Antitrust Compliance Manual

2001

Prepared by:

Gaming Standards Association Legal Counsel
Brian D. Herrington
Arthur O. Rogers II

Howard & Howard
law for business

TABLE OF CONTENTS

Page

INTRODUCTION 1

Origin 1

Statement of Intent 2

OVERVIEW OF ANTITRUST LAW 3

History 4

Statutes 4

The Sherman Act 5

The Clayton Act 5

The Federal Trade Commission Act 6

Monopolies, Horizontal Restraints, Tying Arrangements, and 6

Other Questionable Practices 6

Monopolies 6

Horizontal Restraints and Cartels 8

Tying Arrangements 9

Court Standards: The Rule of Reason and *Per Se* Violations 10

RECOMMENDED POLICIES AND PROCEDURES 12

Meetings 12

Documents 13

Document Retention Policy 14

Board of Directors 14

Leadership 14

Policy Review 15

Dues and Fees 15

Membership, New Members, and Discrimination 15

Lobbying and Legislative Materials 16

Language 16

Compliance Program and Audits 17

Legal Counsel 17

CONCLUSION 18

INTRODUCTION

Origin

This compliance manual was prepared at the request of The Gaming Standards Association ("GSA"), by their counsel, Howard & Howard Attorneys, P.C. It is designed to be a layman's guide to the relationship between trade associations like GSA and federal antitrust laws.

Trade associations are often subject to intense governmental scrutiny because they are (especially insofar as setting uniform industry standards) regulatory within a segment of that industry. Association members routinely enter into mutual agreements that provide for collaboration and cooperation between competitors who are then obliged to offer substantially similar products at substantially identical prices - precisely the anticompetitive consequences that the drafters of the antitrust laws sought to prevent.

Current antitrust jurisprudence recognizes that quality assurance, cooperative marketing, standard-setting, and other common trade association practices may actually foster competition. Still, trade associations may find themselves in court battling antitrust lawsuits.

The creation of standards and the certification of products, services, or providers as being in compliance with those standards are processes that often benefit consumers enormously. In the United States,…[m]uch of the work of creating standards and certifying products, services, and providers that meet those standards…has been left to private organizations, [such as] trade…associations. This delegation of standardization and certification…can create problems for consumers. The members of trade…associations often have a strong motive to suppress competition. Indeed, trade…associations have frequently used standardization and certification programs to injure competition and deprive consumers of its benefits. Not surprisingly, when

standards and certification programs are used in this manner, the federal antitrust laws come into play.[1]

"Unfortunately, the application of federal antitrust laws to…trade association standardization and certification programs is rife with uncertainty and outright confusion."[2] This highly complex and unsettled[3] area of the law seldom offers clear-cut answers to antitrust questions. Inconsistent precedent, sweeping scope and potentially severe civil and criminal penalties, can make antitrust law the bane of any organization which chooses to ignore it.

GSA Vision

To be the leading forum that creates value by facilitating innovation and efficiencies for the gaming community.

GSA Mission Statement

GSA is an international trade association representing gaming manufacturers, suppliers, and operators. We facilitate the identification, definition, development, promotion, and implementation of open standards to enable innovation, education, and communication for the benefit of the entire industry.

Statement of Intent

Violations of antitrust laws should not be taken lightly. Violations are considered to be felonies and can carry fines as high as $10,000,000 for corporations and $350,000 for individuals. At the discretion of the court, corporate executives and managers may be sentenced

---

[1] Harry S. Gerla, Federal Antitrust Law and Trade and Professional Associations Standards and Certification (19 U.Dayton L.Rev. 471)

[2] *Id*. at 472

[3] Some commentators have noted that the antitrust statutory regime is so flexible as to be almost purely arbitrary. Supreme Court Justice Stewart, dissenting in *United States v. Von's Grocery*, 384 U.S. 270 (1966), stated that the only consistency that he was aware of, insofar as antitrust precedent involving mergers, was that the government always won. Things have changed somewhat since then, but "[t]he experience of the past thirty years . . . raises grave doubts about the [Supreme] Court's ability to bear the primary responsibility for antitrust policy development. [The Supreme Court's] attempt to reshape antitrust law during the 1960s can best be described as a disaster, and its attempt to recover from that disaster remains incomplete, with significant portions of its prior caselaw remaining uncorrected and unrevised and thus constituting misleading signals to the unwary." (Daniel J. Gifford, The Jurisprudence of Antitrust, 48 SMU L.Rev. 1677 at 1684.)

to as long as three years in prison, or fined, or both[4]! Federal antitrust laws are also one of the few means by which private plaintiffs can recover treble damages and attorneys' fees[5]. It is therefore in the best interest of GSA to maintain a policy of compliance with all antitrust laws. The goal of this policy is to implement an effective compliance program employing periodic audits to ensure compliance with all applicable federal and state antitrust laws.[6] **It is critical for GSA to ensure that it is not a vehicle for collusion, and that statements and activities carried out under GSA's auspices don't create even the appearance of collusion**. Such appearances, even if unintentional, can be very damaging to GSA and its members[7].

Specifically, GSA was never meant to be and will never be used for anticompetitive purposes. GSA does not market particular gaming manufacturers' software or hardware and will not consider or discuss matters relating to product development, marketing, purchasing, or pricing decisions of individual companies. While these rules and procedures are stricter than existing laws require, they are designed and have been implemented to absolutely ensure that GSA's actions do not impinge upon any antitrust laws, and to avoid even an appearance of impropriety. This conservative standard has been adopted because of the increasingly litigious nature of participants in many U.S. markets, the often over-reaching allegations of plaintiff's lawyers, and the sometimes over-zealous tactics employed by state and federal enforcement agencies.

OVERVIEW OF ANTITRUST LAW

[4] 15 U.S.C. §§ 1&2.
[5] 15 U.S.C. § 15
[6] This is merely one factor courts consider when determining the culpability of antitrust defendants in criminal cases. Commentary to 18 USCS Appx, USSG § 8A1.2 at 3(k)(5). Companies with a compliance program are also more likely to obtain amnesty under the Department of Justice's leniency guidelines in the event of a criminal antitrust violation.
[7] See: *Wall Products Co. v. National Gypsum Co.*, 326 F.Supp. 295 (N.D. Calif. 1971) where the court inferred collusive pricing from economic effects alone, in the absence of a showing of any written agreement.

Stated simply, antitrust laws are intended to preserve and promote competition. The United States Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and the courts closely scrutinize trade associations because such organizations exist to promote cooperation among businesses that normally compete with each other. Any activity or behavior found to have an anticompetitive effect may be a potential violation. However, cooperation is not necessarily anticompetitive. Trade associations can and do serve useful, pro-competitive functions. Still, the DOJ and FTC are ever-vigilant to ensure that the marketplace remains competitive.

History

Antitrust laws were first enacted in the United States during the Industrial Revolution to break-up huge "trusts" which had essentially closed certain free markets to competition. By tightly integrating procurement of raw materials with transportation and the manufacture of finished products, vast economic power came to be concentrated in a handful of giant companies. Vanderbilt's railroad empire, Rockerfeller's Standard Oil, and the American Tobacco Company[8] easily snuffed-out competition – not by providing superior products, but by virtue of their size alone.

The "trust-busting" of the late 1800s was the basis of modern antitrust law. Like their antecedents, today's antitrust statutes are designed to combat monopolies, trusts and other devices which concentrate economic power and suppress competition. The Sherman Act, the Clayton Act, and the Federal Trade Commission Act comprise the bulk of antitrust law in this country. They are the primary governmental controls over a highly dynamic system that is constantly shifting, seeking an equilibrium position somewhere between non-interventionist free-market theory and economic regulation theory.

Statutes

The Sherman Act

The Sherman Antitrust Act of 1890, was the first federal antitrust statute passed and it is still the broadest and most potent statutory scheme used in antitrust enforcement. Its broad language allows for refinement and development of antitrust law on a case-by-case basis as the judiciary strives to enhance competitive aspects of the marketplace, without placing an undue burden on private enterprise (in terms of government interference), and without placing an undue burden on government (in terms of expenditure of resources in overseeing the administration of the laws).

The Sherman Act contains two substantive provisions: § 1 declares contracts and conspiracies in restraint of trade to be illegal, § 2 prohibits monopolization and attempts to monopolize. This Act also provides for criminal penalties, including incarceration for corporate officers, and stiff civil monetary fines.

The Clayton Act

In 1914, the Clayton Act further defined the scope of the Sherman Act by identifying, more specifically, behaviors which are subject to antitrust concerns. But it was left to the courts to determine when the specific behaviors enumerated in the Clayton Act are prohibited. They are deemed illegal when such behaviors tend to "substantially lessen competition" or may lead to a monopoly. Though certain business activities may trigger investigation, the courts ultimately determine whether the overall effect is anticompetitive. Even if a business is engaging in behavior enumerated in the statute, the business will not be subject to sanctions for antitrust violations if the court cannot find an anticompetitive aspect to the behavior.

As amended by the Robinson-Patman Price Discrimination Act[9] of 1936 and the Celler-Kefauver Anti-Merger Act[10] of 1950, the Clayton Act deals with price discrimination (§ 2);

---

[8] *American Tobacco Co. v. United States*, 221 U.S. 106, 31 S.Ct. 632, 556 L.Ed. 663 (1911)

[9] 15 U.S.C. 13

exclusive dealing and tying arrangements (§ 3); mergers (§ 7); and, interlocking directorates (§ 8).

The Federal Trade Commission Act

The Federal Trade Commission Act of 1914 (as amended) contains only one substantive provision (§ 5): "Unfair methods of competition in [interstate] commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." The primary purpose of the Act was to establish the FTC as a federal agency. It enables the FTC to work with the DOJ Antitrust Division to enforce trade regulations and antitrust laws, allowing a broad purview to prevent unfair competition and deception not explicitly covered by the other antitrust statutes. The DOJ has no inherent authority to enforce the FTC Act, but courts have held that § 5 of the FTC Act allows the FTC to enforce Sherman Act provisions, with the assistance of the DOJ.

Monopolies, Horizontal Restraints, Tying Arrangements, and Other Questionable Practices

Antitrust laws have the potential to effect re-structuring of entire industries, alter the national economy, and ultimately, affect every one of us, either directly or indirectly. But they do have their limitations, so it is important to have at least a rudimentary understanding of what they can and cannot do and under what circumstances they may or may not be invoked. To achieve complete understanding of even a single, relatively uncomplicated antitrust problem would involve examination of economic and legal theory far beyond the scope of this manual. So, this section attempts only the more modest and realistic goal of providing a very general analytical framework by taking a closer look at some of the behaviors examined by courts in light of antitrust statutes.

Monopolies

---

[10] 15 U.S.C. 18

A monopoly is a business combination specifically intended to eliminate or stifle competition or dominate a segment of economic enterprise so as to maximize profits through restraint of free trade. The famous jurist, Learned Hand, warned that monopolies "deaden[ ] initiative . . . and depress[ ] energy."[11] Judge Hand was also aware that a company or organization could *appear* to be a monopoly, while actually being "the survivor out of a group of active companies, merely by virtue of . . . superior skill."[12] After all, a large company may exert market influence in any number of ways detrimental to competitors without any intent to monopolize. When is an organization truly a monopoly, and when is it simply a superior competitor, following a wise business policy?

First, the accused monopoly must have market power (Sherman Act, §2). Market power is defined much more narrowly for antitrust purposes than it is in economics and, according to Ernest Gellhorn and William E. Kovacic, can be analyzed in three ways:

1) the ***"actual-performance"*** test (looks at an organization's deviation from normal competitive methods in the economic segment);

2) the ***"rivalry"*** test (a statistic-heavy test that determines an organization's actions and reactions to buyer preference and competitive tactics); and

3) the commonly-used ***"structural"*** test (examines economic output, geographic area, and market share).[13]

An ongoing difficulty in antitrust jurisprudence, particularly in terms of monopoly, is that courts have not been able to settle on a consistent remedy. Divestiture (wherein a company is broken up into smaller, competing entities) is the remedy most feared but it has been inconsistently applied and administered. After years of litigation against a company, for example, a market may have had violent changes in which the company under scrutiny has

[11] *United States* v. *ALCOA*, 148 F.2d 416, 427 (2d Cir. 1945)
[12] *Id.* at 430
[13] Of course, all three tests suffer from imprecision. Definitions of market power are under constant scholarly assault, and there are numerous sub-classifications for it such as *product* market and *geographic* market. Percentage-shares of these markets are not determinative of the existence of a monopoly; the figures supporting an

already lost its alleged monopoly due to naturally-occurring economic forces.[14] In that case, the expensive research and planning aimed at divestiture is wasted, because divestiture is no longer appropriate or necessary.

Although there are many ways to create a monopoly, four practices have lately received particular attention: **predatory pricing**, **product innovation**, **refusal to deal**, and **leveraging**. Without going into great detail, predatory pricing may take a number of forms and whether a pricing scheme is held to be competitive or predatory depends largely on the jurisdiction and ideological values of the court hearing the case; product innovation deals with the marketing procedures used by an organization to vend their merchandise; refusal to deal is when an organization denies another entity access to essential facilities involved in the manufacture of the good; and leveraging is when a firm uses its dominant market position in one economic sector to force its way into a dominant position in another economic sector.

Horizontal Restraints and Cartels

More common than one large firm attempting a monopoly are agreements (called horizontal restraints) between two or more competitors (a cartel) to fix prices, control sources of output, or other anticompetitive actions. Although companies routinely enter into contracts to deal with one another, these agreements are a violation of the antitrust laws (specifically, the first two sections of the Sherman Act) when they are for the sole purpose of eliminating competition. Prohibited arrangements can include agreements to restrict output, exclude other companies, fix prices, or to divide the market. Of course, certain agreements (for example, to cooperate in research and development) may actually enhance competition and improve efficiency. Although the courts may still examine such an activity if a lawsuit is brought, judges typically find that the pro-competitive aspects of these arrangements easily outweigh the anticompetitive presumption.

"inference" of exercising monopoly power have varied from two-thirds to 90%, depending on the industry being examined and the specific company under scrutiny.

Tying Arrangements

Tying arrangements typically prevent customers from purchasing a product or service (tying product) unless they also purchase some other product or service (tied product); this is know as a positive tie. There is also a negative tie which conditions the purchase on the customer agreeing that he will not purchase the tied product from any other supplier. Illegal tying is one of the most common antitrust claims and is often considered illegal, *per se*. However, tying arrangements may sometimes be justified and courts have, in a limited number of cases, been willing to delve more deeply, looking at all of the facts to determine whether the true nature of the suspect arrangement is anticompetitive and thus illegal. Analysis of a tying arrangement can be complex and will almost certainly involve difficult factual questions, still there is almost universal agreement that all of the following elements be present before a tying scheme is illegal:

1. There must be an *agreement* or *policy* that the purchase of one product or service is conditioned upon the purchase of another product or service.

2. The desired product or service must be entirely *separate* and *distinguishable* from the product or service to which it is "tied."

3. The seller must have sufficient *economic power* with respect to the tying product to appreciably *restrain free competition*.

4. The tying arrangement must affect a "not insubstantial" amount of commerce.

Not all tying arrangements involve two "tied" products from the same seller. If most courts agree on the basic elements needed to establish an illegal tying agreement, those same courts do not require a showing that the seller has an economic interest in the tied product. If a seller requires the buyer to purchase a product from a third party as a condition upon purchasing

[14] See *United States* v. *IBM*, 539 F.Supp. 473 (S.D.N.Y. 1982).

the seller's product, the seller is exerting leverage, but not to its own advantage. Some courts now require a showing that the seller has an economic interest in the tied product to sustain a claim of illegal tying.

Another complexity in the analysis of tying arrangements is that there are defenses to tying arrangements. The first and most common defense to per se tying is the business justification defense. Simply put, there may be a sound business interest which justifies the otherwise illegal tie. Another defense, known as the fledgling industry defense, allows a new industry to illegally tie products in order to prevent destruction of the industry.[15]

Court Standards: The Rule of Reason and *Per Se* Violations

In the search for illegal monopolies, horizontal restraints, tying arrangements and other questionable practices, "[s]ize alone is not an offense." Absent a blatant antitrust violation, courts test most voluntary standardization and certification programs under the "Rule of Reason."[16] The Rule of Reason is a multi-faceted balancing test, which examines an organization's behavior to determine whether its pro-competitive aspects outweigh any potential anticompetitive aspects; it is the approach used most often in cases involving trade associations.

The Rule of Reason was first enunciated in *Standard Oil Co. of New Jersey* v. *United States*[17]. In this landmark opinion, the Supreme Court of the United States held that §1 of the Sherman Act did not ban <u>all</u> <u>restraints</u> on competition just those which imposed <u>unreasonable</u> <u>restraints</u>. In a later opinion, Supreme Court Justice Brandeis, provided a classic statement of the rule of reason test,

> [t]he true test of legality [of a restraint] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the

[15] See William A. Hancock, *Tying Arrangements*, in Executive Legal Summary No. 337 (1998)
[16] *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 486 U.S. 492, 501 (1988)
[17] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502 (1911)

> nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[18]

Judicial precedent since *Standard Oil* seems to allow for the Rule of Reason to be applied to many business practices which might ostensibly appear violative of antitrust law. However, depending upon the purpose, effect, and scope of the alleged restraint, the courts are entirely free to use the more stringent *per se* analysis. A *per se* approach is a bright-line rule resembling strict liability. The court looks at a particular behavior enumerated in one of the antitrust statutes and if it fits the definition, then the behavior is a *per se* violation – period. "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[19] There is no balancing of pro-competitive and anticompetitive behavior- the only remaining question is the measure of damages.

It is important to note that

> [the] definition of competition a court chooses can, at least in theory, make a difference in deciding whether a [given behavior], on balance, suppresses or promotes "competition." [However], . . . the debate over the proper definition of "competition" may . . . be more theoretical than real. Using a Rule of Reason Analysis, most antitrust courts would consider the diminution in consumer choice an anticompetitive effect and the enhancement of productive efficiency a procompetitive effect. For better or worse, the majority of federal courts, including the United States Supreme Court, have refused to choose between the different definitions of "competition." Instead, they have fashioned a pragmatic compromise. Under the terms of this compromise, injury to the competitive process, diminution of rivalry, and output restrictions are all anticompetitive effects. Enhancement of rivalry, maintenance of consumer sovereignty, and the creation of economic efficiencies are all procompetitive effects.[20]

---

[18] *Chicago Board of Trade* v. *United States*, 223 F.2d 348 (D.C. Cir. 1955)

[19] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958)

[20] Harry S. Gerla, Federal Antitrust Law and Trade and Professional Associations Standards and Certification (19 U.Dayton L.Rev. 471, 475)

RECOMMENDED POLICIES AND PROCEDURES

A general, rudimentary understanding of the antitrust laws and the practices and economic effects they were designed to discourage is all well and good. But what exactly does all of this mean for trade associations in general, and GSA, in particular? Specifically, what situations should be avoided and what practices should be encouraged? Though it is impracticable to enumerate and describe each and every act which could arguably be considered violative of these laws, the following recommendations should help GSA, its members, officers and employees quickly recognize and address potential problems, adroitly dodge pitfalls, and avoid liability for any violation of antitrust laws.

Meetings

From the standpoint of antitrust law, meetings are extremely sensitive and potentially hazardous because they present myriad opportunities to run afoul of antitrust law. It is all too easy for seemingly innocent discussions to inadvertently digress or stray into inappropriate, dangerous areas. Current or proposed prices[21], cash discounts, credit terms, future production volumes or the allocation of customers or markets[22] are examples of topics that should be scrupulously avoided.

Since the most common violations of antitrust law arise from agreements among competitors to fix prices or allocate customers, GSA staff and members must ensure that

---

[21] This is one of the fastest ways to land in court facing either a civil suit sounding in antitrust or a criminal prosecution by the federal government. Whether price goes up, down, or stays the same, if there is an agreement among members, express or implied, about any type of pricing of a good or service, it is a *per se* violation and the court will cease deliberations, immediately find for the plaintiff, and not weigh the defendant's actions in any light. The term "price" in antitrust context also means not only the **price, but also any element or anything that will have an effect on price**. This includes, but is not limited to: warranties, coupons, buy-back arrangements, freight, quotes, levels, discounts, output, inventory, costs, and even delivery terms.

[22] An agreement between two companies outlining the other's permissible **geographic sales area** is a violation of antitrust laws. Any projected division of goods or services so as to eliminate competition must be avoided. These can also be expressed in contracts or non-competition agreements. Generally, both of these efforts to reduce competition are viewed as violations of the antitrust statutes.

absolutely no discussions take place which could generate even the appearance of such an agreement. The presence of a GSA staff member at a meeting should not invite "probing" to "test the limits" of discussion. Each GSA member must take responsibility to avoid, or, where necessary, cut-off inappropriate discussion. "Discussion" also includes written materials. No one should be allowed to distribute materials at a Board meeting unless they have been previously approved. Only pre-screened materials or materials meeting predetermined objective criteria should be distributed at Board or Committee meetings.

Furthermore, it is irrelevant whether the setting is an official meeting, an informal social gathering, or a chance encounter on the street. In the eyes of the law, agreements can be formed without a writing or a handshake. Following an order can be construed as an agreement. Even a nod, a shrug, or a wink can be interpreted as an agreement. Much of the evidence surrounding the nature of agreements in antitrust laws is circumstantial and courts are more than willing to infer the existence of an agreement stemming from *any* situation. That is why all discussion must be confined to official meetings, limited to, and tightly focused on, a detailed agenda, and those meetings *must* be accurately **recorded and documented**.

Documents

In addition to minutes of meetings, large organizations characteristically generate many different kinds of documents for a variety of purposes, and trade associations are no exception. GSA, its staff and members can be expected to produce large quantities of memos, reports, letters, press releases, and the like. So it is important to have procedures in place that govern the handling of documents as well as their creation. Toward this end, a document retention policy is of paramount importance. GSA's Document Retention Policy is attached as Appendix B. Storing documents unnecessarily is admittedly expensive and wasteful. However, destroying the wrong documents or destroying documents prematurely can have grave consequences.

Document Retention Policy

Several *general rules* regarding document retention should be observed:

1. Document retention must be routine and non-selective. All documents for a given nature should be disposed of at a designated time.

2. Drafts should not be retained, but should be disposed of immediately upon revision of the document.

3. Note taking by individual members should be kept to a minimum, and any notes taken should be kept no longer than necessary.

NOTE: If you become aware of an actual or threatened government investigation or court proceeding regarding any GSA activity, you should ensure than no documents relative to the inquiry are destroyed regardless of any document retention policy. If you are notified of any such investigation or proceeding, or if you receive a subpoena or other request for documents in your possession in connection with such an investigation or proceeding, you should notify counsel immediately.

Board of Directors

Leadership

The role of the Board's leadership will go beyond merely implementing the necessary program outlined herein. Board leadership will play an essential role in GSA's antitrust compliance program and will create the tone for the entire Board and GSA's members' attitudes toward antitrust compliance[23]. The primary responsibility for enforcing these activities and achievements lies with its chairperson or president. Thus, the chairperson or president must be fully prepared to guide the committee, and do so in a manner that complies with GSA policy and applicable laws[24].

[23] Appendix A to this manual is GSA's antitrust policy. It, or a condensed version of same, should be distributed to all attendees at all meetings of GSA's board, committees, sub-committees, and other groups, and should be reviewed by GSA's chairperson, president, or committee chair at the beginning of each meeting.
[24] The chairperson of each committee must file a certificate of compliance with these rules each year. (Attached as Appendix C.)

Policy Review

When appropriate, the Board will submit proposed changes to bylaws, rules, regulations and policies for a thorough review by GSA's counsel. Then, the Board leaders, together with counsel will examine the reasons behind the policy to determine whether the policy hampers, discourages or restricts competition in any way. The Board will take whatever steps are necessary to assure that abuses do not occur, and will make no rule directly or indirectly suppressing competition or unreasonably restraining trade in a manner that would be inconsistent with the law. Every bylaw, rule, and regulation must be able to withstand antitrust scrutiny. GSA's Board, in their role as makers and enforcers of policy, will ensure that the Board is never used as a tool to stifle competition.

Dues and Fees

The Board is responsible for setting fees and dues. Sound business and financial judgment should be the foundation of these decisions. Dues should be at a level to give the Board sufficient operating expenses as dictated by responsible financial management. While any level of fees may eliminate some individuals or organizations from joining GSA, the dues of GSA are geared towards maximizing participation of its members while placing the Board in a financially sound position. GSA's level of fees and/or dues shall not be used to limit the number of new members to GSA. This is GSA's policy since an unreasonably high fee and/or dues may be seen as a way to limit competition.

Membership, New Members, and Discrimination

Trade associations must not "**freeze out**" or **exclude** competitors, or **discriminate** against any member. The courts very likely will hold that such actions are illegal "**boycotts**"

because they put the "outsider" at a competitive disadvantage. Therefore, membership in GSA must be available on a non-discriminatory basis to any and all applicants who qualify for membership under the Board's bylaws. Applications for membership should be considered pursuant to objective, pre-determined criteria with none being denied but for legitimate reasons.

Antitrust problems could also arise if GSA develops or promulgates standards which unfairly discriminate against the products or services of particular competitors, thereby excluding them from the market. It is **never** permissible for a trade association to boycott products that do not "meet its standards." Members may agree on standards -- both in terms of production, quality, or design, but compliance with any standard promulgated by GSA must be recognized as purely voluntary. To help insure that the standards developed by GSA are not discriminatory, those who would be affected by the standards must be given a reasonable opportunity to participate in the process of developing the standards, and it must be left up to each individual member of the Association to decide whether to comply with the proposed standard, or whether to participate in the program at all.

Finally, it is extremely important that GSA have written procedures for interpreting its standards which also detail who has authority to act on behalf of the Association in responding to requests for interpretation of standards.

Lobbying and Legislative Materials

Lobbying activities are **generally exempt from antitrust scrutiny.** Sometimes, the mission of a trade association is to work with government and the legislature on a consultant basis. Accordingly, trade associations are taken to be representative of a segment of the public, and are protected by the First Amendment.

Language

Although alluded to under the meeting sub-heading above, language itself deserves its own category. Enthusiastic comments reflecting anything about "dominating the industry" could earn the utterer and GSA and/or its member(s) a quick trip to the courthouse. Phrases on documents, such as "For Your Eyes Only" or "Destroy After Reading" are to be avoided at all times. Not only must GSA avoid impropriety, it is just as important in terms of antitrust enforcement not to give any appearance of impropriety.

Compliance Program and Audits

An official statement of intended compliance with antitrust laws, reinforced by follow-up programs and actions, is immensely important.

> An effective compliance program with periodic audits is one factor that the courts will consider when determining the culpability of antitrust defendants in criminal cases. Commentary to 18 USC Appx, USSG § 8A1.2 at 3(k)(5). Companies with a compliance program are also more likely to obtain amnesty under the Department of Justice's leniency guidelines in the event of a criminal antitrust violation.[25]

GSA must embark on an education and awareness program; implementing a policy whereby every member reads, and acknowledges receipt of, a copy of this antitrust compliance manual. Strict adherence to GSA's rules and policies must be a continuing priority of all of its members. Such a comprehensive approach should place every member of GSA, as well as the individuals working within GSA, in a better position to protect the Association from violating antitrust law.

Legal Counsel

Last, but by no means least, please remember that this manual is only a brief summary of antitrust law as it relates to trade associations like GSA. Because the body of antitrust law is so large and complex, any question concerning an antitrust issue should be brought to the attention of legal counsel as soon as possible. Even if not an antitrust specialist, the attorney is trained to

[25] Michelle Sherman, Antitrust Audits: Pay Now or Pay Later (1998 by Sheppard, Mullin, Richter & Hampton LLP)

know when and where a problem may exist; your attorney, however, is constrained to the information received. If GSA fails to keep its attorney well-informed, an easily-corrected situation can turn into a disaster overnight.

CONCLUSION

By encouraging cooperation to establish and promulgate industry standards, trade associations such as GSA can greatly reduce marketplace inefficiencies, foster healthy competition and, improve the overall quality of life. However, these same cooperative efforts can just as easily serve to inhibit competition. When the actions or practices of a trade association work, either accidentally or by design, to substantially reduce competition, government and private entities may intervene and, using the Sherman Antitrust Act, the Clayton Act, or the Federal Trade Commission Act, seek injunctive relief or the imposition of harsh civil and criminal penalties. Since the Association as well as individual members and officers are potentially liable, it is in the best interests of all that GSA conduct its activities in strict compliance with all provisions of the antitrust laws. Toward this end, GSA instructed that this manual be written and distributed throughout GSA, to its members, staff, and employees, that all may become at least minimally informed of the basics of antitrust law and guard against any acts or omissions which could expose the organization or individuals to liability for violation of antitrust statutes.

Thoroughly read and review this manual. Refer to it frequently. Remember, however, that this manual is a rough guide, nothing more. If a situation arises that, in your best judgment, might compromise GSA legally, do not rely on this or any other handbook, bring relevant information to the attention of counsel without delay. It is everyone's responsibility to see to it that GSA accomplishes its worthwhile aims without violating any facet of antitrust law.