

Antitrust Guidelines for the Working Group on U.S. RMB Trading and Clearing

I. Introduction

The U.S. Congress, the states, and many governments outside the United States have enacted antitrust laws (also called competition laws) to protect consumers and the competitive process by prohibiting agreements that unreasonably reduce competition and conduct by firms with high market shares that foreclose competition without justification. Antitrust law recognizes that cooperation among industry participants and competitors is often useful or even necessary to facilitate the introduction of new or improved products and services. However, because such cooperative efforts involve competitors, they are subject to antitrust scrutiny to ensure that communications and agreements among participants further competition and benefit consumers, rather than reduce competition that would have occurred absent the collaboration. Care must be taken when participants in these collaborative efforts communicate — whether at formal or informal meetings, conference calls, or electronically — to ensure that no conduct becomes or appears anticompetitive.

Enforcement of the antitrust laws can come from federal enforcers (the U.S. Department of Justice and Federal Trade Commission), state authorities, foreign competition authorities, and private individuals or entities. The Department of Justice and some foreign competition authorities prosecute certain types of antitrust violations as criminal offenses, with corporations subject to heavy fines and individuals subject to both imprisonment and fines. U.S. government antitrust enforcers and private parties may bring civil suits and recover three times (treble) their actual damages, court costs and (in private suits) reasonable attorneys' fees, and foreign enforcers can impose significant fines even for non-criminal antitrust violations.

The Working Group on U.S. RMB Trading and Clearing (“Working Group”) is a private-sector group formed to identify, evaluate, and recommend opportunities to develop and expand the trading, clearing and settlement of the Chinese renminbi (RMB) in the United States.

All participants in activities of the Working Group should review these Guidelines carefully. The Working Group is committed to strict compliance with antitrust laws. If you have any questions about these Guidelines, please contact Jonathan Gleklen at 202-942-5454 or Jonathan.Gleklen@aporter.com.

II. Activity Between Competitors and the Antitrust Laws

Federal, state, and foreign competition laws prohibit agreements that unreasonably restrain competition. An agreement includes any understanding or arrangement, whether written or oral, formal or informal, express or implied. Moreover, any attempt to reach such an agreement may be unlawful, even if it is unsuccessful.

Courts in the United States have divided agreements into two categories. Agreements that courts always find illegal, regardless of any purported beneficial effects on the market or competition, are *per se* illegal. All other agreements are analyzed using the “rule of reason,” under which a court will consider both agreement’s procompetitive and anticompetitive effects on the market and competition. This analysis usually includes a consideration of whether the procompetitive goals of the agreement could reasonably have been achieved through less restrictive means.

a. Impermissible Conduct

As noted, some agreements are condemned as *per se* illegal without further analysis. Many agreements subject to *per se* condemnation are also subject to criminal prosecution. Working Group members should never engage in the following conduct or activities.

- **Price Fixing Agreements:** Members should never agree to fix prices, fees, commissions, or any other element of the price or terms of a transaction. A price fixing agreement is illegal, whether it is meant to raise, lower or stabilize prices.
- **Bid Rigging:** Members should never agree on prices or terms to be paid for a product or service, or engage in collusive bidding practices, including agreeing to refrain from bidding for a product or service.
- **Allocation of Customers or Territories:** Members should never agree to allocate customers or products among themselves. Discussions concerning plans to expand into or withdraw from certain geographic or product markets should be avoided.
- **Agreements to Control Production:** Agreements to increase or restrict services or production levels are illegal and members should avoid such agreements. This includes agreements to refrain from introducing new products or services or eliminating old products or services.

b. Conduct That May or May Not Be Permissible

The following activities may or may not be permissible, depending on the circumstances. A court analyzing the conduct will apply the “rule of reason” and conduct a fact-intensive inquiry into whether the anticompetitive effects outweigh the pro-competitive justification for the conduct. While antitrust law recognizes that these activities have benefits in many situations, care should be taken to ensure that otherwise permissible activities do not mask or promote actions that are or could be interpreted as anticompetitive.

- **Information Sharing:** Members may discuss common problems and challenges of a general, administrative, or logistical nature. However, disclosure of competitively sensitive information such as prices (including fees, commissions, or other elements of price), other terms of agreements with customers, costs, or business plans can raise antitrust concerns and will be found unlawful where the information exchange has the purpose or effect of raising prices or otherwise harming competition. Accordingly, members shall not exchange competitively sensitive non-public information with other members without the express approval of counsel.
- **Group Boycotts:** Group boycotts involve agreements not to deal with a particular individual, firm, or group of firms or treating a particular individual, firm, or group of firms differently than others. Boycotts intended to punish a firm for doing business with the boycotter’s competitors can be condemned as illegal *per se*, while other agreements not to do business with a firm are analyzed under the rule of reason, and will be unlawful where the effect of the boycott is to reduce competition without offsetting competitive benefits. Members shall not enter into, or create the appearance of entering into, any such agreements through participation in the Working Group.
- **Standard Setting:** The creation of standards that have the effect of preventing certain entities (or groups of entities) from competing in the market or that raise significant barriers to entry presents antitrust risks. Standards must be justified by legitimate business reasons, such as improving market efficiency, stability or integrity. Market participants’ adherence to the standards must be voluntary.
- **Best Practices Recommendations:** Recommending best practices is an objective of the Working Group. Best practices recommendations should not relate to areas of competition between Working Group participants such as fees or customer terms and conditions. Rather, recommended best practices should seek to enhance the efficiency, stability and integrity of the market and should discourage practices that have a detrimental effect on customers. Members shall independently determine

whether and how to implement any best practices recommendations developed by the Working Group.

- **Exclusive Dealing:** Exclusive dealing arrangements that require a customer to deal only with a particular supplier or that prohibit suppliers from dealing with competitors of the customer can raise antitrust concerns where the agreement eliminates competition that would have occurred absent the agreement and participants in the agreement have a significant market share. Members shall not enter into, or create the appearance of entering into, any such agreements through participation in the Working Group.

III. Legislative Activities

The Working Group may from time to time present its views regarding governmental and regulatory matters. U.S. courts have recognized that the antitrust laws were not intended to restrict First Amendment rights to petition the government, including collective efforts by industry participants to obtain legislative or executive action that may affect competitive conditions. However, antitrust liability has been imposed in circumstances where communications among industry participants in the context of planning to seek government action had the effect of reducing competition among participants independent of the effect of any government action sought. Accordingly, the rules applicable to information exchange apply even in the context of legislative activities.

IV. Procedures to Ensure Compliance

The purpose of the Working Group is to benefit customers and the competitive process by facilitating the introduction of new products and services. This is a goal that the antitrust laws encourage.

To maximize compliance with the letter and the spirit of the antitrust laws and promote transparency, consistency, and fairness in proceedings, the Working Group has created the following procedures:

- The Vice-Chair, in consultation with legal counsel, will set an agenda for each meeting, which the Secretariat will circulate in advance of each meeting.
- The Secretariat will attend each meeting, take meeting minutes, distribute draft minutes to meeting participants for comment, and retain a filed copy. The minutes

shall, at a minimum, list all attendees and describe the topics discussed and resolutions or other decisions reached.

- Members may register objections to the draft minutes. The Working Group will adopt final minutes after addressing any objections that have been raised.
- An attorney designated by a member of the Working Group will be available to provide guidance on antitrust issues to the participants in any Working Group meeting, and the Secretariat shall determine in consultation with the Vice-Chair whether counsel will attend a Working Group meeting.

Members are expected to follow the Working Group's Antitrust Guidelines and help ensure that their deliberations do not violate the antitrust laws. The Antitrust Guidelines apply to all discussions related to the Working Group, whether during a meeting or in an "off the record" conversation. Members should police themselves, and are encouraged to report suspected violations of this policy to an attorney.