



Association Information Exchanges An Antitrust Sensitive Activity

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Members of associations are always interested in exchanging information to learn what others in their industry or profession are doing.

Whether the information deals with costs such as labor costs, energy costs, or production costs or prices such as how much competitors charge for products or services, or whether the price is a base price with surcharges or a bundled price, or whether the price includes or excludes transportation charges, association members will encourage association executives to establish association information exchange programs so they can find out what their peers are doing.

Developing and promoting an industry or professional information exchange program can provide competitors with basic information that enable them to compete more efficiently. Promoting efficient competition is pro-competitive and benefits consumers. As a result, it can be argued that information exchange programs should be favored by the antitrust enforcement agencies. In fact, the FTC and the Department of Justice do recognize that these programs can promote competition. However, they also recognize that information exchange programs have been used by association members as a way to fix prices. Fixing prices is a criminal violation of the antitrust laws. Individuals convicted of price fixing may face jail sentences of up to 10 years and fines of up to \$1 million. Corporations convicted of price fixing may be fined \$10 million or more and are subject to treble damage litigation that could result in billions of dollars of damages.

The good news is that the FTC and the Antitrust Division of the Department of Justice have published guidelines that can be used by association executives in establishing an information exchange program with little risk of antitrust liability.

Under the guidelines, your information exchange program should:

1. Be managed by the association or, even better, by an accounting firm or a group of economic consultants,
2. Involve pricing information that cannot be used in making current price decisions, i.e., is more than three months old,

3. Provide aggregate data (not the information submitted by any individual participant) of a group of at least five data providers where:
 - a. no data provider has a market share in excess of 25% and
 - b. recipients of the data cannot break out any prices paid or charged by a particular provider.

Generally following these guidelines will help to ensure that the exchange of price or cost data is not used by competing providers for a discussion or coordination of costs or prices.

By contrast exchanges of information regarding future prices or future compensation of employees rather than older data raises an antitrust red flag.

In setting up an information exchange program:

1. Associations should not limit information exchange programs to members only. Non-members falling within the category of information suppliers should be allowed to participate although they may be charged a higher fee.
2. Members or non-members who have the opportunity to participate in the information exchange program but who elect not to participate can be treated in a different manner than participants.
3. The full details of any report can be limited to those who elect to participate by submitting data. Non-participants can be provided with only a summary or with the full report on a delayed basis.
4. Non-participants can also be charged a higher price than participants.

Since information exchange programs do present an antitrust risk, it is strongly recommended that associations that are considering establishing such a program work closely with experienced antitrust counsel to ensure that neither the association nor its members participating in the program, end up defending an antitrust complaint.

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