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CHEMICAL MANUFACTURERS ASSOCIATION

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A. E. GREENE

July 1,1982

TO: Occupational Safety and Health Committee
Task Groups and Work Groups

SUBJECT: Committee Guide

The CMA booklet "General Principles Applicable to The Structure and Operations of Committees" was revised recently. I am enclosing a copy of the latest version and urge you to become familiar with its contents.

Sincerely,

Milton Freifeld

Milton Freifeld
Associate Director
Health, Safety, and
Chemical Regulations

MF:er

Formerly Manufacturing Chemists Association—Serving the Chemical Industry Since 1872.
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CMA

COMMITTEE GUIDE

CMA

GENERAL PRINCIPLES APPLICABLE TO THE STRUCTURE AND OPERATIONS OF COMMITTEES*

Preamble. The Association's Bylaws, in Article V, Section 6, authorize the Board of Directors or the Executive Committee to appoint such committees with such duties and functions as may from time to time be determined. The Bylaws further permit the adoption of regulations for the conduct of committee affairs consistent with Association policy and subject to review and approval by the Board or Executive Committee as appropriate.

To assist the committees in carrying out their functions consistent with the Bylaws, certain general principles applicable to the structure and operations of all committees are formalized in this Resolution. No committee or other group operating under CMA auspices on CMA business shall deviate from these general principles, except where specifically authorized by the Executive Committee or the Board (or as determined to be necessary by the President or Secretary of the Association).

As used in this Resolution, unless otherwise indicated, the term "committee" includes all CMA standing committees and such special committees as may be authorized from time to time, but does not include the Executive Committee or other committees composed of members of the Board.

1. Functional vs. Product Committees. The Association's committees shall continue to be organized primarily along functional rather than product lines. No committee having to do with a particular chemical product or product segment shall be formed without approval of the Board (or in an emergency by the President of the Association). Before agreeing to the establishment of any such committee, the Executive Committee shall determine whether the existing committees are adequate to handle the problem, and if not, whether the problem is of such general concern as to call for a new standing or special committee. All committees dealing with a particular product segment of the industry and all other committees formed for a temporary purpose shall be deemed ad hoc. Unless otherwise specified, the term of such committee shall be no longer than two years, subject to renewal for additional periods of one year or less by specific action of the Board.

2. Purposes. Each committee shall operate in accordance with PURPOSES setting forth its authorized activities which have been approved by the Executive Committee. Each committee's PURPOSES shall be printed in the Associations annual Directory.

3. Organization. All committees shall, unless otherwise authorized, be subject to the following rules in respect to their organization:

(a) **Members.** Each committee normally shall be limited to not more than 15 members. The members shall be recommended by the President of the Association and appointed by the Executive Committee from qualified full-time personnel of member companies interested in supporting such activities. To the maximum extent practicable, appointments should be reasonably representative of all interested member companies, taking into account such factors as their size, geographical location, chemicals manufactured, and differences in the general nature of their operations. Normally, a member company may have only one representative on any given committee. Members of any necessary task groups shall be appointed by the committee on the same basis. The membership of each committee should be composed of persons well qualified in the committee's field of activity, normally having primary responsibilities within that field in their respective companies. Nominations for committee membership will be made by member company Executive Contacts and shall include name, company affiliation and personal title, background relevant to committee's field of activity, and description of major responsibilities within the company. A committee may nominate for consideration by the President and Executive Committee one or more associate members representing governmental bodies or scientific or trade associations where such representation on a continuing basis will

*As approved by the Board of Directors on March 12, 1963, and amended by the Executive Committee on March 19, 1971; July 11, 1978, and June 3, 1981.

facilitate significantly the committee's programs. Associate members shall have non-voting status and be subject to review and Executive Committee confirmation annually.

(b) **Task Groups.** A committee may form such task groups as may be necessary to assist it in conducting its authorized activities. The Executive Committee shall be promptly advised of the formation of each such task group, and terms of reference in each case shall be established in writing by the parent committee subject to review and approval by CMA staff and the President of the Association.

(c) **Officers.** The chairman of each committee to serve as its chief executive officer, and a vice chairman, shall be appointed annually by the Executive Committee. The heads of task groups shall be appointed by the respective chairmen with committee approval.

(d) **Rotation.** The term of individual committee members shall be three years, one-third of the membership being rotated annually. Initial committee membership terms will be scaled to accommodate this rotation. Upon the expiration of one term of committee membership, a waiting period of at least one year must lapse before a former member becomes eligible for reappointment. For this purpose, a term will be regarded as three years or any fraction thereof according to the member's latest appointment to that committee. A committee member appointed chairman in the third year of his committee tenure may be appointed to a second year as chairman in which case he would serve in this post outside of the member limit on committee membership. A chairman cannot be extended in this manner for more than one additional year.

(e) **Staff Executive and Committee Secretary.** Each committee shall have as its staff executive and secretary a full-time CMA staff employee who shall function as the Board's administrative repesentative for such committee and as its chief administrative officer. It shall be the staff executive's duty and responsibility to see that all operations and proceedings of the committee, and of all its task groups, and conducted in full conformity with their purposes and this Resolution, consulting with General Counsel as necessary. On all procedural questions arising within any committee, including matters relating to established Association policy, the staff executive's decision shall be accepted, pending appropriate review.

4. **Meetings.** The business of each committee shall be conducted in executive sessions attended by its members and by others who have a leading role in matters to be considered at the particular meeting. Each task group meeting shall be an executive session of assigned members of the task group plus any members of the parent committee who wish to be present.

(a) **Frequency.** Each committee and task group will meet only as necessary to perform authorized committee business as determined by the chairman in consultation with the CMA staff. Meetings should not be held where the subject matter can be adequately and practicably handled by correspondence or telephone between the appropriate staff executive and individual members.

(b) **Location.** To the extent practicable and in the absence of cogent reasons for being elsewhere, all committee and task group meetings should be held in Washington, DC, preferably at the Association's office. Other locations, such as major city airports, may be considered in instances when they would afford greater convenience and cost savings to attendees.

(c) **Agenda.** Following consultation with the committee chairman, the staff executive assigned to each committee shall prepare written agenda prior to each of its meetings, which agenda shall be cleared in advance with General Counsel.

(d) **Attendance of Staff Executive.** No CMA committee meeting shall be held without the attendance of the staff executive assigned to it or other full-time CMA staff employee. General Counsel or his designate should also attend any meeting whenever in his option the nature of any subject on the agenda makes his presence desirable.

(e) **Minutes.** The staff executive assigned as secretary to the committee shall keep accurate and complete minutes of all business transacted at each meeting, which are to be subject to review and approval by General Counsel.

(f) **Discussions Limited to Agenda.** All substantive discussions at any CMA committee meeting are to be limited to authorized aspects of subjects on the agenda, except where additions to the agenda are specifically approved by the staff executive assigned to the committee. The staff executive's decision as to the propriety of any subject matter raised for discussion at any meeting shall be accepted, pending appropriate review. Any discussions or occurrences on the occasion of any meeting which are contrary to CMA's policies or rules and which come to the staff executive's attention shall be reported promptly by him to his supervisor and to General Counsel.

(g) **Task Groups.** The foregoing rules on meetings are applicable to all committees, task groups, and any other working groups meeting under CMA auspices, except that subparagraphs (c), (d), and (e) may be modified as indicated below in those cases where the group must meet in order to carry out a limited and specific written assignment from the parent committee and it is impractical for a staff executive to be present. In each such case, (i) the specific assignment must be set forth in the parent committee's minutes; (ii) the CMA staff executive assigned as secretary to the parent committee must be satisfied that the meeting in question is necessary and that the subject matter is not such as to require staff presence; (iii) the chairman of the group is to be responsible for carrying out the duties of the CMA staff executive, including particularly those specified in subparagraph (f) above; and (iv) the chairman must promptly make an accurate and complete written report to the parent committee and to the CMA staff executive as to everything occurring at such meeting.

(h) **General Meetings.** Apart from executive sessions, each committee shall schedule meetings, at least two per year, to which designees of Executive Contacts whose companies are not represented in the membership of the committee shall be invited and other interested representatives of member companies may attend. Such meetings shall be scheduled and notices issued amply in advance as often as appropriate to keep the designees and others informed about the committee's activities and provide opportunities for offering suggestions.

5. Policy Statements. Statements of Association policy or position developed by any CMA committee or other group for submission to the Congress or any governmental or other external agency shall, unless otherwise authorized, be transmitted by the President or other appropriate officer of the Association.

6. Reports. An account of the significant program activities of each committee shall appear in the Annual Report of the Association. The President and Executive Committee shall be kept informed on a current basis by communication from the chairman and the assigned staff executive. Presentation of reports to the Board shall be made as determined by the Executive Committee.

7. Periodic Reminder to Committee Members. A copy of this Resolution, as it may be amended from time to time, shall be furnished to each member of each CMA committee and task group thereof at the beginning of his duties as a member, and at least once a year thereafter so long as he remains a member.

RULES OF PROCEDURE FOR COMMITTEES*

1. Purposes. The purposes of each committee shall be as set forth in the *CMA Directory*.

2. Membership. Nominees, in addition to competence in the subject area, should have the perspective to recognize which matters are truly significant to the chemical manufacturing industry, and have the talents and personal inclination to be dynamic workers. The nominee's position in the company should provide ready access to the Executive Contact so as to authoritatively reflect corporate views and also assure company backing in devoting a considerable portion of time and associated company resources to committee activities.

3. Officers

3.1 The officers of a committee will be a chairman and a vice chairman.

3.2 The officers will serve for a term of one year commencing June 1.

3.3 **Chairman**

3.3.1 The chairman will preside at meetings and exercise general supervision over affairs of the committee within the general framework of CMA policies.

3.3.2 The chairman will be responsible for full reporting at regular meetings of all committee activities not previously reported.

3.3.3 The chairman will familiarize the vice chairman with all of the functions of the chairman in order to provide for proper and effective continuity in the chairman's absence.

3.3.4 With the concurrence of the committee, the chairman may establish task groups, define their purpose and scope, appoint their membership, and designate the chairman.

3.3.5 The chairman will designate from the membership of the committee liaison assignments to various CMA standing committees and task groups as necessary.

3.4 **Vice Chairman**
In the absence of the chairman, the vice chairman shall fulfill all the functions of the chairman.

4. Secretary/Staff Executive

4.1 The secretary shall be the CMA staff executive assigned to the committee.

4.2 The staff executive shall exercise those authorities and responsibilities prescribed by the "General Principles Applicable to the Structure and Operations of Committees."

4.3 The staff executive shall prepare and distribute notices of meetings, agenda, and minutes, and have custody of the official records of the committee.

5. Meetings

5.1 Meetings of the committee will be held at the call of the chairman.

5.2 A majority of committee members shall constitute a quorum at any meeting.

5.3 Task groups shall arrange separate meetings as justified by their assignments, subject to call by their respective chairmen and advance notice to the members from the staff executive.

5.4 The staff executive shall issue advance notices for all meetings of the committee and task groups, an no meetings may be held in the absence thereof.

5.5 It shall be the responsibility of the chairman of a task group to submit a timely request to the staff executive concerning any desired modifications of subparagraphs 4(c), (d), or (e) of the "General Principles Applicable to the Structure and Operations of Committees" under the provisions of subparagraph 4(g).

5.6 Actions shall be decided by a majority of members present. The presiding officer may vote only to break a tie. The staff executive is not entitled to vote.

6. Task Groups

6.1 Designations of task groups for special assignments, as to their membership, purpose, and scope shall be recorded in committee minutes. All task groups shall

*As approved by the Executive Committee on July 11, 1978, and amended by the Executive Committee June 3, 1981.

be reviewed annually by the committee. Unless recommended for continuance by the committee and authorized by the President of the Association they shall terminate.

6.2 Committee membership is not a prerequisite to serving on task groups.

6.3 The chairman and vice chairman shall be *ex officio* members of all task groups and shall be furnished notices of their meetings. They, together with the staff executive, shall be furnished copies of all reports and correspondence pertaining to task group activities.

6.4 Task group chairmen shall be responsible for keeping their members informed regarding progress of activities and assigned tasks.

6.5 Task group chairmen shall furnish written reports to the committee chairman, vice chairman, and staff executive in advance of each regular meeting of the committee concerning activities, plans and recommendations.

6.6 The term "task group" as used in these rules is defined to include any other committee sub-units.

7. Administration

7.1 The committee may consider matters from any source provided they fall within the scope of the declared PURPOSES.

7.2 An agenda of matters to be considered at meetings shall be prepared and furnished to those involved, at least one week in advance whenever practicable.

7.3 Minutes of meetings shall be prepared and distributed promptly. Corrections or additions shall be considered at the next meeting. In addition to normal distribution, such minutes shall be furnished to other member company representatives designated by their Executive Contact to receive them.

7.4 Voting may be conducted by letter ballot when, in the judgment of the staff executive, circumstances warrant.

7.5 Appearance before any legislative or regulatory body or other organization on CMA's behalf shall be made only as officially authorized. If, in any such appearance other than as a duly authorized representative, a person identifies himself with CMA in any way, he shall also make clear that he is not representing CMA in such participation.

8. Legal Assistance. Requests for legal assistance shall be directed by the committee chairman or staff executive to the CMA General Counsel. Assistance of the CMA General Counsel, staff counsel, or member company will normally be provided. Outside counsel, if required, will be selected and supervised by the General Counsel and will be engaged only after approval by the President or Executive Committee.

9. Primary Requirement. These rules are designed to supplement CMA's "General Principles Applicable to the Structure and Operations of Committees," originally approved March 12, 1963, as subsequently amended. Nothing in these rules shall be interpreted or applied in such manner as to conflict with that document.

CMA

ANTITRUST GUIDE FOR CMA COMMITTEE MEMBERS

This is designed to be a layman's guide on how the antitrust laws apply to trade association activities, with particular reference to CMA committee work. It is written both for the guidance of those CMA committee members who have no particular knowledge of this complicated subject, and to provide a useful reminder or "refresher course" for those who have had the benefit of antitrust advice from their own company counsel.

The Chemical Manufacturers Association is a non-profit industry association representing about 200 chemical producers. Like other industry associations, CMA is composed of member companies (many of whom are competitors of one another) representatives of which serve on its Board of Directors and on its committees.

Whenever competitors meet together problems can arise under the antitrust laws. If the meeting or other activities among competitors is conducted by or through a trade association, it is just as vulnerable to antitrust attack as if the same companies were meeting or acting together without the medium of an association. Trade associations generally seek, quite properly, to promote understanding and cooperation among their members. But if this "cooperation" restrains competition, both the association and its members will be in trouble under the antitrust laws.

Antitrust enforcement is being emphasized as never before. The number of criminal and civil antitrust actions is steadily increasing. Congress has greatly increased both criminal and civil antitrust penalties, has made important procedural changes, and has substantially increased the budgets for the Antitrust Division of the Department of Justice and the Federal Trade Commission, the two agencies charged with antitrust enforcement. The courts are expanding the scope of antitrust prohibitions which may especially affect trade association activities, and such associations are more frequently becoming the objects of FTC and Antitrust Division investigations. In view of these developments, increased awareness of the application of the antitrust laws to association activities is essential.

Like most reputable trade associations, CMA has objectives and programs that are well within the law. It also makes every effort to prevent possible antitrust abuses from arising. But a large responsibility also rests upon its member companies—and particularly upon their individual representatives who serve on CMA committees. This means that committee members should know enough about this subject to be able in their CMA work to avoid actions or discussions that might raise antitrust questions. The main purpose of this guide is to help all committee members to recognize what is, or might become, an "antitrust question."

Some actions or discussions by members of a trade association are clearly illegal; many others are wholly legal and proper; and there is a sizeable "grey area" or danger zone in between. This grey area between legal and illegal association activity is often vague and uncertain, and CMA's policy has always been to keep far away from the doubtful zones.

The Association's aim is not only to avoid actual violations of law—it wants to prevent even any appearance of violation which might invite suspicion or investigation on the part of the enforcement authorities. To protect itself and its members in this respect, CMA has adopted and observes several basic policies:

1. It has well-defined, constructive objectives and programs which are designed to promote the overall interest of the industry and the public.

2. Its organizational structure consists primarily of standing committees with specific and limited functional purposes; any activities concerned with pricing or marketing chemical products are scrupulously avoided, and limitations are also imposed on the subject matter and duration of *ad hoc* committees dealing with specific chemical products or product segments.

3. It maintains various procedural safeguards—particularly those set forth in the "General Principles Applicable to the Structure and Operations of Committees" which appears in the Association's annual Directory.

4. It retains counsel to help insure full observance of the above policies and procedures, and to provide guidance and protective advice as to all CMA's operations from an antitrust standpoint.

5. It has approved the issuance of this "Antitrust Guide" to help member company representatives on CMA committees avoid problems under the antitrust laws.

The Federal Antitrust Laws
Beginning in 1890, Congress has enacted a series of statutes which are known collectively as the federal antitrust laws. These laws are designed to promote and preserve our competitive private enterprise system by encouraging free and open competition in open markets. The federal antitrust laws give the force of law to the philosophy underlying our economic system, namely, that a free market in which supply and demand operate to determine the conditions and terms of production, distribution and sale, and where each seller and buyer deals independently, serves to achieve the most equitable allocation of high quality goods and services at the lowest possible prices.

The central core of federal antitrust legislation is formed by the Sherman Act (1890) and the Clayton and Federal Trade Commission Acts (1914). Most states have also enacted antitrust laws similar to the federal statutes but no attempt is made to discuss them in this brief manual. Similarly, there is no discussion herein of other areas of federal antitrust law (such as the Robinson-Patman Act and many parts of the Clayton Act) which may bear directly on the activities of individual companies but are usually not involved in association activities. The primary focus here is on horizontal conduct, *i.e.*, conduct involving relationships between competitors, rather than vertical relationships such as those between a company and its customers.

Section 1 of the Sherman Act prohibits "contracts," "combinations" or "conspiracies" in restraint of trade or commerce. These are terms of collective action or conduct by two or more persons, and they include agreements and understandings of all kinds—whether written or oral, formal on informal—which unduly restrain competition. Because of the collective nature of most trade associations activities, this section is the principal weapon used by the Department of Justice in antitrust suits against trade associations or their members. Such suits are usually based upon an alleged conspiracy or agreement among competitors to restrain trade. (The Federal Trade Commission also can, and does, challenge trade association activity which is alleged to lessen competition under Section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition.")

Although the language of the antitrust statutes is deliberately general in its coverage, prohibiting "[every] contract, combination or conspiracy in restraint of trade" and "unfair methods of competition," the courts have defined a number of specific activities as inherently unlawful, the so-called "*per se*" offenses (see "Prohibited Activities," *infra).* The legality of other activities is determined by the "rule of reason," *i.e.*, whether the activity is ancillary to the achievement of a legitimate business objective and is no more restrictive of competition than necessary to achieve that objective. Although this necessarily involves difficult questions of interpretation, even here useful guidelines for antitrust compliance have evolved from the courts' decisions. The importance of obtaining legal counsel in any area of uncertainty cannot be overemphasized, for the sanctions imposed for violations of the antitrust laws are severe.

Antitrust Enforcement
The Federal antitrust laws are enforced by the Department of Justice (Antitrust Division) and the Federal Trade Commission and frequently provide the basis for suits by private parties.

All of the following penalties can be imposed for violations of antitrust laws:

1. **Imprisonment.** Violations which are criminal offenses, including most prohibited collusive activities are felonies, and each individual participant is subject to a prison sentence of up to three years. Prison sentences are becoming increasingly common, particularly in price-fixing cases. Convicted felons may also be denied citizenship, the right to vote and other privileges and rights.

2. **Fines.** Fines of up to $1,000,000 for corporations and up to $100,000 for individuals may be imposed for each criminal offense. An individual may not be reimbursed by his corporation for fines paid by him and fines are not deductible for income tax purposes.

3. **Injunctive Court and Federal Trade Commission Orders.** Orders (injunctions) which prohibit future violations or activities can be imposed as a result of civil action brought by the Department of Justice, the Federal Trade Commission, or private parties, with far-reaching consequences. Such injunctions may contain sweeping prohibitions which go well beyond the scope of the violations charged and prohibit conduct which is not itself considered contrary to the antitrust laws. Such orders can seriously limit freedom of corporate or association action, require burdensome and time-consuming reporting obligations, cause day-to-day activities to be supervised by a court or

agency, and even require dissolution of a trade association. Violation of an injunctive order issued by a court can result in contempt proceedings with attendant fines, while failure to comply with an injunction ("cease and desist order") issued by the Federal Trade Commission carries penalties of up to $10,000 for each day the non-compliance continues.

4. **Treble Damages.** A sanction which has been applied with increasing frequency as private antitrust suits have rapidly increased in recent years is the "treble damage" provision of the antitrust laws which allow persons or businesses injured by an antitrust violation to recover three times the amount of actual damages sustained. Such cases have resulted in hundreds of millions of dollars of damages being paid to private litigants. Thus, an antitrust violation could impair the financial resources of any corporation and significantly weaken its competitive position.

Prohibited Activities

As noted above, many antitrust violations—and particularly those involving trade associations—result from concerted or collusive activity, that is, from an "agreement" between or among competitors which result in a restraint of trade. An illegal agreement may be proved in a number of ways. It need not be written, and seldom is. Rather, the term "agreement" in antitrust parlance may mean no more than knowing adherence to or participation in a common scheme. Explicit promises, commitments, or assurances are not necessary to establish a violation, nor must the parties actually carry out the agreement. (This definition of "agreement" is assumed throughout.)

Convictions for collusive activities can be based on a series of seemingly isolated facts which have been linked to present a chain of circumstantial evidence from which an agreement or conspiracy—a meeting of the minds—can be inferred; for example, identical price increases by competitors following shortly after a trade association meeting at which "business conditions" and the need of the industry for higher prices were discussed. For this reason it is important when participating in CMA committee work or other association activities, which involve contact with other members of the industry, to avoid doing or saying anything which might even give an appearance of agreement with others in areas which may involve a lessening of competition.

(a) **Agreements Involving Prices.** Pricing is the most sensitive subject under the antitrust laws. "Price" in this context includes all the elements of the terms of sale: sales prices, discounts, allowances, freight, credit terms, container deposits, and all other services or conditions integrally related to a sale. Any agreement between competitors which fixes, stabilizes, maintains, bolsters, depresses, or tampers in any way with price is unlawful "*per se,*" that is, the activity is indefensible and illegal without further analysis of its reasonableness, good intentions, arguable benefits to the public, or extenuating circumstances. In short, there is no defense.

"Price-fixing" encompasses not only agreements with competitors on a selling price. It may also include, for example, agreements to buy up surplus goods, to adhere to a formula for determining prices, to standardize discounts, to control raw material prices, and any other agreement which has the net result of affecting the price structure of a given product. Moreover, it is just as unlawful for competitors to agree on the prices at which they will offer to buy from their suppliers, as on those at which they sell. As previously noted an agreement can be shown in a number of ways. Thus, even the mere exchange of price lists between competitors on a regular basis may in some circumstances serve as evidence of an illegal price-fixing agreement.

The essential rule is that each seller must determine on its own the prices at which it purchases and sells. To avoid inferences of agreement or collusion—and there can be no exceptions—CMA members must not engage in any direct or indirect discussions with any competitors regarding prices, pricing policies, or any other marketing policy which may affect pricing. The following are a few examples of activities which have been found by the courts to constitute evidence of illegal pricefixing.

1. Some supermarket executives were held to have violated the Sherman Act on the basis of evidence which included a trade association meeting where one participant made remarks to the general effect that it was time to stop passing lower wholesale meat prices on to the consumers and keep some of it for themselves. After viewing this and other evidence in light of

the article pricing practices, the court upheld a jury verdict that the attendees at the trade association meeting had engaged in an illegal conspiracy to keep wholesale prices low and retail prices high. (The jury awarded plaintiffs a verdict for over 32 million dollars, plus the plaintiffs' attorneys' fees.)

2. In another case, the sales manager of the leading company in a market invited the sales managers of the other major companies in the market to a meeting at which he described a proposal for reclassifying distributors and changing discount schedules. No one present openly agreed to reclassify his distributors and change his discount schedules. Subsequent to the meeting, however, the leading company instituted the changes proposed at the meeting and the other companies, one by one, adopted the same distributor classifications and discount schedules. All of the companies and their sales managers were convicted of engaging in an unlawful conspiracy. The fact that all of the individual defendants were at the meeting, heard the discussion, and subsequently reclassified their distributors and changed their discount schedules, supported a jury finding that they had unlawfully conspired to fix prices.

3. Sales officials of corrugated cardboard box manufacturers in the Southeast followed a practice of occasionally calling each other to determine quotes given on specific and current sales to identified customers. The Supreme Court held the practice illegal because it had the effect of stabilizing prices (*i.e.*, it tended to limit price reductions and the range of price changes). The decision was reached in spite of an express finding that the calls did not result in an actual agreement on prices. Rather, each defendant, on receiving a request for pricing information, usually furnished the data with the expectation that reciprocal information would be furnished to him. This simple exchange of information was held to establish an unlawful combination or conspiracy under the Sherman Act.

(b) **Agreements to Control Production or Sales.** Competitors may not agree to limit or control production or sales. Any limitations on output by direct or indirect agreement are illegal *per se* and cannot be justified, even where the purpose is to preserve the industry or conserve natural resources.

(c) **Division of Territories and Allocation of Customers.** Any agreement between competitors to divide or allocate either sales territories or customers is unlawful *per se*. Exchanges of information with competitors relating to customers or territories can create the appearance of such collusion or agreement and must be strictly avoided.

(d) **Refusals to Deal.** Any agreement among competitors which results in a refusal to deal with suppliers or other competitors—for example, a blacklist or boycott—is illegal *per se*. For this reason exchanges of information (e.g., credit information) concerning particular customers which might lead td parallel decision not to deal should be avoided.

Application of Antitrust Laws to Trade Association Activities

The valuable and proper activities of CMA and its committees can be accomplished effectively if participating members are alert to the prohibited types of behavior described above and react quickly when danger signals appear.

Obviously, CMA activities should be conducted in such a way as to avoid any possible inference of agreement among its members with respect to prices, controlling production or sales, division of territories, or refusals to deal in any form whatsoever. Further guidelines are given here to highlight potential danger zones to be avoided. When a danger zone appears, counsel should be consulted for specific guidance.

In reviewing the following guidelines there are a few general points you should bear in mind:

1. As indicated above, an otherwise lawful act may become unlawful if done for an improper purpose, or if it is part of a larger unlawful scheme. For example, a product standardization program might be justifiable considered by itself, but not if it is combined with other activities to facilitate the fixing of uniform prices. In other words, the courts may look at the cumulative effect of several activities—not at each one separately.

2. Good motives are not an excuse for doing things that are otherwise unlawful, either because they fall within one of the "*per se*"

categories discussed previously or because they are more restrictive of competition than necessary to accomplish their legitimate objectives. Thus, even though a product standardization program may be intended to increase competition by providing consumers with important information, it may nevertheless be found unlawful if conducted in a manner more restrictive than necessary to achieve its legitimate purpose.

3. An ostensibly lawful program or activity runs a greater risk of getting into vulnerable areas if conducted by a group of competitors making the same product. That is the main reason why CMA operates primarily through functional committees, and imposes limitations on the subject matter and duration of any ad hoc committees dealing with matters concerning a specific chemical product or product segment.

4. As a member of a CMA committee, you *and your company can be held responsible for* any improper acts that may occur which you know about (or should know about), and if you fail to protest or disassociate yourself from them.

Participation in CMA Committee Meetings

All meetings of CMA committees must be conducted in strict compliance with the procedures set out in the "General Principles Applicable to the Structure and Operations of Committees."* These General Principles provide for agendas, attendance of staff representatives, and for the keeping of accurate and complete minutes—all of which are designed to avoid antitrust risks.

If you participate in a CMA task group meeting held without a staff member being present (pursuant to the special circumstances set for in subparagraph 4(g) of the General Principles), be sure that the meeting complies with the requirements of that subparagraph 4(g), including an "accurate and complete written report . . . as to everything occurring at such meeting."

Note: The attitude of enforcement personnel will be governed by what committee or task group members actually do, not by what is said in reports or minutes that may be incomplete or inaccurate.

*As approved by the Board of Directors on March 12, 1963, and amended by the Executive Committee on March 19, 1971; July 11, 1978, and June 3, 1981.

CMA committee members participating in activities involving advocacy before governmental entities should be familiar with and carefully observe the guidelines set out in the memorandum, "General Principles and Guidelines for MCA Advocacy," dated May 14, 1975. In general, advocacy should *be conducted in lawful ways and directed* solely at efforts to influence that policy. It should not be used as a sham or as a means to affect competition directly and independently of what would be the effect of the government policy which is sought to be influenced.

While committee agendas will have been cleared in advance with CMA counsel, it is the obligation of all committee members to make sure that their own participation in committee meetings will not give rise to even an inference of antitrust wrongdoing. Thus, even when carrying out approved and legitimate activities members must be careful to avoid *discussions or exchanges of information with their* competitors on any subject relating to the "*per se*" restraints listed above since such discussions or information exchanges may give rise to inferences of agreement. As examples, you should avoid any discussion with competitors of the following:

(a) Individual company prices, price changes, price differentials, mark-ups, discounts, allowances, credit terms, etc.
(b) Individual company figures on costs, production, capacity, inventories, sales, etc.
(c) Industry pricing policies, price levels, *price changes, differentials*, etc.
(d) Changes in industry production, capacity, or inventories.
(e) Transportation rates or rate policies for individual shipments or particular products, including basing point systems, zone prices, freight equalization, etc.

Note: This was an alleged factor in the 1962 FTC charges against MCA (now CMA) in the TSP (trisodium phosphate) case. MCA denied the charges, but joined the producers in signing a consent order prohibiting the practices charged. Standardization of TSP containers was another principal factor in the TSP case; these charges pertained to an activity in 1939-40 which has long since been abandoned. MCA denied that this activity was illegal, but joined the respondent TSP producers in signing a consent order prohibiting the various practices charged, in order to avoid costly and time-consuming litigation.

(f) Bids on contracts for particular products; procedures for responding to bid invitations.
(g) Plans of individual companies concerning the design, production, distribution or marketing of particular products, including proposed territories or customers.
(h) Matters relating to individual suppliers or customers that might have the effect of excluding them from any market.
(i) Any matter relating to TSP as a specific product.

Regardless of subject matter, you should not attend or tolerate any meeting with your competitors in connection with CMA business which has no agenda, or which is concerned with matters outside your committee's terms of reference, or which otherwise fails to conform with the procedures in the General Principles.

Informal Gatherings
It is important to avoid discussions of the above subjects, not only at formal CMA or committee meetings, but also in connection with social or other gatherings on those occasions. If any improper discussion should start in your presence, you should protest; if the discussion continues, you should promptly excuse yourself from the group and communicate your protest to the appropriate CMA staff member. Even if you do not take part in any improper discussion, your presence without participation could still get you and your company into trouble. Any individuals who participate in such improper discussions, whether deliberately or innocently, are doing their companies, and CMA, a real disservice, and subjecting themselves to possible liability. In case of doubt as to whether a particular subject may properly be discussed with your competitors, you should consult your own company counsel.

Documents
Care must be taken to avoid wording any written documents including reports or notes from committee meetings in a way that might be interpreted as indicating, contrary to fact, the existence of an antitrust violation. Every memorandum, letter, or other document dealing with prices, competition, or the other danger areas specified in this guide should be written with the assumption that it will one day be examined for antitrust implications. An antitrust case may be based on documents which are in reality innocent or innocuous but have been written in such a way as to create suspicion and require explanation. Such documents may include personal notes based on recollection, or taken at committee or other meetings, which record personal impressions rather than the facts of what transpired.

Conclusion
It is hoped that this guide will help you to understand how the antitrust laws bear upon trade association activities, and to carry out your CMA work in full compliance with these laws and with CMA policies. Again, please remember that this is a limited outline and is not intended to be a complete description of the application of the antitrust laws—for answers to specific problems, you should consult CMA counsel and your own company counsel.

CMA

CMA AND ADVOCACY*

Advocacy means pleading or defending a cause, hence advocacy is implicit in CMA's representation of the chemical manufacturing industry, and should be conducted forthrightly and forcefully, concentrating on matters which affect a number of its members or which broadly concern the chemical manufacturing industry even though not immediately affecting many members.

To be beneficial, advocacy must be persuasive. Solid evidence and reasoned interpretation coupled with effective presentation are needed.

Enlightened and progressive advocacy is directed to the common good rather than being merely self-serving. Bearing in mind the pervasive significance of chemicals, it is vital that CMA advocacy so qualify.

Advocacy on behalf of a collective industrial group must heed antitrust limitations. For this reason and because of the fact that certain chemicals compete with others in the marketplace for similar purposes, CMA normally limits its advocacy to matters having general applicability, as contrasted with those involving particular chemical substances or companies. If an important precedent-setting principle is involved, however, CMA may elect to advocate regarding the principle alone.

The foregoing precepts underlie CMA's advocacy role. Each member company should recognize this in no way diminishes its responsibility to protect its own interests, nor is intended to restrict independence in so doing. Each member company is encouraged to express its individuals views.

*As approved by the Executive Committee on July 11, 1978.