Enabling Marketing in Groundfish Sectors: A Manual for Navigating Antitrust Issues

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Introduction

This sector manual on antitrust issues is provided as an educational resource for participants in commercial fisheries regulated under Amendment 16 to the Northeast Multispecies Fisheries Management Plan. The Manual is written from a harvester's perspective and focuses on the exemption from federal antitrust law afforded "fishermen's associations" under the Fishermen's Collective Marketing Act. That exemption does not apply to activities of fish processors or buyers, but other principles of antitrust law discussed in this Manual may be of interest to them.

Regardless of the reader's background, this Manual is not intended to serve as legal advice. Independent legal counsel should be consulted for advice on how federal and state antitrust law may apply to the reader's particular circumstances. This Manual is not intended in any way to serve as a substitute for advice of independent counsel. That advice is especially critical in light of the grave potential consequences of antitrust violations, which include treble (triple) civil damages and even jail time.

This Manual is divided into three parts. Part One addresses federal antitrust law, and in particular the limited exemption from that law provided by the Fishermen's Collective Marketing Act. Part Two outlines state antitrust issues under the laws of Maine, Massachusetts, New Hampshire and Rhode Island. Part Three includes a questionnaire designed to elicit information relevant to compliance with the Fishermen's Collective Marketing Act. Following Part Three is a list of cases and other resources addressing issues under the Fishermen's Collective Marketing Act and the related Capper-Volstead Act, which applies to agricultural producers.

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Part One – Federal Law

I. Antitrust Law Generally.

The antitrust laws of the United States prohibit certain "anticompetitive" activities. One classic example is price fixing—when two or more businesses that would otherwise compete on price instead agree to sell their products for the same price. Another example is monopolization—when a business attempts to or actually does obtain a large enough percentage of a relevant market that it can control prices or exclude competition, resulting in higher prices to the consumer than would otherwise exist if the market were more competitive. Price fixing and monopolization tend to eliminate competition among producers to sell their goods at lower prices and are therefore "anticompetitive" activities. Federal law provides for both civil and criminal penalties for violation of antitrust laws.

II. Why Do Sectors Implicate Antitrust Issues?

Under Amendment 16 to the Northeast Multispecies Fishery Management Plan, multispecies fisheries permit holders may join together in "sectors." The National Marine Fisheries Service annually awards each sector an "Annual Catch Entitlement" or "ACE." An ACE is a dedicated percentage of the overall annual catch limit for certain species that is awarded to a sector based on its members' landings history. Subject to certain federal regulations, sector members decide among themselves on a plan to harvest the sector's ACE.

The sector system was designed to encourage cooperation among fishermen who would otherwise compete with each other in the "race for fish." Such cooperation may result in "pro-competitive" benefits to the consumer as more fish products make it to the market at lower cost. However, to the extent that some or all members of a sector enter into agreements that restrain or eliminate price or delivery market competition, such agreements may artificially increase the price of the products of the fishery. In that respect, cooperation among sector members may be viewed as anticompetitive and raise concerns under the antitrust laws.

III. The Fishermen's Collective Marketing Act Provides "Fishermen" with Limited Protection from Federal Antitrust Law.

In the 1930s, Congress enacted the Fishermen's Collective Marketing Act ("FCMA"), 15 U.S.C. §§ 521-522, in an effort to give harvesters more leverage in their negotiations with fish buyers and processors. Without an exemption from federal antitrust law, agreements among harvesters to sell fish only at or above a certain price

(price fixing) or to refuse to fish until processors or buyers raised their price offers (supply restriction) would be illegal.

The FCMA provides "associations" of "fishermen" with a limited exemption to the general prohibition on price fixing and other types of otherwise-anticompetitive conduct, such as withholding product from market. However, as explained below, the FCMA's exemption is only available if certain conditions are met and the FCMA only protects certain types of conduct.

IV. Text of the FCMA.

The FCMA, at 15 U.S.C. § 521, provides as follows:

> Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.
>
> The term 'aquatic products' includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.
>
> Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> and in any case to the following:

> Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

V. Requirements of the FCMA.

The FCMA exempts certain conduct of qualified fishermen's marketing associations from the application of federal antitrust laws. Whether the FCMA applies to a particular situation thus generally depends on the answers to two questions: 1) is the association properly qualified under the FCMA?, and 2) does the FCMA shield the conduct at issue from antitrust liability? Both of these questions are addressed below.

A. FCMA qualification.

(i) All members of an association must be "fishermen."

The general question is whether the member is a harvester of fish—the type of person the FCMA was designed to protect—or a buyer or processor of fish—people whose market power Congress intended to offset through enactment of the FCMA. There is no bright-line test of what or who is a "fisherman." Rather, three factors are to be considered:

- The character of the member's activities;
- The member's degree of "vertical integration" (for example, besides harvesting fish, does the member also process, market or sell fish at retail or partner or contract with someone who does?); and
- The functions historically performed by "fishermen" in the area.

Even one member's failure to qualify as a "fisherman" can potentially destroy the FCMA antitrust exemption for the entire association. Care should be taken to avoid even the appearance that the association includes non-fishermen as members.

"Fishermen" can include fishing businesses—corporations, limited liability companies, etc.—and not just natural persons. Although this issue does not appear to have been addressed in cases construing the FCMA, courts interpreting the Capper-Volstead Act—which applies to "farmers" and served as the model for the FCMA—have concluded that the legal form of the member entity should not matter.

A member's individual processing, marketing or sales activity outside an association can be problematic. However, the type of processing, marketing or sales

activity and the extent to which it has typically been done by bona fide fishermen in the area must be considered before it can be determined whether the member is or is not a "fisherman" under the FCMA.

Another complicating factor, besides a member's individual processing, marketing or sales activity, is a member's service as an agent, employee, or contractor for a third party that conducts one or more of those activities.

(ii) "Fishermen" must join together in "associations."

The FCMA requires that fishermen act together in "associations," but the FCMA does not require any particular form of association. In fact, the FCMA states that associations may be "corporate or otherwise," and does not provide for any means of formal incorporation or recognition of fishermen's associations under federal law. In contrast to the usual practice of starting a business under state law—applying to a Secretary of State or similar office for a certificate of incorporation or other formal recognition of corporate status—there is no federal agency that formally recognizes or certifies "fishermen's associations" under the FCMA. While it would not seem necessary for a group of fishermen to formally organize as a corporation, partnership or other entity to benefit from the FCMA's antitrust exemption, the association's membership should be readily identifiable, at a minimum. Otherwise, it is questionable whether an association truly exists.

Notwithstanding the absence of any requirement of formal organization in the FCMA, the U.S. Department of Justice ("DOJ") in at least one case seemed to require some level of formal organization in connection with a settlement agreement with a group of harvesters that DOJ investigated for antitrust violations. And as discussed in detail in Part Two of this Manual, formal organization may be required to benefit from any state law antitrust protections for harvesters.

(iii) Associations may deal in product of members <u>and</u> non-members, but the value of members' product must be greater than or equal to the value of non-members' product.

Sales by association members outside the association could impact the association's ability to meet this requirement and also affect the association's long-term viability. Product purchased by association members from non-member sources and marketed through the association counts as non-member product because it is not produced (that is, harvested) by association members.

(iv) Associations must be operated for the mutual benefit of its members.

This requirement is designed to ensure that the association is not run for the benefit of one powerful member or a select sub-group of members, but for the "mutual benefit" of all members.

(v) Association members are limited to one vote or dividends limited to 8% per annum.

At least one of these requirements must be met.

B. Scope of the FCMA's protection.

The FCMA provides that fishermen "may act together in associations … in collectively catching, producing, preparing for market, processing, handling, and marketing" of "aquatic products." So what conduct would this language allow sector members participating in a qualified FCMA association to undertake, and what conduct would remain at risk to prosecution under antitrust laws?

- Protected activities

  - Catching: Association members may collectively agree on when and where to harvest fish, and may harvest fish using one or more of the members' vessels.

    - "Tie-ups" or other means of "supply control": It is generally acceptable for an association's members not to fish until prices increase or to limit output to avoid flooding the market. However, such conduct may not be protected by the FCMA if it results in "undue price enhancement." Also, an association's members are not protected if they threaten or otherwise coerce non-member harvesters in an attempt to convince them to join in the tie-up. Likewise, members would not be protected if they intimidate buyers who purchase from non-members who continue to fish.

  - Producing, preparing for market, processing and handling: An association may operate a facility to process fish harvested by members and non-members, provided the value of the members' fish is greater than or equal to the value of the non-members' fish.

- Marketing: Marketing has been defined as "the aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying marketing information." Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 215 (9th Cir. 1974) (construing the related Capper-Volstead Act).

  - Association members may agree to a price floor below which they will not sell.

  - An FCMA association—or two or more FCMA associations acting through a common marketing agency—may conduct collective price negotiations on behalf of association members.

- Areas of antitrust risk

  - Price agreements with third parties.

    - An FCMA association may not engage in simultaneous price negotiations with two or more fish buyers if, during the negotiations, the association discloses to Buyer A the price it is attempting to negotiate with Buyer B, or vice versa. In such situations, the association would be acting as an impermissible conduit of price information between competitors in the fish-buying market—thereby facilitating price fixing by non-members.

    - Association members may not reach agreements on price with non-member competitor fishermen who are not part of another FCMA association. However, when acting as a fish buyer, an FCMA association may post or otherwise freely transmit to the public the price at which it is offering to purchase fish.

  - Transmission of competitively sensitive information.

    - Competitively sensitive information includes price, output or cost data; customers or territories; and operating plans or future business plans.

    - The FCMA does not protect transmission of competitively sensitive information by members of an FCMA association to buyers, processors

or non-member competitor fishermen. Such information could be used by such entities for anticompetitive purposes. The classic example would be non-member competitor fishermen obtaining the price at which an FCMA association's members intended to sell their product to a particular buyer. That would enable the non-member to enforce the floor price adopted by the association, thereby contributing to a fixing of the price.

- Besides direct transmission of competitively sensitive information, FCMA association members also should avoid indirect "price signaling" to buyers, processors or non-member competitor fishermen. This could occur if association members make sales outside the association while the association is negotiating price with a buyer or processor.

- Collaboration with entities not qualified under the FCMA.

  - FCMA associations may collaborate with entities not qualified under the FCMA, but such activity will <u>not</u> be protected by the FCMA's antitrust exemption.

- Undue price enhancement.

  - The FCMA authorizes the Secretary of Commerce to issue cease-and-desist orders to an FCMA association if "such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is <u>unduly enhanced</u> by reason thereof." 15 U.S.C. § 522.

- "Predatory" conduct.

  - General test: Is conduct anticompetitive and does it lack a legitimate business justification?

  - Examples: Coercing non-member competitor fishermen to join the association and comply with its members' price agreements; campaigning against a store that sells product of the kind produced by the association's members, but obtained from other sources.

  - Essential facilities doctrine: An association that owns or controls an "essential facility"—such as a landing dock—may be under an

obligation to make the facility available to its competitors under reasonable circumstances.

- Monopolization.

  - An FCMA association may permissibly attain near or complete control of a particular harvesting/selling market by virtue of the collective activities allowed under the FCMA, so long as its market control does not "unduly enhance" prices. However, the association may be prosecuted for monopolistic activities when it does or attempts to increase its market share through "predatory" or other anticompetitive conduct.

- Member selection.

  - Reasonable conditions on membership in an association are generally permissible. Examples: Applicant must qualify as a fisherman, sign membership and marketing agreements, and pay a membership fee. Other legitimate justifications for limiting membership may include an association's limited capacity to handle product and the need for a potential member to produce product meeting the association's quality standards.

  - Denying membership in an association may raise antitrust issues if membership is essential to staying in business and competing with the association's members.

- Customer selection.

  - In general, an association may sell all its product to <u>one</u> buyer. However, an association's refusal to deal with <u>other</u> buyers may violate antitrust laws if such a refusal is a means to acquire a monopoly, fix prices, or drive out competitors.

  - "Full supply" contracts—through which a buyer agrees to purchase all of its supply of a certain product from the association—are problematic, as they tend to exclude competitors of the association from that particular buyer.

C. Hypothetical situations.

The following hypothetical situations are intended to illustrate the general principles of federal antitrust law discussed above. **They are not intended as legal advice. Sectors should retain their own attorneys to counsel them on the application of federal antitrust law to their specific circumstances.**

Unless otherwise noted below, all responses assume the referenced sectors are qualified "associations" of "fishermen" under the FCMA. As explained in Part Two, it may be more appropriate for a separate entity apart from a sector to be formed to act as a fishermen's collective marketing association. Depending on the circumstances, the association may consist of all, or fewer than all, of the members of the sector.

Hypothetical No. 1: May a sector negotiate the price at which fish harvested by its members will be sold to buyers such as Whole Foods or a Community Support Fishery ("CSF") organization?

Response: Yes. This is one of the fundamental purposes of a properly qualified FCMA association—to increase harvesters' leverage by allowing multiple harvesters to collectively negotiate price with a particular buyer.

Two or more sectors may jointly negotiate with one buyer and in that context may exchange price and other sales information with each other. However, outside of that context, sectors and their members should not disclose price and other sales information to non-members. Such disclosures can facilitate price fixing that is not protected by the FCMA.

Hypothetical No. 2: May a sector decide to limit output of fish during the course of a year to avoid flooding the market and lowering market prices?

Response: Generally yes, sectors may restrict their output of fish to stabilize prices. However, such activities are not protected when a limitation on output leads to an "undue enhancement" of price. Also, sector members should not threaten or otherwise coerce non-member harvesters into joining the sector's limit on output, and should take care that any price points that the sector may be attempting to maintain are not communicated to non-member competitor harvesters, processors or fish buyers.

Hypothetical No. 3: May multiple sectors engage in a tie-up and agree not to fish until prices are higher?

Response: This would most likely be protected activity, provided that: all sectors involved are qualified under the FCMA; the tie-up does not lead to an undue

enhancement of the price of fish; and the joint action among sectors is voluntary on the part of all sectors (i.e., no coercion). The same concerns regarding the communication of particular price targets as discussed in the response above would apply here, too.

This conduct would be protected if all sector members combined into one, larger FCMA-qualified sector. So the fact that more than one sector is involved should not change the analysis, particularly in light of the fact that the FCMA expressly allows multiple sectors to act together through a "marketing agency." However, as with a single sector, when more than one sector is involved, all members of all involved sectors must still qualify as a "fishermen" under the FCMA. If even one of the sectors is shown not to qualify as an "association" of "fishermen," then agreements involving that sector would not be exempt from prosecution under the antitrust laws. And a joint tie-up with a non-FCMA qualified sector would in all likelihood violate those laws.

Hypothetical No. 4: May a sector agree that its members will not sell fish below a certain price?

Response: Yes, provided that this agreement is not communicated to non-member competitor harvesters, processors or fish buyers.

Hypothetical No. 5: May a sector approach a fish buyer or processor and agree to sell to that processor/buyer exclusively if it pays a certain price?

Response: Yes, provided that the sector does not discuss this agreement with non-member competitor harvesters, processors or fish buyers. (If the processor/buyer does so, that is its own problem.) Also, the sector should not disclose the price at which it is attempting to sell to one processor in its negotiations with another processor. Finally, any exclusive sales arrangement would need to be analyzed in detail if it would effectively constitute a "full supply" agreement with a particular buyer, as such an agreement would tend to prevent other harvesters from selling to that buyer.

Hypothetical No. 6: May a sector agree not to land at a particular dealer because that dealer's catch reporting may not be accurate or timely?

Response: A sector has no general legal obligation to deliver to any specific party. However, if the sector is the only source of the processor's supply of fish for a certain market, then the sector may be subject to the assertion that the fish it harvests are essential to the processor's business. In that case, the sector will need to identify legitimate concerns, such as the processor's failure to report catch accurately and timely, to support any "refusal to deal" with the processor.

Hypothetical No. 7: Are antitrust or other legal issues implicated by a sector manager purporting to negotiate fish sales on behalf of only one member of a sector, rather than multiple or all members of a sector?

Response: Yes, including but not limited to the following. First, the sector manager's negotiations may be interpreted by third parties (such as affected buyers or state or federal antitrust enforcement agencies) as undertaken on behalf of multiple or all members of the sector. Second, any sharing of information from the sector manager's negotiations by the member for whom the sector manager is negotiating with other sector members could result in the other members adopting the same price demands. In either of those two scenarios, antitrust liability could arise if the sector does not qualify as a fishermen's association under the FCMA.

More generally, a sector and all of its members may be liable for the actions of the sector manager under agency law. "Principals"—sectors and sector members—are typically liable for actions of their "agent"—the sector manager. So even if a sector manager intends to commit only one member to deliver a certain amount of fish to a buyer, that buyer may reasonably believe the manager is representing the sector and all of its members and may seek to hold the other members responsible for any shortfall in deliveries. Because the sector manager may appear to third parties to be the agent of the sector and all of its members, representation of one member or a discrete subset of members by a sector manager may render the sector and all of its members liable for the sector manager's actions.

A note about "forward contracts": In preparing this Manual, questions arose about the propriety of "forward contracts." This Manual does not address those questions because any attempt to do so would require an appreciation of all the facts involved. That type of analysis is beyond the scope of this Manual and should be conducted by independent legal counsel.

Part Two – State Law

I. State Antitrust Laws Generally.

Most states have their own antitrust laws similar to the federal antitrust laws that prohibit anticompetitive activities. For example, Massachusetts prohibits anticompetitive activities concerning combinations (price fixing), monopolizing, restraints on trade and other discouragement of competition. Mass. Gen. Laws Ch. 93. Maine, New Hampshire, and Rhode Island all similarly forbid anticompetitive practices.

As the federal government may enforce federal antitrust law, so too may state governments enforce respective state antitrust laws. It is therefore not enough that a fish marketing association comply with the federal FCMA. An FCMA-qualified marketing association and its members must also comply with the relevant state law where they land, sell, and advertise their fish.

II. Relevant Exceptions to State Antitrust Laws.

Fortunately for would-be fish marketing associations, New England states bordering the Gulf of Maine have adopted in various forms exemptions from state antitrust laws. These exemptions vary widely, with differing requirements to qualify for the exemption. The various states' respective antitrust exemptions are discussed below.

A. Maine.

Maine's antitrust exemption for fish marketing associations is comprehensive, but also somewhat complicated to attain. The Maine Fish Marketing Act provides in part:

> An association shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State.

13 Me. Rev. Stat. § 2007. In other words, Maine exempts the activities of a qualified fish marketing association from state antitrust laws. This is a broad exemption that seems to categorically allow these associations to operate free of state antitrust laws. The complication is that fishermen and related entities must form and operate a qualified "association" under the Maine Fish Marketing Act.

A Maine fish marketing association must be a Maine nonprofit corporation, all members must be "engaged in the fishery business," and a majority of the members must be Maine residents. 13 M.R.S. §§ 2051-52. Qualifying associations must maintain other formalities, such as deciding whether to issue stock, where to locate a principal office, what members' fees, payments, and dividends will be, establish association meetings, and how a membership interest can be transferred. 13 M.R.S. §§ 2051-2197. While it may sound daunting, the Act's requirements are pretty standard fare for setting up and maintaining any corporation, with a few key differences (such as the residency and occupational requirements for members).

While the federal FCMA does not require any specific type of organization, Maine specifies exactly how a qualifying association should be formed and organized. As discussed above, the U.S. Department of Justice has indicated a preference for some formalized structure for fish marketing associations. Maine's law certainly provides for formal structure, so compliance with Maine law would in most cases aid in compliance with federal law.

It is worth noting, however, that Maine antitrust law is primarily concerned with restraints of trade within the state of Maine. *See* 10 M.R.S. §§ 1101 & 1102 (Maine antitrust law applies to proscribe conduct affecting "trade or commerce in this State"). A Maine resident fisherman who lands, sells, and markets his catch in Massachusetts should be primarily concerned with Massachusetts state antitrust law. Maine state antitrust law should only apply to those activities, including contract formation, advertising, and even negotiation, that take place within Maine or otherwise affect Maine commerce. (Recall, also, that federal law must still be followed, as discussed above. Federal agencies can and do enforce federal laws even against people who are following state law.) The interaction between the laws of different states is discussed in greater detail in the hypotheticals below.

B. New Hampshire.

Unlike Maine, New Hampshire does not have a specific antitrust exemption for fish marketing. There is a general antitrust exemption under New Hampshire law, though it is a little vague.

> Activities of and arrangements between persons shall be exempt from this chapter if such are permitted, authorized, approved, required, or regulated by a regulatory body acting under a federal or state statutory scheme or otherwise actively supervised by a regulatory agency.

N.H. Rev. Stat. § 356:8-a. Certainly a fish marketing association is permitted under the federal FCMA. But no regulatory body approves, authorizes, or actively supervises the

marketing activities of such an association, so the statute is not as clear an exemption for fish marketing associations as it could be. While one of the few decided cases on the New Hampshire statute extended its exemption based on a relevant state statute, that party's activities were actively regulated by a government body—unlike a fish marketing association. While the intent of the New Hampshire law is to provide the protection that fishermen would want, the New Hampshire statute as drafted leaves open an ambiguity as to whether or not compliance with federal law will satisfy state law. Subject to that reservation, activities that comply with the more limited federal exemption would likely not draw the scrutiny of New Hampshire regulators.

C. Massachusetts.

By contrast, Massachusetts gives a very clean answer, exempting from state antitrust law any activities that are exempt from federal antitrust law.

> No provision of [the Massachusetts Antitrust] Act shall apply to (a) Any activities which are exempt from any of the federal antitrust laws or the Federal Trade Commission Act . . . (b) Any activities which are subject to regulation or supervision by state or federal agencies; or (c) Any activities authorized or approved under federal, state or local law.

Mass. Gen. Laws Ch. 93 § 7. As discussed above, a fish marketing association may be exempt from federal antitrust law under the FCMA. When an association is exempt from federal law, Massachusetts state law extends the exemption to state law as well. In other words, a fish marketing association operating in compliance with the federal FCMA will also be exempt from Massachusetts' state antitrust law.

On the one hand, Massachusetts law provides no more certainty than the federal law, so an association runs the risk of violating both federal and state law. On the other hand, Massachusetts law is helpful by allowing associations to focus on a single standard—federal antitrust law—knowing that compliance with the federal FCMA exemption will apply as a state antitrust exemption as well.

Like Maine, Massachusetts state antitrust law is geographically limited, and applies only to those activities that "have their competitive impact primarily and predominantly within the commonwealth and at most, only incidentally outside New England." M.G.L. Ch. 93 § 3. Therefore, the state antitrust laws are triggered by the sale, marketing, and contracting for fish within Massachusetts. If a Massachusetts fisherman lands his fish in another state, does all his business in that other state, and goes home to Massachusetts only to sleep, the competitive impact is probably not "predominantly" within the commonwealth of Massachusetts.

D. Rhode Island.

Similar to Massachusetts, Rhode Island's antitrust law provides an exemption for any activity that is exempt under federal law. "Any activity or activities exempt from the provisions of the antitrust laws of the United States shall be similarly exempt from the provisions" of Rhode Island antitrust law. Gen. Laws R.I. § 6-36-8.

Like Massachusetts, then, Rhode Island provides a clear answer, extending state antitrust exemption to any persons who are exempt from federal antitrust law. Because the FCMA provides such a federal exemption, compliance with the FCMA will exempt fishermen in Rhode Island.

In sum, Maine provides a blanket protection from state antitrust law, but requires compliance with specific procedures for organizing and maintaining a collective fish marketing association. Rhode Island and Massachusetts provide clear exemptions for people and organizations exempt under the federal antitrust law, essentially making the federal FCMA the single standard in those states. New Hampshire's exemption may be similar to Massachusetts, but the statute is unclear, providing less assurance for when a fish marketing association will qualify for exemption from New Hampshire antitrust law.

III. Sectors and How to Set Up a Fish Marketing Association.

The above state law concerns must be taken into account when setting up a fish marketing association. For the sake of simplicity, it may be desirable to have the sector and the marketing association be the same entity, but depending on the membership and the relevant state law, that may not be possible. Below are some hypothetical situations and possible ways a sector could set up a marketing association that complies with state antitrust law. The discussion below is not intended as legal advice, and sectors and associations should consult independent counsel as additional facts beyond those described in the below hypotheticals may change the result.

Unless otherwise noted, the following hypotheticals assume that referenced "fishermen" are qualified as such within the meaning of the federal FCMA. Hypothetical B provides an example of a "vertical integration" issue precluding "fisherman" status.

Hypothetical A: Sector A's full membership is comprised solely of fishermen who live in Massachusetts, and land, sell, and market their entire catch in Massachusetts.

Response: The entity that is Sector A can probably become both the sector and the marketing association. Sector A is incorporated in Massachusetts already, so the sector has articles of incorporation, bylaws and corporate books maintained under Massachusetts law. Further, the sector has its required Operations Plan and Agreement. Importantly for purposes of antitrust law, the corporate books and Agreement will provide a list of members in the sector.

Currently, many sectors' Op Plans state that the sector cannot be a fish marketing association. In this simple example where all the members are fishermen, there is no problem with vertical integration, so the whole sector of fishermen can all be part of a marketing association. Amending the Op Plan to expressly state that the Sector *is* a fish marketing association provides the formal structure showing there is an actual association under the FCMA. The sector's bylaws and articles of incorporation should be reviewed as well, to make sure there are no conflicting provisions.

Provided that Sector A (now both a sector and a marketing association) follows federal antitrust law in marketing its catch, it will be exempt from Massachusetts state antitrust law.

Hypothetical B: Sector B consists of 9 fishermen who only fish, and 1 business entity that owns a small fishing boat, with the majority of its business and assets in fish processing. The fishermen all land, sell, and market their catch in Massachusetts and the processor also lives and works in Massachusetts.

Response: For the reasons discussed above, the fish processor is probably not a "fisherman" for FCMA purposes and may be a disqualifying entity under the FCMA. Recall that if even one member of a fish marketing association fails to qualify as a "fisherman" within the meaning of the Act, the FCMA antitrust exemption likely will not extend to the association and its members. It is therefore important to set up a marketing association without the fish processor.

Because only some of the members of Sector B are "fishermen" under the FCMA, it would not make sense to use the sector itself as the marketing entity under the Act. The better practice would be to create a new entity, whose members are a subset of Sector B's membership, for example, the nine "fishermen" together. (Let's call it "Collective B, Inc.") As discussed above under federal antitrust law, a formal entity may not be required, but will help any future regulatory agency determine that the FCMA protections apply to those members. As discussed in the state law section, if

Collective B, Inc. complies with federal antitrust law, it will be exempt from Massachusetts state antitrust law.

Perhaps the most troubling part of this arrangement—a subset of the sector members forming a separate marketing association—is that the members of the association must remain cognizant of who is, and who is not, part of the association. If a member of Collective B, Inc. starts coordinating pricing with anyone not part of that association (even the fish processor member of Sector B), that combination will not be protected by the FCMA. In Massachusetts, a federal violation will also be a state law violation, so the antitrust violation could be pursued by both state and federal authorities, in addition to private parties. The important point here is that sector membership may differ from fish marketing association membership.

Hypothetical C: Sector C consists of five Massachusetts fishermen and five Rhode Island fishermen. Any of the fishermen may land, sell and market their catch in either Massachusetts or Rhode Island.

Response: Because the state law exemptions in Massachusetts and Rhode Island are substantially similar, the sector itself could probably be the entity for the marketing association. Rather than setting up a new entity, the sector's articles, bylaws, and/or Ops Plan could be amended to allow for collective marketing between all sector members. As long as the members comply with federal antitrust law and operate within the FCMA, they will be exempt from Massachusetts and Rhode Island state antitrust law.

Hypothetical D: Sector D consists of four Maine fishermen and six Massachusetts fishermen. The fishermen all land, sell, and market their whole catch in their respective states.

Response: Because Maine and Massachusetts have very different requirements for a collective marketing exemption, it would make little sense to have the fishermen from the two states in the same fish marketing association. In particular, Maine's exemption statute requires the majority of association members be Maine residents. Because Sector D comprises a majority of Massachusetts residents, the sector itself should not be the entity to act as the marketing association. The better practice might be for the Maine fishermen to set up a Maine marketing association, and the Massachusetts fishermen to set up their own association as well.

The Maine association would have to follow the strictures of the Maine act—create a Maine company, meet residency and occupational requirements, etc. The Maine marketing association would have to follow the FCMA to be exempt from

federal antitrust law. By following the state exemption requirements, the Maine association would also be exempt from Maine state antitrust law.

The Massachusetts fishermen should set up their own association as well. As long as the Massachusetts association follows federal antitrust law under the FCMA, it will be exempt from both state and federal antitrust law.

As noted above when discussing federal antitrust law, different marketing associations may use marketing agencies in common. In other words, the Maine association and the Massachusetts association may together hire a common marketing agency for marketing on behalf of both associations. At least one court has acknowledged that if information may be shared with a common marketing agent, it stands to reason that the qualified associations may directly share marketing information between them.

One note of caution, however, is that if marketing association members begin sharing competitively sensitive information outside their own association, they need to be very sure that whomever they share pricing and other sensitive information with is a member of another FCMA-qualified association. As discussed above, antitrust protections may not extend to the association if its members coordinate marketing activities with people who do not qualify for exemption under the FCMA.

The foregoing was a brief discussion of some of the factors to consider when setting up a fish marketing association. As the above shows, it may not always be possible to have the sector itself double as the collective marketing entity. There are countless ways some of the above elements could be combined, and probably many other factors that could affect fishermen's decisions to set up their marketing association, and where and how to do so. Independent counsel will be able to apply the law to the facts of a particular group's situation and desires, and help fishermen arrive at a targeted solution.

Part Three – FCMA Compliance Questionnaire

This questionnaire should be completed by every applicant for membership in a fishermen's collective marketing association and the manager(s) of that association.

The Fishermen's Collective Marketing Act ("FCMA") provides a limited exemption from federal antitrust law for certain activities of "associations" of "persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products …." However, that exemption does not protect agreements or information flow between an association of "fishermen" and non-"fishermen" such as fish processors or buyers.

Accordingly, the following questions are designed to elicit information relevant to whether a prospective member of an association qualifies as a "fisherman" and whether any member or manager of an association has a connection with fish processors or buyers. **If even one member of an association is not a "fisherman," all association members may lose the protection of the FCMA's exemption, and that exemption may otherwise be jeopardized by any impermissible connections between the members and managers of the association and fish processors or buyers.**

Member/Manager Identification and Ownership Information

1) Member/Manager name: _____

2) Does the member/manager own one or more vessels that would participate in this association? Yes No If yes, describe the vessel(s) by name and USCG official number: _____
_____
_____

3) Is the member/manager a natural person or a business entity (for profit or not for profit)? If a business entity, what type (partnership, LLC, corporation, nonprofit, etc.)? _____
_____

4) If a business entity, list all persons with a direct or indirect interest of any kind in the member/manager and their percentage interest. For interest-holders who are themselves business entities, list all persons with interests in those businesses, and so on until you have identified all persons with a direct or indirect interest in the member/manager: _____
_____
_____

Business Activities

5) Describe all lines of business in which the member/manager has engaged in the past five (5) years, including fishing operations and any other kinds of business, and the percentage of total revenues attributable to each business: _____

_____
_____
_____
_____

6) If the member/manager is a business entity, describe all lines of business in which persons with a direct or indirect interest in the member/manager have engaged in the past five (5) years, including fishing operations and any other kinds of business, and the percentage of their total revenues attributable to each business: _____

_____
_____
_____
_____

7) If the member/manager is a vessel owner, describe the operations of all of the member/manager's vessels (those that will be participating in this association and any other vessels). For each vessel, describe its operations from harvesting through the point at which the member/manager relinquishes possession of the fish (for example, "trawl catcher vessel, harvest, ice and deliver fish to buyer"): _____

_____
_____
_____
_____

8) Describe any alterations that are made to the fish brought aboard each of the vessels listed above (bleeding, gutting, freezing, filleting, etc.), and the percentage of the harvest that is so altered: _____

_____
_____
_____
_____

9) Does the member/manager buy fish from harvesters? Yes No If yes, describe the amount purchased annually and what the member/manager does with those fish:

_____

_____
_____
_____

10) Does the member/manager sell fish to anyone other than fish processors or buyers (such as a grocery store or the public)? Yes No If yes, identify such persons and state the percentage of sales to those persons: _____
_____
_____
_____
_____

Processor/Buyer Connections

11) Does the member/manager own an interest in a fish processor or buyer?
Yes No If yes, identify the processor(s) or buyer(s) at issue and state the ownership percentage: _____
_____
_____
_____

12) If the member/manager is a business entity, does a fish processor or buyer hold an interest in the member/manager, or do any persons with a direct or indirect interest in the member/manager also own an interest in a fish processor or buyer?
Yes No If yes, identify those persons and the processor(s) at issue and state the relevant ownership percentages: _____
_____
_____
_____

13) Is the member/manager also a manager, officer, director, employee or agent of a fish processor or buyer, or in a personal or family relationship with such persons?
Yes No. If yes, please explain: _____
_____
_____
_____

14) If the member/manager is a business entity, are any officers, directors, employees or agents of the member/manager also officers, directors, employees or agents of a fish processor or buyer, or in a personal or family relationship with such persons?
Yes No. If yes, please explain: _____

_____
_____
_____

15) Is the member/manager party to a custom-processing agreement with a fish processor, under which the processor processes the member/manager's fish and the member/manager then sells the fish? Yes No. If yes, please explain: _____

_____
_____
_____

16) Is the member/manager party to any other type of agreement with a fish processor or buyer (such as a contract to deliver to or buy supplies from a processor/buyer, a loan from a processor/buyer, etc.)? Yes No. If yes, please explain:_____

_____
_____
_____

17) Does the member/manager help fish processors or buyers in any way set prices at which they buy fish? Yes No If yes, please explain: _____

_____
_____
_____

Case List

1. Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

2. Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 355 F. Supp. 408 (C.D. Cal. 1971).

3. Commonwealth v. McHugh, 93 N.E.2d 751 (Mass. 1950).

4. Manaka v. Monterey Sardine Indus., Inc., 41 F. Supp. 531 (N.D. Cal. 1941).

5. Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458 (1960).

6. In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274 (E.D. Pa. 2009).

7. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978).

8. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974).

9. United States v. Borden Co., 308 U.S. 188 (1939).

10. United States v. Hinote, 823 F. Supp. 1350 (S.D. Miss. 1993).

11. In re Washington Crab Ass'n, 66 F.T.C 45 (1964).

Other Resources

1. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 249 ("Agricultural Cooperatives and Related Producer Organizing").

2. DONALD A. FREDERICK, ANTITRUST STATUS OF FARMER COOPERATIVES, THE STORY OF THE CAPPER-VOLSTEAD ACT (September 2002), available at: http://www.rurdev.usda.gov/rbs/pub/cir59.pdf.