

## **COALITION TO STOP FLU, INC. ANTITRUST POLICY**

### **Introduction**

The Coalition to Stop Flu, Inc. (the “Coalition”) is a social welfare organization that seeks to bring together leaders from across the U.S. health care and public health sectors to advocate for federal policies and funding that will stop deaths from seasonal and pandemic influenza.

The Coalition’s policy is to comply strictly in all respects with the antitrust laws. The purpose of this document is to clearly and unequivocally communicate the Coalition’s antitrust policy and to provide educational information on the antitrust laws, rules and guidelines and operating procedures to assist the Coalition and its members to not only avoid violations of the antitrust laws, but to prevent any appearance of a violation.

The rules, guidelines, and operating procedures in this document are in some respects more restrictive than required by the antitrust laws. The Coalition has opted to err on the side of caution in light of the severe penalties for violation of the antitrust laws and the substantial costs of defending antitrust investigations and claims, even those in which the inquiry or charge is without merit.

This document is not intended as a substitute for legal advice. Nor is it intended to be a comprehensive review of all antitrust-related issues that may arise.

### **I. Antitrust Primer**

The antitrust laws are intended to promote a vigorous economy benefiting consumers, in which each competitor has a full opportunity to compete on the basis of price, quality, and services. Their goal is to maximize consumer welfare, i.e., they protect free competition, not individual competitors. They prohibit particular anticompetitive activities and more generally those that are deemed to unreasonably restrain competition.

#### **A. Basic prohibitions**

The principal antitrust statutes that are applicable to associations and their members are the Sherman Antitrust Act and the Federal Trade Commission (FTC) Act:

##### **1. Sherman Antitrust Act – Section 1**

Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies (any type of agreement, understanding, or joint action) that unreasonably restrains competition. Generally speaking, any agreement between two individuals or entities will suffice for joint action under Section 1. The agreement can be express (e.g., in the form of a written contract or other oral or written communication) or implicit (e.g., inferred from the conduct of the parties and the circumstances).

Virtually all contracts or other business agreements restrain competition in some fashion. However, long ago, the Supreme Court interpreted section 1 as only prohibiting joint action that *unreasonably* restrains competition. A restraint is unreasonable if its overall effect is to decrease competition significantly.

In most cases, the courts will determine whether a restraint is unreasonable by the “rule of reason” analysis. This involves a balancing test. The pro-competitive effects of the restraint are weighed against the anti-competitive effects. The restraint is considered unreasonable only if the scales tip more to the anti-competitive side. Anti-competitive effects include increasing prices significantly, decreasing the quality of services, or significantly reducing consumer choice.

However, the courts view certain conduct as so inherently anti-competitive and lacking in redeeming value that it is considered “*per se*” unreasonable. Examples include horizontal price fixing, market divisions, and certain group boycotts. When the existence of this conduct is proven, the challenger does not need to provide proof of the harm to competition and the defendant is not permitted to attempt to justify the conduct or to show pro-competitive benefits.

## **2. Sherman Act – Section 2**

Section 2 of the Sherman Act forbids monopolization and attempts to monopolize by a single seller (i.e., no joint action is required), and conspiracies to monopolize. As this provision has been interpreted by the courts, it is not illegal, by itself, for a business to have a monopoly or to try to achieve a monopoly position. A violation results only if the business has substantial market power and maintains its power through *unreasonably anticompetitive* methods that exclude its competitors from the market. Conduct is not unreasonably anticompetitive, even if it excludes competitors from the market, if there is a legitimate business justification for the conduct, such as its benefiting consumers.

## **3. FTC Act – Section 5.**

Section 5 of the FTC Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” The Supreme Court has ruled that violations of the Sherman Act also are violations of Section 5. In addition, the courts have allowed the FTC broad power to define what is “unfair” and to prohibit activities that are not necessarily in violation of the Sherman Act, but are contrary to the policies underlying the antitrust laws.

## **B. Exceptions and immunities**

There are a number of statutory and court-created exceptions or immunities to the antitrust laws (meaning the antitrust laws do not apply to the conduct or parties involved). The most relevant to the Coalition is the Noerr-Pennington doctrine. The Noerr-Pennington doctrine is a court-created exception to the antitrust laws premised on the First Amendment right to petition the government. Under the doctrine, joint action by

competitors intended to influence decisions of the government is exempt from the antitrust law. In general, it permits competitors to meet and collect necessary information and to make joint presentations with respect to governmental activities of common interest if any subsequent anticompetitive effect results from the government's action. The courts have applied the doctrine to petitions directed to the legislative, executive, and judicial branches.

### **C. Enforcement**

The U.S. Department of Justice (DOJ), state attorneys general, and private parties harmed by the anticompetitive conduct of others may bring suit for violations of the Sherman Act. The Federal Trade Commission (FTC) has exclusive authority to enforce the FTC Act.

#### **1. Pre-complaint investigations**

Both the DOJ and FTC have extensive pre-complaint investigative powers that they can utilize to determine whether there is evidence to support the filing of an antitrust case. For example, the DOJ can issue a pre-complaint civil investigative demand (CID) to any person or entity if there is reason to believe that they have relevant information. CIDs can require responses to interrogatories, production of documents, and depositions. Compliance is mandatory with limited exceptions (e.g., privileged information). The costs entailed in defending and complying with such investigations can be considerable, even when no case is ultimately filed or the matter is settled.

#### **2. Sanctions**

The sanctions for violation of the antitrust laws are severe and include:

- **Imprisonment and fines.** Violation of the Sherman Act is a crime punishable by (i) a prison term of up to ten years per violation, and (ii) fines of up to \$1 million per violation for an individual and \$100 million per violation for a corporation. Only the DOJ has jurisdiction to seek criminal penalties.
- **Injunction enjoining conduct.** The DOJ, states, and private parties can obtain court orders enjoining actual and threatened violations of the Sherman Act, and the FTC can issue a cease and desist orders enjoining actual and threatened violations of the FTC Act. Violation of a FTC order is punishable by a civil fine of up to \$40,000 per violation or per day in the case of a continuous violation.
- **Corrective action.** Both court injunctions and the FTC cease and desist orders can require corrective action, the net result of which may be extensive governmental restraints on the activities of the sanctioned party.

- **Treble damages.** Private parties can obtain treble damages (three times their loss) for injuries they sustain as a result of Sherman Act violation. States also can obtain treble damages on behalf of injured citizens, and the DOJ can obtain single damages for any injury sustained by the federal government.
- **Attorney fees and costs.** Private parties who obtain a damage award or injunction for a Sherman Act violation can recover their cost of bringing the action, including reasonable attorney fees.

## II. Potential problem areas for trade associations

Since coalitions are by definition "combinations," the actions of the Coalition and its members and their representatives are vulnerable to a Section 1 claim that the action constitutes an agreement unreasonably restraining competition. In addition, Coalition meetings and other communication vehicles (e.g., newsletters, e-rooms, and forums) bring together companies and others who may be in competition. The Coalition needs to exercise caution to avoid any claim that it facilitated anti-competitive conduct of others by permitting anti-competitive conduct via these vehicles.

In the past, not only coalitions and trade associations but their officers and directors have been found criminally and civilly liable for antitrust violations. In addition to imposing strict sanctions for antitrust violations, the courts and the FTC have ordered the dissolution of associations found to have engaged in anticompetitive practices.

### A. *Per se* violation concerns

Of the conduct that is deemed to be a *per se* violation, the following are of most concern to coalitions:

#### 1. Horizontal Price-fixing

Horizontal "price fixing" includes much more than an agreement among competitors to set prices at a particular level, within a specific range, or in accordance with a particular formula. It potentially includes any agreement which tends to establish, stabilize, raise, or even lower price. It also potentially includes agreements to control other factors that directly or indirectly affect price, such as production levels, setting uniform discounts, credit or warranty terms, or agreeing on matters relating to costs, especially when those costs account for a substantial percentage of the final price.

#### 2. Horizontal Market division

A horizontal "market division" is an agreement among competitors to divide or allocate the market among themselves along geographic, product, or customer lines.

#### 3. Group boycotts (aka "refusal to deal")

A “group boycott” is an agreement not to deal with certain suppliers, customers, or other competitors, or to undertake actions that tend to exclude certain participants from the marketplace or deny them access to a significant competitive benefit available to others in the market.

Certain group boycotts are considered to be a *per se* violation. Factors considered by the courts when determining whether to apply the rule of reason or *per se* treatment include: whether the boycotting group possesses market power, and whether the boycotting group holds exclusive or unique access to a business element necessary for effective competition. Both of the above examples are at risk of being deemed a *per se* violation.

## **B. Other areas of concern**

Other primary areas of concern for coalitions include:

### **1. Membership exclusions**

Assuming that the members of a coalition derive an economic benefit from membership, the denial of membership to an applicant may constitute an unreasonable restraint of competition if the denial significantly limits the ability of the applicant to compete. Denial of membership for failure to meet qualification requirements ordinarily will be analyzed under the rule of reason (rather than being considered a group boycott that warrants *per se* treatment), but could be problematic if the qualifications do not have a legitimate purpose and substantially restrict competition.

### **2. Standardization and certification**

A trade association that develops voluntary industry standards may face antitrust problems if a standard or ethical rule purposefully favors some competitors and discriminates against others. Similarly, an association standardization or certification program that furthers the interests of certain groups of members, to the exclusion of others, may result in antitrust problems. Standards and certification programs ordinarily will be analyzed under the rule of reason, but can be problematic if they do not have a legitimate purpose and substantially restrict competition.

### **3. Collection and dissemination of fee and fee-related information**

The collection and dissemination of fees and fee-related information (cost data) is not itself price-fixing. This conduct is often pro-competitive because the data helps sellers and buyers make informed decisions on the price they should charge or pay. However, collection and dissemination of fee or fee-related information among competitors is extremely risky, especially when the market includes few competitors and the information relates to current or future, rather than past, fee information. When evaluated in the context of other conduct or

occurrences (e.g., increased uniformity in fees), it may be construed as evidence of an agreement to fix prices.

The DOJ and the FTC announced in their joint Statements of Antitrust Enforcement Policy in Healthcare, that surveys of fees and fee-related information pursuant to the following protocol should not raise significant antitrust concerns:

- (a) The fee or fee-related information must relate only to historical or current fees, as opposed to prospective fees,
- (b) The collection must be managed by a third party (e.g., purchaser, government agency, health care consultant, academic institution),
- (c) Any information that is shared among or is available to the contributing providers must be more than three months old, and
- (d) For any information that is available to the contributing providers: (i) there must be at least five providers reporting data upon which each disseminated statistic is based, (ii) no individual provider's data may represent more than 25 percent on a weighted basis of each statistic, and (iii) any disseminated information must be aggregated so that recipients cannot identify the prices charged by any individual provider.

### **C. Governmental advocacy efforts**

The Noerr-Pennington doctrine provides broad protection for the Coalition's governmental advocacy efforts. However, it is important to remember that the doctrine does not apply to "sham" petitions. This would exclude activities designed to influence governmental action in a corrupt manner (such as through fraud or misrepresentation) and activities intended to harm a competitor's business interests rather than to induce the government to take lawful action. There also is debate as to whether the doctrine applies when the government is acting in a commercial capacity, such as when it purchases services.

### **III. Antitrust policy rules and guidelines**

In order to ensure that the Coalition complies with the antitrust laws, the Board of Directors has adopted the following rules and guidelines:

#### **A. Encouraged conduct - DOs**

1. **Anticipate and avoid risk.** Coalition decision-making and activities must be undertaken with extreme care and avoid even the appearance of an anti-competitive intent or purpose.

2. **Consult legal counsel.** Legal counsel should be consulted prior to any decision, discussion, communication, or other activity that seems in any way to be questionable from the antitrust standpoint. If in doubt, it is always better to ask. The Coalition's legal counsel may respond to inquiries relating to appropriate measures to protect the Coalition. However, companies or individuals seeking legal advice regarding their own exposure should consult their own legal counsel.
3. **Protest inappropriate conduct.** The Sherman Act is a criminal conspiracy statute. Mere attendance at a meeting or other event during which an illegal discussion or activity takes place may result in criminal liability, even though the attendee was not an active participant and said nothing. Depending upon the circumstances, attendance may be sufficient to imply acquiescence in the discussion or activity and make the attendee liable.

Accordingly, it is important to protest any discussions or other conduct at a meeting or other event that appears to violate the antitrust laws or the Coalition's antitrust policy; disassociate from any improper discussions or activities; leave any meeting or event in which improper discussions and activities continue; and make Coalition legal counsel aware of improper discussions and activities that may be attributed to the Coalition.

## **B. Prohibited conduct - DON'Ts**

**1. Anticompetitive action by the Coalition.** Neither the Coalition nor any person acting on behalf of the Coalition shall engage in, promote, or facilitate any of the following conduct:

- Fixing prices for goods or services
- Limiting availability of goods or services
- Initiating a boycott of any purchaser of goods or services
- Initiating a boycott of any provider of goods or services
- Dividing markets for services or patients
- Otherwise engaging in anticompetitive conduct in violation of the antitrust laws.

**2. Use of Coalition information for anticompetitive conduct.** No member or other person shall use any Coalition meeting, function, e-room, forum, or other communication vehicle to engage in, promote, or facilitate any of the conduct listed above.

**3. Collection and dissemination of competitive information.** Unless directed by legal counsel, neither the Coalition nor any person acting on behalf of the Coalition shall collect or disseminate price or other competitive information of an entity involved in influenza product manufacturing or sales. The competitive terms covered by this prohibition include, but are not limited to:

- Current or future prices or costs
- Possible increases or decreases in prices or costs
- What constitutes a "fair" or acceptable profit level
- Current or future expense for staff, equipment or supplies
- Methodology for establishing prices or costs
- Discounts
- Credit terms
- Production capacity numbers

**4. Discussions of competitive terms.** Unless directed by legal counsel, no member or person shall discuss or share price or other competitive information at a Coalition meeting or function, in a Coalition Web site forum, or via any other Coalition communication vehicle. The competitive terms covered by this prohibition include, but are not limited to, those listed above.

### **C. General operating procedures**

**1. Distribution of policy.** A copy of this document shall be provided to all directors, officers, participating members, and any staff. This Policy also shall be available on the Coalition's Web site, and a copy shall be provided to any member upon request.

**2. Education and training.** Coalition legal counsel shall discuss the Coalition's Antitrust Policy with new board members during their orientation and shall periodically update directors, officers, and management staff about potential antitrust problems.

### **3. Meetings.**

- a. **Notice and agenda.** To the extent feasible, each Coalition meeting shall be preceded by a notice with a draft agenda, and the agenda for the meeting shall be approved at the beginning of the meeting and followed during the meeting.

- b. **Attendance of legal counsel.** To the extent feasible, Coalition legal counsel shall be given advance notice of Coalition meetings at which antitrust-sensitive issues may be discussed.
- c. **Conduct.** Members and management staff have the responsibility to terminate any discussion, seek the advice of Coalition legal counsel or, if necessary, terminate any meeting if the discussion might be construed to violate the antitrust laws or the Coalition's antitrust policy.
- d. **Minutes.** The events of each Coalition meeting shall be recorded in concise written minutes. The minutes shall accurately describe the actions taken, and where appropriate, any rationale or additional pertinent discussion. Coalition staff shall review all minutes of Board of Directors meetings and shall bring any antitrust issues to the attention of Coalition legal counsel.

**4. Communications and statements.** All Coalition communications and statements made on behalf of the Coalition shall comply with this Antitrust Policy. Newsletters, press releases, speeches, statements, comments to governmental agencies, letters, etc., which involve antitrust-sensitive issues, shall be submitted for advance review by Coalition legal counsel.

**5. Exclusion of members.** Membership application and decisions affecting continuing membership rights shall be processed in accordance with Coalition bylaws.

**6. Communications with antitrust authorities.** No Coalition director, officer, or staff person shall have authority to communicate on behalf of the Coalition with officials of the Federal Trade Commission, the Antitrust Division of the Department of Justice, or the Antitrust Division of the state's Office of Attorney General without prior approval of Coalition legal counsel.