

ALC ANTI-TRUST POLICY

This section reviews policies and procedures for the following areas relating to outreach programs:

- background on the need for an antitrust policy,
- an overview of antitrust laws,
- enforcement and penalties,
- general antitrust guidelines, and
- general operating procedures

BACKGROUND

There is no reason for a company or an individual to withhold participation in an association for fear of violating the antitrust laws. Courts have universally held that membership in an association and participation in traditional association activities are entirely legal and appropriate and in no manner indicate an intent to engage in unlawful trade practices.

Because trade associations are comprised of competitors, however, they do need to be sensitive to the restrictions of the antitrust laws. The antitrust laws are intended to foster and protect competition. As such, the laws prohibit particular anticompetitive activities, and more generally those that are deemed to unreasonably restrain trade. For these reasons, this Antitrust Policy has been developed to provide a general overview of antitrust laws as applied to associations and to assist the Association in conducting its activities in conformity with those laws.

OVERVIEW OF THE ANTITRUST LAWS

The basic statutes, which are applicable to trade associations, are the Sherman Act and the Federal Trade Commission Act. The Sherman Act prohibits "contracts, combinations or conspiracies in restraint of trade or commerce." Taken together, the contract, combination or conspiracy requirement has been found to exist where there is some form of agreement between two or more parties. Such agreements may be explicit, e.g., taking the form of a contract or other oral or written communication, or implicit, e.g., implied by the conduct of the parties and construed to indicate an agreement was formed.

By their very nature, trade associations involve a "combination" of competitors, so they are especially prone to antitrust attack. Under the Sherman Act, any understanding or agreement affecting the price of a product or bid on a job is prohibited, regardless of the purpose of the understanding. Even if the agreement will benefit consumers, it is prohibited. Although courts have interpreted Section 1 to only prohibit "unreasonable" restraints of trade, the courts have found that particular practices such as price fixing, group boycotts, or division of customers or markets are by their very nature so pernicious as to automatically be deemed "per se" unreasonable without the need for detailed inquiry as to their effect on the market. Of great importance to Association members is the fact that the Sherman Act is a criminal conspiracy statute. Consequently, an executive who attends a meeting at which competitors engage in illegal discussions which relate to prices or bids may be held criminally responsible, even if he says nothing at the meeting. The executive's attendance at the meeting may be sufficient to imply acquiescence in the discussion, making him liable to as great a penalty as those who actively participated in the price-fixing or bid-rigging agreement.

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The FTC Act's broad enforcement provision empowers the FTC to determine the meaning of "unfair." In addition, activities considered illegal under the Sherman Act also are generally unlawful under Section 5 of the FTC Act. Furthermore, Section 4 of the FTC Act empowers the FTC to take action against "incipient" unfair

practices; that is, conduct that does not yet amount to—but is likely to lead to—a violation of the other antitrust statutes.

ENFORCEMENT AND PENALTIES

The U.S. Department of Justice, States, and private parties harmed by the anticompetitive conduct of others may bring suit for violations of the Sherman Act. Enforcement of the FTC Act is vested exclusively in the FTC. Violations of the Sherman Act may result in both criminal and civil penalties. In addition, private plaintiffs may recover three times the amount of damages suffered, plus the costs of bringing suit, including attorneys' fees. Therefore, it is imperative that all Association members, directors and officers, and staff take all appropriate measures to minimize the risk of antitrust violations.

GENERAL ANTITRUST GUIDELINES

While the antitrust laws apply to all business, there are several types of activities that are particularly relevant to trade associations.

PRICE-FIXING

Any agreement among competitors to raise, lower or stabilize prices is unlawful, even if the agreed-upon price is reasonable, and even if the agreement is never put into effect. Details like credit terms, discounts, and warranties are elements of price. Competitors may be charged with illegal price fixing if they discuss general pricing ranges or policies because these discussions may have an impact on actual price quotations. At no time shall any discussion or agreement among members take place regarding product prices, price changes, or any other subjects bearing on product pricing.

A problem area that must be clearly understood in this context is bid-rigging. A bid-rigging scheme bears some of the traits of both a price-fixing agreement and an agreement to divide customers (see below) and, in fact, could be considered a synthesis of those two violations. An agreement between two or more persons that one will submit a higher or lower bid than the other, or will submit no bid at all, will constitute a criminal restraint of trade violating the Sherman Act. In making their case, those alleging an unlawful bid-rigging conspiracy need not prove a formal, express agreement with all terms set forth as clearly understood by the conspiring competitors. The antitrust injury caused by a bid-rigging scheme is the denial of the purchaser's property right to choose the lowest responsible bidder and to allocate its funds to that bidder.

AGREEMENTS TO DIVIDE CUSTOMERS OR TERRITORY

Territorial or market allocation involves an agreement among competitors operating at the same level of the market structure—such as manufacturers, distributors, etc.—to divide the market in such a way as to allow each party to the agreement to serve its share of the market without competition from the others. An agreement among members of an association to divide customers is an antitrust violation. The antitrust laws expressly prohibit any understanding or agreement between competitors or members of an association involving division or allocation of customers or territory. Even an informal agreement whereby one member agrees to stay out of another's territory will constitute a violation.

GROUP BOYCOTTS

A collective refusal by otherwise competing companies to deal with some third party, sometimes called a “group boycott,” raises serious antitrust concerns. It is unlawful for one company to agree with another company that neither one will do business with a particular supplier or customer, or that they will do business only with certain suppliers or customers or only on certain terms and conditions.

MEMBERSHIP RESTRICTIONS

As a general rule, any company that meets the criteria for membership and pays the applicable dues should be admitted, and allowed to remain, as a member. Considerations such as competitive concerns, commercial disputes, or personal animosity should not be a basis for denying or revoking membership; a trade association is not a social club. Denial of, or expulsion from, membership may constitute a restraint of trade because it could limit the ability of the applicant or nonmember to compete.

PRODUCT STANDARDS AND CERTIFICATION

Many associations develop standards related to product manufacture, performance, or compatibility. These standards must be prepared through a consensus process that is balanced and allows for participation by all interested parties, and must be based on objective technical, engineering, and safety factors. Whether a member chooses to offer products in conformance with any standard shall be a voluntary decision. Likewise, association certification activities which unreasonably further the interests of certain groups of members, to the exclusion of others, may result in antitrust problems.

CODES OF ETHICS

Associations may develop a code of ethics or business practices, and membership in the association may be contingent upon adherence to such rules. However, a code or similar document may not unlawfully regulate legitimate business practices, such as advertising that is not false or misleading, competition with other association members, or offering products or services at reduced prices. Any enforcement process must be fair and non-discriminatory.

INDUSTRY STATISTICS

The compilation and distribution of industry data on various topics is one of the most valuable services that an association can provide. These programs should be administered by the association to ensure that reports consist of data in composite form, and the information submitted by specific member companies is not revealed. Statistical programs also may not be used as a means of fixing prices, allocating production, or otherwise restraining trade.

ASSOCIATION MEETINGS

To minimize the possibility of antitrust problems at association gatherings, the following guidelines should be followed at all meetings of the Board of Directors and committees, as well as all association-sponsored conventions, trade shows, training seminars, conferences, and task force and working group sessions.

1. DO NOT discuss your prices or competitors' prices with a competitor (except when buying from or selling to that competitor), or anything that might affect prices such as costs, discounts, terms of sale, or profit margins.
2. DO NOT agree with competitors to uniform terms of sale, warranties, or contract provisions.
3. DO NOT agree with competitors to divide customers or territories.
4. DO NOT act jointly with one or more competitors to put another competitor at a disadvantage.
5. DO NOT try to prevent your supplier from selling to your competitor.
6. DO NOT discuss your future pricing, marketing, or policy plans with competitors.
7. DO NOT discuss your customers with your competitors.
8. DO NOT make statements about your future plans regarding pricing, expansion, or other policies with competitive overtones. Do not participate in discussions where other members do.
9. DO NOT propose or agree to any standardization that will injure your competitor.

10. DO NOT attend or stay at any informal meeting where there is no agenda, no minutes are taken, and no association staff member is present.
11. DO NOT do anything before or after association meetings, or at social events, which would be improper at a formal association meeting.
12. DO alert association staff and legal counsel to anything improper.
13. DO send copies to an association staff member of any communications or documents sent, received, or developed by you when acting for the association.
14. DO alert every employee in your company who deals with the association to these guidelines.
15. DO be conservative. If you feel an activity might be improper, ask for guidance from the association staff or legal counsel in advance.

GENERAL OPERATING PROCEDURES

1. A description of the association's intention to comply fully with the antitrust laws is included in the written policies of the association. All members of the Board of Directors of the association receive a copy of the association's antitrust policy statement, detailing what can and cannot be done at association meetings.
2. On an annual basis, the association shall request its legal counsel to review and update the Antitrust Policy Statement and the Rules for the Avoidance of Antitrust Problems and to advise the association as to any necessary changes in such documents.
3. The association's legal counsel shall approve, in advance, all new association programs or changes in existing programs that may have potential antitrust implications. In this regard, special attention shall be given to statistical reporting programs.
4. All association meetings are regularly scheduled, and members are not permitted to hold "rump" meetings.
5. An agenda is prepared for each meeting of the association, and the agenda is reviewed in advance by legal counsel where antitrust-sensitive issues are involved.
6. The minutes of all Board of Directors' meetings are reviewed by legal counsel. The minutes reflect the association's policy of complying with the antitrust laws.
7. The minutes of all association meetings are accurate as to the general substance of matters discussed at such meetings, and minutes are not submitted which have been doctored or are incomplete.
8. No action by the association or its Board of Directors that has the effect of rejecting a membership application becomes final without approval by legal counsel, if the Board of Directors has any question as to the legality of such rejection.
9. The association shall comply with the record retention requirements of Oregon Code 65.771 and any successor thereto.
10. No officer, director or staff member of the association has authority to communicate with officials of the Federal Trade Commission or the Antitrust Division of the Department of Justice without prior approval of the association's legal counsel.

MEMBERSHIP POLICY

The ALC does not:

1. Exclude certain competitors from membership in the association, if the applicant meets bylaw requirements.
2. Restrict members from dealing with nonmembers.
3. Unreasonably limit access to information developed by the association, unless such limitation is firmly grounded upon the need to protect trade secrets.

SELF-REGULATION AND CODES OF ETHICS

The ALC does not:

1. Adopt regulations or policies which have price-fixing implications, such as restrictions on advertising of prices or bidding, or which unreasonably inhibit the ability of any member or group of members to compete.
2. Require members to refrain from dealing with any vendor, supplier, customer or other member.