Role of an Association’s Board

- Manage the business and strategic objectives of the association
- Provide the association with sound governance policies that:
  - Ensure compliance as a tax exempt organization; and
  - Assure members of the highest level of service.

FIDUCIARY OBLIGATIONS

- Definitions
- Duty of Care
- Duty of Loyalty
- Corporate opportunity
- Confidentiality
- Legal standard
Fiduciary Duties - Definitions

- **Fiduciary Duty**: an obligation imposed on someone because she holds a position of trust.
- **Who Owes Such Duty?**: Directors, Officers, and Senior Staff.
- **To Whom is the Duty Owed?**: the Association itself, not the members or other stakeholders.

Duty of Care

- Most often the cause of director liability
- Should guide a director’s decision-making process
- Multiple components to the Duty of Care

Duty of Care

- Components of the duty of care:
  - Be informed:
    - understand the business; and
    - attend meetings, but
    - not expected to know every detail of the operation.
  - Periodic review of finances

Duty of Care

- Components (continued)
  - Showing decision processes
    - Paper trail is important
    - Use of independent experts and analysts is encouraged for major transactions
  - Delegation to staff and committees
    - Permitted, so long as there is monitoring
Duty of Loyalty

The second component of a director’s fiduciary duties, the duty of loyalty, requires:

• Independence
• Avoiding conflicts of interest

Independence

• Decisions by board members must be made on the corporate merits and free of the influence of social or business relationships among board members
• Outside social or business relationships are common – board members are presumed to have acted independently unless there is evidence to the contrary

Avoiding Conflicts of Interest:

AHCA/NCAL Policy on Conflicts of Interest*

• Conflicts arise when:
  • Outside interest
    – Contract between AHCA/NCAL and a family member
    – Contracts between AHCA/NCAL and an entity in which a family member has a material financial interest
  • Outside activities
    – Director or Officer competes with AHCA/NCAL to render services to a third party
    – Director or Officer having a material financial interest with a competing party

*For definitions and more specifics, please refer to the AHCA/NCAL official policy.

AHCA/NCAL Policy on Conflicts of Interest (continued)

• Conflicts arise when:
  • Gifts, gratuities and entertainment
    – might be inferred that such action was intended to influence personnel in the performance of their duties
    – these include gifts from:
      • third parties seeking to do business or competing with AHCA/NCAL
      • third parties receiving financial consideration from AHCA/NCAL
      • a charitable organization
AHCA/NCAL Policy on Conflicts of Interest (cont.)

- Procedures:
  - Disclose all potential conflicts on the record
    - Via Chair if not in attendance
  - Person with conflict shall not hear discussion of the issues or influence the decision-making either in or outside the meeting
  - Not counted for purpose of quorum for voting and ineligible to vote
  - Each new responsible person must review the official policy and complete annual conflict disclosures

Corporate Opportunity

Part of a director's duty of loyalty

- doctrine disallows a director taking an opportunity she learned about through her insider status when the association might have a legitimate interest in pursuing the same venture, activity, property, or even idea.
- common example is a director pursuing valuable property she has learned about through her role with the association

Confidentiality

- A specific fiduciary duty of board directors is to maintain confidentiality
- This becomes particularly important when the information disclosed could jeopardize the association or put it at a competitive disadvantage

Legal Standard

- Nonprofit directors are held to the same standard of care as corporate directors.
- Directors are required to discharge their duties:
  - in good faith
  - with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
  - in a manner the director reasonably believes to be in the best interest of the corporation.
- If acting in good faith, then the standard for liability is gross negligence.
Legal Standard

- Nonprofit directors are held to the same standard of care as corporate directors.
- Directors are required to discharge their duties:
  - in good faith
  - with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
  - in a manner the director reasonably believes to be in the best interest of the corporation.
- If acting in good faith, then the standard for liability is gross negligence.

What is Good Faith?

- Directors are presumed to act in good faith when making business decisions.
- So, when is an action not in good faith?
  - for a purpose other than the best interests of the corporation; or
  - when an act or transaction is known to constitute a violation of law.

DIRECTOR LIABILITY

- How does it arise?
- Protections
  - Traditional protections
    - Business judgment rule
    - Reliance on experts
  - Statutory protections
  - Indemnification
  - Director and officer liability insurance

How Does Liability Arise

- Common grounds for suits are:
  - Poor business decisions
    - waste of corporate assets
  - Wrongful discharge
  - Defamation
  - Can arise in membership or board member disputes, with suppliers, and with opponents or competitors
How Does Liability Arise?

Common grounds for suits continued:
- Investment of association funds
- General mismanagement
- Antitrust violations
- Breach of contract
- Tort liability

Traditional Protections

Business Judgment Rule
- Generally a court will respect the judgment of a director in business matters even when in error
- Court will not substitute its judgment
- NOT available when bad faith or oppressive conduct is at issue

Reliance on experts
- Acceptable whether delivered personally or in written form
- Board members not expected to know every aspect of the association

Statutory Protections

Most states have nonprofit volunteer protection laws
- Scope of protections may vary by state
- Exclusions for conduct that is illegal, in bad faith, or that constitutes a conflict of interest

Indemnification
- Most state statutes permit indemnification if the board member was acting in good faith and within the scope of her duties
- Differs among states, but in some, proceeding indemnification is mandatory for board members to the extent they are successful in their defense
- Sometimes not allowed for violations of fiduciary duties
Director and Officer Liability

Permissible and recommended insurance coverage areas:
• defamation
• employment
• copyright and other IP
• breach of fiduciary duty
• antitrust

AHCA’s Insurance Coverage
Up to $1,000,000 per loss/ per year insurance for its directors and officers
Excluded from coverage
• Professional services exclusion
• Medical malpractice exclusion
• Absolute bodily injury and property damage exclusion
• Sexual misconduct and child abuse exclusion
• Publishers liability exclusion
• Other specific individual exclusions

Antitrust Law Review: Basics

Competition produces lower prices and better goods and services
Antitrust laws are designed to foster competition and prohibit collusion among competitors
• Three main federal statutes:
  • Sherman Act
  • Federal Trade Commission Act
  • Clayton Act (plus Robinson-Patman Act Amendments)
• State antitrust laws and consumer protection statutes

Antitrust Enforcement
• United States Department of Justice (DOJ) Antitrust Division
• Federal Trade Commission (FTC) Bureau of Competition
• State Attorneys General
• Private plaintiffs
Why Worry About Antitrust?

Criminal Penalties:
- Prison Terms
- Felony
- Up to 10 years in prison
- House arrest
- Probation
- Monitoring

Fines:
- Up to $1 million for individuals
- Up to $100 million for corporations
- Twice the pecuniary gain or loss
- Restitution to victims

Why Worry About Antitrust? (cont.)

- Civil liability
  - Treble damages and attorneys’ fees
  - Joint and several liability, with no right of contribution
  - Lawsuits (class actions) brought by private parties & State AGs
  - Foreign authorities may review the conduct and penalize violations
  - Easy for Plaintiffs to build a case on badly worded emails

Win or lose, antitrust lawsuits consume a tremendous amount of time, energy, and money.

Trade Associations and Antitrust

- By definition: A group of competitors who get together to share common interests and seek common solutions to common problems.
- Lawful: Often seeking goals such as greater profits, better treatment by suppliers, etc.
- Perception: Trade associations are prone to antitrust violations.
- Risks of Collaboration: Associations themselves may be sued or prosecuted, in addition to members and officers.

Trade Associations (cont.)

Examples of trade associations found liable for antitrust violations:
- Industry codes of conduct restricting certain business practices unlawful
- Accreditation program unlawful that excluded certain competitors based on unfair standards
- Restricting members’ abilities to use certain technologies
- Forcing members to follow certain protocols that are in fact competitive
Important Antitrust Topics for Trade Associations

- Price fixing
- Market division (territory or customer allocation)
- Group boycotts
- Membership restrictions
- Obligations to non-members
- Statistical reporting

Price Fixing

- Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is a per se violation of the antitrust laws.
- It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy.
- Prohibition also applies to price-related items (e.g., salaries, benefits, etc.) and may prohibit collusion on other key commercial terms (e.g., accreditation requirements).
- “Can we talk about prices?”: Discussion regarding current and future prices are not per se illegal, but may be strong evidence of an illegal price-fixing conspiracy.
- Key takeaway: competitors must always determine price independently and without consultation or agreement with any competitor.

Market Division

- Dividing the market is illegal as a per se violation of antitrust laws.
- For example, it is illegal for competitors to agree not to advertise in specified areas.
- Key takeaway: agreements not to do something are as problematic as agreements to do something.

Group Boycotts

- In the trade association context, often arises in the case of a group decision to punish supplier or customer for perceived wrongful behavior.
- Also improper to decide to reward certain cooperative suppliers or customers with increased business.
- Discussions regarding dealing with a particular supplier or customer may be permissible – but, need to avoid discussions regarding group action.
Membership Restrictions

- A trade association is seen as conferring competitive benefits on its members.
- It may be an illegal restraint of trade to unreasonably deny membership to competitor within the industry.
- Membership qualifications must be reasonable.
- Requirements must be consistently applied to all applicants.

Obligations to Non-Members

In most cases, association may limit its services to members only.

May have obligation to make services available to non-members when:
- Service is reasonably necessary to compete; or
- Membership is not available.

In such a case, may still charge non-member a higher price to account for lacks of dues payment.

Statistical Reporting

While certain discussions may raise antitrust concerns, the FTC and DOJ have provided a safe harbor for statistical reporting regarding business activities.

The requirements for the safe harbor are:
- the prices reported must be at least three months old;
- the price information must be aggregated by a third party so that individual company information cannot be determined from the published results;
- at least five companies must participate; and
- no reporting any one company’s data represents more than 25% on a weighted basis of the aggregate statistic.

The Risks of Collaboration

- Trade associations are, by definition, groups of competitors coming together to work for a common purpose.
- Often seeking goals such as greater profits, better treatment by suppliers, etc.
- Associations themselves may be sued or prosecuted.
- More commonly, cases are brought against members that were involved in the activities.
The Risks of Collaboration

• It is fine to join industry trade associations and participate in activities that do not affect the vigor of your competition with other members.
• But trade associations have clear risks that must be monitored – a well-managed association like AHCA will have its own counsel to help with this.
• If the trade association discussion turns to what might be construed as market division or price-fixing, speak up to raise antitrust concerns or consider leaving the discussion.

How Can a Trade Association Protect Itself?

• Include legal counsel at association meetings to spot potential antitrust issues.
• Avoid discussions that may be interpreted as an attempt to: (1) raise, lower, or stabilize prices; (2) regulate provision of services; (3) allocate markets; (4) encourage boycotts; or (5) create monopolization.
• Discipline any member that violates antitrust policy.

AHCA/NCAL Antitrust Compliance Policy

Meeting Procedures:
• Written agenda, distributed in advance;
• Discussion limited to agenda items;
• Discussions regarding official AHCA/NCAL business only at meetings; and
• Minutes kept at all Board, Council, and Committee meetings and reviewed by staff and legal counsel, if necessary, prior to finalizing such minutes.

Inclusion of Policy in all Board and Committee meeting materials.
Trade Association Dos and Don'ts

**Do:**
- Establish reasonable standards and disseminate "best practices".
- Collect and circulate impersonal market data or statistics.
- Promote the industry in general (e.g., through advertising).
- Discuss lobbying legislative or executive government bodies.
- Gather and manage industry statistics if blinded – i.e., not involving company-specific current data or future plans.

*These practices are usually permissible*

**Don't:**
- Agree on or announce pricing, especially future pricing, or other terms of sale.
- Allocate territories or customers.
- Agree to prevent or impede entry of new competitors.
- Agree to eliminate "inferior" products or services.
- Refuse to sell to certain customers.
- Agree to deny a competitor a significant input or competitive tool.
- Agree on industry standards for an improper purpose, i.e., to preclude competition from a non-member.
- Go "off agenda" or have informal or impromptu discussions on prohibited topics.

QUESTIONS?
Carol Loepere
202-414-9216
cloepere@reedsmith.com