

soundwaves

NAVIGATING THE FUTURE

Information and Risk Management Ideas for Not-for-Profit Organizations

Antitrust and Your Association

It's a serious business - understanding the law is key.

Although Ma Bell or Microsoft may pop into your mind when the subject of antitrust is raised, the reality is that corporations aren't the only ones who need to make sure they're on the right side of the law. Not-for-profits, too, have antitrust issues, and associations that don't pay attention could find themselves in legal jeopardy.

Any discussion about antitrust, however, needs to start with an understanding of the free-market system, which the Routledge Dictionary of Economics defines as "a market in which buyers and sellers are free to contract on whatever terms they wish, without government interference." Yet even Adam Smith, the great, great, great grandfather of free-market economics, understood that some restrictions were needed. Smith, whose 1776 book *The Wealth of Nations* argued for open markets and largely unfettered competition, also warned that "people of the same trade seldom meet together...but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

While most people don't believe that a conspiracy is lurking in every shadow or business meeting, U.S. law does recognize that some restrictions are needed to protect the smooth operation of the marketplace. And so modern antitrust regulation was born.

"A key to the free market is the ability to make independent business decisions," says Jeff Glassie, a partner in the Washington office of Shaw Pittman. "Antitrust laws came into place to prevent people from getting together and skewing the market in a way that is viewed as not appropriate." The best-known law is the Sherman Antitrust Act. Section 1 prohibits unreasonable restraints of trade; Section 2 prohibits monopolies. "Price fixing, market allocation, and concerted refusals to deal, also known as boycotts, are per se violations under Section 1. You can't even argue that the activity had some economic justification — it's just illegal," Glassie told *Soundwaves*.

Federal and state laws don't prohibit the exchange of information about prices, markets, competitors, or even business

debt. In fact, a 1925 Supreme Court decision stated that it is appropriate to exchange information. The problem arises if, rather than just sharing information, two or more parties decide to have an agreement on prices or decide they don't like a vendor and agree not to do business with him or her.

"Associations comprise groups of competitors, or groups of people who do the same type of work, so they've been called 'rife with opportunity for anti-competitive behavior' by the Supreme Court," explains Jeff Glassie. "Associations have also been called 'walking conspiracies' since people are getting together and having discussions in the context of their meetings that could lead to excluding certain competitors from business; or making decisions not to do business with some parties, or some groups that are in a certain category."

What does this mean for your association? Glassie stresses that associations need to take care at their meetings — whether a monthly meeting of the board or an annual meeting of the entire membership — that participants do not discuss prices, individual projects, financial relationships with various suppliers, or even who they do and don't like doing business with. Because any of these activities could become evidence that people are making agreements that could be construed as anti-competitive.

"No one is stupid enough to put stuff in writing anymore, except perhaps if it's in an e-mail," says Glassie. "It's all much more sophisticated now. But if you get together at an association meeting and there's a discussion about prices, and then the prices go up, that can be implied evidence that there was an agreement between everyone. It's that agreement that's the problematic factor in almost all of the cases that are brought."

Antitrust Policies

To mitigate the risk of problems, savvy associations have put in place antitrust compliance policies that prohibit any discussion that involves prices, individual business practices, specific competitors or future business plans.

The National Association of Chemical Distributors is one such association. Annemarie Baranick, NACD's Vice President of Operations, told *Soundwaves* that her association has antitrust guidelines in place.

"The guidelines include a general statement that certain activities, such as discussions about specific prices or pricing, are potentially suspect," explains Baranick. "But they also note that there is a public good that comes out of the interaction of potential competitors. Our activities can improve the delivery of goods and services, and can increase competition. This is good for business and consumers."

Indeed, NACD's antitrust guidelines state that "many activities among competitors ... are both legal and beneficial to the industry." In addition, they stress that "it is the responsibility of each member in the first instance to avoid raising improper subjects for discussion." The guidelines also counsel members not to discuss these issues "during social gatherings, incidental to any meetings, even in jest."

Other antitrust guidelines include similar language. The American Industrial Hygiene Association's guidelines say that "members should refrain from any discussion that could provide the basis for an inference that the members agreed to take any action that might restrain trade." They also note that "the basic principle to be followed in avoiding antitrust violations in connection with organization activity is: to see that no illegal agreements, expressed or implied, are reached or carried out through the organization."

Or take the antitrust compliance guidelines of the American Gas Association, which stress that "compliance ... is a serious business." They list a series of dos and don'ts for those engaged in AGA operations and activities, such as "do consult with council about any documents that touch on sensitive antitrust subjects such as pricing, market allocations, refusals to deal with any company and the like" and "do not have discussions with other member companies about limiting production."

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NACD's antitrust guidelines are referenced at every NACD meeting. Annemarie Baranick explains that once the meeting is called to order, whether it's a small board meeting or a large membership gathering, someone notes for the record (and the minutes) that the meeting is being conducted under the antitrust guidelines. A copy of the guidelines is also printed along with other meeting materials so that NACD members can refer to them as needed.

Finally, as a last precaution against inadvertently running into trouble, NACD's outside counsel attends all official meetings. This is a move that Jeff Glassie and other lawyers dealing with antitrust issues would doubtless support. For, as Glassie remarks, "It's one thing for individual association members to go to jail for violating antitrust laws, but there's no point in having your association dragged down too." ♦

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Certification and Standard Setting

If not managed properly, these activities can also lead to antitrust problems.

Whenver an association engages in an activity that is inherently exclusionary, from screening potential members to professional certification and peer review, there are often a few people who are not accepted for one reason or another. One or more just might be disgruntled enough to feel they have been conspired against and anti-competitively disadvantaged.

While this issue certainly has a high profile — and is a genuine risk — Jeff Glassie stresses that such claims are relatively rare. "While antitrust is a big potential claim," he says, "the other factor that associations need to keep in mind is due process. If you meet the substantive elements of due process, that goes a long way toward minimizing claims."

So what's an association to do? Glassie's rule of thumb is simple: "Make sure the process is reasonable, open, and fair."

Say, for example, that your association is engaged in certification activities, such as the Community Association Institute's professional community association manager (PCAM) or the American Society of Association Executives' certified association executive (CAE). You should ensure that you have in place a board or commission that objectively reviews the

program and sets the rules based on the advice of experienced consultants. In addition, it's important to ensure that your program has in place:

- exams that psychometrically sound;
- reasonable criteria (that are not meant to be exclusionary);
- procedures for appeal of exam results, denials of certification, disciplinary problems, and potential revocation of a certification previously granted.

It also helps if your certification is accredited by the National Organization for Competency Assurance or another accrediting arm.

Claims regarding standard-setting activities are also rare. But when an association is embroiled in a standard-setting lawsuit, the stakes can be very high.

"Organizations that set standards create unique exposures for themselves," says Michelle Holmes, a vice president at Rust Insurance. "As a result, boards need to weigh carefully whether or not to become involved in standard-setting activities." Any association that is involved in such activities, says Holmes, should purchase an errors-and-omissions policy to fill in any gaps in their insurance coverage. ♦



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