

ALERT

DOJ Statements Highlight Antitrust Risks for Trade Associations and Accreditation Bodies

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The U.S. Department of Justice (DOJ) Antitrust Division recently filed two important "Statements of Interest" in private antitrust cases that affect trade associations and groups that set accreditation standards. These filings underscore that rules and standards created by private associations are not automatically protected from antitrust laws. The DOJ is paying close attention to how these organizations set rules, especially when those rules affect competition or prices.

DOJ: Trade Associations and Accreditation Bodies Are Not Insulated from Antitrust Liability

In *Lincoln Memorial University v. American Veterinary Medical Association* (AVMA) (E.D. Tenn.), a nonprofit veterinary school challenged certain AVMA accreditation requirements. The DOJ argued that (1) private accreditation standards must follow antitrust laws; (2) exemptions for government-directed actions or lobbying (known as the *Parker* and *Noerr-Pennington* doctrines) do not apply to private associations setting their own standards; and (3) government recognition or approval of an accreditor does not immunize a private accreditor's standards from antitrust scrutiny.

In *Davis v. Hanna Holdings* (E.D. Pa.), homebuyers challenged rules set by the National Association of Realtors (NAR). The DOJ argued that trade association rules themselves can qualify as agreements between competitors in certain circumstances. And where such rules function like price-fixing or other "inherently unlawful" agreements, they may be *per se* unlawful.

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Key Takeaways for Associations

These two DOJ Statements – filed four days apart in December – suggest trade association activities, rules, and policies have the attention of antitrust enforcers. While courts continue to grapple with how antitrust principles apply to trade association rules and policies, the Statements highlight some key themes for trade associations to keep in mind:

- **Association rules could be viewed as agreements.** If your association sets rules or policies that members must follow, those rules may be seen as agreements under antitrust law – even if there's no separate contract.
- **Government approval is not a free pass.** Just because a government agency recognizes or approves your standards does not mean you are immune from antitrust scrutiny.
- **Pricing rules can be risky.** Rules that affect prices, commissions, or payment formulas can attract extra attention from regulators.
- **Exemptions are narrow.** Legal exemptions for government-directed actions or lobbying are often interpreted narrowly. Private association activities may not qualify.
- **Enforcement is active and evolving.** Federal, state, and private enforcers are focusing on trade associations, especially in areas like pricing, accreditation, labor markets, and information sharing.

Considerations to Help Associations Manage Risk

Although it is prudent for trade associations to carefully manage meetings and communications, the recent DOJ Statements highlight that association rules, policies, procedures, and standards can sometimes lead to antitrust liability. Below are some suggestions to help trade associations and members manage risk:

- **Review your rules and standards.** Periodically assess association rules, policies, and standards. Pay special attention to those that require members to act together or vote as a group, or any rules that may affect prices, commissions, or payment formulas.
- **Document the benefits.** If you have rules that impact competition, make sure you can show they help consumers (for example, by improving quality or safety), and document your reasoning.
- **Train your team.** Provide antitrust training to board members, staff, and anyone involved in setting or enforcing rules. Pay special attention to mandatory rules, policies, and requirements, and develop guidance to address how potential competitors should interact and communicate.
- **Consult legal counsel early.** Talk to antitrust counsel before creating, changing, or enforcing rules that affect how members compete.
- **Stay informed.** Keep up with DOJ and FTC guidance and ongoing private litigation. Enforcement priorities can change quickly, especially in areas like labor, digital markets, and sustainability collaborations.