



NATIONAL RESTAURANT ASSOCIATION

ANTITRUST POLICY AND GUIDE

FOR ASSOCIATION MEMBERS,
AFFILIATES, AND STAFF

REVISED & ADOPTED, 2021

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INTRODUCTION

Although trade associations such as the National Restaurant Association (the “Association”), are generally recognized as procompetitive and important resources for American business, they can be particularly subject to accusations of anticompetitive behavior. Because the Association is by its nature a combination of competitors, potential competitors, suppliers, customers and affiliates, the Association and its members must ensure that their activities do not lead to an illegal restraint of trade, or even create the appearance of such an anticompetitive restraint.

All Association members, directors, officers, committee members, meeting participants, and employees must be aware of the ever-present threat of antitrust liability. This applies at formal and informal meetings of the Association or other related activities; including Board meetings, member meetings, educational events and community forums. It is important to remember that the antitrust laws apply equally in the board room as in the bar room, so caution should be undertaken at dinner and social events.

Moreover, a trade association is often the entity that government enforcers look to first in seeking information about possible anticompetitive conduct in a given industry, and/or by member companies that may be under investigation.

The Association believes that thriving and competitive markets are necessary for the continuing success of its members and the restaurant and hospitality industry. Antitrust laws are designed to promote competition by prohibiting certain kinds of behavior. For these reasons, the Association expects all of its members, directors, officers, committee members, meeting participants, and employees to comply with the applicable federal and state antitrust laws.

This Association Antitrust Policy and Guide should aid the Association members, directors, officers, committee members, and employees on general antitrust questions and issues. As these guidelines do not address every situation with antitrust consequences, please feel free to consult with the Association’s General Counsel or appropriate staff with any questions or concerns.

SPECIAL NOTE ON THE NATIONAL RESTAURANT ASSOCIATION EDUCATIONAL FOUNDATION (“FOUNDATION”) ACTIVITIES

Although activities of charitable foundations are not generally thought to be conducive to anticompetitive behavior, because The National Restaurant Association Educational Foundation’s activities are generally conducted by industry competitors, potential competitors, suppliers and customers, this Policy is to apply to the Foundation as well as other Association affiliates.

NATIONAL RESTAURANT ASSOCIATION SAMPLE SCRIPT

FOR DISTRIBUTION AND RECITATION AT
ASSOCIATION MEETINGS

INTRO SCRIPT FOR ANTITRUST

The National Restaurant Association and its affiliated organizations are committed to advancing and protecting the restaurant and hospitality industry.

In doing so, we are also committed to complying with all applicable antitrust laws and regulations. As an association comprised of competitors, potential competitors, suppliers, and customers, it is extremely important that we steer clear of any discussions that could be interpreted as anticompetitive.

As such, like all meetings and activities of the Association, we will refrain from sharing competitively sensitive, confidential information such as proprietary pricing methods, pricing components, individual company business plans, production figures, or similar matters. Similarly, we must also avoid any attempts to limit or restrict competition or new market participants.

Further antitrust guidance is contained in the Association's Antitrust Policy.

SUMMARY OF ANTITRUST DOS AND DON'TS

The intent of this Guide is not to make you an antitrust lawyer but to give you enough information about the law so you will know a dangerous area when you see it. The following are some of the most critical “Dos and Don’ts” for antitrust compliance:

- **DON'T** share confidential, competitively sensitive information that has not been disclosed to the public before.
- **DON'T** discuss prices, fees or rates, or features that can impact (raise, lower, or stabilize) prices such as discounts, costs, salaries, terms and conditions of sale, warranties, or profit margins. Note that a price-fixing violation may be inferred from price-related discussions followed by parallel decisions on pricing by association members — even in the absence of an oral or written agreement on prices.
- **DON'T** share data concerning wages paid, bonus structures, tip pool inclusion, production, sales, bids, costs, or other business practices unless the exchange is made pursuant to a well-planned survey that has been approved by the Association.
- **DON'T** agree with competitors as to uniform terms of sale, warranties, or contract provisions without the input of your own counsel or the Association’s General Counsel.
- **DON'T** agree with competitors as to restrictions on production or other output.
- **DON'T** agree with competitors to divide territories or markets.
- **DON'T** agree with competitors not to deal with certain suppliers or customers.
- **DON'T** try to prevent a supplier from selling to your competitor(s).
- **DON'T** agree to any association membership restrictions, standard-setting, certification, accreditation, or self-regulation programs without consultation and approval by the Association’s General Counsel.
- **DO** ask the staff if there is any information exchange or survey that you believe might benefit the industry, which can be arranged with appropriate safeguards.
- **DO** expect and require that the Association meetings have agendas that are circulated in advance, and that minutes of all meetings properly reflect the actions taken at the meeting.
- **DO** feel free to question any improper or questionable subjects or conversations, and bring to the attention of others.
- **DO** seek advice from your own counsel or from the Association’s General Counsel if you have questions regarding the antitrust laws or your responsibilities under these laws.

OVERVIEW OF ANTITRUST LAWS

Broadly stated, the basic objective of the antitrust regulations is to preserve and promote competition and the free enterprise system. These laws are premised on the assumption that private enterprise and free competition are the most efficient ways to promote quality commerce and services, allocate resources, and produce goods at the lowest price.

The U.S. antitrust statutes of principal concern to companies and individuals that participate in trade association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. These laws prohibit all contracts, combinations, and conspiracies that unreasonably restrain trade.

In addition, each State has adopted laws that address antitrust and fair trade matters which can be investigated and/or enforced at each State level. State laws usually are interpreted and applied 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.

Some activities are regarded as unreasonable by their very nature and are, therefore, considered illegal “*per se*,” which means that are conclusively presumed to be unlawful. Practices in the “*per se*” category include naked agreements between competitors to fix prices; agreements to boycott competitors, suppliers, or customers; and agreements to allocate markets or limit production. Conduct that does not unambiguously injure competition is not “*per se*” unlawful, but rather is analyzed under the “rule of reason.” Under the “rule of reason,” courts will analyze agreements or conduct by examining all of the facts and circumstances that surround the conduct in question to determine whether the actions unreasonably restrain trade.

WHY IS COMPLIANCE WITH THE ANTITRUST LAWS IMPORTANT?

Aside from the fact that the Association is committed to abiding by the laws of all jurisdictions in which it operates, the penalties for violations of the antitrust laws can be very severe — both for the Association members and for individuals.

FOR MEMBERS AND PARTICIPANTS OF ASSOCIATION ACTIVITIES:

- Under U.S. antitrust laws, corporations can be fined up to \$100 million per violation. Courts also can 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 can impose permanent restrictions limiting corporate activity.
- Private actions — by competitors who can show they were harmed by the perpetrator’s actions — can result in damages many times the size of a government-imposed fine.

FOR INDIVIDUALS:

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

FOR THE ASSOCIATION:

- Injunctions or other orders issued by the courts may prevent the Association from pursuing association business.
- On occasion, courts have ordered trade associations to disband.

EVENT AND INVESTIGATION IS EXPENSIVE AND TIME CONSUMING

Dealing with a government antitrust investigation or a private antitrust lawsuit is expensive, time-consuming, and distracting. In addition, an investigation or lawsuit can seriously damage the reputation of the Association, its members, and individuals. It is important to emphasize that these penalties, damages, and distractions are entirely avoidable — by understanding in very basic terms what the antitrust laws require, and by consulting with legal counsel whenever you are in doubt.

DEALING WITH COMPETITORS

The basic premise of the antitrust laws is that competition entails each company making its business decisions **independently of the others**. Each of the offenses highlighted below, as well as other antitrust law violations, have at their core some form of “agreement” among otherwise independent companies. It is important to understand that an “agreement” in antitrust terms rarely means a written agreement signed by all of the “parties” to the agreement. More often than not, “tacit” agreements are inferred, by judges or juries, from facts and circumstances that suggest the existence of an understanding. Agreements can be direct or indirect, explicit or tacit. Plaintiffs can prove an agreement with all sorts of evidence, including, most typically, circumstantial evidence.

In the discussion that follows, bear in mind that an “agreement” is a very flexible concept under the antitrust laws. **For this reason, it is important that your statements, actions, and writings be as clear and unambiguous as possible, so as to avoid misinterpretation or misconstruction after the fact.** Never give the impression that any illegal agreement has been reached with a competitor or that inappropriate information has been exchanged.

The following outlines some of the activities involving competitors that can lead to violations of the antitrust laws:

PRICE FIXING

Any agreement with a competitor establishing, altering, or relating to prices, or terms and conditions of sale, is unlawful, regardless of the circumstances. Price fixing is considered unlawful under the antitrust laws regardless of the reasons why it is undertaken (*per se* unlawful). You should not communicate with a competitor to obtain their prices, or have any discussions with competitors on pricing methods, pricing strategies, margins, costs, price increases, credit terms, or terms and conditions of sale under any circumstances.

WAGE RELATED INFORMATION

Although wages are a component and input of prices, particular care should be taken to avoid exchanging confidential wage, wage structure, bonus structure or other similar information dealing with compensation. The Department of Justice has recently issued a series of “Red Flag” alerts advising against sharing of such information. Information like tip pool participation, bonus structures, and benefits should not be exchanged or discussed.

ALLOCATING MARKETS

Unlawful agreements allocating markets occur when competitors divide territories or customers among themselves. Market allocation is *per se* unlawful in the United States. For example, two competitors cannot agree that one will sell or focus on one geographic market, and the other will sell or focus in a different geographic market or to a different group of customers.

GROUP BOYCOTTS

An unlawful group boycott occurs when competitors, suppliers, or customers agree with each other (or pressure another person) not to deal with others. This should be distinguished from a unilateral refusal to deal, where a company decides on its own, and without consulting any other company, that it does not want to buy from or sell to another company, which is usually lawful (except, for example, in certain cases where the supplier has a dominant market position).

BID RIGGING

Any agreement with a competitor on any method by which prices or bids will be determined is *per se* unlawful. Illegal bid rigging also includes agreements or understandings among competitors to (1) rotate bids or contracts; (2) determine who will bid and who will not bid, or who will bid to which customers, or who will bid high and who will bid low; (3) fix the prices that individual competitors will bid; or (4) exchange information about the value or terms of bids between competitors in advance of submitting bids.

KEY POINTS

DEALING WITH COMPETITORS



Competition requires independent business decisions.

NEVER give the impression that any illegal agreement has been reached with a competitor.

DON'T discuss prices, pricing methods, pricing strategies, margins, costs, price increases, credit terms, or terms and conditions of sale with a competitor.

DON'T discuss wage related information, including wages, bonus structure, or other information.

DON'T agree with a competitor to divide territories or customers.

DON'T enter into an agreement with a competitor, supplier, or customer not to deal with others.

DON'T agree with a competitor on a method for dividing up bids/jobs.

DEALING WITH CUSTOMERS OR SUPPLIERS

REFUSALS TO DEAL

Generally, companies have the right to select their customers and suppliers and may refuse to deal with anyone for any reason or for no reason at all. However, any decision not to supply/purchase must be made by the member **alone**. Agreeing, or even just conferring, with another company regarding a refusal to deal can transform a **unilateral** refusal to deal into an unlawful group boycott. When you decide not to deal with a particular supplier/customer or not to sell in a particular market, the decision should be made for independent business reasons and not because of an agreement or understanding with another company.

KEY POINTS

DEALING WITH CUSTOMERS OR SUPPLIERS



Decisions not to deal with customers or suppliers must be made unilaterally.

MONOPOLIZATION, ABUSE OF DOMINANCE, AND PREDATORY PRACTICES

Although monopolization is not generally thought to be major concern for industries such as the restaurant and hospitality industry due to the large number of market participants, attention should still be paid in the event that market participants have significant power over a particular market or geographic area. A company has “monopoly power” or a “dominant position” if it has the power to control market prices or exclude competition. Relevant factors in determining whether a company has a dominant market position include: its market share; the company’s position relative to that of its competitors; the existence of barriers to entry into the market; the dependence of customers on a particular product or service; and the extent of any vertical integration with other operators (e.g., between suppliers and retailers).

Even companies with monopoly power or a dominant market position can continue to compete fairly to increase the size of their business. It is not an offense to be dominant; what is problematic is the abuse of such dominance. Companies cannot use their market position to further entrench their monopoly power or abuse their dominant position. Determining what constitutes a given market, whether these restrictions apply to particular markets, and whether particular business practices may create problems.

KEY POINTS

MONOPOLIZATION, ABUSE OF DOMINANCE, AND PREDATORY PRACTICES



DON'T use market position to prevent effective competition.

DO compete fairly.

TRADE ASSOCIATION DOS AND DONT'S

Trade associations are generally recognized to serve important and procompetitive business purposes but raise antitrust concerns simply because competitors are present. Government officials often view trade associations as potential sources of illegal competitor collaboration. They also often subpoena associations to gather information on members or industries under investigation. If a trade association meeting is followed by parallel action among competitors, such as an increase in prices or a reduction in output, it could be assumed or inferred that improper activity took place.

The following are a few simple guidelines:

DO expect a clear statement of the purpose of the association meeting.

DO ask for an agenda if you do not receive one with your meeting notice. Do not participate in meetings that do not have set agendas, or agendas that appear improper or overly vague. If you have any questions about any agenda item, contact legal counsel before attending.

DO request that Association staff or counsel be present at any trade association discussion that involves potentially competitively sensitive information. Don't disclose or discuss your confidential, competitively sensitive information that has not been shared with the public previously.

DON'T discuss prices, price trends, the timing of price changes, costs of common inputs, margins, terms of sale, discounts and rebates, advertised prices, promotional programs, inventory levels, production levels, capacities, new projects, and the like with competitors.

DON'T hesitate to "raise your hand" if you think that inappropriate topics or information may be discussed or considered either at a meeting or an informal or social event in connection with a meeting. Feel free to seek the advice of Association staff or General Counsel. The risk of potential embarrassment for asking for clarification is far outweighed by the time and expense created by an investigation or subpoena.

KEY POINTS

TRADE ASSOCIATIONS



DO reduce the risks associated with trade associations by following these guidelines.

REMEMBER:

- Include purpose for meeting
- Have an agenda
- Presence of counsel when competitive issues are discussed
- No discussion of prices, margins, terms of sale, inventory and production

ANTITRUST ISSUES SPECIFIC TO TRADE ASSOCIATIONS

MEMBERSHIP

Trade associations are permitted to adopt objective and reasonable standards for membership. Exclusionary membership practices that affect a market participant's ability to compete, however, may raise antitrust issues. Similarly, denial of membership or discrimination in membership terms may place competitors at a disadvantage if membership is necessary to compete in the industry on equal terms. The same general rules apply to non-members: if certain benefits or services provided by the association are essential or material to compete effectively, then the association likely will be required to provide access to those benefits necessary to effectively compete in the industry upon payment of a reasonable fee.

INFORMATION EXCHANGE, DATA COLLECTION, AND DISSEMINATION

Providing valuable industry information and/or compiling industry data is a key function of the National Restaurant Association. Structured properly, an information exchange program is a legitimate and valuable function of a trade association. Compilations of reasonably-available public information and other data collection and statistical reporting, conducted under reasonable guidelines, will not run afoul of the antitrust laws. Nonetheless, because of the risk that information collected as part of an information exchange could be used for unlawful purposes (for example, as the basis for an agreement to fix prices or restrict output between competitors), a number of precautions must be taken:

- Clearly articulate the purpose and procompetitive benefits of the information exchange program, and keep it closely focused on those criteria.
- Participation should not be a condition of membership, and a member's decision not to participate should not result in a loss of membership or limitation of membership rights;
- The data should be collected by the Association staff or other independent third-party collectors. Participating companies are not involved in the collection or compilation of the raw data;
- The third party treats specific information provided by participating companies confidentially and does not disclose it in its raw form to any other participant or a third party.
- Published data are reported in an aggregated form so that information relating to individual transactions is not disclosed and cannot be figured out. Surveys that include data from fewer than five companies may be risky because it may be difficult to conceal the source of the information.
- The survey does not include information about future prices or other future forecast information.
- Joint discussion and analysis of the data by association members should be avoided. Each participant should separately analyze the data and make independent business decisions based on the data;

No new data collection or information exchange program should be embarked upon without the approval of appropriate Association Staff or Counsel. All such programs should be reviewed from time to time for antitrust concerns. The Association has adopted the following specific policy:

KEY POINTS

TRADE ASSOCIATIONS *(continued)*



- The potential risks associated with meetings with competitors are not altered simply because the meeting is an "informal" (e.g., lunch or dinner) meeting rather than a "formal" (e.g., meeting in offices) meeting. Antitrust authorities do not distinguish between types of meetings.
- **DO NOT** exclude companies from membership if doing so would put that company at a competitive disadvantage.

ANTITRUST ISSUES SPECIFIC TO TRADE ASSOCIATIONS *(continued)*

STANDARD SETTING

The process of developing industry standards, if properly executed, can be a beneficial function of an industry group. Certain precautions should be taken in evaluating and adopting a position on a standards issue to ensure that a position taken by the Association accurately reflects member interests and does not implicate any antitrust concerns such as price fixing or group boycott issues. Adoption of a standard or a position on a standard with anticompetitive intent to limit or prevent certain competitors from competing effectively could lead to antitrust liability. Therefore, these guidelines should be followed in articulating a the Association position on any standard:

- Consider all relevant opinions.
- Articulate a sound technical basis for the position based on legitimate objective justifications.
- The standard must be reasonably related to the goals it is intended to achieve.
- The standard must be no more extensive than necessary to accomplish those goals.
- Revise positions over time as necessary to reflect the beliefs of the membership and the current state of the technology.
- Members must disclose voluntarily any proprietary interest (e.g., a patent) they may have in a particular standard that the trade association adopts; failure to disclose intellectual property and other interests in a specific standard may lead to antitrust liability.

CERTIFICATION AND SELF-REGULATION

A key function of the Association, the Foundation, and their affiliated organizations is to provide industry certifications and guidance to allow for compliance with best practices, applicable laws, and regulations. Such valuable procompetitive programs must be carefully planned and created to be objective and not unreasonably restrict the interests of certain industry participants to the benefit of others. Even if an association's intent is to improve members' ethical conduct and provide the public with better products and services, it can still violate the antitrust laws. Any industry certification program or attempt at self-regulation must be based on sound, objective justifications; must be reasonably related to the goals it is intended to achieve; must be no more extensive than is necessary to accomplish those goals; and must incorporate reasonable procedural safeguards to ensure that participants are not arbitrarily discriminated against. This Guide is intended as an aid to assist you in understanding and fulfilling your responsibility to comply with the Association's antitrust policies. It is not intended to make you an expert, but rather to help you identify antitrust issues that could arise in the course of your job responsibilities. Always contact the Association's President & Chief Executive Officer or General Counsel for further guidance.

KEY POINTS



TRADE ASSOCIATIONS *(continued)*

INDUSTRY SURVEYS REQUIRE:

- Procompetitive rationale for sharing data.
- Voluntary participation.
- Third-party data collection.
- Maintain confidentiality.
- Aggregate data.
- No disclosure of competitive data in raw form.
- More than a few participants.
- No future prices or forecasts.
- Unilateral analysis of data.

STANDARD SETTING GUIDELINES:

- Consider all relevant opinions.
- Articulate sound technical basis.
- Reasonably related to goals.
- No more extensive than necessary.
- Revise positions as necessary.
- Voluntarily disclose proprietary interests.

CERTIFICATION AND SELF-REGULATION:

- Based on sound objective justifications.
- Reasonably related to goals.
- No more extensive than necessary.
- Reasonable procedural safeguards against discrimination.

ANTITRUST ISSUES SPECIFIC TO TRADE ASSOCIATIONS *(continued)*

PUBLIC POLICY ADVOCACY/LOBBYING

In the U.S., activity by a single company or group of companies to petition lawmakers, regulatory agencies, the courts, or other government bodies to adopt or change laws or regulations in ways that favor the Association's business interests may be exempt from the antitrust laws, even if others may be disadvantaged if the efforts are successful.

Under the Noerr-Pennington doctrine of antitrust immunity, joint action by trade associations or groups of competitors such as the Association to influence government policy generally does not violate the antitrust laws. This doctrine generally includes legislative activity, litigation in the courts, and proceedings before administrative bodies, which are protected under the First Amendment to the Constitution.

While discussion of any public policy (e.g., bill, law or regulation) is permitted under the law, the Association members should refrain from any discussion which could be interpreted as an agreement to take common action on prices, discounts, refusals to deal, production, or allocation of customers or markets. The Association counsel should be kept informed of the nature of all the Association public policy activities in order to identify possible antitrust risks.

CONCLUSION

This Guide is intended as an aid to assist you in understanding and fulfilling your responsibility to comply with the Association's antitrust policies. It is not intended to make you an expert, but rather to help you identify antitrust issues that could arise in the course of your job responsibilities. Always contact the Association's President & Chief Executive Officer or General Counsel for further guidance.

