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**ANTITRUST GUIDELINES**  
**FOR THE**  
**NATIONAL ASSOCIATION OF HEALTH UNDERWRITERS**

The purpose of this document is to  
briefly review the federal antitrust laws  
applicable to association activities  
and to set forth some general guidelines  
for compliance with those laws

There are two antitrust statutes which are of principal concern to individuals and firms who take part in association activities: the Sherman Act and the Federal Trade Commission Act. These laws prohibit contracts, combinations, and conspiracies in restraint of trade. The Supreme Court has said that not every contract or combination in restraint of trade constitutes a violation; only those which unreasonably restrain trade are unlawful. Thus the courts will look at all of the facts and circumstances surrounding the conduct in question in order to determine whether it unreasonably restrains trade and therefore violates the laws.

Certain kinds of conduct are exclusively presumed to be unreasonable and therefore unlawful. Such conduct, which is considered to be unlawful per se, consists of certain practices which clearly restrain competition and have no other redeeming benefits. Examples of such practices include:

- agreements to establish price (price fixing);
- agreements to refuse to deal with third parties (boycotts);
- agreements to allocate markets or limit production;
- tie-in sales which require the customer to buy an unwanted item in order to buy the product desired.

Associations by their very nature present potential antitrust problems. One reason is that in bringing competitors together into an association, there exists the means by which collusive action can be taken in violation of the antitrust laws. Since both the Sherman and Federal Trade Commission Acts prohibit combinations in restraint of trade and since an association by its very nature is a combination of competitors, one element of a possible violation is already present. Only the action to restrain trade must occur for there to be a violation.

Another special antitrust problem of an association is that many of its valuable programs deal with subjects sensitive from an antitrust viewpoint – price reporting, product standards, certification, statistics, and customer relations.

Association members should refrain from any discussion which could provide the basis for an inference that the members agreed to take any action that might restrain trade. An "agreement" among association members in antitrust terms is a very broad concept – it may be oral or written, formal or informal, expressed or implied. A "gentleman's agreement" to "hold the line" on prices is more than sufficient to evidence an unlawful conspiracy to fix prices.

The basic principle to be followed in avoiding antitrust violations in connection with association activity is: to see that no illegal agreements, expressed or implied, are reached or carried out through the association. Members should also avoid engaging in conduct which may give the appearance of an unlawful agreement.

Following are some general guidelines which can minimize the possibility that inferences of antitrust guilt can be drawn from association activities:

1. Meetings should be held only when there are proper items of substance to be discussed which justify a meeting.
2. In advance of every meeting, a notice of meeting along with an agenda should be sent to each member of the group; the agenda should be specific and such broad topics as "marketing practices", which might look suspicious from an antitrust standpoint, should be avoided.
3. Participants at the meeting should adhere strictly to the agenda. In general, subjects not included on the agenda should not be considered at the meeting.
4. If a member brings up for discussion at a meeting a subject of doubtful legality, he should be told immediately the subject is not a proper one for discussion. This, of course, is the counsel's responsibility, but in his absence, the association staff representative or any member present who

is aware of the legal implications of a discussion of the subject should attempt to halt the discussion. Should the discussion continue, despite protest, it is advisable that members leave the meeting.

5. Minutes of all meetings should be kept by the association, and they must accurately report what actions, if any, were taken.
6. Secret or "rump" meetings held at the time of the regular meeting should be strictly avoided. Such meetings seldom have any purpose except to discuss illegal activities, and, accordingly, they seriously jeopardize legitimate association activities and create a very substantial risk that those activities will be investigated. An association staff member should usually attend all meetings.
7. During meetings there should be no recommendations with respect to "sensitive" antitrust subjects – those that relate to price, production markets, and the selection of customers or suppliers. Prices should not be discussed at all. In the less sensitive areas, such as standardization activities, recommendations may be permissible.
8. Members should not be in any way coerced into taking part in association activities. There should be no policing of the industry to see how individual members are conducting their business.
9. If there is any doubt about an association program or subject of discussion, members should check with association staff and counsel. Members may also wish to consult with their company's counsel, and this is encouraged.
10. Members should cooperate with Association counsel in all matters, particularly when counsel has ruled adversely about a particular activity.

The following topics are some of the main ones which should not be discussed at meetings of association members:

1. Do not discuss current or future prices.
2. Do not discuss what a fair commission is or profit level.
3. Do not discuss price adjustments.
4. Do not discuss cash discounts.

5. Do not discuss credit terms.
6. Do not discuss allocating markets.
7. Do not discuss wage or commission rates.
8. Do not discuss refusing to deal with a corporation.

Some of the basic areas of association activity which should be carefully scrutinized from an antitrust standpoint are the following:

1. Denial of association membership to an applicant.
2. Expulsion of an association member.
3. Conduct of a statistical reporting program.
4. Conduct of a standardization and certification program.
5. Conduct of a joint research program.
6. Establishment and enforcement of codes of ethics.
7. Denial of association services to non-members.

There are both civil and criminal penalties for violating the antitrust laws. The penalties for violating the antitrust laws are severe. An individual and a corporation found to have violated the antitrust laws may be fined up to \$1 million and \$100 million, respectively, and/or jail sentences of up to ten years. Additionally, there are civil penalties available to government antitrust enforcement agencies such as a cease and desist order and dissolution of the association. In addition to government enforcement of the antitrust laws, an individual or company that suffers injury as a result of an antitrust violation may file a private suit against the violator and recover treble damages. Therefore, the association's antitrust liability does not lie solely at the hands of government enforcement agencies.