The Edison Electric Institute Antitrust Compliance Manual

Objective

The Edison Electric Institute ("EEI") and its member companies are committed to strict compliance with federal and state antitrust laws. These laws establish the rules by which companies compete and are intended to prevent and eliminate any agreements and individual conduct which would unreasonably interfere with the operation of the marketplace. It is essential that everyone who may encounter potential antitrust issues be advised of the fundamentals of antitrust laws and EEI's firm resolve that its employees and member companies comply with them fully.

Responsibility for Antitrust Compliance

While the General Counsel's Office provides guidance on antitrust matters, you bear the ultimate responsibility for assuring that your actions and the actions of any of those under your direction comply with antitrust laws.

We're Here to Help

Whenever you have any question about whether particular EEI activities might raise antitrust concerns or your responsibilities under antitrust laws, please contact the General Counsel's Office (202-508-5757), the Compliance Hotline (800-743-8633), or your legal counsel.

Summary of Antitrust Tips

- **DO** your best to terminate a conversation immediately if you believe it involves a sensitive antitrust issue. If the discussion nonetheless continues, end the meeting.
- **DO NOT** exclude companies from membership if doing so would put that company at a competitive disadvantage.
- **DO NOT, *without prior review from counsel*,** have discussions with member companies about prices, terms of sale, or contract provisions.
- **DO NOT, *without prior review from counsel,*** have discussions with member companies about any competitive employment information including wages, salaries, or benefits; terms of employment; or even job opportunities.

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Introduction

It is the policy of the Edison Electric Institute ("EEI") and its member companies to comply with all laws, including federal and state antitrust laws that apply to EEI's operations and activities. The procedures discussed below formalize EEI's continuing antitrust compliance program and are to be observed by all EEI members, directors, officers, committee members and employees.

The Antitrust Compliance Manual ("Manual") should aid EEI members, directors, officers, committee members and employees on general antitrust questions and issues. As these guidelines do not address every situation where potential antitrust concerns may arise, EEI employees confronted with potentially sensitive antitrust issues should consult with EEI's legal counsel. Those who are not EEI employees should consult with their own company's legal counsel.

Overview of Antitrust Laws

Violators of antitrust laws can be prosecuted both criminally and civilly. Criminally, the U.S. Department of Justice is authorized to prosecute Sherman Act violators as felons, who may be severely fined and, in the case of individuals, imprisoned. Civilly, the Department of Justice, state attorneys general and private parties may bring suits and recover money damages from EEI or member companies and individual employees who have violated the federal antitrust laws. Additionally, the Federal Trade Commission has its own statutory authority to enforce antitrust laws through civil and administrative proceedings.

Antitrust laws are designed to promote fair competition and to provide American consumers with the best combination of price and quality. This Manual focuses primarily on the federal antitrust and trade regulation laws created by the Sherman Act, Clayton Act, Robinson Patman Act and Federal Trade Commission Act ("FTCA"). Most states and the District of Columbia have their own antitrust laws, which frequently parallel the federal laws.

Why is Compliance with Antitrust Law Important?

Aside from EEI's commitment to abiding by the laws of all jurisdictions in which it operates, the penalties for violations of antitrust laws can be very severe – for EEI, EEI member companies and individual employees.

For Members:

- Under U.S. antitrust laws, corporations can be fined up to $100 million per violation. Courts also can impose an "alternate fine" of up to twice the gain to the perpetrator or twice the loss to the victim as a result of an illegal behavior.

- Courts or government antitrust agencies can impose permanent restrictions limiting corporate activity.

- Private actions – customers or competitors who can show they were harmed by the perpetrator's actions can obtain damages verdicts many times the size of a government-imposed fine.

For Individuals:

- Violations of the Sherman Act are felonies.

- Individuals can be imprisoned for up to ten years, fined up to $1 million, or both, per violation.

For EEI:

- Injunctions or other orders issued by the courts may prevent EEI from pursuing association business.

- On occasion, courts have ordered trade associations to disband.

Dealing with a government antitrust investigation or a private antitrust lawsuit is expensive, time-consuming and distracting. In addition, an investigation or lawsuit can seriously damage the reputation of EEI, its members and individuals. It is important to emphasize that these penalties, damages and distractions are entirely avoidable – by understanding in very basic terms what antitrust laws require and by consulting with legal counsel whenever you are in doubt about what the laws require.

Agreements

The basic premise of antitrust law is that each company must make its business decisions independently of other competitors. Agreements among competitors to fix prices, to reduce price competition by allocating customers or markets or to exclude other competitors from the market are the most serious antitrust offenses. These agreements are almost always held to be illegal *per se,* which means that they cannot be justified by arguments about the reasonableness of the prices charged or the need to avoid chaos in the marketplace.

What Constitutes an Agreement

An agreement between competitors in violation of antitrust laws includes not only an express written or oral agreement, but also any implicit understanding. It is sufficient if there is a "meeting of the minds" between two competitors as to a course of action to be taken, even if it is not spelled out. In fact, most illegal agreements are inferred from circumstantial evidence (e.g., two competitors had a meeting and later engaged in parallel conduct) or from conduct (e.g., two companies consistently raise or lower prices at the same time). Therefore, it is essential that your statements, actions and writings are as clear and unambiguous as possible to avoid misinterpretation after the fact. Never give the impression that an illegal agreement has been reached with a competitor or that inappropriate information has been exchanged.

Examples of Unlawful Agreements Between Competitors

While any agreement with a competitor can raise antitrust concerns, the following are some of the activities involving competitors that can most commonly lead to violations of antitrust laws:

- ***Price Fixing and Bidrigging Agreements***
  Any agreement between competitors on prices charged to others for products, assets or services violates antitrust laws. Every direct price fixing agreement is illegal, whether it is meant to raise, lower or just stabilize prices. Agreements may be illegal even if they only indirectly affect prices because they involve such things as discounts, promotional allowances, standardization of customer or delivery services and uniform credit terms and billing practices. It is also illegal for competitors to agree on the prices they will pay for products or services sold by other persons or to engage in collusive bidding practices (or bidrigging).

- ***Employment Agreements***
  An agreement among competing employers to limit or fix the terms of employment for potential hires may violate antitrust laws if the agreement constrains individual company decision-making with regards to wages, salaries, or benefits; terms of employment; or even job opportunities. Naked wage-fixing or no poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under antitrust laws.

- ***Agreements to Allocate Markets, Customers, Territories or Products***
  It is illegal for competitors to agree to divide or allocate customers or territories. An agreement among competitors is also illegal if it provides that they will refrain from selling a certain product generally, in any geographic territory or to any category of customer.

- ***Group Boycotts***
  An unlawful group boycott occurs when competitors, suppliers or customers agree with each other (or pressure another person) not to deal with others. This is distinguishable from a lawful, unilateral refusal to deal, where a company decides on its own, and without consulting any other company, that it does not want to buy or sell to another company.

- ***Agreements to Control Production***
  Agreements among competitors to increase or restrict services or production levels are always problematic under antitrust law. The same is true of agreements among competitors that do any of the following: limit the quality of production, restrict the products or services sold to a particular customer, refrain from introducing new products or services, eliminate existing products or services, or accelerate the introduction or withdrawal of a product or service. These types of agreements should be avoided.

- ***Exclusive Dealing***
  Exclusive dealing arrangements come in various forms. Some might require a customer to sell exclusively the products of a particular company or coerce a supplier into refusing to sell to its customer's competitors. Others might compel a customer to purchase all of its requirements for a particular product or service from a single supplier. These types of agreements should be avoided.

Examples of Unlawful Agreements with Customers or Suppliers

A company generally is free to choose its suppliers and customers, and to refuse to do business with any particular company. However, as discussed below, some arrangements, such as forced reciprocal dealing and exclusivity requirements, may raise antitrust issues.

- ***Resale Price Agreements***
  A resale price agreement is an agreement between a seller and a customer on the price at which the customer will resell a product or asset. The seller may, however, suggest a resale price so long as it is completely clear that the customer is free to accept or reject the suggestion and will not be penalized if it decides to disregard the suggestion. These types of agreements should be avoided.

- ***Tying Arrangements***
  A "tie in" or "tying" arrangement permits a buyer to purchase one (tying) product or service only if it agrees to buy a second, distinct (tied) product or service from the seller. This might happen, for example, if a utility were to refuse to sell natural gas to a manufacturer unless the manufacturer also purchased proprietary software owned by the utility. These types of agreements should be avoided.

- ***Reciprocity***
  In a reciprocal dealing arrangement, a customer makes purchases from a supplier only on the condition that the supplier will buy products or services from the customer. Such reciprocal arrangements are particularly troublesome when one of the parties is openly or implicitly coerced. These types of agreements should be avoided.

Other Conduct That May Violate Antitrust Laws Even Without an Agreement

You should also be aware of antitrust law violations that may take place even where there is no agreement among competitors or anyone else. The most common violations of that type are briefly discussed here.

Monopolization

When any enterprise enjoys a strong market position for a particular product, it should be concerned about questions of monopolization. The law of monopolization often comes into play in mergers or acquisitions for companies that compete or could compete with each other. No enterprise should take actions that might be viewed as evidence of an intent to acquire or maintain monopoly power in a particular market, to drive a particular competitor out of business or to prevent somebody from entering the market.

Price Discrimination

The Robinson Patman Act and some state antitrust laws restrict a seller from charging different prices for its goods to competing customers at the same point in time. Those laws also forbid sellers in certain circumstances from discriminating when they offer promotional materials, services or other inducements to individual customers in an effort to have the customers engage in in-house promotions or advertising. Buyers, in turn, are prohibited from knowingly inducing or receiving a discriminatory price, promotional allowance or service. These general prohibitions have a number of exceptions, which are too complex to be discussed here.

Unfair Competition

The FTCA prohibits all "unfair methods of competition" and "unfair or deceptive acts or practices." The FTCA covers antitrust violations like those discussed above, but also forbids conduct that falls short of those violations. Specifically, the FTCA prohibits all forms of deceptive or misleading advertising and trade practices, such as disparaging a competitor's product, harassing a customer or competitor, and stealing trade secrets and customer lists.

Antitrust Matters of Particular Concern to Trade Associations

Trade associations are generally seen as potential sources of illegal competitor collaboration. If a trade association meeting is followed by parallel action among competitors, such as an increase in prices or a reduction in output, it could be inferred that improper activity took place at a trade association meeting.

While virtually all antitrust issues generally applicable to individual companies apply to trade associations as well, there are some special antitrust issues that are raised by specific types of trade association activities.

Summary of Trade Association Tips

- **DO** insist that EEI meetings have agendas that are circulated in advance.
- **DO** take minutes of all meetings, ensure they properly reflect the actions taken at the meeting and circulate them to participants.
- **DO** your best to terminate a conversation immediately if you believe it involves a sensitive antitrust issue. If the discussion nonetheless continues, end the meeting.
- **DO NOT**, ***without prior review by counsel***, have discussions with member companies about prices, market allocations, refusals to deal, and the like.

Membership

Trade associations are permitted to adopt objective and reasonable standards for membership. Exclusionary membership practices that affect a market participant's ability to compete, however, may raise antitrust issues. Similarly, denial of membership or discrimination in membership terms may place competitors at a disadvantage if membership is necessary to compete in the industry on equal terms. If certain benefits or services provided by the association are essential or material to compete effectively, then the association likely will be required to provide access to those benefits necessary to effectively compete in the industry upon payment of a reasonable fee.

Information Exchange, Data Collection and Dissemination

Statistical information may cause problems from an antitrust standpoint if its use somehow harms competition. This might happen, for instance, if statements in EEI publications were to suggest what specific product, prices, storage levels or market demand should or would be in the future. Broadly speaking, the farther removed the data are from prices and costs, the less company-specific they are, the more historical they are and the wider their public dissemination is, the less likely it is that they will raise antitrust problems.

- **Do** clearly articulate the purpose and procompetitive benefits of the information exchange program and keep it closely focused on those criteria.

- **Do** ensure member participation in any statistical reporting program must be voluntary.

- **Do** ensure published data is reported in an aggregated form so that information relating to individual transactions is not disclosed and cannot be figured out.

Standard Setting

Reasonable industry codes, standards and certification programs may promote valid interests, including the protection of safety, health and the environment and the maintenance of high standards of ethics and conduct. You should nonetheless be alert for anticompetitive effects that a particular standard may have. For example, a product standard that is unreasonably biased in favor of one company's product at the expense of another's may raise significant antitrust problems. Care should therefore be used in creating and applying codes, standards and certification criteria, as well as influencing other organizations as they undertake these activities.

Meetings

EEI meetings regularly bring together representatives of member companies that are potential or actual competitors. It is important, therefore, that certain ground rules be followed to eliminate any suspicion that a particular meeting might be used for anticompetitive purposes:

- **Do** prepare an agenda for meetings.

- **Do** provide a copy of the "Edison Electric Institute's Guidelines" to every participant at the meeting.

- **Do** have an EEI staff member attend the meeting.

- **Do** invite legal counsel to attend if the meeting might involve matters having to do with sensitive antitrust subjects.

- **Do** follow the agenda at your meeting.

- **Do** keep accurate minutes that contain the broad topics discussed at the meeting.

- **Do not** discuss any subjects that might raise antitrust concerns (including prices, market allocations, refusals to deal and the like) unless you have received specific clearance from counsel in advance. If someone begins discussing a sensitive subject, do your best to terminate the conversation immediately. If the discussion nonetheless continues, do not allow the meeting to continue.

Record Keeping

When we talk about "records," we are referring to any of the various communications people record in some tangible form every day – documents, email, videotapes, audio recordings (such as voice mail) and the like. These records are sometimes inaccurate, often less precise or artful than we would like, and all too frequently subject to misinterpretation. You should prepare every record with the thought that it might someday have to be produced to government officials or plaintiffs' lawyers who will interpret your language in the worst possible way. The following guidelines may help you avoid problems in matters involving competition:

- **Do** avoid creating unnecessary records.

- **Do** use language that is clear, simple and accurate.

- **Do** avoid language that might be misinterpreted to suggest that EEI condones or is involved in any anticompetitive behavior.

- **Do**, as much as possible, limit yourself to facts and avoid offering opinions.

- **Do not** use joking or aggressive language (*e.g.*, "Let's kill our competitors").

- **Do not** use language that might inappropriately arouse suspicion (*e.g.*, "for limited distribution" or "destroy after reading").

- **Do not** speculate about the legality of specific conduct.

- **Do not** keep records longer than necessary for business or legal purposes, consistent with EEI's document retention requirements.

- **Do not** hesitate to consult counsel about any nonroutine correspondence requesting an EEI member company to participate in projects or programs, submit data for such activities or otherwise join other member companies in EEI actions.

Reporting Channels

To fulfill EEI's commitment to comply with antitrust laws, we all have an obligation to report any of the following:

- a violation of the law;
- conduct that might be a violation of the law; or
- questionable conduct that might indicate a violation.

A report may be made to any of the following:

- Victoria Calderón, Associate General Counsel, Compliance & Corporate Affairs;
- Emily Sanford Fisher, Vice President, Law and Corporate Secretary; or
- the Compliance Hotline.

The Compliance Hotline

The Compliance Hotline is a 24-hour service that any employee can contact to report any violation or potential violation of the law. Employees can also use the Compliance Hotline to seek any guidance on legal and ethical compliance by calling the number 800-743-8633. Your reports to the Compliance Hotline will be confidential, if you so request.

EEI does not permit any retaliation of any kind for any report made in good faith of an actual or potential instance of illegal or unethical misconduct.

Questions?

If you have any Questions about potential antitrust concerns, contact the General Counsel's Office or your company's legal counsel. We look forward to working with you to ensure that EEI, its directors, officers and employees, and the representatives of its member companies strictly comply with the letter and spirit of antitrust laws.

Victoria Calderón
Associate General Counsel,
Compliance & Corporate Affairs
202-508-5757

Emily Sanford Fisher
Vice President, Law
Corporate Secretary
202-508-5616

Conclusion

This Manual is intended as an aid to assist you in understanding and fulfilling your responsibility to comply with antitrust laws. It is not intended to make you an expert, but rather to help you identify antitrust issues that could arise in the course of your job responsibilities. The practices described above do not encompass every type of arrangement, agreement or instance which has been held to constitute an antitrust violation. Anyone confronted with potential antitrust issues should contact their company's appropriate legal counsel.

Acknowledgement of Receipt and Review

I acknowledge that I have read and understand EEI's Antitrust Compliance Manual, and that I will comply fully with it.

_____
Signature

_____
Printed Name

_____
Date