



The Association of Union Constructors

**ANTITRUST POLICY STATEMENT
FOR
ASSOCIATION MEMBERS**

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ANTITRUST COMPLIANCE PROGRAM

I. APPLICATION OF ANTITRUST LAWS TO ASSOCIATION ACTIVITIES

Trade associations, such as The Association of Union Constructors (TAUC), are subject to strict scrutiny under both federal and state antitrust laws. Since competitors in a particular industry join a trade association to pursue a common business purpose, trade associations are especially vulnerable to antitrust attack under federal and state laws. Trade associations and trade association members should exercise a great deal of care when carrying on certain activities so as to avoid any violation of the federal and state antitrust laws.

The consequences for violating the antitrust laws can be severe. A conviction can carry stiff fines for the association and its members, jail sentences for individuals who participated in the violation, and a court order dissolving the association or seriously curtailing its activities.

II. THE SHERMAN ACT AND THE FEDERAL TRADE COMMISSION ACT

With regard to trade association activities, the most important antitrust statutes are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits "contracts, combinations, or conspiracies ... in restraint of trade." By their very nature, trade associations involve a "combination" of competitors so they are especially prone to antitrust attack.

Under the Sherman Act, any understanding or agreement affecting the price of a product or bid on a construction job is prohibited, regardless of the purpose of the understanding. Even if the agreement will benefit consumers, it is prohibited.

Of great importance to TAUC members is the fact that the Sherman Act is a criminal conspiracy statute. Consequently, an executive who attends a meeting at which competitors engage in illegal discussions which relate to prices or bids may be held criminally responsible, even if he or she says nothing at the meeting. The executive's attendance at the meeting may be sufficient to imply acquiescence in the discussion, making him or her liable to as great a penalty as those who actively participated in the price-fixing or bid-rigging agreement.

Section 5 of the Federal Trade Commission Act forbids "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." It is distinct from Section 1 of the Sherman Act in that it does not require a "combination" in order to reach anticompetitive acts committed by individual companies. On the other hand, it will, like the Sherman Act, cover joint actions.

The Federal Trade Commission's authority in determining what constitutes an unfair method of competition or unfair or deceptive act or practice under any given circumstances is extremely broad. As a result, antitrust actions can be brought to cover a wide range of charges.

TAUC has established an antitrust compliance program to protect the association and its members from possible antitrust liability. Under this program, every effort will be made to stop any potential antitrust violation before it begins.

III. PENALTIES FOR VIOLATION OF THE ANTITRUST LAWS

The federal antitrust laws may be enforced against associations, association members and the association staff, both by government officials and by private parties through treble damage actions. In each case, the potential penalties are quite severe.

The maximum penalty for an individual convicted of a violation of the Sherman Act is a fine of \$1,000,000, twice the pecuniary loss of the victims, or twice the pecuniary gain of the wrongdoer, whichever is greater. In addition, an individual may be imprisoned for up to ten years. However, in no case can an individual convicted of a criminal Sherman Act Violation expect to be sentenced to less than 90 days of jail time. A corporation convicted of such a criminal offense may be fined as much as \$100 million, twice the pecuniary loss of the victims, or twice the pecuniary gain of the wrongdoer.¹

A violation of the Federal Trade Commission Act can result in the issuance of a cease and desist order, thereby placing extensive governmental restraints on the activities of an individual company, its officers and directors, an association and its members. Failure to obey such an order can result in penalties of as much as \$10,000 per day.

In addition to governmental prosecution for a criminal or civil antitrust violation, a company or an association can face a private treble damages action brought by competitors or consumers. A finding of a violation of an antitrust law in a private action will result in payment by the defendant of three times the damages suffered by the plaintiff plus attorneys fees.

In recent years, liability for corporate defendants have exceeded hundreds of millions of dollars.

¹ As an example, in 1999, Hoffman-LaRouche paid \$500,000,000 in fines, and BASF paid \$225,000,000 in fines in an Antitrust Division vitamin price fixing case.

IV. ANTITRUST PROBLEM AREAS OF ASSOCIATION ACTIVITY

A. Areas of General Concern

As a practical matter, all trade associations such as TAUC should focus their attention on five principal antitrust problem areas:

1. Price-Fixing

Experience shows that trade association members are most likely to violate, and the government is most likely to strictly enforce, the Sherman Act's ban on price-fixing or bid-rigging. Antitrust violations in the price-fixing or bid-rigging areas can be inferred simply from similar price or bid behavior by association members. An oral or a written agreement is not needed to ground a charge of price-fixing or bid-rigging. Neither the reasonableness of the prices set or the amounts bid nor the potentially beneficial purposes underlying the agreement will constitute a defense in the event that price-fixing or bid-rigging is established.²

2. Agreement to Allocate Customers or Divide Territories

An agreement among members of an association to allocate customers or divide geographical territories is, in and of itself, a per se violation. The antitrust laws expressly prohibit any understanding or agreement between competitors or members of an association involving division of territories or allocation of customers. Even an informal agreement whereby one member agrees to stay out of another's territory will constitute a criminal violation of the antitrust laws.

3. Membership Restrictions

Assuming that the members of an association derive an economic benefit from membership, the denial of membership to an applicant may constitute a restraint of trade because such a denial

² Courts consider bid rigging as very serious antitrust offenses. In 2011, a United States District Court in Iowa sentenced the President of an Iowa ready mix-concrete firm to 48 months in prison for price fixing.

may limit the ability of the applicant to compete. Therefore, membership criteria must be carefully established with a view toward avoiding antitrust problems.

4. Standardization and Certification

An association that develops voluntary industry standards may face antitrust problems if such a standard unreasonably favors some competitors and unfairly discriminates against others. Similarly, association certification activities which further the interests of certain groups of members, to the exclusion of others, may result in antitrust problems.

5. Industry Self-Regulation

Associations commonly establish codes of ethics for their members, including procedures for enforcement of such codes. The association must guard against any efforts to enforce such codes of ethics if such enforcement would result in economic injury to certain members.

B. Bid-Rigging -- An Area of Special Concern for the Construction Industry

An antitrust problem area which is of particular concern for TAUC is that of bid-rigging. A bid-rigging scheme bears some of the traits of both a price-fixing agreement and an agreement to divide customers, and, in fact, could be considered a synthesis of those two violations. In U.S. v. W.F. Brinkley & Son Construction Co. [1986-1 Trade Cas. (CCH) & 66,963] (a highway construction case), the Fourth Circuit Court of Appeals upheld the lower court's jury instruction that "a conspiracy to allocate projects or rig bids is automatically or per se unreasonable and illegal." As a result, an agreement between two or more persons that one will submit a higher or lower bid than the other, or will submit no bid at all, will constitute a criminal restraint of trade violating the Sherman Act. In making their case, those alleging an unlawful bid-rigging conspiracy need not prove a formal, express agreement with all terms set-forth as clearly understood by the conspiring

competitors. The antitrust injury caused by a bid-rigging scheme is the denial of the purchaser's property right to choose the lowest responsible bidder and to allocate its funds to that bidder.³ Those individuals found guilty of bid-rigging face a mandatory jail sentence of at least 90 days.

Recently, both the federal and state governments have prosecuted a number of antitrust cases involving bid-rigging on construction projects. U.S. v. Vandebroke [No. CR10-4025 MWBC N.D. Iowa 2011].

V. HOW TO AVOID ANTITRUST PROBLEMS

TAUC has adopted the following rules in order to insure against unintentional violations of the antitrust laws:

A. General Operating Procedures

1. A full description of the association's intention to comply fully with the antitrust laws is included in the written policies of the association.
2. All members of the board of directors of the association receive a copy of the association's antitrust policy statement, detailing what can and cannot be done at association meetings.
3. The association's legal counsel updates members concerning antitrust problems periodically and has formalized the association's antitrust compliance program.
4. The association's legal counsel approves, in advance, all new association programs or changes in existing programs that may have potential antitrust implications. In this regard, special attention is given to statistical reporting programs.

³ See County of Orange v. Sullivan Highway Products, Inc. and North Dakota Cement Co., 1989-2 Trade Cas. (CCH) & 68,815.

5. All association meetings are regularly scheduled, and members are not permitted to hold "rump" meetings.

6. An agenda is prepared for each meeting of the association, and the agenda is reviewed in advance by legal counsel.

7. Legal counsel is present at all meetings of the board of directors and at any other meeting at which antitrust sensitive issues will be discussed.

8. The minutes of all meetings are approved by legal counsel. The minutes reflect the association's policy of complying with the antitrust laws.

9. The minutes of all association meetings are accurate, and the TAUC staff never submits minutes which have been doctored, which are incomplete, or which have not been approved by legal counsel.

10. No action by the association or its board of directors which has the effect of rejecting a membership application becomes final without approval by legal counsel.

11. The association has a formal record retention program.

12. No association staff member has authority to communicate with officials of the Federal Trade Commission or the Antitrust Division of the Department of Justice without prior approval of the association's legal counsel.

B. Membership Policy

TAUC does not:

1. Exclude certain competitors from membership in the association, if the applicant meets bylaw requirements.

2. Restrict members from dealing with nonmembers.

3. Limit access to information developed by the association, unless such limitation is firmly grounded upon the need to protect trade secrets.

C. Self-Regulation and Codes of Ethics

The association does not:

1. Adopt regulations or policies which have price-fixing implications, such as restrictions on advertising of prices or bidding, or which unreasonably inhibit the ability of any member or group of members to compete.

2. Require members to refrain from dealing with any vendor, supplier, customer or other member.

D. Topics of Discussion Which Must Be Avoided at Association Meetings

1. Current or future prices or bids. (Great care must be taken in discussing past prices or bids.)

2. What constitutes a "fair" profit level.

3. Possible increases or decreases in prices.

4. Standardization or stabilization of prices.

5. Pricing procedures.

6. Bid-rigging.

7. Credit terms.

8. Control of sales.

9. Allocation of markets.

10. Refusal to deal with a corporation because of its pricing or bidding practices.

11. Whether or not the pricing or bidding practices of any industry member are unethical or constitute an unfair trade practice.

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