

## **ANTITRUST GUIDELINES: GOVERNING PARTICIPATION IN AISGW PROGRAMS, DISCUSSIONS, AND LISTSERVS**

### **General**

1. While recognizing that AISGW is a community of schools within which members seek each other out for advice and support and that most conversations do not implicate antitrust issues, the antitrust laws clearly apply to the activities of member schools and the Association. Antitrust violations can result in significant monetary penalties, costly litigation, and embarrassing publicity.
2. Fundamentally, the antitrust laws promote and protect competition and restrict activities that are anti-competitive. Some conduct, such as price-fixing, is illegal *per se* under the antitrust laws, without regard to its effect on competition. Other conduct is assessed under the “rule of reason” to determine whether, on balance, it is anti-competitive and thus unlawful.
3. The actions of individuals, such as school administrators, can subject schools to antitrust liability or litigation.
4. Member schools compete in at least two important respects: for students and for faculty and other personnel.

### **Agreements Generally**

1. From the perspective of member schools, the most significant provision of the antitrust laws is the prohibition on agreements in restraint of trade.
2. An agreement need not be written or formal to violate the antitrust laws. Moreover, an unlawful agreement (*e.g.*, to increase tuition) can be “inferred” from the actions of two parties (*e.g.*, a discussion of the need to increase tuition, followed by parallel tuition increases) even if there is no clear proof of an agreement of any kind.

### **Agreements on “Price” Prohibited**

1. Two or more member schools may not reach an agreement – whether written or oral, formal or informal – regarding the amount of tuition to be charged, the amount of financial aid to be offered, or the level of salaries or benefits to be offered. Any such agreement would be viewed as price-fixing, which is illegal *per se* under the antitrust laws and can even lead to criminal liability.
2. The antitrust laws could also be violated if an agreement between two or more schools has the effect of increasing “prices.” For example, an agreement to limit class sizes could result in tuition increases to compensate for the reduction in the number of students paying tuition.
3. Member schools should avoid any activities from which an agreement on tuition, financial aid, or compensation might be inferred.

### **Surveys**

1. Surveys of tuition, financial aid, compensation, and other information can promote competition, by giving member schools a better sense of the “market” within which they seek to be competitive. However, a survey is, by definition, an agreement to exchange

information, typically concerning a sensitive subject. A survey could be viewed as evidence of an agreement on “price” or as agreement to exchange information that has an effect on “price.”

2. To minimize potential antitrust exposure, exchanges of tuition, financial aid, or compensation information should always be (1) administered by a third party (such as AISGW) rather than conducted directly between member schools, (2) based on “historical” data, preferably data that are at least three months old when disseminated to member schools, and (3) include at least seven entries.
3. Surveys should also aggregate information to the greatest extent possible and avoid providing information that is identifiable to particular schools.

#### **Other Potential Agreements in Restraint of Trade**

1. Agreements between member schools to refuse to deal with a competitor, a vendor, a faculty member, or a student could all raise significant antitrust concerns.
2. More generally, any collective action involving two member schools should be scrutinized for potential antitrust concerns.

#### **Caution Zones**

1. While AISGW continues to encourage our member schools to reach out to one another for advice and support in pertinent areas of school life, member schools should be aware of potential antitrust issues at any time they meet or have discussions with each other.
2. Meetings between competitors, such as many association meetings, always create a “red flag” for potential antitrust issues.
3. Antitrust violations can also occur during informal communications with competitors – email, social gatherings, etc.

*The information provided should not be construed as legal advice nor should it be used as a substitute for consulting with legal counsel. If in doubt, seek legal counsel.*