Reduce the Risk of Your Information-Sharing Program

This article was originally published in the American Society of Association Executives' *Association Law & Policy* newsletter on December 18, 2013.

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Trade associations, professional societies, and other nonprofit organizations often sponsor or conduct information-sharing programs that collect, assemble, and disseminate valuable financial or other data about the industries or professions they represent. These programs have long been recognized as highly beneficial and perfectly legal. Nevertheless, they do raise inherent antitrust risks, and even programs that have operated without incident for decades should be examined periodically to ensure that they are as safe as possible from outside inquiry or challenge.

Nonprofits' information-sharing programs may collect and share a wide variety of vital information, including:

- prices or fees
- sales or revenues
- production or service levels
- product or service quality
- costs of inputs
- sales or purchase contract terms
- employment compensation, benefits, or terms
- best practices
- credit risks of customers, clients, or patients.

Typically, programs share only historic information, but some may share sales or production forecasts or other projections.

Because these programs often collect information from—and share it with—competitors in business, professions, or elsewhere, they have the potential to run afoul of the antitrust laws. The concern is that competitors could use the shared information to agree on prices or fees, production or service levels, contract terms, or other business matters where such coordination is prohibited. Improper use of the information could subject program participants, and even the organization itself, to serious antitrust liability. Defense of an antitrust challenge, even a baseless one, is nearly always prolonged and expensive.

The good news is that the federal antitrust enforcement agencies have issued clear guidance on how to make these programs nearly bulletproof. The guidance is now well established and sets forth what are, for all practical purposes, bright-line rules.

The Safety Zone

To be protected from an antitrust challenge, an information-sharing program that includes sensitive data (such as price or fee information) should adhere to the following guidelines:

- A third party—such as the organization itself or an accounting or consulting firm—should collect, assemble, and distribute the information.

- There must be at least five participants reporting each data item.
- No single participant's data may represent more than 25 percent of any item reported.
- The information must be at least three months old.

If an organization's information-sharing program operates within these guidelines, which the government refers to as an antitrust "safety zone," it is most likely compliant with antitrust law. There remains a remote possibility of challenge if, for example, the government suspects that, despite adherence to the guidelines, the program has been used as the basis for anticompetitive conduct, such as fixing prices or production levels.

Many organizations, however, find the safety zone too restrictive. Using a third party is easy enough. Yet valuable information might not be reported if the program follows the 5/25 rule. And exchanging only information that is at least three months old might not be realistic in a world in which so much information becomes public almost instantly. Also, things can change. An information-sharing program that was within the safety zone when the program was established may later fall outside it, due simply to changes in market conditions or participants' needs over time.

The guidelines make clear that an information-sharing program that falls outside the safety zone does not necessarily violate the antitrust laws, and they encourage organizations considering implementing programs that fall outside the zone to submit their programs to the government for review and approval. That process, however, is time-consuming and expensive, and it is not available to existing programs. Another consideration for programs that are deliberately operated outside the safety zone is that, if required to defend an antitrust claim, the burden could fall on the organization or program participants to explain why the benefits of the program could not have been achieved by operating within the safety zone. That was the fate of program participants in a recent case.

Even with this uncertainty, many organizations' information-sharing programs do indeed fall outside the safety zone.

Protective Steps

What to do? Must every nonprofit organization retreat and make certain that its information-sharing program falls within the safety zone?

Probably not. For a few organizations—in particular those serving fields that for whatever reason operate under the antitrust microscope—the answer may be "yes." But most organizations should be comfortable taking a more pragmatic approach.

These organizations should understand all aspects of their information-sharing programs; assess the risk, if any, that the programs create; and determine whether changes should be made to reduce risk. In most cases, there will likely be ways to make an information-sharing program safer without diminishing its value, even if the program continues to fall outside the safety zone in certain respects.

Understand the program. While an organization knows its particular field well, it may not know its information-sharing program as well as it should. The program may have been created long ago and may be administered by a third party—operating, in essence, on auto-pilot, without much attention from the organization. The program may involve a committee of the organization that operates largely on its own, without the participation of the organization's executives or legal counsel. Participants may discuss the reports generated by the information-sharing program outside the organization. In some cases, the organization may merely rubber-stamp or brand the program, leaving its details to experts in the field who care most about the data.

It is crucial to get to know your information-sharing program thoroughly. Understand exactly what information participants submit to you or your third-party administrator. Know how the information is processed and what reports are distributed. If any part of the program involves participants discussing anything at any point in the process, from gathering and reporting the information through the distribution and use of the reports, become a part of those discussions. Understand how participants use the reports and whether they discuss them after they are distributed. You can learn a lot in this self-examination process.

Assess the risk. Now for the hard part. Assessing the risk of operating an information-sharing program that falls outside the safety zone could require making some important judgment calls. If your field is not generally subject to antitrust

scrutiny, if your program is not substantially outside the safety zone, if the stated benefits of the program strike objective reviewers as true and legitimate, and if it has operated for years without incident, you may conclude that no changes are necessary and that your organization is comfortable continuing to operate outside the safety zone.

More likely, assessing the risk will be more complicated. You may well need to assess the program in much the same way that the antitrust enforcement agencies would assess it in connection with an investigation, or that a judge would if the program were actually challenged. That means you must balance the legitimate justifications for the program against its actual and likely anticompetitive effects. This is rarely easy to do. "Don't try this at home" is usually sound advice, and it may be wise to involve experts.

Reduce the risk. Understanding your information-sharing program and assessing the antitrust risk could help identify ways to reduce risk without limiting the program's usefulness. Here are some suggestions:

- Adopt antitrust guidelines tailored to your particular program. It is common for organizations to have general antitrust guidelines and to refer to them at the beginning of each governance or information-sharing committee meeting. Preparing guidelines specifically for the program should help reduce risk.

- Make the information produced publicly available. The antitrust safety zone does not address the matter, but the enforcement agencies have made clear that an information-sharing program that makes the reports it produces publicly available entails less antitrust risk (even if the organization charges for the reports and even if the reports are made public at some point after they are provided to participants).

- Encourage participants to refrain from discussing the information they provide for the program and the reports they receive. If they have a legitimate need to discuss the information, have them do so as part of scheduled meetings, with precirculated agendas that are monitored by your executive staff or legal counsel.

- Make sure the information that participants provide is aggregated and that participants are not able to determine which participants provided which information. Participants may see nothing problematic in revealing that they are the source of the information they provide, and in one recent case the independent aggregator did not remove identifying information. The antitrust enforcement agencies make clear that all information shared must be sufficiently aggregated or blinded such that no competitor can identify the data submitted by any other competitor.

- Determine whether the program could be nudged closer to the safety zone without reducing its usefulness to participants. Any antitrust assessment asks whether a challenged practice could use less anticompetitive means to achieve comparable benefits. Asking that question before you face any outside inquiry or challenge—and making small adjustments, where possible—should help reduce antitrust risk.

- Above all, make sure your organization does not use the information-sharing program as the basis for any recommendations or advice. If recipients of those kinds of communications act in concert as a result, when they should be competing with each other, the elements of an antitrust violation are all but established.

These guidelines should work well for most organizations, but even apparently bright-line rules have exceptions. For example, for certain fields, an information-sharing program involving the announcement of expected future prices or fees would not violate the antitrust laws. Such exceptions, of course, are rare.

In the end, understanding whether and how an information-sharing program falls outside the safety zone, assessing the program's risk, and taking measured steps to reduce that risk should be well worth the effort. The program should be safer—and just as valuable to participants.

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