

# Sealant, Waterproofing & Restoration Institute

## Antitrust Compliance Policy

Trade associations are subject to strict scrutiny under the many federal and state antitrust laws. One of the most powerful of these is the Sherman Act. Section 1 of that Act prohibits “contracts, combinations or conspiracies ... in restraint of trade.” But by its very nature, a trade association is a combination, such that there is no problem in proving the fact. This should serve as a signal to trade associations that they must proceed with extreme caution lest they be cited for antitrust infringements, carrying stiff fines and jail sentences.

Association members must also remember that the Sherman Act is a criminal conspiracy statute. Even if you are not an active participant but simply attend a meeting where other members of the association engage in an illegal discussion concerning price-fixing, you may still be held criminally responsible, even though you said nothing during the discussion. Mere attendance at such a meeting may be sufficient to imply acquiescence in the discussion and thereby make the individual liable to as great a penalty as those who actively agreed to fix prices.

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” Unlike the Sherman Act, the Federal Trade Commission Act reaches anti-competitive acts committed by single persons or companies, whether or not there is any agreement or “combination”; like the Sherman Act, it also covers joint actions. The Federal Trade Commission has broad power to determine what constitutes an unfair method of competition or an unfair or deceptive act or practice under any given circumstances.

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

The federal government can be expected to bring civil and criminal felony cases each year against trade associations, including members and staff. Penalties are severe. Each individual can be fined up to \$1,000,000 and each member corporation can be fined up to \$100,000,000. Individuals are subject to imprisonment of up to ten years. In addition, the government can impose civil sanctions such as cease and desist orders which result in government restraints on the activities of association members. This, in turn, inhibits association functions and may culminate in the dissolution of an association altogether.

In addition to lawsuits prosecuted by the government, civil treble damage suits can be brought by competitors and consumers. By way of illustration, the Sherman Act prohibits any price agreement regardless of purpose. Thus, if members of a trade association have an agreement as to price, they cannot justify the agreement by showing benefits to customers. Members will be found liable for treble damages for injury resulting from the excess price charged.

Trade associations should focus their concern on five principal antitrust problem areas. These are: price-fixing, division of customers, membership, standardization and certification, and industry self-regulation.

**Price-Fixing.** Association members are most likely to violate this provision, and the government has evinced its greatest concern about the price-fixing prohibitions of the Sherman Act. A price-fixing violation can be inferred from the fact of similar price conduct by members, even though there is no written or oral agreement shown. If prices are fixed, it is no defense that the prices set are reasonable or that the ends sought are worthy.

**Division of Customers.** An agreement among members of an association to divide customers is, in and of itself, a criminal act. The antitrust laws prohibit any understandings or agreements between competitors or members of an association that involves the division or allocation of customers. Even informal agreements whereby one member agrees to stay out of another member's territory will constitute a violation of the antitrust laws.

**Membership.** A basic assumption about every trade association is that its members derive an economic benefit from membership. Denial of membership to an applicant may therefore constitute a restraint of trade in that such denial of an economic benefit limits the rights of an applicant to compete. Thus, membership criteria must be carefully drafted to avoid antitrust problems.

**Standardization and Certification.** An association which develops voluntary industry standards may face antitrust problems if the standard favors some and discriminates against others. Similarly, association certification activities which further interests to certain groups, to the exclusion of others may result in antitrust problems.

**Industry Self-Regulation.** Associations commonly establish codes of ethics for their members, with procedures enforcing them. It is laudable for an association to promote high ethical standards, but antitrust problems may arise of an association's attempt to enforce its code of ethics causes economic injury.

### **Rules for Members**

The Sealant, Waterproofing & Restoration Institute ("SWR Institute") has a policy of strict compliance with federal and state antitrust laws. SWR Institute members should avoid discussing certain subjects when they are together, at formal membership, Board of Director, committee and other meetings and in informal contacts with other industry members. Members should otherwise adhere strictly to these guidelines.

At association gatherings, members should avoid discussion of certain sensitive subjects. Informal gatherings which follow association meetings are particularly looked upon with great suspicion by the government.

Some topics which should be scrupulously avoided in all meetings:

1. Do not discuss current or future prices (be very careful of discussion of past prices), or features that can impact (raise, lower or stabilize) prices such as discounts, costs, salaries, terms and conditions of sale, warranties, or profit margins. Note that a price-fixing violation may be inferred from price-related discussions followed by parallel decisions on pricing by association members — even in the absence of an oral or written agreement.
2. Do not agree with competitors as to uniform terms of sale, warranties or contract provisions.
3. Do not exchange data concerning fees, prices, productions, sales, bids, costs, salaries, customer credit, or other business practices unless the exchange is made pursuant to a well considered plan that has been approved by SWR Institute's legal counsel.
4. Do not agree with competitors to divide up customers, markets or territories.
5. Do not agree with competitors not to deal with certain suppliers or others.
6. Do not try to prevent a supplier from selling to your competitor(s).
7. Do not discuss your customers with your competitors.
8. Do not discuss what is a fair profit level.
9. Do not discuss an increase or decrease in price.
10. Do not discuss standardizing or stabilizing prices.
11. Do not discuss pricing procedures.
12. Do not discuss cash discounts.
13. Do not discuss credit terms.
14. Do not discuss controlling sales.
15. Do not complain to a competitor that his or her prices constitute unfair practices.
16. Do not discuss refusing to deal with a corporation because of its pricing or distribution practices.
17. Do not attend informal sessions in which any of the above subjects are discussed.

Generally, all SWR Institute meetings shall have agendas that are circulated in advance and the minutes of all meeting shall properly reflect the actions taken at the meetings. In addition, only SWR Institute staff should send out written and electronic correspondence on behalf of the SWR Institute. All SWR Institute officers, directors, committee members, or other members should not hold themselves out as speaking or acting with authority of SWR Institute when they do not, in fact, have such authority.

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

1. Restrictions on dealing with non-members.
2. Exclusions from membership, especially if there is a business advantage in being a member.
3. Limitations on access to association information, unless the limitation is based upon protection of trade secrets.

**Industry self-regulation and codes of ethics** should 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.

The SWR Institute and its members shall conduct their business openly and avoid even the appearance that they are engaging in activity which might be seen to have an effect on prices or competition.

If questions arise about the legal aspects of SWR Institute's activities or a member's individual responsibilities under antitrust laws, the SWR Institute's legal counsel or the individual member's own counsel should be consulted. Any questions regarding the SWR Institute's antitrust policy should be directed to the SWR Institute's Executive Director.