

## **ANTITRUST POLICY STATEMENT for ASSOCIATION MEMBERS**

### **I. PREAMBLE**

The Michigan Spirits Association is a not-for-profit organization. The association is not organized to and may not play any role in the competitive decisions of its members or their employees, nor in any way restrict competition among members or potential members. Rather it serves as a forum for a free and open discussion of diverse opinions without in any way attempting to encourage or sanction any particular business practice. The association provides a forum for exchange of ideas in a variety of settings including its quarterly meetings and Board meetings. The Board of Directors recognizes the possibility that the Association activities could be viewed by some as an opportunity for anti-competitive conduct. Therefore, this policy statement clearly and unequivocally supports the policy of competition served by the antitrust laws and to communicate the Association's uncompromising policy to comply strictly in all respects with those laws.

### **II. APPLICATION OF ANTITRUST LAWS TO ASSOCIATION ACTIVITIES**

Trade associations are subject to strict scrutiny under both federal and state antitrust laws. Since competitors in a particular industry join a trade association to pursue a common business purpose, trade associations are especially vulnerable to antitrust attack under federal and state laws. Trade associations and trade association members should exercise a great deal of care when carrying on certain activities so as to avoid any violation of the federal and state antitrust laws. The consequences for violating the antitrust laws can be severe. A conviction can carry stiff fines for the association and its members, jail sentences for individuals who participated in the violation, and a court order dissolving the association or seriously curtailing its activities.

### **III. THE SHERMAN ACT AND THE FEDERAL TRADE COMMISSION ACT**

With regard to trade association activities, the most important antitrust statutes are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits "contracts, combinations, or conspiracies ... in restraint of trade." By their very nature, trade associations involve a "combination" of competitors so they are especially prone to antitrust attack.

Under the Sherman Act, any understanding or agreement affecting the price of a product or bid on a project is prohibited, regardless of the purpose of the understanding. Even if the agreement will benefit consumers, it is prohibited.

Of great importance to association members is the fact that the Sherman Act is a criminal conspiracy statute. Consequently, any member who attends a meeting at which competitors engage in illegal discussions which relate to prices or bids may be held criminally responsible, even if he or she says nothing at the meeting. The member's attendance at the meeting may be sufficient to imply acquiescence in the discussion, making him or her liable to as great a penalty as those who actively participated in the price-fixing or bid-rigging agreement.

Section 5 of the Federal Trade Commission Act forbids "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." It is distinct from Section 1 of the Sherman Act in that it does not require a "combination" in order to reach anticompetitive acts committed by individual companies. On the other hand, it will, like the Sherman Act, cover joint actions.

The Federal Trade Commission's authority in determining what constitutes an unfair method of competition or unfair or deceptive act or practice under any given

circumstances is extremely broad. As a result, antitrust actions can be brought to cover a wide range of charges.

Certain activities of the Association and its members are deemed protected from antitrust laws under the First Amendment right to petition government. The antitrust exemption for these activities, referred to as the Noerr-Pennington Doctrine, protects ethical and proper actions or discussions by members designed to influence: (1) legislation at the national, state or local level; (2) regulatory or policy-making activities of a government body; and (3) decisions of judicial bodies. However, the exemption does not protect actions constituting a “sham” to cover anticompetitive conduct.

#### **IV. PENALTIES FOR VIOLATION OF THE ANTITRUST LAWS**

The federal antitrust laws may be enforced against associations, association members and the association staff, both by government officials and by private parties through treble damage actions. In each case, the potential penalties are quite severe.

The maximum penalty for an individual convicted of a violation of the Sherman Act is a fine of \$1,000,000, twice the pecuniary loss of the victims, or twice the pecuniary gain of the wrongdoer, whichever is greater. In addition, an individual may be imprisoned for up to ten years. A corporation convicted of such a criminal offense may be fined as much as \$100 million, twice the pecuniary loss of the victims, or twice the pecuniary gain of the wrongdoer.

A violation of the Federal Trade Commission Act can result in the issuance of a cease and desist order, thereby placing extensive governmental restraints on the activities of an individual company, its officers and directors, an association and its members. Failure to obey such an order can result in penalties of as much as \$10,000 per day.

## **V. ANTITRUST PROBLEM AREAS OF ASSOCIATION ACTIVITY**

As a practical matter, all trade associations should focus their attention on five principal antitrust problem areas:

### **1. Price-Fixing**

Experience shows that trade association members are most likely to violate, and the government is most likely to strictly enforce, the Sherman Act's ban on price-fixing or bid-rigging. Antitrust violations in the price-fixing or bid-rigging areas can be inferred simply from similar price or bid behavior by association members. An oral or a written agreement is not needed to ground a charge of price-fixing or bid-rigging. Neither the reasonableness of the prices set or the amounts bid nor the potentially beneficial purposes underlying the agreement will constitute a defense in the event that price-fixing or bid-rigging is established.

### **2. Agreement to Allocate Customers or Divide Territories**

An agreement among members of an association to allocate customers or divide geographical territories is, in and of itself, a per se violation. The 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.

### **3. Membership Restrictions**

Assuming that the members of an association derive an economic benefit from membership, the denial of membership to an applicant may constitute a restraint of trade because such a denial may limit the ability of the applicant to compete. Therefore, membership criteria must be carefully established with a view toward avoiding antitrust problems.

#### 4. Standardization and Certification

An association that develops voluntary industry standards may face antitrust problems if such a standard unreasonably favors some competitors and unfairly discriminates against others. Similarly, association certification activities which further the interests of certain groups of members, to the exclusion of others, may result in antitrust problems.

#### 5. Industry Self-Regulation

Associations commonly establish codes of ethics for their members, including procedures for enforcement of such codes. The association must guard against any efforts to enforce such codes of ethics if such enforcement would result in economic injury to certain members.

### **VI. HOW TO AVOID ANTITRUST PROBLEMS**

Michigan Sprints Association has adopted the following rules in order to insure against unintentional violations of the antitrust laws:

#### A. The association does not:

1. Adopt regulations or policies which have price-fixing implications, such as restrictions on advertising of prices or bidding, or which unreasonably inhibit the ability of any member or group of members to compete.
2. Require members to refrain from dealing with any vendor, supplier, customer or other member.

#### B. Topics of Discussion Which Must Be Avoided at Association Meetings

1. Current or future prices or bids.
2. What constitutes a "fair" profit level.
3. Possible increases or decreases in prices.
4. Standardization or stabilization of prices.
5. Members' Pricing procedures.

6. Allocating or dividing geographic or service markets or customers.
7. Bid-rigging.
8. Credit terms.
9. Control of sales.
10. Allocation of markets.
11. Refusal to deal with a corporation because of its pricing or bidding practices.
12. Whether or not the pricing or bidding practices of any industry member are unethical or constitute an unfair trade practice.

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Michigan Spirits Association  
Director