

ANTITRUST COMPLIANCE STANDARDS
MISSOURI TELECOMMUNICATIONS INDUSTRY ASSOCIATION

I. Association Policy

As members of the Missouri Telecommunications Industry Association (MTIA), member companies enjoy the benefits of shared pursuit of common business interests, information exchange, and services such as advocacy, education and advancement of their interests.

1. MTIA is aware of the federal and state antitrust laws, is aware that the penalties for violation of these laws can carry stiff fines and jail sentences, and is aware that, as a trade association, it must remain vigilant to ensure that its purposes, goals, procedures and every aspect of its operation are in compliance with the letter and spirit of these laws. It shall be the policy of MTIA's directors, members, and staff to conform their activities so as not to violate any of the antitrust laws and to review periodically these laws to remain abreast of changes. In furtherance of this policy, every director, member, and all staff of MTIA will be provided a copy of these standards and will be responsible for reading same and understanding that the participation of each and every such individual is necessary for achieving compliance with the stated policy of ensuring compliance with the antitrust laws.

The enclosed standards provide guidance for avoiding antitrust liability and are prepared to assist our association and members in realizing the above policy. Any questions concerning the impact of MTIA's activities under the antitrust laws should be referred immediately to the association.

II. Antitrust Laws/Consequences for Violation

A. Sherman Act of 1890 (Act)

This federal law is the basis for the majority of actions brought against trade associations. It is enforced by the United States Department of Justice, which has the power to bring actions against entities (including trade associations) for violations of the Act.

Section 1 of the Sherman Act prohibits Acontracts, combinations and conspiracies in restraint of trade. Because a trade association is, by its nature, a combination of competitors, it is already subject to the provisions of Section 1. This makes such associations extremely vulnerable to antitrust violations. Because its members have already combined, a trade association must exercise great caution during meetings and other group activity to ensure that no action is taken which would constitute restraint of trade. If an association action results in restraint of trade in interstate or foreign commerce, which is almost any conceivable type of trade, the association and its individual members can be held criminally liable.

Section 2 of this Act prohibits monopolization or conspiracies to monopolize.

The vast majority of actions brought against trade associations are based on Section 1 of the Act. The two most common violations of Section 1 involving restraint of trade are *price fixing* and *boycotts*. Price fixing violations occur when there is an agreement by a group of competitors relating to, for example, prices, profit levels, discounts or credit terms. When such a group has Acombined≅ and subsequently decided as a group, even informally, to establish uniformity concerning any price or profit factor and the potential result of this action may diminish competition, the group leaves itself open to charges of price fixing under the Sherman Act. This can occur even if the group *did not intend* that its actions reduce competition. Therefore, it is imperative that a trade association such as MTIA avoid any discussion by members of price ranges, fee schedules, discounts, credit terms or other cost factors, because such discussion when coupled with subsequent acts can be the basis for an Agreement≅ under the Sherman Act. It is vital that MTIA strive to avoid not only discussions or conduct which could result in restraint of trade, but also those which could have the *appearance* of an illegal agreement. Under the Act, a conspiracy by association members to restrain trade can be inferred from many types of conduct which do not rise to the level of a formal agreement, and individual members may be held criminally liable based upon their presence at meetings in which the conduct occurred, even if they did not personally participate in the suspect discussion or decision. Again, it must be kept in mind that a trade association already comprises a Acombination≅ of competitors, and thus activities of the association require only a showing of action in restraint of trade to trigger the Sherman Act.

Boycotts occur when two or more individuals or firms agree not to deal with a third party. As with price fixing, a boycott agreement may be inferred from the parties' conduct and does not require a written or explicit verbal agreement.

Violations of the Sherman Act may result in fines amounting to the greater of \$350,000, twice the monetary loss suffered by victims of the violation, or twice the monetary gain of the wrongdoer. Corporations may be fined up to \$10 million. Individuals convicted under this act may serve a term of imprisonment between 90 days and three years.

B. Section 5 of the Federal Trade Commission (FTC) Act

This antitrust statute is also frequently applied to the actions of trade associations. It is enforced by the agency for which it is named, and prohibits unfair methods of competition and unfair or deceptive acts or practices in interstate commerce. This act overlaps the Sherman Act in that it also prohibits conduct such as price fixing and boycotts, but also provides for redress of incipient restraint of trade, thus allowing the FTC to step into cases in which certain patterns of trade practices will likely result in Sherman Act violations if allowed to continue. This act covers a potentially broad range of activities because of the FTC's discretionary authority in determining what constitutes an unfair method of competition.

The FTC has authority to issue cease and desist orders to prevent further violation of this act, and failure to obey such orders can result in penalties of up to \$10,000 per day of noncompliance.

C. Other Statutes/Remedies

In addition to the Sherman and FTC Acts, the federal Robinson-Patman Act makes it unlawful for any person engaged in commerce to knowingly induce or receive a prohibited price discrimination.

The Missouri Antitrust Law (Chapter 416, RSMo.) is modeled after the Sherman Act and states that every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful. The Missouri act allows for fines of up to \$50,000, imprisonment for up to one year, and allows state courts to enter injunctions to prevent further violation.

Finally, associations and companies can be the subject of civil lawsuits by competitors or consumers and may be liable for up to three times the damages suffered by the plaintiff, plus plaintiff's attorney fees.

III. Potential Areas of Antitrust Violation

A. Price-Fixing

The most likely violation of antitrust statutes involves the Sherman Act's ban on price-fixing of products or services or on bid-rigging. Prohibited acts include agreements relating to any price factors, including discounts, credit terms or profit levels. Courts have long recognized that establishing uniform schedules for fees or services is price fixing. Other prohibited acts include tie-in sales which require a customer to buy an unwanted item or service in order to buy the desired product or service.

Antitrust violations in the price-fixing or bid-rigging areas can be inferred simply from similar price or bid behavior by association members. No oral or written agreements are needed to support a charge of price-fixing or bid-rigging. Once price-fixing or bid-rigging is established, a company cannot escape liability by claiming that the prices were reasonable or would have benefited the consumer.

B. Agreements to Allocate Customers or Divide Territories

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.

C. Membership Restrictions

Membership criteria must be carefully established with a view toward avoiding antitrust problems. Assuming that the members of an association derive economic benefits from membership, the denial of membership to an applicant might constitute a restraint of trade if such a denial limits the ability of the applicant to compete effectively with members of the association. One court said that the Sherman Act was specifically intended to prohibit independent businesses from becoming associates in a common plan which reduces their competitor's opportunity to buy or sell the products covered by the association. Likewise, an association cannot deny services to nonmembers if those services confer important competitive or economic advantages which would impair the ability of non-members to compete with members.

D. Boycotts

Members cannot use trade associations as a tool to suppress competition by refusing to deal with nonmembers, or refusing to deal with those who deal with nonmembers. Accordingly, an association and its members must not enter into any agreements to refuse to deal with certain competitors, customers or suppliers. This includes advertising sources such as newspapers.

E. Information Exchanges

Associations, such as MTIA, can conduct certain economic surveys and exchange information regarding costs and how to accurately determine the cost of doing business. So long as the data are more than three months old, and are gathered from more than five anonymous members, MTIA may compile certain surveys dealing with financial matters. Price surveys of current prices or charges are prohibited. Any survey that collects current data on revenues on an item-by-item, product-by-product, or service-by-service basis creates major antitrust issues and must be reviewed by counsel prior to circulation.

F. Lobbying

Lobbying efforts are protected by the First Amendment to the U.S. Constitution and by the Missouri Constitution. Although the rules of the Missouri House and Senate regulate the mechanics of lobbying, in general lobbying is not subject to antitrust laws. Exceptions apply where the lobbying efforts merely are a sham to cover up what is actually an attempt to interfere with competition.

IV. MTIA Standards and Procedures for Antitrust Compliance

In an effort to prevent unintentional violations of the applicable antitrust laws, MTIA adopts the following standards governing conduct of the MTIA board, officers, staff and membership at association meetings and other group activities.

A. MTIA's Responsibilities

- Include the following statement on the Agenda of all board meetings and general membership meetings:

DURING THE COURSE OF THIS MEETING, AND DURING ALL OTHER ACTIVITIES CONDUCTED BY THIS ASSOCIATION, THE MEMBERS, DIRECTORS AND STAFF PRESENT HEREBY ACKNOWLEDGE AND AGREE TO COMPLY WITH MTIA'S ANTITRUST COMPLIANCE STANDARDS. WRITTEN COPIES OF THE STANDARDS HAVE BEEN PROVIDED IN ADVANCE TO ALL MEMBERS OF MTIA. A WRITTEN COPY OF THE STANDARDS ARE AVAILABLE FOR REVIEW UPON REQUEST.

- Update members concerning antitrust problems periodically and formalize the association's antitrust compliance program.
- Provide all members a copy of the Antitrust Compliance Program.
- Approve, in advance, all new association programs or changes in existing programs that may have potential antitrust implications. In this regard, MTIA will give special attention to statistical reporting surveys and other information exchange programs.
- All association meetings will be regularly scheduled, and MTIA members should not hold rump meetings.
- The minutes of all association meetings will be accurate, and MTIA staff will not submit minutes that have been altered or which are incomplete.

- Have legal counsel review all action by the association or its board of directors which has the effect of rejecting a membership application.
- Prohibit association staff members from communicating with officials of the Federal Trade Commission of the Antitrust Division of the Department of Justice without prior approval of MTIA legal counsel.

B. Membership Policy

MTIA does not:

- Exclude competitors from membership in the association, if the applicant meets membership requirements of the association.
- Restrict members from dealing with nonmembers.
- Prevent nonmembers from obtaining access to information which, if denied would limit the ability of the applicant to compete effectively with members of the association.
- Revoke a membership without affording full due process hearing rights to the effected member.

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

- Past, current or future prices.
- What constitutes a fair profit level.
- Possible increases or decreases in prices.
- Standardization or stabilization of prices.
- Pricing procedures including matters that affect price.
- Actual costs of individual companies.
- Control of sales.
- Division or allocation of markets or customers.
- Refusal to deal with a particular business entity because of its pricing or bidding practices.

Whether the pricing practices of any industry member are unethical or constitute an unfair trade practice.