ANTITRUST IN BRIEF

WHAT THE LAW SAYS ABOUT WHAT YOUR ASSOCIATION CAN – AND CANNOT – DO.

Without question, trade associations and professional societies play a vital role in the modern American economy. Notwithstanding their importance, their conduct is subject to legal scrutiny, particularly in the area of antitrust. As a board member, you need to understand why this is true, and what it means for the organization whose well being you are charged with protecting.

WHY IS ANTITRUST AN ISSUE?

Trade associations and professional societies such as yours (1) are generally composed of competitors who meet and may take joint action on matters of common interest and (2) have been misused in the past to carry out or facilitate anticompetitive purposes. As a result, government at both federal and state levels, as well as consumers and other competitors, examine the conduct of these organizations to ensure that the principles of fair and free competition are preserved in the marketplace. Antitrust laws provide a means for government and private parties to enforce these principles.

Four federal statutes establish the basics: the Sherman Act, the Clayton Act, the Robinson Patman Act, and the Federal Trade Commission Act. Although all of these acts are generally aimed at preserving open competition, each is used to prevent and rectify a different abuse of the economic system. Virtually every state has enacted some form of antitrust law, generally patterned after the Sherman Act, to regulate unfair methods of competition.

WHAT DO ANTITRUST LAWS MEAN FOR YOUR ORGANIZATION?

Compliance with these laws does not prevent your members from lawfully engaging in a wide variety of group activities as long as the purpose or intended effect of such activities is to promote the industry or profession and not to gain a competitive advantage over nonmembers. Thus, your organization may, among other things:

- Engage in public relations and promote your industry or profession and its products and services;
- Engage in lobbying and otherwise attempt to improve government relations and affect decisions that have an impact on your industry as a whole;
- Exchange information on accounting and other business methods;
- Conduct educational programs;
- Conduct myriad statistical studies so long as the information gathered is not used or intended to be a means to fix, control, or stabilize prices; allocate markets; affect production; or otherwise impede competition in markets;
- Adopt *voluntary* safety programs for your field;
- Develop *voluntary* engineering and performance standards that provide a bona fide benefit to the public; and/or
- Engage in joint research programs on technical and other matters.

Nonetheless, under the Sherman Act, certain types of conduct are so patently unreasonable that they are deemed illegal on their face. The prime example, and the one posing the greatest threat to fair competition, is the Sherman Act's per se prohibition against price-fixing. The term *price fixing* covers a multitude of activities beyond the mere increase of a product's price by competitors. Simply stated, *any* conduct by competitors that has the purpose or effect of raising, depressing, fixing, pegging, or stabilizing the price of a product is unlawful. Neither you nor anyone else in your organization wants to face prison terms or substantial fines for allowing such noncompetitive discussions to occur.

Certain other conduct that limits competition is automatically deemed unlawful under the Sherman Act. Concerted action that may have an *effect* on prices – including matters relating to production, terms, and conditions of sale; distribution of products; and division of markets – is likewise prohibited. In practice, that means your organization should not encourage any activities that could inhibit free and fair trade.

Here is the partial list of matters that competitors should not discuss or make the subject of any type of agreement, whether formal or informal, express or implied:

- Prices to be charged to customers or suppliers;
- Exchange of price information as to specific customers;
- Coordination of bids or requests for bids;
- Basis upon which prices are determined;
- Terms and conditions of sales, including credit or discount terms;
- Profit levels;
- Division or allocation of markets or customers;
- Boycott of or a refusal to deal with a customer or supplier;
- Compilation of "approved lists" of customers or suppliers;
- Dissemination of information relating to sales policies of specific customers or manufacturers;
- Production of products or the level of production; and
- Distribution and sales terms, conditions, and methods.

How to Prevent Antitrust Violations

Obviously, your board's first step is to understand these antitrust issues and how they apply to your particular organization. It might also be useful for you and the staff to participate in a seminar explaining exactly how the laws apply to your activities. Finally, the presence of knowledgeable legal counsel at board meetings can help to avoid problems – and in the worst cases – jail sentences.

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