



Aviation Insurance Association

Antitrust Laws in the United States and Application to Trade Associations: An Overview for Members of the Aviation Insurance Association

*NOTE: AIA provides this document as a limited overview only and to enhance member awareness of the existence of certain laws and regulations in the United States that might affect their communications and conduct with other members and AIA personnel. This document does not provide any data on the existence and content of laws and regulations outside the United States. **This document does not constitute legal advice by AIA for its members or any other person or organization.** For specific information on the laws and regulations within the United States or other countries at the federal, state and local government level concerning restraints on trade and any related topics, **members should seek advice and data from their own legal counsel.***

Trade associations are subject to strict scrutiny under various federal and state antitrust laws. One of the broadest in scope of these laws is the Sherman Act ("the Act"). Section 1 of that Act prohibits "contracts, combinations or conspiracies ... in restraint of trade." By its very nature, a trade association might be held by a Court to constitute a "combination" as defined by the Act. Therefore, trade associations must proceed with extreme caution to avoid a "restraint on trade" per the Act, lest the association and/or its members might be cited for violation of antitrust law. Such violations can include significant fines and incarceration.

Responsibility for enforcement of the antitrust laws lies with the US Department of Justice, the Federal Trade Commission, and various regulatory bodies and prosecuting authorities within the many states that have enacted antitrust legislation.

The federal government prosecutes civil and criminal felony cases each year against trade associations, including members and staff. Each individual can be fined up to \$100,000 and each member corporation can be fined up to \$1,000,000. Individuals are subject to imprisonment of up to three years. In addition, the government can impose civil sanctions such as cease and desist order, which result in government restraints on the activities of association members. This, in turn, inhibits association functions and may culminate in the dissolution of an association altogether.

In addition to lawsuits prosecuted by the government, competitors and consumers can bring civil lawsuits that might include the award of treble damages. As one example, the Act prohibits any price agreement, regardless of purpose. Thus, if members of a trade association create an agreement as to price, they cannot justify the legality of the agreement even by showing benefits to customers. Members could be found liable for treble damages for injury resulting from the agreed price charged.

From a practical standpoint, trade associations such as AIA often encourage members to focus their concern on certain antitrust issues, which is not intended to be an exclusive list. These areas include: price-fixing, division of customers, membership, standardization and certification and industry self-regulation. **Again, consult your own legal counsel for an exhaustive list of communications and conduct that could constitute a violation of antitrust laws and regulations.**



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Price-Fixing. Members of a trade association generally are more likely to violate this provision of the Act versus other provisions. The government has evinced its greatest concern about the price-fixing prohibitions of the Sherman Act. A price-fixing violation can be inferred from the fact of similar price conduct by members, even though there is no evidence of a written or oral agreement. If prices are fixed, it is no defense that the prices set are reasonable or that the ends sought are worthy.

Division of Customers. An agreement among members of an association to divide customers can be, in and of itself, a criminal act. The antitrust laws prohibit any understandings or agreements between competitors or members of an association that involve the division or allocation of customers. Even informal agreements whereby one member agrees to not compete within a geographic area where another member conducts business could constitute a violation of the antitrust laws.

Membership. A basic assumption about every trade association is that its members derive an economic benefit from membership. Denial of membership to an applicant may therefore constitute a restraint of trade in that such denial of an economic benefit limits the rights of an applicant to compete. Thus, membership criteria must be carefully drafted to avoid antitrust problems.

Standardization and Certification. An association that develops voluntary industry standards may face antitrust problems if the standard favors some and discriminates against others. Similarly, association certification activities that further interests of certain groups to the exclusion of others may result in antitrust problems.

Industry Self-Regulation. Associations commonly establish codes of ethics for their members, with procedures enforcing them. But antitrust problems may arise if an association's attempt to enforce its code of ethics causes economic injury.

Considerations for Members

One way to help avoid possible infringement of the antitrust laws is for members and staff to avoid at AIA association gatherings discussing certain sensitive subjects. The same process should be employed for informal gatherings that surround AIA association meetings, which government regulators might look upon as the functional equivalent of an association meeting.

Some topics that should be scrupulously avoided in all such meetings:

1. Do not discuss current or future prices (be very careful of discussion of past prices).
2. Do not discuss what is a fair profit level.
3. Do not discuss an increase or decrease in price.
4. Do not discuss standardizing or stabilizing prices.
5. Do not discuss pricing procedures.
6. Do not discuss cash discounts.
7. Do not discuss credit terms.
8. Do not discuss controlling sales.



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9. Do not discuss allocating markets.
10. Do not complain to a competitor that his or her prices constitute unfair practices.
11. Do not discuss refusing to deal with a corporation because of its pricing or distribution practices.
12. Do not attend informal sessions in which any of the above subjects are discussed.

With regard to antitrust risks present in membership and industry self-regulation, **membership policies** should avoid:

1. Restrictions on dealing with non-members.
2. Exclusions from membership, especially if there is a business advantage in being a member.
3. Limitations on access to association information, unless the limitation is based upon protection of trade secrets.

Industry self-regulation and **codes of ethics** should avoid:

1. Requiring refusal to deal with any member violating the association's code of ethics.
2. Arbitrary enforcement of the code.
3. Unreasonably severe penalties for violation of the code.
4. Regulations or policies that have price-fixing implications, such as preventing the advertising of prices.

Thus, AIA members and personnel should bear in mind that they can be targets for government antitrust enforcers and private treble damage suits. By conducting their business openly and avoiding even the appearance that they are engaging in activity that might be seen to have an effect on prices or competition, AIA members may help protect themselves from potential antitrust law and regulation violations. **When in doubt, avoid the conduct or communications at issue until you obtain guidance from your own legal counsel.**