

# **WISCONSIN CENTRAL GROUP**

**June 8, 2010<sup>1</sup>**

## **Preliminary Antitrust Compliance Guidelines<sup>2</sup>**

### **Preface.**

1. The concepts set out in these Guidelines are generally stricter than what is required by law, in recognition of the fact 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. Since 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:<sup>3</sup>
  - 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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1 This draft is intended to guide organizational activity and to illustrate the type of antitrust guidelines that will be put in place to guide ongoing Group activity. A refined set of Guidelines will be provided upon completion of the organization process. The term “member” is used for convenience and is considered synonymous with “participant.” Ultimately we will use a term appropriate to the type of organization structure which the Group chooses.

2 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.

3 This list will be tailored specifically to the Wisconsin Central Group.

### **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 many Wisconsin Central Group participants are not competitors in markets for their products, all are deemed to be competitors for the purpose of applying these Antitrust Compliance Guidelines.
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 WC Group Members.**

7. Communications on Sensitive Competitive Information between or among Wisconsin Central Group members, in any formal or informal meeting and in any forum or in conjunction with any activity in which Wisconsin Central Group is involved, are prohibited.
8. Wisconsin Central Group members shall be deemed to be competitors, except only upon a written finding by Wisconsin Central Group counsel, specific to the subject matter of the communication, that such members are not competitors.
9. Communications related to purchase-sale transactions between members who are competitors and which involve services of Wisconsin Central Group may only occur in the context of a legitimate, good faith interest in buying or selling. 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.

10. Communications related to product or trades between members who are competitors are outside of the scope of activity of Wisconsin Central Group, as an *ad hoc* stakeholder coalition and, accordingly, are prohibited and excluded from Wisconsin Central Group activity. No communications of specific “competitive intelligence” such as, but not limited to, general market trends, supply or demand, pricing, or other Sensitive Competitive Information, shall occur.

**Communications Between Individual Members and WC Group.**

11. To promote competition and reduce cost, consumption and emissions associated with energy in the supply chain through the application of logistics and technology management solutions to advance the capabilities for effectively managing the energy lifecycle in supply chain transportation, it may become necessary for individual members and Wisconsin Central Group, on a regular and continuing basis, to exchange communications including data and various types of information classified as Sensitive Competitive Information. Any such communications shall be subject to standards and protocol which assure compliance with these Guidelines.
12. Wisconsin Central Group 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 between individual members and Wisconsin Central Group. Records of such communications 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 Wisconsin Central Group's legal counsel and upon notice to the members.
13. Data and information classified as Sensitive Competitive Information included in such communications between individual members and Wisconsin Central Group shall be limited to that which is reasonably necessary to plan, carry-out, and account for Wisconsin Central Group's functions. Wisconsin Central Group shall provide for review of the templates and protocols which are to be used to communicate such data and information by its own antitrust counsel whose findings shall be summarized in a written report. On request, Wisconsin Central Group shall afford opportunity for such review by independent antitrust counsel of individual members. Wisconsin Central Group may request an

individual member to provide for a review of its own. All additions and changes to such templates and protocols shall similarly be reviewed in advance of implementation. All such templates and protocols shall be subject to similar antitrust review and written report, annually.

**Communications By WC Group To The Membership.**

14. Statistical and other informational reports provide substantial benefits to association members by providing accurate and timely information that may be highly useful for sound business planning. At the same time, under some circumstances, such reporting programs can give rise to antitrust concerns. Accordingly, these Guidelines are designed to ensure that Wisconsin Central Group's statistical and other reporting does not give rise to antitrust issues or risks.
15. Statistical and other reports (or portions of reports) that meet the criteria set forth below need not be subjected to individual detailed review by antitrust legal counsel. Statistical and other reports that do not satisfy these Guidelines shall be subject to individual review in the same manner as communications including data or information classified as Sensitive Competitive Information.
16. No statistical or other reporting shall compromise the confidentiality of data or information communicated to Wisconsin Central Group by individual members and classified as Sensitive Competitive Information.
17. 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 members, and (c) no member accounts for more than twenty-five percent of the aggregate data in any category. 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 member-specific basis is inherently more likely to raise antitrust concerns and, therefore, must be carefully reviewed by counsel.<sup>4</sup>

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<sup>4</sup> Were such activity undertaken by the Group, it may be necessary to profile the active membership to determine whether or not this set of criteria is adequate and appropriate for Wisconsin Central Group.

18. Statistical reports that provide information that is otherwise publicly available before the time of publication raise no antitrust concerns.
19. Statistical reports that provide data regarding consumption or demand at the customer level (as opposed to reporting member consumption of, or demand for, certain goods or services) generally raise no antitrust concerns. However, all reports related to member consumption of, or demand for, specific goods and services are subject to review by counsel unless these Guidelines are satisfied. There shall be no reports of individual member consumption of, or demand for, specific goods and services, except upon specific review and approval by antitrust counsel.
20. Statistical reports that provide aggregated data concerning members' use of goods or services are safe from an antitrust standpoint if the reporting members: (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 members' cost of any product that they produce.
21. Statistical reports that provide data concerning imports or exports of particular products would raise no concerns to the extent that imports or exports account for less than twenty-five percent of U.S. sales.
22. Communications by individual members to Wisconsin Central Group's membership shall generally follow the same Guidelines governing communications by Wisconsin Central Group to the membership. Advance review by Wisconsin Central Group for antitrust compliance of such communications, if any, shall be encouraged.

**Wisconsin Central Group Agendas, Minutes, Record Retention.**

23. Meetings (including conference calls and electronic forums) of the membership or committees which include more than one member, shall be held pursuant to written agenda. 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 Wisconsin Central Group's legal counsel and upon notice to the members.

24. Any listserve or similar communications exchange hosted by Wisconsin Central Group shall be assigned a moderator and shall be monitored for compliance with these Guidelines.

#### **WC Group Antitrust Compliance Training And Monitoring.**

25. Wisconsin Central Group 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 representative who participates in meetings with other Wisconsin Central Group members or engages in communications with Wisconsin Central Group which involve Sensitive Competitive Information.
26. Wisconsin Central Group shall provide for invocation of these Guidelines at the outset of each meeting in which more than one member participates.

#### **Duty To Report/Withdraw.**

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

#### **Non-Member Access To WC Group Membership And Services.**

28. [Here specify the mechanism and/or terms and conditions on which non-members may become members or otherwise participate in Wisconsin Central Group activities.]

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

29. Many activities in which Wisconsin Central Group 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.
30. 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.
31. Wisconsin Central Group will not, and will counsel its members 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. Wisconsin Central Group does not engage in lobbying activities.