AmSAT™
AMERICAN SOCIETY FOR THE ALEXANDER TECHNIQUE

The AmSAT mission is to establish the Alexander Technique as a basic and recognized resource for health, productivity, and well being.

AMERICAN SOCIETY FOR THE ALEXANDER TECHNIQUE ANTITRUST COMPLIANCE POLICY

I. Introduction

A trade association such as the American Society for the Alexander Technique ("AmSAT") is an organization of competitors. As such, there are obvious inherent antitrust implications in its operations and those of its committees. AmSAT's members and committee volunteers are continually counseled and reminded to avoid any discussions or actions that have the remotest antitrust implications. AmSAT's Legal Counsel is available to counsel members and AmSAT Staff when needed.

To assist AmSAT members and committees, the Board of Directors has adopted the antitrust guidelines summarized below. These guidelines are neither intended to substitute for the legal advice members may receive from their own company's Legal Counsel nor are they intended to be a comprehensive review of all antitrust-related issues that may arise.

Trade associations perform many useful and lawful functions, but they present inherent antitrust dangers because of their nature as organizations of competing concerns. The purpose of these guidelines is to assist AmSAT, its employees and members not only to avoid violations of antitrust law, but also to prevent any appearance of violation.

II. Application of Antitrust Laws to Association Activities

Trade associations are subject to strict scrutiny under both federal and state antitrust laws. Associations are particularly vulnerable to attacks by federal and state antitrust enforcers, because an association is, by its nature, a group of competitors joined together for a common business purpose. Therefore, associations must proceed with extreme caution in certain areas of activity to insure against violation of the various antitrust laws.

A conviction for violating an antitrust law may result in stiff fines for the association and its members, jail sentences for individuals who participated in the violation, a consent decree under which the association must operate, or a court order disbanding the association.

III. The Sherman Act and the Federal Trade Commission Act

The most important antitrust statutes relating to association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits "contracts, combinations, or conspiracies . . . in restraint of trade." Since trade associations are by definition "combinations," they are particularly vulnerable. The Sherman Act prohibits any understanding affecting the price of a product regardless of the understanding. For example, if members of an association reach any form of an understanding or agreement concerning price, they cannot justify the understanding on any basis including by showing that it will benefit consumers.

Association members must also remember that the Sherman Act is a criminal conspiracy statute. Even if you are not an active participant but simply attend a meeting where other members of the association engage in an illegal discussion concerning price-fixing, you may still be held criminally responsible, even though you said nothing during the discussion. Mere attendance at such a meeting may be sufficient to imply acquiescence in the discussion and thereby make the individual liable to as great a penalty as those who actively agreed to fix prices.

B. Section 5 of the Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Unlike the Sherman Act, the Federal Trade Commission Act reaches anticompetitive acts committed by single persons or companies, whether or not there is any agreement or "combination"; like the Sherman Act, it also covers joint actions.

The FTC has broad power to determine what constitutes an unfair method of competition or an unfair or deceptive act or practice under any given circumstances.

IV. Penalties for Violation of the Antitrust Laws

Federal antitrust laws may be enforced against associations, their members, and staff both by government officials and by private parties through treble damage actions. In both cases, penalties are severe.

An individual convicted of a criminal violation of the Sherman Act may be fined as much as $350,000 and imprisoned for up to three years. A corporation convicted of such a criminal offense may be fined as much as $10,000,000.

Violation of the Federal Trade Commission Act can result in issuance of a cease and desist order, which will place extensive governmental restraints on the activities of the association and its

members. Failure to obey such an order can result in penalties of as much as $10,000 for each daily violation.

In addition to governmental prosecution for a criminal or civil violation, the association can face private action for treble damages brought by competitors or consumers. A finding of violation of an antitrust law in such a private action will result in payment by the convicted party of treble damages to the injured plaintiff.

V. Antitrust Problem Areas for Association Activity

A. "Per Se" Violations

Section 1 of the Sherman Act is construed as outlawing only those arrangements which "unduly" or "unreasonably" restrain interstate or foreign trade or commerce. Normally, an arrangement is tested by its purpose and effect to determine whether the restraint is "undue" or "unreasonable." However, certain arrangements and activities are conclusively presumed to be "unreasonable" in and of themselves and deemed to be indefensible under all circumstances and, therefore, illegal.

These "per se," or automatic, violations include:

1. Price Fixing

Experience shows that the price-fixing prohibitions of the Sherman Act are most likely to be violated and the government is most likely to strictly enforce. If price-fixing is established, the association and its members may not raise the defense that the prices set are reasonable or that the ends sought through the price-fixing behavior are worthy. For these reasons, prices must not be discussed before, at, or after AmSAT meetings.

Price fixing encompasses not only agreements or combinations with competitors on a selling price, but it may also include, for example, agreements to buy up surplus goods, to adhere to a formula for determining prices, to standardize discounts, to control raw material prices, to control or standardize the price of services, and any other agreement or combination which has the net result of affecting the prices of goods or services. Furthermore, discussion of even peripheral matters relating to price, such as credit policies and terms of sale should also be avoided.

2. Agreement to Divide Customers or Allocate Territories

An agreement or understanding among members of an association to divide customers is, in and of itself, a criminal act. Even an informal agreement whereby one member agrees to stay out of another's territory will constitute a violation of the antitrust laws.

3. Agreement to Limit Supply

Any agreement or understanding between competitors to restrict the volume of goods they will produce or make available for sale is illegal.

4. Boycotts

Any agreement or understanding between suppliers and/or customers that they will not sell to, purchase from or deal with particular outsiders is illegal.

5. Tying Arrangements

Certain agreements imposed by a seller who enjoys a substantial market position that its sale of one product compels the buyer also to purchase a different (or tied) product may be illegal.

B. Association Efforts to Influence Governmental Action

The Supreme Court has held that the Sherman Antitrust Act is inapplicable to bona fide group efforts to influence legislative action. Subsequent lower court decisions have extended this privilege (known as the Noerr-Pennington doctrine) to include influencing other governmental agencies besides legislative bodies, but have left its bounds somewhat uncertain.

In general, one has a right to meet and collect necessary information and to make joint presentations with respect to governmental activities of common interest. This is conduct which is protected to a much larger degree than are other forms of joint activity.

While such activities are legal, AmSAT's committees should not undertake them unless they are cleared by AmSAT Staff or Legal Counsel. Such activities include, but are not limited to, activities designed to impact matters relating to actual or prospective governmental policy-making activities, *i.e.*, legislative and regulatory rulemaking

C. Miscellaneous Matters

1. Meetings

All notices for meetings, agenda and minutes of meetings should be reviewed by Legal Counsel for conformance to these guidelines. Agendas for all meetings should be prepared and given to participants before the meetings. All meetings of the Board of Directors shall have Legal Counsel in attendance. Any meeting sponsored by AmSAT may have Legal Counsel in attendance upon request of any AmSAT member.

Each committee or section head or any person conducting or holding an AmSAT meeting of any kind, should be made aware of these guidelines and furnished a copy thereof at least once a year.

Adequate minutes of all meetings on what transpired should be kept.

2. Documents

Captions on letters to and from committees like “confidential” (indeed anything suggesting secrecy), should be avoided wherever possible. A suggestion of secrecy or the destruction or retrieval of documents could be the foundation for an adverse inference with respect to a paper that otherwise is innocuous. Such actions should be avoided.

3. Public Statements

Speeches, newsletters, press releases, statements to governmental agencies, etc., prepared by AmSAT spokespeople should be reviewed by Legal Counsel in advance.

4. Pre and Post Meeting Conduct

Persons attending AmSAT meetings must not discuss competitive or sensitive matters with each other at any time.

VI. How to Avoid Antitrust Problems

A. General Operating Procedures

1. Membership

Assuming that the members of AmSAT derive an economic benefit from membership, the denial of membership to an applicant may constitute a restraint of trade because such a denial may limit the ability of the applicant to compete. Therefore, membership criteria must be carefully established with a view toward avoiding antitrust problems. Any action by AmSAT or its Board of Directors which has the effect of rejecting a membership application should not become final without approval by Legal Counsel.

2. Access to Information by Non-Members

The Association should not restrict members from dealing with non-members or limit access to information developed by the Association, unless such limitation is firmly grounded upon the need to protect trade secrets.

3. Communicating Antitrust Policy to Members

All members of AmSAT should receive a copy of this Antitrust Policy Statement.

4. Role of Legal Counsel

Legal Counsel should update members concerning antitrust problems periodically and should formalize the Association's antitrust compliance program.

Legal Counsel should approve in advance all new association programs or changes in existing programs that may have potential antitrust implications. In this regard, special attention should be given to statistical compilation and reporting programs.

5. Meetings

All AmSAT meetings should be regularly scheduled, and members should never hold "rump" meetings. An agenda should be prepared for each meeting of the Association, and the agenda should be reviewed in advance by Legal Counsel. Legal Counsel should be present at any meeting at which sensitive issues will be discussed.

The minutes of all AmSAT meetings should be accurate and should not be signed if they have been doctored, are incomplete, or have not been approved by Legal Counsel.

Topics of discussion to avoid at meetings include:

- Current or future prices. Great care must be taken in discussing past prices.
- What constitutes a “fair” profit level.
- Possible increases or decreases in prices.
- Standardization or stabilization of prices.
- Pricing procedures.
- Cash discounts.
- Credit terms.
- Control of sales.
- Allocation of markets.
- Refusal to deal with a corporation because of its pricing or distribution practices.
- Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice.

6. Records

AmSAT should develop a formal document retention/disposal program.

7. Communications with Antitrust Enforcement Authorities

No AmSAT staff member should have authority to communicate with officials of the Federal Trade Commission, the Antitrust Division of the Department of Justice or States’ Attorneys General without prior approval of Legal Counsel.

B. Self-Regulation

AmSAT shall not engage in any of the following:

- Adopt regulations or policies which have price-fixing (such as prohibitions on advertising of prices), market or customer allocation, or group boycott implications, or which unreasonably restrict the ability of any member or group of members to compete.

- Require members to refrain from dealing with a member who has violated the Association's rules, policies or by-laws.

- Enforce any rule, policy or bylaw arbitrarily.

- Impose unreasonably severe penalties for violation of a rule, policy or bylaw.

VII. A Case in Point

The following discussion of an actual case highlights the potential problems associated with association activities and the antitrust law.

The Supreme Court held in *Hydrolevel Corp. v. The American Society of Mechanical Engineers*, 456 U.S. 556 (1982), that a non-profit organization may be held liable for treble damages under the antitrust laws if the officers of one of its committees, as part of conspiracy with others, issue an anti-competitive "interpretation" (or misinterpretation) of one of the organization's standards for the committee officer's own purpose or for the purpose or benefit of his company.

The holding of the Supreme Court may be properly viewed as a limited one resulting from the particularly unscrupulous acts of two individuals who were officers of an American Society of Mechanical Engineers ("ASME") subcommittee. These individuals gave a written opinion on ASME stationery, and with the apparent approval of the subcommittee as a whole. The opinion in effect indicated that a "low-water fuel cutoff" manufactured and sold by plaintiff Hydrolevel was in violation of ASME's code. One of the two subcommittee officers was a vice president of McDonnell & Miller, Inc., the major producer of low-water fuel cutoffs.

While this case arose only because of clearly imprudent and unlawful actions by only several members of a very large industry association, it is critical that similar associations use this case as a reminder of their responsibilities to fairly serve their member companies and the public as well.

Of particular interest are the following antitrust exposures of an industry association which were discussed by the Supreme Court in its decision:

A. Standard Setting

A standard-setting organization such as ASME has the opportunity for anti-competitive activity by its members, or the members' employees. The court stated:

"The facts of this case dramatically illustrate the power of ASME's agents to restrain competition. M & M instigated the submission of a single inquiry to an ASME subcommittee.

For its efforts, M&M secured a mere 'unofficial' response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M&M was able to use that one 'unofficial' response to injure seriously the business of a competitor."

B. Apparent Authority of Members

The courts will likely hold the industry association liable for antitrust violations committed by its members under the theory that such members, or their employees, had "apparent authority." Such liability will occur even though the industry association was unaware of the improper acts and did not formally ratify these improper acts of several of its members.

C. Lack of Defenses

The fact that the industry association does not benefit from the anti-competitive acts of its agents is not a defense.

The fact that an industry association is a nonprofit organization is not a defense to an antitrust violation.

The Supreme Court stated in conclusion:

"When ASME's agents act in its name, they are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. By holding ASME liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, we recognize the important role of ASME and its agents in the economy, and we help to ensure that standard-setting organizations will act with care when they permit their agents to speak for them."

The concepts of consensus and due process used to develop and revise standards must be used in the area of standard interpretation. There was no claim that the ASME code was anti-competitive. It was the lack of the procedures designed to assure consensus and due process in the interpretation that gave rise to the problem.

The possibility of personal liability and member liability for those who participate in voluntary standards has in no way been changed by the decision in *Hydrolevel vs. ASME*. Had ASME's procedures been different for its interpretive process, the court might not have applied liability to ASME itself.