

Antitrust Guidelines

Association of American University Presses

A. Background

The Association of American University Presses (“AAUP”) serves its member presses through cooperative programs, professional development opportunities, industry research and analysis, and by representing the interests of members to the public, other organizations, and government agencies. These Antitrust Guidelines (the “Guidelines”) are designed to ensure that AAUP and its members observe the requirements of the antitrust laws in connection with AAUP business.

The premise on which the American economy is built is the promise of the free enterprise system: competition will lead to lower prices, more output and higher quality goods and services. The goal of the antitrust laws is to promote competition, thereby enhancing consumer welfare, and to prohibit activities that dampen competition. As Justice Thurgood Marshall wrote, capturing this central aim in a much-quoted phrase, the antitrust laws “are the Magna Carta of free enterprise.”

Because of the central role the antitrust laws play in the American economy they apply to for-profit companies and not-for-profit organizations alike, and they make no exception for small businesses as distinguished from large corporations. The antitrust enforcement agencies and the courts have made this point forcefully and often: ivy league universities, tax exempt hospitals, non-profit associations of professionals, and other charitable, educational and religious institutions have been named repeatedly as defendants in antitrust lawsuits, and when found liable have had to pay substantial damages, penalties and fines.

AAUP is committed to compliance with the antitrust laws. Because the antitrust laws are sweeping in scope and impose severe penalties on violators, it is important for all concerned to understand the Guidelines’ purposes and to comply with the Guidelines. The purpose of the Guidelines is to ensure that AAUP complies with the antitrust laws and that its members, when participating in AAUP activities or transacting AAUP business, do so as well. Activities of individual members that do not implicate AAUP (for example, deciding how to price its products, to whom to sell, through which companies to distribute, and the like) may raise important antitrust issues as well. It is not the role of these Guidelines, however, or AAUP, to address those issues. Such matters should be raised by individual members directly with their own antitrust counsel.

It is not possible for these Guidelines to cover all types of conduct that could lead to problems under the antitrust laws. Nonetheless, these Guidelines cover the basic principles of antitrust law and will assist AAUP and its members in being sensitive to situations that could result in antitrust liability.

A summary of the antitrust laws that are relevant to these Guidelines is attached hereto.

B. Antitrust Guidelines

1. No Discussion or Agreement Among Members on Prices

Members of AAUP will not, during AAUP meetings or while otherwise engaged in AAUP business, discuss or agree between or among themselves on any aspect of prices. Members will not agree on prices, pricing formulas, advances paid to authors, royalties, discounts, markups, credit terms or commissions to be paid to sales agents or representatives. All decisions on such matters must be made independently by each member and without involving AAUP.

2. No Discussion or Agreement Among Members on Other Terms of Competition

Members of AAUP will not, during AAUP meetings or while otherwise engaged in AAUP business, discuss or agree to limit competition between or among themselves in any way. Accordingly, and by way of examples only, members will not agree on who will publish which books (or class of books), who will bid or negotiate to publish a given book, or what kinds of promotions and advertising will or will not be employed.

3. Compilation of Information

AAUP collects and analyzes certain operating data to assist its members in making individual decisions about their businesses. AAUP seeks to ensure that the collection and provision of this data provides information which members may use individually to respond more quickly and accurately to market forces while avoiding the exchange of price or cost data that could lead to coordination of individual members' prices or costs. To further this goal, AAUP generally will compile and distribute information (or will participate in a compilation of such information by another third party) only when the following conditions are met:

- (i) the survey is managed by AAUP or another third-party (*e.g.*, a purchaser, government agency or consultant);
- (ii) the information provided by survey participants is based on data more than three months old; and
- (iii) there are at least five presses reporting data upon which each disseminated statistic is based, no individual press's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

C. Government Relations

The Constitution protects petitioning activities directed at the government. AAUP and its members may petition any branch of government (executive, legislative or judicial), at any level, for any governmental action they deem appropriate. To be protected the petitioning must

genuinely seek government action and should not be a sham intended to abuse the governmental process and in that manner inflict injury on the rival.

D. E-mail Guidelines

Members will not use AAUP e-mail to discuss or agree on any of the subjects prohibited by these guidelines. If AAUP determines an e-mail has been sent in contravention of this policy it will inform the member of that and send an e-mail to this effect to the member that received the initial e-mail.

E. Meeting Guidelines

Because AAUP's members are actual or potential competitors it is important that certain ground rules be followed at AAUP meetings. These include:

- An agenda should be prepared in advance of every formal meeting to conduct AAUP business attended by 12 or more members of AAUP.
- A copy of these antitrust Guidelines should be available at every meeting.
- An AAUP staff member should endeavor to attend every formal meeting to conduct AAUP business attended by 12 or more members of AAUP.
- AAUP members will endeavor to ensure that no discussion on a subject that might raise antitrust concerns will take place unless counsel has cleared this in advance or is present during the meeting. If such a discussion begins, AAUP staff will bring it to an immediate close.

ATTACHMENT

OVERVIEW OF THE ANTITRUST LAWS AND ANTITRUST ENFORCEMENT

The antitrust laws most relevant to the operations of AAUP and its members are the following. *By necessity this description is very general.* If members have question about the application of the antitrust laws to activities they undertake at AAUP meetings or while on AAUP business they should consult the Executive Director, who will in turn consult outside counsel where appropriate. If members have questions regarding the application of the antitrust laws to the activities of their individual presses they should consult their individual antitrust counsel.

Section 1 of the Sherman Act

Section 1 of the Sherman Act provides, in part, that “Every contract, combination, . . . or conspiracy, in restraint of trade or commerce” is illegal. This statute prohibits price fixing agreements among competitors, group boycotts, customer or market allocations among competitors, and certain types of exclusive dealing arrangements and tying arrangements.

A violation of Section 1 requires that two or more independent entities be involved. An entity can be a person, corporation, partnership, or association.

Section 2 of the Sherman Act

Section 2 states that it is unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize” trade or commerce.

This statute does not prohibit possession of monopoly power. It does, however, make illegal the abuse of monopoly power, or attempts to gain monopoly power through anticompetitive means, such as by attempting to exclude competitors from a market. Unlike Section 1 of the Sherman Act, Section 2 may be violated by a single entity.

Section 5 of the Federal Trade Commission Act

This act prohibits all “unfair methods of competition . . . and unfair or deceptive acts or practices.” It has broad applicability and covers activities prohibited by all of the other antitrust laws, as well as such practices as deceptive advertising. This statute may be enforced only by the Federal Trade Commission.

Robinson-Patman Act

The Robinson-Patman Act prohibits discrimination in price in the sale of goods where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person. This Statute does not apply to services. There are various exceptions to the Act to permit a seller to meet competition or pass on cost savings that are achieved through dealing in quantity with a particular buyer.

This statute and its defenses are highly technical. Because the Robinson-Patman Act may apply to many aspects of a press's individual activities members are encouraged to consult with their individual antitrust counsel with respect to such activities.

State Antitrust Laws

In addition to the above federal statutes, all states have antitrust laws. While the antitrust laws of most states are very similar to federal law, in some cases state law may be broader and prohibit additional activities not forbidden by federal law.

Enforcement of the Antitrust Laws

The antitrust laws can be enforced by the federal government (acting through either the Antitrust Division of the U.S. Department of Justice or the Federal Trade Commission), the several states, or by private plaintiffs.

The Antitrust Division may prosecute a violation of the Sherman Act as a felony. Such violations are punishable by substantial fines and prison terms. Typically such prosecution is reserved for "hard core" violations of the Sherman Act, such as price fixing or agreements to divide markets among competitors.

It is more common for a violation of antitrust laws to result civil liability. Civil actions may be brought by the Antitrust Division, the Federal Trade Commission, the states, or any person who is injured by reason of a violation of the antitrust laws. A government agency may sue to obtain an injunction and prescribed penalties. A successful private plaintiff recovers three times its actual damages, plus costs and attorneys' fees. A prevailing defendant does not recover its attorneys' fees.