

Trade Associations: Risky Business

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Trade associations can be positive influences. They disseminate useful information among members, 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. Therefore, participating in a trade association can provide the opportunity for an antitrust violation. All that is needed is a restraint of trade.

An unlawful agreement or conspiracy can exist without any writing. An agreement may be oral or written, formal or informal, express or implied. Even casual conversations or “off the record” remarks can provide the basis for an antitrust claim.

Therefore, do not discuss the following topics with competitors generally, or when participating in trade association activities:

- Future or present prices, discounts, rebates, allowances, premi-

ums, credit terms, or any other terms or conditions of sales within the industry, or information that will enable calculation of any of these items.

- Upcoming bids, tenders, solicitations or invitations to bid.

- The nature, extent, and cost of any services to be provided, including minimum rates, working periods, additional reimbursable charges (e.g. travel expenses and cancellation fees), or controlling when or how services are performed.

- Individual firms’ costs, inventories, production capacities, profits, profit margins, market studies or surveys, market shares, or business plans and strategies.

- Whether or not to sell to any particular customers or classes of customers.

- Whether or not to sell in any particular territories or markets.

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.

Here are some antitrust guidelines for trade associations in dealing with membership, data collection, and standard setting and certification procedures:

- Membership:

- Keep membership requirements reasonable, nondiscriminatory, and non-arbitrary.

- Expulsion is allowed, but only when the reasons are objectively valid

and reasonable. Implement realistic and timely appeals procedures if possible.

- Nonmembers must be granted membership or access to membership services when such access is necessary to compete in the industry on equal terms.

- Data collection:

- Clearly articulate the purpose and pro-competitive benefits of the program and keep the program focused on those criteria.

- Make sure participation is voluntary.

- Collect aggregated historical data. Do not exchange customer-specific information, estimate or project future price information, or identify in compiled data industry suppliers, customers, or other participants.

- Consult with counsel before undertaking any statistical or information exchange program.

- Standard setting and certification procedures:

- Participants should not discuss any specific company’s prices or pricing strategies, price advertising, discounts or rebates, or future product or service offerings.

- Participants should not discuss doing business with particular suppliers, customers or competitors, or complaints about particular firms or their business practices.

- Keep the standard or certification voluntary.

- Implement due process procedures, such as keeping a written record of meetings and the decisional process, as well as a fair and timely appeals process.

- Address all views and objections fairly and objectively. An industry segment, industry group, or company should not be allowed to control the process or its outcome.