OFFICE OF THE GENERAL COUNSEL

ANTITRUST COMPLIANCE BOOKLET

FEBRUARY 2024

CONTENTS

INTRODUCTION

This booklet is intended to help you to understand the requirements of the antitrust laws in connection with SIFMA-related activities. The antitrust laws recognize that trade associations, like SIFMA, can promote and support robust competition, particularly in the context of industries, such as those SIFMA serves, that frequently require collaborative efforts to maintain fair, efficient, and liquid markets. But because trade associations necessarily bring competitors together, participants must be mindful of the risk that collaborative activity 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. While it is intended to illustrate antitrust concerns that have been known to arise in the context of trade association activities, it is not an exhaustive discussion of every type of antitrust issue that might arise and SIFMA staff and members should never hesitate to consult with counsel about antitrust questions.

THE IMPORTANCE OF OBEYING THE ANTITRUST LAWS

This booklet focuses on ensuring that SIFMA activities are conducted in compliance with the antitrust laws and that SIFMA staff and members avoid even the appearance of conduct that could give rise to antitrust concerns.

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. Compliance with the antitrust laws is consistent with, and essential to, these procompetitive objectives SIFMA serves.

Moreover, the penalties for violating the antitrust laws can be severe. 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 seek to prevent contracts or other private agreements that unduly "restrain trade" and the independent decision making of market participants. Such agreements need not be written, explicit or formal; they can be oral, informal, tacit or expressed; and they can be inferred on the basis of circumstantial evidence of a collective decision and parallel action inconsistent with independent decision-making. Some types of agreements, such as price-fixing, are viewed as inherently bad and therefore per se illegal. However, in many other circumstances antitrust law considers whether the collaborative activity in question has some legitimate purpose that justifies any restraint it may impose on competition. Good intentions alone are not sufficient, but conduct that in some respects restrains trade can nevertheless be legal and procompetitive 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 connection SIFMA- related activities.

A. PER SE ANTITRUST VIOLATIONS

Certain types of agreements among competitors are “per se” illegal under the antitrust laws. This means that the agreement may be deemed illegal regardless of its purpose or effect. Per se illegal agreements can result in criminal as well as civil sanctions. The most important of these per se illegal practices are discussed below. No discussions from which any such per se illegal agreement could be inferred should 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 could 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 horizontally 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 based on 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 jurisdictions). 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, customer, or employee or prospective employee, or to deal with such competitors, suppliers, customers, or employees only on certain terms and conditions. As a matter of prudent antitrust compliance, group boycotts should be considered per se illegal, and no discussion about forming a boycott should take place. For these reasons, whether and to what extent, or under what terms and conditions, a member chooses to conduct business with another market participant must be a unilateral and independent decision that it will make for itself, guided by its own independent economic and other interests.

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.

Please consult attorneys in SIFMA's Office of the General Counsel 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 are 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 made available to all market participants, 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 (exchange of 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 that are related in any way to prices or costs or other competitively-sensitive information should be reviewed by attorneys in SIFMA's Office of the General Counsel in advance. This includes, for example, non-public information about current or future price ranges, formulas, and ratios; proprietary marketing, capital investment, or expansion plans; future operations or strategies pertaining to specific investing opportunities; customer lists, account details, and other trade secrets; or employee recruiting, compensation, benefits, or other terms or conditions of employment.

3. BEST PRACTICES

It is not unusual for trade associations, particularly professional associations, to promulgate recommended standards of conduct or a code of professional responsibility for members of the association. There are substantial business justifications to support such recommended "best practices" or standards of conduct under the antitrust laws that are designed to protect the public from clearly unethical, fraudulent, unfair or deceptive practices, or otherwise seek to promote regulatory compliance and fair, efficient, and liquid markets.

Care must be taken, however, to ensure that any proposed recommended "best practices" or standards of conduct 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 securities and other financial markets.

In addition, any proposed recommended "best practices" or standards of conduct should be viewed as voluntary and no member should be asked to make any commitment to adopt a particular practice when operating in the market. Instead, each member must decide for itself whether and to what extent it will adopt or implement any standards, best practices, or other recommendations developed through industry collaborative activity, including through SIFMA-sponsored activities.

Accordingly, any such collaborative initiatives should ensure that: (i) the participation of members is voluntary and non-binding, and (ii) each member retains the ability to determine for itself whether and how to adhere to any stated principles or objectives.

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 generally immune from antitrust prosecution. Antitrust lawyers call this the "Noerr- Pennington" doctrine.

To ensure the protection of the Noerr-Pennington doctrine, discussions about about petitioning the government for 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 self-regulatory organizations (SROs), such as the stock exchanges or FINRA, have major regulatory responsibilities, joint efforts to petition those authorities for the purposes of influencing regulatory standards may not in all circumstances be immune from antitrust scrutiny under the Noerr-Pennington doctrine. 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.

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-related 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 consistent with SIFMA document retention policies and practices.

2. MEETING MINUTES

Any meeting minutes prepared or maintained by or on behalf of SIFMA must accurately reflect the matters discussed at SIFMA-sponsored meetings. Any such 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 the agenda that sets forth the topics addressed, or 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.

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 as soon as possible.

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. Should you have any questions concerning this booklet or any of the guidelines detailed herein, please contact the SIFMA's General Counsel's Office or its outside antitrust counsel.

sifma®

140 Broadway, New York, NY 10005
www.sifma.org