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Facts Association Executives Need to Know About Antitrust Law

by Mark Alcorn

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Although many business owners and managers pay little or no attention to antitrust laws, these laws pose a substantial threat to both businesses and their leaders. Antitrust laws are complex and confusing, and violations of antitrust laws can arise from seemingly harmless conduct. Worse yet, Federal Trade Commission (FTC) and Department of Justice (DOJ) enforcement resources are virtually unlimited, while very few individuals or businesses have the financial resources to defend themselves against a powerful government agency. Indeed, in a recent case, the FTC attacked two Arizona dentists for agreeing between themselves not to do business with a particular insurance company. The FTC sued and ended its assault only after both dentists were financially ruined, and their misdeeds published nationally. Antitrust liability is NOT just for big business anymore.

Antitrust laws are set forth in the Sherman Act, Federal Trade Commission Act, the Clayton Act, the Robinson-Patman Act, and California's Cartwright Act, among other statutes. These laws prohibit combinations of competitors in restraint of trade, attempts to monopolize and other anti-competitive activities. Since most association activities involve groups of competitors, the opportunity to unlawfully restrain trade is always present.

No Easy Fix

Unfortunately, there is no checklist of what is and is not safe conduct from an antitrust standpoint. All antitrust analysis depends substantially on the surrounding facts and circumstances. What is lawful for one group of individuals to discuss may be a violation for another group. Further, activities of individual groups of association members and/or chapters may be attributed to a state or national association. Also, inferences may be drawn from association, chapter or member activity. Even though no specific conspiracy or agreement to restrain trade has actually occurred, it is possible for a violation to have occurred.

Areas of Risk

It is not possible to provide a complete or specific list of activities that amount to an antitrust violation. However, it is helpful to identify areas of risk, where close attention can be paid to the possible anti-competitive nature of the agreements or activity involve. Some areas of risk include discussions of the following:

- Controlling or influencing current or future prices (for purchase or sale), controlling or influencing price increases or decreases, or stabilization or standardization of prices
- What constitutes a "fair" profit
- Procedures for establishing selling prices, cash discounts, credit terms
- Control of sales levels, inventory levels or timing of sales
- Allocation or division of markets or geographical divisions of markets among competitors
- Agreements, recommendations or suggestions that members refuse to deal with certain other persons or firms (boycott)
- Whether or not the pricing practices of any competitor/industry member are unethical, or constitute an unfair trade practice
- Agreements limiting or restricting advertising

Again, certain discussions relating to activities identified above will not amount to antitrust violations. However, discussions relating to them require thorough prior antitrust analysis and guidance in the discussion.

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Minimizing the Risk

To rationally cope with this risk, business owners and managers are wise to educate themselves about antitrust laws, and the likely application of these laws within their respective business. A good place to start is with the association's "antitrust policy." The association's policy should serve to protect the association and its leaders, and help educate leadership and members about these laws and how to avoid liability under them. Having a basic understanding of antitrust risks will help avoid inadvertent violations, and aid members in challenging and interrupting risky behavior before harm occurs.

First Aid

What further steps can be taken to avoid antitrust liability? First, educate yourself about the law. Be aware that even the most informal meetings between competitors in which risky topics are discussed can lead to liability. When in group meetings, have the agenda reviewed for antitrust risk, then stick to the agenda. Additions to the agenda that touch upon risky areas should be scrutinized. Discussions during meetings should be monitored; in some instances, legal counsel should be present at the meeting. Meeting minutes should be reviewed by the group's Executive and/or Counsel. Audio or video recordings of business meetings should not be permitted; if they exist, a policy should be adopted to provide for their systematic erasure. If discussion leads to possible antitrust violations, discussion should cease immediately. Meeting attendees should loudly object to risky discussions, and leave the meeting if risky discussions do not cease. If a possible violation has occurred, seek counsel, and strongly advise attendees against discussion of the possible violation. Note that "executive session" discussions are NOT truly confidential.

Antitrust law is a difficult and complex subject, and a cause for realistic concern for nearly all business owners, managers and associations. The preventive measures noted above can help an association avoid these risks, potentially preventing a disaster.

A sample Antitrust Statement and Policy is included in this paper. This document has been prepared for general reference only. It is intended to inform association leaders and members of basic antitrust principles to assist them in acting responsibly in the conduct of association and members business activities. It must not be considered as a substitute for competent legal advice. It is recommended that interested persons confer with competent legal counsel concerning this and other significant legal issues.

Sample Antitrust Statement

(To be read aloud by Chair / Facilitator at the beginning of any ASSOCIATION meeting/gathering.)

It is the policy of the [name of association] and its members to comply with laws and regulations applicable to their activities.

Among other things, ASSOCIATION members and leaders are subject to antitrust laws that prohibit fixing prices, allocating geographic markets, unfair or deceptive practices, setting profit levels; boycotts, and most other anticompetitive actions. ASSOCIATION will neither permit nor condone anti-competitive behavior, whether willful or inadvertent, in connection with any ASSOCIATION activity.

Additionally, discussion among two or more providers that suggests intentional or unintentional fraudulent activity is illegal. For example, [insert a suitable example, such as: discussion of methods to enhance reimbursement by providing services that are not medically necessary may amount to a crime (conspiracy to commit fraud)].

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Conversations involving discussion of matters that may violate applicable laws and regulations should always be avoided, even in private settings, and cannot be tolerated in connection with any ASSOCIATION meeting or activity. Persons engaging in possible violations of ASSOCIATION policy during meetings or activities will be required to cease such activities, and if necessary, are subject to ejection by the presiding officer of the meeting.

Questions concerning antitrust or other laws or regulations connected to ASSOCIATION activities should be referred immediately to the Chief Staff Executive.

Sample Antitrust Policy

Name of Association

ANTITRUST LAW COMPLIANCE POLICY AND GUIDELINES

It is the policy of the _____ (INSERT NAME OF ASSOCIATION) and its members to strictly comply with laws and regulations applicable to their activities, including federal and state antitrust laws. It is further the policy of ASSOCIATION to assist its members and volunteers in complying with federal and state antitrust laws. ASSOCIATION members and leaders are expected to conscientiously adhere to antitrust laws. ASSOCIATION will neither knowingly permit nor condone anti-competitive behavior, whether willful or inadvertent, in connection with any ASSOCIATION activity.

ANTITRUST LAWS

The antitrust laws seek to preserve a free competitive economy. As a general rule, competitors may not restrain competition among themselves through understandings or agreements as to the price, the production or the distribution of their products, or other agreements that unreasonably restrict competitive capabilities or opportunities of their competitors, their suppliers or their customers. The antitrust laws also prohibit monopolization and attempts to monopolize, unfair methods of competition, unfair or deceptive acts or practices, most discrimination in prices between different purchasers in the sale of a commodity, exclusive dealing arrangements, most tying sales and requirements contracts, some joint ventures/mergers/consolidations, and similar activities. A more complete discussion of the antitrust laws (Sherman Act, Federal Trade Commission Act, the Clayton Act, the Robinson-Patman Act, and California's Cartwright Act) is available upon request from ASSOCIATION.

However, antitrust laws are often unclear in terms of applicability to any given conduct. Whether or not an antitrust violation exists depends purely on the specific conduct and facts involved in each instance. Notwithstanding the nebulous nature of the antitrust law, penalties for violating them, both civil and criminal, are severe. Certain activities can result in felony criminal convictions with penalties of up to three (3) years in prison and \$100K fines for individuals and \$1,000K fines for corporations per offense. Also, treble damages are available to private persons enforcing the antitrust laws.

Association members and leaders, in particular, have compelling reasons to understand and comply with antitrust laws because antitrust violation commonly consist of two elements: 1) concerted action with produces 2) an unreasonable restraint of competition. Since ASSOCIATION's activities involve meetings and activities of competitors (ASSOCIATION members), the concerted action element can generally be established without difficulty. The only other element necessary to prove a basic antitrust violation is to show that the action amounts to an unreasonable restraint of competition. So, agreements or activities of association members that are anti-competitive or have an anti-competitive effect, whether conducted as association business or not, could result in serious antitrust consequences.

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MEMBER RESPONSIBILITIES

ASSOCIATION programs are carefully designed and monitored on an ongoing basis to ensure compliance with antitrust law. Every ASSOCIATION member, whether organizational or individual, has a duty and responsibility under the law to avoid and prevent antitrust violations. Every ASSOCIATION member needs to understand basic antitrust laws, to recognize areas of potential antitrust risk, and to overtly object to and refuse to participate in any activity that poses antitrust risk until that risk is properly assessed and cleared by legal counsel or other qualified advisor.

AREAS OF RISK

It is not possible to provide a complete or specific list of activities that amount to an antitrust violation. However, it is helpful to identify areas of risk, where close attention can be paid to the possible anti-competitive nature of the agreements or activity involve. Some areas of risk include discussions of the following:

- Controlling or influencing current or future prices (for purchase or sale), controlling or influencing price increases or decreases, or stabilization or standardization of prices (Note: Discussion of prices established by third parties not influenced or controlled by the discussing parties is generally not, standing alone, anti-competitive or illegal.)
- What constitutes a “fair” profit level
- Procedures for establishing selling prices, cash discounts, credit terms
- Control of sales levels, inventory levels or timing of sales
- Allocation or division of markets or geographical divisions of markets among competitors
- Agreements, recommendations or suggestions that members refuse to deal with certain other persons or firms (boycott)
- Whether or not the pricing practices of any competitor/industry member are unethical, or constitute an unfair trade practice
- Agreements limiting or restricting advertising Again, some discussions relating to activities identified above will not amount to antitrust violations. However, discussions relating to them require thorough prior antitrust analysis and guidance in the discussion.

ASSOCIATION MEETINGS

To avoid even the appearance of impropriety, as well as to avoid inadvertent violation of antitrust laws, all association board and committee meetings will be conducted in accordance with the following rules:

1. A written agenda will be prepared and distributed in advance of each meeting. Agendized issues with potential antitrust implications will be reviewed and discussed by the chairman, executive director and legal counsel, if deemed appropriate. Additions to the agenda having potential antitrust implications should be postponed, or discussions of such matters held with legal counsel or other qualified advisor present.
2. Accurate, detailed meeting minutes of every meeting will be prepared and reviewed. Audio, video or other recordings of meetings will not be permitted. Minutes will be approved at the next meeting.
3. In the event of concern regarding potential antitrust implications of a discussion, discussion must be discontinued pending resolution of the matter through the executive director or legal counsel, if necessary.

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4. In the event that any member has a concern about potential antitrust implications of discussion during a meeting, he or she shall interrupt discussion and state that concern immediately. If discussion is not terminated and the concern resolved, the concerned member should state that he or she is leaving the meeting for that reason, and leave.
 5. Conversations involving discussion of matters in violation of this policy will not be tolerated at a association meeting, and violating parties may be ejected from the meeting by the chairman.
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About the Author

Mark Alcorn founded Alcorn Associates Law Offices in 1997 and is also a principal in Alcorn Associates Management Consulting. Mark is an experienced attorney and management consultant specializing in the non-profit association community. As part of the law practice, he counsels numerous associations and for-profit firms on business, tax, antitrust, management and related matters. As part of the management consulting practice he conducts visioning and strategic planning.

You can find out more about Mark here:

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