

FTC Provides Guidance on Ethical Codes

Q Is it true that the Federal Trade Commission recently banned the use of codes of ethics by nonprofit organizations?

A No, the Federal Trade Commission did not ban nor take action prohibiting nonprofit organizations from using a code of ethics. It did, however, recently publish its proposed consent orders with two professional associations that both highlighted the antitrust issues associated with codes of ethics and provided valuable guidance to the nonprofit community. As a general matter, the adoption and enforcement of an ethical code is a legitimate association activity recognized by both the FTC and the courts. Numerous associations have adopted ethical codes to be followed by their members. However, there are serious legal risks associated with ethical codes that associations must be aware of and take care to avoid.

Serving as a reminder to the association community of the need for vigilance, the FTC recently issued for public comment proposed consent orders with two nonprofit professional associations — the Music Teachers National Association Inc. and the California Association of Legal Support Professionals — involving antitrust complaints regarding their codes of ethics. In its statement, the FTC expressed its belief that those professional associations and their respective members “violated

the antitrust laws by agreeing not to engage in fundamental forms of competitive activity” due to certain restrictions and prohibitions set forth in their respective codes of ethics.

Specifically, the MTNA code of ethics imposed a ban on solicitations, prohibiting teachers from actively recruiting students from one another, while CALSP’s code prohibited its members from offering discounted rates to rivals’ clients, engaging in certain comparative advertising and recruiting employees of competitors without first notifying the competitor. While the FTC acknowledged in its statement that codes of ethics can serve important purposes and benefit competition and consumers, it noted that because “trade organizations are by their nature collaborations among competitors, the Commission and courts have long been concerned with anti-competitive restraints imposed by such organizations under the guise of codes of ethical conduct.” The FTC stated its belief that the code provisions in question constituted unreasonable restraints of trade “of precisely the nature that the Sherman Antitrust Act was designed to combat.” In lieu of challenging the FTC’s allegations, the associations agreed to eliminate the provisions from their respective codes of ethics.

How to Avoid Antitrust Concerns

In order to avoid potential antitrust concerns, there are

two matters that must be considered in developing an ethical code. First, associations cannot include code provisions that place restrictions on individual activity in violation of state or federal law, particularly the federal antitrust laws. For example, while the code may include prohibitions on false and deceptive advertising or fraudulent billing practices, it may not include blanket restrictions on advertising or any restriction that could be held to constitute a price-fixing agreement among the membership.

Second, the association should determine whether or not its code will be voluntary guidelines or an actual enforceable code. As a general rule, a “code” is a document that prescribes or proscribes certain activity. The activity may be described in general or specific terms, often depending on what is involved. Whether or not a related enforcement mechanism is adopted, a code is essentially considered an “enforceable” document. A “guide,” on the other hand, merely serves as an instructional piece on responsible professional behavior and is a good way to reduce antitrust exposure.

If the association intends to enforce its code, due-process-like procedures should be adopted. Such procedures serve a dual function inasmuch as they provide the association with an enforcement mechanism as well as protect the interests of any individual who becomes

the subject of a disciplinary action. The enforcement procedures should be drafted to provide due process protections to the affected party. Adopting “fair procedures” may help avoid antitrust claims, and provide the association with an avenue for creating a record to support the absence of anti-competitive motive in the event of a claim.

Associations should regularly review their codes of conduct with legal counsel to make sure they remain relevant, serve “pro-competitive” purposes and do not run afoul of the antitrust laws. **■**

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