

Antitrust Laws & Trade Associations

Guide for Members of the Aviation Insurance Association

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Trade associations are subject to strict scrutiny under the many federal and state antitrust laws. One of the most powerful of these is the Sherman Act. Section 1 of that Act prohibits "contracts, combinations or conspiracies ... in restraint of trade." But by its very nature, a trade association is a combination, such that there is no problem in proving the fact. This should serve as a signal to trade associations that they must proceed with extreme caution, lest they be cited for antitrust infringements, carrying stiff fines and jail sentences.

Responsibility for enforcement of the antitrust laws lies with the Department of Justice, the Federal Trade Commission, and the more than 40 states that have enacted antitrust legislation.

The federal government can be expected to bring civil and criminal felony cases each year against trade associations, including members and staff. Penalties are severe. Each individual can be fined up to \$100,000 and each member corporation can be fined up to \$1,000,000. Individuals are subject to imprisonment of up to three years. In addition, the government can impose civil sanctions such as cease and desist order, which result in government restraints on the activities of association members. This, in turn, inhibits association functions and may culminate in the dissolution of an association altogether.

In addition to lawsuits prosecuted by the government, competitors and consumers can bring civil treble damage suits. By way of illustration, the Sherman Act prohibits any price agreement regardless of purpose. Thus, if members of a trade association have an agreement as to price, they cannot justify the agreement by showing benefits to customers. Members will be found liable for treble damages for injury resulting from the excess price charged.

From a practical standpoint, trade associations should focus their concern on five principal antitrust problem areas. These are: price-fixing, division of customers, membership, standardization and certification and industry self-regulation.

Price-Fixing. Association members are most likely to violate this provision, and the government has evinced its greatest concern about the price-fixing prohibitions of the Sherman Act. A price-fixing violation can be inferred from the fact of similar price conduct by members, even though there is no written or oral agreement shown. If prices are fixed, it is no defense that the prices set are reasonable or that the ends sought are worthy.

Division of Customers. An agreement among members of an association to divide customers is, in and of itself, a criminal act. The antitrust laws prohibit any understandings or agreements between competitors or members of an association that involves the division or allocation of customers. Even informal agreements whereby one member agrees to stay out of another member's territory will constitute a violation of the antitrust laws.

Membership. A basic assumption about every trade association is that its members derive an economic benefit from membership. Denial of membership to an applicant may therefore constitute a restraint of trade in that such denial of an economic benefit limits the rights of an applicant to compete. Thus, membership criteria must be carefully drafted to avoid antitrust problems.

Standardization and Certification. An association that develops voluntary industry standards may face antitrust problems if the standard favors some and discriminates against others. Similarly, association certification activities that further interests of certain groups to the exclusion of others may result in antitrust problems.

Industry Self-Regulation. Associations commonly establish codes of ethics for their members, with procedures enforcing them. It is laudable for an association to promote high ethical standards, but antitrust problems may arise if an association's attempt to enforce its code of ethics causes economic injury.

Rules for Members

The best way to avoid possible infringement of the antitrust laws is to institute a program of compliance. At association gatherings, the association should resolve to avoid discussion of certain sensitive subjects. Informal gatherings that follow association meetings are particularly looked upon with great suspicion by the government.

Some topics that should be scrupulously avoided in all meetings:

1. Do not discuss current or future prices (be very careful of discussion of past prices).
2. Do not discuss what is a fair profit level.
3. Do not discuss an increase or decrease in price.
4. Do not discuss standardizing or stabilizing prices.
5. Do not discuss pricing procedures.
6. Do not discuss cash discounts.
7. Do not discuss credit terms.
8. Do not discuss controlling sales.
9. Do not discuss allocating markets.
10. Do not complain to a competitor that his or her prices constitute unfair practices.
11. Do not discuss refusing to deal with a corporation because of its pricing or distribution practices.
12. Do not attend informal sessions in which any of the above subjects are discussed.

With regard to antitrust risks present in membership and industry self-regulation, **membership policies** should avoid:

1. Restrictions on dealing with non-members.
2. Exclusions from membership, especially if there is a business advantage in being a member.
3. Limitations on access to association information, unless the limitation is based upon protection of trade secrets.

Industry self-regulation and **codes of ethics** should avoid:

1. Requiring refusal to deal with any member violating the association's code of ethics.
2. Arbitrary enforcement of the code.
3. Unreasonably severe penalties for violation of the code.
4. Regulations or policies that have price-fixing implications, such as preventing the advertising of prices.

Without being alarmist, trade associations should bear in mind that they are targets for government antitrust enforcers and private treble damage suits. By conducting their business openly and avoiding even the appearance that they are engaging in activity that might be seen to have an effect on prices or competition, trade associations can protect themselves from charges of antitrust violations.