Antitrust Statement & Summary

Introduction

The purpose of this document is to assist the staff and Board of Directors of the National Association of Convenience Stores in understanding how the federal antitrust and trade regulation laws apply to NACS. It is the policy of NACS to comply fully with the antitrust laws. This document has been prepared to remind NACS staff, Board members, and any other individuals who have occasion to conduct programs sponsored by NACS of the Association's commitment to antitrust compliance and to provide general guidelines for conducting NACS meetings in a manner that minimizes antitrust risks. This is not intended to make you an antitrust law expert, but to point out the danger areas of antitrust as well as situations that may require you to seek advice from NACS legal counsel.

The antitrust laws seek to preserve a free competitive economy in the United States and in commerce with foreign nations. The penalties for violating the antitrust laws are severe; engaging in anticompetitive activities exposes NACS members, their companies, and employees to criminal prosecution, as well as government and private civil suits for treble damages.

Trade associations must be particularly concerned with the antitrust laws because a trade association inevitably brings competitors together for meetings and other activities.

When competitors meet or work together through a trade association, there may be opportunities to reach unlawful agreements. It would be wrong, however, to conclude that all trade association activities carry antitrust risks. To the contrary, when properly conducted, trade association activities play a valuable role in promoting free and open competition within industries and present very few antitrust problems. It is not possible to provide a complete list of antitrust rules that would cover every situation that you, as a NACS member or employee, might encounter. You should bear in mind, however, that the antitrust laws are concerned not with preventing discussions and meetings among competitors, but with agreements that unreasonably restrict competition among competitors. Thus, while there are no "bad" words, the mere mention of which violates the antitrust laws, there are topics and situations that potentially may lead to illegal agreements or may appear to do so.

Responsibility for Antitrust Compliance

Although NACS carefully designs and reviews its programs to ensure their conformity with antitrust standards, each NACS member is individually responsible for complying with both the letter and spirit of the antitrust laws. NACS staff is expected to intervene in situations where it may be necessary to remind members to use their good judgment to avoid discussions or activities that give even the appearance of involving impermissible subjects or improper procedures. Since anticompetitive agreements may be inferred from circumstantial evidence, NACS staff must see to it that discussions at NACS meetings and functions do not stray into subjects that may have troublesome implications.

Basic Antitrust Principles

One of the most important antitrust laws relating to NACS activities is Section 1 of the Sherman Antitrust Act, which prohibits "contracts, combinations, or conspiracies… in restraint of trade." Section 2 of the Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize and is, therefore, less relevant to trade association activities.

Section 1 of the Sherman Act prohibits competitors from restraining competition among themselves by agreeing to take common action regarding, for example, the price, production, or distribution of their products. Price-fixing agreements are always illegal. Any agreement among competitors to raise, lower, or stabilize prices is unlawful even if the price agreed upon is reasonable or beneficial to consumers and even if the agreement is never put into effect. Unlawful pricing agreements may be inferred from

circumstantial evidence, such as an exchange of price lists between competitors. This does not mean, however, that the word "price" may never be spoken at NACS meetings. For example, a presentation by an outside speaker on how economic trends might affect members' prices would not in itself raise any antitrust risk. It would not, of course, be appropriate for the members to discuss a joint price-related response to what may be perceived as a common problem. Because many price-related topics can be of value to NACS, and present no antitrust risks if presented properly, NACS legal counsel should be consulted whenever the members are interested in discussing such topics so that proper limits for the presentation may be established in advance. It is only the express or implied agreement among competitors restricting their freedom to establish prices that is prohibited.

The Sherman Act also prohibits agreements among competitors to harm, through trade boycotts or similar means, the competitive capabilities of their suppliers, customers, or other competitors.

Trade associations are also subject to Section 5 of the Federal Trade Commission Act. Under Section 5, the Federal Trade Commission (FTC) may challenge actions or commercial practices that, although perhaps not rising to the level of an antitrust violation, are deemed "unfair methods of competition" or "deceptive acts or practices." Thus, FTC may challenge not only agreements that restrain competition, but also such practices as false advertising.

NACS Meeting Guidelines

Because the existence of unlawful agreements may be inferred from circumstantial evidence, the following topics carry antitrust risks and must be avoided at NACS meetings, seminars, and other functions:

- Members' current or future prices or components thereof, including discounts, rebates, and credit terms;
- The possibility or desirability of members' limiting their sales of any product in any geographic area;
- Allocation or division of customers or territories among competing retailers;
- Reasons why NACS members should refuse to deal with a particular supplier or customer;
- Whether the pricing or distribution practices of a competitor are "unethical" or constitute an unfair trade practice;
- Efforts to influence suppliers' prices;
- What constitutes a "fair" profit margin;
- Price lists or procedures for coordinating price changes.

This text was prepared by R. Timothy Columbus, Esquire, with Steptoe & Johnson, LLP, general counsel to NACS for 2007.