GROUP ANNUITY/PENSION COMPLIANCE ASSOCIATION

ANTITRUST GUIDELINES

The antitrust and trade regulation laws promote and safeguard the free enterprise system by assuring that there is vigorous competition in all markets and at all levels of trade. Any activity which reduces or eliminates competition is subject to antitrust scrutiny.

The principal federal antitrust laws are the Sherman Act, the Clayton Act and the Federal Trade Commission Act. In addition, many states have enacted state antitrust and trade regulation laws which closely parallel their federal counterparts.

While the McCarran-Ferguson Act is often thought to shield the insurance industry from all antitrust scrutiny, it is in fact far less inclusive. Group boycotts are fully actionable under federal antitrust laws. Similarly, activities which do not qualify as the "business of insurance" - a term narrowly defined by the Supreme Court to include only those activities which (i) are directly connected with the insurer/insured's contractual relationship, (ii) involve the spreading and underwriting of policyholder risk, and (iii) are engaged in exclusively by insurers - may be reached by the federal antitrust laws. Finally, the McCarran-Ferguson Act does not in any way impact the panoply of state antitrust and trade regulation laws which remain fully applicable to insurers. California, for example, has comprehensive antitrust guidelines specially designed for the insurance industry.

The federal antitrust laws are particularly pernicious because of the potentially significant criminal and civil liability involved. As a result of the Antitrust Amendments Act of 1990, companies engaged in price-fixing, allocation of markets or group boycotts may now be fined up to $10,000,000. Individuals may now be fined up to $350,000 and imprisoned for up to three years. As for potential civil liability, the vast majority of antitrust suits are not brought by federal or state governments but by competitors, customers and suppliers harmed by the unlawful activity, who are in fact, encouraged to bring suit by the prospect of treble damages and recovery of all attorneys' fees and other costs.

The following basic guidelines are for your general guidance. While they will help participants avoid some of the more obvious antitrust pitfalls, they are not an exhaustive compilation of state and federal antitrust laws. Should there be any question as to the propriety of a particular agenda item, antitrust counsel should be consulted. In addition, for the protection of all attendees, it is strongly suggested that a written agenda and discussion questions be reviewed for antitrust concerns prior to distribution to attendees before each meeting and that these be strictly adhered to during the meeting.

Price Fixing: No participant may engage in any discussion or other activity which has the purpose or effect of soliciting an agreement or common understanding with regard to prices or terms offered or to be offered to any policyholder, contract-holder or other customer. While standardization of policies and contracts is not itself illegal, it may pose antitrust problems if it is used to restrain price competition or inhibit product innovation.

Market Allocation: No participant may engage in any discussion or other activity which has the purpose or effect of soliciting an agreement or common understanding with any other participant regarding the allocation or division of territories, markets, policyholders, contract-holders or other customers.

Group Boycotts: No participant may engage in any discussion or other activity which has the purpose or effect of soliciting an agreement or common understanding with any other participant regarding a boycott or concerted refusal to deal with a third party. For purposes of the foregoing, a conditional boycott - that being an agreement regarding the terms or conditions under which two or more companies will do business with a third party - should be treated as an unlawful boycott.

Disparagement of a Competitor: No participant may make any statement regarding any competitor which he or she does not know to be true.

In addition to the basic guidelines, the following should prove helpful at meetings:

- It is proper for members to express their views on positions taken by Insurance Departments, and to note the impact on their own companies' practices.
- Questions or statements which are argumentative and present only one side of a problem should be avoided. It is preferable to phrase the question in such a way as to solicit an analysis of a problem, as an aid in finding a solution.
- It is not improper to solicit information concerning a type of practice in use in one or more companies, when there is no suggestion that one practice or another is desirable.
- Analysis of past trends may properly be sought but suggestions as to present or continuing future trends should be avoided, since the latter is more susceptible of the claim of inducement to follow the reported trend.
- Avoid questions which suggest the general adoption of a restriction in coverage, such as whether or not it is feasible to exclude a specific item under a given coverage. However, it is not improper to inquire as to the factors which have led to past restrictions.
- Questions pertaining to "how many companies" do certain things are not necessarily improper, but they should not be phrased so that they merely involve a nose count. ("Polling can be dangerous in the areas of competitive endeavour.")
- Questions pertaining to any aspect of the calculation or payment of premiums or commissions must be avoided.
- Remember that the company is not a member. Only the individual is a member.
- Examples of how questions should be phrased (keeping in mind that the individual is the member, not the company):
    - How are members interpreting regulation xyz with respect to……..?

- Has any member had experience with filing requirements for ……?
- What have members' experiences been with ……?
- Does any member have any suggestion on how to file… ?
- With the DOL new proposed regulation on XYZ, have members interpreted this to mean…..?
- Are members aware of which states require notices for ……?

Adoption: These Guidelines were approved by the Executive Committee of GAPCA on July 1, 2012. They replace the original Guidelines adopted in October, 1992 and subsequently amended in June, 1999 and February, 2012.