

## COLLABORATION AND INFORMATION-SHARING AMONG COLLEGES AND ASSOCIATIONS IN THE CORONAVIRUS ERA: ANTITRUST AWARENESS

Educators and their institutions collaborate. They also compete. Neither colleges nor their professional associations are exempt from antitrust prohibitions. This issue brief offers a primer about whether, when, and how antitrust considerations should factor into information-sharing and other collaborative activities that may be desirable, and perhaps even crucial, to institutional decision-making during the coming months.

The COVID-19 pandemic is forcing institutions of higher education and their professional associations to sensibly consider and address a plethora of difficult logistical and operational issues as they look to fall 2020 and beyond. Particularly during challenging times, it is common for an institution's decision makers to confer and work with peers at other institutions—directly or through associations, groups or networks—to find solutions to vexing problems. These collaborations often are informal, via telephone calls, email exchanges, or social networks. They might naturally lead to discussing alternatives, questioning others about their plans, or discussing options. Sometimes a consensus on the optimal way to proceed may emerge.

However, these seemingly sensible collaborations may also run up against, or even across, an often-gray line drawn by federal and state antitrust laws prohibiting agreements among competitors that significantly inhibit competition. The U.S. Department of Justice (DOJ) recently completed a two-year investigation of the National Association for College Admission Counseling (NACAC), forcing the association to rescind several provisions of its ethical code based on the government's belief that they prohibited its college members from competing for students committed to other institutions. In a meeting with NACAC to discuss the investigation, the DOJ Antitrust Division's senior leadership suggested a possible lack of understanding in the educational community about obligations under the antitrust laws. And, last year a university settled an antitrust case for \$54.5 million where a faculty member alleged that the university and a nearby institution agreed not to hire members of the other's faculty.<sup>1</sup>

Independent decisions by institutions about their competitive strategies raise no antitrust problem. When, however, those decisions result from understandings or agreements that lessen or eliminate in some way elements of "competition" between institutions, such as for students or faculty, serious antitrust problems may arise. Depending on their substance and effect on competition, collaborations among institutions or with their professional associations can lead to expensive and time-consuming antitrust investigations and litigation.

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1 *Seaman v. Duke Univ.*, 2019 WL 4674758 (M.D.N.C. Sept. 25, 2019).

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This issue brief was prepared by John "Jeff" Miles of the law firm of Baker Donaldson at the request of the American Council on Education and the Association of American Universities. (May 2020)

**DISCLAIMER:** This issue brief does not constitute legal advice. It incorporates and reflects high-level observations based on non-exhaustive research and does not analyze any actual factual scenarios taking into account potentially relevant details. Institutions should examine issues addressed here based on the context and facts of each situation, institutional policies, geographical and political context, and on their own counsel's interpretation of relevant law. This is a fluid environment and topic, including the potential for changes in current law or current enforcement practices.

## **My Organization Is a Nonprofit Entity. Do the Antitrust Laws Even Apply to It?**

The antitrust laws apply to nonprofit organizations just as they do to for-profit entities, but they do not apply to certain activities. They apply only to “commercial activities,” not to “noncommercial activities.” This is an important, and relatively comforting, distinction for universities to appreciate, and for their professional associations as well. Much of what colleges and universities do, particularly in implementing their educational mission, constitutes noncommercial activity. That said, few antitrust court decisions offer clear guidance between the two; antitrust statutes are similarly unhelpful. Although some activities of educational institutions fall clearly on one side or the other, the line between commercial and noncommercial activity is often quite gray.

In general, activities are “commercial” if they involve the “exchange of money for services.” Hence, almost any agreement among colleges directly affecting their tuition, financial aid, student fees, wages, and the like constitutes commercial activity and is subject to the antitrust laws. For example, where several universities allegedly agreed not to provide merit-based scholarships, the court held the agreement constituted commercial activity.<sup>2</sup> On the other hand, agreements closely related to colleges’ educational missions rather than their business operations normally constitute noncommercial activity not subject to those laws. These might include such things as accreditation issues, admission standards, and protection of students from the pandemic.

But again, the line is often far from clear, and many activities have both educational and financial ramifications. Generally speaking, if the agreement protects institutions from competing with each other in some way that potentially benefits them financially, it likely constitutes commercial activity.

Complicating matters further, some agreements inhibiting competition among institutions may be exempt from the antitrust laws if mandated or clearly expressed by a state as its policy, and, in the case of private institutions, they are reviewed or monitored by the state. Making this determination requires examination of the state’s statutes and regulations to assess whether the state generally authorized the type of agreement in question and contemplated that its authorization might result in inhibiting competition among the institutions. Similarly, the antitrust laws might not apply if the conduct is mandated by, or taken in collaboration with, the federal government.

In addition, the antitrust laws do not apply to agreements to petition or lobby the government or one of its agencies to take action with anticompetitive effects. For instance, an agreement between two institutions to request the legislature to appropriate funds in a way that gives them a competitive advantage over a third institution raises no antitrust concern regardless of its effect on competition.

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2 *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993).

Importantly, the COVID-19 pandemic and the severe financial problems it is causing offer no safe harbor, exemption, or defense from the antitrust laws. DOJ and the Federal Trade Commission (FTC), the two federal antitrust enforcement agencies, have not issued antitrust pandemic guidance specifically for the educational community. However, they have stated generally that “there’s no relaxation of antitrust rules” because of the pandemic, while also issuing statements recognizing that the pandemic may affect how some conduct limiting competition is analyzed because of the changed market conditions it has caused.<sup>3</sup>

Also importantly, the antitrust laws do not apply to agreements among separate entities controlled by another entity or governing body, such as universities in the same system. However, action by a professional association may be viewed as resulting from an agreement among its members and the association, and thus can violate the antitrust laws if it inhibits competition among the association’s members.

### **The Applicable Statute: Section 1 of the Sherman Act**

Section 1 of the Sherman Act prohibits agreements or understandings (“conspiracies” in pejorative antitrust jargon), primarily among competitors, that “unreasonably restrain competition.” Enforcers are the DOJ’s Antitrust Division; the FTC; private parties allegedly injured by antitrust violations; and, to a lesser extent, state attorneys general. Almost every state has its own state antitrust laws, enforced by the state’s attorney general.<sup>4</sup>

### **What Is an “Agreement”?**

An understanding or agreement (“concerted action” in antitrust jargon) is essential for a Section 1 violation; the statute does not apply to individual or unilateral actions or decisions. The thing is, conversations may begin with no intention whatsoever of “agreeing” upon anything. They may even end with the participants not appreciating that they actually “agreed” upon anything. Yet, antitrust regulators, or the courts, may take a different view.

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3 *See generally* U.S. Dep’t of Justice & Fed. Trade Comm’n, Joint Statement Regarding Covid-19 (Mar. 17, 2020); U.S. Dep’t of Justice & Fed. Trade Comm’n, Joint Antitrust Statement Regarding Covid-19 and Competition in Labor Markets (Apr. 13, 2020); Fed. Trade Comm’n, Antitrust Review at the FTC: Staying the Course During Uncertain Times (Apr. 6 2020); Bryan Koenig, “No Relaxation Under Covid-19, FTC Antitrust Chief Says,” *Competition Law360*, Apr. 20, 2020.

DOJ and the FTC have implemented an expedited COVID-19 opinion-letter process by which they “aim” to inform the parties within seven days of receiving all necessary information whether they would challenge the arrangement. This may be of interest to institutions considering a potential collaboration but unsure about whether it would raise antitrust concern.

4 DOJ prosecutes egregious antitrust violations as criminal felonies, potentially resulting in incarceration of not more than 10 years and fines not exceeding \$1 million for individuals, and fines not exceeding \$100 million for others. Most challenges are civil actions, however, resulting in injunctions prohibiting the challenged conduct. Parties injured by violations can file civil suits—often large class actions. Courts automatically triple the damages of successful plaintiffs and order the defendants to pay the plaintiffs’ attorneys fees and costs.

Agreements can be either express or inferred. The agreement is express if the parties execute a document embodying the action or if, in a telephone call or email, they state they will undertake the action collectively. But a court can infer the agreement or understanding necessary for a violation from the parties' actions and surrounding circumstances. Even absent an express agreement, the parties' discussions and resulting actions may be sufficient to permit a court to infer that they reached an understanding. For this reason, institutional decision makers would be prudent to avoid discussions about competitively sensitive subjects such as prices or wages because they may lead to further statements or actions that suggest the participants reached an understanding.

Suppose provosts from four institutions, by email, discuss whether to reduce tuition for the fall semester. College 1 emails the others, saying, "I don't care what the rest of you do, but we will not reduce tuition." College 2, hitting "reply to all," responds, "I don't care what you or the others do, but we're not going to reduce tuition either." College 3 reads the emails, and responds, "We're not going to lower our tuition." College<sup>4</sup> does not respond. As it turns out, two weeks later, all four colleges announce that their tuition will remain the same as before. A court, on similar facts, held that a jury could conclude that they reached an agreement.<sup>5</sup>

On the other hand, suppose a potential student interviewing for admission at College X tells the admission official that College Y told him that it intends to reduce tuition for the fall semester by 5%, and, hearing that, College X then decides to follow Y's lead and reduce its tuition 5%. Although their actions have the same effect as if they had agreed to reduce tuition 5%, there is no agreement to reduce tuition and thus no violation. The same is true where three colleges, individually viewing the website of a fourth, see that it lowered (or raised) its tuition, and each decides individually to do the same. In both situations, the colleges "follow the leader," but make individual decisions.

Suppose a professional association issues a guideline, recommendation, opinion, or "best practice" that competing for students by offering special "perks" such as free classes, free meals, better housing, early registration, no early classes, and the like is unethical. An agreement among institutions not to compete by offering benefits like these might raise an antitrust issue. However, an association's mere promulgating of a guideline or its opinion on a subject typically raises no antitrust problem. There is no agreement among the members or with the association inhibiting members from making individual decisions whether to comply. But if the association's "guideline" were mandatory rather than advisory because compliance was required for membership and those failing to comply were subject to expulsion or some other sanction, the answer would likely be different.

### **What Constitutes an "Unreasonable Restraint on Competition"?**

An agreement violates Section 1 only if it significantly inhibits competition among its participants. How to determine the agreement's effect on competition depends on the type or nature of the agreement.

Some types of agreements so clearly limit competition on their face that no analysis of their effects is required, and they are conclusively presumed unlawful without further examination or permitting the participants to raise justifications. In antitrust jargon, they are "per se" unlawful, and DOJ often prosecutes them criminally. The quintessential example are horizontal price-fixing agreements—agreements among competitors directly affecting the price of the services they sell (e.g., college educations) or the goods or services they purchase (e.g., faculty services).

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<sup>5</sup> See *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9<sup>th</sup> Cir. 1965).

Thus, any understanding or agreement among colleges directly affecting variables such as tuition amounts (total tuition, tuition discounts, payment of tuition on credit, methodology for determining tuition, freezing tuition, types and amounts of financial aid, methodology for determining financial aid, room and board charges, increases or decreases in the above, and the like) raise a potentially serious antitrust issue. The same is true of agreements affecting faculty and employee salary and benefits.

Market-allocation agreements are a second type of per se unlawful agreement. Examples include two institutions agreeing not to offer services the other offers, not to compete with each other for people or things, or not to compete in the geographical area in which the other competes. An agreement between universities not to solicit each other's students or not to hire each other's faculty members is an example of a per se unlawful market-allocation agreement.

If the agreement is not per se unlawful, proving that it did not violate Section 1 may require expensive and time-consuming factual and economic analysis (in antitrust jargon, "rule-of-reason," rather than per se, analysis). This is especially true if the agreement both limits competition in some ways and improves it in others ways because the two effects must be balanced to determine the agreement's lawfulness.<sup>6</sup> Typically, however, if the agreement inhibits competition for students and is not a price-fixing or market-allocation agreement, the effect on competition is minimal unless a large percentage of institutions participate in the agreement and students have few other alternatives from which to choose (in antitrust jargon, the participants, collectively, have "market power").

## Surveys and Data Gathering

Exchanges of competitively sensitive information among universities—such as tuition, room and board charges, and faculty compensation—can raise antitrust issues because, even absent an express agreement among the institutions on these variables, the exchanges can result in higher, lower, or stabilized prices. Likewise, professional association surveys or data gathering and dissemination programs including members' competitively sensitive information, when they permit members to obtain specific price, wage, or cost information of identified other members, may raise concern. In general, however, no problem arises when the information is already public.

DOJ and FTC guidance provides an "antitrust safety zone" for competitor agreements to exchange price and wage information. These are permissible if (1) a third party, such as an association, manages the survey; (2) the information provided by survey participants is at least three months old; (3) the survey includes information from at least five participants; (4) the data provided to participants is sufficiently aggregated so members cannot identify the information of other participants; and (5) no individual participant's data constitutes more than 25% of any data provided by the association to its members.<sup>7</sup>

Often, association studies and surveys of member information will create no antitrust concern. For example, an association surveys college presidents about the percentage of colleges that had implemented a staff-hiring

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6 See generally Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), available at <https://www.justice.gov/atr/page/file/1098461/download>.

7 U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, Statement 6 (Aug. 1996), available at <https://www.justice.gov/atr/page/file/1197731/download>. While technically applying to exchanges of price and cost information in the health-care sector, the principles would apply across all industries.

freeze, issued student refunds, furloughed faculty and staff, and similar financially related matters, and discloses the percentages to members. This type of survey disclosing aggregated information to members is not problematic because it is not likely to facilitate an understanding among competing institutions to implement those actions.

### **Heat-Mapping Antitrust Risk: Some Hypothetical Conduct by Colleges or Their Associations**

It is impossible to predict with certainty the antitrust ramifications of all collaborative conduct that institutions or their associations might consider in light of the current pandemic. Examples may help focus on risk factors, as well as questions to ask such as:

- Why is an agreement or understanding necessary rather than individual decision-making?
  - Who benefits from the agreement—students (or faculty or staff) or the institutions participating in the agreement?
1. Through exchanges of messages on their professional association’s social network, admission officers from two universities confirm their institutions’ agreement that to induce students to enroll for the fall semester, each will lower its fall-semester tuition by 5%. Is this an antitrust violation? If so, is the association as well as the universities and their admission officials liable because the universities used the association’s network?

Perhaps ironically, this is a per se unlawful horizontal price-fixing agreement: it does not matter that the participants agreed to lower, rather than raise, prices. It may be that absent the agreement, one would have discounted its tuition by more than 5%. And because price-fixing agreements are a per se violation, it matters not that only two schools with little or no market power participated in the agreement. Because the admission officials were participants in the agreement, they, individually, as well as their institutions, are liable for the violation.

Although the participants used the association’s social network to reach their agreement, the association would not violate the antitrust laws unless it participated in the discussions or, at a minimum, knew about them and the agreement reached and did nothing to prevent them. Nevertheless, it is wise for associations to monitor member chatter on their social sites to prevent problems such as this.

2. Forty admission officers from different universities are on a Zoom call talking about how they managed their last few months amidst COVID-19. One takes the conversation to a different place – fall 2020, and tells the others, “We’re going to lower our tuition by 20% next semester if we cannot offer a full on-campus experience to our undergraduates.” A second official says, “That’s helpful to know.” A third says, “I’d like us to do something like that.” The fourth says, “We haven’t decided yet.” Three weeks later, each college, individually, posts notice of a 20% tuition reduction for next semester in the event there is not a full on-campus experience. Have their schools violated the antitrust laws?

Probably not, although they should avoid discussing their plans about tuition in this manner. These facts, by themselves, are probably not sufficient for a court to find an inference that 40 schools reached an understanding that each would lower tuition. But if there were further discussions among them about reducing tuition, all the facts could become sufficient to permit an inference that they reached an understanding.

3. Four associations had booked hotels having a particular national brand for their annual meetings in September and October and paid large deposits. Because of the pandemic, they must hold their meetings virtually if at all. A large number of emails go back and forth among the associations' CEOs discussing whether there is anything they can do to recoup their deposits. Ultimately, they agree to send each of the hotels a letter signed by each CEO association asking the hotels to refund 80% of each of their deposits. Each hotel responds in writing, rejecting their request. The CEOs then hold a conference call with each of the hotels, arguing for returns of the deposits. Have they violated the antitrust laws?

No. Although they reached an agreement to contact the hotels to argue that their deposits should be refunded and their actions are commercial activities, there is no restraint on competition. The hotels were free to accept or reject the request. The conclusion might be different if there was any joint coercion or threat of coercion by the associations to force the hotels to return the deposits, such as the associations' agreeing not to book those hotels in the future or recommending to other groups that they not book the hotels. That said, no problem would arise if each association, without collaboration with the others, decided not to use the hotel it had booked in the future. (An agreement among the hotels not to refund the deposits would raise an antitrust issue for them.)

4. In a publication to its members, a professional association opines that student interests are best served if those colleges opening in the fall announce their decisions on the same date, July 15. [After reviewing the publication, 90 members announce their decision on July 15.] Does the association's recommendation result in an antitrust violation?

No. The association is merely providing a recommendation that members may or may not follow as they determine individually.

5. Suffering extreme financial pressure from the pandemic, several institutions are considering whether to cut faculty salaries. Each believing it will have greater difficulty recruiting new faculty members if it decreases salaries but others don't, they decide a collective decision is necessary. Thus, representatives from 10 of the smaller, more financially pressed institutions meet and agree to reduce faculty salaries by 5%. Is this an antitrust violation?

Yes. This is a per se unlawful wage-fixing agreement. Financial pressure is not a defense.

6. To help address FY 2021 costs, admission officers at institutions with polices to reimburse some potential applicants or accepted students for the costs of campus visits agree to abandon this policy. Is this an antitrust violation?

Yes. The policy is a method the institutions use to compete for students, and abandonment of the policy, because it benefits the institutions financially, probably constitutes a commercial activity. The policy appears to be a form of price fixing and may be per se unlawful.

7. Concerned that some of their committed new or returning students might decide to take a gap semester rather than commit to a fall semester of online classes from home, several institutions agree to tell students who had been offered merit aid that if they take a gap semester they will have reduced merit aid when they return. Is that an antitrust violation?

Probably. Because the agreement directly affects the prices that students pay for college education services, it likely constitutes a horizontal price-fixing agreement and may constitute a per se violation.

8. Several institutions discover that the pandemic has prevented tenure-track faculty members from conducting the research and publishing necessary to obtain tenure. Accordingly, they agree to extend the tenure track for one year. Is this an antitrust violation?

No. This policy is likely noncommercial activity and would have little or no effect or competition for faculty members. Moreover, it would probably increase the ability of faculty members to obtain tenure and thus have a procompetitive effect if any effect at all.

9. Although some institutions have terminated their requirement that applicants take the SAT or ACT, many others believe that test scores are an important indicator of likelihood of student success in college. They also believe that some students who prefer to avoid standardized testing will base their choice of a college in part on whether the school requires test scores. Hence, they agree to require the scores for admission. Is this an antitrust violation?

Probably not, although the answer is not clear. In general, establishment of admission requirements is a noncommercial activity. The counterargument is that if students base college decisions on whether the school requires test scores, requiring or not requiring the scores is a competitive variable to attract students and thus increase revenues. A relevant question, as with the other hypotheticals, is why the institutions believe an agreement, rather than independent decision-making, is necessary.

10. At an association meeting, the association, because of safety concerns from the pandemic and its potential aftereffects, urges its members not to offer on-campus courses until January 2021. During the meeting, members agree not to open for the fall 2020 semester and then adopt this as an association policy. Is this an antitrust violation? If so, is the association as well as its members liable?

The answer is not clear. The purpose for the agreement is noncommercial, but students eager to start or resume their education in the fall might select a school based on whether its campus opened earlier than others. The effect on competition, if any, is uncertain.

The same conclusion and analysis would apply to agreements among colleges about (1) when students can return to campus housing, (2) staggering student returns based on their class, and (3) whether classes will be graded or pass/fail. A strong argument can be made in each case is that the agreements constitute noncommercial activity, but, on the other hand, each is a method by which institutions might compete for students.

If the agreement were a violation, the association would probably be liable because of its direct involvement in it.

11. Universities recognize that providing students with tuition refunds for the spring 2020 semester would have serious financial consequences. And they recognize that if some schools begin to offer tuition refunds, there may be a domino effect because others might feel forced to do so as well. Hence, several universities, after discussing the problem on Zoom, decide that none will offer refunds. They note that students still received an education, most of the institutions' costs are fixed and thus incurred regardless of whether students are on campus, and the cause of closing the campuses was beyond their control. Is the agreement an antitrust violation?

Probably. Tuition and room and board are part of the price students pay for college educational services; thus, the agreement affects commercial activity. Arguably, it's a horizontal price-fixing agreement and may be per se unlawful. None of the institutions' arguments would constitute a valid defense.

12. Several small, severely distressed colleges wish to expand their online class presence but lack the resources to build the necessary infrastructure to do so. They meet with several universities with large online programs and the necessary infrastructure, which the latter are willing to share by hosting the smaller colleges' courses. They may or may not charge the small colleges for this access; if so, the smaller colleges agreed they would share the expense equally. All the parties, however, are concerned that the collaboration may violate the antitrust laws. Would the collaboration result in an antitrust violation?

No. The collaboration would promote competition, not inhibit it. Moreover, it would constitute noncommercial activity. The parties do need to take care that the resource sharing does not result in their sharing competitively sensitive nonpublic information. To the extent that a successful collaboration requires either party to furnish any of its competitively sensitive information (e.g., tuition or faculty compensation) to the other, they may need to establish firewalls to limit personnel with access to that information.

13. Several colleges, under intense financial pressure, discuss a possible agreement halting contributions to their employee retirement accounts for the duration of the pandemic. Would the agreement violate the antitrust laws?

Yes. Retirement contributions are a component of an employee's wages, and thus the agreement would probably constitute an unlawful wage-fixing agreement.

14. After discussing the chaotic state of colleges attempting to pilfer students who've committed elsewhere, several institutions decide that it's an unfair and unethical method of competition. Accordingly, they agree to share their lists of committed students and not target those who've deposited elsewhere. Is this a concern?

Yes. This is a "no-poaching" market-allocation agreement and may be per se unlawful.

15. A university official at a school with a refundable deposit policy, speaking at an association meeting, tells the meeting that she's frustrated by students depositing, changing their minds, deciding to go elsewhere, and then demanding refund of their deposits. She states emphatically that her school will adopt a non-refundable deposit policy. She closes her presentation by stating emphatically, "I strongly urge that all of you do the same!" Within the next three weeks, 25% of universities represented at the meeting announce that they will not refund deposits. Is this an antitrust violation?

No, absent further problematic conduct among the members or in conjunction with the association suggesting an agreement. An agreement among members, either through the association or outside its auspices, would likely result in a horizontal price-fixing agreement. But the facts here would not enable a court to infer an agreement, even though a significant percentage of institutions decided not to provide refunds. The conclusion that those institutions acted independently is equally, if not more, plausible than the conclusion that they agreed not to refund deposits.

Associations, however, should take what action they can at meetings to prevent members from urging that they act in a uniform matter regarding competitive variables. Where such statements do occur, the association's antitrust counsel, if present, or an association official, should emphasize to the group that each institution must make its own independent decision whether to implement policies such as this without discussion or an understanding with others.

## **Concluding Principles and Observations**

1. The antitrust laws apply to colleges, universities, and professional associations just as they do to others selling or purchasing goods or services.
2. The antitrust laws, however, do not apply to noncommercial activity; but it is often difficult to distinguish from commercial activity.
3. No violation of Section 1 of the Sherman Act can result absent an agreement or understanding to take action inhibiting competition. Thus, unilateral, independent action by universities never violates Section 1, regardless of its effect on competition.
4. But an agreement need not be express; it can be inferred from the parties' actions and their surrounding circumstances if sufficient to imply that the parties reached a mutual understanding. Often, understandings begin with lawful discussions that are followed by additional actions suggesting that agreement was reached, and thus permitting a court to reach that conclusion.
5. Section 1 of the Sherman Act applies to professional association action that inhibits how its members compete with each other, including for students and faculty.
6. Professional associations and their members should be particularly careful about agreements or understandings related to member prices, both as sellers of educational services and purchasers of employee services.
7. Educational institutions compete based on many variables in addition to price. Any potential agreement or understanding limiting competition based on any competitive variable warrants review by counsel.
8. In considering any collaboration relating to any competitive variable, ask why an agreement, rather than independent decision-making, is necessary. Antitrust risk is greatest when the reason is to prevent or inhibit competition based on that variable.
9. Financial pressures experienced by institutions, regardless of how dire, resulting from COVID-19 or other causes are not a justification for agreements violating the antitrust laws.
10. If an association or institution has a concern about whether any specific collaboration or agreement with another institution might violate the antitrust laws, it should consult its counsel before participating in the agreement.