Compliance with Federal Antitrust Laws
INTRODUCTION

As a nonprofit corporation acting as an insurance advisory, statistical, and consultative association for its members, National Crop Insurance Services, Inc. (“NCIS”) does not encounter some of the federal and state antitrust issues with which its members must deal.

Its three primary areas of focus – gathering and analyzing crop statistics, formulating standard policy terms and conditions, and developing loss adjustment methods and adjuster training – subject it to regular reviews by various regulatory authorities, especially state insurance commissioners; also NCIS often provides input to the Federal Crop Insurance Corporation. Such activities differentiate NCIS from a private “for profit” corporation which can confront the full range of the antitrust laws. However, as an association whose operations inevitably involve facilitating and organizing meetings of its members, NCIS and its members must be cognizant of the importance of the federal antitrust laws and their compliance obligations. These guidelines have been adopted to avoid even the appearance of impropriety under the antitrust laws.

NCIS has adopted and adheres to the following fundamental statement of position:

NCIS intends to conduct, and does conduct, its meetings in compliance with applicable federal and state laws, including the federal antitrust laws.

The insurance industry is permitted some exception from federal antitrust law by the McCarran-Ferguson Act, which exempts the ‘business of insurance’ to the extent that it is regulated by state law. The only activities considered the ‘business of insurance’ (and therefore exempt) are those that (1) have the effect of spreading or transferring a policyholder’s risk, (2) are integral parts of the policy relationship between the insurer and the insured, and (3) are limited to entities within the insurance industry. In addition, the activities must not involve boycott, intimidation, or coercion.

Participants in NCIS meetings should avoid any discussion of pricing, underwriting criteria, or market division except to the extent that they are
specifically regulated by state or federal law or if they are asked to provide input on these issues by a state or federal regulatory agency, and then only until such input has been provided. Participants also should avoid any discussion of the relationship or dealings of any private companies outside the insurance industry with members of the insurance industry. Any discussions that could be viewed as an agreement to boycott, coerce, or intimidate any person also must be avoided.

Any discussion at any NCIS meeting, particularly on a non-legislative issue (not for purpose of providing input to a regulatory or legislative body on a specific issue it will decide), which deals with the above subjects or suggests minimum pricing, standardized underwriting criteria, or market division, unless specifically covered under state law, must be avoided. If such a discussion occurs, individuals should exercise the right to object, to have their objections noted in the minutes, and to absent themselves during that part of the meeting that is objectionable.

NCIS reaffirms the foregoing commitment at each meeting of its Board of Directors. Each committee meeting or other activity sponsored by NCIS should include distribution of and recognition of the foregoing commitment by NCIS to adherence to the federal and state antitrust laws.

The purpose of this brochure is to reiterate the long-standing commitment of NCIS to compliance with the antitrust laws and to provide an educational tool for its members and their representatives.

Many actions undertaken by the insurance industry benefit from a limited exemption under the federal antitrust laws. To understand that exemption, provided in the McCarran-Ferguson Act, it is important to start with a recognition of the prohibitions on business conduct mandated by federal antitrust law. For that reason, this brochure begins with a general description of the federal antitrust laws and then proceeds to note the key issues arising under the limited exemption for the insurance industry.

By necessity, no explanatory brochure can present a definitive explanation of antitrust law or its application to the many situations which arise in the day-to-day business world. Most emphatically, NCIS does not purport to provide legal advice or counsel to its members. This brochure simply is an educational tool for facilitating implementation of NCIS policies of long standing. NCIS’ policies are designed to avoid even the appearance of impropriety under the antitrust laws. Members of NCIS should consult their own counsel if they have legal questions concerning their individual activities or their participation in NCIS sponsored activities. Utilizing its own legal counsel, NCIS periodically presents
educational programs regarding the antitrust laws. NCIS hopes that its members will benefit from their attendance at those programs, but neither those programs nor this brochure can substitute for legal advice and counsel necessitated by particular situations.

Finally, NCIS’ experience in presenting antitrust educational programs in the past suggests that a number of members have legal questions of significance, either applicable to their own activities or to the activities of NCIS, which do not implicate antitrust law, but still involve other matters of legal or regulatory concern. Such issues are not within the scope of this brochure. Members are welcome, however, to raise any legal issue of general applicability to NCIS by contacting either NCIS management or the Law Committee of NCIS.

FEDERAL ANTITRUST LAWS

Federal antitrust law is found in three principal statutes and in decisions of courts interpreting them. The earliest, and most frequently applied, law is the Sherman Act, which was passed in 1890. In general, the Sherman Act prohibits combinations, contracts, and conspiracies in restraint of trade as well as monopolistic practices. The Clayton Act, enacted in 1914, prohibits anti-competitive mergers and acquisitions and exclusive dealing and tying arrangements which substantially lessen competition. In 1936, Congress passed the Robinson-Patman Act to prohibit price discrimination in the sale of commodities and in providing promotional assistance.

As a nonprofit corporation with discretely defined business objectives, NCIS does not sponsor activities or engage in conduct which warrants discussion of the anti-monopoly provisions of the Sherman Act or of the prohibitions contained in the Clayton and Robinson-Patman Acts. It is more appropriate, therefore, to focus on the prohibitions found in the Sherman Act against
combinations, contracts, and conspiracies in restraint of trade. These are the acts prohibited by Section 1 of the Sherman Act.

In their interpretations of Section 1 of the Sherman Act, courts have found some agreements so inherently anti-competitive that they are presumed to be illegal, without proof of actual effect on the marketplace and without any opportunity to provide a justification for the agreement. Those particular types of agreements are:

- Agreements among actual or potential horizontal competitors on price, terms or conditions related to pricing, or levels of output.
- **Agreements among actual or potential horizontal competitors to rig bids or limit competition in bidding.**
- Allocations of markets or customers among actual or potential horizontal competitors
- Boycotts by a group of competitors that collectively possess market power.

The fact of an agreement in any of those areas may be sufficient to subject the participants to the sanctions authorized under federal law for violations of the antitrust laws.

Penalties for violation of Section 1 of the Sherman Act (as well as other provisions of the antitrust laws) are severe. Penalties are both criminal and civil in nature.

A criminal violation of the antitrust laws constitutes a federal felony. An individual can be sentenced to ten years in prison and a payment of fines up to $1 million for each count on which he is convicted. A corporation can be fined up to $100 million for each count on which it is convicted.

Civil liabilities for federal antitrust violations also are severe, as they involve payment of treble damages for any injuries suffered (actual damages sustained by a plaintiff multiplied by three), reimbursement of the injured parties’ attorneys fees, and injunctive relief to prevent repetition of the illegal actions. Defense costs in any antitrust proceeding can be substantial.
STATE ANTITRUST LAWS

Like the federal government, the states have enacted their own versions of antitrust laws. A brochure like this one cannot endeavor to explain the antitrust laws of any one state, let alone the laws of all fifty states. Two recurring themes of state legislation, however, need to be noted.

First, state antitrust laws generally mirror federal antitrust laws, with the principal differences lying in their scope of application (such as reaching actions only occurring within a given state or whose effects are felt within a given state) and in the remedies provided. Violation of a state antitrust law, therefore, frequently results in a violation of federal law (absent an exemption). As a result, adherence to state antitrust laws is as important as is adherence to federal antitrust laws.

Second, enforcement of state antitrust laws has been increasingly vigorous. State Attorneys General and private plaintiffs who feel themselves aggrieved by trade practices which constitute, if proved, antitrust violations are suing more frequently.

THE INSURANCE INDUSTRY AND THE MCCARRAN-FERGUSON ACT

The insurance industry enjoys a limited exemption from federal antitrust laws. As NCIS’ antitrust compliance statement indicates, the insurance industry exemption depends on the occurrence of each of the following three conditions:
• The activity in question must constitute the business of insurance.
• The activity in question must be subject to regulation by state law.
• The activity in question cannot constitute a boycott, coercion, or intimidation.

To repeat, all of these conditions must be present for there to be an exemption from federal antitrust laws. In other words, the presence of one or two of these conditions, without all three, leaves the participants exposed to liability under the federal antitrust laws, plus any exposure they might have under applicable state antitrust laws.

The balance of this brochure will address the three conditions required for the McCarran-Ferguson exemption to apply. Further, a limited number of examples (which theoretically might arise for NCIS members in conjunction with their participation in NCIS affairs) will be used to illustrate these conditions.

First, the activity in question must involve the insurance business, and this is a concept which courts have narrowly defined. In essence, the business of insurance involves those activities which have the effect of spreading or transferring risk, are fundamental to the policy relationship between the insurer and the insured, and are limited to entities within the insurance industry. For instance, determination of premiums and adjustment of risks constitutes the business of insurance. On the other hand, agreements with providers are not exempt. For example, organizing a “storm center” to adjust losses in the aftermath of flooding, therefore, is permissible, but extending its functions to set terms and conditions of dealing with providers of seed for replanting is impermissible.

All of the activities sponsored by NCIS constitute the business of insurance. For instance, the gathering of statistical information and other actuarial data for making adjustment determinations constitutes the business of insurance. When state and regional committees meet for loss adjustment purposes, they, similarly, engage in an activity which is part of the business of insurance.

Taking actions against providers who may seek to profit from flooding, drought, or other events causing crop damage does not constitute the business of insurance. Thus, there can be no agreement with such persons (for example, a feed and seed supplier) determining the price or other terms and conditions upon which they will provide seed, fertilizer, or other goods for replanting of crops.

Second, the McCarran-Ferguson Act requires that, even if the activity constitutes the “business of insurance,” the activity is exempt only if it is regulated by state law. Virtually every state regulates the business of insurance. However, certain activities undertaken by insurance companies in some states may be
considered subject to state regulation, but in other states they may not be. This places special emphasis on sensitive issues such as the setting of premium rates.

Federal courts view a state’s decision to make the business of insurance subject to state antitrust regulation to constitute, for McCarran-Ferguson Act purposes, regulation of the insurance business. The result is that, when a state makes the business of insurance within its borders subject to state antitrust laws, a federal exemption exists, but the same acts which otherwise would violate federal law generally would constitute violations of applicable state law. Members need to consult with their counsel about actions which they undertake in the states where they do business. NCIS is aware of two significant states, however, which make their antitrust and unfair competition laws applicable to some or all of the insurance business conducted within these states, specifically California and Texas. Accordingly, in those states it is illegal to fix premium prices, to allocate markets or customers, to undertake boycotts, and to participate in actions which restrain trade.

Finally, the action in question cannot constitute a boycott, coercion, or intimidation. Members should recognize that Section 1 of the Sherman Act declares a group boycott to be one of those activities so pernicious in nature that, under certain circumstances, it constitutes a per se violation of federal antitrust law and is not subject to any defense or other justification. Thus, not only does the existence of a boycott deprive the participants of the exemption available under the McCarran-Ferguson Act, but it may place the participants in line for condemnation as co-conspirators in one of the acts considered per se unlawful by federal courts.

For purposes of the antitrust laws and the McCarran-Ferguson Act exemption, a boycott generally can be considered to be an agreement between two or more competitors (that is, insurance carriers) not to do business with a third-party. A third-party can be either a customer of an insurance company or a provider of services or products to an insurance company or its insureds. Thus, it may be a boycott for two or more carriers to agree not to accept a person as an insured; similarly, it may be a boycott for two or more carriers to agree not to use a specific provider of a service or a product.

The antitrust laws do not limit the freedom of unilateral action. If an individual carrier decides that it will not do business with a particular risk or a particular provider, it may implement that decision on its own without jeopardy under the antitrust laws. On the other hand, the antitrust laws may prohibit an agreement by one carrier with one or more other carriers to terminate or to limit their dealings with third-parties.
CONCLUSION

In conclusion, NCIS reminds its members and their employees and representatives of a critical aspect of NCIS’ policy: If questionable or improper discussion begins, object and ask for the objection to be noted in the meeting minutes; if such a discussion continues, exercise the right to leave the meeting and remain absent during the objectionable discussion. And if there is any doubt about the propriety of a particular discussion or topic, raise the issue with legal counsel immediately.

NCIS wishes to thank its members for their past commitment to educate themselves and each other about the antitrust laws. The participation by NCIS members in antitrust compliance programs undoubtedly reflects members’ genuine commitment to NCIS’ policy of compliance with the antitrust laws.