

2024 NAHB Association  
Management Conference

**BUILDING STRONGER HBAs**  
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# Trade Associations & Legal Considerations

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# MEET YOUR SPEAKERS

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# History: The Gilded Age (1865-1910)



Source: AP Photo/Arcadia Publishing

- Rapid industrial expansion
- Rapid growth of large corporations
- Laissez-Faire Economics



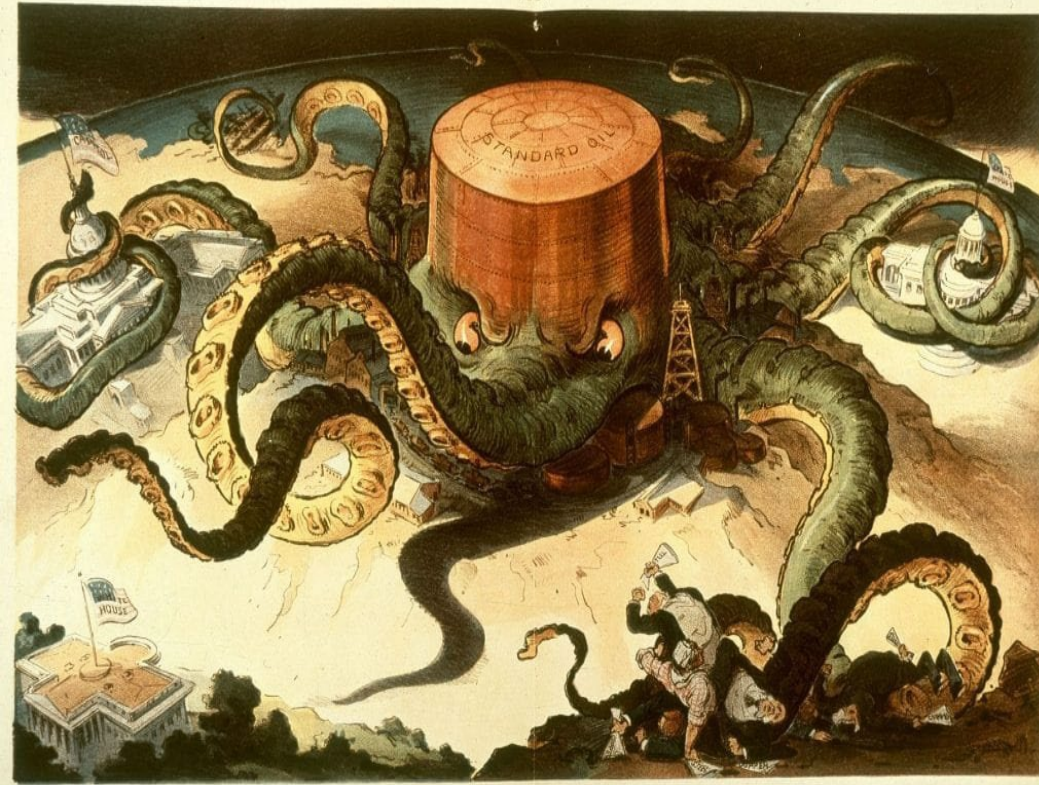
# History: The “Trusts” (1880’s)



Source: “The Bosses of the Senate,” J. Keppler, Puck Magazine, 1889

- Monopolies emerge
- “Trusts” created (groups of business competitors colluding to manipulate pricing)
- Immense economic and political influence
- Stifle competition

# History: Standard Oil “Trust” (1882)



Source: “Next !,” Puck Magazine, 1904

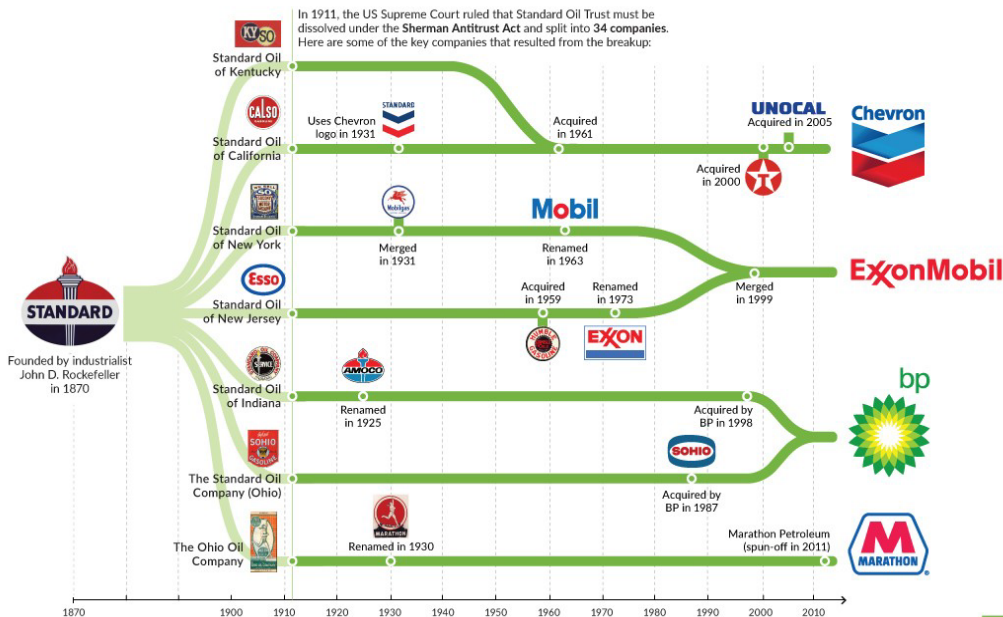
- Controlled 93% of oil production, processing, marketing & transport
- Public experiencing high prices + inferior products (oil, coal, rail transport, agriculture)
- Public demands legislation to “rein in” the trusts
- Passage of the Sherman Antitrust Act of 1890 (House: 242-0; Senate 51-1)

# History: *Standard Oil v. United States* (1911)

Chart of the Week

## THE EVOLUTION OF STANDARD OIL

Following the remnants of John D. Rockefeller's oil juggernaut



SOURCE: Wikipedia

visualcapitalist.com



- U.S. Supreme Court orders dissolution of the Standard Oil Trust
- Standard Oil Trust broken into 34 different companies



# Underlying Basis of Antitrust Laws

- Free and open competition promotes lower prices and new and better products and services.
- In a competitive market, to attract buyers, each competing business will set prices lower and increase quality of goods and services. Consumers and overall economy benefit.
- Antitrust laws protect and promote competition by prohibiting participants in the market from colluding to restrain or restrict trade and commerce, which will have anticompetitive effects.

# Renewed Administrative Focus

- Biden Administration has had consistent focus on antitrust enforcement.
- Volume of antitrust enforcement activity is higher today than at any other time in past 20 years.
- Biden references antitrust enforcement at SOTU (2023):
  - ***“For millions of renters, we’re cracking down on big landlords who break antitrust laws by price-fixing and driving up rents.”***
- Biden Administration announces new multi-agency “strike force” tasked with curbing unfair and illegal pricing in key sectors, including the labor and housing market (2024).

# Three Main Federal Antitrust Laws

- Sherman Act – enacted in 1890
  - Cornerstone antitrust law
- Clayton Act – enacted in 1914
  - Passed to supplement the Sherman Act
- Federal Trade Commission (FTC) Act – enacted in 1914
  - Led to the creation of the FTC, a federal agency created to protect competition and consumers.
- There are also state antitrust laws, which mainly follow the federal laws.

# Sherman Act

- ❖ Prohibits agreements that allow **unreasonable** restraints on trade.
- ❖ Violations are either *per se* or analyzed under the Rule of Reason.
  - *Per se* violations: price fixing, bid-rigging, horizontal customer allocation.
  - Rule of Reason: used in most cases, analyzes the anticompetitive effects against the procompetitive effects.



# Sherman Act – Cont'd

- ❖ Subject to civil enforcement by the Antitrust Division of the Department of Justice (DOJ).
- ❖ DOJ may also bring criminal actions.
- ❖ FTC technically does not have authority to enforce the Sherman Act – can refer cases to the DOJ.
- ❖ Individuals may receive up to 10 years in jail and over \$1M in fines. Companies may be fined \$100M or more!

# Clayton Act

- ❖ Passed to supplement the Sherman Act.
- ❖ Addresses specific practices that the Sherman Act does not clearly prohibit:
  - Mergers and acquisitions that result in substantially lessened competition.
  - Interlocking Directorates – one person acting as a director of two or more competing corporations.
  - Price discrimination.
- ❖ Enforced by the FTC and the DOJ.
- ❖ Penalties are strictly civil.

# FTC Act – Section 5

- ❖ Section 5 prohibits unfair methods of competition and encompasses violations of the Sherman and Clayton Acts plus other violations that contravene the spirit of antitrust laws.
- ❖ FTC has limited jurisdiction over nonprofits.
- ❖ Types of nonprofit conduct challenged by the FTC:
  - Price fixing.
  - Use of agreements to hinder competition.
  - Refusals to deal.
- ❖ Enforced by the FTC.
- ❖ Penalties are strictly civil.

# Antitrust and Trade Associations

- ❖ Trade associations serve many valuable procompetitive functions.
- ❖ The Supreme Court has made it clear that nonprofits are subject to antitrust laws.
- ❖ There are narrow exceptions for non-commercial activities, which are **not** subject to the Sherman Act:
  - Political fundraising.
  - Soliciting charitable donations.



# Cases: Anticompetitive Bylaws

- *Professional Skaters Association, Inc., In the Matter of* (2015)
  - Charge: Association bylaws and code-of-conduct prohibited members (coaches) from soliciting other members' students/athletes, thereby depriving students/athletes of the benefits of competition among the coaches.
- *Professional Lighting & Sign Mgmt. Co., In the Matter of* (2015)
  - Charge: Association bylaws prohibited members (electricians) from providing lighting services in the designated territory of another member unless that member first declines the work, thereby restraining competition among members and increasing consumer costs.
- *U.S. v. National Assoc. for College Admission Counseling* (2019)
  - Charge: Condition of membership rules (Transfer Rule/Early Decision Rule/1<sup>st</sup> Year Recruitment Rule) were “not reasonably necessary to any legitimate pro-competitive collaboration between its members,” resulting in harm to college student applicants.

# Membership Restrictions

## [Video: Staying in Compliance | NAHB](#)

### ❖ Permissible Restrictions:

- Limiting membership to a certain trade, profession, or market function.
- Imposing geographic limitations.
- Requiring a professional certification.
- Adherence to ethical standards.

# Compliance Program

- ❖ Benefits of creating a compliance program include:
  - Helps minimize the risk of violating antitrust laws.
  - Violations can lead to hefty penalties and time-consuming, disruptive investigations, as well as lowering consumer trust.
  - Many jurisdictions consider a robust compliance program to be a mitigating factor.
- ❖ Use handout as a guide to create a compliance program tailored to your needs.

# Issue Spotting Exercise





# 5 Best Practices To Minimize Antitrust Risk

## 1. Establish clear membership criteria

- Nondiscriminatory, uniformly applied, objective, and related to a competitive purpose
- Fully documents all reasons for exclusions/expulsions

## 2. Develop a written antitrust policy & robust compliance program

- Accessible to all members
- Reference antitrust policy at all meetings

## 3. Follow meeting procedures

- Circulate detailed meeting agenda in advance + strictly adhere
- Prepare meeting minutes summarizing all official meeting business, attorney/compliance expert should review

## 4. Monitor member compliance

- Prohibit exchanges of confidential or private business data and avoid discussions involving anticompetitive activities
- Educate members on antitrust compliance
- Create a mechanism (e-mail address) for anonymous reporting of antitrust conduct
- Contact counsel to report troubling member conversations

## 5. Review and revise antitrust policies & compliance program

- Update written policies in response to antitrust compliance incidents

# ADDITIONAL RESOURCES

[NAHB Antitrust Statement and Best Practices](#)

[NAHB Antitrust Guidelines for In-Person and Virtual Meetings](#)

[Guide to Antitrust Laws | Federal Trade Commission \(ftc.gov\)](#)

[Department of Justice | Antitrust Division \(justice.gov\)](#)

# Q & A

