

CALIFORNIA ASSOCIATION OF BUILDING ENERGY CONSULTANTS ANTITRUST POLICY

The Antitrust Laws

The antitrust laws are intended to ensure free and open competition. These laws – the Sherman Act, Clayton Act, and Federal Trade Commission Act at the federal level and similar laws in California – prohibit contracts, combinations, conspiracies, and other “agreements” in restraint of trade, as well as monopolization and attempted monopolization. It is CABEC’s policy to comply in all respects with the antitrust laws.

An “agreement” among trade association members in antitrust terms is a very broad concept: it may be oral or written, formal or informal, express or implied.

Potentially Severe Penalties

It is essential for association members and staff to comply with all aspects of federal and state antitrust laws. Violation of these laws can result in severe penalties and significant litigation expenses for organizations and individuals.

For example:

- The government can seek to impose fines of up to \$10,000,000 for a corporation/business entity and up to \$350,000 for individuals, per violation.
- Individuals who are involved in activity that violates the antitrust laws can also be sentenced to jail for up to three years, and possibly more if mail or wire fraud is involved.
- The government can also seek other relief for violations, including cease and desist orders and dissolution of an association.
- Private companies and individuals who are injured by an antitrust violation can sue the association, its member companies, and individuals for three times their damages (“treble damages”), plus reasonable attorneys’ fees and injunctive relief.

Even if a government or private suit is successfully defended, the cost and disruption of operations resulting from the litigation can be overwhelming. Taking antitrust precautions, therefore, is not only advisable, but imperative.

The purpose of this Antitrust Policy is to alert members, directors, and staff to the kinds of activities most likely to raise antitrust concerns and to the precautions that must be taken to avoid antitrust problems.

Trade Associations and Antitrust Agreements

Trade associations by their very nature must be particularly sensitive to avoiding antitrust violations. This is because, in bringing competitors together into an association, one element of a possible antitrust violation may already be present – a combination of competitors. Thus, all that may be needed to prove a violation is the action to restrain trade (fixing prices, allocating territories, etc).

Trade association members, directors, and staff should refrain from any discussion that could provide the basis for an inference that the members agreed to take any action that might restrain trade. Remember that an “agreement” among trade association members need not be in writing. A “gentleman’s agreement” to “hold the line” on prices may be more than sufficient for a court to permit a jury to infer an unlawful conspiracy to fix prices. The “agreement” can also be inferred by the parallel actions of trade association members that happen to follow the discussion of the topic at an association gathering.

The basic principle to be followed in avoiding antitrust violations in connection with association activity is to see that no illegal agreements, express or implied, are reached or carried out through the association.

Joint Conduct That Is Automatically Unlawful

Certain kinds of joint conduct are presumed to be unreasonable and therefore unlawful. These so-called “*per se*” unlawful practices are joint activities that the courts have long found to clearly restrain competition and lack any redeeming pro-competitive benefits. Examples include:

- **Setting Prices.** Agreements with the purpose or effect of setting or maintaining either prices or factors relating to prices, such as credit or discounts.
- **Allocating Markets.** Agreements with the purpose or effect of allocating markets, such as an agreement not to provide service to a particular geographic area, industry, or group of customers in return for a reciprocal pledge from a competitor.
- **Tying.** Agreements with the purpose or effect of requiring a customer to buy an unwanted product or service in order to obtain the product or service desired (a “tying” agreement).

In addition, agreements with the purpose or effect of refusing to deal with competitors, customers, or other third parties (often called “group boycott”) also have often been declared *per se* unlawful, and should be avoided.

Meeting Guidelines

To minimize the possibility of antitrust problems at association gatherings, the following guidelines should be followed at all meetings of the members, meetings of the Board of Directors, and committees, as well as all association-sponsored conventions, trade shows, conferences, and task force and working group sessions.

- **DO NOT** discuss your prices or competitors' prices with a competitor or anything which might affect prices such as costs, discounts, terms of sale, or profit margins.
- **DO NOT** agree with competitors to divide customers or territories.
- **DO NOT** act jointly with one or more competitors to put another competitor at a disadvantage.
- **DO NOT** discuss your future pricing, marketing, or policy plans with competitors.
- **DO NOT** discuss your customers with your competitors.
- **DO NOT** make any statements regarding prices or matters affecting prices at association meetings.
- **DO NOT** make statements about your future plans regarding pricing, expansion, or other policies with competitive overtones. Do not participate in discussions where other members are discussing these issues.
- **DO NOT** do anything before or after association meetings, or at social events, which would be improper at a formal association meeting.
- **DO** alert association staff or a Board member and legal counsel to anything improper.
- **DO** consult your legal counsel or the association's legal counsel before raising any matter which you feel might be sensitive.
- **DO** send copies to an association staff member or legal counsel of any communications or documents sent, received, or developed by you when acting for the association.
- **DO** alert every employee in your company who deals with the association to these guidelines.
- **DO** be conservative. If you feel an activity might be improper, don't do it.