



NEII

NATIONAL ELEVATOR INDUSTRY, INC.

SETTING STANDARDS IN MOTION

ANTITRUST GUIDE FOR MEMBERS OF NATIONAL ELEVATOR INDUSTRY, INC.

As with all trade associations, the National Elevator Industry, Inc. (NEII) is subject to strict scrutiny under federal and state antitrust laws. One of the most powerful laws is the Sherman Act. Section 1 of that Act prohibits "contracts, combination or conspiracies... in restraint of trade." To prove a violation, it has often been difficult to demonstrate the essential element of "combination." By its very nature, however, a trade association is a combination. Thus, there is no problem in proving that fact. This should signal trade associations such as NEII, that they must proceed with extreme caution to avoid being cited for antitrust infringements, which carry stiff fines and jail sentences.

Responsibility for enforcement of the antitrust law lies with the Department of Justice, the Federal Trade Commission, and the more than 40 states which have enacted antitrust legislation.

The federal government can be expected to bring approximately five civil and ten criminal cases each year against or involving trade associations. Penalties are severe. For violations of the Sherman Act, each individual can be fined up to \$1,000,000 and receive up to a 10-year prison sentence, and each member corporation can be fined up to \$100,000,000. In certain circumstances, the maximum fines can go even higher, up to twice the gain or loss involved. Individuals and corporate officers are subject to imprisonment of up to three years. In addition, the government can impose civil penalties such as cease and desist orders. These result in government oversight of association members. This, in turn, inhibits association activities and may culminate in the dissolution of the association entirely.

In addition to lawsuits prosecuted by the government, civil treble damage suits can be brought by competitors and consumers. For example, discussions among members about future product plans or marketing plans, or with regard to specific customers, may be interpreted as creating an understanding that the companies will restrain competition. Members may be held liable for treble damages for injury resulting from this type of conduct. Some types of conduct, such as price-fixing or marketing allocation, do not provide for any defenses, so that proof of the mere fact of the activity constitutes a violation.

From a practical standpoint, trade associations such as NEII should focus their concern on five principal areas. These are: (1) price fixing (2) division of markets, jobs and customers (3) membership (4) standardization and certification, and (5) industry self-regulation.

Price-Fixing. Violations of antitrust laws are mostlikely to occur in the area of price-fixing. The government hasvinced its greatest concern about this area. A price-fixing violation can beinferred from the fact of similar price conduct by members, even though there is no written or oral agreement shown. One court ofappeals emphasized that anunlawful price-fixing agreement may beshown in manydifferent ways, including "a knowing wink," and declared that a jury could infer such an agreement from evidence of

meetings among competitors at which prices were discussed, followed by generally uniform prices or price changes. If prices are fixed, it is no defense that the prices set are reasonable or that the ends sought are worthy.

Division of Markets, Jobs and Customers. Competitors cannot establish competitive stability by dividing markets, jobs or customers. Any agreement between competitors to permit one "to take this one and I'll take the next one" is illegal. Similarly, in bidding situations, agreements to refrain from bidding or acting in collusion in preparing bids are illegal because they eliminate competition.

Membership. A basic assumption about associations is that an economic benefit is derived from membership. Otherwise, no one would pay to join associations. Denial of membership to an applicant where membership is necessary in order to effectively compete in the industry may therefore constitute a restraint of trade. Membership criteria must be carefully drafted to reduce the potential of issues relating to membership exclusion.

Standardization and Certification. An association must not draft voluntary industry standards to favor some and discriminate against others. Similarly, antitrust problems may result if association certification activities further interests of certain groups to the exclusion of others.

Industry Self -Regulation. Codes of ethics with enforcement procedures are commonly established by associations. It is laudable for an association to wish to promote high ethical standards, but antitrust problems may ensue if an association's code of ethics or its enforcement causes economic injury and has an anticompetitive or insufficient business purpose.

GUIDE FOR MEMBERS AT ASSOCIATION GATHERINGS

The best way to avoid possible violation of the antitrust laws at association gatherings is compliance. The association should resolve to avoid discussion of certain sensitive subjects. Informal gatherings, such as dinners or "rump sessions," which may occur in conjunction with association meetings, are viewed with great suspicion by the government and private parties.

The following topics should be scrupulously avoided in formal meetings or "rump sessions," or at any time amongst NEII members. Therefore:

1. Do not discuss prices, past, present or future.
2. Do not discuss what is a fair profit level.
3. Do not discuss an increase or decrease in price.
4. Do not discuss standardizing or stabilizing prices
5. Do not discuss pricing procedures.
6. Do not discuss discounts.
7. Do not discuss credit terms.
8. Do not discuss controlling sales.
9. Do not discuss allocating markets.
10. Do not complain to a competitor about its prices or that its prices constitute unfair trade practices.
11. Do not discuss bids with competitors or identify costs included in bids with competitors.
12. Do not discuss refusing to deal with a buyer because of its pricing or distribution practices.
13. Avoid general discussions about "business conditions", since the conversation can easily drift into prohibited areas and others may perceive the discussion as improper.

With regard to antitrust risks present in membership and industry self-regulation, membership policies must avoid:

1. Restrictions on dealing with non-members.
2. Exclusions from membership, if there is a significant business advantage in being a member.
3. Limitations on access to non-confidential association information, unless the limitation is based upon protection of trade secrets, although reasonable charges for access can be imposed.

Industry self-regulation and codes of ethics must avoid:

1. Requiring refusal to deal with any member violating the association's code of ethics.
2. Arbitrary enforcement of the code.
3. Unreasonably severe penalties for violation of the code.
4. Regulations or policies which have price-fixing implications, such as preventing the advertising of prices.

Trade associations such as NEII should bear in mind that they are targets for government antitrust enforcers and private treble damage suits. By conducting its business openly and avoiding even the appearance that its members are engaging in activity which might be seen to have an effect on prices or competition, NEII can put itself and its members in a strong position to protect against any charges of antitrust violations.

APPROVALS:

The NEII Legal Advisory Group is responsible for maintaining this policy. This policy shall be in effect for three (3) years from the date of approval by the NEII Board of Directors.

NEII Legal Advisory Group:
Approved: 01-Apr-13
Reaffirmed: 04-Mar-16

NEII Board of Directors:
Approved: 23-Apr-13
Reaffirmed: 19-Apr-16

Acknowledgement of Receipt:

Signature

Printed Name

Company Name

Date