

Friends and Trade Associations: Antitrust How-Tos

Yee Wah Chin
ywchin@ingramllp.com

Trade associations are good. They disseminate useful information, which enables members to serve their customers better. Customers also benefit from access to trade association information because they may then be better able to choose among different products and services. In addition, trade associations often establish industry standards that make products easier to evaluate, buy and use. Finally, trade associations contribute to the transparency and efficiency of markets by gathering and distributing valuable historical market information, including average prices and sales volumes.

However, a trade association is a combination of competitors. The antitrust laws – the Sherman Act, Clayton Act and Federal Trade Commission Act at the federal level, and similar laws in many states – prohibit contracts, combinations, conspiracies, and other agreements in restraint of trade, as well as monopolization and attempted monopolization. An unlawful agreement or conspiracy can exist without any writing. An agreement may be oral or written, formal or informal, express or implied. Casual conversations or “off the record” remarks can provide the basis for an antitrust claim.

Therefore, participating in a trade association can also provide the opportunity for an antitrust violation. Moreover, trade associations can themselves violate the antitrust laws. For instance, when trade associations make decisions regarding membership, the collection of market data, and standard setting or certification procedures, they can expose themselves to antitrust risk. There have been numerous prosecutions of trade associations for violations of the antitrust laws.

To minimize antitrust exposure to a trade association, it is important to develop and maintain a culture of antitrust compliance among association staff and members. Association staff should be trained as trouble-shooters in legal compliance. They should be encouraged to seek legal counsel when in doubt; there are no stupid questions. It is far better to ask first than to try to stuff the genie back into the bottle later. Especially on special association projects such as surveys, codes of conduct, consortia, antitrust counsel should be brought in early and often. When planning meetings, the goals should be clear. Some topics are off-limits. Meeting agendas must be prepared and followed, and minutes should be kept. All should be reviewed by counsel before finalization. Counsel should attend meetings with potentially sensitive agendas.

A compliance program is key to a compliance culture. Counsel should be asked to develop and help implement such a program. Effective implementation means more than a written document distributed to new members and employees and annually re-distributed. There needs to be staff training on the program. An effective compliance program must also include oversight to ensure that there is compliance and processes to be followed when an offense is discovered. There should be a reporting system for potential problems. And there must be regular audits to monitor compliance.

Here are some general principles for trade associations:

- Don't permit or facilitate
 - Discussion of current or future prices, costs, output levels, member business plans, bids
 - Use of the association to negotiate commercial terms, even if the customer requests
- Ask antitrust counsel when the association engages in
 - Lobbying campaigns on sensitive topics such as industry capacity and prices
 - Data collection and exchange
 - Standard setting
 - Members' joint market activities
 - Restrictive membership requirements

In conducting association meetings:

- Keep in mind the association's antitrust guidelines
- Have agendas that do not raise antitrust questions. When in doubt, ask counsel in advance.
- Limit all discussion to the agenda
- Steer discussion away from sensitive topics
 - If a sensitive topic arises, say:
 - "We can't talk about that. Let's stick to the agenda."
 - "Let's go into that another time, after checking with the lawyers."
 - "We must check with the lawyers before talking any more about this."
 - Be prepared to shut down the meeting

Following these guidelines and keeping counsel involved will enable a trade association to benefit its members with little antitrust exposure.