



OFFICE OF THE GENERAL COUNSEL

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# ANTITRUST COMPLIANCE BOOKLET

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# CONTENTS

INTRODUCTION .....	3
THE IMPORTANCE OF OBEYING THE ANTITRUST LAWS.....	3
A SNAPSHOT PICTURE OF ANTITRUST LAW.....	3
A. PER SE ANTITRUST VIOLATIONS	
1. PRICE-FIXING	
2. BID-RIGGING	
3. CUSTOMER ALLOCATIONS	
4. GEOGRAPHIC/PRODUCT MARKET ALLOCATIONS	
5. GROUP BOYCOTTS	
B. CONDUCT SUBJECT TO RULE OF REASON ANALYSIS	
1. STANDARD SETTING	
2. INFORMATION EXCHANGES	
3. BEST PRACTICES	
GOVERNMENT RELATIONS ACTIVITIES .....	5
SEEKING LEGAL ADVICE .....	6
CONCLUSION .....	6
RECOMMENDED PROCEDURES FOR SIFMA-RELATED ACTIVITIES.....	6
A. SIFMA-SPONSORED COMMITTEE MEETINGS	
1. MEETING AGENDAS	
2. MEETING MINUTES	
3. MEETING HANDOUTS	
4. INFORMAL DISCUSSIONS	
B. DOCUMENT PREPARATION AND RETENTION	
1. DOCUMENT PREPARATION	
2. MEMBER EMAIL AND OTHER CORRESPONDENCE	
C. SIFMA STAFF SUPERVISION	

## INTRODUCTION

This booklet is intended to help you to understand the requirements of the antitrust laws in connection with SIFMA-sponsored activities. Although the antitrust laws recognize that trade associations make many pro-competitive contributions to the American economy, the very fact that trade associations bring competitors together presents a risk that trade group discussions could lead to, or provide a basis for inferring, agreements which may raise antitrust concerns. This booklet provides guidance to SIFMA members and staff to minimize the risk of antitrust concerns with respect to SIFMA-related activities. This booklet is intended to illustrate antitrust concerns that have been known to arise in trade association activities. It is not an exhaustive discussion of every type of antitrust issue that might arise, either through SIFMA activities or other activities of broker-dealers not related to SIFMA work. SIFMA staff and members should never hesitate to consult with counsel about antitrust questions.

## THE IMPORTANCE OF OBEYING THE ANTITRUST LAWS

This compliance booklet focuses on ensuring that, especially in the context of SIFMA activities, no discussions or communications occur that might lead to the perception that any SIFMA members or their employees have violated the antitrust laws.

Such communications could arise in many contexts — from a formal discussion at a SIFMA committee meeting to a casual conversation in a taxi or over lunch. A conversation that seems quite innocent could be linked in hindsight with a series of other events to provide circumstantial evidence of an anti-competitive agreement. The guidelines presented below are generally couched in terms of avoiding discussions of certain topics, to avoid the

risk that these discussions could later be construed as evidence of an antitrust violation.

Why is antitrust compliance important? The penalties for violating the antitrust laws can be severe. As the statement of policy adopted by the SIFMA Board of Directors indicates, compliance with the antitrust laws is essential to preserving the vigorous competition that exists in the securities and financial markets industry today. Competitive markets enhance public trust and confidence in the securities industry and help to ensure that the U.S. securities market is the most liquid and efficient in the world.

Violating the antitrust laws can be a felony offense. Individuals involved in some antitrust violations can, and do, go to jail. In addition to imprisonment, criminal prosecutions for antitrust violations can result in severe financial penalties for companies and individuals. In addition, the costs and burdens involved in defending a government antitrust investigation can be exorbitant, as can the costs of defending a private antitrust class action, where plaintiffs can seek to recover triple their actual damages as well as their attorneys' fees.

## A SNAPSHOT PICTURE OF ANTITRUST LAW

The antitrust laws are designed to prevent contracts or other private agreements that “restrain trade.” Antitrust analysis views some types of behavior, such as price-fixing, as inherently bad and therefore per se illegal. However, in many other circumstances antitrust law takes into account whether the behavior in question has some legitimate purpose that justifies the restraint that it may impose on competition. Good intentions alone are not sufficient, but conduct that in some respects restrains trade can nevertheless be legal if on balance it has the effect of promoting rather than suppressing competition. What follows is a brief

overview of some of the key aspects of antitrust analysis to keep in mind in SIFMA related activities.

## **A. PER SE ANTITRUST VIOLATIONS**

Certain types of conduct are considered to be “per se” illegal under the antitrust laws. This means that the conduct is strictly illegal — there is no defense. Per se illegal conduct can result in criminal as well as civil sanctions. The most important of these per se illegal practices are discussed below. Absolutely no discussions that fall within these categories can be held at any SIFMA function.

### **1. PRICE-FIXING**

Agreements among competitors on the price at which they will sell their products or services are called “price-fixing.” Price-fixing may exist even if there is no agreement on a specific price to be charged. Any agreement between or among competitors with the purpose of increasing or affecting the price of a product or service will violate the antitrust laws, as would an agreement to reduce output or restrict supply to impact price.

Price-fixing might include agreements among competitors on price ranges, pricing formulas, stock and other commission rates, the size of price spreads, discounting policies, or account fees. Thus, representatives of competing firms should, at all times, avoid discussing actual prices charged or to be charged for products and services.

### **2. BID-RIGGING**

“Bid-Rigging” is an area closely related to price-fixing and is also per se illegal. The objective of bid-rigging is to eliminate or reduce price competition, or to assure that, over time, each competing bidder receives a “fair share” of total business awarded on the basis of sealed bids. Bid-rigging includes the designation by competitors of one company to win a bid with the understanding that the remaining companies will submit higher bids. An agreement among competitors not to bid on a particular project also constitutes bid-rigging.

### **3. CUSTOMER ALLOCATIONS**

Another per se illegal violation concerns any agreement to divide or allocate customers among competing entities. These are illegal, whether based upon specific customers or classes of customers. For example, an agreement between competitors pursuant to which one competitor agrees not to pursue retail investors, if the second competitor agrees not to pursue institutional investors, or a certain class of institutional investors, is an unlawful customer allocation. No discussions should occur concerning allocating customers.

### **4. GEOGRAPHIC/PRODUCT MARKET ALLOCATIONS**

Agreements among competitors to divide or allocate business on the basis of U.S. geographic or product markets are per se unlawful. For example, agreements among firms in different regions of the country not to enter each other’s U.S. geographic territories are strictly illegal, as are agreements with competitors allocating certain products or investment vehicles among themselves. (Discussions about dividing or allocating business in foreign markets may not be covered by U.S. antitrust laws, but could violate laws of other nations). Discussions concerning plans to expand into or withdraw from certain geographic or product markets should be avoided.

### **5. GROUP BOYCOTTS**

A group boycott exists when a group of competitors agrees to take some form of joint action to exclude someone from the market, such as by agreeing to refuse to deal with another competitor, or with a supplier or customer. Group boycotts are per se illegal, and no discussion about forming a boycott should take place.

## **B. CONDUCT SUBJECT TO RULE OF REASON ANALYSIS**

The conduct discussed below is subject to an antitrust analysis under the “rule of reason.” This means that the conduct may or may not be permissible, depending on the circumstances.

Attorneys in SIFMA's Office of the General Counsel should be consulted if you think that any SIFMA-related activity might fall within the areas described below, or if you are otherwise uncertain.

### **1. STANDARD SETTING**

Product standards development refers to the process of identifying and agreeing upon a specific set of criteria to which a particular type of product should conform or the establishment of rules that govern the markets in which products are bought and sold. In the United States, product standards are generally developed by private industry and are often spearheaded by trade associations.

Standards development may create antitrust problems where, for example, they preclude certain entities from competing in the sale of that product, or features are added to a product for no reason other than to increase the price of the product. Care must be taken to ensure any such standards can be supported by legitimate business justifications.

### **2. INFORMATION EXCHANGES**

Information concerning matters such as prices charged for services rendered, business plans, marketing plans, new product development, costs and profits, that is not already publicly available, and which is competitively sensitive, can raise antitrust questions. While some types of information exchange, such as stock quotes and spreads, are clearly pro-competitive and raise no concerns, there are some types of information sharing that could raise questions as to whether the exchange of information suggests an agreement to restrain trade. Some of the factors that are important to consider are: whether the information is being collected by SIFMA or another third party and will be disseminated in such a way that the data providers are anonymous; whether the information is historical data or reflects current or prospective prices or costs (historical data exchanges are less likely to raise antitrust concerns); whether the

data providers constitute a significant share of the market; and whether the data is already publicly available. Surveys undertaken by SIFMA related in any way to prices or costs should be reviewed by attorneys in SIFMA's Office of the General Counsel in advance.

### **3. BEST PRACTICES**

It is not unusual for trade associations, particularly professional associations, to promulgate standards of conduct or a code of professional responsibility for members of the association. To the extent these standards are designed to protect the public from clearly unethical, fraudulent, unfair or deceptive practices, there are substantial business justifications to support the standards of conduct under the antitrust laws.

Care must be taken, however, to ensure standards of conduct, such as any proposed SIFMA "Best Practices" standards, do not have the purpose or effect of eliminating competition in the pricing of products or services provided by SIFMA members. Accordingly, a code of ethics or professional standards of conduct should seek to discourage practices that would have a clear detrimental effect on consumers and/or the reputation and integrity of the securities industry.

## **GOVERNMENT RELATIONS ACTIVITIES**

A very important role performed by SIFMA is to act as liaison between industry members and the Congress, federal regulatory agencies such as the Securities and Exchange Commission as well as state legislatures, and state regulatory agencies. In performing this function, SIFMA members join together, under the auspices of the Association, to discuss issues of concern to the industry and the government sector and to prepare, adopt and present positions for action by government agencies. Joint action by competitors to develop

and articulate positions to be communicated to the government for the purpose of influencing government action is immune from antitrust prosecution. Antitrust lawyers call this the “Noerr-Pennington” doctrine.

To ensure the protection of the Noerr-Pennington doctrine, discussions about proposed government action should occur within the context of SIFMA meetings whenever possible. Furthermore, if a SIFMA committee or division identifies practices that it believes should be addressed by the government, and those practices raise any potential antitrust issue, then the staff adviser, committee chairman or appropriate division official should consult an attorney in SIFMA’s Office of the General Counsel.

Although SROs, such as the stock exchanges or FINRA, have major regulatory responsibilities, it is not absolutely clear whether they automatically have the power or authority to trigger Noerr-Pennington protection. Therefore, it is best to view SROs as another segment of the industry with which SIFMA may join in petitioning for government action that might otherwise be anti-competitive, and in violation of the antitrust laws, if implemented without the necessary legislation or agency regulation.

## SEEKING LEGAL ADVICE

Attorneys in SIFMA’s Office of the General Counsel are a resource on the antitrust laws that you should use in connection with SIFMA activities. Should you become aware of ongoing or planned SIFMA-related activities that may raise antitrust questions, you should consult with the Office of the General Counsel at the earliest possible moment.

In discussing any issue with the Office of the General Counsel, it is essential that you provide all the relevant facts that are available to you. Antitrust advice is only as good as the information upon which it is based.

## CONCLUSION

Failure to abide by the antitrust laws can have extremely grave consequences. To minimize the risk that SIFMA activities could expose SIFMA or its members to antitrust sanctions, any SIFMA staff member who violates these guidelines is subject to discipline as circumstances require, and any employee of a SIFMA member who violates these guidelines in SIFMA activities may be subject to sanction by his or her employer. In addition, SIFMA’s By-Laws provide that “[a]ny member may be suspended or expelled by the Board of Directors if . . . it has committed any acts detrimental to the Association or injurious to the securities industry, or tending to bring the securities business into disrepute” (Article II, Section 6(b) of the By-Laws of the Securities Industry and Financial Markets Association).

We are confident the SIFMA antitrust compliance program will continue to be a successful and integral part of SIFMA operations.

## RECOMMENDED PROCEDURES FOR SIFMA-RELATED ACTIVITIES

To reduce the chance that any SIFMA-sponsored committee meeting might run afoul of any legal requirements, the following procedures should be observed. Some of these procedures may not be applicable or practical for certain SIFMA-sponsored activities, such as conferences, roundtables and SIFMA division gatherings. Organizers and participants in these events should use their best judgment about ensuring that their activities do not inadvertently stray into questionable topics or discussions, and should feel free at all times to consult with SIFMA staff or to seek SIFMA staff assistance.

## **A. SIFMA-SPONSORED COMMITTEE MEETINGS**

### **1. MEETING AGENDAS**

Agendas should be prepared prior to all scheduled committee meetings. The agenda should be closely followed and copies of the agenda should be retained in SIFMA files.

### **2. MEETING MINUTES**

A complete set of minutes should be prepared whenever feasible. The minutes should be distributed to committee members and a copy kept in SIFMA files. It is recommended that committee members not keep their own personal minutes of meetings, other than personal copies of the official minutes. Sometimes minutes may be unnecessary or impractical. Some examples may include conference calls, conversations through electronic media such as Internet “chat rooms” (particularly if they offer alternative means of recording the substance of the discussion), or meetings to prepare public testimony or to formulate positions on legislative or regulatory proposals. On those occasions, it may be desirable to retain some other record about the meeting, such as a staff adviser’s notes and/or a notice describing the purpose and content of the meeting and the expected attendees.

### **3. MEETING HANDOUTS**

As far as possible, all handouts prepared for dissemination at meetings should be reviewed in advance by SIFMA staff. A copy of all handouts should be retained in SIFMA files.

### **4. INFORMAL DISCUSSIONS**

The antitrust guidelines set forth above apply regardless of whether discussions among competitors take place in person during formal committee meetings or during informal conversations that precede or follow formal meetings. Substantive discussions concerning the work of a committee should be strictly limited to

the matters set forth in the committee’s approved agenda and, as much as practicable, restricted to formal committee meetings.

## **B. DOCUMENT PREPARATION AND RETENTION**

### **1. DOCUMENT PREPARATION**

All documents, including email correspondence and memoranda, should be written with the expectation that they might be reprinted in The Wall Street Journal or the New York Times. That is, all documents prepared, even if intended solely for internal consumption by a small group of SIFMA members, should be prepared in anticipation of public scrutiny and review by antitrust enforcement officials.

### **2. MEMBER EMAIL AND OTHER CORRESPONDENCE**

To the extent a committee chairman or members find it necessary to correspond with respect to SIFMA business, that correspondence, with the exception of nonsubstantive matters such as invitations or thank-you notes, should first be cleared through SIFMA staff. Note that SIFMA policy also prohibits the use of SIFMA letterhead by anyone other than SIFMA staff.

## **C. SIFMA STAFF SUPERVISION**

In order to assist members in the conduct of committee meetings, a SIFMA staff member should attend all meetings (preferably in person, although telephonic participation may sometimes be unavoidable). Should certain agenda items arise that present potential antitrust issues, it may also be advisable to have an attorney from SIFMA’s Office of General Counsel attend the meeting.



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