



Balancing Act: Navigating Antitrust Laws in the Nonprofit Sector

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- Gerald Stein, a seasoned antitrust litigator and former attorney at the Federal Trade Commission's Bureau of Competition, brings decades of representative and enforcement experience to DWT's commercial litigation team and transactions practices. Specializing in antitrust law and federal and state investigations and enforcement proceedings, Gerald represents and counsels clients in a variety of industries, including healthcare, life sciences, pharmaceuticals, and medical devices; retail, merchandise, and e-commerce; industrial equipment and chemicals; automotive, commercial airlines, and air cargo; and fintech.
- Gerald has thirty years of antitrust litigation and counseling experience. For almost a decade, Gerald investigated mergers and anticompetitive conduct for the FTC's Bureau of Competition, serving in senior positions on trial and pretrial teams for the government. In private practice, Gerald is his clients' go-to counsel for all aspects of antitrust litigation and counseling. Gerald also regularly represents clients in commercial litigation, including in class actions, multidistrict litigation, and federal appeals. Recognized by The Legal 500 in the areas of antitrust litigation, class action defense, and merger control, Gerald is well-versed in handling multibillion-dollar disputes and government investigations, having successfully represented major corporations in various sectors. He has analyzed and litigated complex issues involving price fixing, monopolization, boycotts, refusals to deal, exclusive dealing, and unfair and deceptive practices (among other issues), and provides strategic M&A, counseling, and compliance advice, as well as representation during government investigations and proceedings.
- Gerald has served in various roles for the American Bar Association's and New York State Bar Association's antitrust sections, has been a member of the NYSBA Antitrust Law Executive Committee since 2010, and has chaired or moderated myriad panels and workshops focused on litigation expertise and competitive markets. Gerald is regarded as a thought leader in M&A and antitrust law, having contributed to the New York Law Journal, the National Law Journal, Bloomberg Law, mLex, CompLaw, and other publications.

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- Denise Gold serves as VP, Corporate and Labor Legal Affairs, Associated General Contractors of America, Inc. (AGC), a nationwide trade association of commercial construction contractors and other companies that serve the construction industry.
- As AGC's sole in-house corporate counsel, Denise manages the organization's corporate legal affairs, supporting AGC's and its affiliates' business development, risk management, and compliance efforts. Her responsibilities include drafting association contracts, protecting association intellectual property, guiding association leaders on governance matters, and more. Denise also serves as AGC's subject-matter expert on labor and employment law. In this role, she provides association staff, members, and chapters with information, analysis, resources, and guidance on a broad array of traditional labor, employment, and HR legal and practical matters.
- Prior to joining AGC, Denise worked in private practice as a labor and employment lawyer and labor relations consultant in Detroit, Michigan. She earned her J.D. from Georgetown University Law Center in 1991 and a B.A. with distinction from the University of Michigan in 1988.
- Denise is a long-time member of ACC National Capital Region. She currently serves on the chapter's Board of Directors and as chair of the Community Service Committee, and she's a past co-chair of the Nonprofits & Associations Committee. She is also a proud graduate of ACC NCR's Leadership Academy.

Introduction

- This presentation will provide you a brief overview of antitrust laws and the importance of antitrust compliance for nonprofits. The presentation will include:
 - An overview of antitrust laws
 - Highlights of the current antitrust enforcement agenda
 - Special issues that affect trade associations
 - Practical antitrust compliance tips for trade associations and other non-profits
 - A recent litigation case study involving a trade association
 - An overview of the FTC's jurisdiction over nonprofits
- Our discussion will enable you to spot important issues that you should discuss with your clients

Agenda

01 Overview of Antitrust Laws

02 Current Enforcement Climate

03 Trade Association Antitrust Concerns

04 FTC Jurisdiction Over Nonprofits

05 Antitrust Compliance

06 Questions



01

Overview of Antitrust Laws

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Why You Need to Know About Antitrust

- The goal of antitrust laws is to protect and promote competition in the commercial marketplace.
- Today's antitrust enforcement regime is most concerned with protecting *competition—ensuring that markets are not unduly concentrated*

US Antitrust Laws and Their Enforcers

Antitrust Laws

- Sherman Act.
- Clayton Act.
- Robinson-Patman Act.
- Federal Trade Commission (FTC) Act.
- Foreign Trade Antitrust Improvements Act (FTAIA).
- State Antitrust laws.

Enforcers

- Department of Justice (DOJ) Antitrust Division.
- FTC Bureau of Competition.
- State Attorneys General.
- International agencies (for example, the European Commission's DG Competition).
- Private litigants: individuals, classes of people, and US and foreign governments.

Activities Covered by US Antitrust Laws

- Agreements and conduct that **unreasonably restrain trade**.
- Unlawful **monopolization**. Single-firm conduct that threatens to create or entrench monopoly power, or a transaction (such as a merger) that creates a monopoly.

Agreements That Unreasonably Restrain Trade Are Prohibited

In addition to a formal contract, an "agreement" can be **informal** or **inferred** from written or oral communications or a pattern of conduct. For example:

- Casual conversations.
- "Off-the-record" or "confidential" remarks.

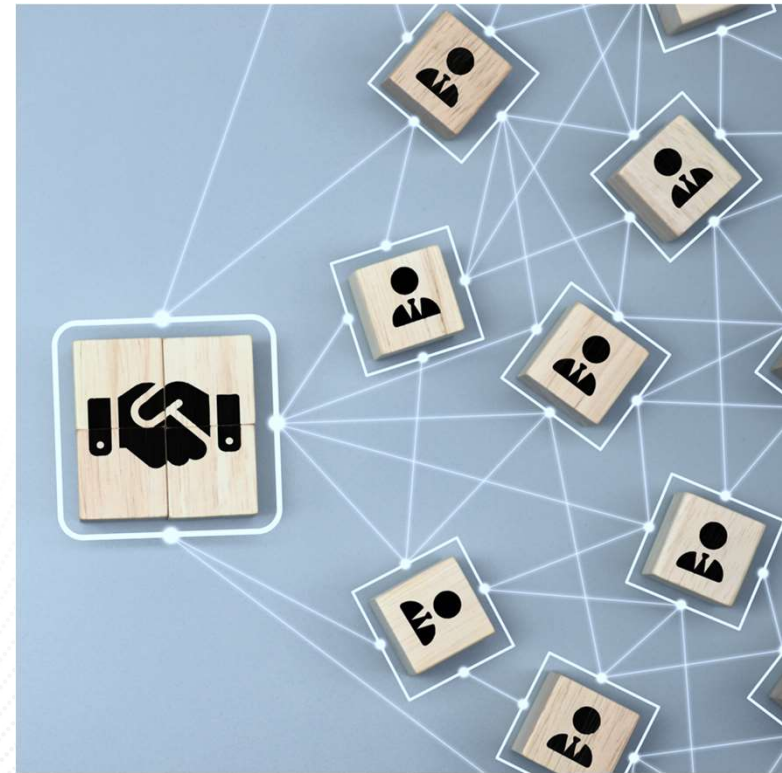
Agreements can only arise between two or more **independent** entities, not between a parent and wholly-owned subsidiary or commonly owned sister companies.

Monopolization

Section 2 of the Sherman Act prohibits:

- *Unlawful* monopolization.
- Attempts to unlawfully monopolize.
- Conspiracies to monopolize.

The exercise of **monopoly power** to exclude rivals and harm competition is an antitrust violation.





02

**Current Enforcement
Climate**

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In-House Counsel: Educate yourselves



ANALYSIS

In Era of Antitrust Paranoia, In-House Lawyers Must Look Beyond Usual Traps

"Education is really key Do you want to deal with a subpoena? Do you want to deal with a deposition?" said Erin Shencopp, senior counsel at Boeing.

April 25, 2024 at 11:56 AM

🕒 5 minute read

Antitrust



Chris O'Malley [↗](#)

Current Trends in U.S. Antitrust Enforcement

- U.S. Agencies are increasingly concerned whether transactions will permit companies to leverage their platforms to integrate across business lines and gain “undue economic and political power.”
- Goal is to protect “our economy and our democracy from unchecked monopoly power.”
- Focus has shifted away from consumer welfare (e.g., lower prices) and towards a “plurality of market participants” (regardless of pricing effect).
- Labor, labor, labor
- Healthcare, agriculture, retail industries, tech



Name of the Game: Deterrence

- We hear that corporate dealmakers are increasingly assessing the legality of the transaction at the beginning of the process rather than at the end, and that some mergers are no longer making it out of the boardroom if the antitrust risk is viewed as high. **As a law enforcer, deterring illegal deals is a mark of success.**



Office of the Chair

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Remarks by Chair Lina M. Khan
As Prepared for Delivery
American Medical Association National Advocacy Conference

February 14, 2024

President Biden's Executive Order

BRIEFING ROOM

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

MEMORANDUM FOR THE PRESIDENT

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better service, and lower prices.

Robust competition is critical to preserving America's role as the world's

A More Aggressive, Holistic Approach

FTC Chair Lina M. Khan:

- “[W]e need to take a **holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers**. Focusing on power asymmetries and the unlawful practices those imbalances enable will help to ensure our efforts are geared towards tackling the most significant harms across markets, including those directed at marginalized communities. . . . **[W]e need to orient our enforcement efforts around targeting root causes rather than looking at one-off effects**. This means focusing on structural incentives that enable unlawful conduct—be it certain conflicts of interest, business models, or structural dominance—as well as looking upstream at the firms that are enabling and profiting from this conduct.”

Assistant Attorney General Jonathan Kanter:

- “Antitrust law enforcement has not succeeded in keeping pace with these massive changes in our economy. In my view, the only way to reinvigorate antitrust enforcement is to adapt our approach to reflect the obvious economic and transformational technological changes that now define our economy. That is why we and our law enforcement partners are committed to using every tool available to promote competition. The American people deserve real antitrust enforcement that meets the economic challenges that we confront. . . . **[T]he challenge we face today from increased consolidation and decreased competition is serious. It will take an aggressive campaign of antitrust enforcement to meet the moment.**”



03

**Trade Association
Antitrust Concerns**

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Trade Association Antitrust Concerns

- Trade Associations bring together competitors to communicate and share information, which may raise two different categories of antitrust concerns:
 - (1) whether the trade association is properly formed:
 - open membership
 - objective criteria
 - not excluding competitors
 - (2) whether member participation in a trade association is proper:
 - Cannot use as a vehicle to form agreement with competitors
 - Must make independent decisions

Areas to Watch Out For

- **Price-Fixing**

- It is illegal to use a trade association to control or even suggest prices for members.
- It is illegal to use information-sharing programs as a disguised means of fixing prices.
- Watch out for message boards, listservs, and informal meetings, where members may independently share competitively sensitive information.

- **Division of Customers or Markets**

- Agreements—even informal—of one member to stay out of another member's territory are a per se violation of the antitrust laws.

- **Membership Criteria**

- Because membership in a trade association confers a competitive benefit, membership criteria should be carefully drafted to avoid unfairly or arbitrarily excluding industry participants.

- **Voluntary Industry Standards**

- Voluntary standards and certifications that favor some competitors and disfavor others may raise antitrust concerns.

- **Industry Self-Regulation**

- Codes of Ethic, Conduct, or Safety: Be wary of arbitrary or severe enforcement of the code, encouraging members to refuse to deal with code violators, and agreements with price fixing implications.

Case Study: Burnett v. The Nat'l Association of Realtors

Facts:

- The National Association of Realtors (“NAR”) controls access to the Multiple Listing Service (“MLS”) marketplace, where a vast majority of US residential real estates sales occur.
- NAR Rule Section 2-G-1 prohibits participants from “publish[ing] listings that do not include an offer of compensation” to any buyer-broker or “include general invitations . . . to discuss terms and conditions of possible cooperative relationships.”
- NAR’s Code of Ethics states that “REALTORS shall cooperate with other brokers except when cooperation is not in the client’s best interest.”

Allegations:

- Plaintiffs argued that NAR imposes an anticompetitive trade restraint that inflated residential real estate commissions by mandating all Subject MLS participants comply with Section 2-G-1 and its related provisions, conditioning the benefits of participation in the MLS system on adherence to Section 2-G-1.
- Plaintiffs argued that NAR adopted Section 2-G-1 and the Franchisor Defendants required their franchisees to follow Section 2-G-1, either explicitly or through NAR’s Code of Ethics.



Case Study: Burnett v. The Nat'l Association of Realtors

Current State:

- A jury verdict awarded \$1.8 billion in damages to Missouri home sellers.
- Ten copycat lawsuits were filed across the United States.
- On March 15, 2024, the NAR agreed to settle the suits in exchange for eliminating its commissions rules and a \$418 million payment.
- In April, the D.C. Circuit lifted restrictions preventing DOJ from investigating the NAR's Participation Rule and Clear Cooperation Policy.

Takeaways

- A code of ethics promulgated by a trade association may be evidence of a conspiracy in restraint of trade.
- Courts may not consider procompetitive justifications in defense of such codes.
- Even long-established practices are vulnerable to antitrust scrutiny.



Dos and Don'ts of Information Sharing

- **DO** use caution when hosting industry-wide activities. These include *trade associations*, standard-setting organizations, industry conferences, and trade shows.
- **MAKE SURE that information shared among members is from public sources or vetted third-parties** concerning competitors' pricing, compensation, products, operations, and strategic plans. Information is less likely to raise antitrust issues if it is:
 - Public
 - Historical
 - Aggregated
 - Not competitively sensitive
- **DO** clearly identify the **source** of any information relating to competitors' prices or plans to preclude any assumption that the information was unlawfully obtained as part of a price-fixing agreement.
- **Trade associations should NOT** facilitate or enable members to discuss or exchange competitively sensitive information or business plans whether through meetings or chat boards, etc.
- **Members should NOT** exchange information concerning:
 - pricing;
 - discounts;
 - marketing and strategy plans;
 - customer and supplier selection;
 - product or service offerings and innovation;
 - business operations and performance;
 - growth and contraction plans; or
 - current or future wages, salaries, benefits, or other compensation terms and policies.
- **DON'T** talk about pricing or other competitively sensitive information with other industry participants at joint events, including *trade shows and trade associations*. Information that may be of concern is:
 - Non-public
 - Current or forward-looking
 - Disaggregated or firm specific
 - Competitively sensitive

In re RealPage, Inc., Rental Software Antitrust Litigation (No. II) 3:23-md-03071 (Md. Dist. Tn.)

- Plaintiffs allege rental housing markets throughout the United States have been tainted by an illegal price-fixing conspiracy, facilitated by RealPage's revenue management software
 - Brought claims under Section 1 of the Sherman Act as well state law claims
- Court agreed with plaintiffs that none of the offered rationales were procompetitive under the antitrust laws at the motion to dismiss stage
- Court did rule that the student renters hadn't alleged a straightforward enough anticompetitive standard for *per se* treatment



US v. Agri Stats, 0:23-cv-03009 (D. Minn.)

- Agri Stats is a third party that collects price, cost and production information from the nation's largest meat processors
- Agri Stats processes the information, then creates and distributes comprehensive reports that contain pricing, margins, inventories, and operations
- Agri Stats provides insights about production, costs, and pricing
- By refusing to sell this information to the processors' customers, farmers, workers, or consumers, the U.S. Department of Justice alleges that Agri Stats "enables and encourages processors to use its asymmetrical information exchanges to weaken competition, curb production, and increase prices for purchasers."
- Joined by MN, NC, CA, TN, TX, UT
- Motion to dismiss is denied on May 28, 2024



DOJ's Views on Information Sharing in Algorithmic Pricing Cases

- *In re RealPage* (November 2023)
 - Concerted action can be proven in various ways and does not require proof of parallel conduct and plus factors. Conduct was per se unlawful although landlords and RealPage algorithm company were not competitors because competitors “cannot simply get around antitrust liability by acting through a third-party intermediary.”
- *Karen Cornish-Adebiyi, et al. v. Caesars Entertainment, Inc., et al.* (March 2024)
 - Direct communications are not required to establish agreement, and merely recommending Casino-Hotel starting prices through third-party algorithm constitutes price fixing.
- *McKenna Duffy v. Yardi Systems, Inc., et al.* (March 2024)
 - It is per se illegal for competing landlords to jointly delegate key aspects of their pricing to a common algorithm, even if the landlords retain some authority to deviate from the algorithm's recommendations.





04

FTC's Nonprofit Jurisdiction

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FTC's Jurisdiction over Nonprofits

- Rather than rely exclusively on non-profit tax-exempt status, the FTC applies a two-part test to determine whether a corporation is organized for profit and thus within its jurisdiction:
 1. Adequate nexus between an organization's activities and its alleged public purposes; and
 2. Net proceeds are properly devoted to recognized public, rather than private, interests.

Factors to Watch For


- Existence of private benefit or private inurement.
- Engagement in business on behalf of for-profit partners or organization
- Contracting with for-profits partners or entities
- "Unreasonable" compensation paid to founders, board members, their families, or other insiders

Non-Competes and “No-Poach” Agreements

- Non-compete clauses typically prevent former employees from working for a competitor of the former employer for a specific length of time in a limited geographical area.
- Non-solicitations (“no-poach” agreements) are designed to prevent competitors from stealing each other’s employees.
- Non-competes and no-poach agreements can be lawful if they are justified, narrowly tailored, and ancillary to a lawful agreement.
- However, naked non-competes and no-poach agreements may expose entities to civil and criminal liability.

Federal Judge Partially blocks FTC nationwide ban on Non-Compete Agreements

Banning noncompetes:
Good for workers, businesses, and the economy




The FTC estimates that banning noncompetes will mean

- ▶ **More innovation:** an average of 17,000-29,000 more patents each year
- ▶ **More startups:** a 2.7% increase in new firm formation - that's 8,500+ new businesses per year
- ▶ **Higher earnings:** typical workers earn \$524 more per year

Judge delays ban on noncompete agreements for small number of employers

By Jeanne Sahadi, CNN
3 minute read · Updated 7:06 PM EDT, Wed July 3, 2024

f X M 9 comments



FTC CRACKDOWN

FTC: NONCOMPETE CLAUSES BAN WOULD BOOST WAGES, LOWER HEALTH CARE COSTS & GENERATE NEW BUSINESS

E DEPT. ARGUES THERE IS NARROW CONFLICT BETWEEN IDAHO'S LAW AND FEDERAL S

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05

Antitrust Compliance

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Essential Features of an Effective Antitrust Compliance Program

- While there is no checklist or formula for evaluating the effectiveness of a corporate compliance program, three fundamental questions guide the DOJ's analysis:
 - Is the corporation's compliance program well-designed?
 - Is the program being applied earnestly and in good faith?
 - Does the corporation's compliance program work?



9 Areas for an effective compliance program

- The design and comprehensiveness of the program
- The culture of compliance within the trade association
- Responsibility for, and resources dedicated to, antitrust compliance
- Antitrust risk assessment techniques
- Compliance training and communication to staff and to membership
- Monitor and audit techniques, including continued review, evaluation, and revision of the antitrust compliance program
- Reporting mechanisms
- Compliance incentives and discipline
- Remediation and the role of the compliance program in discovering the violation

Antitrust Guidelines for Trade Associations

- Trade Association by-laws
 - Reviewed by antitrust counsel
 - Objective membership rules
 - Due process for revoking/denying membership
- Information sharing
 - Procompetitive reasons
 - Sharing is optional
 - Aggregated/anonymized
 - Objective basis for distribution (i.e., who gets to use the information)
- Codes of ethics/conduct
 - should not contain terms that restrict competition
 - Standard setting
 - Should be objective
 - Should not invite collusion
- Meetings
 - Presence of antitrust counsel
 - Objective criteria to attend meetings
 - Agendas
 - Detailed meeting minutes to reflect date, duration, location, attendance, topics discussed

Encourage Members to Maintain Antitrust Compliance

- Is your compliance program current?
- What is its format?
- How often is it updated and reviewed?
- Who is responsible for integrating policies and procedures into the business?
- How are the policies incorporated into the company's internal controls?
- What guidance is provided to relevant employees regarding the antitrust risks they face, what constitutes an antitrust violation, and document retention and destruction?

Most importantly: Make Compliance Relatable





QUESTIONS

