

NASBP Antitrust Policy

Policy

Antitrust laws, including the Sherman Act, Clayton Act, Federal Trade Commission Act and Robinson Patman Act, are among the most important of all laws affecting associations like the National Association of Surety Bond Producers. The purpose of antitrust laws is to preserve fair and honest competition. It is the policy of NASBP to comply with antitrust laws.

To ensure compliance with federal and state antitrust laws, NASBP members should have a basic understanding of those laws. The Guidelines for Antitrust Compliance set forth below are designed to provide the basic framework for compliance.

Meetings

Special care must be taken to ensure that NASBP meetings are not used or perceived to be used as a means of violating antitrust laws. Meetings of NASBP are regularly scheduled and follow a prepared agenda. A detailed agenda is prepared for each meeting. If potential antitrust questions are raised by agenda items, they should be reviewed in advance by legal counsel.

Minutes

Accurate minutes are kept of all NASBP meetings. These minutes should be a factual, objective, and businesslike account of the activities of NASBP. Notes taken at meetings and drafts of documents having no further lasting value are discarded.

Antitrust Compliance Guidelines

Introduction

The antitrust laws were first created nearly a century ago to preserve and promote free and fair competition throughout the United States economy. Antitrust laws advance competition by preventing businesses and professionals from engaging in anticompetitive conduct such as price-fixing, market allocation, boycotts, monopolies, and other activities that limit free trade. Associations like NASBP bring together surety bond producers and others in the surety industry to facilitate the exchange of ideas and information among those parties. This creates the potential for activities that may be seen by some as a violation of various antitrust laws.

NASBP recognizes the importance of the antitrust laws. It is the policy of NASBP to comply strictly with both the letter and intent of these laws. To help ensure this policy, these guidelines address: (1) the areas of antitrust which may relate to NASBP and its members, (2) the activities that should be avoided to minimize the risk of antitrust liability, and (3) policies and procedures to follow in the area of competition. Members should be aware, however, that these guidelines cannot address every potential area of antitrust concern for NASBP and its members. Whenever there is doubt, it is the policy of NASBP to seek the assistance of legal counsel.

Antitrust Laws in General

The basic federal antitrust statutes are the Sherman Act (15 U.S.C. §1-27), the Clayton Act (15 U.S.C. § 12-27, 29 U.S.C. § 52-53), the Federal Trade Commission Act (15 U.S.C. §41-51, and the RobinsonPatman Act (15 U.S.C. §13).

The Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade in interstate commerce. Among the activities prohibited by the Sherman Act are those that involve price fixing, allocation of markets or customers, and boycotts of competitors, suppliers, or customers.

The Clayton Act prohibits various kinds of business behavior which tend to lessen competition or monopolize trade. Among the activities prohibited by the Clayton Act are exclusive dealing arrangements, acquisitions, and mergers which tend to lessen competition.

The Federal Trade Commission Act, in addition to prohibiting the anticompetitive activities made illegal by the Sherman and Clayton Acts, bans unfair methods of competition and unfair or deceptive acts and practices. Unlike the Sherman and Clayton Acts, where most of what is prohibited requires the action of two or more parties, individuals or firms can be liable under the Federal Trade Commission Act even though they did not act in concert with others.

The RobinsonPatman Act prohibits price discrimination where the effect is to lessen competition.

In addition to the federal laws, most states have enacted statutes similar to the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. It is impossible for these summary guidelines to outline each state's antitrust laws. When particular questions arise, NASBP's members must look to their own states' antitrust laws and enforcement mechanisms. Because of the general similarities between the federal laws and the laws of most states, however, it is appropriate to use the federal antitrust laws for general guidance.

Antitrust Enforcement

The Sherman Act is enforced by the Antitrust Division of the United States Department of Justice and by the Bureau of Competition of the Federal Trade Commission, as well as through suits by private entities and persons. In suits by private individuals, the Sherman Act provides for penalty damages in an amount equal to three times actual damages ("treble damages") against violators of the law. The government may bring civil and/or criminal suits alleging violations of the Sherman Act. The remedy for a civil suit in an action brought by the government is an injunction prohibiting the offender from future violations. Criminal penalties can include fines, imprisonment, or both.

Sherman Act violations carry stiff fines with the added deterrent of possible jail terms. A violation of the Act is a felony, punishable by up to three years in prison. In addition, steep fines can be imposed for Sherman Act violations.

The Federal Trade Commission enforces the Federal Trade Commission Act by issuing "cease and desist" orders to stop practices found to violate the law. The violation of a Commission order may result in a penalty of as much as \$10,000 per day. An association, such as the NASBP, that is adjudged to be in violation of the antitrust laws can be dissolved by court order.

It is important to note that *each* party found liable, no matter how small a role that party played, can be held liable for *all* damages caused by *all* participants in the antitrust conspiracy. The legal costs incurred in defending an antitrust challenge, beyond the penalties that might ultimately be imposed, frequently run into the hundreds of thousands of dollars. Some associations have paid millions of dollars to defend themselves in especially long or complex antitrust suits.

Antitrust Laws Applicable to the National Association of Surety Bond Producers

Focusing on the federal antitrust laws, of principal concern to NASBP and its members is Section 1 of the Sherman Act, which renders illegal all "contracts, combinations, and conspiracies" in

restraint of trade in interstate commerce. Section 1 is interpreted to prohibit only agreements which have the effect of *unreasonably* restraining trade.

Certain activities are regarded by courts as unreasonable by their very nature and are considered illegal *per se*. When an activity is designated a *per se* antitrust violation, a conclusive presumption is created that the activity was engaged in for no other purpose than to restrain trade. This means that those engaged in the activity will be liable for damages regardless of the reason for the activity. Practices within the *per se* category include agreements to fix or set prices, fees, rates, or commissions, as well as certain kinds of agreements to boycott competitors, suppliers, or customers. Note that the concept of "price fixing" encompasses agreements not only to raise prices but also to lower or stabilize prices. Virtually any agreement, arrangement, or understanding among competitors that involves tampering with free market prices, fees, rates, or premiums is a *per se* antitrust law violation.

The Sherman Act prohibition extends to any such agreement, whether written or oral, formal or informal, express or implicit. Only rarely is an anticompetitive agreement set out clearly in a written document. Antitrust liability is more often found by examining a course of business conduct from which a jury can infer the existence of an illegal conspiracy. The circumstances may be entirely innocent and lawful when viewed separately, but the same circumstances, when viewed together, may constitute an antitrust conspiracy.

Basic Principles of NASBP's Antitrust Policy

The legality of activities of associations and their members under the antitrust laws is determined according to standards no different from those used to determine the legality of the activities of other persons or firms. Special problems arise, however, from the basic nature of an association. Many of an association's most fundamental policies and programs concern areas regulated by antitrust laws.

No illegal agreements, arrangements, or understandings should be reached or carried out through NASBP. Conduct which might even give the appearance of an illegal agreement should be avoided. Officers, directors, members and staff of the NASBP should be alert to conduct that might fall into areas of particular antitrust concern.

Price Fixing. NASBP and its members will not engage in any activities to regulate prices or rates for surety products, including the level of agent commissions.

Boycotts and Refusals to Deal. NASBP and its members will not suggest, directly or indirectly, that they cancel agency contracts, move business, place moratoria on new business, or do business with certain companies. Similarly, NASBP will not create "blacklists" of companies engaged in practices disfavored by the association or its members.

Membership. The process of admission, suspension and expulsion of NASBP members will not be used to carry out any anti-competitive purpose. Membership criteria set forth in NASBP's bylaws will be applied in a fair and neutral fashion.

Market Allocations. NASBP and its members oppose any arrangement between two or more competitors to divide customers, territories or markets, or restrict sales volume.

Antitrust Statement to be Read at the Start of NASBP Meetings

Pursuant to its Antitrust Policy, it is the policy of the NASBP to operate in full compliance with anti-trust laws. During its meetings and programs, NASBP will not condone any discussions—official or unofficial—of price-fixing, boycotts, refusals to deal, blacklisting, market allocation or other illegal anti-competitive activity.