

ANTITRUST LIMITS ON THE NSSEA AND ITS MEMBERS

Whenever members of an industry join together in a trade organization, antitrust issues are never far from the surface. NSSEA staff members and legal counsel believe that it is important to remind members periodically of the limits placed on NSSEA and its members by the federal antitrust laws. This article provides a brief overview of some of the key issues facing NSSEA and its members in this regard.

In light of current events, all of us are generally aware of the antitrust laws. However, those laws are more typically associated with such classic examples as the Standard Oil Trust and, more currently, Microsoft at the present time. The antitrust laws, however, do apply to less obvious situations which are regularly faced by NSSEA and its members in a variety of contexts, including credit reporting questions, availability of NSSEA membership, discipline of members, statistical reporting, in addition to more “classic” issues such as price-fixing.

The antitrust laws of the United States prohibit combinations or conspiracies in restraint of trade. This prohibition is not limited to formal agreements to restrain trade. Rather, restraint of trade may be demonstrated by a general course of business conduct. Despite the fact that trade organizations typically involve conduct which might raise antitrust questions, trade organizations are in fact recognized as a legitimate means for industry members to act together for certain purposes. However, because trade associations bring competitors together (and, in the case of NSSEA, virtually entire distribution chains) the antitrust laws place important limits on trade association activities. A key limitation is that a trade association must not involve itself in the competitive issues that exist in a particular industry, regardless of whether those issues arise only

between members or between members and nonmembers. The antitrust laws simply do not permit businesses to band together to establish a group boycott or a refusal to deal, to fix prices or for any other prohibited purposes. Such conduct would expose both NSSEA and its members to significant liability.

In addition to these general legal concerns, other factors are at play as well. NSSEA's membership is diverse and represents many different aspects of the school supplies industry. With respect to many issues, NSSEA members have different interests which may conflict. As a result, NSSEA cannot play favorites among its members. Where certain issues favor only certain members, NSSEA must refrain from intervention. This is an important practical and legal limitation on NSSEA. For example, NSSEA must refrain from attempting to enforce uniform market behavior because this would both cause the organization to be in conflict with some of its members and also expose the organization and its members to prosecution under the federal antitrust laws.

Membership issues themselves also give rise to antitrust concerns. NSSEA membership is open to "any firm, corporation, or individual engaged in the business of manufacturing, distributing, or selling school equipment, supplies or instructional materials, excluding textbooks." Membership in NSSEA is a valuable asset and that asset cannot be denied to an otherwise qualifying company due to competitive reasons. This is also why NSSEA cannot discipline its members because of conduct to which other members might object. For example, NSSEA is frequently asked to police its members to assure that members with poor credit histories cannot participate in the organization. It is not, however, permissible for NSSEA to act as a credit bureau.

Another common feature of many trade organizations – including NSSEA – is statistical reporting. Many trade associations in the past have found themselves in legal difficulty when statistical reporting was arguably used to further price-fixing or some other monopolistic scheme. This is why NSSEA has developed certain rules of thumb which determine when statistical information may be distributed to membership. These rules are designed to protect confidentiality of an individual company's reports and to minimize the risk that the statistical reporting services provided by NSSEA could be construed to be inconsistent with the antitrust laws.

Compliance with the federal antitrust laws is a concern for both NSSEA and its individual members. Each company has an obligation to comply with these laws. For that reason, if any company has a question concerning the legality of its actions under these laws or concern regarding the legality of actions by its competitors, suppliers, or customers, that company should consult its legal own counsel.

YOUR GUIDE TO NSSEA ANTITRUST POLICIES

It is the policy of the Association to comply fully with federal and state antitrust laws and the Association shall not engage in, or become affiliated with, any activity which directly or indirectly restricts free and lawful competition.”

– Article III, Section 2, of the National School Supply and Equipment Association Bylaws as adopted November 12, 1979.

All business-related organizations face antitrust issues in one way or another. Trade associations, in particular, must always be aware of the restrictions placed on them by the antitrust laws. Trade associations, by their nature, are a group of competitors who have organized together for a common business purpose. Because of this basic element, these associations are subject to strict scrutiny under both federal and state antitrust laws.

Trade associations which disregard their obligations under the antitrust laws face the risk of either civil or criminal prosecution (or both) by the Antitrust Division of the Department of Justice or the Federal Trade Commission. Most of these prosecutions are triggered by complaints filed by those who consider themselves injured or adversely affected by an alleged violation of the law.

A conviction for violating an antitrust law may result in stiff fines for the association and its members, a court order disbanding the association or severely limiting its activities and jail sentences for individuals who participated in the violation.

Areas Subject to Antitrust Regulations

A trade association's obligations under the antitrust laws are varied and these laws are quite complex. Trade associations most commonly run afoul of these laws with respect to certain key areas of activities which are subject to antitrust regulation. One common theme to each of these areas is the underlying rule that trade associations must never be involved in any way with an agreement which restricts a member's freedom to make independent decisions in matters that affect

competition. This includes agreements relating to prices, production levels, sales levels, and choice of customers, markets or suppliers.

Price Fixing. The clearest, and unfortunately, the most common antitrust violation by trade associations is involvement in price fixing among its members. Price fixing is illegal without regard to whether prices are set at reasonable levels or whether the ends sought are worthy. The prohibition against price fixing extends to any joint tampering with the free market structure which has the effect of fixing, maintaining, or stabilizing prices. Even informal understandings on pricing are forbidden. This prohibition against joint action on prices extends to terms and conditions of sale, such as discounts, freight allowances, and product warranties. It also includes agreements to limit production levels or to limit members' freedom to choose markets in which to participate.

Therefore, NSSEA strictly forbids discussion of current prices by its members at NSSEA sponsored meetings. Similarly, individual companies' commercial practices and terms and conditions of sale are also not to be discussed at NSSEA sponsored meetings.

Boycotts. Agreements not to deal with a third party violate antitrust laws. As with price fixing, these agreements need not be formal; unwritten or even implied agreements as evidenced by members' conduct may also expose trade associations and its members to liability. For this reason, a trade association must never be involved in an agreement to exclude non-members or members which are not in good standing from the market.

Petitioning Government Agencies. Companies often find it a commercial necessity to petition governmental agencies to present their views of appropriate policies and actions. Individual industry members often find that influencing government agencies and legislative bodies can be accomplished best through a group approach. The First Amendment protects most group efforts to influence governmental decisions and actions. Nevertheless, this protection may not cover efforts to mislead governmental agencies or to use those agencies to harass the competitors of association members.

NSSEA seeks to promote the interest of the educational industry through governmental action whenever possible by lawful and honest means. Members shall not hold themselves out to government officials as speaking for NSSEA unless authorized to do so and then only in conformance with guidelines spelled out beforehand.

Industry Standards. Trade associations often engage in promulgation of industry standards or product specifications. These efforts may, at times, give rise to antitrust concerns. In general, industry standards are permissible provided that they do not give a competitive advantage to some members of the association to the detriment of other members and non-members in the industry.

NSSEA remains committed to sponsoring only such industry standards that do not adversely affect competition.

Exhibiting at NSSEA Conventions. Trade shows sponsored by NSSEA shall be conducted in a non-discriminatory manner. All exhibits shall have reasonable access to the show on equal terms.

Meetings. The proper conduct of NSSEA meetings requires an understanding of antitrust implications. To ensure that there will be no appearance of anti-competitive conduct, NSSEA requires that certain formalities be observed at all meetings. An agenda is distributed in advance. The agenda is followed during the meeting. Accurate minutes are kept and distributed following the meeting. As a general rule, legal counsel is present for section meetings involving competitors in the same market. Although legal counsel may not be present for association meetings which do not involve competitors from the same segments of the school industry, and which deal with the administration and general affairs of the association, no formal action will be taken in antitrust-sensitive areas without an opinion from legal counsel.

Statistical Reporting. Trade associations in the past have run into trouble when statistical reporting was used to further price fixing or monopolistic schemes. Statistical reports, however, are permissible when designed to keep industry members generally informed of market conditions and developments.

With the guidance of legal counsel, NSSEA's statistical programs are designed to provide permissible market information and at the same time preserve the confidentiality of members' products and proprietary information. NSSEA conducts all statistical functions on a voluntary basis protecting the confidentiality of individual reports as well as the compiled data. As a result of antitrust concerns, NSSEA may provide redacted statistical reports or decline to issue some reports, when it is necessary to avoid disclosure of confidential information.

Membership and Disciplinary Action. Trade association membership can be an economic advantage in many industries. When that is the case, exclusion or expulsion from membership may inflict economic injury on a competitor.

Therefore, any firm meeting the requirements of membership as set forth in Article V of the NSSEA Bylaws shall be welcomed into NSSEA on a non-discriminatory basis. Once a firm becomes a member, it shall be entitled to the same services that are available to other members on a non-discriminatory basis. No firm shall be expelled except for just cause, and in such a manner as is established in the Bylaws to insure that the expulsion is fair, objective, reasonable, and non-discriminatory.

Credit Reporting. Trade associations often run into antitrust problems when engaged in credit reporting activities. Such activities may be construed as an effort to create a boycott or to set uniform credit terms, both prohibited by the antitrust laws. Because of these concerns and because NSSEA is not equipped to be a credit reporting company, NSSEA does not engage in any credit reporting functions.

Antitrust Laws

Antitrust laws are wide ranging, complex and subject to changing interpretations. The four main laws regulating antitrust are reviewed briefly below. For further clarification consult the actual wording of the law or our legal counsel.

The most important of the laws, the **Sherman Act**, declares that every contract, combination or conspiracy in restraint of trade is illegal. The fact that good motive, good purpose, good intentions, even benefits to the public are considered does not change the legality of the actions.

Business arrangements which prevent a buyer from using or selling a product of a competitor of the seller are illegal according to the **Clayton Act**. This act supplements the Sherman Act by identifying such prohibitive practices as exclusive dealing, tie-in-sales, and full line forcing.

It is illegal to charge commercial customers different prices for the same quantity of goods where the effect of such price discrimination may substantially lessen competition or tend to create a monopoly under the **Robinson-Patman Price Discrimination Act**.

The Federal Trade Commission Act declares unlawful all “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.” This has been held to include conspiracy between competitors, false or misleading advertising, monopolization of trade channels, obstruction of a competitor’s source of supply, concerted boycotting, and the misrepresentation of products.

Antitrust Laws

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