

The Basics of Antitrust Law



Q: Can you provide a “basic primer” on antitrust law so our association knows what to watch out for?

A: The four primary areas of antitrust concern for associations are price fixing, membership decisions, codes of ethics or other forms of self-regulation, and standard-setting and certification. Antitrust laws make unlawful every contract, combination or conspiracy in restraint of trade. Because an association is, by nature, a group of competitors joined together for a common business purpose, an association typically satisfies what would ordinarily be a difficult element in proving an antitrust violation. As a result, association activities are subject to close scrutiny under both federal and state antitrust laws.

Historically, the area of greatest concern has been price fixing. An actual agreement to set prices is not required to show an antitrust violation. Rather, price fixing includes any concerted effort or action that has an effect on prices, terms or conditions of trade, or competitors. Such actions cannot be justified by showing that they will benefit customers, or that the prices set are otherwise reasonable.

With such a broad definition of price fixing, association members should refrain from any discussion that may provide the basis for an inference that members agreed to take any action relating to prices, services, production, allocation of markets, boycotts or refusals to deal, or any other matter having a market effect. Topics to be avoided include current or

future prices, profit levels, pricing practices, credit terms, market allocation and anticipated wage rates. Such discussions should be avoided both at formal meetings and informal gatherings, including online forums and listserv “discussions.”

Information on past prices may be shared under limited circumstances. Information-gathering activities such as surveys, “benchmarking” and statistical reporting programs should be based on past, not present or future, data. Information that would identify the participants should be removed, and results published in aggregate form without analysis or recommendations. Participation in such information-sharing activities must be voluntary.

The second major antitrust area is membership decisions and non-member access. Because association membership can be of substantial benefit to a company or an individual, associations must ensure they do not restrict qualified competitors from membership or illegally discriminate against non-members. Membership criteria must be reasonable, objective, clearly-defined and not overly-restrictive, and must accurately reflect the segment of the industry the association represents. Individuals or companies may not be denied membership if they meet the qualifications.

Furthermore, if an association activity is essential to a non-member’s ability to do business, then access must be allowed. However, not all association information or activities must be accessible to non-members to the same degree as they are to members. Associations may establish policies that allow non-member participation in the activity at a fee higher than that charged to members, so long as the fee is reasonably related to the activity and is not so high that it compels membership. Associations also may deny non-members access to member business meetings, member directories and surveys or survey results in which the non-member did not participate.

Self-regulation is a third major antitrust area. Associations may establish codes of ethics to encourage certain conduct

by their members. However, codes that may have an anticompetitive effect, such as those banning advertising or competitive bidding, are prohibited. Disciplinary actions to enforce such codes must be fair and consistently applied.

Product and professional certification and standard-setting programs are the final area of concern. Certification programs should benefit the industry and the public and should not be used to restrict competition or discriminate against new entrants. Standards should be voluntary and developed with broad input from affected parties. Non-members must be allowed to participate in certification programs, although they may be charged a reasonable, higher fee. Standards and certification criteria also should be periodically reviewed to account for changes in technologies and practices.

The penalties for violating federal and state antitrust laws are severe. An association may be held strictly liable for the illegal conduct of its members and others acting under the association’s name even if the association did not authorize the activity. Active participants, and those who silently acquiesce in illegal activity, can be held criminally responsible. Potential fines are substantial, and individuals and corporate officers may be imprisoned for up to 10 years. Civil antitrust suits may result in treble damage awards.

While not all potential activities or ways to minimize antitrust risk are covered here, the above provides a starting point. You should also put reminders in meeting materials, post online forum rules, obtain legal review of agendas and minutes, adopt a policy on who may speak for the association and ensure appropriate due process procedures for various decision-making activities (e.g., disciplinary matters, standards). Consult legal counsel for advice specific to your circumstances to ensure appropriate antitrust compliance. ■

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.