

Anti-Trust Guide for Members, Directors, Staff and Committee Members Of the Oklahoma Telephone Association

This *Antitrust Guide* reflects the Oklahoma Telephone Association's ongoing commitment to compliance with the nation's and Oklahoma's antitrust laws. It is intended to be a resource for members, directors, employees and OTA committees as they conduct business at and on behalf of OTA. Strict compliance with the antitrust laws is OTA policy.

The association and its members must ensure that their activities comply not only with the requirements of the antitrust laws, but avoid even the appearance of an antitrust violation. All OTA members, directors, committee members and employees must be sensitive to antitrust issues – at formal and informal meetings of the association or industry members, at trade shows and educational events, at cocktail parties, dinners and social events and in telephone and on-line conversations and correspondence. OTA expects all of its members, directors, committee members and employees to comply with the applicable federal, international and state antitrust laws.

This Guide should aid OTA members, directors, committee members and employees on general antitrust questions and issues that may arise while conducting OTA business or participating in an OTA-sponsored activity. As this guide does not address every situation in which antitrust consequences may arise, OTA advises those confronted with sensitive antitrust issues to consult their own company counsel. If an OTA member, director, committee member or employee disregards the advice of counsel or does not consult with counsel on a sensitive antitrust issue, that individual may be subject to disciplinary action within OTA, as well as civil and criminal liability under the antitrust laws.

Applicable Federal Antitrust Laws

The principal federal antitrust laws that apply to OTA's activities include the Sherman Act, the Clayton Act, the Federal Trade Commission Act, the Robinson-Patman Act and Oklahoma antitrust laws.

Following is a brief description of the four major federal antitrust laws:

- ◆ The Sherman Act is the fundamental antitrust law and the primary statute looked to in evaluating the activities of OTA and its members. It has two major sections. Section 1 prohibits agreements that unreasonably restrain competition. Section 2 prohibits monopolizing, or attempting to monopolize, a market by exclusionary means.

- ◆ The Clayton Act prohibits certain specific types of conduct, such as certain exclusive dealing and “tying” arrangements, certain mergers that may harm competition and certain corporate officers and direct interlocks.
- ◆ The Federal Trade Commission Act generally prohibits the same practices barred by the Sherman and Clayton Act but in a few cases extends those laws to bar additional practices. In addition, the Federal Trade Commission Act prohibits practices that are unfair and deceptive, such as false or misleading claims about a product or service. It prohibits the use of any false or misleading claims or any other unfair or deceptive practice in the sale or marketing of a product or service.
- ◆ Under certain circumstances, the Robinson-Patman Act prohibits price discrimination and discriminatory furnishing of promotional services and allowances.

Every state of the United States has some form of antitrust law. State laws are usually interpreted and applied similarly to the federal laws, although some state laws may have unique provisions. In general, strict compliance with federal laws often ensures compliance with the state laws. See "Oklahoma Antitrust Law," below.

Application of the Antitrust Laws

Trade associations have been recognized by the courts and by others as valuable tools of American business. Trade associations such as OTA contribute to society by helping their members to ensure the quality, safety and effectiveness of their products and services by facilitating the creation and promotion of standards, by providing information and education, by helping their members to comply with laws and regulations and by participating in the governmental process. Nonetheless, because their members are often competitors in the provision of goods and services, trade associations must take particular care to avoid antitrust pitfalls in connection with their activities.

OTA members, directors, committee members and employees should be aware of two categories of antitrust behavior. Some activities are considered so inherently anti-competitive that they are *per se* illegal – that is, there is no legal defense, justification or excuse for the activity. Examples of this type of activity include agreements between competitors *to fix, increase or stabilize prices or terms or conditions of sale to reduce the supply of goods or services, to rig bids, not to deal with a particular customer, supplier, distributor or vendor (a group boycott), or to divide markets, territories or customers.* Activities that are *per se* illegal under the antitrust laws are typically subject to the harshest penalties, which may include criminal charges, for violations.

Other activities, depending on the circumstances, may or may not be legal, and courts analyze them under the antitrust “rule of reason.” Such activities, including quality control or safety initiatives or standard setting, having significant benefits but in some circumstances may hinder competition as well. Examples of activities in the telecommunications industry that a court might analyze under the rule of reason include the adoption of technical transmission requirements or other standards, the provision of incentives to maintain quality of service or the sharing of methods for monitoring service

quality. Under the rule of reason, a court balances the pro-competitive benefits of these activities against anti-competitive harm. Because every situation must be evaluated on its particular facts, the antitrust implications of activities evaluated under the rule of reason are not always foreseeable. Determining whether such conduct ultimately will be lawful is complex and requires consultation with counsel.

The following summary lists some of the conduct that may be *per se* illegal under the antitrust laws or illegal under the rule of reason. Some of the conduct described is the type of conduct that can be viewed as related to the workings of the association and its day-to-day business – such as the conduct of meetings, lobbying and standard activities. Other types of conduct relate to the activities of individual association members – such as relationships between suppliers and customers and tying issues. This summary is not intended to be a comprehensive guide to all of the antitrust issues OTA and its members may encounter but, rather, is intended to create an awareness of danger areas that may call for consultation with one’s own counsel.

Note that many of the antitrust laws apply only to concerted action or agreements (but see discussion of Oklahoma law regarding illegal unilateral activity). However, an illegal agreement can be found even without a handshake or express words or writings indicating agreement. Tacit understandings, including responding to pressure, exerting pressure, or doing what is expected, can be sufficient. An implied agreement may also be inferred from actions or the result of those actions. For example, if two competitors discuss prices and later adopt prices that are similar, a conspiracy to fix prices may be inferred even though the competitors never explicitly agreed to do anything. Comments made in an informal environment may be used as proof of an agreement, even though the parties’ subsequent actions actually were taken independently for sound business reasons. Therefore, the safest rule of thumb is to avoid any discussions with competitors in association meetings or elsewhere of topics on which it would be illegal to agree.

◆ **Relations with Competitors, Customers and Suppliers**

Section 1 of the Sherman Act prohibits “contracts, combinations and conspiracies” that unreasonably restrain trade, that is, adversely affect competition. To avoid violation (or the appearance of violation) of this provision, OTA members must observe certain rules and refrain from certain topics of discussion with competitors.

- ◆ *Communications with Competitors on Price and Related Terms.* Because price-fixing agreements are *per se*, or automatically, illegal under the antitrust laws, competitors should not have any discussion or communication concerning past, present or future prices, pricing policies or guidelines, prices paid to input sources, bids, discounts, credit or service charges, promotions, terms or condition of sale, royalties, choice of customers, territorial markets, or production quotas. A competitor can be defined as a rival that competes with the seller in the same geographic or product market for actual or potential customers. It is *per se* illegal to agree on price or output levels with a competitor. Competitors should not agree to divide markets by territories, customers, product lines, etc.; they should not agree to rig bids; and they generally should not allocate equipment or agree on product specifications or service characteristics. Nor should competitors discuss specific research and development, sales and marketing plans, or any confidential

product, development or production strategies. This applies to every product or service OTA members sell or buy. It includes all such information about member products or services or about competitors' products or services. It follows, of course, that there must never be any express or implied agreement between competitors concerning these subjects. This includes not only formal written or oral agreements but tacit understandings and informal, so-called "off-the-record" conversations as well.

Sellers' prices must be determined independently, in light of costs, market conditions and competitive prices. While sellers may consider competitive prices in determining their own prices, they should obtain competitive pricing information from sources other than competitors, such as published tariffs and customers. Policies regarding statistical collections and summaries are discussed in more detail below. Discussions between competitors concerning wages or wage policies should be reviewed with counsel in advance.

- ◆ *Group Boycotts/Choice of Customers and Suppliers.* As a general rule (and within the constraints imposed by federal and state communications laws), companies are free to select their own customers and suppliers. On the other hand, it is unlawful for two or more competitors to agree not to do business with a third party or to do business only on certain terms, even though each party may have a legitimate basis for taking the same action independently. This refusal to do business does not have to be specific or absolute in order to raise antitrust concerns. Because of this, it is normally inappropriate for companies to suggest any concerted action by competitors, with respect to purchasing or other contractual dealings, for example, which are best handled on an individual-company basis. Nor should complaints about individual firms or other actions that might tend to hinder a competitor from competing fully in any market be tolerated. A related group activity that could raise antitrust concerns – standard setting – is discussed in more detail below.

Before any company refuses to sell to any customer or prospective customer (whether or not the company has done business with the party in the past), other than for valid credit reasons or other reasons provided-for under federal and/or state regulations, the company should consult with counsel because refusals to sell frequently lead to litigation.

- ◆ *Resale Prices and Other Terms.* Sellers may suggest minimum resale prices to customers provided they do not require that the customer adhere to their suggestions. However, it is *per se* illegal to have any understanding or agreement – whether formal or informal, express or implied – concerning minimum prices for resale by the customer. It is up to the customer, using its independent business judgment, to decide whether to follow the seller's suggestions. Moreover, the seller should not accept complaints about one customer's pricing from other customers. Also, seller's counsel should approve any restrictions on the places where or the customers to whom a customer may resell or the maximum prices at which a customer may resell.

- ◆ *Tying and Reciprocity.* “Tying” is requiring a customer to buy a different product as a condition to buying the primary product it wishes to purchase. It is sometimes illegal to sell one service or commodity only on the condition that the customer also must buy some other service or commodity from the seller. It also may be illegal to engage in reciprocity – that is, basing purchases from a supplier upon the supplier’s patronage. This includes all express or implied agreements. The distinction between illegal tying and reciprocity and legal commercial relationships can be difficult to ascertain, and those seeking to make this distinction in a particular situation should seek legal advice.
- ◆ *Exclusive Dealing Agreements.* In certain circumstances, it may be illegal to agree that a buyer will purchase its full requirements of a particular product or service from a single seller or that a seller will commit its entire output to a single buyer. Restrictions on competitive merchandise that a customer may handle also may raise antitrust issues. One should consult with counsel before entering into such an arrangement.
- ◆ *Price Discrimination Under the Robinson-Patman Act.* The provisions of the Robinson-Patman Act are particularly complex: they relate to direct and indirect price discrimination between customers in the sale of commodities. Counsel should review all new price lists and new promotional plans in advance. Counsel should also review any deviation from current price lists or from promotional plans for the sale of goods or commodities in advance. While the Robinson-Patman Act does not apply to the sale of services, such as telephone service, the Federal Trade Commission Act and various state laws do apply to discrimination in the sale of services.

◆ **Monopolization and Attempts to Monopolize**

Section 2 of the Sherman Act prohibits companies from using predatory or exclusionary means to achieve, maintain or attempt to achieve monopoly power. A monopolization or attempted monopolization charge is a risk that company controls a substantial segment of the market for a product or service in a given geographic area (generally, but not always, seventy percent of the market or more for monopolization and fifty percent or more for attempted monopolization) and the company engages in exclusionary actions to attain or maintain that position. While mere size is not illegal and even a dominant firm may continue to compete aggressively, the employees of a firm with market power must be careful to avoid actions or statements that may be taken as evidence of exclusionary conduct or an intent to destroy competition.

◆ **Mergers, Joint Ventures and Director Interlocks**

Mergers and acquisitions, combinations of competitors to form joint enterprises and overlaps in the officers or directors of competitors are subject to antitrust scrutiny. The legality of mergers, joint ventures or officer or directorate interlocks is a complex subject that normally concerns only the most senior members of corporate management who have immediate access to legal advice. These arrangements are, therefore, not discussed here, other than to note: a) that the antitrust laws cover these areas, b) that OTA itself is not a joint venture and c) that OTA should not be used by its members for the development of joint ventures with antitrust risks.

◆ **Unfair Methods of Competition**

Deceptive or unfair marketing practices that take unfair advantage of customers, competitors or the general public may be illegal. These practices include harassing competitors through groundless lawsuits, theft of competitors' trade secrets, disparaging competitors by making false or misleading statements about their products or by misrepresenting performance or financial status, tampering with a competitor's products, commercial bribery or payoffs, coercing or intimidating customers or suppliers, passing off one firm's products as those of another and making misleading or unsubstantiated marketing claims. The use of any false or misleading claims or any other unfair or deceptive practice in the sale or marketing of a product is prohibited.

◆ **Antitrust Issues Unique to Trade Associations**

While virtually all of the antitrust issues generally applicable to individual companies apply to associations as well, certain association activities raise some special antitrust concerns. By designing association rules and programs carefully with the assistance of counsel, however, trade associations can minimize antitrust risk.

- ◆ *Membership.* As groups of companies that band together to address common interest, trade associations may adopt reasonable standards for and classifications of membership. OTA has adopted standards and classifications for membership.

Exclusionary membership practices that affect a competitor's ability to compete may raise antitrust issues. Denial of membership or discrimination in membership terms may place competitors at a disadvantage. Therefore, even competitors who choose not to join OTA are permitted access to benefits necessary to effectively compete in the industry, if any, upon payment of a reasonable fee.

OTA permits non-members to attend its seminars and other events, subject to applicable charges and registration constraints. Under appropriate circumstances, OTA often discusses issues that promote efficient relations with non-members, such as equipment manufacturers, consumer representatives and others in the telecommunications industry.

- ◆ *Information Exchange, Data Collection and Dissemination.* Structured properly, an information-exchange program is a legitimate function of an association. Compilations of reasonably available public information and other data collection and statistical reporting, conducted under reasonable guidelines will not run afoul of the antitrust laws. Nonetheless, because of the risk that information collected as part of an information exchange could be used for unlawful purposes (for example, as the basis for an agreement to fix prices or restrict output between competitors), associations should take a number of precautions:
 - ◆ Member participation in any statistical reporting program should be voluntary. Participation should not be a condition of membership and a member's decision not to participate should not result in a loss of membership or limitation of membership rights;

- ◆ The data collected, particularly any price, credit and volume data, should consist only of past transactions and should not contain unnecessary details;
- ◆ Association staff or other independent third-party collectors should collect the data;
- ◆ Associations must keep confidential certain data submitted and present only in aggregate form (with no individual members identified). No member should be given access to the data submitted by another member except with approval of counsel;
- ◆ Each participant should separately analyze the data and make independent business decisions based on the data. Joint discussion and analysis of data by association members should be undertaken only with the approval of counsel;
- ◆ Data compilation should be initiated only with constructive motivation.

Associations should not engage in any new data-collection or information-exchange program without the approval of counsel. They should periodically review all such programs for antitrust concerns.

At times, OTA may conduct data-collection programs and publish information to assist members in making educated business decisions. OTA generally does not refuse participation in data-collection programs and distribution of data collected to non-members; it may, however, charge a reasonable fee for these services.

- ◆ *Standard Setting.* The process of developing industry standards, can benefit the public. In the telecommunications industry, standards are necessary for interconnection and can be used to facilitate consumer knowledge, expanded choice of products and efficiencies in design, production and operation. OTA may participate in standard-setting activities conducted by other organizations but generally does not set industry standards.

OTA must take certain precautions in evaluating and adopting a position on a standard to ensure that a position accurately reflects member interests and does not implicate any antitrust concerns. In articulating an OTA position on any standard, OTA must consider all relevant opinions; any proprietary interest (such as patents) should be disclosed; it should articulate a sound technical basis for the position; it should base the standard on legitimate objective justifications; it should be able to show how the standard reasonably relates to the goals it is intended to achieve; and it should be able to show how the standard is no more extensive than is reasonably necessary to accomplish those goals. Moreover, OTA must revise its positions over time as necessary to reflect the beliefs of the membership and the current state of the technology.

- ◆ *Certification and Self-Regulation.* Association-run certification and self-regulation programs can serve valuable pro-competitive purpose, but programs that unreasonably further the interest of certain members to the exclusion of others may raise antitrust concerns. Even if the association's intent is to improve members' ethical conduct and provide the public with better products and services, such programs can still violate the antitrust laws.

Any industry certification program or attempt at self-regulation should be based on sound, objective justifications, should be reasonably related to the goals it is intended to achieve, should be no more extensive than is reasonably necessary to accomplish those goals and generally should incorporate reasonable procedural safeguards to ensure that it does not arbitrarily discriminate against participants.

- ◆ *Educational Presentations.* Many associations provide a valuable forum for industry education. Nonetheless, associations should limit discussions of this type to objectives that promote overall industry or consumer welfare; they should not promote one particular company, product or service over others. A member or non-member that can provide useful information on specific concerns may be invited to make a presentation or otherwise address issues at an OTA meeting. However, outside presenters may not be as cognizant of antitrust issues as OTA members may be.

Official Position of OTA on Antitrust Compliance Guidelines

OTA expects each member, director, committee member and employee to recognize antitrust risks. Not every issue that raises antitrust concerns is discussed in detail in this guide. OTA expects that members, directors, committee members and employees will seek legal guidance on how to address unfamiliar antitrust issues that arise in the course of business. Guidelines for OTA members, directors, committee members and employees on how to insulate themselves from antitrust liability through the use of some simple safeguard follow.

◆ **OTA Communications**

In communicating internally or externally about conduct that may come under scrutiny under the antitrust laws, think carefully about how these communications may be perceived – not just about how they are intended. Careful language will not avoid antitrust liability when the conduct involved is illegal, but is unfortunate when perfectly lawful conduct becomes suspect because of a poor choice of words. Careless and inappropriate language in OTA and member communications, including correspondence, internal memoranda, e-mails, drafts and handwritten notes, can have an extremely adverse effect on OTA position and the position of its members in an antitrust investigation or lawsuit.

Write all letters, memoranda and e-mails to, from or in connection with OTA activities clearly so that no improper implications may be reasonably drawn. Counsel should review all correspondence involving sensitive antitrust matters. Members, directors, committee members or employees of OTA who receive a letter from a member that seems ambiguous or improper from an antitrust point of view should ask counsel to assess it and determine the appropriate response.

Except as authorized by OTA's board of directors, only OTA employees may send out correspondence on OTA's behalf. Members should not hold themselves out as having authority to speak for OTA. If a committee chair or OTA member finds it necessary to communicate with other OTA members on association business, such communications must be coordinated with the appropriate OTA staff member. OTA staff and authorized members may use OTA stationery for OTA business only. In

addition, meetings with government officials on behalf of OTA should not be held without prior consultation with OTA's Board of Directors

◆ **Conduct of Meetings**

In order to avoid potential problems in conducting meetings, OTA adheres strictly to the following guidelines:

- ◆ *Notice and Agenda.* OTA may hold association meetings of all kinds (board, committee, subcommittee and workgroup, formal and informal, live or via teleconference) only when there is appropriate association business to discuss or act upon and only after sending notice of the meeting and draft agenda to the appropriate members. OTA members should avoid private meetings addressing "off-the-record" topics, which can result in conduct being attributed to OTA
- ◆ *Supervision.* OTA must determine whether counsel or a designated representative of the association must be present at any OTA meeting. OTA members must obtain consent from OTA prior to holding any OTA-sponsored meeting at which an OTA staff member will not be present.
- ◆ *Minutes.* After each board and board committee meeting sponsored by OTA, a designated meeting attendee must draft concise written minutes that accurately describe the actions taken and, where appropriate, additional pertinent discussion.
- ◆ *Meetings.* At the meetings themselves, all participants should be afforded an opportunity to present their views. With rare exceptions to be made only upon the advice of OTA, participants should not discuss the following topics at any OTA meeting:
 - ◆ Any company's prices or pricing policies;
 - ◆ Terms of sale, warranties or contract provisions;
 - ◆ Division of customers, territories or locations;
 - ◆ Specific R&D, sales or marketing plans;
 - ◆ Any company's confidential product, product development, or production strategies;
 - ◆ Whether to purchase from certain suppliers or sell to certain customers;
 - ◆ Prices paid to input sources;
 - ◆ Complaints about individual firms or other actions that might tend to hinder a competitor from competing fully in any market (with some exceptions in the public policy context); or
 - ◆ Data concerning fees, prices, production, sales, bids, costs, salaries, customer credit, or other business practices, unless the data in question is exchanged and disclosed pursuant to a well-considered plan that has been approved by counsel.

OTA meeting participants have an obligation to terminate any discussion, seek legal counsel's advice or, if necessary, terminate any meeting if the discussions

- might be construed to raise any antitrust issues. If serious antitrust concerns are left unaddressed, the OTA member should announce that he or she is leaving, explain why and leave the meeting.
- ◆ *Social Functions.* At social events held in conjunction with OTA meetings or sponsored by OTA, OTA members should follow the same antitrust guidelines as they would at regular OTA meetings.
 - ◆ *Compliance Reminders.* Counsel should make timely reports at appropriate association meetings of current antitrust developments affecting OTA activities, antitrust guidelines and periodically advise board and committee members of the importance of antitrust compliance.
 - ◆ **Other Areas of Concern**
 - ◆ *Membership.* Membership standards and the content of all OTA programs and activities are subject to these guidelines and are to be cleared by counsel before implementation. Reasonable request from non-members for information, to attend programs or to purchase or participate in certain other products, services or activities offered by OTA generally should be granted, subject to reasonable fees or charges. OTA members and staff should consult with counsel regarding unusual or unreasonable requests.
 - ◆ *Record Retention.* All organizations and individuals are required by law to keep certain records for certain periods of time. OTA has a record retention policy that its employees should follow at all times. Periodically, employees must review all hard and electronic files for compliance with the policy.
 - ◆ *Requests for Information/Investigations.* Should any OTA member, director, officer, committee member or employee receive a request for information from a government agency, private attorney, or other non-member about OTA or for any documentation or information under OTA's control that has not been developed specifically for public dissemination, the person receiving the request should not respond before consulting with OTA and should not make any documents available without OTA's knowledge and approval.
 - ◆ *"When in Doubt..."* OTA members, directors, committee members and employees should consult with OTA prior to any discussion of actions that could raise antitrust risks or that seem in any way to be questionable or out of the ordinary. It is always better to ask first.

Oklahoma Antitrust Law

Every state has enacted statutes similar to the federal antitrust laws. Consequently, if the conduct does not involve interstate commerce and cannot be prosecuted by the federal enforcement agencies, it will be subject to challenge in the state courts. Federal antitrust law provides the guidance for most courts interpreting state antitrust statutes. It is important to understand the difference, particularly conduct which might be challenged under a state's antitrust law even though the same conduct would not violate federal antitrust laws.

Prior to 1910, antitrust law in Oklahoma was governed by the Territorial Act of 1890 and federal law. The State's first antitrust laws were enacted in 1910 as required under the Oklahoma Constitution and most recently revised in 1997. The current Oklahoma antitrust laws, titled the Oklahoma Antitrust Reform Act ("OARA"), can be found under Title 79 of the Oklahoma Statutes, beginning at section 201. The Oklahoma antitrust laws generally conform to the federal antitrust laws with the key differences discussed below.

Section 203 of the OARA is essentially Oklahoma's Codification of the Sherman Act. Subsection (A) of this section is identical to section 1 of the Sherman Act except that, in addition to contracts, combinations and conspiracies, the OARA includes the word "act." Section 1 of the Sherman Act is directed exclusively at concerted action, that is, anticompetitive conduct involving at least two parties or conspirators. The addition of the word "act" under the OARA makes an individual act in restraint of trade actionable under section 203(A) of the Oklahoma statute. Subsection (B) of section 203 is identical to section 2 of the Sherman Act. Subsection (C) is the incorporation of the "essential facilities doctrine" into the Oklahoma antitrust law.

Section 204 of the OARA contains prohibitions on price discrimination where the effect is to injure competition. Exceptions to this statute authorize price discrimination for reasons similar to those found in the Robinson-Patman Act.

Section 205 of the OARA follows federal antitrust law, stating the injured party is entitled to receive treble damages, attorney's fees, and the statute of limitations is four (4) years. The key difference from the federal antitrust law is that under the OARA, if the state is the injured party, damages are not trebled, but if the state attorney general brings an action on behalf of Oklahoma citizens, then treble damages are allowed. Under the previous Oklahoma antitrust law the state attorney general was not allowed to intervene in an action on behalf of Oklahoma citizens.

Section 210 of the OARA gives the state attorney general the power to conduct an investigation of alleged anti-competitive activity before suit is filed. This section also allows the attorney general to impose all requirements of discovery, allowing the attorney general to request, and requiring the investigated party produce, the same materials that would be provided before trial. Section 210 does have a safeguard that allows the investigated business to request a court to intervene in the investigation if the business feels the attorney general has overstepped his bounds.

Conclusion

This guide represents OTA's continued commitment to compliance with the antitrust laws. It is intended to emphasize OTA's belief that competitive markets are necessary for the continuing success of its members and for the growth of the telecommunications industry. While technology and industry continue to change, basic principles of antitrust and competition tend to remain the same. All OTA members, directors, committee members and employees should familiarize themselves with this guide and the basics of the antitrust laws.

You should discuss with legal counsel any contemplated conduct that may involve antitrust risk before taking such action.

Approved by the OTA Board of Directors – 4/3/06

