

Association Discretion in Addressing Exhibitors and Advertisers

Q A former exhibitor has applied to exhibit at this year's annual meeting. It has recently adopted policies inconsistent with those of our association. Do we have to allow it to exhibit? May we prohibit it from advertising and taking advantage of other association promotional opportunities, including website placements?

A Associations typically have a significant amount of discretion in deciding whether and which companies may exhibit, advertise, or otherwise take advantage of an association's promotional opportunities. The fact that an association is tax-exempt does not mean that it must "open its doors" to anyone interested.

In general, an association has the right to accept or reject a request by an industry supplier or other vendor to exhibit or advertise at association meetings or in association publications, subject to certain limitations. The principal consideration is whether the association's meetings, publications or other outlets (e.g., website) represent the sole means for the advertiser or exhibitor to market its goods or services so that the rejection would trigger potential antitrust liability. In other words, if an association possesses sufficient market power such that denying access to the association's markets effectively would

preclude the vendor from having any reasonable means to reach the market, then the association would be limited in its otherwise broad discretion to accept or reject exhibitors and advertisers. While even associations with market power may reject a potential exhibitor or advertiser on reasonable grounds, the reality is that such market power rarely, if ever, exists.

Create Consistent Policy

The second consideration relates to the association's adoption and application of exhibitor and advertising policies. Associations should establish reasonable advertiser and exhibitor policies that are based on the purposes and needs of the organization. Once those policies are adopted, it is particularly important that the association apply them in a consistent manner. Associations need not treat every potential advertiser equally, but they should address comparable situations in the same way each time they occur.

For example, an association may adopt a policy prohibiting exhibitors or advertisers of products or services that are not consistent with the purposes of the association from exhibiting or advertising those products or services through the association. Likewise, an association may prohibit the participation of an exhibitor or advertiser that offers products and services that compete with the association or with the association's products and

services. Thus, if an association sponsors or administers a certification program for the profession, it is not obligated to allow a competing certification program to advertise, exhibit, or otherwise have access to the association's promotional outlets.

Similarly, associations need not accept potential exhibitors or advertisers offering products that compete with an existing association affinity (e.g., insurance or credit card) program. In adopting advertising and exhibitor policies, associations should retain flexibility by including a provision that reserves the organization's right to say "no thanks" to an advertisement, exhibit or Web placement it deems not in the organization's best interests.

In exercising its discretion to determine whether acceptance of an application by an exhibitor or advertiser is in its best interests, however, an association must apply its policies in a reasonably consistent manner. For example, if the association rejects one advertiser because it wishes to promote products that compete with those of the association, then the association should respond to other potential advertisers in the same manner. If a policy is applied inconsistently or in a discriminatory way, the association may risk claims of unfair treatment, including antitrust claims. At the same time, except for the limited case of an association bearing market power, an association electing to reject an applica-

tion to advertise or exhibit has no legal obligation to provide the reason for its rejection. While it may wish to provide such an explanation for vendor relations purposes, such an explanation should be limited to citing applicable policy provisions.

First Amendment Rights

One final note: There is a common misconception that individuals and organizations have a First Amendment right to exhibit, advertise, and have access to an association listserve or other association-owned or sponsored forum. No such First Amendment right exists. In fact, if the association becomes aware that advertising or listserve material it is publishing or otherwise making available through the association is defamatory, infringes another's rights, or violates antitrust or other laws, the association can—and should—take appropriate action to remove the material and/or reject future attempts by the individual or organization to advertise, exhibit or participate in an association-sponsored forum. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.