The National Motor Freight Traffic Association, Inc.

Antitrust Compliance Program

I. Introduction

The National Freight Motor Traffic Association, Inc.® ("NMFTA"®) is a not-for-profit membership corporation incorporated under the laws of the District of Columbia. The majority of the members are less than truckload ("LTL") motor carriers, but NMFTA membership also includes other industry stakeholders and individual Professional Society members.

II. Antitrust Exposure for Associations and Association Members

The basic U.S. antitrust law (the Sherman Antitrust Act) is a conspiracy statute that prohibits two or more entities from engaging in conduct that unreasonably restrains trade.

In general terms, the Sherman Act prohibits competitors, directly or indirectly, from entering into agreements to fix prices, rig bids, allocate customers or territories or boycotting or refusing to deal with vendors or competitors. These types of violations are what are known as "*per se*" violations. That means that if a group of competitors are found to engage in one or more of these practices, the Court will not consider any excuses.

A "*per se*" violation of the Sherman Act subjects the violators to civil and criminal suits by the Department of Justice ("DOJ"), civil and sometimes criminal suits by State Attorney Generals and treble damage suits by private plaintiffs. Individuals convicted of "*per se*" criminal violations of the Sherman Act are guilty of a felony and face mandatory jail sentences of up to 10 years.

All individuals, corporations, or other entities that violate the antitrust laws are also subject to civil penalties and private litigation that may result in treble damage awards.

Trade and professional associations may provide a forum for antitrust violations. At trade and professional association meetings, groups of competitors gather and unless an antitrust compliance program exists, the discussion may involve pricing. Such discussions can lead to direct or indirect agreements on what is a "fair" price or what is a "minimum" price to charge customers. If such an agreement is reached at a trade or professional association meeting, the individuals involved, the companies represented by those individuals, the trade or professional association and the trade or professional association staff attending the meeting could all be found to have committed a "*per se*" violation of the Sherman Act and be subject to the criminal penalties, including jail, provided by the Act.

In addition to "*per se*" type violations, the Sherman Act also prohibits conduct that involves a less serious type of violation that is generally described as an "unreasonable" restraint on trade that does not fall in the "*per se*" category. Cases brought against trade and professional associations under this theory are civil cases which involve monetary damages and possible injunctive relief. These cases involve allegations such as unreasonable membership restrictions by an association or utilization of an association certification or standards program to "unreasonably restrain trade."

"*Per se*" and "unreasonable restraint of trade" cases are usually prosecuted by the Antitrust Division of the DOJ. The Antitrust Division is the only federal antitrust agency with criminal enforcement authority. However, there is a second federal antitrust agency, the Federal Trade Commission ("FTC") that has a broader range of enforcement authority than the DOJ.

Section 5 of the FTC Act declares that all unfair methods of competition or unfair or deceptive acts or practices affecting interstate commerce are illegal. However, the statute does not define what is an "unfair method of competition" or an unfair or deceptive act or practice."

In recent years, the FTC has used Section 5 of the Federal Trade Commission Act as a basis for attacking trade and professional association codes of ethics that restrict the right of members to advertise; trade and professional association codes of ethics that declare it is "unethical" for a member to solicit another member's customers; and trade and professional association codes of ethics that restrict a member from offering another member's customer a discount to switch vendors.

The FTC also has attacked association minimum fee schedules and actions by associations to induce state legislatures to prohibit second level professionals from performing certain services previously restricted to first level professionals. In most cases, FTC actions result in Cease and Desist Orders against the associations. However, in certain cases, the FTC has the authority to seek civil penalties and disgorgement of illegally obtained profits.

Both the Antitrust Division of the DOJ and the FTC have repeatedly emphasized that trade associations, professional associations, and corporations need to establish a culture of antitrust compliance by establishing comprehensive antitrust compliance programs specifically directed at the type of antitrust risks to which the organization has the most exposure.

To establish a culture of antitrust compliance, the association should adopt a custom-designed antitrust compliance program, implement the program in a meaningful manner, communicate the details of the program to officers, directors, members and staff, set up a schedule for re-education updates and establish a "whistle-blower" program to encourage members and staff to report possible antitrust violations without fear of reprisals or loss of employment.

It is with this background, that NMFTA has established its antitrust compliance program.

III. How the Antitrust Laws Apply to NMFTA and Its Members

A. Description of NMFTA

NMFTA is a trade association of motor freight carriers and other industry stakeholders of all sizes, and individuals, whose mission is to promote, maintain, and advance uniform standards that support the efficient and secure movement of goods across the LTL and broader trucking industry.

NMFTA establishes and defines the standards that keep North American freight moving safely and efficiently. From LTL freight classification to dock operations, to cybersecurity and digital API Standards, NMFTA brings carriers, shippers, and a myriad of logistics partners together to build a stronger, smarter, and more secure supply chain. NMFTA regularly holds educational meetings for members, supports research and training activities and publishes communications for the benefit of its members.

B. Competition

Organizations and individuals providing freight motor carrier services to the public sector and to government agencies are direct competitors. Their actions may "govern the conduct" of other freight motor carriers and therefore, may be engaged in antitrust sensitive conduct in that they collectively may restrict what other competitors can do. There are certain types of conduct by an association and its members that are so egregious from an antitrust perspective that they are considered to be illegal "*per se*." This means that if it can be proved that the association and its members engaged in this type of conduct, there are no defenses or excuses. Individuals found guilty of *per se* violations can be found to be subject to criminal penalties, including jail.

There are other types of anticompetitive conduct that are considered less serious. These types of conduct are covered by the antitrust "rule of reason." Under the "rule of reason," a court will find that this type of conduct violates the antitrust laws when it can be shown that the association and its members have the power to affect prices in a given market and where the anti-competitive effects of the conduct in question outweigh the pro-competitive benefits.

The following examines both categories of conduct with specific reference to the conduct of NMFTA and its members.

C. "*Per Se*" Antitrust Violations

i. Price Fixing

An agreement by a group of members to fix the price that they charge for their services is a "*per se*" violation of the antitrust laws. In this context any agreement that "affects" prices will be considered the same as an agreement to "fix" prices.

As competing entities, members may not agree on:

a) Amounts to charge for various types of transportation and/or logistics services;

b) An amount of surcharge to add to the base amount for additional services;

c) What services are to be included in a base charge and what services should be subject to an extra charge;

d) What is a "fair" minimum charge for a transportation and/or logistics service;

e) Minimum prices that should be charged for transportation and/or logistics services;

f) Whether or not to charge interest for late payments or when to start charging interest or the amount of interest to charge; and/or

g) Any other matter that affects the price of the services offered.

ii. Customer Allocation

It would be illegal and a *per se* antitrust violation for a group of members to agree to allocate, assign or divide customers. As an example, they could not agree that all requests for service from Customer A will go to Member X and all requests for service from Customer B will go to Member Y. Customer allocation agreements take various forms including:

a) Agreements not to solicit certain accounts;

b) Agreements to quote "high prices" to non-favored accounts;

c) Agreements to provide poor service to accounts coming from a co-conspirator; or

d) Agreements to divide an account.

iii. Territorial Allocation

Group of competitors cannot agree to limit offering services to specific geographic areas. It would be illegal and a *per-se* antitrust violation for members, all of whom provide services in a certain state, which has five major cities, each to agree to provide services in one of the five cities and not to provide services in the other four.

Similarly, it would be illegal for two members located in the same city to agree that one company will provide services only to customers located on the east side of the city and the other company will only provide services to customers located on the west side of the city.

iv. Bid Rigging

It would be illegal and a *per se* antitrust violation for two or more members to enter into an agreement to affect or rig a bid for services. This would include:

a) Agreeing that if four jobs are up for bid, member A will bid low on Job X and Member B will bid high on Job X;

b) Agreeing to alternate bidding high and low to ensure that all get a "fair" market share;

c) Refusing to bid on certain jobs to protect the "favored" bidder;

d) Agreeing to submit an intentionally high bid to make sure that a bid from a friendly competitor is accepted; and/or

e) Engaging in any other bidding conduct designed to make sure that a favored bidder is successful.

v. Boycotts or Refusals to Deal

It would be illegal and a *per se* antitrust violation for two or more members to agree to refuse to deal with a competitor or vendor offering a legitimate product or service to the market. As examples:

Vendor A and Vendor B make competitive models of scanning machines. Independent tests show that Vendor A's machines are better than Vendor B's machines. NMFTA could publish the test results but could not recommend that all members buy only brand "A." NMFTA could publish the test results and recommend that members consider the test results when making equipment purchases.

The antitrust statutes are conspiracy statutes prohibiting agreements among competitors to engage in the practices set out above. Acting unilaterally and not pursuant to any agreement, an NMFTA member can set whatever prices, deal or refuse to deal with any customer or bid or not bid on any job, based on its own economic objectives.

vi. Association *Per Se* Liability

If association members engage in conduct that is "*per se*" illegal while attending an association meeting and the association, directly or indirectly, has knowledge of such illegal activity, the association and the association staff who participate in the illegal conduct, directly or indirectly, may be held to be co-conspirators and equally liable.

As an example, if the members of the association decided to establish minimum service fee levels at an association Board meeting and an association staff member sat through the entire meeting, took minutes, including the details of the minimum fee agreement, the association and the staff members could be found guilty of a criminal antitrust violation and the staff member would face criminal penalties including a jail sentence of not less than one year or more than ten years for engaging in a conspiracy to fix prices.

D. <u>Rule of Reason Antitrust Conspiracies</u>

As a trade association, NMFTA provides benefits for members that enable them to compete more effectively. NMFTA requires that members meet certain standards and comply with a Code of Conduct. NMFTA establishes standards and educational programs in the LTL carrier industry.

If NMFTA's membership criteria limits the ability of a company to compete in the marketplace, then there is conduct that, on its face, may be considered a concerted action by a group of competitors that restrains trade.

The conduct in question does not fall in the *per se* category and, as such, will be evaluated under the antitrust "rule of reason." Under the "rule of reason" the question is "Does the association have the power to affect a defined market?" If so, do the anti-competitive effects of the conduct outweigh the pro-competitive benefits? If the anti-competitive benefits outweigh the pro-competitive benefits, we have an unreasonable restraint on trade that arguably violates the antitrust laws.

For purposes of antitrust consideration, a person claiming an antitrust violation may argue that NMFTA membership has economic value and that non-members may face impediments in certain markets. However, as a trade association, NMFTA is entitled to set reasonable membership criteria.

NMFTA's requirements for membership should be established based on criteria that the association believes are important for the services to be provided in a beneficial way for the public.

Membership in NMFTA is open at various levels and the requirements for membership are designed to encourage high levels of professional conduct for the benefit of the public. Those companies who do not meet NMFTA's requirements for membership are free to provide the same transportation-related services and NMFTA should not be deemed to be engaging in conduct aimed at denying non-members from access to the market.

In addition, NMFTA's membership restrictions have pro-competitive benefits that outweigh the anti-competitive risks and thus, strongly argue for meeting the test of the "rule of reason."

Where trade organizations establish transportation and logistics related standards and provide education and training regarding those standards, such standards, in order to meet the "rule of reason," should be reasonably designed to bring carriers, shippers, and a myriad of logistics partners together to build a stronger, smarter, and more secure supply chain for the benefit of the public. If NMFTA can show that the standards are reasonable, will benefit the public, and can be substantiated on a rational and reasonable basis, and are not designed to keep transportation and logistics companies out of the market, NMFTA's conduct should meet the requirements of the rule of reason.

E. <u>Adoption of Antitrust Compliance Program</u>

In order to ensure that NMFTA and its members do not engage in practices that may violate the antitrust laws, NMFTA has, by vote of its Board of Directors, adopted this Antitrust Compliance Program. As part of this program, NMFTA will follow the following practices.

i At Association Meetings:

a) *Do not* discuss past, current or future prices.

b) *Do not* discuss what is a fair profit level.

c) *Do not* discuss specific increases or decreases in price.

d) *Do not* discuss standardizing or stabilizing prices.

e) *Do not* discuss specific pricing procedures.

f) *Do not* discuss cash discounts.

g) *Do not* discuss credit terms.

h) *Do not* discuss surcharges such as additional charges for copies of reports.

i) *Do not* discuss controlling sales.

j) *Do not* discuss allocating markets.

k) *Do not* complain to a competitor that its prices constitute unfair trade practices.

l) *Do not* discuss refusing to deal with a competitor because of its pricing or distribution practices.

ii. As to Self-Regulation and Membership Policies:

a) *Avoid* restrictions on dealing with nonmembers.

b) *Avoid* unreasonable exclusions from membership, especially if there is a business advantage in being a member.

c) *Avoid* limitations on LTL carriers having access to association information and publications, unless the limitation is based on protection of NMFTA and/or its members' trade secrets or failure to provide data to an information exchange program.[1]

iii. Antitrust Compliance Education

As part of NMFTA's Antitrust Compliance Program:

a) NMFTA's Antitrust Compliance documents will be published on NMFTA's website and all members will be encouraged to review the documents.

b) NMFTA will have an annual antitrust compliance education session as part of a Board meeting.

c) NMFTA will have NMFTA staff watch available antitrust training videos once per calendar year.

d) NMFTA will advise Committees, Councils and their Divisions that this Antitrust Compliance Program is available in the NMFTA Resource Center which can be found at footer on the NMFTA website at www.nmfta.org.

e) NMFTA has adopted a Whistleblower Policy which can be found in the Employee Handbook.

f) NMFTA will read the Antitrust Compliance Statement (attached as Exhibit A) before all Board meetings and membership meetings.

F. <u>Antitrust Investigations</u>

i. Allegations Regarding Antitrust Violations

In the event that any allegations of possible antitrust violations are reported to NMFTA's staff or NMFTA's volunteer leadership, legal counsel will be contacted immediately. Legal

[1] Non-members can be charged a fee that is greater than the fee charged members for purchasing publications or attending educational program. The fee differential must reflect the cost incurred by members in developing and production of the publications or program.

counsel will make a thorough investigation of the allegations and report the results of the investigation to the NMFTA Board of Directors with a recommendation for appropriate action.

ii. FTC or Antitrust Division, DOJ Investigations

a) Written Inquiry or Subpoena

In the event that NMFTA receives a written inquiry or subpoena from a federal or state antitrust agency, the inquiry or subpoena will be immediately sent to legal counsel for review.

b) Visit by FTC or DOJ Investigator

The Executive Director or other executive staff member shall be appointed as the responsible person to meet with any FTC or DOJ investigator who visits the association offices without warning and requests access to books and records of the association or requests to interview employees.

If such a visit occurs, the appointed staff member should obtain the name of the investigator, his or her contact information and ask to look at the person's identification.

The appointed staff member should ask the investigator to explain the purpose of the investigation, and then politely state that it is the policy of the association to cooperate with all government investigations but before answering any questions or providing access to any files or documents, the staff person must consult legal counsel and provide them with a copy of the subpoena or civil investigative demand, if any.

The investigator should be asked to wait in the office reception area while staff person calls legal counsel and receives advice on how to proceed. In very rare occasions, the DOJ will obtain a court warrant to conduct a raid on the offices of a company or an association. In such a situation several FBI agents will show up at the association's offices, ask all the employees to go to one location and begin seizing documents, computer files, computers, etc. Employees will not be permitted to call legal counsel, use the telephone or use cell phones until the raid is completed. It is extremely unlikely that such a raid would occur at NMFTA. The FBI needs a warrant issued by a court to authorize such a raid. A subpoena does not provide authority to obtain immediate access without first giving the association the right to contact legal counsel and obtain legal counsel's advice on how to proceed. Staff should be educated as to how to respond to an antitrust investigation.

G. <u>Minutes and Agendas</u>

A detailed agenda should be prepared prior to all meetings of the association and the association's Board of Directors. Legal counsel should review the agenda to ensure that there are no antitrust sensitive issues scheduled for discussion. If legal counsel determines that a scheduled discussion item may be antitrust sensitive, legal counsel will advise the association of the best way to deal with the issue presented.

Accurate minutes should be kept of all association and association Board of Directors meetings. Minutes should be approved by legal counsel before adoption.

H. Standard-Setting

Courts and antitrust authorities have found that standard-setting activities by trade associations can have significant procompetitive advantages when supported by objective industry-based judgments and conducted through procedures that prevent standard-setting from being biased by members with economic interests in stifling competition.

NMFTA conducts several standard setting activities, most notably related to the National Motor Freight Classification ("NMFC") commodity classifications, cybersecurity and Application Programming Interface for digitization.

In order to avoid antitrust concerns with standard-setting activities, NMFTA and its members should always strive to maintain the following factors in their standard-setting procedures and practices:

i. Participation from different levels of the supply chain (shippers, 3PLs, carriers).
ii. Clear transparent procedures followed by the bodies that propose and evaluate rules.
iii. No discussion of rates, charges, or prices.
iv. Objective and expert analysis to opine on standards and when performing related research.
v. Proposed and draft rules/standards are made public to allow for comments by interested parties.
vi. Use of the standards is voluntary by shippers, 3PLs, and carriers – parties should be free to contract around the standards.

When contemplating larger rules or standards changes, NMFTA should be wary of any proposed rules by NMFTA or carrier members or councils that could have a net effect on pricing or service offering that is beneficial to carriers to the detriment of shippers, 3PLs, or other parties in the transportation supply chain.

FCDC related rules and procedures have been reviewed by antitrust legal counsel who found that those procedures should comply with U.S. federal antitrust standards set by federal courts. Accordingly, NMFTA and its members should always strive to follow the procedures and avoid departing from the procedures.

I. Carrier Tariffs

Carriers maintain their own tariffs with rules pertaining to classification and other matters. It is a carrier's right to do so. Even so, carriers are prohibited from taking concerted action to publish tariff rules that apply to shippers.

Discussion of tariffs or even particular tariff rules may have a procompetitive effect under certain circumstances. Both within and outside of NMFTA meetings, however, members and NMFTA must never engage in conversations about how carriers can jointly use their tariffs in the marketplace.

Carriers have the right to independently maintain their tariffs but cannot coordinate with other carriers while doing so. NMFTA must not be a vehicle for any concerted tariff activity.

K. Information Sharing

Like standard-setting, information sharing activities by associations have been found by courts and antitrust authorities to have procompetitive effects under certain conditions. NMFTA may engage in information sharing activities with respect to benchmarking operational data or otherwise sharing developments in the industry.

In order for information sharing activities to be compliant with antitrust laws, information sharing must meet the following conditions:

i. Information must be submitted to NMFTA or other neutral third party;
ii. Shared information must be aggregated, meaning that the information should show trends and charts;
iii. Shared information must be anonymized, meaning that it is not possible to determine who submitted what data based on the presentation of the data;
iv. Shared information must be historic (at least three months old but preferably older);
v. NMFTA must offer open participation for parties that want to submit information;
vi. A sufficient number of carriers must submit information (five at a bare minimum) so that individual carriers cannot be identified;
vii. No single carrier should represent more than 25% of the aggregated data points; and
viii. Shared information must not include future sales, specific pricing and similar information regarding future equipment investments, and/or any marketing strategies.

Direct information sharing between carriers may violate antitrust laws if it includes sensitive information. Accordingly, all information sharing about carrier operations should be sent to NMFTA and presented by NMFTA to interested parties.

L. Written Model Agreements and Best Practices

Associations are not prohibited from working on model agreements and best practices for the industry, as long as those items are not violating antitrust laws for other reasons. To maintain antitrust compliance, NMFTA shall **not** work on any model agreements or best practices that:

i. Are mandatory to use;
ii. Must be used as published without any amendment; or
iii. Contain provisions setting out pricing, exact services, bundling of pricing and services, credit terms, revenue splits, specific accessorial charges, or other economic terms.

Exhibit A

NMFTA Antitrust Policy Statement

(To Be Read Before All Association Meetings)

It is the policy of NMFTA that its business is conducted in full compliance with all applicable laws, including federal and state antitrust laws. It is a basic principle of American antitrust laws that competitors may not restrain competition among themselves with reference to the price, quality, or distribution of any products or services, and they may not act in concert to restrict the competitive capabilities or opportunities of their competitors, suppliers or customers. To ensure compliance, all NMFTA business must be conducted in accordance with the NMFTA Antitrust Policy and Compliance Program, which can be found on the NMFTA website at www.nmfta.org.

In accordance with this statement and the NMFTA Antitrust Policy and Compliance Program, meeting participants, including NMFTA directors, officers, staff, member representatives, and guests, should not discuss or even mention matters involving price or pricing policy, rates, bidding, terms and conditions of sale, allocation of territories or customers, particular customers, or any current or future intended action that could restrain competition. These requirements extend to outside of the meeting rooms and include informal discussions. It is imperative that meeting participants work conscientiously to avoid any discussion that may have unintended implications. Violation of the NMFTA Antitrust Policy and Compliance Program will subject the participant to appropriate disciplinary action.

An equal responsibility for antitrust compliance, which includes avoidance of even an appearance of improper activity, rests with all involved parties. Penalties for violating the antitrust laws can be severe, subjecting corporations to criminal penalties, as well as fines, civil treble damages and injunctions. In extreme cases, individuals also are subject to criminal prosecution and may be punished by fines or imprisonment.

In the event that any questions or concerns arise, please consult with NMFTA's Legal Counsel.