

# ASSOCIATION OF MEDICAL DEVICE SERVICE ORGANIZATIONS ANTITRUST GUIDE AND POLICY STATEMENT

## I. INTRODUCTION

Businesses join together to form trade associations such as the Association of Medical Device Service Organizations (AMDSO) in an effort to achieve certain lawful common objectives that can be obtained more easily and fully through group action than through individual action. A trade association, by its very nature, is therefore a combination of firms, some of which may be competitors. As such, an association's activities can be scrutinized under antitrust laws of the United States.

It is the unqualified policy of AMDSO and all of its operating committees to conduct their operations in strict compliance with the antitrust laws of the United States. The purpose of this guide and policy statement is to briefly outline the antitrust laws of the United States to aid members in avoiding any activities which may violate those antitrust laws.

AMDSO's long-standing commitment to have legal counsel present at board meetings and activities is intended to ensure that AMDSO's activities are consistent with antitrust laws.

This outline guide and policy statement is not intended as a substitute for consultation with counsel if an issue develops in this area.

## II. OVERVIEW OF U.S. ANTITRUST

Section 1 of the Sherman Act broadly prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." The agreement must be among two or more persons or corporate entities (including non-profits) that has the effect of restraining trade (*i.e.*, reducing competition in a relevant market). The word "agreement" has been given the broadest possible meaning by the courts to include a formal contract, an informal agreement, an "understanding," a "knowing wink," and, most importantly, any course of conduct from which the existence of an agreement could be inferred. Antitrust enforcement actions and large jury awards have often been based on circumstantial evidence from which it could be inferred that the parties have entered into an agreement of some kind.

The vast majority of antitrust cases against trade associations have been brought under Section 1 of the Act. Over the years, the courts have developed two important doctrines in the application of Section 1 of the Sherman Act:

1. *The Rule of Reason*: only those restraints of trade which are deemed to be unreasonable constitute a violation of the Act. Under the "Rule of Reason" approach, an agreement violates the antitrust laws if the anticompetitive impact of the agreement outweighs the procompetitive benefits of the agreement.

2. *Per Se Violations*: certain actions always have significant anticompetitive effects and, therefore, are conclusively presumed to be unreasonable, including, among other things, price fixing, certain boycotting conduct, market allocation agreements, and bid rigging agreements. These activities are deemed to be *per se* violations of the Act without regard to whether the agreement arguably has procompetitive effects.

Section 2 of the Sherman Act broadly prohibits monopolization and attempted monopolization. The Sherman Act is primarily enforced by the Department of Justice, the Federal Trade Commission, and the state attorneys general. Liability for monopolization or attempted monopolization under Section 2 requires proof of monopoly power in a relevant product and market and attainment or maintenance of monopoly power by predatory or unreasonable exclusionary conduct.

The Clayton Act, as amended by the Robinson-Patman Act, is designed to supplement the Sherman Act by conferring upon courts the power to stop potential violations of the law in the incipiency before such potential violations ripen into an actual offense. The Clayton Act, among other things, prohibits acquisitions where the effect may be to substantially lessen competition or tend to create a monopoly. The Robinson-Patman Act also is designed to prevent injury to competing purchasers by the discriminatory pricing practices of the same seller.

Section 5 of the Federal Trade Commission Act declares as unlawful “unfair methods of competition” and “unfair or deceptive acts or practices” in, or affecting, commerce. The courts generally have interpreted Section 5 to reach at least conduct that is prohibited under the Sherman and Clayton Acts.

In addition to the above, U.S. State law may provide additional layers of antitrust laws.

### **III. AMDSO POLICY**

In its broadest sense, AMDSO’s antitrust policy is that there must be no agreements, express or implied, which restrict members’ freedom to make independent business judgments in matters that may affect competition. Moreover, there are certain basic topics that AMDSO members should not discuss with other members of the industry at AMDSO conventions or meetings. Topics that should not be discussed among competitors include:

1. Current and future pricing of products and services;
2. What constitutes a “fair” price or profit level;
3. Division of territories or customers;
4. Allocation of markets;
5. Refusal to deal with a corporation because of its pricing or distribution practices;
6. Whether or under what conditions to submit a bid on a potential contract;
7. Strategic plans; and
8. Any other competitively-sensitive confidential information

The above is not intended to be an all-inclusive list. In the event of any doubt with respect to an activity or discussion, members are urged to seek their own legal counsel for advice as to the lawfulness of the activity.

There are other areas of conduct which present special antitrust issues for an association such as AMDSO. Conducted properly, the activities listed below have all been considered lawful by courts or administrative bodies. However, members should not assume that such conduct will automatically be legal. Members must use extreme caution to ensure that the following activities do not have the unintended effect of AMDSO violating antitrust laws:

1. *Membership standards.* AMDSO may establish reasonable guidelines for admission or expulsion of members. However, membership standards cannot be applied in a manner that may be considered anticompetitive. AMDSO will not establish rules designed to restrict members from competing with each other or which limit access to a resource entities need to compete in the marketplace.

2. *Setting of industry-wide standards.* Uniform product or service standards concerning, for example, grade and quality, are often procompetitive and, if so, should not violate the antitrust laws. AMDSO must, however, take care that such standards are adopted objectively. Standards that may have an adverse effect on a competitor could raise antitrust issues and should be reviewed by counsel.

3. *Industry seals of approval.* As with industry-wide standards, AMDSO seals of approval or other such designations of products or companies can raise antitrust issues and should be reviewed by counsel.

4. *Collection of statistical data.* Trade associations often compile and exchange information needed to produce industry-wide data that may be helpful to members and their customers. However, information exchange has often been the basis for suits alleging price fixing or other anticompetitive conduct. The exchange of confidential information regarding current prices or regarding future plans and activities raises the most antitrust risk; exchange of historical non-price data entails less risk. Any information exchanges among AMDSO members involving non-public information should be reviewed by counsel before they are undertaken.

5. *Credit activities and services.* AMDSO may provide reports concerning the credit status of its members' customers. However, any decision to extend credit must at all times be made individually by individual members. Obviously, any credit information concerning customers must be reported accurately.

6. *Joint Programs or Lobbying.* A trade association has a right under the First Amendment to the United States Constitution to petition the government. The act of petitioning the government, however, may lose antitrust protection if it is merely a "sham," (*i.e.*, not a legitimate attempt to influence government policy).

7. *Research and development projects.* AMDSO efforts to discover new markets and promote product innovation are likely to be considered procompetitive and permissible, but, to the extent they may involve the marketing or sale of new products, or the competitive strategies of AMDSO members, such efforts should be reviewed first by counsel.

#### **IV. CONDUCT AND PROCEDURE OF MEETINGS**

As discussed, antitrust violations are often proved by inference. Adherence to the following guidelines on AMDSO meetings is crucial to assure compliance with the antitrust laws and to avoid even the appearance of impropriety.

1. Board meeting agendas should be approved beforehand by AMDSO legal counsel. Legal counsel should be in attendance at all board meetings and activities.
2. An AMDSO staff person should approve the agenda for all other meetings before it is distributed. A staff person should attend all such meetings and activities.
3. An AMDSO staff member should prepare accurate draft minutes for meetings soon after they are held and have them approved by AMDSO legal counsel before signing.
4. All official AMDSO meetings should be held only when an AMDSO staff member is present. Members should not participate in any “rump” sessions. There should be no “unofficial” AMDSO meetings or gatherings, nor should AMDSO members take the opportunity of an AMDSO event to meet with other members to discuss any of the prohibited topics described at the beginning of Section III.
5. If, during a meeting or activity, participants address a subject that may present antitrust problems, the subject should be dropped unless AMDSO legal counsel advises that the subject may continue to be discussed. Absent that occurring, if the discussion persists, the meeting should be terminated and all participants should leave the meeting place.

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This *Antitrust Guide and Policy Statement* is not intended to constitute a legal opinion to AMDSO members individually. Each member should have its own legal counsel advise it on the member’s own obligations under applicable antitrust laws.

Effective as approved by the AMDSO Board of Directors on June 8, 2017