



INDEPENDENT DISTRIBUTORS COOPERATIVE-USA
ANTITRUST COMPLIANCE STATEMENT



This Statement is an introduction to the United States antitrust laws and their application to cooperative activities. It is intended for the general use of the members of this cooperative to assist them in avoiding improper actions in cooperative meetings and activities. It is not intended to answer specific legal questions that may arise from time to time.

Cooperatives are formed and thrive in response to the common interests of companies and people within the same industry and areas of interest. By definition, therefore, cooperatives can be "combinations" of competitors. Because of this, their actions are especially susceptible to scrutiny by the state and federal regulatory agencies charged with enforcing the antitrust laws. The various antitrust laws that relate to cooperative activities are listed here:

1. Sherman Act (1890) – The earliest federal antitrust law and probably the most important for cooperatives because its two key sections prohibit all group actions, contracts, agreements and understandings, whether written or oral, formal or informal, that unreasonably restrain competition. Section 1 states that "every contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal." Section 2 declares unlawful all monopolization of trade, and attempts or conspiracies to monopolize trade.

Two tests have been created by courts in applying the Sherman Act. The "per se" test is used whenever the court is faced with practices that in the past have been so injurious to competition that they are deemed unreasonable. Elaborate inquiry into the facts and the economics of "per se" practices is not required by the court. "Per se" illegal practices generally include, but are not limited to, price fixing, bid rigging, allocation of markets, group boycotts, and other actions that may be construed as clearly unreasonable restraints on trade.

Activities that are not "per se" illegal are examined by the court under the "rule of reason." A "rule of reason" inquiry consists of a close examination of the facts and the economic impacts of the trade practice under scrutiny. A practice will be illegal under this test only if it is unreasonable, meaning unduly restricting free competition or unduly obstructing the normal course of trade.

2. Federal Trade Commission Act (1914) - Section 5 of this law broadly prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." It prohibits actions, even by one person or entity, that lessen competition or that put too many obstacles in the path of open competition.

3. The Clayton Act (1914) – This law forbids activity or agreements of any kind that "tend to substantially lessen competition or tend to create a monopoly in any line of commerce." Although monopoly, which is the concentration of an industry in one or a very few sets of hands, is generally not a concern of cooperative activities, this law has been used to attack preliminary, incipient behavior before it ripens into an actual restraint of trade in violation of the Sherman Act.

4. The Robinson-Patman Act (1936) – Actually an amendment to the Clayton Act, this law bans price discrimination or differentiation between purchasers of "commodities of like grade and quality" if such activity substantially lessens competition.

The broad language of these federal laws and the imaginative practices of American businesses have spawned hundreds of court cases brought by:

1. U.S. Department of Justice – The Federal government's prosecuting attorney, the Department has an Antitrust Division devoted solely to these matters. The Division is empowered to bring criminal and non-criminal (civil) lawsuits under any one or more of the federal laws. Criminal penalties for individuals who violate the antitrust laws can include jail terms of three (3) years and fines up to \$350,000. Fines for corporations can reach \$10 million. In addition, the Department now may seek treble damages in certain cases.

2. Federal Trade Commission (FTC) – This agency can initiate administrative proceedings on its own that have the force and effect of a lawsuit, or it may file its own lawsuits. It may impose penalties that include cease and desist orders, and fines that reach \$10,000 per day for continued violations of these orders.

3. State Attorney's General - The state counterparts to the U.S. Department of Justice are empowered to enforce the antitrust laws of their own state, which often include treble damages provisions, as well as the federal laws.

4. Private Parties - Virtually any private party that can allege an antitrust injury (including competitors within an industry, businesses in related industries, aggrieved present or past customers or other cooperatives) is entitled to bring non-criminal (civil) lawsuits under one or more of the federal and state laws. Successful private party plaintiffs may recover treble damages, and attorney fees and costs.

Obviously, therefore, it behooves any cooperative to exercise appropriate caution when developing and conducting its programs and activities. By following the rules set out below, the cooperative should be able to minimize the legal risks to which it is inherently subject.

1. The cooperative's structure, bylaws and operations shall be well defined and designed to serve the interests of the entire industry and the public.
2. Committees shall have clearly defined roles that avoid consideration of any issue or subject that could be anti-competitive.
3. Informal (or "rump") sessions of committees or other cooperative bodies shall be avoided.
4. The cooperative's Board of Directors meetings, executive committee meetings and all other legally sensitive meetings shall be attended by legal counsel. Legal counsel shall also be continually available to the members and staff for consultation, review and guidance on antitrust issues.
5. Each cooperative meeting (committee, task force, etc.) shall have a written agenda to which the participants shall adhere.
6. The cooperative's documents, especially bylaws, board and committee agendas and minutes, general meeting minutes, and contracts concerning such subjects as business practices, statistics, standards, certification, and membership, shall be reviewed by legal counsel before distribution.
7. Non-members seeking admission and members being considered for expulsion shall be treated without discrimination and on the basis of membership criteria set out in advance.
8. Correspondence among cooperative members regarding cooperative activities shall be distributed by staff rather than directly by the members.
9. Cooperative letterhead stationery shall be distributed by staff only to those staff and cooperative members who are current officers or who have an approved specific need to use the letterhead for external correspondence.
10. Statistical data on past market information shall be collected by an entity (which could be cooperative staff) that assures the confidentiality of each reporting member's data. Statistical data shall not be collected that could be used to facilitate collusive pricing or business practices.
11. Dues schedules shall be designed so that members cannot thereby determine sensitive sales or profit information about any other member.

12. Cooperative staff, legal counsel and members shall not tolerate or authorize any member activity or discussion concerning current or future prices; pricing methods; geographical allocation of markets; boycotts; restrictions on or refusals to deal with one or more suppliers, customers or related businesses; or similar matters that may be interpreted as antitrust violations under federal or state law.

Legally troublesome cooperative activities are often not clearly separable from acceptable ones. Therefore, it is critical that the cooperative has resources for authority and guidance to which it can turn whenever a legally sensitive matter arises. In order of importance, these resources are:

1. You, the person reading this Statement – Your responsibilities begin with a thorough understanding of this Statement and continue during every contact you have with the cooperative itself, its members and other interested parties. For example, if you are approached privately at a cooperative social function by a competitor who wants to discuss pricing, you have a responsibility to yourself, your company and your cooperative to change the subject, protest this reckless behavior, and move away. For another example, if you are sitting on a committee that proposes an activity that you believe may be legally sensitive; you should refer it to cooperative staff or legal counsel immediately for an opinion.
2. If you have a concern about a cooperative activity, voice it early and directly to cooperative staff or legal counsel. You and your cooperative members must remain vigilant in these matters.
3. Legal Counsel - There are actually several resources here: the cooperative's counsel and, to a lesser extent, each member's in-house or outside counsel. The cooperative's counsel's primary responsibility is to the cooperative. While each member's own legal counsel may advise on antitrust problems for the member's own use, the cooperative's legal counsel is charged with keeping current with the antitrust laws and regulations that may have an adverse impact upon the cooperative and making recommendations for internal procedures that will help the cooperative avoid antitrust liability. It is for these reasons that this cooperative requires legal counsel's presence at all Board and other meetings where legally sensitive matters could arise. Cooperative staff - Although not experts in antitrust law, the staff have varying degrees of sensitivity to antitrust concerns and can help members recognize when and under what circumstances legal counsel should be consulted.

Once more: if, despite these policies, a cooperative member becomes involved in activities or discussions that are or may be illegal, the member should withdraw from participation, announce his objections and promptly inform the cooperative staff or legal counsel.

This Statement demonstrates that this cooperative, like all cooperatives, operates within a complex web of antitrust laws designed to assure free enterprise and open competition. The legal pitfalls are many and require the diligent efforts of you, the member, cooperative staff and cooperative legal counsel to avoid them.