

Why Are Trade Associations Targeted by Government Antitrust Enforcers? Part One



Jennifer Dowdell Armstrong | Friday, August 3, 2018

Antitrust enforcers have always been concerned about potential harm arising from the activities of trade associations. In fact, the FTC said in its first annual report in 1916:

One of the most important questions of trade policy at the present time relates to the practice of trade associations. Their activities are of a varied character, and many of them are of great benefit not only to the branch of trade concerned therein, but also to the public. Nevertheless, their activities have sometimes involved them in practices which have been condemned by the courts as violations of the antitrust laws.

In one of its very first decisions, *FTC v. Association of Flag Manufacturers of America*, 1 FTC 55 (1918), the newly-formed FTC ordered a voluntary association of flag manufacturers to stop engaging in concerted efforts to raise the prices of American flags sold in the U.S. Once the FTC halted the scheme, the trade association dissolved.

Trade associations continue to be a focus of antitrust enforcers such as the Department of Justice's Antitrust Division, the Federal Trade Commission, and states attorneys general. Potential criminal and civil antitrust liability exists for the association and its officers and directors, as well as its members under Sections 1 and 2 of the Sherman Act, Section 5 of the FTC Act, and various state antitrust laws. Common antitrust issues trade associations face include:

- Communications with competitors at trade association meetings and social events
- Exchange of information with competitors for business decision-making, benchmarking, safety and security purposes, public relations, and to facilitate industry legislative efforts
- Decisions on membership applications and termination of existing members
- Non-member access to association events and services
- Code of ethics and advertising rules
- Promulgating standards (technical, quality, or safety), seals of approval, or certification

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Trade associations (and their members) proactively addressing these issues can avoid potential stiff criminal and civil penalties, reputational damage, business disruption, and attorneys' fees. I'll dive into each of these areas in subsequent posts detailing how and why these issues present risk and what trade associations can do to mitigate these risks. Stay tuned.



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