ANTITRUST AND ASSOCIATIONS

INTRODUCTION

This *Handbook* is intended to provide practical guidance on the antitrust laws to people involved in trade and professional associations and attorneys who counsel or represent associations or their members.

The antitrust laws of the United States are designed to preserve competition by prohibiting monopolistic practices and agreements that unreasonably restrict competition. In doing so, the antitrust laws define certain boundaries of interaction between competitors, and among buyers and sellers in the marketplace. Because trade and professional associations are frequently associations of competitors or of customers and suppliers, associations and their counsel must view the antitrust laws and antitrust compliance through a somewhat different lens than the one used when analyzing individual enterprise activities.

The antitrust laws do not stand as an obstacle to appropriate association activities. Collaborations among members of trade and professional associations are not only commonplace, but integral to the U.S. economy. The courts and the antitrust enforcement agencies recognize the intrinsic value of associations as a means for enhancing competition, thereby contributing to the economy and the public interest. Association activities run the gamut from collection and exchange of information to standard-setting activities to establishing codes of conduct to joint ventures in research and development or purchasing. But although most of these collaborative business activities promote efficiency and benefit consumers, some do not. For example, a conspiracy to fix production volumes by trade association members—a type of competitor collaboration—is clearly anticompetitive and illegal under the antitrust laws. Standard setting can confer many pro-competitive benefits but also can raise antitrust concerns in certain situations.

Where the line lies between legal and illegal behavior and between reasonable (procompetitive) and unreasonable (anticompetitive) conduct is the focus of this *Handbook*. It is designed to provide a timely, substantive, and practical guide to counselors desiring to minimize antitrust risk and to educate associations and their members and participants accordingly.
Chapter I provides an overview of U.S. antitrust laws and enforcement regimes that could apply to association activities. The Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, the National Cooperative Research and Production Act, and the Foreign Trade Antitrust Improvements Act, all relevant to associations, are summarized in the chapter. Also summarized are the 2000 Competitor Collaborations Guidelines and the 1996 Health Care Statements issued by the federal antitrust agencies. The chapter concludes with a discussion of Federal Trade Commission and U.S. Department of Justice enforcement of the antitrust laws and state antitrust laws and enforcement activities.

Chapter II provides an analytical framework for identifying association activities under the antitrust laws. Association activities, by their very nature, often constitute a contract, combination, or agreement, as those terms are defined under the Sherman Act. As such, one of the threshold elements of Section 1 of the Sherman Act may readily be established. This emphasizes for association counselors the other element under Section 1, whether the conduct at issue unreasonably restrains trade. Whether conduct is illegal will be determined by the nature and purpose of the particular association conduct, as explored in this chapter. Certain conduct, such as price fixing and allocation of markets or customers, is per se illegal. The legality of most association activities, however, will be evaluated under a "rule of reason" analysis. Under the rule of reason, associations usually can engage in a variety of activities without serious antitrust concerns. Later chapters give guidance on how counselors can advise their client when engaging in specific activities.

Chapter III discusses the range of liabilities and penalties for antitrust violations, both civil and criminal, that can be levied against trade associations, member companies, and individual employees or executives of associations and their members. Associations and their members may face civil damages, criminal fines, imprisonment, and administrative sanctions for violating the antitrust laws, all discussed in this chapter. The actions of an association may expose the association itself to antitrust liability, but association liability is not limited to such situations. Actions of members may give rise to association liability; likewise, association members also may be liable for the association's actions. The chapter discusses the potential exposure of associations
and their members in private antitrust actions and government antitrust enforcement actions.

Chapter IV considers core issues for every trade or professional association: membership criteria and expulsion. The determination of when denial of membership or expulsion may be anticompetitive is generally made using a rule of reason analysis. This chapter summarizes the factors applied by the courts under the rule of reason, then suggests guidelines for membership criteria, disciplinary proceedings, and expulsion. The chapter also discusses antitrust issues concerning nonmember access to association services and participation in trade shows, with suggested guidelines for associations faced with these issues.

Chapter V addresses the antitrust concerns raised by information collection and dissemination by trade associations. Agency guidance and consent decrees, along with a substantial body of judicial precedent, provide the criteria for determining the legality of an information exchange. The chapter discusses these criteria, including the type of information being shared, the structure of the market in which the information is exchanged, the purpose of the exchange, the age and form of the data, the public availability of the information, and whether the information is exchanged directly among competitors or through a third party administrator. The chapter concludes by noting that these criteria also apply to benchmarking activities.

Chapter VI examines the scope of the Noerr-Pennington doctrine, which provides antitrust immunity for certain lobbying activities and other solicitations of competition-restricting government action, and the Parker doctrine, which provides immunity for certain actions taken pursuant to state direction. Associations often engage in government-related activities, including lobbying, standard setting, administrative advocacy, and litigation, which can have competition-restricting consequences and thus may trigger antitrust claims. The chapter explores the ability of trade and professional associations faced with such lawsuits to use the Noerr-Pennington doctrine as a defense. Associations may also engage in government-directed action, and the applicability of the Parker doctrine as a defense to association activities also is addressed in the chapter.

Chapter VII provides guidance on industry self-regulation and association codes of ethics and advertising rules. Codes of ethics that regulate business conduct can enhance competition by prohibiting unethical business practices, such as deceptive advertising. Sometimes,
they can be a pretext for private agreements among competitors to unreasonably restrict competition. The chapter reviews decisions of the courts and the Federal Trade Commission to probe the distinction drawn between procompetitive and anticompetitive codes, and then provides practical guidance to counsel when an association is considering codes of ethics or advertising rules.

Chapter VIII provides a framework for the discussion of competitive issues related to standard setting. Standard setting by associations or private standards-development organizations can have substantial procompetitive benefits. The procompetitive effects of standards development may include lower information costs, expanded use of technologies to the advantage of consumers, increased compatibility and interoperability of complementary technologies, and enhanced entry by new participants in relevant markets. On the other hand, standard setting has attracted antitrust scrutiny because it may provide a vehicle for an economically interested firm, or group of firms, to restrict competition. The chapter reviews the antitrust intellectual property interface, which is fundamental to assess the competitive issues related to the use of patented technology in standards. In recent years, the issue of "hold up" (the assertion of patent rights after a standard has been adopted where consumers of products using the standard are harmed by the patent holder charging higher royalties) has been addressed in a number of court cases, not always consistently. This chapter explores these cases, recent business review letters issued by the Department of Justice, and Federal Trade Commission challenges to alleged intellectual property hold up in standard setting.

Chapter IX considers the relevant legal principles affecting other types of competitor collaborations that may take place in the association context, including joint purchasing, joint marketing, and joint research and development ventures. The chapter summarizes the current enforcement standards of the Federal Trade Commission and the Department of Justice as set forth in the Competitor Collaborations Guidelines, which were issued jointly by the agencies in 2000, and the guidance provided for joint purchasing activities by the Health Care Statements, issued jointly by the agencies in 1996. The chapter concludes with some practical recommendations with regard to counseling on joint research, purchasing, and marketing activities.

Chapter X provides insights and strategic considerations for handling government investigations and litigation. The applicability of the attorney-client privilege in association settings depends on, among
other things, whether there is an attorney-client relationship and whether the privilege has been waived. The chapter begins with a discussion of general principles, including the work product and joint defense doctrines in the association context. The chapter provides practical advice for associations involved in government investigations and civil litigation, whether as a defendant, plaintiff, or third party.

Chapter XI discusses the elements of an effective association antitrust compliance program, including appropriate standards for behavior, management responsibilities, training, oversight, disciplinary action, and document control. The Federal Organizational Sentencing Guidelines outline key elements of an effective compliance program. In addition to policy statements and compliance guides, individualized for the association, an effective compliance program must include compliance and ethics training and active oversight of the association’s compliance. The chapter provides practical advice on antitrust compliance, including listing the basic elements found in most association antitrust compliance guides, why and how to conduct an antitrust audit, and the role of document retention and control policies in an association’s compliance program.

Finally, the Appendices offer sample association document retention guidelines, antitrust compliance policies, and meeting guidelines.

This Handbook is designed to help counsel for associations and their members understand and minimize the antitrust risks associated with association activities. The contributing authors and editors hope that association practitioners will find this Handbook to be an informative, reliable, and useful tool in their practice.