

## **CN ADVISORY BOARD – GREAT LAKES REGION**

**January 1, 2013**

### **Confidentiality and Fiduciary Duty.**

Accomplishing the mission, objectives and goals of the Advisory Board necessarily involves CN's sharing confidential proprietary information with Board members but also timely public communication of information concerning the Board's activities. By agreeing to serve, members of the Advisory Board undertake a duty as fiduciaries and otherwise agree to observe legal and customary standards to protect the proprietary and commercial confidentiality of information provided to facilitate the function and activities of the Advisory Board and to refrain from disclosure of the deliberations and proceedings of the Board except as authorized by the Board or as may be made publicly available.

The Advisory Board and CN shall endeavor to identify or mark the level of confidentiality to be accorded communications, reports and other forms of information coming before the Board, confidentiality of which is particularly critical, permanent or time sensitive as to its release.

### **Antitrust Compliance Guidelines Summary.**

A detailed set of “Antitrust Compliance Guidelines” for Advisory Board activities is provided on the following pages.

The Guidelines are based on pro-active, defensive antitrust practices, designed to: (a) provide guidance on avoiding any perception of anti-competitive behavior; and (b) emphasize the pro-competitive effects and impacts of the Advisory Board's objectives and goals. The Guidelines:

- Prohibit communication of “Sensitive Competitive Information” in ways that may have anti-competitive impacts;
- Provide a means for communication of information, including some types of “Sensitive Competitive Information” to advance objectives that are pro-competitive in their effect; and
- Provide mechanisms to assure transparency and accountability.

The Antitrust Compliance Guidelines apply to and are invoked for all meetings, including conference calls, in which members engage and to all communications between and among the Advisory Board and its members, but excluding communications between CN and a single or individual Advisory Board member. The nature of the Advisory Board's objectives and goals is likely such that the organization will align with the antitrust safe harbor extended to traditional shipper associations.

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**Antitrust Compliance Guidelines<sup>1</sup>**

**Preface.**

1. The concepts set out in these Guidelines are generally stricter than required by law, recognizing that antitrust investigations and lawsuits, even if completely without merit, are often generated from mere appearances of impropriety, and are extraordinarily expensive, time-consuming, and disruptive.
2. These Guidelines are necessarily general in nature. Consultation with an experienced antitrust counsel is recommended when analyzing specific issues and circumstances.

**Sensitive Competitive Information.**

3. “Sensitive Competitive Information” includes, but is not necessarily limited to, information and data related to the following topics:
  - Prices;
  - Bids (or intent to bid);
  - Discounts;
  - Rebates;
  - Profit margins;
  - Credit standards;
  - Inventory levels;
  - Selection or classification of customers/suppliers;
  - Terms of sale/purchase;
  - Pricing plans;
  - Markets, market and sourcing strategies or plans;
  - Expansion and contraction plans;
  - Facility closures, downtime or turnaround plans;
  - Changes in operating/consumption rates; and
  - Costs.

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<sup>1</sup> These Guidelines draw upon and parallel “Antitrust Compliance Guidelines for the Forest and Paper Industry” approved, AF&PA Board of Directors, October 30, 2004, as well as earlier guidelines used for groups in transportation which were historically subject to close antitrust scrutiny.

### **Who Are One's “Competitors”?**

4. One's competitors include persons and entities that purchase materials or services from the same or some of the same vendors or sell products or services to the same or some of the same customers. Although some or all members of the Advisory Board are not competitors in markets for their products, all are deemed to be competitors for the purpose of applying these Guidelines. For the purposes of these Guidelines, individual members of the Advisory Board are not deemed to be competitors of CN.
5. Sensitive Competitive Information relates to any person or entity who is a competitor.

### **What Is A “Communication”?**

6. A “communication” may be verbal, written, electronic, physical gesture or by any means that conveys information, data, thought, concept or anything of value.

### **Communications Between And Among Advisory Board Members.**

7. Communications on Sensitive Competitive Information between or among Advisory Board members in any formal or informal meeting and in any forum or in conjunction with any activity in which Advisory Board is involved, are prohibited. This prohibition does not apply to communications between an individual member and Canadian National. “Member” includes those providing support and assistance to the Advisory Board.
8. Advisory Board members shall be deemed to be competitors, except only upon a written finding by Advisory Board counsel, specific to the subject matter of the communication, that such members are not competitors. This presumption does not apply to communications between an individual member of the Advisory Board and Canadian National.
9. Communications related to purchase-sale or trade transactions between members of the Advisory Board, other than between an individual member and the Canadian National, who are competitors, may only occur in the context of a legitimate, good faith interest in buying or selling or trading. This does not mean that every such communication must result in a purchase-sale. For example, company X may call supplier Y to explore a purchase, but learns

that there is no product available or the price is not acceptable. However, the context must be that company X had a genuine, legitimate interest in buying. Assuming that the legitimate, good faith interest condition is met, the communication should be strictly limited to matters directly necessary to complete the transaction.

**Communications Which Include  
Sensitive Competitive Information.**

10. The goal of the CN Advisory Board – building CN's share of the market for freight originating and/or terminating in the regions served by CN/WC lines – will necessarily include exchange of communications including data and various types of Sensitive Competitive Information. Members of the Advisory Board shall observe appropriate standards of confidentiality governing CN proprietary information as well as standards and protocol which assure compliance with these Guidelines.
11. Statistical and other informational reports which include Sensitive Competitive Information may provide substantial benefits to Advisory Board by providing accurate and timely information that may be highly useful for sound business planning. At the same time, under some circumstances, communication of such information can give rise to antitrust concerns. Accordingly, these Guidelines are designed to ensure that availability of such reports to the Advisory Board does not give rise to antitrust issues or risks.
12. The Advisory Board shall adopt standards and protocols, as necessary, to secure and maintain the confidentiality of data and information classified as Sensitive Competitive Information included in such communications. Availability of such information shall be limited to that which is reasonably necessary to plan, carry-out the Advisory Board's functions.
13. No statistical or other reporting shall compromise confidentiality of Sensitive Competitive Information communicated to CN by individual shippers or customers..
14. In general, no antitrust concerns are presented by statistical reports wherein: (a) the data is at least three months old, (b) the data is aggregated from at least five reporting participants, and (c) no participant accounts for more than twenty-five percent of the aggregate data in any category. Statistical and other reports (or portions of reports) that meet these criteria need not be subjected to individual detailed review by antitrust legal counsel. Statistical and

- other reports that do not satisfy these criteria shall be subject to individual review in the same manner as communications including data or information classified as Sensitive Competitive Information. Where only some data categories in a report meet these requirements, the compliant data categories may be cleared without review, but non-compliant categories must receive legal review. Any report that provides data on a participant-specific basis is inherently more likely to raise antitrust concerns and, therefore, must be carefully reviewed by counsel.
15. Statistical reports that provide information that is otherwise publicly available before the time of publication raise no antitrust concerns.
  16. In general, statistical reports that provide aggregated data concerning participants' use of goods or services are safe from an antitrust standpoint if the reporting participants: (a) account for less than thirty-five percent of overall purchases of each product or service, and (b) the products or services with respect to which such reports are provided collectively account for less than twenty percent of the reporting participants' cost of any product that they produce.
  17. Statistical reports concerning particular import or export products do not raise concerns if they account for less than twenty-five percent of U.S. Sales.

**Advisory Board Agendas, Minutes, Record Retention.**

18. Meetings (including conference calls and electronic forums) of the members of the Advisory Board and its sub-committees shall be held pursuant to written agendas. Any additional topics for discussion or action shall be added to the written agenda. Minutes shall summarize discussion and report actions taken on each agenda item. Minutes and agenda of such meetings shall be retained in a systematic manner, including provision for retrieval, and shall be subject to destruction only in a manner consistent with protocols approved by Advisory Board's legal counsel and upon notice to its members.

**Advisory Board Antitrust Compliance Training And Monitoring.**

19. The Advisory Board shall provide a copy of these Guidelines, any updates and modifications of these Guidelines, and its report on the annual review of these Guidelines, to all members and each

member's representative who participates in meetings with other Advisory Board or engages in communications with Advisory Board members which involve Sensitive Competitive Information.

20. The Advisory Board shall provide for invocation of these Guidelines at the outset of each meeting and conference call in which more than one participant participates.

**Duty To Report/Withdraw.**

21. If any Sensitive Competitive Information offered in discussion, except as authorized by these Guidelines, the Advisory Board and each member representative shall raise objection. If the person or persons involved fail to desist immediately or the behavior is repeated, the Advisory Board and each member representative shall withdraw from the meeting, and the Advisory Board shall report details of the incident to the Advisory Board's antitrust counsel. Unless counsel is satisfied that adequate corrective action has been taken and is documented in an incident report, or if the behavior is repeated, the Advisory Board's counsel shall report the incident to legal counsel for the member or members represented by the person or persons involved in the incident.

**Relationship to *Noerr-Pennington* Antitrust Immunity.**

22. Some activities in which Advisory Board may engage in to achieve its objectives and goals, either directly or in alliance with other stakeholders, may involve petitioning or otherwise seeking action by governmental bodies, whether legislative, executive, administrative, or judicial.
23. Through the *Noerr-Pennington* antitrust immunity doctrine, the United States Supreme Court has recognized an antitrust exemption for such joint efforts to influence government, provided such efforts do not constitute a sham to cover an attempt to interfere directly with the business relationships of a competitor.
24. The Advisory Board will not, and will counsel its participants not to, rely upon *Noerr-Pennington* immunity, in place of these Guidelines, except upon a satisfactory opinion of antitrust counsel which addresses the specific facts and circumstances of the joint effort to be undertaken and sets forth antitrust guidelines to govern the specific undertaking.