



Financial Lines

How Antitrust Laws and Regulations Affect Your Not-for-Profit

Antitrust laws were created to encourage a competitive, free and open marketplace where the customer benefits from lower prices and higher quality goods and services.

U.S. antitrust laws date back to 1890 with the Sherman Act,¹ which was established to prevent restrictions on competition. It was followed by the Federal Trade Commission Act² and the Clayton Act in 1914.³ These three acts constitute the most prominent part of federal antitrust law in the United States.⁴ Individual states may also have their own antitrust laws.

What Not-for-Profit Leaders Need to Know

Navigating antitrust law is crucial in making decisions for any organization, including not-for-profits (NFPs).⁵ Let's explore how these regulations affect NFPs and what steps you should take to remain compliant while achieving your mission.

The Sherman Act prohibits any unreasonable restraint on trade and any conspiracy to constrain trade.⁶ Price-fixing agreements between competitors are considered a per se violation of the Sherman Act, meaning that "no defense or justification is allowed."⁷

The primary antitrust law that concerns NFPs is the Sherman Act, specifically Sections One and Two.⁸ Section One outlaws "[e]very contract ... or conspiracy" that restrains trade.⁹

Key Factors for Trade Associations and Professional Groups

Trade association NFPs should be aware of the potential for Sherman Act violations as the association's purpose may be to facilitate communication and collaboration among competitors. This creates opportunities for members to reveal information and enter into agreements based on shared knowledge, which could violate antitrust laws.¹⁰

An area of concern outlined by the Federal Trade Commission (FTC) is the sharing of price information or any business data among industry group members. Industry pricing information exchange could potentially lead to uniform pricing and reduce market competition. To prevent this, before industry meetings, trade and professional groups should alert members to antitrust laws. Sharing of past data is acceptable, but sharing of future pricing can cause concern. Careful consideration should be taken when sharing any non-public information such as your member organizations' plans to raise the prices of products or services.

Previously, one way to avoid the appearance that members were conspiring to interfere with competition was to have a third-party vendor collect data anonymously to share with the organization's members. However, the U.S. Department of Justice (DOJ) Antitrust Division has changed its guidance, and it is unclear whether using third parties to collect data anonymously is currently allowed. An organization considering market benchmarking methods should consult antitrust legal experts.¹¹

Case Example

The DOJ brought a lawsuit against Agri Stats, Inc. (Agri) in September 2023. Agri collects data from competing meat processors and provides them with a report outlining each competitor's pricing, margins, inventories and operations that is not shared with farmers, workers, consumers or customers of the meat processors. In its complaint, the DOJ alleges that the result of Agri's actions is to "weaken competition, curb production, and increase prices for purchasers" in violation of the Sherman Act. The DOJ brought the action to stop Agri from continuing its anticompetitive scheme while also restoring competition to the agricultural market of the United States.¹² The court did not grant Agri's motion to dismiss and is continuing with the discovery process.¹³

Membership Requirements Can Create Conflicts

Another issue NFPs need to consider is requiring organizational membership to obtain professional credentials. This is an area of concern because it may be seen as "tying," which is the selling of one good conditioned on the customer buying another good. This may obligate the customer to buy a product that they did not want, thus controlling trade and possibly violating the Sherman Act.¹⁴

Case Example

The plaintiffs are osteopaths and members of the American Osteopathic Association (AOA), a professional organization for licensed osteopaths. The organization recognized the plaintiffs as certified professionals, providing them with a level of esteem within the community. Prospective customers relied on that certification when hiring the osteopaths, and to maintain the certification, the association required the plaintiffs to maintain a membership.¹⁵

Plaintiffs brought an action against the association, alleging that the requirement that they maintain a membership to remain certified was an unlawful act of “tying.” The plaintiffs argued that this was a violation of antitrust law because if the plaintiffs lost their certification, it would interfere with their ability to compete while the organization was unfairly profiting. The only way to be certified was to be a member of the organization, which prevented plaintiffs and others from seeking membership of other professional organizations, interfering with competition among them.¹⁶ The matter settled in favor of the plaintiffs with the association no longer requiring professionals maintain membership in the organization to maintain their professional licenses.¹⁷

Action Items

NFPs can follow these steps to navigate the complexities of antitrust laws while fostering a competitive and fair marketplace.

- Avoid behaviors and agreements that may appear to be an unreasonable restraint on trade.
- Implement robust antitrust compliance statements and programs with a clear reporting policy and employee training.
- Inform association members by providing an antitrust statement prior to meetings.
- Be aware of potential “tying” practices for membership and credentials.
- Consult with an attorney when engaging in market benchmarking.¹⁸

Additional Resources

Joining a Nonprofit Board? Know Your Fiduciary Duties

Board Roles and Responsibilities

Visit cna.com.

1 15 U.S.C. § 1

2 15 U.S.C. §§ 41-58, as amended

3 15 U.S.C. §§ 12-27

4 The Antitrust Laws, The Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>

5 *Id.*

6 *Id.*

7 *Id.*

8 Bender, Joseph E., “Associations Can Run Afoul Of Anti-Trust Rules”, The NonProfitTimes (September 27, 2012), https://www.thenonprofittimes.com/npt_articles/associations-can-run-afoul-of-anti-trust-rules/

9 15 U.S. Code § 1, Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/uscode/text/15/1>

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11 “Spotlight on Trade Associations”, Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations>

12 “Justice Department Sues Agri Stats for Operating Extensive Information Exchange Among Meat Processor”, Office of Public Affairs: U.S. Department of Justice (September 28, 2023), <https://www.justice.gov/opa/file/1316576/dl?inline>

13 Eadie Jim, “Court Orders Agri Stats to Proceed with Discovery in Antitrust Case”, Swineweb (May 22, 2024), <https://www.swineweb.com/latest-swine-news/court-orders-agri-stats-to-proceed-with-discovery-in-antitrust-case/>

14 Jerald A. Jacobs and Alvin Dunn, “Early-stage development in Talone v. American Osteopathic Association puts nonprofit organization membership and credential links on antitrust alert”, Pillsbury Alert, <https://www.pillsburylaw.com/en/news-and-insights/nonprofits-beware-of-antitrust-troubles.html>

15 Albert Talone, et al. v. The American Osteopathic Association, United States District Court District of New Jersey, Case Number 1:16-cv-04644-NLH-JS (D.N.J. 2017)

16 Alvin Dunn, “The Antitrust Risk You May Be Overlooking”, The Center for Association Leadership (September 16, 2019), [https://www.bing.com/search?q=Alvin+Dunn%2C+%2The+Antitrust+Risk+You+May+Be+Overlooking%2C+The+Center+for+Association+Leadership%2C+September+16%2C+2019+and+Albert+Talone%2C+et+al.+v.+The+American+Osteopathic+Association%2C+United+States+District+Court+District+of+New+Jersey%2C+Case+Number+1%3A16-cv-04644-NLH-JS+\(D.N.J.+2017\)&cvid=c72555bb1b2c481aa36f8440314dcab6&gs_lcrp=EgZjaHJvWUyBggAEEUYOTIICAQEQ6QcY_FXSAQg3MTIlyajBqNKgCALACAO&FORM=ANAB01&PC=U531](https://www.bing.com/search?q=Alvin+Dunn%2C+%2The+Antitrust+Risk+You+May+Be+Overlooking%2C+The+Center+for+Association+Leadership%2C+September+16%2C+2019+and+Albert+Talone%2C+et+al.+v.+The+American+Osteopathic+Association%2C+United+States+District+Court+District+of+New+Jersey%2C+Case+Number+1%3A16-cv-04644-NLH-JS+(D.N.J.+2017)&cvid=c72555bb1b2c481aa36f8440314dcab6&gs_lcrp=EgZjaHJvWUyBggAEEUYOTIICAQEQ6QcY_FXSAQg3MTIlyajBqNKgCALACAO&FORM=ANAB01&PC=U531)

17 “American Osteopathic Association details settlement agreement in class-action lawsuit”, AOA (July 27, 2018), <https://osteopathic.org/2018/07/27/american-osteopathic-association-details-settlement-agreement-in-class-action-lawsuit/>

18 Eva Cole and Lauren Duxstad, “Antitrust 101: Best Practices for an Effective Antitrust Compliance Program”, Winston & Strawn LLP, <https://www.winston.com/en/competition-corner/antitrust-101-best-practices-for-an-effective-antitrust-compliance-program.html>

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