ANTITRUST IMPLICATIONS AND CONCERNS FROM PARTICIPATION IN A TRADE ASSOCIATION

I. INTRODUCTION

A trade association such as the National Flood Association ("NFA") is comprised of competitors. As such, there are antitrust implications inherent in its operations, and trade associations such as NFA are subject to strict scrutiny under both federal and state antitrust laws. NFA's policy is to avoid any actions that have the remotest appearance of conduct prohibited by federal and/or state antitrust laws. The purpose of this guide is to assist NFA, its employees, and members in avoiding violations of antitrust law, and to prevent any appearance of a violation. Accordingly, this guide outlines areas of concern in antitrust law for NFA and its members and describes actions that NFA members should and should not take to comply with the law.

This guide is not a substitute for legal advice that members may receive from their own legal counsel. Nor is it intended to be a comprehensive review of all antitrust-related issues that may arise. Each member bears responsibility for assuring that its actions and those of its employees comply with antitrust laws. Each member should be made aware of this guide and review a copy thereof at least once a year.

II. ANTITRUST LAWS AND TRADE ASSOCIATIONS: THE SHERMAN ACT AND THE FEDERAL TRADE COMMISSION ACT

Antitrust laws are intended to promote vigorous and fair competition and to provide consumers with the best combination of price and quality products and services. The primary antitrust statutes relating to trade association activities are Section 1 of the Sherman Antitrust Act and Section 5 of the Federal Trade Commission Act. *See* attached Summary of Antitrust Laws.

A conviction for violating an antitrust law may result in stiff fines for NFA and its members, jail sentences for individuals who participated in the violation, a consent decree under which the association must operate, or a court order disbanding NFA. In addition to governmental prosecution for a criminal or civil violation, trade associations also face the possibility of private actions brought by competitors or consumers. Violators of antitrust law in a private action may be ordered to pay treble damages to the injured plaintiff. *See* attached Summary of Antitrust Laws.

Thus, to assist NFA, its employees, and members in avoiding violations of antitrust law, NFA members should abide by the following checklist.

III. NFA MEMBER CHECKLIST

A. What You Can't Do

1. Do not enter into any agreements with competitors regarding or affecting prices.

2. Do not discuss your company's current prices with competitors. Specifically, do not discuss pricing before, at, or after NFA meetings, including peripheral matters relating to price, such as credit policies and terms of sale.

3. Do not agree with competitors on pricing or profit levels.

4. Do not agree with competitors to give or deny cash discounts or promotional allowances.

5. Do not agree with competitors to give or deny credit to a specific customer, or to establish uniform credit terms.

6. Do not agree with competitors to deal or not to deal with any customer or agree on the prices to be charged to a specific customer.

7. Do not discuss allocation or division of markets, territories or customers.

8. Do not refuse to deal with a company because of its pricing or distribution practices.

9. Do not discuss with your competitors any confidential, competitively sensitive information concerning your own or another competitor's business plans.

10. Do not attend or remain at meetings or gatherings if it appears that sensitive topics are being discussed, *e.g.*, pricing, market allocation, etc., without first obtaining legal advice.

11. Do not discuss competitive quotations, bids, and bid pricing with competitors.

12. Do not enter into any agreement to: share information with the understanding that one party will be the low bidder; submit complementary bids at the request of a competitor with the understanding that one bid will be higher; not bid on a specific project.

13. Do not enter into any agreement or understanding with a competitor to restrict the volume of goods your company and/or the competitor will produce or make available for sale.

14. Do not enter into any agreement or understanding with suppliers and/or customers that provides that your company will not sell to, purchase from, or deal with particular outsiders.

15. Do not restrict another NFA member from dealing with non-members.

16. Do not limit access to information developed by NFA, unless the limitation is grounded upon the protection of trade secrets.

17. Do not prohibit non-members from receiving NFA services that provide a competitive benefit, although NFA may charge higher fees for non-members. All fees required for non-members must be reasonably related to the cost of the service or information provided.

18. Do not condition the sale of one product (the tying product) on the purchase of a different (or tied) product, particularly if your company enjoys a strong market position.

19. Do not enter into an agreement requiring adherence to a standard. Competitors should be free to conform or not conform.

20. Do not adopt a standard that results in the elimination of incentive for industry members to improve their products or engage in research.

21. Do not enter into a standardization program where there will be penalties, coercions or compulsion to enforce the standards adopted.

22. Do not standardize on a product that requires use of a patent or technical information not available on equal terms to everyone in the industry.

23. Do not standardize on a raw material that is scarce or difficult for non-members of the association to obtain.

24. Do not impose standards which may deprive consumers of legitimate options, such as eliminating less expensive product lines, or which may limit price competition.

B. What You Can Do

1. Discuss ways to educate and provide meaningful information to NFA members about the industry.

2. Discuss economic trends, business forecasts, and materials availability, emphasizing that each company is free to use this information in the way it sees fit and should make its own business decisions.

3. Provide a properly structured environment for the exchanging of credit.

4. Discuss federal and state governmental actions and develop industry-wide lobbying efforts.

5. Discuss technological advances and better ways to utilize them.

6. Discuss ways to improve the public image of the industry.

7. Include the entire membership in discussion of standards setting and certification activities.

8. Adhere to written agendas for meetings and gatherings.

9. Conduct standard setting activities under close legal supervision and continually scrutinize standards and certifications to ensure that no members are unfairly benefitting from the standards and certifications and that all standard and certification criteria are based on legitimate pro-competitive values.

10. Collect and disseminate non-public information, such as marketing reports, raw material costs, employee compensation, and aggregate data regarding historical prices and costs, but under the close supervision or instruction from legal counsel. NFA members should assure that any information exchanges are managed by third-parties, rather than members, that the information exchanged is greater than three months old, and that information is collected from as many members as possible such that no one member's data constitutes more than 25 percent of the basis for the statistic at issue.

11. Distribute these guidelines to employees and fellow NFA members as necessary and review them regularly, at least once per year.

12. Seek legal advice if you have questions regarding antitrust implications of your actions in relation to NFA.

IV. ACKNOWLEDGMENT

I certify that I have read and understood these guidelines;

I further certify that I have had the opportunity to consult with legal counsel regarding my participation in and association with NFA; and

I further certify that I will follow these guidelines in all matters relating to NFA.

DATE: ______________________________

Name of NFA Member ____________________________________

Signature By:___________________________________

PRINT NAME OF SIGNATORY ______________________________________

Title:_________________________________

SUMMARY OF ANTITRUST LAWS

I. Sherman Act

Section 1 of the Sherman Act makes illegal agreements, combinations, or conspiracies, especially among competitors, that unreasonably restrain trade. Illegal agreements may be written, oral, informal, express, or implied. The term "combination" simply means an agreement or compact between two or more persons or companies. Since trade associations are by definition "combinations," they are acutely exposed to potential antitrust liability.

The Act precludes only "unreasonable" restraints of trade. Agreements are typically deemed to unreasonably restrain trade if the anticompetitive effects of the agreement outweigh the pro-competitive benefits. This formulation is typically called the "Rule of Reason" analysis. However, other agreements are deemed *per se* unreasonable and, by their nature, are illegal regardless of their pro-competitive benefits. *Per se* illegal agreements include: (1) price fixing; (2) bid rigging; (3) market allocation (of customers, territories, suppliers, product lines and other lines of commerce); (4) output restrictions; (5) group boycotts; and (6) certain tying arrangements.

A. *Per se* violations present the most difficulty:

1. Price Fixing

Price fixing is the most common antitrust violation and most likely to be enforced by the government. Price fixing encompasses not only agreements or combinations with competitors on a selling price, but may also include, for example, agreements to buy up surplus goods, to adhere to a formula for determining prices, to standardize discounts, to control raw material prices, to control or standardize the price of services, and any other agreement or combination which has the result of affecting the prices of goods or services. Prices must not be discussed before, at, or after NFA meetings. Furthermore, discussion of peripheral matters relating to price, such as credit policies and terms of sale, should also be avoided.

2. Bid Rigging

Various activities fall under the heading of bid rigging, including agreements to: share information with the understanding that one party will be the low bidder; submit complementary bids at the request of a competitor with the understanding that one bid will be higher; not bid on a specific project. NFA members should avoid discussion or activity of this nature.

3. Agreement to Allocate Customers or Territories

An agreement or understanding among members of a trade association to divide customers is, in and of itself, a criminal act. Even an informal agreement whereby one member agrees to stay out of another's territory will constitute a violation of the antitrust laws. Accordingly, NFA members should not discuss allocation or division of markets, territories, or customers.

4. Agreement to Limit Supply or Output

Any agreement or understanding between competitors to restrict the volume of goods they will produce or make available for sale is illegal.

5. Group Boycotts

Any agreement or understanding between suppliers and/or customers that they will not sell to, purchase from, or deal with particular outsiders is illegal. Because a trade association, by its nature, provides certain benefits to members, denial of membership to qualified competitors could violate antitrust law. NFA members should not restrict one another from dealing with non-members or limit access to information developed by NFA, unless the limitation is grounded upon the protection of trade secrets. NFA services that provide a competitive benefit should also be available to non-members. However, NFA may charge higher fees for non-members. While a fee may be required for non-members, it must be reasonably related to the cost of the service or information provided.

6. Tying Arrangements

A seller that enjoys a strong market position may violate antitrust law by conditioning the sale of one product (the tying product) on the purchase of a different (or tied) product.

B. Rule of Reason issues may also present difficulty:

1. Standards Setting

The setting of standards by a trade association is not *per se* unlawful. However, standards setting activities can create antitrust violations if the standards limit or eliminate certain products or competitors from the market. NFA members should strive to develop standards in a fashion that allows for participation from all interested parties in development and implementation of the standard.

2. Certification

Like standards setting, certification of products or trade association members may result in antitrust liability if the certification limits or restrains competition. NFA members should ensure that any certification criteria are based on legitimate pro-competitive values.

3. Information Exchange

Collecting and disseminating non-public information, such as marketing reports, raw material costs, employee compensation, and aggregate data regarding historical prices and costs is permissible. However, NFA members must be especially vigilant with regard to the type of information shared and close supervision or instruction from legal counsel is suggested. The problem is that exchange of such non-public, pricing information raises the specter of price fixing and measures should be taken to avoid engaging in such activities. Generally, the further removed the data are from current, non-public prices and costs and the less company-specific the data are, the less likely that an information exchange will raise antitrust concerns. Thus, NFA members should assure that any information exchanges are managed by third-parties, rather than members, that the information exchanged is greater than three months old, and that information is collected from as many members as possible such that no one member's data constitutes more than 25 percent of the basis for the statistic at issue.

4. Government Relations Activities

The Sherman Act is generally inapplicable to *bona fide* group efforts to influence legislative or regulatory action under what is known as the *Noerr-Pennington* doctrine. Nevertheless, the bounds of the *Noerr-Pennington* doctrine are difficult to discern and members should tread carefully with the advice of legal counsel before engaging in group efforts to lobby government.

C. Penalties and Damages for Violations

Federal antitrust laws may be enforced against trade associations, their members, and staff both by government officials and by private parties. In both cases, penalties are severe.

The Sherman Act is a criminal statute as well as a statute providing treble damages in civil actions and it is broadly construed. For example, even if a NFA member is not an active participant but simply attends a meeting where other members of the association engage in an illegal discussion, the member may still be held criminally responsible.

An individual convicted of a criminal violation of the Sherman Act is subject to heavy fines and imprisonment. A corporation convicted of such a criminal offense may be fined as much as $100,000,000. However, under alternative sentencing guidelines a higher fine may result if the court imposes a fine of twice the amount of the loss caused to victims or twice the gain to the competitors.

II. The Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Unlike Section 1 of the Sherman Act, the Federal Trade Commission Act reaches anti-competitive acts committed by single persons or companies, whether or not there is any agreement or "combination." Like the Sherman Act, it also covers joint actions.

The FTC has broad discretion to determine what constitutes an unfair method of competition or an unfair or deceptive act or practice.

Violation of the Federal Trade Commission Act can result in issuance of a cease and desist order, which will place extensive governmental restraints on the activities of the trade association and its members. Failure to obey such an order can result in penalties of as much as $10,000 per day