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TOPIC:

ANTITRUST ISSUES AFFECTING COLLEGES AND UNIVERSITIES

AUTHORS:

Jennifer Zimbroff, Stanford University
Sankar Suryanarayan, Princeton University
Thane D. Scott, Morgan, Lewis & Bockius LLP

INTRODUCTION:

U.S. antitrust laws are intended to promote maximum competition in a business environment. The policy objective is to provide consumers with the benefits of competition–lower prices, greater choices, more innovation, and higher quality goods and services. Because these laws are tailored to the needs of the commercial marketplace, they often fit awkwardly into the world of nonprofit educational organizations. Nevertheless, there has been a surprising amount of enforcement activity and private antitrust litigation involving colleges and universities, and this trend will likely increase. Senator Sherman (whose eponymous legislation is the cornerstone of this country's antitrust laws) famously scoffed at the prospect of applying the Sherman Antitrust Act to schools[1], but courts and enforcers have taken a more aggressive tack in the modern era. This Note highlights the many circumstances in which antitrust issues can arise for colleges and universities, and it seeks to provide situation-specific, practical guidance on antitrust risk assessment and risk minimization.

DISCUSSION:

I. THE LAW

Under federal law in the United States, there are three primary antitrust statutes: the Sherman Act, the Clayton Act (as amended by the Robinson-Patman Act), and the Federal Trade Commission Act.[2]

A. The Sherman Act (1890)

The Sherman Act of 1890[3] is the basic antitrust statute. Its proscriptions are contained in two sections: Section 1 and Section 2.

The great majority of antitrust issues affecting colleges and universities arise under Section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[4] This provision has been interpreted by the courts to apply only to "unreasonable" restraints of trade.[5]

Section 2 of the Sherman Act states that it is illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[6]

The Antitrust Division of the U.S. Department of Justice can seek criminal or civil penalties, or injunctive relief, for violations of Sections 1 and 2 of the Sherman Act.[7] Additionally, private parties injured by violations may be entitled to treble damages, attorneys' fees, court costs, and injunctive relief.[8]

To decide whether an activity unreasonably restrains competition, courts have traditionally applied one of three methods of analysis depending on the nature of the activity in question.

The ***"per se rule"*** assumes that certain conduct (e.g., horizontal price-fixing, bid-rigging, and market allocations) violates Section 1 of the Sherman Act even without assessing market power, anticompetitive effects, or procompetitive justifications.[9]

In contrast, under the ***"rule of reason"*** analysis, "the factfinder weighs all of the circumstances of a case,"[10] including the defendant's motive and intent, to determine whether the anticompetitive effects outweigh the procompetitive restraint.[11]

The ***"quick look"*** or ***"truncated"*** rule of reason is applied to restraints that inherently appear to be anticompetitive, but for which the defendant can arguably provide a procompetitive justification. If the defendant's argument appears persuasive, then a full rule of reason investigation may be undertaken; if not, then further inquiry is cut off and the conventional per se rule is applied.[12] If the "restrictions might plausibly be thought to have a net procompetitive effect,"[13] then the defendant is entitled to a full rule of reason analysis rather than a truncated version.[14]

B. The Clayton Act (1914)

In 1914, Congress supplemented the Sherman Act by passing the Clayton Act[15] and the Federal Trade Commission Act.[16] The Clayton Act, as amended by the Robinson-Patman Act,[17] and subsequent case law regulates the following practices: price discrimination (selling a product at different prices to similarly situated buyers);[18] tying and exclusive dealing contracts (sales on the condition that the buyer stop dealing with the seller's competitors);[19] corporate mergers (acquisitions of competing companies);[20] and interlocking directorates (the same person making business decisions for competing companies).[21]

The Department of Justice shares enforcement of the Clayton Act with the Federal Trade Commission (FTC). The Clayton Act also permits private parties injured by violations to sue for treble damages, attorneys' fees, and court costs, as well as to seek injunctive relief.[22]

C. The Federal Trade Commission Act (1914)

The Federal Trade Commission Act (FTC Act), which created the FTC, broadly prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[23] To our knowledge, there are no reported decisions applying the FTC Act to colleges or universities.[24]

D. The "State Action" Doctrine and Public Colleges and Universities

The federal antitrust laws apply to all "persons" engaged in interstate commerce, but the statutory term "person" has been construed not to include the fifty states acting in their capacity as sovereigns. This judicially created doctrine, called "state action immunity," is based on concepts of federalism and was first articulated in the Supreme Court's decision in *Parker v. Brown*.[25] In that case, the Court decided that fundamental principles of federalism afforded the states broad independence from federal antitrust laws. However, a long line of subsequent cases has substantially narrowed the doctrine, limiting antitrust

immunity to entities and individuals that are clearly acting solely in their capacity as state actors, as opposed to state-created entities who also play a role as market participants. In more recent times, the Court has described the state action immunity doctrine as "disfavored."[26]

Determining whether an individual associated with a public institution, or the institution itself, qualifies as an antitrust-immune "state actor" can be complicated. The Supreme Court's most recent decision addressing this question, *Federal Trade Commission v. Phoebe Putney Health System, Inc.*,[27] rejected a state action immunity defense asserted by a hospital authority established by a town and surrounding county in Georgia. There, after the hospital authority purchased a second hospital in the county, the FTC challenged the transaction, alleging that it would substantially reduce competition in the market for acute-care hospital services, in violation of antitrust laws. The Court concluded that the hospital authority lacked antitrust immunity because the Georgia legislature "ha[d] not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition."[28] In the 2014-15 term, the Court heard argument in an antitrust case challenging the operations of a state-created board overseeing the practice of dentistry, with several Justices expressing skepticism concerning the availability of the state action defense.[29]

If a public college or university can successfully establish that the state's legislature or governor has "clearly articulated" and "affirmatively expressed" a policy of allowing the college or university to pursue the specific competition-suppressing activity being challenged, then its conduct will likely fall within the state action doctrine and it will thus be immune to attack under the federal antitrust laws. However, in all but the clearest of cases it will be difficult to satisfy this standard, and so it would be prudent to assume that antitrust immunity is unlikely to be available to public institutions that appear to have engaged in prohibited activities. Thus, the legal standards and guidance provided in this Note generally apply to public and private institutions alike.

II. SETTINGS IN WHICH ANTITRUST ISSUES ARISE

Listed below are situations in the higher education context where antitrust issues may arise. We then offer brief summaries for some of the items listed.

a. Peer-group institutions sharing information (including salary information, prospective budget-building information)
b. Joint buying arrangements
c. Jointly establishing financial aid methodologies, awards, and packages
d. Joint agreements regarding faculty recruitment and compensation (non-raiding agreements)
e. Shared trustees or officers
f. Licensing of institution-owned intellectual property (IP) rights
g. Commercial activity (including agreements with competitors and potential competitors in ancillary markets (utilities, landlords))
h. Student housing
i. Medical school/hospital issues (including the National Resident Matching Program)
j. "Boycotts" of ranking organizations
k. Jointly establishing admissions protocols (e.g., early admissions, early action, dates for admissions and financial aid events)
l. Sales of broadcast rights and paraphernalia
m. Intercollegiate athletics
n. Accreditation

A. Peer-Group Institutions Sharing Information

Educational institutions often collaborate and share information with one another, be it formally or informally. Some of these collaborations are in the form of associations, such as higher education consortiums or athletic conferences. Others may be informal, such as the periodic gatherings of

administrators from similarly-situated educational institutions. Antitrust laws recognize that competition and services may sometimes be enhanced when competitors collaborate and share information. For example, when competitors set standards or share best practices, the activities often are benign and may serve to benefit consumers. However, when competitors interact in what could be deemed "anticompetitive" activities (e.g., setting salaries or tuition rates, or collaborating to boycott certain businesses); or where interactions appear to evidence a lack of independent decision-making, antitrust concerns arise.[30]

To determine the anticompetitive potential of a specific information exchange, courts look to a number of factors, including the following: (1) timing (i.e., how current the information is); (2) availability of the information to the general public; (3) the specificity of the information; and (4) the purpose of the information exchange. Basically, the more specific and timely the information, the more likely an institution is to use such information to set its own prices, and, therefore, the more likely such information is to impact price competition among institutions.

Many trade associations maintain industry statistics and share the aggregated data with members. Collection of historical data by an independent third party (such as a trade association)—data that is then shared or reported on an aggregated basis—is unlikely to raise antitrust concerns. Other factors can also reduce the antitrust risk. For example, the *Statements of Antitrust Enforcement Policy in Health Care*[31], issued by the FTC in 1996, set out a "safety zone" for data exchanges that included the following criteria: (1) data that is gathered and managed by a third party (like a trade association); (2) data that is more than three months old; and (3) data that involves at least five participants when no individual participant accounts for more than 25%, on a weighted basis, of the statistic reported and the data is aggregated such that it would not be possible to identify the data of any particular participant.

B. Joint Buying Arrangements

Joint buying arrangements are common among groups of colleges or universities that form local or regional buying groups, are common members of an athletic conference, or share other interests or affinities. While these arrangements can present antitrust issues under Section 1 of the Sherman Act, they are analyzed under the "rule of reason." Particularly where the collaborating buyers have limited market power and their arrangement yields efficiency gains, joint buying will be a low-risk endeavor. However, an agreement that does nothing more than pool market power to achieve better pricing may prompt concern if the group possesses substantial market power, generally thought to be 35% or more of any relevant market.[32]

C. Jointly Establishing Financial Aid Methodologies, Awards, and Packages

Agreement to set tuition prices by educational institutions deemed to be competitors (e.g., competing in the same markets or competing for the same students) would likely constitute a per se violation of antitrust laws. However, there are some business dealings that may be permissible.

A U.S. Department of Justice investigation of "overlap" led to *United States v. Brown University*[33], in which the Department's Antitrust Division sued all of the Ivy League institutions and MIT under Section 1 of the Sherman Act for engaging in a conspiracy to fix prices via conspiring on financial aid policies in an alleged effort to reduce aid and raise revenues. A central issue in the case, filed in 1991, was whether intercollegiate agreements on financial aid should be condemned under the per se rule or analyzed under the more fact-specific rule of reason. The Ivy League institutions entered into a consent decree, agreeing to stop the challenged cooperative activity.[34] As part of the consent decree, the institutions acknowledged the applicability of antitrust principles to the higher education context and to all forms of joint financial activity, including discussions regarding prospective student charges and faculty and staff salaries.[35]

MIT refused to sign the consent decree and went to trial, admitting that it met with the other overlap schools and discussed financial aid packages for individual students but contending that there was no antitrust violation.[36] The district court's decision that MIT violated the Sherman Act was overturned by a

1993 Third Circuit Court of Appeals decision which held, in essence, that the antitrust laws do apply in these spheres of college and university operations but that the cooperation embodied in the Ivy League overlap system was not to be treated as per se unlawful.[37] Also, when scrutinized properly under the rule of reason, the court determined that the overlap system might be justifiable.[38] The Third Circuit ordered a new trial, saying that the challenged behavior must be analyzed more deeply under a rule of reason analysis, taking into account the objective articulated by MIT as justification for the practices. Subsequently, MIT settled with the government under terms permitting colleges and universities that admit U.S. citizens on a need-blind basis and provide financial aid to meet the full need of all such students to agree on methods of determining need. The terms also allow institutions to limit certain sharing of student data through a central facility.[39]

D. Joint Agreements Regarding Faculty Recruitment and Compensation (non-raiding agreements)

Competition in the labor markets is protected by the antitrust laws; therefore, colleges and universities must compete with each other with respect to the terms of employment they offer to faculty and staff. Express agreements not to solicit or hire another institution's employees have been challenged occasionally, both by antitrust enforcers and in class action litigation filed by employees.[40]

E. Shared Trustees or Officers

Periodically, a trustee or other university official will be asked to serve on the board of another educational institution. That invitation will prompt questions about conflicts of interest and other issues, including whether and to what extent information they possess as a result of their service to one institution may be shared with colleagues at the other one. However, antitrust law may also be implicated in this process, and the more competitive—that is, economically competitive—the institutions are with each other, the greater the antitrust concern. Even in situations where a lack of competitive posture between two institutions fails to generate per se antitrust concerns, officials should be attentive to antitrust concerns when possessing knowledge of either institution's prospective, non-public "pricing" information—such as anticipated tuition, room, board, fees, financial aid, salaries, research costs and rates—as well as related projections or budget assumptions. Officials should also make prudent decisions about when to recuse themselves from certain decisions and discussions.[41]

F. Licensing of Institution-Owned IP Rights

Many research universities actively participate in or oversee independent or sponsored research, the fruits of which are licensed out to participants or licensees. The antitrust laws encourage innovation and recognize that collaboration often expedites or otherwise improves innovation. However, the antitrust laws apply to research efforts conducted by a college or university if undertaken jointly with "outsiders" (i.e., any other schools or firms). This issue is comprehensively addressed in *The Department of Justice/Federal Trade Commission Antitrust Guidelines for Collaboration Among Competitors*[42], which provide a useful assessment of risks associated with particular collaborative research efforts. For example, the guidelines state:

> Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration. In determining whether independently controlled R&D efforts are close substitutes, the Agencies consider, among other things, the nature, scope, and magnitude of the R&D efforts; their access to financial support; their access to intellectual property, skilled personnel, or other specialized assets; their timing; and their ability, either acting alone or through others, to successfully commercialize innovations. The antitrust safety zone does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied.[43]

In addition, the National Cooperative Research and Production Act of 1993[44] is a little-known but advantageous statute providing limited antitrust immunity for certain types of collaborative research and production activities that follow procedures outlined in the statute.[45]

G. Commercial Activity (including agreements with competitors and potential competitors in ancillary markets (utilities, landlords))

Institutions can run afoul of antitrust laws by entering into what can be seen as anticompetitive agreements with local industry providers or related or necessary services. For example, in 1997, the U.S. Department of Justice filed a complaint against Rochester Gas & Electric Company (RG&E) challenging an agreement RG&E had reached with the University of Rochester that prevented the University from replacing its aging, coal-burning steam plant with a new, efficient power plant. The Department of Justice alleged that RG&E encouraged the University to enter the anticompetitive agreement by threatening to cut off certain research grants, promising to pay hundreds of thousands of dollars for conservation programs even if the University did not undertake them, and offering a low electricity rate. At the time, the University was planning to build a “cogeneration” plant, which would have produced electricity as a by-product of producing steam for heating and cooling campus buildings. The complaint alleged that the new plant would have produced inexpensive, surplus electricity that, under New York law, the University could have sold in competition with RG&E. The Department of Justice settled the matter by reaching an agreement with RG&E that allowed the University to produce and sell low cost electricity in competition with RG&E.

In *Sunshine Books, Ltd. v. Temple University*,[46] the plaintiff, a bookstore that sold student textbooks from trailers parked on the street near the University bookstore, complained that the University bookstore's one-week "manager's special" on fifty undergraduate textbook titles (offered at fifteen percent off the suggested retail price) represented an attempt by Temple to monopolize the sale of undergraduate course textbooks to students at the University by means of a predatory pricing scheme, in violation of the Sherman Act. The plaintiff argued that under the Sherman Act, “prices that are calculated to destroy, rather than reflect, competition do not comport with the Act's purposes.”[47] Temple moved for summary judgment on the grounds that its discounted prices were above average variable cost and, therefore, were presumptively not predatory. The trial court granted the motion for summary judgment but the appellate court reversed and remanded the case for factual determination with respect to issues relating to pricing and costs.

In *Campus Center Discount Den v. Miami University*,[48] a local convenience store, Campus Den, alleged that Miami University engaged in anticompetitive conduct when it opened a similar convenience store in order to accommodate its students who live on-campus. Prior to the University store's opening, Miami offered meal cards that operated on a "use it or lose it" credit system. To offer more flexibility and convenience, Miami offered an alternative to the cafeteria meal plan by allowing purchases at the University convenience store equivalent to meal costs. As a result, Campus Den brought an action against Miami alleging that the University store “provided stiff competition.”[49] The plaintiff asserted only that its business was reduced.

The Court dismissed the action, finding that Miami University had no intention to eliminate the convenience store market. The Court concluded that since most Miami freshmen and transfer students lived on campus, the flexibility of the meal cards created a better opportunity for students. In addition, the system did not generate more revenues for the University. Since the plaintiff failed to demonstrate the anticompetitive effects from the operations of the University convenience store on the entire convenience store industry, and because Miami’s attempt to succeed in business was not anticompetitive conduct, Campus Den lacked standing to bring any antitrust claims.

H. Student Housing

Provision of on-campus housing may also be considered a commercial activity that is subject to antitrust laws. In *Hamilton Chapter of Alpha Delta Phi v. Hamilton College*,[50] several fraternities alleged that a policy requiring all students to live on campus violated antitrust laws. The College moved to dismiss,

arguing that antitrust laws did not apply because the policy was not commercially motivated. Finding that the provision of housing could not be separated from the College's academic mission, the district court concluded that antitrust laws did not apply. The Second Circuit reversed and remanded the case, noting that the district court improperly ignored the allegation raised by the fraternities that the policy was intended to raise revenues. On remand, the trial court granted summary judgment to the College, finding that plaintiffs' definition of the relevant market as "the market for residential services for students matriculating at Hamilton College" was artificially narrow.[51] The trial court agreed with the College that the relevant market must encompass all colleges that are "reasonably interchangeable" with the College, and that plaintiff's proposed market definition was incorrect as a matter of law.

In *Hack v. President and Fellows of Yale College*,[52] several Orthodox Jews contested Yale's requirement that all freshmen live in coeducational dormitories by claiming, among other things, that the requirement was an attempted monopoly in violation of the Sherman Act. Because the plaintiffs did not allege that Yale had any market power in the local housing market, the Second Circuit found no violation of antitrust laws.[53]

I. Medical School/Hospital Issues (including the National Resident Matching Program)

Antitrust laws extend to the health care field, thereby implicating the business decisions of medical schools and university hospitals relating to mergers of health facilities, participation in joint ventures with other entities, and exclusive agreements with physicians or other hospitals. For example, one hospital may allege that a competing hospital has entered into an exclusive contract with a network payor prohibiting the payor from entering into an agreement with the competing facility for the provision of services. Competing hospitals may argue that such exclusive provisions constitute illegal monopolization, tying, and refusal to deal.

Similarly, hospitals may enter into contracts with physicians for the right to be the exclusive providers of designated medical services at the hospital in exchange for the physician agreeing to provide and manage all aspects of such services within the hospital. These "exclusive contracts" generally prevent physicians who are not part of the contract group from offering the designated services. Although these agreements appear to be anticompetitive, most courts have rejected antitrust challenges to exclusive contracts, noting that hospitals often create efficiencies associated with exclusive contracts, such as greater control over quality and decreased cost, and that these benefits are then passed onto the consumers.[54]

In *Jung v. Association of Medical Colleges*,[55] plaintiffs, comprised of 200,000 current and recent medical students, filed a class action lawsuit challenging the "match" program for assigning medical residents to positions through the National Resident Matching Program (NRMP). The complaint alleged that the NRMP (including its affiliated organizations and teaching hospitals) conspired to "displace competition in the recruitment, hiring, employment and compensation of resident physicians, and to impose a scheme of restraints which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment."[56] While some initial rulings of the district court permitted the case to proceed, Congress intervened by passing Section 207 of the Pension Funding Equity Act of 2004, entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs," which amended the antitrust laws to grant an exemption to the NRMP and participating hospitals.[57] Following the enactment of Section 207, the district court dismissed all claims against the defendants.[58]

J. "Boycotts" of Ranking Organizations

A lively debate exists concerning whether institutions might collectively refuse to participate in ranking initiatives that are mounted by various publishers, student groups, and consumer interest organizations. There is no clear answer to the antitrust questions presented by the possibility of concerted action by rated organizations to "boycott" a rating agency. Collective action taken to exert pressure in support of non-economic objectives lies beyond the antitrust laws.[59] Before participating in a concerted plan to

block or frustrate participation in a rating initiative, a school should obtain specialized antitrust guidance evaluating the nature of the plan and the mechanism by which it is to achieve its intended effect.

K. Jointly Establishing Admissions Protocols

Intercollegiate coordination of events in the academic calendar is in many ways a time-honored tradition. Agreements or conventions governing when applications must be submitted, when acceptances are issued, when aid applications must be received, when award letters are sent, and the like, have been routine and, in general, not subject to close antitrust scrutiny. However, events in recent years have raised antitrust questions. For example, an inter-school agreement among law schools establishing recruitment deadlines and protocols that law firms must accept in order to do on-campus interviewing of students collapsed after a number of leading law firms protested that such agreements disadvantaged them and violated the antitrust laws.[60] In addition, reports indicated that the Department of Justice Antitrust Division took an interest in (but no action on) discussions it thought might lead to collective efforts to end "early admission" and "early action" programs. Currently, collective efforts to establish events in the academic calendar that do not affect competition to attract students appear to present little risk; if the collective action may reduce competition in the admissions or aid arenas, however, the antitrust risks are significantly higher.

In a related area, a recently filed case challenges coordination among colleges in developing and implementing a common application form. That case, *CollegeNET, Inc. v. The Common Application, Inc.*,[61] appears to challenge both (1) horizontal coordination among colleges and (2) vertical policies embodied in rules that The Common Application organization applies to member schools. The complaint alleges a "conspiracy" among the member schools and mounts a challenge under Section 1 of the Sherman Act, as well as a misuse of market power by the organization itself, which the complaint challenges under Section 2 of the Sherman Act. The case is currently in its early stages.[62]

L. Sales of Broadcast Rights and Paraphernalia

Sales of broadcast rights for athletic leagues are governed by the rule of reason,[63] as are collective decisions governing sales and purchases of apparel and other tangible items.[64]

M. Intercollegiate Athletics

The application of antitrust laws to the many dimensions of intercollegiate athletics is a complex and active subject deserving of its own Note. The cardinal difference separating athletics from all other applications of the antitrust laws to institutions of higher education is that the "product" of athletic endeavors is competition itself, and some collaboration must occur in order for that "product" to exist at all.[65]

N. Accreditation

Accreditation is, by definition, collective action by rivals who have the power to exclude a school by denying accreditation. In the normal course, accreditation by various regional groups has been seen as non-commercial behavior and thus not subject to the antitrust laws.[66] However, where an injured school claims that it has been excluded as a result of collective decision-making by rival schools seeking to advance their commercial interests, enforcement activity and private litigation have resulted. The most prominent cases in this area arise in the context of professional schools, where the plaintiff claims that the accreditation process has been "hijacked" by an outside association that wields the accreditation power to advance its economic interests.[67] Where the denial of accreditation results from non-commercial forces, accreditation rarely presents antitrust risks; where the denial of accreditation results at least arguably from the action of rival schools pursuing their economic self-interest, accreditation can present high risks and requires specialized, advance guidance.

III. RISK REDUCTION

Antitrust risk most often arises from two "hot spots." Section 1 of the Sherman Act, which prohibits anticompetitive agreements, requires an agreement. Therefore, only multilateral conduct raises antitrust risk under this Section. Section 2 of the Sherman Act prohibits the unfair acquisition or use of monopoly power, and so the use of "clout" by an institution (or group of institutions) can present antitrust risk under this Section. Most compliance policies focus on these two sources of risk, educate individuals who might be in the higher risk zones as to the rules of the road to be followed, and designate a compliance officer to receive inquiries and obtain legal guidance where appropriate. Sample compliance policies are provided below, under Resources.

CONCLUSION:

While lawmakers in the early twentieth century may not have envisioned that antitrust laws would apply to educational institutions, the legal environment in which these institutions operate has changed substantially since that time. Government regulators have recently pursued more aggressive litigation and enforcement actions against these institutions, and this trend does not appear likely to subside. As a result, colleges and universities should remain mindful of how laws designed to regulate the commercial marketplace may apply to their activity on the host of issues outlined above. The practical suggestions included in this Note should help colleges and universities in assessing compliance risk and taking appropriate steps to mitigate that risk.

RESOURCES:

Compliance Policies

- Stanford University
- Tufts University
- University of Maryland Medical Center
- University of Pennsylvania
- University of Rochester Medical Center
- Vanderbilt University
- Wesleyan University
- Yale University

Research Tools

In addition to the risk management tools identified above, there are some excellent resource materials for counsel seeking to gain greater insight and familiarity with this very interesting subject. The materials identified below are particularly useful starting points for antitrust research, and all of them provide deeper analysis on an issue-by-issue basis.

- Dale Collins, Applied Antitrust Law
- Julian O. Von Kalinowski et al., Antitrust Laws and Trade Regulation (2d ed., 2014)
- Antitrust Law Developments (American Bar Ass'n, 7th ed., 2012)

AUTHORS:

Jennifer Zimbroff and Sankar Suryanarayan are University Counsel at Stanford University and Princeton University, respectively. Thane Scott, a partner at Morgan, Lewis & Bockius LLP, concentrates his practice on matters involving antitrust and trade regulation, and counsels universities in this area.

ENDNOTES:

[1] 21 Cong. Rec. 2658-59 (1890).
[2] In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these laws closely parallel the federal antitrust laws.
[3] 15 U.S.C. §§ 1 et seq.
[4] *Id.* § 1.
[5] *See Standard Oil Co. of N.J. v. United States,* 221 U.S. 1 (1911).
[6] *Id.* § 2.
[7] *Id.* §§ 1, 2.
[8] 15 U.S.C. §15.
[9] *See, e.g.*, *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (characterizing conduct as per se unlawful if it has been found to have a pernicious effect on competition and lack of any redeeming virtue"); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) (market allocation).
[10] *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 244 (1918)).
[11] Courts will likely consider "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable, . . . [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained." *Chicago Bd. of Trade*, 246 U.S. at 238.
[12] *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (citing *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992)).
[13] *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).
[14] *Brown Univ.*, 5 F.3d at 669. The Supreme Court has held that a quick look analysis is inappropriate unless "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 757.
[15] 15 U.S.C. §§ 12 et seq.
[16] *Id.* §§ 41 et seq.
[17] The Robinson-Patman Act, an amendment to Section 2 of the Clayton Act, prohibits certain forms of price discrimination in the sale of goods, discriminatory provision of facilities or services in connection with the resale of goods, and certain brokerage payments in lieu of discounts. *Id.* § 13.
[18] *Id.* § 2.
[19] *Id.* § 3.
[20] *Id.* § 7.
[21] *Id.* § 8.
[22] 15 U.S.C. § 15(a).
[23] *Id.* § 45(a)(1).
[24] The FTC Act defines the entities it covers as "any company, trust,. . ., or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. While this provision has been used to argue that non-profit corporations are not subject to FTC jurisdiction, the Supreme Court has stated that the FTC Act extends to non-profit professional associations that provide "substantial economic benefit to [their] for-profit members." *California Dental Ass'n. v. FTC*, 526 U.S. 756, 759 (1999). The FTC has exclusive jurisdiction to enforce the FTC Act and shares enforcement of the Clayton Act with the Department of Justice. The FTC Act carries no criminal penalties and cannot be enforced by private parties.
[25] *Parker v. Brown,* 317 U.S. 341 (1943).
[26] *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).
[27] *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).
[28] *Id.* at 1017.
[29] *See N.C. Bd. of Dental Exam'rs v. Federal Trade Comm'n*, Docket No. 13-534 (argued Oct. 14, 2014); Transcript of Oral Argument, N.C. Bd. of Dental Exam'rs v. FTC, No. 13-534 (filed Oct. 25, 2013), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_8nj9.pdf.

[30] *See Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (holding that firms in the oil and gas industry exchanging nonpublic data on employees' salaries could form the basis for an antitrust class action suit by employees of one of the firms, even in the absence of an actual agreement among the firms to fix salaries).
[31] U.S. Dep't of Justice & the Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996), *available at* http://www.justice.gov/atr/public/guidelines/0000.htm.
[32] Market definition in markets characterized by a spectrum of price, quality, and other differences, as well as diverse geography, is a highly fact-specific and notoriously difficult exercise. No reported antitrust decision in the higher education field undertakes this analysis in any significant or conclusive way. Given the absence of useful precedent, one key consideration in defining a relevant market in the higher education field would be the manner in which market participants themselves define the market. Documents touting a group's market power heighten the risk that the group will be considered to be a relevant market, and consequently such documents should not lightly be created.
[33] *United States v. Brown Univ. & Providence Plantations*, 5 F.3d 658 (3d Cir. 1993).
[34] *United States v. Brown Univ.*, No. 91-CV-3274 (E.D. Pa. May 22, 1991).
[35] *Id.*
[36] MIT had four responses to the Government. First, MIT argued that, as a threshold matter, the challenged conduct did not constitute "trade or commerce" and, thus, was not proscribed by the Sherman Act. Second, MIT argued that if the court decided that the Sherman Act did apply to the challenged conduct, that conduct should not be condemned as a per se violation but instead should be analyzed under the rule of reason. Third, MIT argued that the challenged overlap conduct was justified on social welfare grounds – necessary to conserve financial aid for only the truly needy and entirely consistent with the federal government's own financial aid policy. Fourth, MIT argued that when evaluating the challenged conduct under the rule of reason, there was no antitrust harm, i.e., there was no statistically significant basis for the claim that the collective action raised average net tuition per student at the overlap schools. *See* Gustavo E. Bamberger & Dennis W. Carlton, *Antitrust and Higher Education: MIT Financial Aid (1993)*, *available at*
http://people.umass.edu/resec453/documents/Case7KwokaandWhite4th.pdf .
[37] *United States v. Brown Univ.*, 5 F.3d 658, 661 (3d Cir. 1993).
[38] *Id. at* 679.
[39] Thereafter, Congress expanded the number of schools that could benefit from the kind of cooperation permitted by the standards included in the MIT settlement agreement. *See* Section 568 of *Improving America's Schools Act of 1994*, 20 U.S.C. § 6301, reauthorizing the *Elementary and Secondary Education Act* of 1965.
[40] *See United States v. Adobe Sys., Inc.*, 10 CV 1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011); *see also In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).
[41] Section 8 of the Clayton Act generally prohibits an individual from contemporaneously serving as a director or officer of multiple corporations that are "engaged in whole or in part in commerce" and are "competitors" "by virtue of their business and location of operation" such that "the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." While the prohibition of interlocks at the directorial level has often been applied by antitrust enforcers to sever lines of communication between competing businesses, no reported decision applies the interlock prohibition to non-profit or charitable entities.
[42] Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaboration Among Competitors* (2000), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
[43] *Id.* at 26-27.
[44] 15 U.S.C. §§ 4301-06.
[45] An overview of the statute and its protections is located at U.S. Dep't of Justice, *Filing a Notification Under the NCRPA*, http://www.justice.gov/atr/public/guidelines/ncrpa.html (last visited Dec. 22, 2014).
[46] 697 F.2d 90 (3d Cir. 1982).
[47] *Id.* at 92.
[48] 114 F.3d 1186 (6th Cir. 1997) (per curiam).
[49] *Id.* at 3-4.
[50] *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, No. 95-CIV-0926, 1996 WL 172652 (N.D.N.Y. Apr. 12, 1996), *rev'd*, 128 F.3d 59 (2d Cir. 1997).

[51] *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 106 F. Supp.2d 406. 412 (N.D.N.Y. 2000).*
[52] 237 F.3d 81, 82-83 (2d Cir. 2000).
[53] *Id.* at 85. *See also Delta Kappa Epsilon Alumni Corp. v. Colgate Univ*., No. 2005–1762, slip op. at 1 (N.Y. Sup. Ct. Mar. 7, 2006), *aff'd sub nom. Delta Kappa Epsilon (DKE) Alumni Corp. v. Colgate Univ*., 38 A.D.3d 1041 (2007) (rejecting plaintiff's argument that Colgate's housing policy, which required students to live in university-owned housing, constituted an unlawful monopoly; rejecting plaintiff's argument that the students were unfairly locked into Colgate housing, noting that the housing requirement resulted from a policy which the students had agreed to upon matriculating; and granting defendant's motion to dismiss). In *American National Bank and Trust Company of Chicago v. Board of Regents for Regency Universities*, owners of a private dormitory alleged that Northern Illinois University's housing policies violated the antitrust laws. 607 F. Supp. 845, 846-51 (N.D. Ill. 1984). Specifically, the private dormitory owners contended that the board's implementation of its rule requiring single, freshmen students under the age of 21 and not residing with their parents to reside in university residence halls violated federal antitrust laws. The trial court ruled that the school was exempted from antitrust laws under the state action immunity doctrine, which provides that state and municipal authorities are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects. *See also Parker v. Brown*, 317 U.S. 341 (1943).
[54] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (holding that a contract between a hospital and a firm of anesthesiologists requiring that all hospital anesthesiology services be provided by such firm did not constitute a per se violation of the Sherman Act, Section 1). In dicta, the Court stated that, if plaintiff had brought an exclusive dealing claim, the contract would have been considered unlawful if "it foreclosed so much of the market from penetration by [the anesthesiologists'] competitors [so] as to unreasonably restrain competition in the . . . the market [for anesthesiological services]." *Id.* at 30 n.51.
[55] 184 F. App'x 9 (D.C. Cir. 2006) (per curiam).
[56] *Jung v. Ass'n of Am. Med. Colleges*, 339 F. Supp. 2d 26, 31 (D.D.C. 2004), *aff'd*, 184 F. App'x 9 (D.C. Cir. 2006).
[57] 15 U.S.C. § 37b.
[58] *Jung*, 339 F. Supp. 2d at 46.
[59] *See*, *e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-15 (1982) (refusing to apply the Sherman Act to a buyers' boycott motivated by social rather than commercial goals despite the fact that the boycott was intended to have an adverse economic effect); *Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 618, 621 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994) (holding that a conspiracy to close women's health centers that perform abortions by co-conspirators that had established competing pregnancy testing and counseling facilities was not covered by the Sherman Act because "the [Sherman] Act was not intended to reach the activities of organizations espousing social causes" but rather "was intended to prevent business competitors from making restraining arrangements for their own economic advantage"). *See also Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1309 (8th Cir. 1980) (holding that a boycott of convention facilities in states that had not ratified the Equal Rights Amendment was beyond the scope and intent of the Sherman Act because the Act was meant to cover "competitive activities by competitors with some self-enhancement motivation," not social or political activities); and *Proctor v. General Conference of Seventh-Day Adventists*, 651 F. Supp. 1505, 1524 (N.D. Ill.1986) (distribution of religious literature is non-commercial and not within the purview of the Act). On the other hand, collective measures among rivals intending to impede, or having the effect of impeding, the flow of information desired by consumers is a tempting target for antitrust action. *See In re Detroit Auto Dealers Ass'n v. FTC*, 955 F.2d 457 (6th Cir. 1992).
[60] *See* Letter from Gregory M. Shumaker, Firmwide Hiring Partner, Jones Day, to NALP Commission on Recruiting in the Legal Profession (Jan. 29, 2010), *available at* http://www.jonesday.com/files/News/dfe04e61-f781-4cdd-a917-b4461515b8bf/Presentation/NewsAttachment/aa481654-b2b1-4541-8b45-bcfa934f35ad/Jones_Day_NALP_Response.pdf.
[61] No. 3:14-cv-00771-HZ (D. Or. filed May 8, 2014).
[62] Thane D. Scott, one of the authors of this Note, represents the defendant, The Common Application, Inc., in the litigation.
[63] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984).
[64] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

[65] For more information on the district court decision in *O'Bannon v. NCAA*, see Mike Glazier and Paul Avery, *O'Bannon v. NCAA: The District Court Decision*, NACUANOTES Vol. 13, No. 1 (Oct. 6, 2014). In addition, a NACUANOTE on antitrust issues in the athletics context is currently in draft form.
[66] *See Marjorie Webster Jr. Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Sch.*, 432 F.2d 650 (D.C. Cir. 1970).
[67] *See Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997).

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