

## Articles

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### Knockin' on Your Association's Door: What You Need to Know about Membership Restrictions and the Antitrust Laws

Related Topic Area(s): Antitrust and Trade Regulation

Groucho Marx famously said, "I don't care to belong to any club that will have me as a member."<sup>1</sup> Associations frequently take this sentiment to heart by establishing membership restrictions and other limits on access to association services or events. These restrictions come in many shapes and sizes – limiting membership to a specific trade, profession, or market function; imposing geographic limitations; or requiring professional certification, state or federal licensure, or adherence to a code of ethics, to name just a few.

These restrictions often serve a legitimate purpose by helping the association function effectively and focusing its efforts on benefiting an industry or profession with common interests. At the same time, however, these restrictions potentially limit competition by excluding others from participating in association activities. Although courts usually are reluctant to interfere with internal association rules and decisions, an association's establishment of membership restrictions or qualifications may raise legal concern under the antitrust laws.<sup>2</sup>

This article provides a brief overview of the antitrust laws as they apply to membership restrictions, along with some suggested practices for minimizing potential liability.

#### Membership Restrictions and the Antitrust Laws

The primary federal antitrust statutes relevant to association membership restrictions are the Sherman Act (15 U.S.C. § 1 *et seq.*) and the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) Together, these laws prohibit contracts, agreements, and conduct that unreasonably restrain trade (as well as monopolization and attempted monopolization). Although certain "hardcore" practices, such as agreements to fix prices, are considered *per se* illegal, most association conduct, including membership restrictions, is analyzed under the more lenient rule of reason.

The rule of reason examines the totality of the circumstances and balances the procompetitive benefits of the conduct against the potential anticompetitive harm to determine the likely overall effect on competition. Under this test, a plaintiff must prove that the association has market power in the relevant market, and that the challenged conduct is likely to cause a substantial, adverse effect on competition in the market as a whole – not simply harm to an individual competitor.

The courts and antitrust enforcement agencies (the U.S. Department of Justice and the Federal Trade Commission) generally have agreed that the mere existence of membership qualifications and standards is not unreasonable. On the other hand, restrictions that restrain competition or impose unreasonable restraints may be viewed as prohibited "group boycotts" or "concerted refusals to deal." Obvious examples include an association's refusal to admit members who offer discounted prices or do business with "disfavored" suppliers or customers. Less obvious areas of potential concern include codes of ethics and association restrictions on access to association certification or accreditation programs or trade shows.

**Membership Qualifications.** Done properly, membership restrictions based on geographic location, level of industry, placement in the supply chain, or the type of service performed by the member are considered to be reasonable and procompetitive. After all, most associations form to benefit members of an industry or profession that share common interests. To limit risk under the antitrust laws, an association's membership criteria should be objective, clearly articulated, and reasonably related to a procompetitive function or purpose. In addition, such criteria should be applied consistently and objectively, meaning that all applicants that meet the criteria should be accepted. The use of any subjective criteria (such as peer review, member sponsorships, *etc.*) should be based on a legitimate,

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competitive rationale, and, as a general rule, should be minimized or eliminated to the greatest extent possible.

**Code of Ethics.** Restrictions that seek to guard against immoral or unethical behavior have received heightened scrutiny under the antitrust laws. When implementing a code of ethics, associations should ensure that the restrictions are reasonably tied to a procompetitive purpose (e.g., discouraging fraud or deception), and that members or applicants are provided ample procedural fairness to challenge any adverse decisions. Further, the code may not be used as a ruse to advance an anticompetitive purpose. To ensure fairness and uniformity, restrictions and the process for enforcing the restrictions should be set forth in the association's governing documents, which should be publicly available. By doing so, associations are able to put members and applicants on notice of the types of restrictions that apply, and associations are better positioned to defeat any assertion that they acted arbitrarily or inconsistently.

**Restrictions on Access to Association Services.** To the extent an association has invested time and resources to develop products or services for its members, it is generally reasonable for the association to restrict access to members only, so long as the restrictions do not foreclose non-members from competing in a particular market. This may occur where having access to an association benefit or service is essential for non-members to compete effectively in the market (e.g., a certification program that effectively is a prerequisite to employment in the profession). Where the benefit or service is essential for non-members to compete effectively in the market, it generally is advisable to permit non-members access to the benefit or service without requiring them to become members first. To that end, the Federal Trade Commission has stated that "non-members of the association may be charged a higher fee than members provided it represents no more than a reasonable differential to insure that members and non-members of the association alike pay an equal share of the costs necessary to support the program." 71 Federal Trade Commission Decisions 1053-1055 (1967).

**Restrictions on Access to Association Trade Shows.** A core function of many associations is to organize industry conferences and trade shows. Often, attendance and/or exhibiting at association trade shows (or other events) is restricted to members only. As a result, it is not unusual for an association to receive complaints from non-members, vendors, and other organizations that are excluded from participation. In most cases, however, membership or access to the conference or trade show is not necessary for vendors or other organizations to compete effectively in a market. Thus, absent demonstrable competitive harm, these allegations generally fail under the rule of reason. Moreover, under the rule of reason, the plaintiff must prove that the challenged conduct is likely to cause a substantial, adverse effect on competition as a whole, and not simply harm to individual competitors.

In conclusion, even if an association membership restriction has strong procompetitive justifications, the association may still be at antitrust risk if the restriction is applied arbitrarily, subjectively, or inconsistently. This holds true for all types of restrictions – membership qualifications, codes of ethics, or restrictions on access to trade shows, certification or accreditation programs, or other services. Disgruntled members or applicants may raise "due process" claims based on a lack of either substantive or procedural fairness. To limit this risk, associations always should provide members or prospective members with (a) notice of a potential adverse decision, (b) an opportunity to respond, and (c) an opportunity to appeal any adverse final decision. Of course, an association that implements such procedures must follow them and follow them consistently. Doing so will help ensure that the association is able to function effectively and to the benefit of its industry or profession while minimizing risk under the antitrust laws.

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*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*

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<sup>1</sup> He also reportedly said "Quote me as saying I was mis-quoted."

<sup>2</sup> It bears noting that membership restrictions may, under certain circumstances, jeopardize an association's tax-exempt status.

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