

Association-Sponsored Market Research Programs: Common Pitfalls, Antitrust Risks, and Opportunities

October 7, 2013
Venable LLP
Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Michael Hayes, Veris Consulting, Inc.

Ian Santo-Domingo, Veris Consulting, Inc.

Andrew Bigart, Esq., Venable LLP



Presentation



Common Pitfalls and Antitrust Compliance Risks with Association-Sponsored Market Research Programs

Monday, October 7, 2013, 12:30 p.m. – 2:00 p.m. EDT
Venable LLP, Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:
Michael Hayes, Veris Consulting, Inc.
Ian Santo-Domingo, Veris Consulting, Inc.
Andrew Bigart, Esq., Venable LLP



Upcoming Venable Nonprofit Legal Events

October 24, 2013 – [The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations](#)

November 14, 2013 – [Donor Intent, Restricted Funds, and Gift Acceptance Policies: What Every Nonprofit Needs to Know to Effectively Accept and Utilize Contributions](#)

December 5, 2013 – [Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws](#)





Agenda

- Introduction
- Value of Market Research Programs to Associations
- Antitrust Laws Applied to Information Exchanges and Benchmarking
 - Overview
 - Recent Developments
- Case Study
- Best Practices and Practical Applications



© 2013 Venable LLP

VENABLE[®]_{LLP}



Value of Market Research Programs to Associations

© 2013 Venable LLP

Value of Market Research Programs

- Provides important member benefit
- Establishes association's industry expertise
- Elicits confidence – reports based on actual data submitted by participants
- Provides business intelligence metrics not available elsewhere
- Tracks industry growth in specific segments



Additional Benefits of Market Research Programs

- Becomes a differentiator when competing associations exist
- Stimulates active member participation
- Promotes the association and industry through press releases and data-driven marketing material
- Creates non-dues revenue
 - Participants pay to participate
 - Participants can purchase customized reports
 - Sold to interested parties / subscription program
 - Additional topics for meetings / webinars



Antitrust Laws Applied to Information Exchanges and Benchmarking

U.S. Antitrust Laws

Overview

▪ Federal Laws

- The U.S. federal antitrust statutes of principal concern are Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act (“FTC Act”).
 - Section 1 of the Sherman Act prohibits all contracts, combinations, and conspiracies that unreasonably restrain trade.
 - Section 2 of the Sherman Act prohibits monopolization and attempted monopolization.
 - Section 5 of the FTC Act prohibits unfair methods of competition.
- U.S. antitrust laws apply to conduct outside the U.S. that has an effect on trade or commerce in the U.S.

▪ State Laws

- The states typically interpret and apply their respective laws in a similar fashion to the federal laws. In general, strict compliance with the federal antitrust laws will result in compliance with the state laws.

U.S. Antitrust Laws

Federal Enforcement Agencies

- The Federal Trade Commission and U.S. Department of Justice share federal jurisdiction over antitrust enforcement.
- Other agencies such as the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Transportation, the Federal Maritime Commission, and the Federal Reserve also have limited antitrust enforcement authority.
- Current federal antitrust agency leadership:

Edith Ramirez, Chairwoman of the FTC



William Baer, Asst. AG for Antitrust, DOJ



© 2013 Venable LLP

U.S. Antitrust Laws

Anticompetitive Conduct

- Certain conduct is per se illegal under the antitrust laws without regard to its justification:
 - Agreements to set prices or components of price; agreements to rig bids; agreements to allocate markets or limit production / output; and most agreements to boycott suppliers, customers, or competitors.
- Other conduct is analyzed under the “rule of reason” by balancing the anticompetitive effects against the procompetitive justifications.
 - This type of conduct generally requires proof that the defendant possesses market power.

© 2013 Venable LLP

U.S. Antitrust Laws

Penalties

■ Companies

- Companies may be fined up to \$100 million per antitrust violation. Courts also may impose an “alternate fine” of up to twice the gain to the perpetrator or twice the loss to the victim as a result of illegal behavior.
- Courts or government antitrust agencies may impose permanent restrictions limiting business activity.
- Private actions – by customers or competitors who show they were harmed by the perpetrator’s actions – may result in treble damages suits and the award of attorneys’ fees.

■ Individuals

- Violations of the Sherman Antitrust Act are felonies.
- Individuals may be imprisoned for up to ten years, fined up to \$1 million, or both, for each violation.



Information Exchanges/Benchmarking

Rule of Reason Analysis

- Information exchanges and benchmarking are reviewed under the Rule of Reason test.
- The main antitrust concern is that the exchange of information may facilitate a collusive agreement (e.g., price-fixing). Key considerations include:
 - More scrutiny for the exchange of
 - Pricing or cost data;
 - Output levels;
 - Business strategies / future forecasts;
 - Detailed or firm specific information; and
 - Information regarding a highly concentrated industry.
 - Potential for pro-competitive benefits:
 - Helps provide information to consumers;
 - Promotes business planning and investment; and
 - Supports R&D.



Information Exchanges/Benchmarking

FTC/DOJ Safe Harbor

- **FTC / DOJ Statements of Antitrust Enforcement Policy in Health Care (1996):** Sets up antitrust Safety Zone for information exchanges.
 - Managed by independent third party;
 - Data more than three months old;
 - Data aggregated from at least five providers;
 - No single provider's data represents more than 25% of the information provided; and
 - Aggregation of data prevents identification of individual provider data.
- **Antitrust Guidelines for Collaborations Among Competitors (2000):** Recognizes that the exchange of information can have procompetitive benefits, but regards exchange of competitively sensitive information (price, cost, output, etc.) as inherently risky because it can facilitate direct or indirect collusion.

© 2013 Venable LLP



13

Information Exchanges/Benchmarking

European Union

- **European Commission**
 - Articles 101 and 102 of the Treaty on the Functioning of the European Union generally mirror Sections 1 and 2 of the Sherman Act.
 - Focus on the full context of the information exchange, including:
 - Nature of the market;
 - Nature of the information exchanged (type and age);
 - Manner in which the information is exchanged; (aggregate data / publicly available); and
 - Potential for procompetitive benefits.
- **Other Foreign Competition Laws**
 - Many foreign competition regimes are modeled on U.S. and EU antitrust principles. Most EU member states also have their own antitrust regimes.

© 2013 Venable LLP



14

Information Exchanges/Benchmarking

Recent Developments

- Recent developments in line with settled law . . .
 - FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13)
- . . . But with some new wrinkles?
 - FTC Consent Order with Sigma Corp. (1/4/12)
 - *Cason-Merenda v. Detroit Medical Center*, 862 F.Supp.2d 603 (E.D. Mich. 2012); *Fleischman v. Albany Medical Center*, 728 F.Supp.2d 130 (S.D.N.Y. 2010)
- **BOTTOM LINE:** The starting point for structuring any information exchange or benchmarking program is the DOJ and FTC safe harbor.



Information Exchanges/Benchmarking

Recent Developments

- **FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13)**
 - Trade association of six licensed national money transmitters.
 - Money transmitters are subject to certain federal and state laws governing money laundering, terrorist financing, etc.
 - TMSRT proposed an information exchange consisting of a database with information on former U.S. sending and receiving agents whose contractual relationships were terminated due to failure to comply with applicable law or money transmitter contract terms.
 - Proposed Information Exchanged
 - Name of the Exchange Member that supplied the terminated agent;
 - Agent’s name and contact information, including information on owners, directors, and management; and
 - Date and reason of termination.



Information Exchanges/Benchmarking

Recent Developments

- **FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13) (cont’d.)**
 - Exchange Structure
 - Independent, third-party vendor;
 - Open to all licensed non-bank money transmitters;
 - Voluntary participation;
 - Members retain right to decide unilaterally whether to work with an agent terminated by another exchange member.
 - FTC Determination
 - Goals of the information exchange did not appear to be either directly or indirectly anticompetitive or designed to further coordination on any significant competitive factor (price, cost, or output);
 - Exchange included safeguards (Safe Harbor); and
 - Exchange appeared that it could generate efficiencies that would enhance consumer welfare.

© 2013 Venable LLP



Information Exchanges/Benchmarking

Recent Developments

- **FTC Consent Order with Sigma Corp. (1/4/12)**
 - FTC alleged that Sigma and two competitors participated in a price fixing agreement for imported ductile iron pipe fittings (DIPF). In addition, the three companies allegedly exchanged information on their DIPF monthly sales through an association.
 - Consent Order imposes restrictions on future exchanges that go beyond the DOJ/FTC Safe Harbor requirements:
 - Data must be at least **six** months old.
 - No communications related to the information exchange other than communications (1) occurring at official meetings, (2) relating to topics identified on a written agenda circulated in advance, and (3) **occurring in the presence of antitrust counsel**.
 - All aggregated industry data communicated to a contributor must be made **publicly available**.

© 2013 Venable LLP



Information Exchanges/Benchmarking

Recent Developments

- **In the Matter of Bosley, Inc. (2013)**
 - FTC alleged that Bosley, Inc. and Hair Club, Inc. exchanged competitively sensitive information on:
 - Future product offerings;
 - Price floors, discounting;
 - Business strategies; and
 - Operations and performance.
 - The Consent Order
 - Prohibits the future exchange of competitively sensitive information with competitors.
 - Requires annual compliance training for all officers, executives, and employees who have contact with competitors or have sales, marketing, or pricing responsibilities for Bosley's hair transplantation operations.

Information Exchanges/Benchmarking

Recent Developments

- **Nat'l Ass'n of Music Merchants, Inc. (2009)**
 - FTC alleged that NAMM organized meetings at which members shared information about prices and strategy.
 - The Consent Order:
 - Bars NAMM from coordinating or aiding price exchanges among members or forming anticompetitive agreements.
 - Requires NAMM to adopt an antitrust compliance program.
 - Requires NAMM antitrust counsel to review written materials, prepared remarks related to price terms and MAP policies, and to provide guidance on complying with competition laws.

Information Exchanges/Benchmarking

Recent Developments

- **U.S. v. Professional Consultants Insurance Company, Inc. (2005):**
 - Professional Consultants Insurance Company Inc. (PCIC), and its actuarial consulting firm members, agreed to stop sharing certain information on the use of contractual limitations of liability (LOL) in their dealings with clients
 - PCIC was owned and managed by three actuarial consulting firms.
 - DOJ alleged that employee benefit clients were denied significant competition among the actuarial consultants in their setting of contract terms.
 - The consent decree prohibits PCIC and its members from exchanging LOL information, except that subject to certain safeguards.

Information Exchanges/Benchmarking

Recent Developments

- **Cason-Merenda v. Detroit Medical Center, 862 F.Supp.2d 603 (E.D. Mich. 2012); Fleischman v. Albany Medical Center, 728 F.Supp.2d 130 (S.D.N.Y. 2010)**
 - Series of cases brought by nurses alleging that hospitals exchanged wage data without meeting the Safety Zone requirements and that the data was relied on by defendants in deciding to reduce RN compensation.
 - In 2012, *Cason-Merenda* went to trial even though limited evidence on actual coordination. Information on current and future wages exchanged through:
 - Direct contacts between HR employees;
 - Industry organizations and meetings; and
 - Third party salary surveys.
- **Todd v. Exxon, 275 F.3d 191 (2d Cir. 2001)**
 - Employee class action against 14 oil and petrochemical industry employers alleging a conspiracy to set salaries at artificially low levels.

Case Study

Starting a New Program

- Dental Implant Market Data Collection Program (DIMDC) – founded in 2010
- Growing industry with lack of reliable industry information
- Objective: To improve the quality of market data available

New Program Action Items

- Get buy-in from major industry players
- Draft Standard Operating Procedures
 - Submission process and timing
 - Data retention policy
 - Reporting definitions
 - Disclosure guidelines
 - Report distribution and usage guidelines
 - Meeting schedule and future program changes
- Create recruiting material and recruitment schedule for potential participants
- Conduct legal review
- Initial data collection/publication of first report



Recruitment Material

ABOUT DIMDC

PROGRAM BACKGROUND

DIMDC is a unique participant driven program that seeks to reveal the industry size for dental implant products. The DIMDC program tracks quarterly shipments of Dental Implants and Abutments for over 20 countries in Europe, Asia-Pacific, North America and Latin America. These cost effective reports are only available to participating manufacturers.

Conducted by Veris Consulting, Inc., an independent third party fiduciary with no vested interest in the performance of the dental implant industry, DIMDC reports provide participants with confidential and reliable data on today's industry trends within the dental implants market.

YOUR DATA IS SECURE AND CONFIDENTIAL

Participants submit data through a secure web portal. Veris follows strict disclosure rules to protect this data and only industry aggregate totals are ever published. Veris has broad experience in market data collection and is treated with confidential data from hundreds of companies in many industries.

RELIABLE SHIPMENT DATA

The DIMDC Industry Statistics provide superior market information by using actual sales data submitted by participating manufacturers. All data is thoroughly reviewed each quarter prior to publication. In addition, Veris conducts annual data reviews of each participant's internal reporting procedures.

FOLLOW INDUSTRY TRENDS

The DIMDC reports show the Unit Volume, Price the Unit and Value for Dental Implants and Abutments shipped each quarter for over 20 countries. Using this information, program participants can see industry growth trends in these markets and are able to track their company's market share.

CURRENT PARTICIPANTS



Frequently Asked Questions

What do DIMDC reports offer that industry programs do not offer?

- DIMDC reports provide market information in over 20 countries in the same format for accurate comparisons between countries.
- Data is collected using the general ledger currency and the exchange rate (USD and Euro) using their currency rates. Data is published for all countries in local currency, USD and Euro. This allows companies to compare sales between countries in a common currency and avoid a foreign exchange (FX) and you can be confident that currency fluctuations are not affecting the trends.

How do DIMDC reports compare to other industry reports?

- DIMDC reports are more accurate because they are based on actual sales figures submitted by participating companies. Unlike other industry reports, no secondary sources are required to build the DIMDC reports.
- Veris works closely with the finance departments of all DIMDC participants to ensure the data at the product level to ensure accuracy.
- The DIMDC reports are published more frequently and are priced competitively with other sources of dental implant market statistics.

What if I need to see confidential information in the report?

- The report categories are determined by the participants and will continue to grow and evolve in the future. All participants are encouraged to provide input in order to improve the structure and quality of the DIMDC reports.
- Report modifications are discussed and determined annually at the DIMDC Steering Committee Meeting.

How do companies benefit from the report?

- DIMDC reports only published aggregated industry results. No individual company data is ever revealed. Published categories in a report must have at least three participants. If a category has one (1) or two (2) participants they must give approval to show the category's category.
- All DIMDC security rules are reviewed and approved by DIMDC outside legal counsel (PfeifferWeiss Executive Derivative LLP).

How do DIMDC reports compare to other industry reports?

- DIMDC reports track the overall market and break out sales by company size based on annual global sales revenue. The current report categories are Large (above \$20M), Medium (\$2M - \$20M) and Small (less than \$2M).
- Having an understanding of the market trends in each of these categories helps companies price and position their products accordingly.
- As current participants levels the Medium and Small categories are combined to protect company confidentiality. As the participation grows, these categories will be created out.

How do DIMDC reports compare to other industry reports?

- Regional reports provide insights into additional markets, allowing you to view other countries where you currently do not operate in the future.
- Report publication is available on a country or regional basis.



Legal Review

- Purpose: Identify antitrust risks and provide guidance to minimize those risks
- Interviews with industry participants to determine procompetitive reasons
- Considered EU and U.S. antitrust laws
- Offered revisions to SOP and guidelines for future meetings
- End Result: Participants were confident that program risks were minimal and moved ahead with data collection



Best Practices and Practical Applications

Best Practices

Antitrust Compliance Program

- Implementation of an effective compliance program is essential
 - Preparation of a user-friendly antitrust compliance manual
 - 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 all association meetings



Best Practices

Antitrust Manual

- Antitrust Compliance Manual should provide a basic overview of the antitrust laws and how they apply to the company and its employees.
- Information Exchange Guidelines
 - Prohibit discussions or exchanges of information among competitors concerning prices, costs, terms of sale, business plans, suppliers, customers, territories, capacity, production, or any other competitively sensitive information without prior written approval from counsel.
 - Any information exchange or benchmarking programs should have a legitimate business purpose and not produce significant anticompetitive results.
 - Ensure that information exchange program complies with DOJ / FTC Safe Harbor, or that any departures are approved in advance by counsel.



Best Practices

Role of Third-Party Fiduciary

- Protect the association
- Protect members / individual companies
- Adhere to antitrust and data retention rules
- Facilitate committee meetings and discussions
- Enforce / recommend market research program best practices
- Ensure data accuracy (data reviews)
- Work closely with member companies to ensure accurate and reliable data



31

© 2013 Venable LLP

Best Practices

Structuring the Information Exchange

- Program funding and potential revenue
- Establish meeting procedures
- Establish program and disclosure rules
- Establish process for participation changes
- Determine appropriate report timing
- Develop copyright language and report usage guidelines
- Develop value-added reports



32

© 2013 Venable LLP

Best Practices

Funding Models

- Participants pay and reports are available to participants only
- Participants pay and reports are sold to interested parties (subscription program)
- Free to participants and reports are sold to membership only
- Free to participants and reports are sold to interested parties (subscription program)



Best Practices

Pricing Considerations

- Availability of public data
- Other industry sources
 - BEA, Census, other associations / companies
- Depth of data published
 - How much detail?
- Perceived value to members
 - Importance to strategic direction



Best Practices

Meeting Procedures

- Market research committee representative of overall membership
 - Suggest changes to keep the program relevant
- Antitrust guidelines review
- Legal counsel presence
- Keep accurate meeting minutes



Best Practices

Program Rules and Disclosure of Information

- Number of participants required to publish specific line items
- Market share limitations
- Submission deadlines
- QA procedures
- Publication dates
- Procedures for data revisions, category changes, and estimations
- Annual program review process



Best Practices

Participation Changes

Participants may not be constant throughout the year.
How do we keep an apples to apples comparison throughout?

- Estimation procedures
- Use of projection factors
 - Pros: projects for the entire market and produces a reliable trend line.
 - Cons: uses a constant estimate throughout the year and is less accurate for detail lines.



Best Practices

Report Timing

- Determine report frequency
 - Annual / quarterly / monthly / weekly
- Determine when to publish report results
 - Rules regarding the publication of certain types of data
 - Public company members
 - Financial information
 - Market pricing or production data



Best Practices

Copyright, Confidentiality and Usage Guidance

- Data is generally not subject to copyright protection, but can be protected contractually.
- Creative, original arrangement / presentation of data can be subject to copyright protection.
- Be sure to secure copyright assignment from all contributors of “copyrightable contributions,” if any.
- If there are restrictions on distribution by recipients, be sure to include those in a usage agreement.
- Also be sure to include in a usage agreement an affirmative obligation to not copy or otherwise infringe the association’s ownership interests.

© 2013 Venable LLP



Best Practices

Increasing Report Value

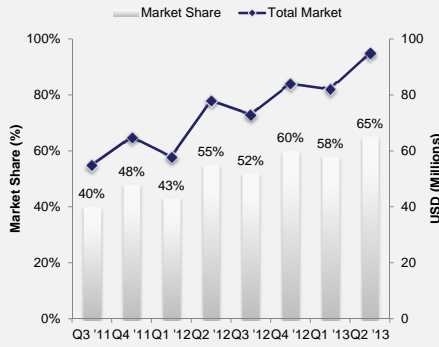
- 24/7 Access to reports
- Customized Market Share Reports
- Executive Summaries
- Forecasting
- Industry summary reports
- Webinars and breakout sessions at conferences to discuss results and other analyses

© 2013 Venable LLP



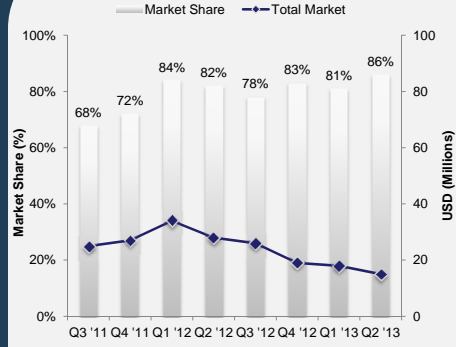
COMPANY MARKET SHARE DASHBOARD

Product Type X



MAT Value	Q3'11-Q2'12	Q3'12-Q2'13	Growth
Total Market	256	334	30%
Market Share	47%	59%	+12 pts

Product Type X



MAT Value	Q3'11-Q2'12	Q3'12-Q2'13	Growth
Total Market	114	78	-32%
Market Share	77%	81%	+4 pts

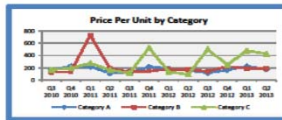
© 2013 Venable LLP



Large Equipment Association Large Equipment Sales Statistical Summary Page 2nd Quarter 2013 Total Industry



The Large Equipment industry had an over all decrease of 0.5% in unit amounts from 2nd Quarter 2013 and 2nd Quarter 2012. The total dollar amount increased by 1.5% in the same period and the price per unit raised to \$289 in 2nd Quarter 2013 from \$167 in 2nd Quarter 2012.



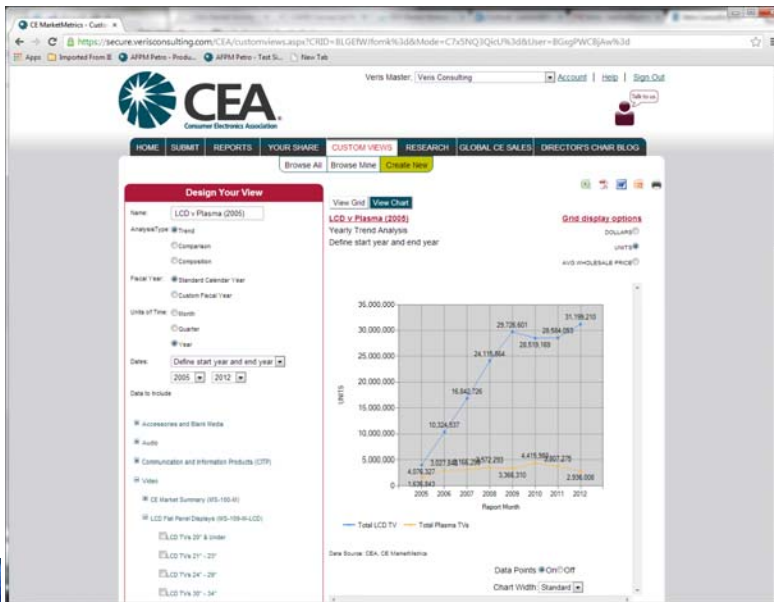
The Price Per Unit by Category stayed consistent for Category A. There was a decline in price per unit for all three categories in 2nd Quarter 2013 compared to 1st Quarter 2013. Category C had a large increase in price per unit in 2nd Quarter compared to the previous year.

Regional at a glance: 2010 to 2013 Quarterly Sales Dollars

Region	Q3'10	Q4'10	Q1'11	Q2'11	Q3'11	Q4'11	Q1'12	Q2'12	Q3'12	Q4'12	Q1'13	Q2'13	YTD 2013	YTD 2012	% Chg
Pacific	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	0%
Midwestern	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	0%
Southeast	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	0%
South Atlantic	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	0%
West	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	0%
TOTAL	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	15,123	0%



© 2013 Venable LLP



Questions?

Jeffrey S. Tenenbaum, Esq.
 Venable LLP
jstenenbaum@Venable.com
 t 202.344.8138

Michael Hayes
 Veris Consulting, Inc.
mhayes@verisconsulting.com
 t 703.654.1482

Ian Santo-Domingo
 Veris Consulting, Inc.
isantod@verisconsulting.com
 t 703.654.1415

Andrew Bigart, Esq.
 Venable LLP
aebigart@Venable.com
 t 202.344.4323

To view Venable's index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings, www.Venable.com/nonprofits/events.

Speaker Biographies





Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

AREAS OF PRACTICE

Tax and Wealth Planning
 Antitrust
 Political Law
 Business Transactions Tax
 Tax Controversies and Litigation
 Tax Policy
 Tax-Exempt Organizations
 Wealth Planning
 Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
 Credit Counseling and Debt Services
 Financial Services
 Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, and one of only eight in the 2013 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-14 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was named as one of Washington, DC's "Legal Elite" in 2011 by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
 American Academy of Physician Assistants
 American Alliance of Museums
 American Association for the Advancement of Science
 American Bureau of Shipping
 American College of Radiology
 American Institute of Architects
 Air Conditioning Contractors of America
 American Society for Microbiology
 American Society for Training and Development
 American Society of Anesthesiologists
 American Society of Association Executives
 American Staffing Association
 Association for Healthcare Philanthropy

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Association of Corporate Counsel
Association of Private Sector Colleges and Universities
Automotive Aftermarket Industry Association
Brookings Institution
Carbon War Room
The College Board
Council of the Great City Schools
Council on Foundations
CropLife America
Cruise Lines International Association
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Goodwill Industries International
Homeownership Preservation Foundation
Human Rights Campaign
The Humane Society of the United States
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
Jazz at Lincoln Center
The Joint Commission
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
Money Management International
National Association of Chain Drug Stores
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements
United Nations High Commissioner for Refugees
Volunteers of America

HONORS

Recognized as "Leading Lawyer" in the 2012 and 2013 editions of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-14

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year

Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 500 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 500 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



Andrew E. Bigart

Associate

Washington, DC Office

T 202.344.4323 F 202.344.8300

aebigart@Venable.com

AREAS OF PRACTICE

Antitrust
 Antitrust Investigations
 Healthcare
 International Trade and Customs
 Advertising and Marketing
 Advertising and Marketing
 Litigation
 Privacy and Data Security
 Foreign Corrupt Practices Act and
 Anti-Corruption
 Political Law
 Regulatory
 Government Contracts

INDUSTRIES

Consumer Financial Protection
 Bureau Task Force
 Government Contractors
 Consumer Products and Services
 Maritime
 New Media, Media and
 Entertainment
 Nonprofit Organizations and
 Associations
 Cybersecurity

Andrew Bigart is an associate in Venable's Regulatory Practice Group with a focus on antitrust law, consumer protection, international trade, and business counseling. Mr. Bigart assists clients with ongoing regulatory compliance matters, civil and criminal investigations, and litigation before the Federal Trade Commission, the Department of Justice, the Department of Commerce, and the Department of the Treasury, and various other federal and state agencies and courts. Mr. Bigart has significant experience in counseling clients on antitrust matters, mergers and acquisitions, and advertising and marketing practices, including data privacy and compliance with state and federal consumer protection laws.

Mr. Bigart also counsels clients on complying with federal laws governing international trade, including the Foreign Corrupt Practices Act, the Foreign Agents Registration Act, and federal export controls administered by the Department of Commerce and the Department of the Treasury. His work also includes representation of clients before the Committee on Foreign Investment in the United States (CFIUS) in CFIUS' review of transactions that could result in control of a U.S. business by a foreign person.

Mr. Bigart has a significant amount of Washington regulatory experience. During law school, he served as a legal intern with the Federal Communications Commission and as a law clerk in the Office of Chief Counsel of the Small Business Administration.

Prior to attending law school, Mr. Bigart worked on legal and economic policy issues at the U.S. Department of State and the Federal Trade Commission.

SIGNIFICANT MATTERS

Mr. Bigart has worked with clients in a variety of industries including financial service companies and organizations, multi-national corporations, healthcare providers, energy companies, nonprofit associations, and online marketers and advertisers. Mr. Bigart has followed recent developments in these industries closely and his strong background in administrative law allows him to help clients navigate the dynamic regulatory landscape.

BAR ADMISSIONS

District of Columbia

Virginia

EDUCATION

J.D., *cum laude*, American University, Washington College of Law, 2006

Federal Circuit Editor, *American University Law Review*, 2005-06

B.A., *cum laude*, College of William and Mary, 2003

MEMBERSHIPS

American Bar Association,
Antitrust Section



Mike Hayes
Director

Mr. Hayes joined Veris Consulting, Inc. in 2001 and since that time has used his extensive experience serving various associations performing highly complex data management and statistical analysis. He manages various projects that collect thousands of data points from dozens of participants on a monthly basis. Mr. Hayes works closely with Veris staff to produce effective, in-depth, value added and cost-effective reports for clients. He is responsible for assuring the timeliness and quality of each of these projects.

The final reviewer of survey data and performs final reporting quality checks, Mr. Hayes effectively communicates with clients and coordinates and runs client meetings among association executives and their member companies.

Mr. Hayes has a Bachelor of Business Administration from James Madison University and is currently working towards his MBA at George Mason University. He is also active in the American Society of Association Executives and the Marketing Research Association. He served two years as a member of the American Society of Association Executives Research Committee.

Ian Santo Domingo
Director

Mr. Santo Domingo joined Veris Consulting, Inc. in 2002. He is a project leader and hands-on analyst on many of Veris' compensation and benefits benchmarking studies, statistical programs, and tradeshow audits. He also directs major online market research programs and complex industry statistical reports.

For almost ten years, Mr. Santo Domingo has managed the Council of American Survey Research Organization's (CASRO) online compensation and benefits survey and financial report program. He also leads the audit team for the Consumer Electronics Show, the largest consumer show in the country. His clients include: the Consumer Electronics Association, American Fuel & Petrochemical Manufacturers, Licensing Executives Society and the Packaging Machinery Manufacturers Institute.

Mr. Santo Domingo is active in the American Society of Association Executives and served for two years as a committee member in their Diversity and Inclusion Initiative. He earned his MBA from George Washington University and his Bachelor's degree in Economics along with a concentration in Finance from The University of Virginia.

Additional Information



Articles

August 2013

Association Membership and Program Restrictions and the Antitrust Laws: Don't Stumble Out of the Gate

This article was also published in Association TRENDS on August 22, 2013.

AUTHORS

Andrew E. Bigart
Robert P. Davis
Jeffrey S. Tenenbaum

RELATED PRACTICES

Antitrust

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2013 2009 2005
2012 2008 2004
2011 2007 2003
2010 2006

Trade and professional associations benefit society by promoting various industries, professions, and other interests. To realize their goals, however, associations must sometimes limit membership in the association or association-sponsored programs. A recent court decision, *Abraham v. American Quarter Horse Association*, No. 2:12-cv-00103-J (E.D. Tex.), highlights how association restrictions can sometimes run afoul of the antitrust laws, especially where the restrictions are intended to, or have the effect of, foreclosing a competitor's ability to compete in the market. In this regard, the case shines a light on the tightrope that associations walk when trying to balance membership and programmatic needs against the limits imposed by the antitrust laws.

This article provides a brief overview of the case, followed by suggested best practices for associations to minimize the antitrust risk of membership and program restrictions.

Summary of *American Quarter Horse Association*

In *American Quarter Horse Association*, the plaintiffs, who breed cloned horses, alleged that "Rule 227 (a) of the American Quarter Horse Association ["AQHA"] Regulations, which prohibited the registration of any horses produced by the cloning process and their offspring, violates Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2)...." Specifically, as explained by the court, the plaintiffs argued that elite Quarter Horse breeders controlled the Association's rules committee, and that "[t]hese breeders" opposed cloning and sought to exclude clones from the registry to "keep prices for their own horses high by avoiding competition...."

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. Most association conduct, including membership and program restrictions, is analyzed under the rule of reason, which balances the procompetitive benefits of the challenged conduct against the potential anticompetitive harm. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization, claims that require proof of both monopoly power (the power to control prices or exclude competition) and the willful acquisition or maintenance of that power through "predatory" or "exclusionary" conduct.

In *American Quarter Horse Association*, the plaintiffs argued that the registry restriction "precluded competition" from cloned horses and "established unnecessary and insurmountable barriers to entry into the market." In terms of competitive harm, the plaintiffs alleged that most shows and races required horses to be registered with AQHA in order to compete. The AQHA defended the rule, in part, on grounds that the registry restriction was designed to promote and preserve the integrity of the breed and to further the association's internal management – goals to which most, if not all, trade associations can relate. The AQHA also cited a number of cases that upheld similar breed registries or membership requirements. *Jack Russell Terrier Network of Northern California*, 407 F.3d at 1032, 1035, for example, held that a breed registry and its local clubs had a common goal in pursuing the best interests of the Jack Russell Terrier breed and protecting the current and future value of that breed as determined by the breed registry's standards.

Managing Your Association's Membership and Program Requirements and the Antitrust Laws

In light of the *American Quarter Horse Association* decision, associations should review their current membership standards and the requirements for participating in an association-sponsored program (such as a certification or accreditation program) for compliance with the antitrust laws. This is particularly important for "dominant" associations or those that control access to a facility deemed (fairly

or not) to be essential to competing in a market. Even smaller associations should be mindful of the potential impact of a rule limiting membership or program participation. No association – no matter its size – wants to end up with the fate of its membership or program standards in the hands of a jury. The following are basic steps that every association should keep in mind when promulgating or enforcing association membership or program restrictions.

In denying the defendant's summary judgment motion, however, the court found that "a factfinder could determine that the AQHA has monopoly power over the economically viable Quarter Horse market because its rules control not only market participation but whether, in turn, a horse is valuable or relatively worthless." The court also found that the question of the rule's alleged procompetitive benefits could "best be dealt with at trial." The jury, following trial, rendered a verdict against AQHA, concluding that the rule was exclusionary and not reasonably tailored to achieve AQHA's legitimate procompetitive goals.

Consider the Antitrust Risks Before Imposing a Restriction.

An association's membership or program restrictions should be, to the greatest extent possible, narrowly drawn, nondiscriminatory, objective, fully articulated, and uniformly applied. Restrictions should be implemented only to the extent necessary to further a legitimate procompetitive purpose. In addition, to limit the risk of "disgruntled" members or others raising due process or other similar arguments, associations should provide prospective members/participants with (a) a clear statement of the association's requirements, (b) notice of a potential adverse decision, (c) an opportunity to respond, and (d) an opportunity to appeal any adverse final decision.

Maintain Oversight of Committee Activities.

A subtle, but important, takeaway from *American Quarter Horse Association* is the need for an association's officers, directors, and staff management to exercise oversight of committee activities. According to the court, "Plaintiffs...produced evidence that the AQHA actually made its decisions to defend Rule 227(a) through the competitor-controlled SBR Committee, and that even if the Board did not relegate control to the Committee on cloning matters, it did not review or question the Committee's unanimous recommendations."

In practical terms, associations should exercise oversight by implementing the following basic steps:

- Adopt a formal antitrust policy in which the association affirms its commitment to abide by the spirit and the letter of federal and state antitrust laws. The policy should be distributed to (and possibly signed by) the association's officers, directors, employees, and representatives. An association should refrain from enforcing "unwritten" policies that restrict membership or program participation.
- All restrictions should be reviewed for full compliance with the association's governing documents.
- Require association meetings to have an agenda circulated in advance, and that minutes of all meetings properly reflect the actions taken at the meeting. Stop any meeting (formal or informal) where improper subjects are being or will be discussed.
- Ensure that any proposed board, committee, or staff recommendations or decisions with potential antitrust implications are reviewed in advance by in-house or outside counsel.

Be Careful What You Say and Do.

From both the antitrust and corporate perspectives, an association should operate in a transparent manner subject to written policies and procedures. At the same time, however, anything said or written by a member or employee, including e-mails, text messages, and the like, may end up before a jury in the event of litigation. In *American Quarter Horse Association*, for example, the plaintiffs presented evidence that AQHA members had previously expressed concerns about competition from cloned horses. Needless to say, an association's statements, actions, and writings should be as clear and unambiguous as possible to avoid misinterpretation or misconstruction after the fact. This rule carries through to statements made and actions taken at or in connection with association-sponsored conferences, trade shows, cocktail parties, dinners, and social events, and on association-sponsored electronic communication services such as listservs and other similar forums.

* * * * *

The *American Quarter Horse Association* case is a reminder for associations of the potential antitrust risk of membership and program restrictions. To minimize this risk, associations should review their membership and program eligibility and participation rules carefully to ensure that they are appropriate

for the market and narrowly drawn to further a legitimate procompetitive purpose of the association.

* * * * *

For more information, contact Andrew Bigart at aebigart@Venable.com, Rob Davis at rpDavis@Venable.com, or Jeff Tenenbaum at jstenenbaum@Venable.com.



AUTHORS:



Lisa Jose Fales
ljfales@Venable.com
202.344.4349



Robert P. Davis
rpdavis@Venable.com
202.344.4514



Andrew E. Bigart
aebigart@Venable.com
202.344.4323

The Antitrust Implications of Non-Compete Agreements

The Federal Trade Commission's (FTC) recent settlement in *In the Matter of Oltrin* prohibiting use of a geographic non-compete by two companies in the bulk bleach industry is a reminder that the antitrust agencies look closely at non-competes, especially when the parties to the non-competes have market power.

What Is a Non-Compete Agreement?

Non-compete agreements are typically found in employment contracts, agreements for the purchase of a business or certain assets of a business, or in service provider agreements. For example, an employer may require an employee – particularly if highly skilled – to sign a non-compete agreement restricting the employee from competing against the employer for a limited period of time after the employee leaves the company and within a certain geographic area. Similarly, a company purchasing the assets of a competitor may include a provision in the purchase agreement prohibiting the competitor from competing in the relevant geographic or product market for a period of time.

Treatment of Non-Competes Under the Antitrust Laws

The primary federal antitrust statutes, the Sherman Act (15 U.S.C. § 1 *et seq.*) and the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*), prohibit contracts, agreements, and conduct that unreasonably restrain trade (as well as monopolization and attempted monopolization). Non-competes are generally analyzed under the rule of reason, which balances the procompetitive benefits of the conduct against the potential anticompetitive harm to determine the likely overall effect on competition.

The competitive analysis typically involves a review of the reasonableness of the non-compete's duration, geographic coverage, and whether the restraint is reasonably related to a legitimate purpose. Legitimate purposes include, among other things, protecting a purchaser's ability to reap the benefits of a purchased business and protecting an employer's valuable personal contacts or trade secrets.

Although non-compete agreements have been treated by some as "lower risk" under the antitrust laws, the FTC and Department of Justice (DOJ) may well challenge non-compete agreements that are unreasonable in scope or duration, or otherwise have an anticompetitive effect on balance in the market. In *Oltrin*, for example, the FTC challenged as anticompetitive Oltrin Solutions, LLC's purchase of a customer list from JCI Jones Chemicals, Inc. for \$5.5 million along with JCI's agreement not to compete in the bulk bleach industry in North or South Carolina for six years. *See* FTC, Complaint, available at <http://www.ftc.gov/os/caselist/1110078/130118oltrincmpt.pdf>. According to the FTC, the market was highly concentrated with high barriers to new entry. Applying the rule of reason, the FTC alleged that the non-compete eliminated actual, direct and substantial competition between Oltrin and JCI in the relevant market; substantially increased the market concentration for bulk bleach sales; and increased

Oltrin's ability to raise bulk bleach prices. Critically, it appears that there was no legitimate business purpose advanced by the transaction.

The settlement agreement requires Oltrin to release JCI from the non-compete, transfer a minimum volume of bulk bleach contracts back to JCI, and provide JCI a short-term backup supply agreement to facilitate JCI's re-entry into the North Carolina and South Carolina markets.

When and How to Use Non-Competes

To minimize antitrust risk, companies should consider the following when using non-compete agreements.

For employment agreements:

- Limit the duration of the non-compete to a reasonable length (this is fact specific, but up to three years is a good rule of thumb); limit the scope of the non-compete to match the type of work performed by the employee; and limit the geographic scope of the non-compete to a reasonable distance. Each of these restrictions should be tied to the business justification for the restraint.
- Determine whether the non-compete involves a profession or set of skills that are scarce in the market. Federal and state antitrust enforcers may be more aggressive in cases where there is a limited supply of replacement workers (think physicians) or where the restrictions are not otherwise in the public interest.
- Don't agree with your competitors not to recruit each other's employees. (This is the case in a recent DOJ complaint against eBay Inc. and Intuit Inc. See <http://www.justice.gov/opa/pr/2012/November/12-at-1376.html>).

For purchase / service agreements:

- Follow the same general guidance noted above on duration and geographic scope (i.e., reasonableness).
- Any non-compete agreement should be narrowly designed to further a legitimate business justification, such as ensuring that the purchaser is able to put the assets purchased to productive use or the service provider is able to protect their investment in building their products and services.
- The non-compete should be tied to a particular economic activity or line of business – avoid overly broad non-competes that prohibit competition outside the scope of the transaction.

In either case, don't forget about state laws – almost every state has its own unique laws governing the use of non-compete agreements. California, for example, has very strict non-compete laws, whereas many other states allow non-competes that are reasonable in scope and duration (as set forth above). See, e.g., <http://www.venable.com/enforcing-non-compete-provisions-in-california-01-13-2012/> (for additional information on California's non-compete laws).

Finally, any company considering the use of a non-compete clause in an employment, purchase, or service agreement should consult with antitrust counsel early in the process, including review of the agreement's terms and conditions, to ensure that the proposed non-compete complies with the antitrust laws.

AUTHORS

Andrew E. Bigart
Lisa Jose Fales
Jeffrey S. Tenenbaum

RELATED PRACTICES

Antitrust

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2013 2009 2005
2012 2008 2004
2011 2007 2003
2010 2006

Articles

February 8, 2013

Managing Association Joint Purchasing Programs without Violating the Antitrust Laws: Lessons from a DOJ Business Review Letter

This article was also published in the June 2013 edition of InView, a monthly newsletter of the New York Society of Association Executives (NYSAE).

Trade and professional associations (“associations”) frequently sponsor joint purchasing arrangements on behalf of their members. These programs offer numerous potential benefits, including centralized ordering, volume discounts, efficient warehouse or distribution, and access to products or services at short notice, among other benefits. Although popular with members, joint purchasing programs also can expose the association (and individual members) to potential antitrust risk.

This article provides an overview of joint purchasing along with best practices for associations looking to help members obtain the potential cost savings and other benefits of joint purchasing while minimizing antitrust risk.

What Is Joint Purchasing?

Defined broadly, joint purchasing involves collaboration among competitors to purchase product inputs and services. Association joint purchasing programs come in many different shapes and sizes; in some, the association simply handles administration of the program, while in others, the association acts as purchasing agent for its members. Some joint purchasing involves product inputs, while others involve the purchase of services. No matter the structure of the purchasing program, associations must take care to avoid running afoul of antitrust laws.

What Are the Antitrust Implications?

The principal federal antitrust statutes, the Sherman Act (15 U.S.C. § 1 et seq.) and the Federal Trade Commission Act (15 U.S.C. § 41 et seq.), prohibit contracts, agreements, and conduct that unreasonably restrain trade (as well as monopolization and attempted monopolization). In this respect, the FTC and the DOJ (the “enforcement agencies”) review joint purchasing under the “rule of reason,” which examines the totality of the circumstances and balances the procompetitive benefits of the conduct against the potential anticompetitive harm to determine the likely overall effect on competition.

The concern with joint purchasing is that it may give members monopsony power over vendors and suppliers or facilitate collusion among members by standardizing costs or encouraging the sharing of competitively sensitive information. (“Monopsony power” is a buyer’s power to eliminate suppliers by artificially depressing prices.)

On the other hand, the enforcement agencies recognize the potential procompetitive benefits of joint purchasing. For this reason, the enforcement agencies are unlikely to challenge, absent extraordinary circumstances, joint purchasing arrangements where: (1) the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by participants in the joint purchasing arrangement. See [DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care](#) and [DOJ and FTC Antitrust Guidelines for Collaborations Among Competitors](#) (setting forth antitrust safety zones).

For example, in a recent DOJ [Business Review Letter to STARS Alliance LLC](#) (“STARS”), the DOJ reviewed a joint purchasing arrangement proposed by an association of several nuclear utility operators. As a starting point, the DOJ noted that the proposal likely qualified for the safety zone for collaborations that account for less than 20 percent of the relevant market. Nevertheless, the DOJ went on to conduct a rule of reason analysis.

Starting with potential anticompetitive effects, the DOJ found that it was unlikely the arrangement would

“restrict competition in either the upstream markets for goods and services or the downstream markets for electricity” because the STARS members were generally located in different geographic areas and did not compete against each other. At the same time, DOJ found that the arrangement had the potential for procompetitive benefits through increased efficiencies and lower costs.

Finally, DOJ noted that STARS had implemented numerous safeguards to limit the potential for anticompetitive coordination among its members, including that the joint purchasing activities would be voluntary for members, that members would not discuss prices for procuring goods and services, and that STARS would require antitrust compliance training for its members.

Suggested Best Practices

Absent extraordinary circumstances, the enforcement agencies are unlikely to challenge an association joint purchasing program where members are not required to purchase a particular product or service, each member makes its own independent decision to participate, and there is significant competition in the relevant market.

Associations looking to implement a joint purchasing program should implement safeguards, as appropriate, to prevent members from sharing competitively sensitive information, such as downstream sale prices, the timing of price increases or purchase orders, and margins. Suggested precautionary measures include:

- Check your association’s governing documents and evaluate its tax-exempt status to confirm that a joint purchasing program is a permissible association activity.
- Consult with antitrust counsel prior to establishing a joint purchasing program and periodically throughout the process to ensure compliance with antitrust laws.
- Monitor the buying group’s market share in the input and output markets to stay within the safeguards set forth in the enforcement agencies’ Antitrust Guidelines for Collaborations Among Competitors (e.g., 35 percent share for total purchases in the relevant input market and 20 percent share in the relevant output market).
- The association or an independent agent should handle joint buying activity and negotiate with suppliers on behalf of the purchasing group, or require each member to contract individually with the supplier offering a group discount.
- The program should not impose minimum purchasing requirements on members.
- Participation in the joint purchasing arrangement should be available to all association members and should not be limited by the size, type or location of a member.
- Joint purchasing should not be used to raise, lower or stabilize prices, or to boycott suppliers.
- Members should not share competitively sensitive information or enter into any agreement or understanding on prices or other competitive conduct in the downstream output market.
- Any meetings of a joint purchasing group should have an agenda and minutes. All discussions should be limited to the purposes of the joint purchasing group.
- Antitrust counsel should be present at all meetings where competitively sensitive information is discussed.

* * * * *

For more information, please contact [Andrew E. Bigart](#), [Lisa Jose Fales](#) or [Jeffrey S. Tenenbaum](#).

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

Articles

August 31, 2012

When Associations Attack: Beware Standing and Other Pitfalls When Suing on Behalf of Members

AUTHORS

Jeffrey S. Tenenbaum
Andrew E. Bigart

RELATED PRACTICES

Antitrust
Litigation
Appellate Litigation
Commercial Litigation

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2013 2009 2005
2012 2008 2004
2011 2007 2003
2010 2006

If you are an in-house lawyer for a trade or professional association, you probably spend a good amount of your time counseling the association and its members on the importance of complying with government regulations, industry-specific laws, and laws of general applicability, such as the antitrust laws. On occasion, however, the circumstances may flip, with members pushing your association to file a lawsuit on behalf of members – perhaps to challenge a government regulation or to protect members from a perceived competitive threat. How should you counsel your association in these situations? On the one hand, you are sensitive to member needs and pressure. On the other, pursuing litigation is costly and time consuming, and may expose your association and its members to potential counterattacks. Balancing these interests is often a complex task.

For those associations looking for an excuse not to pursue litigation, a recent federal district court case, *Association of Independent Gas Station Owners v. Quiktrip Corp.*, No. 4:11CV2083 (E.D. Mo. July 20, 2012), reaffirms the high jurisdictional bar that associations face when bringing suit on behalf of members. This article provides a brief overview of the case along with practical guidance for associations considering (or trying to avoid) litigation on behalf of their members.

High Bar for Representational Standing

As with all litigants, an association may bring a lawsuit in court only if it has standing – meaning the association must demonstrate to the court that it has suffered injury in fact, that the injury is fairly traceable to the defendant, and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472 (1982). An association may sue on its own behalf if it has suffered an injury, or the association may, under certain circumstances, sue in a representational capacity on behalf of its members.

The U.S. Supreme Court has held that an association has standing to sue on behalf of its members only if the following conditions are met: (1) the association's members would otherwise have standing in their own right, (2) the interest the association is seeking to protect is germane to the association's purpose, and (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). As demonstrated in *Association of Independent Gas Owners*, meeting this standard is often a challenge for associations.

In the case, the plaintiff trade association, which represented independent retail gas stations, filed suit on behalf of its members against QuikTrip, a retail gas station operator that allegedly violated the antitrust laws in its effort to dominate the St. Louis market for the distribution of gasoline. The court dismissed the association's complaint for lack of either individual or representational standing.

First, the association lacked individual standing because it did not operate retail gas stations and therefore was not injured by the defendant's alleged predatory pricing. Second, the court held that the association could not satisfy the second and third *Hunt* factors for representational standing. According to the court, the association failed to present evidence showing that the lawsuit was germane to the association's purpose. Finally, with respect to the third *Hunt* factor, the court found that the association's claim required the participation of individual members because the complaint alleged that members suffered varying degrees of injury. *Compare to Nat'l Office Mach. Dealers Ass'n v. Monroe, the Calculator Co.*, 484 F. Supp. 1306 (N.D. Ill. 1980) (finding the challenged conduct to be "equally applicable and equally detrimental" to all of the association's members).

Lessons Learned (or How to Avoid Unnecessary Headaches)

For in-house counsel looking to caution members on the wisdom of pursuing litigation, *Association of*

Independent Gas Owners reaffirms the high bar that associations face to establish representational standing. From the association's perspective, this is not always such a bad thing. Litigation is costly, time consuming, and redirects association resources that would otherwise be used in furtherance of the association's purposes.

To the extent that your association decides to move forward with litigation, you should keep the following points in mind as you put together the complaint and craft a litigation strategy. First, confer with association management to confirm that the litigation is in the best interests of the association, notwithstanding member pressure. As part of this analysis, you should explore whether there are less aggressive ways to resolve the proposed litigation. Maybe you could lobby federal or state legislators or regulators to reconsider a troubling law or regulation. Or, for example, if you are contemplating an antitrust complaint, maybe you could interest a federal or state antitrust enforcement agency to do the heavy lifting by opening an investigation. (Under the *Noerr-Pennington* doctrine, joint efforts to influence public officials do not violate the antitrust laws, even if intended to eliminate competition. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965)). You also should review the association's articles of incorporation, bylaws, internal policies and procedures, federal tax exemption recognition application and annual IRS forms 990, and other organizational documents to determine whether the litigation falls within the organization's mission and purposes. The association should document, whether through meeting minutes or otherwise, any decision to pursue litigation, including how such pursuit will further the association's mission and purposes.

Second, once the decision is made to file a complaint, work with management and outside counsel to develop an organized litigation strategy and budget. In addition to addressing litigation tactics, the plan should provide for a media strategy, address document preservation requirements, and ensure that the association informs relevant employees of the nature of the litigation, their potential roles, and what to expect moving forward.

Third, following *Association of Independent Gas Owners*, make sure to draft your complaint carefully to tie the association's mission and purposes to the lawsuit. In *Association of Independent Gas Owners*, the association very well may have filed suit to protect members from a legitimate competitive threat. The association's complaint, however, did not provide the court with sufficient factual information regarding the association or its members to establish standing, *i.e.*, "the number of members it has, the location of these members, the types of gas stations owned by its members, or what general interests its organization seeks to serve." It also might help to explain that the alleged injury applies equally to all members.

Finally, before pulling the trigger, make sure that your association's house is in order and that filing the complaint will not expose your association and/or its members to counterclaims, such as product disparagement, defamation, trade libel, or other unfair trade and antitrust allegations. In this regard, make sure to counsel your association that offense is not always the best defense.

This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

¹ Jeffrey S. Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. Andrew E. Bigart is an associate in Venable's Washington, D.C. office, where he focuses on antitrust and trade regulation.

Compensation & Benefits Studies

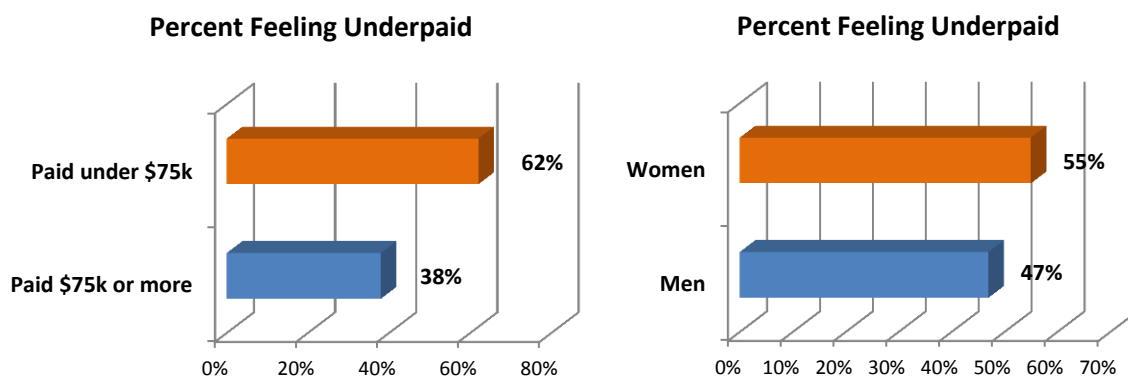
Giving your members a competitive edge in a tough marketplace



How does a Compensation & Benefits Study help your members?

A comprehensive study can give them a significant advantage in hiring and retaining top/talented employees.

Your member companies are in a perpetual staffing struggle and whether times are good or bad, employees are always looking for greener pastures. With studies in recent years (MSNBC Poll, 2010) reporting that 50% or more of the current workforce are passive job seekers and the majority of workers feel underpaid/undervalued, a significant advantage can be gained by the company who knows what fair and competitive compensation is for each type of employee.



Additionally, companies that can identify new trends in benefits and implement them into their compensation structure will stand to improve their image to prospective employees and recruits, even gaining loyalty points from their current employee base.

What steps do you need to take to conduct a successful Compensation & Benefits Study?

1. Determine the need for such a study from your members. A short survey gauging its need and its possible participation rate will suffice.
2. Create a small Compensation & Benefits Committee comprised of different types and sizes of companies in your membership. They should meet before each survey is launched.
 - a. This committee will oversee the development of the survey instrument and help to determine the appropriate job categories the study will report on.
3. Determine whether this study can be handled in-house or whether a compensation consultant/survey research firm is needed.
 - a. If completed in-house, legal advice may need to be obtained to protect your organization from liabilities stemming from the collection of confidential information.
4. Develop a marketing plan to promote the study to your members. Gaining awareness and significant buy-in will be key to a successful study.
5. Determine which members will be able to obtain the final product/report and how others who did not participate will be able to access the result (\$ cost or no access to non-participants).
6. Pick a regular time frame during which this survey can be conducted in order to keep the results fresh and keep your members in the habit of completing it.

How much will this cost your organization and are there ways to defray the total cost?

Conducting the study in-house will cost your organization time, potential software costs, and possibly printing & publishing costs. However, if this is the first time your organization is conducting one, it may be beneficial to hire a compensation consultant or survey research firm for advice in question formulation, compensation range analysis, and the creation of position descriptions.

Hiring an outside firm will typically cost your organization between \$10,000 and \$50,000. The cost can fluctuate depending on the number of positions you'd like to study, the length of the questionnaire, the size of your membership, etc. The cost may seem prohibitive but many private companies do this for their own information and pay upwards of \$100,000 to have one conducted. Asking your membership if they'd all chip in would easily seem like a better option than having them foot the entire bill themselves.

If you decide to hire a compensation consultant or a survey research firm, be sure that:

1. They have significant experience in conducting these types of studies
2. They are able to answer and support any issues your survey takers may have
3. They maintain high levels of security and confidentiality to ensure the safety of all collected data
4. They are able to produce an easily readable and actionable report

Finally, many organizations monetize the final product by offering it to their non-participating members at a price that encourages participation over purchasing it after the fact. This price is something your organization can determine but is normally above \$1,000.

How often should we conduct the survey?

Budgets may constrain the frequency of these studies to once every few years. However, depending on the industry you serve, up-to-date compensation trends are critically important since your members are adjusting salaries and hiring new staff each year.

If conducting this study is not possible every year, an every other year survey can suffice. Any hiatus longer than that may be detrimental to your survey's participation, since ideally, your members would get into a routine of updating their survey. Furthermore, once these studies are over 2 to 3 years old, the data becomes stale and outdated.

Are there any legal ramifications we need to be aware of?

In short, YES. These studies collect very sensitive and confidential information. Knowing your organization's propensity for risk is something that shouldn't be taken lightly. Once you know what you'd like to collect from your members, obtaining the advice of your legal counsel before proceeding on your own could save you headaches down the road.

If the risk of collecting and storing this data is too much for your organization, finding a trustworthy and independent third party fiduciary, such as a survey research firm, will be your best option. Your members may even feel more comfortable with an independent third party, who has a strong history of handling confidential information.

Written by:

Ian Santo Domingo
Director
Veris Consulting, Inc.
February 2012



Industry Market Reports

Understand the size, trends, and movements of your industry

Manufacturing trade associations face the difficult task of providing worthwhile benefits to multi-national organizations. In addition to providing training/certification programs, networking opportunities, and leading lobbying efforts, members look for their association to provide them with market data to help keep their companies competitive. Associations can provide a valuable member benefit by sponsoring their own market reports based on actual information provided by their members. These reports can be tailored to fit the needs of members and can provide additional information and accuracy beyond what's provided by industry consultants and publicly available data.

Industry market reports provide accurate information allowing companies to:

- Track industry growth in specific segments
- Calculate market share
- Identify pricing trends
- Make staffing decisions based on company performance

Associations are uniquely positioned to provide the leading source of information on their industry and should keep in mind the following when running an industry market report program.

How Do I Get the Program Started and Keep it Relevant?

Buy-in from leading companies is critical to get any program started. It will be next to impossible to generate support for a market sales report that doesn't include the industry leaders. Although buy-in from these companies is critical, the reports should still be designed so they are valuable to all of your members. The best way to do this is by forming a market research committee that is representative of the overall membership.

The market research committee should work closely with association staff to identify industry trends and areas that should be included in the report. The committee should have in-person meetings or conference calls scheduled throughout the year. Having a dedicated committee reviewing the reports will make sure that they don't get stale and continue to capture valuable information.

Are the Program Rules Transparent?

Program rules developed by the market research committee help ensure that the reports are accurate and give credibility to the program. Clear program rules make it easier to recruit additional participants and also help participants deal with internal turnover. All of the program rules should be put in a Standard Operating Procedures document that is periodically reviewed and updated by the participants.

Issues to include in the SOP include detailed definitions for each category, due date and estimation policy, participation fees, whether non-members can participate, and the report distribution policy.

What Legal Issues Should I Consider?

Safeguards should be in place to make sure that individual company data cannot be identified in a published report. These rules should specify how many companies must submit data in each category and the max market share that a company can have.

Even association staff typically should not have access to specific company data and the program should be managed by an independent third party.

Legal counsel involvement is necessary to ensure that the reports are in compliance with trade regulations and anti-trust rules. Legal counsel should be involved in the formation of the program rules and should also be present at all meetings to discuss the program.

How Will the Report Be Used?

Legal counsel and the market research committee need to determine if non-participants will have access to the published reports. If non-participants can access the results it opens up many possibilities and potential sources of revenue for the association.

Top level information from the industry market reports can be used in press releases and membership marketing material to promote the industry. The reports can also be sold to interested parties such as customers along the supply chain, industry consultants, and government agencies.

Companies can't afford to make decisions based on inaccurate or incomplete information and a well-structured industry market report program will help your members make informed business decisions and stay competitive in an increasingly global marketplace.

Written by:
Mike Hayes
Director
Veris Consulting, Inc.
September 2011