ANTITRUST COMPLIANCE GUIDELINES FOR THE PROFESSIONAL SNOWFIGHTERS ASSOCIATION

I. INTRODUCTION

The Professional Snowfighters Association and its members are committed to full compliance with all laws, regulations, and ethical standards, including federal and state antitrust laws. Compliance with both the letter and spirit of the antitrust laws is an important goal for the Association and is essential to maintaining the Association's reputation for the highest standards of ethical conduct. The discussion below provides a broad overview of applicable antitrust standards, as well as concrete discussions of the problems that can arise in the course of the activities of the Professional Snowfighters Association and other contacts between members and/or employees of member companies.[1] While the Association has designed a system to ensure antitrust compliance, that system is not effective unless all parties do their part. Antitrust lawsuits and investigations can be brought on mere appearances of impropriety. Given the expense associated with both merited and unmerited suits, everything should be done to guarantee strict adherence to these Guidelines.

II. THE ANTITRUST LAWS

A. Basic Framework

The antitrust laws are intended to preserve a free competitive economy in the United States and in commerce with foreign countries. In a free market, the forces of supply and demand determine the terms and conditions of production, distribution, and sale. Our free enterprise system is designed to ensure that the highest quality of goods and services are available at the lowest price. Accordingly, agreements or understandings among competitors that inhibit firms in an industry from competing freely and effectively are frequently contrary to the antitrust laws.

The United States Department of Justice is authorized to prosecute corporate and individual violators of the antitrust laws as criminal felons. Conviction may result in severe fines, and in the case of individuals, imprisonment for up to three years. Further, the Justice Department, Federal Trade Commission, and state attorneys general may bring civil suits, seeking injunction of prohibited activities. Private parties may also bring civil suits, which can result in the recovery of three times (treble) damages in addition to fees and costs. In the case of class actions, damages from private suits can run into ten figures.

B. Potential Violations

The most common antitrust violations affecting trade associations fall within Section 1 of the Sherman Act. This provision prohibits agreements, understandings, or joint actions between two or more companies that restrict competition. The Sherman Act is of principal concern to trade association members, as a trade association by its very nature is a group of competitors that can easily and inadvertently undertake collective actions that restrain trade. Further, trade association activities enjoy no insulation from antitrust attack, and are under constant scrutiny by federal enforcement officials. For these reasons, it is essential for participants in trade association meetings or activities to appreciate fully: (a) what types of conduct might be considered evidence of an agreement or collusion, and (b) what type of agreements may be deemed to restrain trade unlawfully.

The first element necessary for a Sherman Act violation requires an agreement or understanding between two or more companies. This agreement can be oral or written, formal or informal, expressed or implied. In practice, proof of an agreement is often circumstantial in nature, consisting of evidence that has the mere appearance of a law violation. Although the actual circumstances may in fact be entirely innocent and lawful, their appearance may cause an antitrust investigator or a jury to conclude that an unlawful agreement existed. For example, an agreement may be implied based on the fact that competing firms all acted in a similar manner following a meeting or exchange of information. While the meeting or exchange of information may not in fact have prompted action, the inferences of an illegal agreement may be difficult to overcome. Thus, actual compliance with the

antitrust laws is only the first step in insulation from antitrust scrutiny. Strive to avoid not only action that violates the antitrust laws, but also lawful action that may create an impression of impropriety.
The second element of a Sherman Act violation focuses on whether an agreement unreasonably effects competition. While not every agreement to restrain trade will be deemed to automatically violate the Sherman Act, certain conduct is presumed to be unreasonable and therefore unlawful "per se" under the antitrust laws. In this circumstance, there can be no defense that the activity involved was well-intended, is reasonable, or should otherwise be found lawful. The per se violations of greatest concern to trade associations are:
(a) Price Fixing and Bid Rigging: where two or more competitors coordinate and by actual agreement, or by a pattern of conduct which amounts to an agreement, establish a price or pricing policy for the product they sell or inventory they purchase;
(b) Market Allocation: agreements between competing companies to divide up products, customers, territories, or to agree on output;
(c) Collective Refusals to Deal: group activities among competitors that cause significant competitive injury to third parties, such as the "blackballing" or boycotting of customers; and
(d) Agreements to Control Production: agreements among competitors to increase or restrict the quantity or quality of production levels.
Other joint activity may also violate the antitrust laws, even if it does not rise to the level of a per se violation. In non per se situations, the determination of whether an activity unreasonably restrains trade involves an examination of all the facts and circumstances surrounding the conduct, and a balancing of the pro-competitive aspects of the activity against the potential anti-competitive consequences. Some examples of non per se violations that still may be problematic in certain circumstances include exclusive dealing arrangements, reciprocal sales and purchase agreements, and agreements to establish industry product standards. Frequently, this so-called "rule of reason" approach does not lend itself to specific guidelines, and legal counsel is often necessary to determine whether a particular activity might constitute an unlawful restraint of trade. Even if these activities are ultimately found not to violate antitrust laws, investigations and lawsuits establishing the pro-competitive effects of such practices are often expensive, time-consuming, and disruptive.

III. ANTITRUST GUIDELINES

A. PRICING: DO NOT DISCUSS OR EXCHANGE INFORMATION ON PRICES OR ANY PRICE-RELATED ASPECT OF COMPETITION.

Pricing is the most sensitive subject under the antitrust laws. Agreements between two or more competitors that fix, stabilize, or tamper in any way with the price of goods or services, whether express or implied, is a per se violation of the antitrust laws. In such circumstances, the activity is illegal without further analysis of its reasonableness, arguable benefits to the public, or extenuating circumstances.
"Price" in this context includes all the elements of terms of sale that directly or indirectly affect price or pricing decisions including: sales prices, discounts, allowances, freight, credit terms, costs of production, cost and unavailability of raw materials, inventory levels, profit margins, or levels of capacity utilization. An "agreement" to affect price may be no more than an informal understanding among competitors based upon "casual remarks" or a "knowing wink or nod" from which an inference of concerted action may be raised. Examples of behavior found to potentially violate the Sherman Act include:
(a) Prices: Plaintiff brought suit against a group of truck dealers alleging a conspiracy to refrain from price competition. The plaintiff offered testimony that at a dealer meeting, two defendants approached him and “told him that ‘the way it works’ in New Jersey is that ‘dealers don’t compete on price.’” The plaintiff also introduced handwritten notes taken by a consultant at a dealer sales meeting that stated there was a “gentleman’s agreement among…truck dealers that they would sell only in their own areas of responsibility.” The Third Circuit found this evidence was sufficient for a jury to find an agreement to restrict prices.

(b) Discounts: A vice-president at an advertising company sent a letter to the president of its trade association requesting that an issue relevant to discounting be discussed at the next association meeting. Following this meeting, the advertising company eliminated discounts to local accounts to "align" itself with other competitors' decisions to follow the industry's "standard practices and procedures." In subsequent testimony, a company employee justified this elimination of discounts as showing "consistency" with the trade association's "minimum standard." The trade association also circulated a document which listed a "strong concern" about the practice of discounting. The court held that the above information could be sufficient to support a jury finding that the members of the trade association unlawfully conspired to fix prices.
(c) Price Verification: Sales officials of corrugated cardboard box manufacturers in the Southeast followed a practice of occasionally calling each other to "verify" competitive quotes given on current sales to specific customers. The Supreme Court held the practice illegal because it had the effect of stabilizing prices as it tended to limit price reductions and the range of price changes. The decision was reached in spite of an express finding that the calls did not result in an agreement on actual price levels.
(d) Information Exchange: Three manufacturers of iron pipe fittings submitted monthly sales data to a common trade association. The trade association provided this sales information to an accounting firm, which aggregated the data and then distributed it back to the three suppliers. The FTC brought suit, alleging that this information exchange was used in part to monitor market share and determine whether the companies were adhering to the terms of a previously created collusive price-fixing arrangement. As part of the proposed settlement, the FTC sought to require the companies to agree not to exchange competitively sensitive information through a third party unless certain conditions are met, including: (a) the information being exchanged relates to transactions that are at least six months old; (b) the statistics must aggregate data from no fewer than five competitors; (c) the statistics must not be able to be attributed to any specific company; (d) communications about the information exchange must be at official meetings with a written agenda and antitrust counsel present; and (e) all aggregated statistics must be made public at the same time they are communicated to the contributing companies.
Due to the wide range of conduct that potentially violates the Sherman Act, avoid discussing topics or making announcements related to current, proposed, or planned changes in price, product costs, terms of sale, and marketing policies. Such discussions, however informal or unintended, can be used as evidence to establish illegal agreements on price. Similarly, the Association, its committee, and staff will refrain from making any reference in meetings, literature, or writings of any kind to prices, costs, terms of sale, or other elements of doing business that may affect prices or pricing decisions without specific legal advice to the contrary. Such references can be viewed as the Association advocating that its membership conform to specific pricing practices or policies. Association activities or programs that may have some indirect impact on price could also evoke scrutiny. Refrain from discussion or implementation of practices with an indirect impact to price. For example, agreement upon uniform warranty or delivery terms, competitive bidding procedures, and programs, activities, agreements, or understandings that tend to facilitate common pricing or price movements in the industry could all become the target of antitrust attack.
The essential rule to be kept in mind is that each seller must determine on its own the prices and terms at which it purchases and sells. Conduct your affairs to avoid even the appearance or inferences of agreement or collusion that might affect price.

B. COMPETITORS: AVOID JOINT ACTION THAT WOULD DISCRIMINATE AGAINST OR DISADVANTAGE A COMPETITOR.
The Professional Snowfighters Association's primary function is to provide information and services that afford commercial benefit to all of its members. Each member of the industry should have an equal opportunity to participate in and receive the benefits of the Association's activities. Professional Snowfighters Association members should be encouraged to participate in committees that perform functions of interest to the members. Further, membership should be open to all

participants in the industry that satisfy basic membership requirements. Review any decision to deny membership or expel a member company with counsel.
Discrimination against non-industry participants may also be problematic. When the Association or one of its committees is contemplating action that may have a significant commercial impact on others, such as suppliers to the industry, review the proposed action with antitrust counsel to ensure it does not violate the antitrust laws.

C. CUSTOMERS: REFRAIN FROM ANY ACTIVITY THAT HAS THE APPEARANCE OF DIVIDING UP CUSTOMERS, SALES TERRITORIES, OR PRODUCTS OR AGREEING UPON OUTPUT.
Understandings among competitors about who will or will not sell in a particular geographic market, to particular customers, or particular products are per se illegal. Discussions between company representatives about future plans for a particular product, in particular geographic markets, or with regard to certain customers may be interpreted as creating an understanding that the companies will restrain competition between one another. For example, a criminal conviction resulted when two companies agreed not to solicit business from the other company's existing customers and reported to one another when a customer became unhappy and was considering switching suppliers. Similarly, an agreement to restrict production or limit output would be illegal. For these reasons, avoid discussions among competitors relating to customers, specific products, territories, production, or output.

D. MEETINGS: PREPARE AND FOLLOW AN AGENDA, AVOID DISCUSSION OF SENSITIVE INFORMATION AND KEEP SIMPLE AND ACCURATE RECORDS.
Professional Snowfighters Association meetings regularly bring together representatives of companies that are market competitors. For this reason, it is important to eliminate any suspicion that a particular meeting might be used for anticompetitive purposes. Before the meeting begins, create an agenda that antitrust counsel can review. Attempt to follow that agenda as closely as possible, and have counsel approval of significant deviations. Unless otherwise approved by counsel, participants should avoid discussion of the topics discussed above, as well as other competitively sensitive information. Finally, keep accurate meeting minutes that can be reviewed by counsel before circulation. Apart from meeting minutes, other records may be created detailing activities at Professional Snowfighters Association events, including documents, emails, videotapes, and voice mail. As records are frequently subject to misinterpretation, it is important to always create records with the thought that it could be produced to the government or a plaintiff's lawyer. Use language that is clear, simple, and accurate, avoid speculation about the legality of specific conduct, and avoid language that may arouse suspicion (i.e. "Eliminate the competition" or "For your eyes only"). When possible, limit the creation of records that are not necessary for business or legal purposes.

IV. CONCLUSION

While these Guidelines attempt to provide instruction across a range of antitrust issues, they are by no means exhaustive. If you have any question about whether certain actions, activities or agreements violate antitrust laws, please consult legal counsel.

[1] These Guidelines do not attempt to address certain aspects of the antitrust laws that may be relevant to individual companies. Individual companies should look to other sources for guidance on subjects such as mergers, monopolization, distribution restrictions, price discrimination, etc. In addition, certain companies in the winter maintenance industry are subject to outstanding antitrust decrees that may affect their business operations or participation in various Professional Snowfighters Association activities. If employees of member companies or agencies have antitrust questions which do not relate to Professional Snowfighters Association activities, they should seek advice from legal counsel for the member company or agency rather than Professional Snowfighters Association counsel.