



ANTITRUST COMPLIANCE MEMORANDUM

To: Members of NFC Forum, Inc.

From: The Board of Directors

Date: 9 November 2004

It is the express policy of the NFC Forum to require that all of its activities be conducted strictly in accordance with U.S. federal and state antitrust laws and foreign antitrust laws. It is extremely important that all members of the NFC Forum be aware of the types of activities prohibited by antitrust laws.

This Antitrust Compliance Memorandum was prepared to familiarize you with areas of U.S. law that you should know about in order to maintain compliance with U.S. antitrust laws. However, you should note that this Memorandum is a general guide only; it is not intended to be a complete and definitive statement of all aspects of the antitrust law, nor does it advise you with respect to the antitrust laws of other countries. Non-U.S. antitrust laws will, in many cases, be similar to U.S. laws. However, antitrust laws will differ from jurisdiction to jurisdiction, and you should be aware that some foreign jurisdictions have laws that differ greatly from U.S. laws.

Any specific questions relating to antitrust compliance not addressed in this Memorandum should be referred to counsel for the NFC Forum or to your own legal counsel who has responsibility for considering the antitrust implications of the business activities in question. The purpose of such consultation is to give counsel the opportunity to assess the permissibility of a practice in advance and to allow members to gain the advantage of counsel's advice. Any error may be very costly to the member and to the NFC Forum. For additional information on the applicability of antitrust laws to consortium activities, please see <http://www.consortiuminfo.org>, a consortium information web site created by our law firm.

I. The Antitrust Laws

Broadly stated, the basic objective of the U.S. 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. These laws require that business people make independent business decisions without consultation or agreement with competitors. The success of the NFC Forum requires that free and open competition be adhered to as the policy of the NFC Forum and that this policy be followed by all NFC Forum members.

The NFC Forum's insistence upon full compliance with the antitrust laws is based not solely on the desire to stay within the bounds of the law, but also on the NFC Forum's

conviction that the preservation of a free, competitive economy is essential to the welfare of the industry and the NFC Forum.

(a) Antitrust Laws Applicable to Activities of Associations

The U.S. antitrust statutes of principal concern to companies and individuals that take part in trade association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission (“FTC”) Act. These laws make illegal all contracts, combinations, and conspiracies which are deemed to be in restraint of trade.

Broadly speaking, the courts have interpreted these laws as prohibiting those contracts and combinations that have the effect of unreasonably restraining trade. A court will, therefore, examine all the facts and circumstances surrounding the conduct in question in order to ascertain whether the contract or combination is in violation of the law by restraining trade unreasonably.

Many activities are, however, regarded as unreasonable by their very nature and are, therefore, considered illegal “per se.” Companies and individuals are conclusively presumed to engage in these activities for no other purpose than to restrain trade. Practices within the per se category include agreements to fix prices, agreements to boycott competitors, suppliers or customers, agreements to allocate markets or limit production, and certain tie-in sales. A tie-in sale is one in which the customer is required to purchase an unwanted item in order to purchase the product or service desired.

The legality of activities of the NFC Forum and its members under the antitrust laws is determined by the application of standards no different from those used to determine the legality of the activities of other groups of persons or firms. Special problems do arise, however, from the fact that an association such as the NFC Forum is, almost by definition, a combination of competitors, and the act of bringing these competitors together creates the means by which collusive action can be taken in violation of the antitrust laws.

(b) Penalties for Violations

The U.S. antitrust laws are enforced at the Federal level by the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission.

A criminal conviction for an antitrust law violation may result in stiff fines for the NFC Forum and its members, jail sentences for individuals (including an individual acting in his or her capacity as a corporate employee or officer) who participated in the violation, and a court order disbanding the NFC Forum or severely limiting its activities. In the past, several foreign nationals have been sentenced to serve jail time in the U.S., and corporations convicted of such a criminal offense have been fined hundreds of millions of dollars.

In addition, private persons or firms may sue for damages under the Federal laws and a company found liable may be required to pay up to three times the actual damages suffered by the plaintiff, as well as all of the plaintiff’s costs of litigation and attorneys’ fees.

Finally, State court actions may be brought by U.S. State attorneys-general or injured parties.

II. Detailed Discussion

From a practical standpoint, NFC Forum members should focus their greatest concern on the following principal antitrust problem areas:

(a) Price-Fixing

Experience shows that trade association members are most likely to violate, and the government is most likely to strictly enforce, the price-fixing prohibitions of the Sherman Act. Price fixing, as noted above, is illegal per se.

Trade association meetings (including committee meetings) are convenient places for price-fixing discussions. Whenever competitors get together, it is natural for them to discuss common problems, and the discussion often turns to price. This is even truer at informal meetings before or after a trade association meeting, when members get together socially.

To avoid the risk of liability, NFC Forum members should never discuss prices, pricing systems, or discounts, nor should the NFC Forum ever be involved in members' pricing practices.

Although a prohibition on even the discussion of pricing may appear severe (the antitrust laws prohibit only agreements on prices, not merely the discussion of them), it is a prudent policy, since it is in the best interest of the members to avoid even the appearance of impropriety. A formal agreement is not necessary for a finding of antitrust liability. Antitrust cases often are proven by circumstantial rather than direct evidence. Although there may be perfectly innocent explanations for business conduct, antitrust enforcement agencies, judges or juries may interpret contacts with competitors followed by similarity in conduct as circumstantial evidence of an "agreement." It is, therefore, of the utmost importance to avoid any contacts with competitors that might support an inference of agreement. That means a member's relations with competitors should always be conducted as if they were at all times in the public view.

Members should also be aware that the antitrust prohibition on price-fixing is extremely broad. The Sherman Act itself defines price-fixing as any "combination" formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing "prices."

Competitors violate this law if they:

- agree on the range within which purchases or sales may be made;
- agree that prices charged or paid are to fall within any sort of formula;
- agree to fix or stop giving discounts; or
- agree to artificially increase or limit supply.

Because price-fixing is illegal per se, it is not a defense that the prices set are reasonable. Nor is it necessarily a defense that competitors fixed maximum prices, rather than minimum prices.

Although the discussion thus far has focused on so-called “horizontal” price fixing -- that is, agreements among competitors selling the same or similar products -- it is also illegal to engage in “vertical” price fixing: an agreement to fix the price at which a purchaser will resell a product. Where a product is sold for resale, the seller is permitted to suggest resale prices to customers, but any agreement, whether formal or informal, express or implied, must be avoided.

(b) Agreements To Allocate Markets

An agreement among members of a trade association to allocate markets or customers is, in and of itself, an antitrust violation. The antitrust laws expressly prohibit any understanding or agreement between competitors or members of an association involving division or allocation of geographic markets or customers, or an agreement to divide sales by product type. Even an informal agreement whereby one member agrees to stay out of another’s territory will constitute a violation of the antitrust laws.

(c) Exclusive Selling

An exclusive selling agreement involves the appointment of a sole distributor for the supplier’s product for a defined territory over a defined period of time, usually with the understanding that the supplier will not make separate deliveries or sales of his own into the distributor’s territory. The appointment of an exclusive distributor is generally considered to be legal.

(d) Exclusive Dealing

Exclusive dealing is an agreement where the purchaser agrees to buy exclusively from one supplier for a certain period of time.

A seller’s exclusive dealing contract is unlawful where it covers a substantial dollar volume or forecloses a substantial market share to competitors. However, where there is a significant amount of interbrand competition, it is less likely that an exclusive dealing agreement will be deemed illegal.

(e) Tying Arrangements

Tying is the practice whereby the seller refuses to sell the desired product or service (the tying item) to a customer unless the customer also agrees to buy a second product or service from the seller.

Tying arrangements are illegal if the supplier occupies a dominant position in the market for the tying item or if the uniqueness of the tying item bars other sellers from producing an equivalent product.

(f) Concerted Refusals to Deal

Members should avoid participating in “concerted” refusals to “deal,” more commonly known as boycotts. Members should be careful not to make agreements that in effect result in the exclusion of a competitor from a market or a competitive activity. For example, an agreement among two or more members of the NFC Forum to no longer buy from (or sell to) a particular supplier or distributor might constitute such a boycott. To avoid this risk, members should avoid any discussion or conduct that involves the refusal to deal with a particular supplier or customer.

The NFC Forum itself, as a group of competitors and by virtue of the nature of its work, can easily fall into activities that can be challenged as a boycott. For this reason, counsel must have the opportunity to review any proposed changes to membership rules and any proposed rules that might disadvantage those who are not NFC Forum members.

(g) Price Discrimination

Price discrimination occurs when identical products are sold at different prices to different purchasers. It is unlawful to discriminate in price between different purchasers of goods of like grade and quality where such goods are sold for use, consumption or resale within the U.S. if the discrimination substantially lessens competition. However, price differences based on certain factors, such as a variance in costs, quantity discounts, prompt payment, or shipment fees generally are acceptable and do not violate the antitrust laws.

(h) Standard Setting

While standard setting is recognized as being “pro-competitive” in the U.S., great care must nevertheless be taken in the setting of standards. First, as noted above, there is a potential for challenge to standard setting activities as a boycott. Second, when members of a standards setting body submit technology and vote on that technology, there is the potential for one company, or a group of companies, to act in ways deemed to be unfair to other companies. Similar considerations arise with respect to the establishment of implementation guidelines.

By way of example, the Federal Trade Commission sanctioned Dell Computer Company in 1996 because, after repeatedly certifying (as required by the rules of the standard setting body) that it owned no intellectual property rights that would be infringed by an implementation of a specification being considered for adoption and then voting in favor of adoption of that specification by the standard setting body, Dell announced that products built to the adopted specification would necessarily infringe upon a Dell patent and attempted to extract license fees. More recently, the U.S. District Court for the Eastern District of Virginia found that Rambus, Inc. had committed fraud while it was a member of the Joint Electron Devices Engineering Council (“JEDEC”). Rambus had been accused of failing to disclose certain patent applications regarding SDRAM, in contravention of JEDEC policy. Subsequently, Rambus attempted (and succeeded in some cases) to extract license fees from manufacturers who had implemented the SDRAM standard, based on the undisclosed patents. In light of the foregoing, it is important that standard setting and publication of implementation guidelines be conducted under close



legal supervision, and that policies and procedures created to administer such processes be scrutinized to ensure that they do not lend themselves to situations which could result in antitrust exposure. This will be the policy of the NFC Forum.

(i) Miscellaneous Activities

In addition to the above categories of conduct, there are areas of business behavior that are judged on a case-by-case basis.

These include:

- joint purchasing
- certification of products (that is, that the product conforms to technical standards)
- restrictions on trade association membership or expulsion of members for cause or without cause
- assertions of patent infringement by members with respect to technology approved or adopted by the NFC Forum.

If the activities of the NFC Forum begin to extend into these areas, the Board of Directors will consult with legal counsel to ensure that the proper guidelines are followed.

If you as a member of the NFC Forum have a question regarding these matters, contact your company counsel or feel free to call Andrew Updegrove, of the firm of Gesmer Updegrove LLP, which provides counsel to the NFC Forum.