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BLOG

A Reminder to Trade Associations to Tread Carefully

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A federal judge recently dismissed a complaint by two reporters alleging, among other things, that the Hollywood Foreign Press Association (HFPA)—the trade association responsible for the Golden Globe Awards—had illegally denied them membership and its associated benefits, *i.e.*, access to celebrities.[1] While the trade association escaped liability, the case offers important reminders to trade associations to keep up-to-date on the legal landscape regarding trade association operations and rules. From membership decisions to information-sharing and event access, the antitrust risks are real. Mere synchronized or "parallel" conduct by individual members—perhaps each refusing to deal with a particular competitor or vertical partner—could still invite costly antitrust investigations and litigations by competitors or regulators *even in the absence of an explicit anticompetitive agreement reached during an official association meeting.*

This post provides are some basic antitrust compliance reminders for trade associations and their members as well as best practices for avoiding potentially anticompetitive conduct that can occur in the context of otherwise legitimate trade association activities. Such conduct includes:

- Agreements or implicit understandings reached as to pricing, even as to price "floors" or price "ranges" and not specific, individual prices.
- Agreements or implicit understandings to divide markets or customers, whether by geographic location, tiers or price preferences, or on a customer-by-customer basis.
- Group boycotts or refusals to deal, either with a non-member competitor or with respect to upstream or downstream vertical partners.
- Exchanges of business information that is too recent in time or too competitively sensitive in content.

First: Establish Clear Membership Criteria

Trade associations should develop written criteria for membership that are fairly applied to all would-be members. The more objective the criteria, the better. For example:

- Demonstrated participation in a particular industry, or even in a particular role or level within an industry

- Geography
- Ability to pay for applicable licenses and membership dues
- Future adherence to a specified code of conduct and/or a demonstrated commitment to specified rules, laws, or regulations in the past
- Any other objective criteria that fit the association and its business goals.

Keep in mind that if membership criteria proscribe conduct that is otherwise permissible—such as prohibiting members from dealing with non-members or associating with competing trade organizations—antitrust scrutiny could result. And the risks are more acute if the association and/or its membership enjoys market power or controls access to a resource necessary to compete, *i.e.*, if denial of membership effectively would foreclose the company denied membership from participating in the market (the so-called "essential facilities" concept).

In any event, the reasons for exclusion should be documented and in line with the association's stated policies and past practices, including objective, transparent, and non-discriminatory membership requirements publicized externally.

Finally, the requirement that trade associations treat would-be members fairly extends to existing members as well. Withdrawing the economic benefits of membership from some members, but not others, is risky. And, caution should also be exercised when expelling a particular member from the group altogether.

Second: Develop a Written Antitrust Policy and Monitor Members' Compliance

The antitrust compliance policy for a trade association should confirm its commitment to operate solely for legal purposes and to promote competition and benefit consumers. The association should refer to its antitrust policy at all meetings, and the policy should be accessible to all members and would-be members. Circulate meeting agendas in advance, and keep minutes of all official meeting business. In-house or outside counsel should attend meetings to monitor compliance.

More specific hallmarks of strong antitrust compliance policies and practices include the following:

- Educate all members and prospective members about the antitrust policy and its purpose.
- Train all members regarding antitrust do's and don'ts, and include in the training hypothetical but real-life examples that practice issue-spotting.
- Prohibit the exchange of confidential or private business data (including recent, current or planned pricing, sales volumes, sales practices, discounts, profit margins, deal terms, agreement durations, production capacities, exclusive dealing arrangements, suppliers, or customers). Discussions about not competing for, not poaching, or not soliciting each other's employees should likewise be prohibited, as should discussions about how employees are, or should be, compensated.
- Educate members that the above-described topics are off limits even when discussed on an informal basis outside of official meetings.
- Carefully oversee the sharing of any business information concerning members that might be seen as competitively sensitive (or avoid such exchanges altogether). Pursuant to DOJ and FTC guidance, when aggregating data to share among competitors, ensure that: data are historical (generally, data should be at least three months old); data come from a sufficient number of sources (generally, at least five members' data); and shared statistics are sufficiently aggregated so that no participant can discern the data of any other participant.
- Create a mechanism (hotline, email address) for anonymous reporting of conduct that might violate antitrust laws.
- Do not retaliate against any member who makes such a report.

- Do not overlook violations of antitrust policy or other association rules or policies designed to reduce the risk of intentional or accidental illegal conduct.
- Revise the policies as needed following regular review, especially in response to changes in the business practices of the association or if policies in place are not being followed.

Third: Monitor the Substance of Discussions

Some of the more surprising topics that have been admonished by the FTC or DOJ as illegal price-fixing disguised as information-sharing include exchanges about terms of standardized contracts, operating hours, accounting, safety codes, and transportation methods. For example, sharing anticipated operating hours changes or setting standards for safety measures have been seen as efforts to fix input costs for labor or equipment.

The following "watch words" may indicate a problematic discussion that would be stopped:

- Competitors described as "going rogue"
- "We are doing our part…"
- "We haven't published these numbers, but…"
- "These deal terms are ruining us…"
- "We have no choice but to follow…"
- "Company A is my best customer/supplier…"
- "Company B needs to get on the same page as the rest of us…"
- Discussions about individual members' future plans
- Statements about what "the industry" ought to do or "industry alignment." For example, "The industry needs to do something about capacity," or "The industry needs to take a stand."

Takeaway

The recent HFPA case is a reminder that trade associations do not enjoy blanket immunity from antitrust scrutiny by government regulators or private litigants. Taking a good look at association antitrust compliance policies regularly—including rules for membership—can help to reduce the risks of costly investigation and litigation while retaining the benefits of industry advancement.

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[1] *Kjersti Flaa et al. v. Hollywood Foreign Press Ass'n et al.*, No. 2:20-cv-06974 (SB) (C.D.C.A. March 23, 2021), available at: https://assets.documentcloud.org/documents/20521915/flaa-dismiss-hfpa.pdf.

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Author

Jeffrey J. Amato

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Jeffrey J. Amato

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