

## **Antitrust Risks of Association-Sponsored Market Research**

Avoiding Compliance Pitfalls of Information Exchanges and Surveys

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## Antitrust Risks of Association-Sponsored Market Research: Avoiding Compliance Pitfalls of Information Exchanges and Surveys

Wednesday, December 11, 2013

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# Agenda

- Introduction
- Overview of Association Market Research Programs
- Antitrust Laws Applied to Information Exchanges and Benchmarking
- Best Practices and Practical Applications





# Overview of Association Market Research Programs

# What Is a Market Research Program?

- Market research is a broad term that covers efforts to gather and study data about a particular industry, market segment, product, etc.
- An information exchange involves the provision, collection, and dissemination of data between competitors.
- Benchmarking refers to a process whereby a firm compares its practices or performance against that of other similar firms.
  - Allows firms to determine whether their practices or performance are strong or weak compared to peers within an industry.



# What Are the Benefits of a Market Research Program?

- Association Benefits
  - Establishes an association's expertise in a particular industry;
  - Helps an association stand out from its competitors;
  - Potential source of association revenue.
- Member Benefits
  - Provides important benefits to members to help with their business planning and competitive efforts;
  - Tracks changes over time to help the industry understand its business and future opportunities.
- Other Benefits
  - Provides resource for the public regarding the industry.





# Examples of Association Market Research Programs

- National Association of Realtors – Existing Home Sales
- National Automobile Dealers Association – Monthly Car Sales (by type of vehicle)
- American Bankers Association – Peer Benchmarking Programs
- Beer Institute – Per Capita Consumption Rankings
- Association for Financial Professionals – Treasury Benchmarking Program





# **Antitrust Laws Applied to Information Exchanges and Benchmarking**

# U.S. Antitrust Laws

## Overview

### ■ Federal Laws

- The U.S. federal antitrust statutes of principal concern are Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act (“FTC Act”).
  - Section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies that unreasonably restrain trade.
  - Section 2 of the Sherman Act prohibits monopolization and attempted monopolization.
  - Section 5 of the FTC Act prohibits unfair methods of competition.
- U.S. antitrust laws apply to conduct outside the U.S. that has an effect on trade or commerce in the U.S.

### ■ State Laws

- The states typically interpret and apply their respective laws in a similar fashion to the federal laws. In general, strict compliance with the federal antitrust laws will result in compliance with the state laws.



# U.S. Antitrust Laws

## Federal Enforcement Agencies

- The Federal Trade Commission and U.S. Department of Justice share federal jurisdiction over antitrust enforcement.
- Other agencies such as the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Transportation, the Federal Maritime Commission, and the Federal Reserve also have limited antitrust enforcement authority.
- Current federal antitrust agency leadership:

Edith Ramirez, Chairwoman of the FTC



William Baer, Asst. AG for Antitrust, DOJ



# U.S. Antitrust Laws

## Anticompetitive Conduct

- Certain conduct is per se illegal under the antitrust laws without regard to its justification:
  - Agreements to set prices or components of price; agreements to rig bids; agreements to allocate markets or limit production/output; and most agreements to boycott suppliers, customers, or competitors.
- Other conduct is analyzed under the “rule of reason” by balancing the anticompetitive effects against the procompetitive justifications.
  - This type of conduct generally requires proof that the defendant possesses market power.



# U.S. Antitrust Laws

## Penalties

### ■ Companies

- Companies may be fined up to \$100 million per antitrust violation. Courts also may impose an “alternate fine” of up to twice the gain to the perpetrator or twice the loss to the victim as a result of illegal behavior.
- Courts or government antitrust agencies may impose permanent restrictions limiting business activity.
- Private actions – by customers or competitors who show they were harmed by the perpetrator’s actions – may result in treble damages suits and the award of attorneys’ fees.

### ■ Individuals

- Violations of the Sherman Antitrust Act are felonies.
- Individuals may be imprisoned for up to ten years, fined up to \$1 million, or both, for each violation.



# Information Exchanges/Benchmarking

## Rule of Reason Analysis

- Information exchanges and benchmarking are reviewed under the Rule of Reason test.
- The main antitrust concern is that the exchange of information may facilitate a collusive agreement (e.g., price-fixing). Key considerations include:
  - The nature and quantity of the information;
  - How recent the shared data is;
  - Whether the parties have an anticompetitive intent in sharing the information;
  - Whether the industry is concentrated;
  - Public availability of information;
  - How the exchange is structured and controlled;
  - The frequency of exchanges; and
  - Whether the exchange includes safeguards to prevent the sharing of competitively sensitive information.



# Information Exchanges/Benchmarking

## Rule of Reason Analysis

- More scrutiny for the exchange of
  - Pricing or cost data;
  - Output levels;
  - Business strategies/future forecasts;
  - Detailed or firm-specific information; and
  - Information regarding a highly concentrated industry.
- Recognition of potential for procompetitive benefits:
  - Helps provide information to consumers;
  - Promotes business planning and investment; and
  - Supports R&D.





# Information Exchanges/Benchmarking

## FTC/DOJ Safe Harbor

- **DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care (1996):** Sets up antitrust Safety Zone for information exchanges.
  - Managed by independent third party;
  - Data more than three months old;
  - Data aggregated from at least five providers;
  - No single provider's data represents more than 25% of the information provided;
  - Aggregation of data prevents identification of individual provider data.
  
- **Antitrust Guidelines for Collaborations Among Competitors (2000):** Recognizes that the exchange of information can have procompetitive benefits, but regards exchange of competitively sensitive information (price, cost, output, etc.) as inherently risky because it can facilitate direct or indirect collusion.



# Information Exchanges/Benchmarking

## European Union

### ■ European Commission

- Articles 101 and 102 of the Treaty on the Functioning of the European Union generally mirror Sections 1 and 2 of the Sherman Act.
- Focus on the full context of the information exchange, including:
  - Nature of the market;
  - Nature of the information exchanged (type and age);
  - Manner in which the information is exchanged (aggregate data/publicly available); and
  - Potential for procompetitive benefits.

### ■ Other Foreign Competition Laws

- Many foreign competition regimes are modeled on U.S. and EU antitrust principles. Most EU member states also have their own antitrust regimes.



# Information Exchanges/Benchmarking

## Recent Developments

- Recent developments in line with settled law . . .
  - FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13)
- . . . But with some new wrinkles?
  - FTC Consent Order with Sigma Corp. (1/4/12)
  - Cason-Merenda v. Detroit Medical Center, 862 F.Supp.2d 603 (E.D. Mich. 2012); Fleischman v. Albany Medical Center, 728 F.Supp.2d 130 (S.D.N.Y. 2010)
- **BOTTOM LINE:** Structure any information exchange or benchmarking program in compliance with the DOJ and FTC safe harbor. Consider additional safeguards if the industry at issue is highly concentrated or otherwise susceptible to potential collusion.



# Information Exchanges/Benchmarking

## Recent Developments

- **FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13)**
  - Trade association of six licensed national money transmitters.
  - Money transmitters are subject to certain federal and state laws governing money laundering, terrorist financing, etc.
  - TMSRT proposed an information exchange consisting of a database with information on former U.S. sending and receiving agents whose contractual relationships were terminated due to failure to comply with applicable law or money transmitter contract terms.
  - Proposed Information Exchanged
    - Name of the Exchange Member that supplied the terminated agent;
    - Agent’s name and contact information, including information on owners, directors, and management; and
    - Date and reason of termination.



# Information Exchanges/Benchmarking

## Recent Developments

- **FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13) (cont’d.)**
  - Exchange Structure
    - Independent, third-party vendor;
    - Open to all licensed non-bank money transmitters;
    - Voluntary participation;
    - Members retain right to decide unilaterally whether to work with an agent terminated by another exchange member.
  - FTC Determination
    - Goals of the information exchange did not appear to be either directly or indirectly anticompetitive or designed to further coordination on any significant competitive factor (price, cost, or output);
    - Exchange included safeguards (Safe Harbor);
    - Exchange appeared that it could generate efficiencies that would enhance consumer welfare.

# Information Exchanges/Benchmarking

## Recent Developments

- **FTC Consent Order with Sigma Corp. (1/4/12)**
  - FTC alleged that Sigma and two competitors participated in a price-fixing agreement for imported ductile iron pipe fittings (DIPF). In addition, the three companies allegedly exchange information on their DIPF monthly sales through an association.
  - Consent Order imposes restrictions on future exchanges that go beyond the DOJ/FTC Safe Harbor requirements:
    - Data must be at least **six** months old;
    - No communications related to the information exchange other than communications (1) occurring at official meetings, (2) relating to topics identified on a written agenda circulated in advance, and (3) **occurring in the presence of antitrust counsel**.
    - All aggregated industry data communicated to a contributor must be made **publicly available**.



# Information Exchanges/Benchmarking

## Recent Developments

- **In the Matter of Bosley, Inc. (2013)**
  - FTC alleged that Bosley, Inc. and Hair Club, Inc. exchanged competitively sensitive information on:
    - Future product offerings;
    - Price floors, discounting;
    - Business strategies; and
    - Operations and performance.
  - The Consent Order
    - Prohibits the future exchange of competitively sensitive information with competitors.
    - Requires annual compliance training for all officers, executives, and employees who have contact with competitors or have sales, marketing, or pricing responsibilities for Bosley's hair transplantation operations.



# Information Exchanges/Benchmarking

## Recent Developments

- **Nat'l Ass'n of Music Merchants, Inc. (2009)**
  - FTC alleged that NAMM organized meetings at which members shared information about prices and strategy.
  - The Consent Order:
    - Bars NAMM from coordinating or aiding price exchanges among members or forming anticompetitive agreements;
    - Requires NAMM to adopt an antitrust compliance program; and
    - Requires NAMM antitrust counsel to review written materials, prepared remarks related to price terms and MAP policies, and to provide guidance on complying with competition laws.





# Information Exchanges/Benchmarking

## Additional Developments

- **DOJ Business Review Letter to the National Association of Small Trucking Companies (2007):** Operational and financial survey of trucking companies for benchmarking purposes.
  - Administered by third parties;
  - Individual company information kept confidential;
  - Information published only if five or more responses;
  - Aggregated data at least three months old;
  - Voluntary use of data/recommended best practices.
- **DOJ Business Review Letter to Chemical Information Systems (2003):** Database containing information provided by chemical producers. Information would be same that was provided by individual producers to distributors, but in a more user-friendly format. Included multiple safeguards in line with Safety Zone.



# Information Exchanges/Benchmarking

## Additional Developments

- **U.S. v. Professional Consultants Insurance Company, Inc. (2005):**
  - Professional Consultants Insurance Company Inc. (PCIC), and its actuarial consulting firm members, agreed to stop sharing among themselves certain information on the use of contractual limitations of liability (LOL) in their dealings with clients.
    - PCIC was owned and managed by three actuarial consulting firms.
    - DOJ alleged that employee benefit clients were denied significant competition among the actuarial consultants in their setting of contract terms.
    - The consent decree prohibits PCIC and its members from exchanging LOL information, except subject to certain safeguards.



# Information Exchanges/Benchmarking

## Additional Developments

- **Cason-Merenda v. Detroit Medical Center, 862 F.Supp.2d 603 (E.D. Mich. 2012); Fleischman v. Albany Medical Center, 728 F.Supp.2d 130 (S.D.N.Y. 2010)**
  - Series of cases brought by nurses alleging that hospitals exchanged wage data without meeting the Safety Zone requirements and that the data was relied on by defendants in deciding to reduce RN compensation.
  - In 2012, *Cason-Merenda* went to trial even though it had limited evidence on actual coordination. Information on current and future wages exchanged through:
    - Direct contacts between HR employees
    - Industry organizations and meetings
    - Third-party salary surveys
- **Todd v. Exxon, 275 F.3d 191 (2d Cir. 2001)**
  - Employee class action against 14 oil and petrochemical industry employers alleging a conspiracy to set salaries at artificially low levels.





# Best Practices and Practical Applications

# Best Practices

## Antitrust Compliance Program

- Implementation of an effective compliance program is essential.
  - Preparation of a user-friendly antitrust compliance manual
  - Periodic training for employees to ensure that they can detect antitrust issues in the first instance to prevent them from occurring
  - The commitment of high-level personnel to oversee the program and institute a culture of compliance
  - Circulation of an antitrust statement in advance of all association meetings



# Best Practices

## Antitrust Manual

- Antitrust Compliance Manual should provide a basic overview of the antitrust laws and how they apply to the company and its employees.
- Information Exchange Guidelines
  - Prohibit discussions or exchanges of information among competitors concerning prices, costs, terms of sale, business plans, suppliers, customers, territories, capacity, production, or any other competitively sensitive information without prior written approval from legal counsel.
  - Any information exchange or benchmarking programs should have a legitimate business purpose and not produce significant anticompetitive results.
  - Ensure that information exchange program complies with DOJ/FTC Safe Harbor.



# Best Practices

## Practical Considerations

- Conduct the exchange in-house or hire an outside consultant?
- Manage association meetings
  - Antitrust guidelines review
  - Legal counsel presence
  - Keep accurate meeting minutes
- Funding mechanism (member dues, fees, etc.)
- Develop copyright language and report usage guidelines
- Determine report frequency
  - Annual/quarterly/monthly/weekly



# Questions?

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