MICHIGAN OPTOMETRIC ASSOCIATION

ANTITRUST COMPLIANCE PROGRAM

MOA ANTITRUST COMPLIANCE PROGRAM

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INTRODUCTION

The Michigan Optometric Association Board of Trustees is issuing this Antitrust Compliance Program Manual ("Manual") as a resource and reference guide for understanding the relationship between the antitrust laws and MOA's activities. The Manual is MOA's official policy, and all persons participating in association activities are expected (1) to be familiar with the program both through this Manual and through other presentations; (2) to seek clarification from counsel when matters arise which are unclear; (3) to strictly follow these requirements for meetings, communications and other activities described in the Manual; and, (4) to report any violations of this Manual to the Compliance Officer or to the Association Counsel.

Each responsible employee and "volunteer" member of MOA must have a practical, working understanding of the relevant requirements of the antitrust laws. Accordingly, Section I of this Manual provides an overview of federal and state antitrust and trade regulation statutes and the enforcement of those laws. Sections II through IV then set forth the required procedures to be followed by volunteers and staff to ensure compliance with the antitrust laws and to avoid any possible appearance of noncompliance.

MOA and its committees and members shall remain in full compliance with the antitrust laws. To ensure that this compliance is maintained, MOA shall adhere to the procedural requirements described in detail in the subsequent sections of this Manual.

I. OVERVIEW OF THE ANTITRUST LAWS

Whatever the nature of the trade or professional group involved, all such associations have one thing in common: their membership is made up of people or companies that compete with one another in the marketplace. And the government is always concerned when competitors get together.

The government's concern has existed since the late nineteenth century. At that time, Congress first acted against the trusts (business combinations, monopolies, etc.), who were seen as hindering competition and preventing the general public from enjoying the benefits of free trade and free competition. Over the years, the antitrust statutes have increased in number. Hundreds of court cases have been decided interpreting those statutes. Some cases result in large money awards against competitors who banded together for purposes interpreted by the courts as illegal. Because association members are usually competitors, all association officers and executives need a working knowledge of what antitrust is and what general kinds of behavior to avoid.

At the same time, the hundreds of case decisions and books written on this subject make it impractical for any association officer or executive to become an expert in this field. Nor will reading this overview make anyone an expert. This overview should not be taken as advice as to any particular fact, situation or activity, but only as a means of becoming familiar with the framework of the antitrust laws.

The antitrust laws reflect a policy that the country is best served by the maintenance of a vigorous competition, unrestricted by anticompetitive agreements or collusion among competitors, and free from monopoly practices. It has been, and is, MOA's fundamental policy to comply fully with the antitrust laws in all of its activities, and members and staff are required to conduct themselves so as to avoid even the appearance of anticompetitive behavior.

The Federal and Michigan antitrust laws may be enforced against an association, its members (including officers and trustees) and staff both by federal and state government officials and by private parties through treble damage actions. If individual members or staff of an association participate in an activity that violates the antitrust laws, the association and the individuals may be sued in a civil or criminal proceeding. Penalties may be severe.

As examples, an individual convicted of a criminal violation of the Sherman Act may be fined as much as $250,000 and imprisoned for up to three years. A corporation may be fined up to $1 million.

Violation of the Federal Trade Commission Act can result in issuance of a cease and desist order, which can place severe governmental restraints on the freedom and activities of the association and its members. Also, failure to obey such an order may result in penalties of as much as $10,000 per day.

In addition to prosecution for criminal or civil violations, the association, its members and staff can face private action for treble damages brought by competitors or consumers. Loss of such a private action can result in payment by the defendant of three times the proven damages to the injured plaintiff.

The typical antitrust trial is long, complex, and expensive. The direct costs of litigation actually may exceed the fines or damages imposed. Preparing for and participating in a trial will involve a substantial loss of time of the individuals involved.

The Department of Justice, the FTC and state attorneys general all have extensive investigative powers. They can require an association's members and employees to provide testimony under oath, and to produce voluminous records, as can private litigants in civil discovery, all of which may involve hundreds of hours of work, extensive document reviews and reproduction, and attorney fees. MOA employees and members must take care not only to follow the letter of the antitrust laws, but also to conduct our activities in a manner which avoids even the appearance of questionable conduct.

The major provisions of the antitrust laws that are particularly relevant to volunteer activities are briefly outlined below, and a few examples are offered of applications of those laws.

1. Federal Laws

A. The Sherman Act

The Sherman Act is the primary antitrust law. Section 1 of the Sherman Act prohibits "Every Contract, combination . . . or conspiracy, in restraint of trade . . ." The requirement of a combination is met easily in cases involving professional and trade associations, since they are, by definition, combinations of professional or business competitors. Associations and their members must be especially careful to avoid conduct that might be considered anticompetitive or in restraint of trade.

Certain types of conduct are regarded as so clearly harmful to competition that courts automatically consider them antitrust violations. Such conduct is termed *per se* illegal. That is, no arguments as to the good motives or the purported benefits for such conduct will be listened to by the courts. For example, if competitors agree to set their prices at a particular level, the court would not consider the fact that they lowered the price to consumers -- the price fixing agreement is *per se* illegal.

Not all antitrust violations are *per se* violations. Some agreements among competitors will be illegal only if they unreasonably restrain competition. Conduct that is suspected or alleged to have such anticompetitive effects will be examined under the "rule of reason" to determine (1) whether the conduct is reasonable and is undertaken for a legitimate business

purpose, and (2) whether the suspected or alleged anticompetitive effects are merely incidental to this other, legitimate business endeavor.

The language of Section I -- "contract, combination . . . or conspiracy . . ." -- does not require the antitrust court to find that an explicit agreement was entered into. Violations have been found where there have been no express written or oral agreements to fix prices or engage in some other prohibited activity. The existence of an agreement or conspiracy among competitors may be inferred from circumstantial evidence. For example, evidence that competitors attended a trade association meeting and, afterwards, took similar actions on the subject discussed, may be sufficient to prove that an unlawful agreement existed.

The Sherman Act is both a criminal and civil statute. It is enforced primarily by the United States Department of Justice, and violation is punishable by fines and/or imprisonment. The Act also can be enforced by private parties in civil suits. Victims of antitrust violations may sue for money damages. A plaintiff can recover three times the damages actually suffered because of the violation, plus the plaintiff's reasonable attorney fees. The purpose of the treble damage award is to punish the antitrust violator, to deter others from violating the laws, and to encourage private enforcement of the laws by the victims of antitrust violations.

Finally, the Sherman Act permits government seizure of property obtained pursuant to any contract, combination or conspiracy that violates Section 1 of the Sherman Act.

Over the years, the courts have concluded that Section 1 outlaws (a) agreements which tend to control prices; (b) the division of markets; (c) boycotts of competing enterprises; and, (d) arrangements that restrict advertising or other methods of competing for business.

(a) Agreements Which Control Price

No matter whether the prices are raised, lowered, or stabilized, agreements among competitors ("horizontal" agreements") that fix prices are *per se* violations of Section 1. Price fixing can include an understanding or consensus on a specific price, price range, profit margin, or on a pricing formula or system.

The Sherman Act prohibits both direct price-fixing and indirect price-fixing. For example, an agreement among competitors to reduce production in order to drive up prices would be illegal. Other examples of unlawful practices of competitors, which may impact on price include:

- A trade association of roofing contractors was prohibited from fixing the length and other terms of guarantees for the sale and installation of replacement roofs.

- Real estate boards' establishment of "recommended" commission schedules and sanctions against members who failed to adhere to them was illegal.

- A car dealer association's circulation to its members of a uniform list price for cars was illegal because it affected actual retail prices, even though the list prices were only a starting point for bargaining and no sales were made at list prices.

- Exchanges of information concerning the most recent past price charged or quoted among sellers of shipping containers, even though on an irregular basis, constituted unlawful price fixing.

- An engineering society's ban on competitive bidding was illegal. The United States Supreme Court rejected the argument that competition might endanger the public safety.

- The antitrust enforcement agencies have stated that a professional association may not negotiate with a third party payor concerning the fees to be paid to association members by the third party payor.

(b) Agreements to Divide Markets or to Restrict Supply

Agreements among competitors to assign territories in which each may sell or to allocate customers to whom each may sell are unlawful *per se*.

In addition, competitors cannot lawfully agree that they will limit the amount of goods that each will produce or the amount or type of services that each will sell. For example, all of the doctors in a city cannot agree that each will limit the number of days and hours that his or her office will be open, or that each will not solicit patients of the other doctors.

(c) Group Boycotts

Collective, or joint, action by competitors to refuse to deal with other traders is illegal *per se*. As examples, a group of allergists cannot agree that they will not purchase products from manufacturers because the manufacturers sell the products to non-allergist physicians who compete with the allergists, and a group of dentists cannot agree that they will withhold x-rays from a health care plan in order to obstruct the plan's cost containment procedures.

There is an important distinction between the right of an individual businessman or professional to refuse to deal with a trader (supplier, competitor or customer) and the rights of a group of competitors to refuse to deal with a trader, or to induce others to refuse to deal with a competitor. The antitrust laws do not, in general, restrict an individual's right to buy from or sell to whomever he wants. However, the concerted refusal to deal by a group of competitors is a *per se* violation, and can subject the companies and employees to criminal and civil penalties.

This distinction between a unilateral decision to deal, or not to deal, and a group boycott is an important one. For example, an association may select one laboratory instead of another

to perform a particular research study for the association. However, in rejecting a laboratory as the site for the research, the members of the association cannot agree that they will not individually employ that laboratory for other purposes.

Some examples of activities involving concerted refusals to deal that courts have found illegal are:

- It was illegal for a chain department store with significant buying power to induce appliance manufacturers to agree among themselves not to wholesale to an independent retailer who competed next door to one of the chain's outlets.

- The practice by a group of clothing designers of refusing to deal with retailers who sold pirated copies of original clothing designs was illegal, because it coerced retailers not to engage in a rival (i.e. pirating) and competitive method of marketing.

- Hotel operators who gave favored treatment to suppliers who contributed to an association whose purpose was to generate convention business in the area, and who withheld business from suppliers who did not, were engaged in an illegal boycott against non-contributors, because the non-contributors were prevented from selling to the hotels in an atmosphere of open competition.

- A news gathering service (wire service) with restrictive membership requirements that prohibited news gathered by members from being made available to non-members before it was published by members was engaged in an illegal boycott, because the practice was designed to stifle competition from non-member news publishers.

- The denial of communications connections by the New York Stock Exchange to a non-member was illegal, because it deprived the non-member of a valuable and competitively significant business advantage, even though he might have been able to conduct his business without the system.

(d) Tying Arrangements

A tying arrangement exists when a buyer is required to purchase an unwanted product (the tied product) as a condition of being allowed to purchase a unique or valuable product (the tying product) over which the seller has a high degree of economic power. Tying arrangements are judged under the rule of reason. Not all tying, or tie-in, arrangements are illegal. Unreasonable tying arrangements are illegal under the Sherman Act (and the Clayton Act).

Tie-ins are unreasonable and, therefore, illegal when the party has enough power through control of the unique, tying product to restrain competition for the unwanted, tied product.

A business or professional association might become involved in illegal tying if its conditions access to a valuable resource upon membership in the association. An association may find it necessary to allow non-members access to certain of its resources.

For example, the results of scientific research conducted with association funds may need to be made available to professionals who are not association members if denial of access to the research would unreasonably hurt competition. As another example, one professional association had a rule that only members were eligible for a certificate of clinical competence. A speech pathologist who was not a member of the association, but who needed the certificate to practice, successfully challenged that rule.

B. The Federal Trade Commission Act

The Federal Trade Commission Act (FTC Act) was enacted in 1914 to supplement the Sherman Act. Section 5 of the FTC Act prohibits:

> **Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . .**

(a) FTC Act Enforcement

The FTC Act is enforced by the Federal Trade Commission (FTC). The FTC Act prohibits everything the Sherman Act prohibits, and more. It prohibits conduct in its early formative stages -- in its incipiency -- that, if allowed to mature, would ripen into violations of the Sherman Act or Clayton Act. The FTC Act also reaches certain anticompetitive conduct, whether or not it is the result of an agreement or combination.

Congress deliberately drafted Section 5 to empower the FTC to define and outlaw unfair practices that do not violate the antitrust laws in the traditional ways described earlier. Congress could not enumerate all the possible unfair practices that could arise. Therefore, Congress left it to the FTC to address and define such practices as they occur.

The FTC may take action with respect to a practice under Section 5, although the practice does not actually violate other antitrust laws. An example of this was a shopping center developer who gave a veto right over other prospective tenants to a large department store tenant. The FTC found that the veto violated Section 5 of the FTC Act, even though the veto was never used. Because of its anticompetitive potential, it could be used to boycott prospective competing tenants or to fix prices of goods sold.

While the Department of Justice enforces the Sherman Act in court, the FTC enforces the FTC Act administratively within its own bureaucracy. Administrative cases are brought

against individual companies, persons or associations. These commence with an FTC investigation of the practices involved.

When an administrative case is brought against a company, person or association, there may be an administrative trial before an administrative law judge at the FTC, resulting in an order to cease and desist from the challenged practices. Such an order may be appealed to the Commission and, thereafter, to the federal courts. Violation of a final cease and desist order may result later in court-imposed civil fines of $10,000 a day.

The defense of an administrative proceeding before the FTC can be a very lengthy and expensive process. Thus, many entities sued at the FTC elect to sign consent agreements to abandon the challenged practices. Violation of a consent agreement can also result in court-imposed fines of $10,000 a day.

Finally, the FTC can go to court to seek consumer redress from offending companies, which can be required, for example, to refund money to consumers who have been defrauded by the offensive activities.

(b) Specific Practices Addressed by FTC

In recent years the FTC has filed Section 5 complaints in situations not even amounting to conspiracies, but which were all invitations to collude, or conspire. The conduct sought to be administratively prosecuted at the FTC was alleged to facilitate anticompetitive agreements. These complaints have thus far been brought in situation that involved concentrated industries with few competing sellers.

- The FTC charged a bidder for state contracts for infant formula for disclosing the bid prior to the sealed bidding process.

- A representative of one axle products manufacturer told a competitor that the competitor's prices were too low and indicated no need to compete on price.

- A manufacturer of bearings faxed its price list to a competitor.

- A zipper manufacturer complained to a competitor of its free equipment policy as being "unfair".

The FTC went after these practices as invitations to engage in *per se* violations of the antitrust laws, even though no concerted efforts took place and no violations of the Sherman Act were claimed to have occurred.

2. Michigan Antitrust Statute

In 1984, the Michigan legislature passed Michigan's version of the Uniform State Antitrust Act, called the Michigan Antitrust Reform Act, MCL 445.771 to 445.788.

Section 2 of the Act contains the basic prohibition, which states:

> "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."

This section applies to trade or commerce wholly within Michigan or only partially within Michigan. Thus, if the activity does not come within the interstate commerce element under federal law (a rare occurrence in the case of professional or trade associations), the same activity is probably unlawful under Michigan law if any part of the affected market is within Michigan. Most states now have some sort of statute with this general effect.

In construing the Michigan statute, Michigan courts must give due deference to Federal Court decisions interpreting the various Federal statutes involving antitrust violations. MCL 445.784(2).

As a result of this statute, virtually everything that is illegal under federal law is also illegal under state law. The statute mainly serves as a vehicle for additional enforcement and not as a basis for making more activities illegal. The most important points to keep in mind about the Michigan statutes are: a) purely in-state activities do not protect the association from prosecution; b) the Michigan Attorney General as well as federal agencies may enforce antitrust laws; and c) competitors may bring civil lawsuits in Michigan courts based on the state statute.

* * *

This section has provided a basic outline of very complicated statutes. Should any questions or feelings of doubt regarding any proposed discussion or activity arise, it is recommended and urged that you contact counsel to discuss the matter.

II. REQUIREMENTS FOR MOA MEETINGS

All of the following requirements shall apply to Board of Directors meetings and Advisory Council meetings. Certain portions of the requirements shall also apply to Divisional meetings and Committee and Subcommittee meetings where referenced, or where the term "MOA group meetings" is used.

The MOA and its component members and committees are by definition groups of competitors. Meetings of such groups must be conducted in a manner so as to eliminate even the appearance of anticompetitive activities.

Except where the Executive Vice President approves in writing different procedures in advance, the following meeting requirements shall be adhered to so that MOA members and staff can eliminate antitrust risks and meet to transact the lawful business of MOA.

1. Notice and Agenda

- Each meeting must be preceded by a notice furnished to all directors or advisory council members, as applicable.

- An agenda covering the subjects for discussion must be prepared and distributed to all directors or advisory council members prior to any meeting of the group involved.

- The agenda for Board of Directors meetings and Advisory Council meetings must be communicated to the appropriate counsel in writing. Any items on the agenda that involve areas of antitrust concern (or a subject that might affect competition) should be communicated to counsel sufficiently in advance of the meeting to obtain counsel's approval prior to distribution.

- Notice of any Divisional, Committee, or Subcommittee meeting that will or may involve areas of antitrust concern (or a subject that might affect competition) shall be communicated to counsel sufficiently in advance of the meeting to obtain counsel's advice, and to allow counsel opportunity to attend the meeting.

- Meeting attendees must adhere to the agenda at all meetings where an agenda is required. No "off the record" discussions at the meetings are permissible. Items may be dropped from, or added to, the agenda at the meeting.

- If it appears necessary before the meeting to add an item or items of business to the agenda with insufficient time for formal notice, any such added item must be reviewed and approved by counsel before being taken up if the subject involves an area of antitrust concern (or a subject that might affect competition).

- If a non-agenda subject comes up at a meeting, it should not be discussed without prior consultation with counsel if the subject involves an area of antitrust concern (or a subject that might affect competition).

2. Minutes of Meetings and Written Product

- Accurate, concise and complete minutes must be kept reflecting the subjects discussed and any actions taken at all meetings of the Board of Directors and the Advisory Council. All activities of the Divisions, Committees, and Subcommittees which may or do involve a matter of antitrust concern shall be reported to the Board of Directors. Any such reports shall be included with the minutes of the Board of Directors.

- Minutes are to be considered a "DRAFT" until finally approved at the succeeding meeting. Draft minutes are to be distributed to attendees and other interested persons promptly after the meeting and counsel's review.

- Minutes of a meeting can be important. They are the principal contemporaneous evidence of what transpired at a meeting. It is the presiding officer's responsibility to see that the minutes are clear, complete and accurate with regard to the meeting discussion and the actions taken.

- An accurate list of persons invited to the meeting, as well as a list of those actually attending, should be included as a part of the minutes.

- The presiding officer is obliged to prevent "off the record" conversations, and to see to it that subjects discussed are accurately recorded. If a participant feels that his comments are not appropriate to be "on the record", they probably are not proper for the meeting and should not be made.

- Any task force, or committee, or group work product or publication must be considered a "DRAFT", and may not be published or distributed as a final document until approved in accordance with procedures established by the Board of Trustees or by the Executive Director.

3. Files

- The agenda and minutes for each meeting, including an accurate list of attendees, should be kept in an historical file for the Board of Directors, the Advisory Council, and, where applicable, for each division, committee, subcommittee, task force or other MOA group meeting. The documents should be kept separate from general files that contain memoranda, letters, and other documents relating to the same group.

- Files will be reviewed periodically by MOA's staff, or by counsel on request, for completeness and legal sufficiency.

4. Presence of Counsel at Meetings

- Counsel attends all, or portions of, meetings of the Board of Directors and the Advisory Council. Counsel attends any other meetings on request of the Board of Directors or the Executive Vice President.

5. No "Rump" Sessions

- An MOA group meeting may not be used as an occasion for attendees to informally gather to discuss non-agenda topics or other unrelated business matters. So called "rump sessions" must not be held.

- When a meeting is adjourned, it should be over in all respects and not simply in name. Informal "rump sessions" present too great a temptation for "confidential" discussion of prohibited subjects. If anticompetitive professional practices were to follow such meetings, the results could be disastrous for the individuals involved and perhaps for MOA and for the profession of optometry.

6. Meeting Topics and Taboos

It is very difficult to define the permissible limits of discussion at MOA group meetings because much depends upon the context in which any particular subject is raised or discussed. Nevertheless, a prudent rule which should be followed at all meetings, and during social gatherings incidental to meetings, is that no activities or subjects that would have the purpose and intent of restricting competition should be discussed, acted upon, or even considered. There should <u>never</u> be a discussion or exchange of information (or any activity which creates the appearance of such) on the following subjects at any MOA group meeting or at any meal or social gathering incidental to such a meeting:

- any agreement, understanding, or arrangement on how, why and at what level members should set their fees and prices.

- individual fees and prices or any element of individual price or pricing policy, including price changes, price levels, price differentials, mark-ups, margins, profits, discounts, allowances or credit terms;

- individual costs, sales volume, inventories, or changes in such;

- boycotts of suppliers, competitors, health care plans, or users of optometric services;

- limits on market shares, sales quotas, or allocations;

- any matters which might have the effect of excluding competitors, suppliers, or patients (individual or groups); or restricting the business conduct of competitors, suppliers, or patients; or dealing with coercion or the exclusion of or control of competition.

The above list of forbidden subjects is not all-inclusive. If there is a question or uncertainty as to whether or not a subject is appropriate for discussion, counsel should be consulted in advance of any discussion of the subject. One reason for these prohibitions is that while it is not always unlawful in and of itself to discuss such topics, such discussions among competitors may suggest or create the appearance of tacit understanding or collusion in violation of the antitrust laws.

The most effective method of assuring that MOA group meetings are limited to lawful and appropriate subject matters is to adhere strictly to the procedures set forth in this Manual, as summarized in the following checklist:

1. Have agendas for all meetings where required.

2. Limit meeting discussions to agenda topics unless additional topics have been approved in accordance with these requirements.

3. Prepare meeting minutes that accurately reflect the subjects discussed and distribute drafts to attendees and counsel for review.

4. Compile an accurate list of (1) all persons invited to the meeting, and (2) persons actually attending.

5. Maintain full descriptions of the purpose and authority of all councils, committees, subcommittees, working groups, and other groups.

6. Consult with counsel on all apparent antitrust questions relating to the particular meeting.

7. Protest any discussions or meeting activities which appear to violate this checklist; disassociate yourself from any such discussions or activities; leave any meeting in which they continue; and promptly report any such matters to the Association Counsel.

III. REQUIREMENTS FOR COMMUNICATIONS AND MEETINGS WITH OUTSIDE GROUPS

1. Meetings with Manufacturers, Suppliers and Competitors

From an antitrust perspective, meetings with outside groups --- manufacturers, suppliers or competitors --- may be the most suspect association activities. Therefore, it is imperative that the requirements below be strictly adhered to if there is any indication at all that relate to competition or any area of antitrust concern. It is these meetings between competitor groups or with individual suppliers or supplier groups that antitrust enforcement agencies will scrutinize thoroughly for indications of collusive behavior such as price fixing, market division, refusals to deal, boycotts and other forms of unlawful concerted action. In principal part, the requirements for those meetings are the same as those applied to internal MOA meetings.

- There is notice and agenda for each meeting. The agenda must be substantively informative as to the discussion to take place, and must be strictly adhered to. If the subjects to be discussed involve an area of antitrust concern (or a subject that might affect competition), counsel should review the agenda prior to distribution.

- Counsel shall attend meetings with outside groups on request.

- Minutes that accurately reflect the subjects discussed shall be prepared and distributed in draft form for review.

- Compile an accurate list of (1) all persons invited to the meeting, and (2) persons actually attending.

- Maintain full descriptions of the purpose and authority of all working groups.

- Consult with counsel on all apparent antitrust questions relating to the particular meeting.

- Protest any discussions or meeting activities which appear to violate this checklist, or discussions which touch on any of the "taboos" listed in Section II(6) above; or which could possibly be construed as relating to an anticompetitive attitude to any entity or group not present; disassociate yourself from any such discussions or activities; leave any meeting in which they continue; and, promptly report any such matters to the Association Counsel.

2. Correspondence With Manufacturers, Suppliers and Competitors

- No MOA member or staff person is authorized to correspond on behalf of MOA with manufacturers, suppliers of members, or competitors, or groups thereof

regarding competition, prices, sales, markets, or marketing without consultation with counsel.

- Draft correspondence on behalf of MOA on any other matters with any manufacturer, association of manufacturers, or association of competitors is subject to review and approval in accordance with procedures established by the Executive Director.

3. Telephone Conversations With Manufacturers, Suppliers and Competitors

As with meetings and correspondence, other communications with manufacturers, suppliers, competitors and representatives of associations thereof should never involve anticompetitive matters, including the taboo subjects listed above at Section II(6) above.

- If there is any question about the appropriateness of the subject matter of a proposed conversation, review it with counsel.

IV. REQUIREMENTS FOR OTHER FUNCTIONS

1. Data Collection and Reporting

The collection and dissemination of statistical information and other survey data on the overall state of a profession or industry can help MOA members individually deal with common professional and business problems in a pro-competitive manner. Data collecting and reporting programs are acceptable so long as statistics that could result in price-fixing or other prohibited activities are not developed. The following requirements should be followed for acceptable statistical reporting programs:

- No MOA group shall undertake a statistical reporting program without consultation with counsel.
- Price data and reports should be limited to past transactions. No price information on current or future transactions should be collected or reported.
- Information should be compiled and reported in composite form and individual member data should be kept confidential.
- The reporting program should be entirely voluntary. There should be no subtle coercion to participate.
- The composite data compiled should be made available generally, not just to members.

2. Standards Setting

Standards setting is currently undertaken by the AOA pursuant to the AOA Seal of Certification and Acceptance Program and governed by the Code of Conduct for that Program. Standard setting programs must continue to adhere to the following principles:

- The Program must not be used as a device to fix prices, boycott suppliers or competitors, or otherwise lessen competition.
- Standards should be kept current through periodic review and updating in order to reflect changing technology.
- Non-members and other affected parties should be allowed to participate in the formulation of standards in a meaningful way.
- Standards should not limit the number and type of products, except for safety reasons.

- All standards should be voluntary. Industry members must be free to follow or reject a standard.

3. Codes of Ethics

Associations representing entire industries and professions have felt the need to encourage certain conduct by adopting codes of ethics to guide members' behavior. Such codes help maintain public confidence in the competence of association members, and the formulation of ethical standards is an important and beneficial association activity. Traditionally, associations have asked their members to abide by their codes and have disciplined those who refused or failed to abide by them.

When a provision in a code of ethics results in a restraint of trade it raises antitrust implications. When sanctions or penalties are imposed for violations, antitrust concerns also arise if the sanctions result in restraint of trade. Expulsion from membership for violating a code of ethics may be anticompetitive if membership in the association confers a significant business advantage.

To impose sanctions, an association must have fair procedures complying with due process. This usually requires notice and an opportunity to respond with a right to appeal to a higher authority. Expulsion can be characterized as a refusal to deal or group boycott.

The FTC has issued advisory opinions on codes of ethics which have identified several areas that may result in a restraint of trade. Several types of code provisions have been identified as anticompetitive and therefore must not be included in an association's code of ethics:

a. A code of ethics should not require giving firm price quotes or forbid submitting price quotes.

b. A code of ethics should not call for fair profit levels.

c. A code of ethics should not require uniform delivery and/or credit terms.

d. A code of ethics should not forbid price advertising or any other truthful form of advertising.

e. A code of ethics should not encourage boycotting of nonmembers.

f. A code of ethics should not require use of minimum fee schedules or forbid competitive bidding.

A code of ethics which avoids the above anticompetitive type provisions and affords due process to violators will usually pass antitrust muster.

4. Membership Policies

Most associations place limitations on who may become members. Restrictions on membership may have anticompetitive effects, and may therefore raise antitrust concerns. The FTC will investigate denials of membership by associations where membership is considered essential to compete, or where membership confers a significant business advantage. In establishing criteria for membership, associations should avoid qualifications unrelated to legitimate purposes of the association or which may reduce competition.

Functional restrictions are allowable, *e.g.*, manufacturers may exclude distributors or retailers and vice versa. Geographical restrictions are permitted if they are in accord with commercial realities. An arbitrary boundary line may not be used to exclude a competitor. Restrictions based on race, sex or religion are not permissible. Members of competing associations also should not be denied membership. The Courts are concerned with commercial advantages rather than the social advantages conferred through membership.

Admission procedures should be fair, reasonable and nondiscriminatory. Reasons for denial must be given and should be related to the association's purposes. Generally, trade associations must offer membership to all competitors in an industry if exclusion would limit their opportunity to compete. A membership policy which denies some competitors a significant business advantage only available to members can be characterized as a concerted refusal to deal or group boycott.

Membership restrictions must reasonably relate to the functions and purposes of the association. The greater the competitive advantage conferred by the membership, the greater the scrutiny such restrictions will receive.

The competitive advantage received through membership frequently relates to the services the association provides. Typical of such services are group advertising, information sharing, standards setting and certification programs. These services convey competitive advantages and therefore must be made available to nonmembers on reasonable terms. Failure to make the services available may result in restraint of trade. When access to services or facilities are granted to nonmembers on reasonable terms, the Courts grant greater leeway to membership restrictions. The association may charge reasonable fees for such access. The fees should be calculated by looking to the pro rata cost of developing and maintaining the service, facility or information, including the start up costs involved in serving a new applicant. The fees must not be disproportionately high so as to discourage use and should not arbitrarily equal the membership fee.

5. Lobbying

MOA's efforts through its members and staff to persuade legislators or government officials to take legislative action are generally protected from antitrust condemnation. Generally this immunity extends to judicial and administrative bodies as well. However, activities that

involve deception, unethical lobbying or misrepresentation, harassment or oppression of competitors will lose this protection from antitrust attack.

6. Publications

The Executive Director shall establish written requirements for the advance review by counsel of MOA publications and periodicals.

V. IMPLEMENTATION

1. Annual Presentation

Counsel will make an annual antitrust presentation at a meeting for the MOA directors, volunteers, and key members of the MOA staff. Any volunteer or staff member who is unable to attend the meeting should consult with counsel. Counsel may make more frequent presentations to, and facilitate roundtable discussions with, the MOA staff and/or to parts of the MOA volunteer structure as may be appropriate.

2. Compliance Officer

The Board of Directors shall appoint a Compliance Officer to supervise compliance with this Manual and to whom individuals may direct inquiries regarding specific matters. The Compliance Officer may refer particular matters to the Association Counsel for opinions or investigations. Persons bringing matters to the attention of the Compliance Officer may do so on a confidential basis.

3. Distribution

Copies of this manual shall be distributed to each Director and to all permanent staff of MOA. Copies shall also be distributed to all committee members and volunteers who participate in MOA group activities.

May 1996