Application of Antitrust Laws To Association Activities

Trade associations and their members are subject to federal and state antitrust laws. Associations are particularly vulnerable to antitrust enforcement, because an association is, by its nature, a group of competitors joined together for a common business purpose. Therefore, associations must proceed with caution in certain areas of activity to ensure against violation of the antitrust laws.

The Sherman Act and The Federal Trade Commission Act

The most important antitrust statutes relating to association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits “contracts, combinations, or conspiracies...in restraint of trade.”

Among other things, the Sherman Act prohibits any understanding affecting the price of a product regardless of the purpose of the understanding. For example, if members of an association reach any form of an understanding or agreement concerning price, they cannot justify the understanding by showing that it will benefit consumers. The same is true regarding the allocation of markets or customers.

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”

Unlike Section 1 of the Sherman Act, the Federal Trade Commission Act reaches anti-competitive acts committed by single persons or companies, whether or not there is any agreement or “combination;” like the Sherman Act, it also covers joint actions.

Antitrust Problem Areas Of Association Activity

From a practical standpoint, AASA should focus its concern on four principal antitrust problem areas:

A. Price-Fixing

Experience shows that association members are most likely to violate, and the government is most likely to strictly enforce, the price-fixing prohibitions of the Sherman Act. A price-fixing violation may be inferred from similar price behavior by members, even in the absence of a written or oral agreement. If price-fixing is established, the association and its members may not raise the defense that the prices set are reasonable or that the ends sought through the price-fixing behavior are worthy.

B. Agreement to Divide Customers

The antitrust laws expressly prohibit any understanding or agreement between competitors involving division or allocation of customers. Even an informal agreement whereby one member agrees to stay out of another’s territory will constitute a violation of the antitrust laws.

C. Membership Restrictions

Assuming that the members of an association derive a significant economic benefit from membership, the denial of membership to an applicant may constitute a restraint of trade because such a denial may limit the ability of the applicant to compete.
D. Standardization and Certification

An association that develops voluntary industry standards may face antitrust problems if such a standard favors some competitors and discriminates against others without adequate technical justification. Similarly, association certification activities which further the interests of certain groups of members, to the exclusion of others, may result in antitrust problems.

How to Avoid Antitrust Problems

A. AASA Procedures

AASA is careful to follow rules to ensure against unintentional violations of the antitrust laws. In addition to this formal policy, AASA’s legal counsel approves new association programs or changes in existing programs that may have potential antitrust implications. AASA meetings are regularly scheduled, and members never hold “rump” sessions. The minutes of all meetings are approved by legal counsel. The minutes reflect AASA’s policy of complying with the antitrust laws.

B. Topics of Discussion Which Must Be Avoided at AASA Meetings

Unless the discussion is approved by legal counsel, or the discussion is in the context of legislative or legal activity, the following topics should not be discussed at AASA meetings:

1. Current or future prices. (Care must be taken in discussing past prices, although statistical reporting may be appropriate.)
2. What constitutes a “fair” profit level.
3. Possible increases or decreases in prices.
4. Standardization or stabilization of prices.
5. Pricing procedures.
6. Cash discounts.
7. Credit terms.
8. Selection system or termination or purchasers, customers or suppliers.
10. Complaints to a competitor that its prices constitute unfair trade practices.
11. Refusal to deal with a corporation because of its pricing or distribution practices.
12. Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice.
13. Any matter inconsistent with the exercise of independent business judgment.

What To Do If You Think There Is A Problem

If you think there may be an antitrust issue with an AASA program or discussion, you should not participate in the activity, and you should immediately notify the AASA President and/or its outside legal counsel.
**AASA Antitrust Compliance Additional Efforts and Guidance**

* AASA Antitrust guidelines should, as a matter of course, be used for ALL AASA meetings and events, including council meetings, committee meetings, conference calls, webinars, and events such as breakfast briefings.

This means including a paper copy where possible, and reviewing the guidelines orally at each meeting. If staff is not familiar with what to say regarding the guidelines, the following is a suggestion:

“The AASA antitrust guidelines are in your packet. These guidelines are important when we have potential competitors in the room together, and adhering to this directive ensures that we do not violate antitrust law or the spirit of the law. We are prohibited from anti-competitive discussion and agreements such as sharing information on pricing, agreeing to fix prices, dividing up the market, or group actions that might harm a customer or competitor. We have antitrust counsel present, we will stick to our prepared agenda, and all notes from this meeting will be reviewed by outside counsel.”

* AASA will have outside counsel present at every council, board and committee meeting where practical. In the event that named counsel is not available, staff will make every effort to have someone in place. In addition, counsel will be named to each organized group that is not currently represented.

* AASA will provide all named outside attorneys acting as antitrust counsel with a copy of guidelines for counsel participation.

* AASA staff must agree to and comply with established document retention policies.

* AASA staff must continue to have every survey reviewed by outside counsel before it is issued and before the results are shared.

* In the unlikely event that AASA were to ever be visited by federal or state authorities, staff should cooperate fully as instructed. The most senior person in the office should request to make a copy of any warrants on the photocopier, and contact Arent Fox for further guidance. If property is being seized (such as computers or files) staff is directed not to interfere.

* If and when a subpoena is delivered to the office (which could be for many reasons, not necessarily because of an antitrust issue, the recipient of the subpoena should sign for the document (it’s just like signing for FedEx) and then deliver to the most senior person on staff. That individual should contact Arent Fox for additional guidance at that time.

* Staff is counseled to take Antitrust issues seriously, not because there are concerns about association compliance, but because the association supports the antitrust laws and in the unlikely event that an issue does arise, the association may be required to produce documents.