

## **Antitrust Compliance Guide Chapter**

### **Why Antitrust Applies to the AGO**

The American Guild of Organists is committed to complying fully with all laws and regulations and to maintaining the highest ethical standards. This commitment includes strict compliance with federal and state antitrust laws. In 2017, the AGO entered into a settlement agreement with the Federal Trade Commission (“FTC”), and the FTC’s Order issued in connection with the settlement requires the AGO to abide by certain practices and avoid others.

We provide the following as important information for our members, chapters and leaders to ensure that our organization as a whole abides by its legal responsibilities under the antitrust laws. Please do not hesitate to contact the Executive Director of the AGO with any questions you may have regarding your responsibilities in this regard.

To many, it may seem unusual that we raise the topic of antitrust in the context of the AGO. Antitrust is most often viewed in the context of businesses that are competing to sell products and services, and it may not seem appropriate that antitrust laws also apply to us as members of the AGO. But they do.

- Under the antitrust laws, AGO members are competitors with one another when we offer to provide our professional services as musicians to employers, whether these employers are religious organizations, concert managers, or individuals engaging us for a special event such as a wedding.
- As members of the AGO, we are not unlike doctors – who may join an association that brings together like-minded professionals for educational and other purposes but who compete as providers of medical services to patients and hospitals.
- While working together as members of the AGO and its Chapters, we must remain mindful that certain conduct -- relating to fees and terms for our services or applying for positions of employment -- are subject to antitrust laws. As discussed in more detail below, the antitrust laws specifically prohibit our collaboration on these matters.

The AGO must depend upon its members, leaders and chapters to know, understand, and strictly abide by the antitrust laws and the Federal Trade Commission’s Order that requires the AGO to take certain steps and avoid others. This compliance guide provides important information for our organization.

## **AGO SETTLEMENT WITH THE FEDERAL TRADE COMMISSION**

On May 26, 2017, the FTC issued an Order, as part of a settlement agreement with the AGO. The agency had raised concerns regarding the AGO's Code of Ethics, Professional Standards, and certain other of our practices. The AGO has responded to the FTC's concerns by making a number of changes and undertaking a number of additional obligations to ensure that our practices comply with antitrust laws. We are also implementing a careful program of antitrust compliance education to ensure the AGO does not act anticompetitively and that the organization -- and its leaders, chapters and members -- understand the breadth of our antitrust obligations.

The specific obligations to which the AGO has agreed are contained in the Order issued by the FTC on May 26, 2017. In sum, the AGO may not --

- Limit price competition for the provision of services by its members;
- Discourage members from seeking employment or accepting engagements at an institution when another organist or choral conductor is employed at that same institution, or suggest that to do so is unprofessional or unethical;
- Suggest or mandate that any member requested to play for or conduct for a wedding, funeral or other service must obtain prior approval from the organist or choral conductor currently employed in that worship location or venue;
- Issue any schedule or recommendation of compensation or model contract provisions; or
- Accept any chapter into the organization that engages in the prohibited conduct above.

In addition, to ensure that the our members, leaders and chapters understand and abide by the FTC's Order and the changes it requires, the AGO must implement an antitrust compliance and education program. The articles that have already been published in THE AMERICAN ORGANIST and the speeches and presentations that have already been made at various gatherings, as well as this compliance guide are part of our compliance program.

The AGO's responsibilities extend throughout the AGO, to its leaders and chapters, and to individuals participating in AGO events or in a capacity on behalf of the AGO. Our Chapters are also required to certify that their practices and documents are in accordance with the Order's requirements.

Please do not hesitate to ask questions of our Executive Director, James Thomashower, whom the National Council has appointed as the AGO Antitrust Compliance Officer, or reach out to other leaders for assistance with any questions you may have. We are conducting periodic antitrust training and also have an antitrust

lawyer who will provide us additional advice as well. We all stand ready to make sure everyone understands our responsibilities and is able to act accordingly.

## **GENERAL ANTITRUST PRINCIPLES**

We all know that the mission of the AGO is to foster a thriving community of musicians who share their knowledge and inspire passion for the organ. Our organization is a national professional association which serves the organ and choral music fields and was founded as both an educational and service organization. We seek to maintain high musical standards and to promote understanding and appreciation of all aspects of organ and choral music. As a whole, our members lead worship for congregations in each of the fifty states and our presence is widespread. None of this has changed. We set out our principles proudly in our website and other public materials. The antitrust laws, and the FTC settlement, do not keep us from continuing on this pathway that the AGO established more than 120 years ago.

Like many other professional organizations, however, our members are also competitors. The antitrust laws recognize that professional organizations such as ours provide a great benefit to our members and also to others in our communities. But because professional membership organizations may also provide opportunities for competitors to engage in unlawful trade restraints and “conspire” to fix prices for services, they also draw the scrutiny of the government antitrust enforcers in the Department of Justice, the Federal Trade Commission, and State Attorneys General.

Below are descriptions of some types of activities that may raise antitrust concerns. In some situations, bright lines can be drawn between permissible and impermissible conduct. In others, whether particular conduct is lawful will be less clear. Please ask questions whenever you are unsure about any matter. Our Antitrust Compliance Officer or our legal counsel will provide guidance. We want to be sure that we take every step to abide by the antitrust laws as well as the obligations the AGO agreed to in its settlement with the FTC.

### **A. DISCUSSIONS OF BUSINESS ISSUES**

In many of the AGO activities, our meetings provide opportunities for members to improve our skills, to enjoy others’ musical proficiency, and to become better musicians and worship leaders. We can also assist one another in our personal and professional relationships, which may include providing information and ideas about potential jobs or networking opportunities. These activities are not prohibited by the antitrust laws or the FTC Order.

While information-sharing is the lifeblood of many associations, there are topics that may not be discussed among members. We all need to be aware that certain topics that raise significant antitrust issues because they go to the essence of the competitive sector of our professional lives. These include:

- Current fees, prices or rates we may charge for our services;
- Plans to increase or decrease our fees, prices or rates;
- Allocating customers or territories among ourselves (e.g., agreeing with one another that one will work to serve certain organizations, individuals or geographic area while another seeks to serve others);
- Collaborating with our peers to boycott or retaliate against an organization or another group of competitors (e.g., collectively deciding to boycott an organization that stated it would not increase fees or employ AGO members); and
- Engaging in any collective effort to influence an employer's salary levels or fee structure.

Please note that it is quite appropriate for AGO members to engage in discussions about fees, salaries, and the like with current employers or with those from whom you may be considering employment. You may also discuss these matters with other individuals from whom you might seek advice, either formally or informally. The limits listed above apply to discussions *during AGO or AGO Chapter meetings* and *between members or other organists or choral directors* -- because these are discussions *between competitors*.

While discussions between members about specific fees and salary structures are prohibited, there are business-related topics close to these that are permissible topics for Chapter meetings. The list of permissible topics may include discussions of such things as:

- How current economic trends are affecting the profession;
- What employment opportunities may be likely to become available;
- How members can become more profitable by acquiring better knowledge of their potential job opportunities or their potential students;
- What teaching methods and instruction strategies are most effective and lead to the most income potential;
- How instructors might respond to students who are deciding not to continue instruction;
- How to manage a career that involves part-time employment for a religious organization as well as employment as a teaching professional or in another occupation; or
- How to best serve an employing organization or to develop a better working relationship with an employer.

## **B. MEMBERSHIP APPLICATIONS, BENEFITS AND EXPULSION**

The AGO welcomes new members, openly inviting individuals who are interested in the organ and choral music fields to join our organization. In some professions, however, membership in a particular organization may be critical or necessary for an individual to practice or advance; in these, the organization's actions regarding membership and rejection or expulsion of members may be subject to antitrust scrutiny. While AGO membership most likely is not economically significant enough to raise antitrust liability, it is nonetheless prudent that we use basic procedures so as to avoid even this slight possibility. The AGO expects that our Chapters should do so as well.

The AGO accepts members on non-discriminatory terms. Membership is open to all who are interested in the organ and choral music fields, regardless of denominational affiliation or musical ability. To join, one need only submit a completed membership form with contact information and annual dues payment. In prior years, the AGO's membership form included a request that applicants agree to abide by the organization's Code of Ethics. The Code was last modified (in January 2017, discussed below), but older versions of this Code had included provisions that raised antitrust concerns related to suppressing competition between members. The AGO no longer expects its members to abide by the older versions of its Code of Ethics.

Actions taken to expel a member or consider doing so should also be done in a manner that is not based on discrimination. The AGO may terminate a membership for non-payment of annual dues. Or, if a member engages in conduct that is illegal or would subject the AGO to charges that it has engaged in illegal conduct or violated the antitrust laws or the FTC Order, the AGO may terminate that individual. But neither the AGO nor its chapters should consider terminating membership for any competitive reason. For example, the AGO may not expel a member who is willing to provide services at rates that others believe are unfairly low. To do so could subject the AGO to charges that it has violated the antitrust laws, and the AGO will exercise care to ensure considerations for expulsion are carried out within appropriate procedures that safeguard from this potential liability. A significant element of any expulsion proceeding will be to provide the member an appropriate opportunity to explain or refute claims made. Expulsion by the AGO is, and will remain, a highly unusual action.

## **C. CODE OF ETHICS AND PROFESSIONAL STANDARDS**

The AGO has modified its Code of Ethics and Professional Standards to resolve concerns raised by the FTC. The modified documents, which bear the date January 27, 2017, appear on the AGO website, have been published in *THE AMERICAN ORGANIST*, and are found in the first section of the Chapter Management Handbook.

It is important to note that even when a code of ethics is not enforced by an organization, the organization may still run afoul of antitrust laws. The FTC has long held that voluntary standards may still be actionable if they advocate membership behavior that is anti-competitive.

#### **D. FEE OR RATE SURVEYS**

Surveys and compilations of fees or rates raise serious potential antitrust exposure. In some circumstances, collecting and exchanging this competitively sensitive information can even lead to criminal antitrust liability. Under carefully controlled parameters, however, a professional or trade association may hire an independent third party to collect *historical* data that then is aggregated sufficiently to mask the underlying source data, but this should only be done after obtaining antitrust advice.

To comply with the FTC's Order in connection with its investigation of the AGO, our organization no longer publishes its Salary Guidelines and Model Contract Provisions. In addition, the AGO must be certain that any chapter that desires to collect information concerning fees or salary rates does so only within permissible limits that are in keeping with the FTC's Order and applicable antitrust laws. If any chapter is interested in collecting fee or rate information from members or others, it should contact the Antitrust Compliance Officer to seek necessary guidance *prior* to taking any action. The AGO, including its chapters, must use caution in this context to protect the organization from adverse legal action.

#### **E. CERTIFICATIONS**

The AGO offers certifications for members and non-members of the AGO. These programs provide opportunities for professional musicians to demonstrate their capabilities and to signify to the public and to their peers that they have achieved particular levels of expertise. Because the denial of a certification can disadvantage an applicant in obtaining jobs or engagements when competing with other organists for employment or engagements, antitrust principles require that the certifications be fairly administered.

As a general rule, certification programs will be analyzed under the antitrust laws based on various factors, such as:

1. *How subjective or objective is the certification testing?* The more objective the testing, the more likely it will be immune from challenge.
2. *Who serves as the judges in awarding these certifications?* If the judges are fellow *competitors*, the decision-making process may draw greater scrutiny since

the court may suspect that a denial of certification is motivated by anti-competitive considerations.

3. *Is the certification testing a fair measure of the certification being awarded?* Associations providing certification programs should be able to show that the testing is logically related to the designation being awarded and that the testing was developed in a methodical and competent manner that fairly tests the skills of the applicant.
4. *Was the testing carried out in a consistent manner and without possible discrimination?* In this regard, testing standards should be carefully and uniformly followed by judges. Judges should be free of any possible conflict of interest, which the AGO's blind judging procedures are designed to ensure.

As noted above, certification programs are important benefits that should be open to nonmembers. An association may charge a nonmember more than a member for the certification testing. However, nonmember fees must not be so large that they effectively compel the nonmember to join the association. In addition, testing applied to nonmembers should be identical to that applied to members.

#### **F. DATABASES AND REFERRAL SERVICES**

It is permissible for the AGO to maintain a database that can be used to locate organ instructors. To ensure that this database does not run afoul of antitrust requirements, the AGO maintains certain practices:

- Members who meet objective criteria may be included in the database. The criteria should be reasonably related to the teacher's ability as an instructor, such as the number of years of experience or a particular level of certification.
- All referrals should be made in an objective manner, such as a simple rotation of names, by the location of the teacher(s) closest to the consumer, or by teacher specialty.
- Associations should avoid allowing staff to suggest particular members as referrals since that may lead to claims of favoritism or the unfair exclusion of eligible teachers.

#### **G. COMPETITIONS**

The AGO and its chapters offer competitions, which will not run afoul of the antitrust laws so long as they are administered in an equitable manner. For instructors, the success of students in these competitions can elevate the teachers' reputations and

marketability. Competitions also allow skilled students to showcase their talent and can lead to teachers soliciting other teachers' prized pupils.

When sponsoring competitions, the AGO and its chapters should comply with the following antitrust considerations.

- Neither the AGO nor any Chapter should restrict teachers from soliciting students of other teachers. Any type of solicitation restriction may violate antitrust laws.
- It is permissible to limit the number of students in a competition because of practical limitations, such as hall size or the number of judges.

~ ~ ~

Please do not hesitate to call or write to ask for assistance if you have any questions about the application of the antitrust laws to your activities with the AGO.