



## FIBRE BOX ASSOCIATION

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### FBA Antitrust Guidelines

Please understand that these Guidelines, although written for FBA staff and members, do not and are not intended to replace member company antitrust compliance programs. These Guidelines provide a statement of the FBA's antitrust compliance policies, guidance regarding proper conduct at meetings and in communications involving the FBA and its members, and give a brief refresher course on how the antitrust laws apply to communications among competitors.

### A Quick Look: FBA Members' Responsibilities to Ensure Antitrust Compliance

The FBA's policy is to avoid all communications between competitors that is unlawful or creates the impression of being unlawful. The best rule of thumb for members is to assume that there is no "grey area" with respect to the antitrust laws. FBA members should consider it part of membership to be on the alert for contact between competitors that is or could be perceived as running afoul of the antitrust laws. Conduct that falls into any one of the following categories should be considered unlawful:

- Setting or discussing past, present, or future prices with competitors
- Dividing territorial markets between competitors
- Dividing customers between competitors
- Agreeing on levels of production with competitors
- Agreeing to exclude competitors from the market
- Distorting the bidding process
- Boycotting customers or vendors
- Exchanging any confidential, competitively sensitive information

If an FBA member observes any potentially unlawful interactions, the member should voice his or her objection and alert FBA's outside antitrust counsel, identified at the end of these Guidelines. In addition, a member who comes across an FBA document that reflects prohibited activity should bring it to the attention of FBA's outside antitrust counsel. Remember that even individuals who do not actively participate in an unlawful discussion, or who do not formally agree to act in a certain way, risk incurring liability for themselves, their company, and the Association merely by virtue of their awareness of any potentially unlawful communication.

### A Quick Look: FBA Antitrust Compliance Safeguards

All FBA events and communications are thoughtfully designed by FBA staff to achieve the goals of the organization, noted below, while avoiding any conduct that could be considered unlawful under the antitrust laws. The FBA strictly enforces these protocols to ensure compliance with the antitrust laws for the protection of the Association and its members.

- All official FBA meetings have agendas distributed in advance, detailing the topics to be covered. These agendas are approved in advance by outside antitrust counsel, and are designed to keep all discussions on track and within the bounds of the antitrust laws.
- All presentation materials are reviewed by outside antitrust counsel, whether given by FBA members or outside presenters.
- All official FBA meetings are memorialized in minutes that are reviewed by outside antitrust counsel before distribution. These minutes provide a record of who attended FBA meetings and what was discussed.
- Communications from the FBA to its members are reviewed by outside antitrust counsel. Emails, newsletters, and web site content are approved by FBA staff and antitrust counsel where the content merits review.
- Antitrust counsel is present at official FBA meetings and social events, as determined necessary by outside antitrust counsel.

### **The FBA Organization and Purpose**

The Fibre Box Association was founded in 1940 by corrugated and solid fibre box manufacturers operating throughout the country. In its broadest sense, the purpose of the Association is to promote the general welfare of the corrugated and solid fibre container industry in areas where the individual companies are not able to function as effectively as an Association. Such areas include: presenting the industry's views to various governmental and other agencies; ensuring a high standard of general product performance and quality; collecting, compiling, and disseminating industry statistical data; and providing information to members on technical, safety, health and environmental matters. As our members have said many times, the FBA is the organization to speak for the corrugated and solid fibre industry where its collective voice must be heard.

Membership in any trade association should be assumed to provide an economic benefit. Therefore, exclusion of an entity from a trade association by virtue of its membership criteria should be viewed as having the potential to give rise to antitrust liability. In order to ensure that FBA membership criteria pass muster under the antitrust laws, they are carefully crafted to be non-discriminatory, objective, and in furtherance of the above-noted pro-competitive purposes of the FBA. Any proposed revisions to the FBA membership criteria will be reviewed by antitrust counsel.

### **Conduct that Could Create Antitrust Liability**

The FBA performs important functions for its members, including the creation of an environment in which competitors can come together for the common good of the industry without running afoul of the antitrust laws. The FBA has a policy of obeying all laws that apply to it, and the antitrust laws are no exception. Therefore, as a prerequisite to participation in FBA activities, members should have a basic understanding of the antitrust laws, and what conduct might present concern.

Because the Sherman Act prohibits communication among competitors that has the aim or effect of restraining competition, it is most often invoked by private plaintiffs and the

enforcement agencies in pursuing actions against trade associations or trade association member entities that misuse organizational ties. These lawsuits usually allege a conspiracy or “horizontal agreement” among competitors, and can carry stiff civil and criminal penalties (including imprisonment), treble damages, and injunctive relief. The fine for individuals may reach \$1 million or, for corporations, \$100 million. The treble damages provision of the antitrust laws, which entitles plaintiffs to three times the amount of damages suffered, can allow the ultimate cost of an antitrust litigation to soar. Injunctions restricting the future conduct of defendant entities can last for many years and cover areas of business beyond those involved in the lawsuit itself.

## **1. Pricing**

It is the FBA’s policy not to permit direct or indirect communication between any representatives of member companies concerning past, present or future prices. The word “price” as used in this statement of policy is broadly defined to include sales prices, pricing policies, bids, discounts, allowances, markups, warehousing charges, costs of raw materials, credit terms, terms of sale, transportation costs, manufacturing improvements, *etc.* All are factors bearing directly on the final “price,” and under these Guidelines, they may not be discussed. For purposes of these Guidelines, “discuss” should be understood to include two-way conversation between more than one member or the mere expression of the views or experience of any member to other members.

For a number of years the FBA has published an overall price trend, or index, on a quarterly basis. The statistical trend is based on the total square footage of corrugated and solid fibre shipped divided into the total dollars received. The statistics do not provide a “price” as such, but only a trend. The FBA takes steps to ensure that the index is not susceptible to being used for any illegal purpose, *i.e.*, price fixing.

Agreements resulting from discussions between competitors concerning prices are absolutely prohibited by the antitrust laws. Such agreements likely are to be found to be per se violations of the antitrust laws. The term “per se” is used by the courts to define conduct that is unlawful in and of itself. There are no defenses available to a charge of price fixing if it is proven. This prohibition covers much more than just formal written agreements, and in practice, antitrust conspiracies rarely are conducted through formal means. More often, it is oral agreements, “gentlemen’s agreements,” tacit understandings, “off the record” conversations, a “knowing wink,” and the like, from which an unlawful agreement or understanding will be inferred.

Most evidence in price fixing cases is circumstantial and based on isolated facts from which a common scheme or agreement may be inferred. For example, if general price movements routinely followed meetings between competitor’s representatives, circumstantial evidence is created that agreements to fix prices may have been made at such meetings. To counter this type of proof, clear evidence that price fixing did not in fact take place at such meetings must be offered and one should conduct himself so as to avoid even the appearance of impropriety.

## **2. Control or Limit Production of Sales**

Any attempt on the part of competitors to control, limit or allocate the customers to whom they will sell, or the territories in which sales are made, is likely to be found to be illegal per se.

Further, it is illegal, by concerted action, to segment a market on either a geographical or functional basis.

### **3. Allocation of Territories or Customers**

Under the antitrust laws, competitors are generally prohibited from dividing markets, whether the markets are defined by geography, customer identity, or other factors. As a result, competitors should not engage in any discussions that might be construed as facilitating market allocation.

### **4. Bid Rigging**

One of the most common forms of per se violation is bid rigging, *i.e.*, the process of agreement among competitors to control the awarding of a bid or bids. The FBA policy prohibits communications concerning such subjects, as well as the identity of the persons who are or who are not bidding, prices or terms of bids, or decisions to bid on selected items.

<b>Conduct that May Create Antitrust Liability</b>
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Some areas of FBA activity must be conducted with extra caution. The following are examples of association activity that could create antitrust exposure if they are not properly designed, supervised, and monitored.

#### **1. Statistics**

Since its inception, FBA has gathered, compiled and disseminated statistics on the industry's performance. FBA obtains shipment and aggregate sales data by month and by plant. The identified statistics are not available to other members, but the members receive on a monthly basis aggregate shipments by areas and "regions" of the country. Quarterly they receive an index of the price trend by broad geographical areas. The FBA's statistics program:

- does not allow for the exchange of customer-specific information;
- does not estimate or project future price information;
- uses historical data only;
- ensures that data supplied by members is kept confidential from other members and from third parties (except where appropriate for FBA business and where the third-party is subject to a confidentiality agreement), and is destroyed as soon as is practical after the data is aggregated and the reports created and in no event later than one year; and
- involves the publication of aggregated data, presented in a way that prevents the identification of any particular member's data.

This statistical program is consistent with our antitrust policy. The statistics must not be discussed by member representatives in any more identifiable form than the published data.

## **2. Labor Service**

The Association renders important service to its members in the labor relations field. It collects information on wage settlements and publishes this data to participants. Monthly it issues a compilation by FBA areas. It also conducts fringe costs surveys and, on occasion, a labor forum.

Courts have raised questions about the extent to which employers can exchange wage data while engaged in contemporaneous collective bargaining, absent a multi-employer bargaining unit. This specific area must be monitored and discussion of the data by representatives of the members must be limited. However, most courts have held that statistical exchanges in the labor area can be conducted without concern.

## **3. Standardization**

Another potential problem area is standardization. The FBA has participated in relatively few standard-setting activities. For example, the FBA worked with the Packaging Machinery Manufacturers Institute in the establishment of a series of voluntary standards for boxes to be set up by automatic equipment. The purpose of that project was to arrive at specifications which would ensure the box user that the boxes purchased could be set up properly on automatic equipment.

While they are not industry standards as such, the FBA has traditionally monitored and provided input on changes in Rule 41 and Item 222, the packaging regulations promulgated by the railroads and the truck lines, respectively. Individual company (member and non-member) and FBA input in the development of these regulations has been very important. More recently, the FBA helped in the development of Voluntary Standards for the repulping and recycling of wax corrugated containers.

Because of the importance of these subjects, particular care has been taken by counsel to establish procedures for formulating recommendations. Representation in the formulation process must be provided for all reasonably interested parties, including non-member industry representatives, governmental representatives and others who could be affected by changes in the Rules. Such procedures have insured consideration of all pertinent points of view. The FBA has also provided input in the establishment of international box standards.

<b>Conduct that Presents Little or No Antitrust Concern</b>
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Categories of conduct that present little antitrust concern include the monitoring and disseminating of information about various government regulations, *e.g.*, those concerning the packaging and transportation of hazardous materials; monitoring and disseminating information about recycling industry waste; sponsoring awards for excellent safety performances; studying environmental, technical, health and safety problems which may arise in the industry; and monitoring competitive packaging which might threaten the industry's markets. Furthermore, the FBA is becoming increasingly active in making its members' views known to regulating bodies and government program administrators. The FBA antitrust compliance policy permits and encourages communication and discussions concerning these subjects.

## **Contacting Antitrust Counsel**

These Guidelines are meant to supplement, not replace, the antitrust compliance programs in place at each FBA member. Every member should identify an appropriate contact within their legal department to whom questions may be directed in the event that antitrust concerns should arise, or from whom to seek training and guidance. However, members should not hesitate to contact FBA's outside antitrust counsel. In every instance, the wisest course of action, even at a mere hint of uncertainty regarding the lawfulness of any conduct or communication by FBA members, is to contact counsel.

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