

**ANTITRUST COMPLIANCE GUIDELINES FOR  
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC. (“IPPNY”)<sup>1</sup>**

**Guidance for Discussions Between  
Competitors at IPPNY Meetings**

It is extremely important that association members, guests and invited speakers understand that the provisions of the antitrust laws apply to discussions at association meetings. A careless violation of the antitrust laws by some members could result in expensive litigation that could injure the association and/or result in liability of individual members. The Sherman Act provides substantial monetary and criminal penalties for violation of the antitrust laws.

Since 1987, at its Board of Director meetings, IPPNY and its members have consistently complied with applicable anti-trust laws and policies. Counsel has monitored said compliance.

**Avoid:**

1. Agreeing with competitors to give or deny cash discounts or promotional allowances;
2. Agreeing with competitors to deal or not to deal with any customer or agreeing on the prices to be charged to a specific customer;
3. Discussing your company’s current price with competitors;
4. Agreements with competitors regarding or affecting prices;
5. Agreeing with competitors on pricing or profit levels;
6. Agreeing with competitors to give or deny credit to a specific customer, or to establish uniform credit terms;
7. Entering into agreements with competitors’ price quotations or bids; and
8. Discussing allocation of markets.

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<sup>1</sup> These guidelines have been prepared for the Independent Power Producers of New York, Inc. by its outside counsel as part of the IPPNY, Inc. Antitrust Compliance Program. The guidelines presented herein are designed to be general in nature. More in-depth analysis may be required for specific questions or circumstances.

### **Permissible**

1. Provide and discuss regulatory, economic, business information and technological developments, emphasizing that each company may use this information for its own business decisions.
2. Explore image of the industry and methods to enhance the same.
3. Discuss the status of governmental policies and develop industry-wide lobbying positions.
4. Educate and provide information to IPPNY members about the industry.

## **Discussion**

An objective of IPPNY is to create a space where members can meet and exchange information with the understanding that IPPNY activities will be conducted in compliance with the provisions of the antitrust laws. IPPNY understands the objectives of the antitrust laws to preserve and promote competition and follows procedures that require strict adherence with these requirements. The IPPNY Board of Directors has adopted these Antitrust Compliance Guidelines to be employed by members and staff during IPPNY activities.

### **Relevant of Antitrust Laws to Association Activities**

Trade associations must proceed carefully because they promote spaces where competitors meet and could share information about the way they conduct their business. Associations must proceed cautiously as to not create circumstances that could be interpreted as violations of the antitrust laws.

Violations of the laws could lead to felony convictions and civil fines and penalties. Careless violations of the antitrust laws can result in innocent IPPNY members and staff being subjected to expensive investigations and litigation. It is IPPNY's objective to educate members about these laws and to promote strict compliance.

### **Applicable Antitrust Laws**

Antitrust laws that principally affect trade association activities are the Sherman Act<sup>2</sup> and the Federal Trade Commission Act.<sup>3</sup> Section 1 of the Sherman Act prohibits all contracts, combinations or conspiracies that unreasonably restrain trade. The contract, combination, or conspiracy is the violation of this law. An element of a conspiracy is proof of a relationship between the alleged defendants. An association, being a group of competitors, makes it a possible space for antitrust activity.

The nature of the law might make those who are simply attending a meeting during an illegal discussion liable even though they did not engage in the discussion.

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce." This law addresses illegal acts by individuals and/or companies. In contrast to the Sherman Act, a conspiracy is not required.

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<sup>2</sup> Title 15 United States Code § 1. (15 USC §1).

<sup>3</sup> 15 USC §45.

## Prohibited Association Activities

### Per-se Violations:

As discussed earlier, the Sherman Act forbids combinations and conspiracies that unreasonably restrain trade. The courts have determined certain restraints of trade as “per-se illegal.” Per-se illegal violations are so anti-competitive that they are presumed illegal. If a court concludes that the restraint is a per-se violation, a defendant cannot argue that the restraint was reasonable in that particular situation. Per-se violations must be avoided. Frequent per-se violations that are applicable to association activities are as follows:

1. **Group Boycotts.** Boycotts such as agreements to act in unison such as deny credit, against a competitor or a customer are illegal.
2. **Price Fixing.** An agreement among competitors about pricing that they will charge competitors is price fixing. A concrete agreement regarding the price is not necessary. Members must avoid these discussions.
3. **Bid Rigging.** Bid rigging is designed to reduce competition and ensure that members get higher prices or greater market share. Sharing information to have one party be the low bidder; and submitting “complementary bids” so that this bid will be higher; or an agreement with a competitor not to bid on a project.
4. **Customer Allocation.** Dividing customers or markets among competitors is also illegal.

### The Rule of Reason Inquiry

There are alleged restraints that are not per-se violations, but may be illegal depending on the circumstances. The rule of reason analysis requires consideration of the objective of the alleged restraint and its effect on competition if the restraint is reasonable.

1. **Information Sharing.** Sharing non-public information -- such as statistics, pricing information, marketing reports, material costs and employee compensation – with other IPPNY members can cause antitrust violations if not structured properly. Information-sharing must be performed in ways that do not disclose pricing strategies, market share or other areas that could suggest the development of illegal restraints.
2. **Government Relations Activities.** A joint action by competitors to influence government action is immune from antitrust liability under the provisions of the Noerr-Pennington doctrine. Certain lobbying activities by competitors are exceptions to the Noerr-Pennington doctrine and they must be properly structured to ensure compliance.
3. **Standards Setting.** Standard setting can be illegal if the standards limit or eliminate specific products or competitors from the market. Standard setting is legal if it is done

in a way that provides stakeholders in IPPNY with the opportunity to participate in the development and implementation of the standard.

**IPPNY Antitrust Compliance Operating Procedures:**

1. The IPPNY Board has adopted the antitrust compliance policy detailed herein.
2. The IPPNY Antitrust Guidelines have been provided to each member of the Board of Directors.
3. The IPPNY Antitrust Guidelines will be posted on the IPPNY web site.
4. Each IPPNY Board meeting will begin with a reminder to all attendees about the Association's antitrust compliance policy.
5. Agendas will be prepared in advance for all meetings and will be reviewed by staff for compliance with the antitrust policy.
6. Minutes are kept at all Board meetings and will note that attendees were reminded at the beginning of the meeting of the Antitrust Guidelines.
7. Minutes shall be reviewed by staff, prior to distribution to the Board of Directors to ascertain whether antitrust sensitive discussions are properly documented.
8. Any action by IPPNY or its Board of Directors that has the effect of rejecting a membership application, or removing a party from membership, shall be reviewed to assure compliance with these Antitrust Guidelines.