on sound objective justifications.
- Reasonably related to goals.
- No more extensive than necessary.
- Reasonable procedural safeguards against discrimination.

### Educational Presentations

- **DON'T** promote one company over another.
- Counsel should review educational materials.

### *Standard Setting*

The process of developing industry standards, if properly executed, can be a beneficial function of an industry group. Certain precautions should be taken in evaluating and adopting a position on a standards issue to ensure that a position taken by FCCA accurately reflects member interests and does not implicate any antitrust concerns such as price fixing or group boycott issues. Adoption of a standard or a position on a standard with anticompetitive intent to limit or prevent certain competitors from competing effectively could lead to antitrust liability. Therefore, these guidelines should be followed in articulating a FCCA position on any standard:

- Consider all relevant opinions.
- Articulate a sound technical basis for the position based on legitimate objective justifications.
- The standard must be reasonably related to the goals it is intended to achieve.
- The standard must be no more extensive than necessary to accomplish those goals.
- Revise positions over time as necessary to reflect the beliefs of the membership and the current state of the technology.
- Members must disclose voluntarily any proprietary interest (*e.g.*, a patent) they may have in a particular standard that the trade association adopts; failure to disclose intellectual property and other interests in a specific standard may lead to antitrust liability.

### *Certification and Self-Regulation*

While trade association-run certification and self-regulation can serve valuable procompetitive purposes, programs that unreasonably further the interests of certain members to the exclusion of others may be illegal. Even if an association's intent is to improve members' ethical conduct and provide the public with better products and services, it still may violate the antitrust laws. In particular, attempts by trade associations to self-regulate may, to the extent they exclude some that seek to participate, be subjected to antitrust scrutiny as illegal group boycotts or refusals to deal.

Any industry certification program or attempt at self-regulation must be based on sound, objective justifications; must be reasonably related to the goals it is intended to achieve; must be no more extensive than is necessary to accomplish those goals; and must incorporate reasonable procedural safeguards to ensure that participants are not arbitrarily discriminated against.

### *Educational Presentations*

Many trade associations provide a valuable forum for industry education. Nonetheless, discussions of this type should be limited to objectives that promote overall industry or consumer welfare -- they should not promote one particular company, product or service over others. A member or non-member that can provide useful information on specific concerns may be invited to make a presentation to or otherwise address issues at a FCCA meeting if the purpose is not to give the non-member favored status or treatment in doing so. However, outside presenters may not be as cognizant of antitrust issues as FCCA members may be.

Because of the risk implicated by educational presentations, written outlines and handout materials for presentations involving antitrust-sensitive topics should be reviewed by counsel prior to distribution and use. The same principles and antitrust risks can apply to printed or electronic material published by FCCA.

#### Public Policy Advocacy/Lobbying

- Generally protected under the First Amendment.
- **DON'T** engage in "sham" lobbying

### *Public Policy Advocacy/Lobbying*

In the U.S., activity by a single company or group of companies to petition lawmakers, regulatory agencies, the courts, or other government bodies to adopt or change laws or regulations in ways that favor FCCA's business interests may be exempt from the antitrust laws, even if others may be disadvantaged if the efforts are successful. The FCCA is NOT a lobbying association; the FCCA is an operational association for its member lines.

Under the *Noerr-Pennington* doctrine of antitrust immunity, joint action by trade associations or groups of competitors such as FCCA to influence government policy generally does not violate the antitrust laws. This doctrine generally includes legislative activity, litigation in the courts, and proceedings before administrative bodies, which are protected under the First Amendment to the Constitution.

However, "sham" lobbying or petitioning of the government for standards or other actions that exclude competitors may be illegal under the antitrust laws. Conduct which amounts to nothing more than an attempt to harass or interfere with the business relationships of a competitor, is fraudulent, or is an abuse of the regulatory process will not be protected. As noted above, the failure of individual members to disclose a proprietary interest in a standard being advocated to a governmental body for adoption may raise significant risk as well. Additionally, if the government is acting in the role of a business entity, such as a consumer or contracting entity, rather than as a policymaker or regulator, the *Noerr-Pennington* doctrine does not apply.

While discussion of any public policy (*e.g.*, bill, law or regulation) is permitted under the law, FCCA members should refrain from any discussion that could be interpreted as an agreement to take common action on prices, discounts, refusals to deal, production, or allocation of customers or markets. FCCA counsel should be kept informed of the nature of all FCCA public policy activities in order to identify possible antitrust risks.

### **Conclusion**

This Guide is intended as an aid to assist you in understanding and fulfilling your responsibility to comply with FCCA's antitrust policies. 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. Always contact legal counsel for further guidance.