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Agenda

- Antitrust Overview
- Antitrust Issues Impacting Nonprofit Organizations & Associations
- Practical Guidance

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Sherman Act § 1

15 U.S.C. § 1: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”



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Other Antitrust Laws

- Sherman Act § 2: Monopolization and attempted monopolization
- FTC Act § 5: Unfair methods of competition
- Foreign competition laws (approx. 130 jurisdictions)
- State laws; “Little FTC” Acts
 - Usually consistent with federal law
 - There are exceptions, *e.g.*, while there is no federal antitrust law against excessive pricing, price gouging during times of emergency can violate many states’ UDAP laws

Should Nonprofits Care?

- There is no “nonprofit exemption” from the AT laws
 - “It is beyond debate that nonprofit organizations can be held liable under the antitrust laws.” (U.S. Supreme Court, 1982)
- State laws have been held to apply, too
 - “...nonprofit corporations are not exempt from violations of the Michigan Antitrust Reform Act merely because they conduct business not for a profit.” (Court of Appeals of Michigan, 1994)
- FTC has jurisdiction over any entity “organized to carry on business for its own profit or that of its members.”
 - Frequently enforces sec. 5 against trade associations

Should Nonprofits Care (cont'd)?

Potentially Severe Penalties

- Sherman Act § 1 can be prosecuted by the DOJ criminally
 - For hard-core violations, corporate fines of up to \$100 million per violation or “alternative fine” of up to twice the gain or twice the loss caused by conspiracy
 - Individuals can face imprisonment for up to 10 years and fines up to \$1 million, or both, per violations
- Follow-on, treble damages civil lawsuits
- Bad press
- Business distraction; disruption to tax-exempt mission
- Injunctions, government monitoring of future conduct
 - On occasion, courts have ordered associations to disband

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Conduct Overview

- Hard core, *per se* antitrust offenses:
 - Agreements to fix prices;
 - Agreements to rig bids;
 - Agreements to allocate markets or limit production; and,
 - Some agreements to boycott suppliers, customers, or competitors.
- Other conduct is analyzed under the “rule of reason,” which balances the anticompetitive effects against the procompetitive benefits.
 - Generally requires proof that the conduct has led to anticompetitive effects in the relevant market.
 - Covers any conduct that is not a *per se* violation.
 - Most nonprofit association conduct is reviewed under the rule of reason test.

Organizational vs. Individual Liability

- There should not be personal liability for those who exercise ordinary and reasonable care in the performance of their duties, showing honesty and good faith.
- There may be personal liability for those who participate in or knowingly approve of an antitrust violation.
- Apparent authority – member violates the antitrust laws through the machinery of the association which doesn't have safeguards to prevent it.
 - *See Hyrdolevel* case (U.S. Supreme Court)
 - First Supreme Court case to impose treble damages on a nonprofit association for an antitrust violation



Antitrust Issues Impacting Nonprofits

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Information Sharing & Benchmarking

- Common among trade associations and professional organizations
 - Often pro-competitive and presents low risk
- Antitrust risk when info sharing can facilitate collusion
 - Direct exchange of current or forward-looking competitively sensitive data presents highest risk
- The DOJ and FTC have set a safety zone for exchanges where:
 - Survey is managed by a third party or by the trade association.
 - Survey data is at least three months old (no current or future prices).
 - At least five participants provide data, with no individual participant's data representing more than 25% on a weighted basis of the statistics.
 - Published data reported in an aggregated form.

Info Sharing – Human Resources Data

- “No-poach” hiring agreements
- Agreements to fix compensation and/or benefits
- Exchange of nonpublic salary or benefits information among nonprofits (including universities) competing for employees or faculty
 - Major focus of DOJ enforcement activity
 - See FTC/DOJ Antitrust Guidance for HR Professionals (Oct. 2016)
 - **April 13, 2020 FTC/DOJ Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets
- **NB:** HR Guidance specifically references a nonprofit fact pattern.
 - ***“It does not matter that your employer and the other organizations are not-for-profit; nonprofit organizations can be criminally or civilly liable for antitrust law violations.”***



Nonprofit Self-Governance

Codes of Ethics

- Many associations have codes of ethics regulating various aspects of the businesses of the members of the association.
 - Industry members themselves often have the best incentives and the knowledge to maintain the reputation of the industry.
 - Can improve the services offered to consumers and improve the truthfulness of advertising for example.



Code of Ethics

- This sort of code of conduct can also be anticompetitive:
 - Restrictions on truthful advertising especially relating to price;
 - Restrictions on competitive bidding;
 - Restrictions on the business hours of members;
 - Restrictions on business relationships with suppliers or competitors; and,
 - Restrictions on fees or output set by members.
- *See DOJ 2018 investigation of NACAC's Code of Ethics and Professional Practices*



Certification

- Certification programs can determine whether products comply with a standard or whether professionals have sufficient ability, education and experience.
- Under rule of reason, courts look at the process of how a certification program is implemented to determine if it helps customers or is a way to harm rivals.
- Factors to Consider:
 - Who are the decision-makers – competitors or customers or a mix?
 - Are the criteria objective and related to the function being certified?
 - Were the criteria applied consistently and without discrimination?
 - Were the association's procedures followed?
 - Important to the extent that it might show that a refusal to certify was due to anticompetitive goals.

Certification (cont'd)

- Recent litigation against nonprofit organization illustrates potential theory of antitrust violation
 - *Talone v. Am. Osteopathic Association* (D.N.J. 2018)
 - Plaintiff alleged that AOA “tied” continued certification to doctors’ purchase of association membership
 - Plaintiff survived AOA’s motion to dismiss; case settled with AOA agreeing to monetary and injunctive relief



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Lobbying Activity

- Under the *Noerr-Pennington* doctrine of antitrust immunity, joint action by trade associations or groups of competitors to influence government policy generally does not violate the antitrust laws.
 - This doctrine generally includes legislative activity, litigation in the courts, and proceedings before administrative bodies, which are protected under the First Amendment to the Constitution.
 - However, seeking government action to injure a competitor *directly* – rather than as a result of the government action – is not protected by this immunity (such as filing a baseless lawsuit to harm a competitor's reputation).
- While discussion of any public policy (*e.g.*, bill, law or regulation) is permitted under the law, members should always keep in mind the guidelines discussed earlier for association discussions (*e.g.*, avoid discussing anticompetitive concerted action).



Discussions at Association Meetings

- Proof of an anticompetitive agreement can start with proof of parallel conduct plus potentially illicit communications between rivals.
- Because association meetings generally involve communications between rivals, care must be taken to avoid illicit communications.
- There are a number of off-limit topics where discussions could lead to illegal agreements:
 - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price for company's products or services.
 - Whether to do business with suppliers, customers or competitors.
 - Complaints about business practices of other firms.
 - Confidential company plans regarding output decisions or decisions regarding future offerings.



Membership Requirements and Expulsion

- Membership restrictions are reviewed under the rule of reason (the concern is the potential for a group boycott).
- Key factors under the rule of reason
 - Are the rules objective and consistently applied?
 - Is due process given to those expelled?
 - Exception:
 - The membership rule or decision relates to access to some business input that is essential for effective competition; and,
 - There are no plausible justifications stemming from the association's pro-competitive purposes.



Standard-Setting

- Developing industry standards can be a beneficial function of an industry group.
- Adoption of a standard with anticompetitive intent to limit or prevent certain competitors from competing effectively could lead to antitrust liability.
- Guidelines:
 - Consider all relevant opinions.
 - There should be a justification for the development of a standard at the outset.
 - To the extent that the standard is going to limit access to the market for some firms, that exclusion must be justified.
 - Avoid allowing the process to be dominated by economically interested parties.
 - Members must disclose any proprietary interest (*e.g.*, a patent) they may have in a particular standard that the trade association adopts.



Practical Tips

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Compliance Is Key

- Implementation of an effective compliance program is essential. Components should include:
 - Antitrust compliance policy statement
 - Periodic training for employees to ensure that they can detect antitrust issues in the first instance to prevent them from occurring.
 - The commitment of high-level personnel to oversee the program and institute a culture of compliance.
 - Circulation of an antitrust statement in advance of association meetings.



Conducting Meetings

- Best Practices:

- Agendas and presentations should be prepared and distributed in advance of meetings.
- Care should be taken to keep to these materials at the meeting unless there is a good reason to depart.
- Minutes of the meetings should be prepared that concisely reflect the discussions especially when the discussions diverge from the pre-prepared materials.

- Be Mindful:

- Antitrust compliance is not only for formal meetings; it applies to hallway discussions, text chains, the golf course, and the post-meeting dinner

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Smart Writing

- Most antitrust cases are based on evidence found in both electronic and hard copy documents – e-mails, memos, reports, calendar entries, and notes. Thus, careful drafting is essential since ***anything*** written could be turned over to government law enforcers in an investigation or to plaintiffs' counsel in a private lawsuit
 - Assume anything written will be viewed in the worst possible light.
 - Limit writings to accurate facts and avoid impressions or characterizations.
 - Do not discuss or suggest anticompetitive conduct.

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QUESTIONS?

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