



ANTITRUST PRIMER FOR ASSOCIATION BOARD MEMBERS

Associations are subject to strict scrutiny under both federal and state antitrust laws. The Sherman Act, the principal federal antitrust statute, prohibits "contracts, combinations, or conspiracies ... in restraint of trade." By their very nature, associations are a "combination" of competitors, so one element of a possible antitrust violation is always present, and only some action by the association that unreasonably restrains trade needs to occur for there to be an antitrust violation. Consequently, associations are common targets of antitrust plaintiffs and prosecutors.

The consequences for violating the antitrust laws can be severe. A conviction can carry stiff fines for the association and its offending leaders, jail sentences for individuals who participated in the violation, and a court order dissolving the association or seriously curtailing its activities. The antitrust laws can be enforced against associations, association members, and the association's employees by both government agencies and private parties (such as competitors and consumers) through treble (triple) damage actions. As the Sherman Act is a criminal conspiracy statute, an executive who attends a meeting at which competitors engage in illegal discussions may be held criminally responsible, even if he or she says nothing at the meeting. The executive's attendance at the meeting may be sufficient to imply acquiescence in the discussion, making him or her liable to as great a penalty as those who actively participated in the illegal agreement.

Common antitrust claims against associations include price-fixing (any explicit or implicit understanding affecting the price of a member's product or service is prohibited, even if the understanding would benefit consumers), group boycotts / concerted refusals to deal, customer allocation or territorial division, bid-rigging, and illegal tying arrangements. Antitrust-sensitive areas of association activity include membership restrictions, standard setting, certification and self-regulation, statistical surveys, and information exchange programs, among others.

To avoid antitrust liability, associations should adopt a formal antitrust compliance program, and this policy should be distributed regularly to all association officers, directors, committee members, and employees. The policy should require, among other conditions, that all association meetings be regularly scheduled - with agendas prepared in advance and reviewed by legal counsel - and that members be prohibited from holding "rump" meetings. Above all else, members should be free to make business decisions based on the dictates of the market - not the dictates of the association. Any deviation from this general principle, such as the adoption of a Code of Ethics that infringes on members' ability to make fully independent business decisions, should be approved by legal counsel.

Disclaimer ¶

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