Antitrust Enforcement in the Obama Era:

What Does It Mean For Associations?

October 29, 2009

Gregory M. Scott
Executive Vice President and General Counsel
National Petrochemical & Refiners Association

Christopher E. Ondeck
Michael G. Van Arsdall
Crowell & Moring LLP
Washington, D.C.
condeck@crowell.com
(202) 624-2855
mvanarsdall@crowell.com
(202) 624-2782
• What are the risks?

• The new enforcement team – who they are and what to expect.

• What have we learned from the first year of the new administration?

• How associations can implement policies and procedures to minimize antitrust risk.
First, The Advice

- Turn on radar to monitor:
  - Advocacy positions and industry implementation
  - Voluntary and involuntary standards
  - Information exchange vs. industry output levels
  - Membership strategies/restrictions

- Keep an eye on the politics (where are the DOJ/FTC on your industry and issues?)

- Fill in the boxes on the checklist
What are the risks?
Antitrust in the movies...
Art imitates life...
• Haven’t all the traps already been sprung?

  ➢ The American Society of Association Executives states: “In 2004, there were an estimated 86,054 trade and professional associations.”
  ➢ The association path is well-trodden.
  ➢ Empirically, associations appear safe.

• From a practical point of view, are there really any risks from non-compliance with antitrust law?
• **Obvious risks**
  ➢ Stemming from criminal activity to use the association as cover for ‘intentional’ agreements on price, output, customer or territory, or boycotts.

• **Nuanced risks**
  ➢ Usually civil, stemming from well-meaning association activities that (allegedly) may unfairly disadvantage competitors, customers, or suppliers.
  ➢ These are our focus.
Increasingly Complex Civil Risks

- Historically, associations as a class of business have been the single largest source of antitrust cases under U.S. antitrust law.
- Associations increasingly engage in activities that trigger antitrust risk without intending to do so.
  - Lobbying and public advocacy (e.g., healthcare, climate change; and industry responses)
  - Standard setting
  - Information exchanges
  - Membership restrictions
  - Codes of ethics and other industry self-regulation
  - Public statements and publications
  - Other restrictive practices
  - Process failures
You Thought You Had Immunity in D.C., But...

• **Noerr-Pennington Immunity**: for legitimate and truthful petitioning to the government
  - Lobbying executive or legislative; litigation

• Examples
  - Association executive testifying to a subcommittee regarding proposed legislation; or other typical government advocacy
  - Political action arm of an association coordinating support of legislation
  - Position papers; white papers; how will industry respond to/interpret legislation or regulation

• Reaching the outer-edge of **Noerr-Pennington**
  - *Unocal* and FTC Report
The New Enforcement Team – Who Are They and What to Expect
During the campaign, Obama assured voters he would “reinvigorate antitrust enforcement”

– Obama 2008 Campaign Statement

“I will assure that we will have an Antitrust Division that is serious about pursuing cases ... We’re going to have an Antitrust Division in the Justice Department that actually believes in antitrust law”


“An Obama administration will look carefully at key industries to ensure that the benefits of competition are fully realized by consumers”

– Obama 2008 Campaign Statement
• Christine Varney, Assistant Attorney General
  - Strong “political” background and resume
  - Former FTC commissioner (Clinton appointee)
  - Focus on innovation, high tech industries, privacy

  “It is time for the Antitrust Division to step forward again. . . . As antitrust enforcers, we cannot sit on the sidelines any longer”

• Jon Leibowitz, FTC Chairman
  - Long career as Senate staffer
  - FTC Commissioner since 2004
  - Strong proponent of expanding FTC enforcement

  “The Commission should not be tied to the more technical definitions of consumer harm that limit applications of the Sherman Act when we are looking at pure Section 5 violations”
• “Continued criminal and civil enforcement under Section 1 of the Sherman Act will also be an important part of the Antitrust Division's response to the distressed economy.” Christine Varney “Vigorous Antitrust Enforcement in this Challenging Era” (5/11/09)

• “Trade associations properly provide many services for their members, but enabling competing sellers to work together to coordinate higher prices for their products is not a legitimate function.” David P. Wales, Acting Director of the FTC’s Bureau of Competition, (3/4/09)
U.S. Antitrust Enforcers Are Focusing on Trade Associations

- DOJ full-frontal assault on possible criminal activities in associations
  - DOJ running over 100 grand juries, with more than half focused on price fixing cartels -- most involve associations
- Cartels “frequently use trade associations as a means of providing ‘cover’ for their cartel activities.”
  
  *U.S. DOJ Director of Criminal Enforcement, Antitrust Division*

- “So much for the good part of trade associations, the bad part of trade associations is cartels.”
  
  *Commissioner, Federal Trade Commission*
What Have We Learned From the First Year of the New Administration?
• **October 2009:** Opt-out plaintiffs filed complaint against over 20 LCD manufacturers alleging a price-fixing conspiracy stemming in part from meetings held at trade associations.

• **October 2009:** Minneapolis packaged-ice company and three former executives pleads guilty to conspiracy and pay $9 million fine for customer allocation. Court filings indicate that executives had opportunities to collaborate during several annual meetings of the International Packaged Ice Association.

• **March 2009:** The FTC obtains a consent decree against the National Association of Music Merchants, Inc. (NAMM) for facilitating price discussions between retailers and manufacturers.
The DOJ, FTC and EC have announced industry-wide investigations for:

- Internet/Technology firms;
- Financial Services;
- Pharma;
- Telecom;
- Agriculture;
- Who’s next? (transport, building materials, natural resources, retail, food & beverage, automotive, other healthcare...?)
How is enforcement different?

• Politics now matter
  ➢ Investigations based on political positions taken by associations
  ➢ Hitting the outer-edges of Noerr-Pennington

• Major push to roll-back immunities
  ➢ Industry immunities (e.g., railroads) and possibly conduct immunities (lobbying)

• New look at vertical issues
  ➢ Once favored ‘seller’ industries/associations now under the gun
How Associations Can Implement Policies and Procedures To Minimize Antitrust Risk
Dealing With Competitors At Association Meetings ... Carefully

- Principal legal concern: Agreements among competitors not to compete
- Obvious examples:
  - Price fixing...most tempting
  - Market/customer allocation...most complained about
  - Bid rigging...most obvious
  - Boycotts...most likely to trip-up a discussion
- Not so obvious examples
  - Voluntary and involuntary standards...most common
  - Advocacy positions...most current
  - Information exchange vs. industry output levels...most mentioned in current lawsuits
  - Membership strategies/restrictions (China)...most on the horizon
Specific Elements of an Antitrust Compliance Program for Trade Associations
“First, a discussion of prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, and even in the absence of an explicit agreement on future conduct, an information exchange may facilitate coordination among rivals that harms competition. In light of the long-recognized risk of antitrust liability, a well-counseled trade association will ensure that its activities are appropriately monitored and supervised.”

- **Claimed Conduct**
  - Bringing together retailers and manufacturers to discuss MAP Policies and prices
  - NAMM sponsored the meetings
  - NAMM representatives “set the agenda and helped steer the discussions”

- **Settlement**
  - More rigorous antitrust compliance by NAMM
    - Outside counsel as “antitrust compliance officer” for first 3 years
    - Advance review of written materials
    - Live training of Board of Directors annually
    - Effective reporting and disciplining of violations
    - Required recording of specific sessions for review by antitrust compliance officer
• FTC requirements for National Association of Music Merchandisers (March 4, 2009)
  ➢ Annual antitrust training for the association’s Board
  ➢ Annual antitrust training for the association’s employees and staff
  ➢ Review and approval for all final agendas and materials prior to distribution at association meetings
  ➢ Antitrust counsel or ‘deputy’ present at all association events and meetings
  ➢ Antitrust Reminder read at association meetings
The New Guidance: Antitrust Checklist

• Per the FTC and DOJ:
  ✓ Antitrust Training (Board and Staff)
  ✓ Antitrust Reminder
  ✓ Written antitrust policy
  ✓ Monitoring by counsel/deputies
  ✓ Agenda and minutes
  ✓ Specific compliance for statistical programs
  ✓ Proper standard setting practices
Conclusion

Steps for in-house counsel and executives:

• Turn on radar to monitor:
  ➢ Advocacy positions and industry implementation
  ➢ Voluntary and involuntary standards
  ➢ Information exchange vs. industry output levels
  ➢ Membership strategies/restrictions

• Keep an eye on the politics (where are the DOJ/FTC on your industry and issues?)

• Fill in the boxes on the checklist
YOUR MOMMA’S RULES TO KEEP OTHER PEOPLE FROM GETTING YOU AND YOUR OUTFIT IN ANTITRUST TROUBLE*

1. Who’s Giving the Party? When you were 15, your Momma wouldn’t let you go to a party unless the right group sponsored it (like a church, or school, or somebody’s parents). You couldn’t just say “Momma a few couples are getting together in the woods”. Same deal here; your Momma was right. Don’t go to any meeting unless there is a clear and proper sponsor, and it is the right kind of officially-recognized body which is properly-constituted, broadly-based, and well-run. Otherwise, you may get in more trouble than you can handle.

2. “What’s Up?” Your Momma wanted to know “what kind of party is it?” She was right; there is a difference between drinking and skating and she wanted to know what was going on. Same deal here. What is going on? If they don’t send a written agenda in advance, you really shouldn’t go. (It is not an “agenda” if all it says is “(1) old business, (2) new business, (3) other”, or anything like that.)

*David A. Bagwell, *Your Momma’s Rules to Keep Other People from Getting You in Antitrust Trouble*, Fairhope, AL.
3. Chaperones. When you were 15, your Momma wouldn’t let you go unless a chaperone was going. A lawyer is kind of like a chaperone; they tend to spot any developing troublemakers and throw them out of the party. If no lawyer is going to be there to chaperone, it is a sign the party might get too wild, and maybe you shouldn’t go.

4. Stay Out of the Bushes. Your Momma knew that if you left the party, you were more likely to get in trouble. She was right. Don’t go to “rump sessions” before, during or after meetings; the natural human temptation is to talk business there and your business is best discussed openly in the proper forum. It is okay to have lunch with a friend or two, but don’t let it turn into a “rump session” (hard to define, but we all know it when we see it; so see it before it is too late).

5. No Select Groups. Remember how it hurt your feelings when some people got invited to the party but you didn’t? Same deal here. If they don’t invite the whole class, don’t go. Especially don’t go if they call it something stupid like “let’s get the ‘big three’ together”. That kind of talk will just get you in trouble; don’t go.
6. Don’t Get Taken in By Sweet Words. Your Momma told you they would talk sweet to you; don’t get taken in. She was right. It would be simple if you could spot antitrust trouble just by seeing an evil-looking guy in a cloak and silk hat and a waxed mustache who whispered “Pst! Let’s conspire!” They don’t do that. People sometimes unknowingly fall into conspiracies, pulled in by other nice-seeming people who say “let’s get on the same wavelength”, or “let’s sort it out before the meeting”, or “let’s get our story straight”. If they whisper to you like that, they are the Devil. Don’t be tempted. Don’t go. It can only get you in trouble. Your “story” is open and honorable and firmly-based on correct data, and your story is already “straight”. The only time you need to be on the “same wavelength” as anybody else is when you both tune into the religious channel on your separate radios.

7. Don’t Let Them Spike the Punch. Your Momma suspected that some boy might try to spike the punch, and she told the chaperone to keep a lookout. She was right; same deal here. Watch out that no narrow interest tries to rig the meeting or the system unfairly in favor of its company or its narrow interest; like a spiked punch at junior high party, it can only lead to trouble (and don’t let anybody do the minutes on company stationery; it makes it look like their company is “in charge”, which is probably unfair).
8. **Appearances Count.** Your Momma knew that if you slipped off to the woods from the party, people would assume the worst, even if you only held hands. She was right. Pay attention to how things might look to somebody else. Some people always assume the worst, and start a bunch of gossip. Don’t be grist for the gossip; make sure you behave and look like you are behaving. For instance, don’t sit over in the corner whispering with your competitors, even about football or movies. (At this point in your life, it won’t be a gossip who will spread the scandal; it will be some lawyer trying to make you look bad to a jury, so he can personally make a lot of money. Strike a blow for liberty; behave and look like you behave and keep all the lawyers poor.)

9. **If the Party Turns Wild, Leave.** Your Momma told you to leave if it got wild. She was right. If the other people at your meeting start talking about or doing bad stuff, get up and walk out. (It may be unpleasant then but it beats going to jail or getting sued.)

10. **Call Your Momma if You’re Not Sure.** Your Momma gave you a dime (or a quarter or a nickel, depending on how old you are) to call her if you needed advice or help. She was right; same deal here. If you can’t get your Momma, call your lawyer.