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Journal of Student Financial Aid

Volume 22 | Issue 1 Article 1

2-1-1992

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Recommended Citation

Carlson, Douglas R.; Nickels, Timothy G.; and Street, R. John (1992) "A Model Antitrust Policy for Colleges and Universities," *Journal of Student Financial Aid*: Vol. 22 : Iss. 1 , Article 1.
Available at: https://ir.library.louisville.edu/jsfa/vol22/iss1/1

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A Model Antitrust Policy for Colleges and Universities

by Douglas R. Carlson, Timothy G. Nickels, and R. John Street

The Ivy League schools and others that have been investigated in the Department of Justice's (DOJ) probe of purported student financial aid price-fixing spent thousands of dollars responding to the DOJ's inquiries.[1] Those institutions that were actually sued spent hundreds of thousands of dollars negotiating a settlement.[2] The prudent college is now seeking ways to avoid such costs in the future, and to maximize the likelihood that it is complying with the antitrust laws.

Nothing can be done to change past conduct, but schools can plan to monitor and, in certain instances, alter future conduct to avoid the pitfalls of the antitrust laws. A large part of that planning is the adoption of a realistic, understandable antitrust policy which should be followed by financial aid administrators.

The focal point of this article is a model antitrust policy for a college or university directed toward financial aid, tuition, and faculty salaries. It does not purport to—and probably could not—cover every area where a school could run into antitrust difficulties. But as a guideline, this model policy provides a beginning for developing an antitrust policy for any educational institution.

An antitrust policy cannot be effective unless school personnel are informed about it and adhere to it. Adoption of a policy is the first step; the second step is adoption of a means of ensuring compliance with the policy. This article focuses on the first step, an antitrust policy specifically directed to colleges and universities.[3]

The Overlap Group

For several decades, the goal of student financial aid has been to assure that any student who qualifies for admission to a school receives sufficient aid, in some form, to attend the school. While the mix of the type of aid has changed drastically over the years, the goal has not. The Overlap Group was formed in 1954, purportedly to advance that goal.

The Overlap Group consisted of 23 northeastern private colleges. The group was divided into two subgroups, one representing the Ivy League institutions and MIT, the other representing the remaining members. The group met three times a year to discuss a broad range of subjects pertaining to financial aid. The most important meeting occurred each Spring, during which, among other issues, the level of financial aid for specific individuals was discussed.

For the Spring meeting, a list was prepared of applicants who had been admitted to more than one Overlap member. Each institution, using information more detailed than that provided by the College Scholarship Service, made its own determination of the expected family ability to pay or "family contribution" (FC) for students on the list. Through this process, members compared their calculations and discussed the differences. Of particular note were discrepancies in disclo-

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sure by an applicant to different institutions which prompted members to rectify perceived mistakes and to adjust their opinions. The result was that financial aid packages offered by members of the Overlap Group rarely differed significantly in terms of measured FC.

The Department of Justice Investigation

Even though the Overlap Group had been meeting for almost 40 years, the DOJ did not begin an investigation of financial aid practices until the fall of 1989. The investigation is believed to have been largely the result of an article which appeared in the *Wall Street Journal* on May 2, 1989, accusing the Overlap Group of price-fixing. The article suggested that the members of the Overlap Group were "part of a price-fixing scheme that OPEC might envy."

Less than four months after the *Wall Street Journal* article, the DOJ acted. In August 1989, it sent civil investigative demands (legal demands similar to subpoenas) to twenty schools. Later that year, the investigation grew to at least 57 schools. The DOJ sought a laundry list of documents from the schools, including those showing how the schools set financial aid packages and tuition.[4] While the investigation has been resolved for eight schools, it apparently continues for others.

The Lawsuit and Consent Decree

On May 22, 1991, the DOJ filed a civil complaint in federal court in Philadelphia against nine Overlap Group members, alleging they had violated the antitrust laws by jointly setting levels of financial aid.[5] Specifically, the complaint alleged that the Overlap members had conspired, among other things, to "agree not to offer financial aid based on 'merit,' " to "eliminate significant differences in family contributions for financial aid applicants," and to "exchange anticipated self-help levels and often match self-help awards for students receiving financial aid admitted to more than one Overlap member." The effect of the conspiracy, according to the complaint, was "to restrain price competition among them for students receiving financial aid, resulting directly in higher family contributions for some financial aid applicants."

At the same time the complaint was filed, a consent decree (an agreed-upon court order) was also filed resolving the case against eight of the nine defendants, subject to court approval. The consent decree, entered into after a long period of negotiation between the DOJ and the schools, prohibits the schools from engaging in a number of different actions, and requires the schools to establish a compliance program and to report annually to the government about the school's adherence to the program. The case continues as to one defendant, MIT.[6]

The consent decree enjoins each defendant from:

(A) agreeing directly or indirectly with any other college or university on all or any part of financial aid, including grant or self-help aid awarded to any student, or on any student's family or parental contribution;

(B) agreeing directly or indirectly with any other college or university on how family or parental contribution will be calculated;

(C) agreeing directly or indirectly with any other college or university to apply a similar or common need analysis formula;

(D) requesting from, communicating to, or exchanging with any college or university the application of a need analysis formula, or how family or parental contribution will be calculated for a specific financial aid applicant;

(E) agreeing directly or indirectly with any other college or university whether to offer merit aid as either a matter of general application or to any particular student;

(F) requesting from, communicating to, or exchanging with any other college or university its plans or projections regarding summer savings requirements or self-help for students receiving financial aid;

(G) requesting from, communicating to, or exchanging with any other college or university, the financial aid awarded or proposed to be awarded to any financial aid applicant except as required by federal law;

(H) requesting from, communicating to, or exchanging with any other college or university any information concerning its plans or projections, including budget assumptions, regarding future student fees or general faculty salary levels; and

(I) entering into, directly or indirectly, any contract, agreement, understanding, arrangement, plan, program, combination, or conspiracy with any other college or university or its officers, directors, agents, employees, trustees, or governing board members to fix, establish, raise, stabilize, or maintain student fees or faculty salaries.

The compliance program requires each school to designate an "Antitrust Compliance Officer" to supervise its activities. For the next 10 years, the compliance officer must certify to the court that the school has refrained from prohibited conduct.

Two other aspects of the decree require reference. First, the decree allows the schools to use an independent agency "to collect and forward information from financial aid applicants concerning their financial resources." Second, the decree specifically allows the schools to continue their relationship with the College Scholarship Service.[7]

Application of the Antitrust Laws to Financial Aid

"Price-fixing" to the ordinary citizen evokes images of secret communications in smoke-filled rooms by greedy, corrupt business people hoping to gain millions in illicit profits. The Overlap Group hardly fits the bill: the Group has conducted its meetings, at least somewhat openly, for almost 40 years. Its goal was not excessive profit. Instead, the Overlap Group intended to offer gifted students their choice of schools ostensibly, at least, removing price as a consideration for students choosing colleges.

What follows is a brief explanation of the antitrust laws and a discussion of the competing views of whether these laws were violated by the cooperative setting of financial aid. While a lengthy discussion of the antitrust laws is beyond the scope of this article, some background is necessary to understand the model policy.

Antitrust Laws in a Nutshell

The fundamental theory of the antitrust laws is that free competition is absolutely necessary for our economy to function successfully, and private agreements or efforts to restrict competition should be proscribed. There are, of course, exceptions.

Section 1 of the Sherman Act (15 U.S.C. § 1) is the antitrust law under which the suit against the Overlap Group was brought.[8] It provides that "[e]very contract, combination, or conspiracy, in the form of trust or otherwise, in restraint of trade or commerce . . . is declared to be illegal." Because this language is so broad, courts have been construing it in hundreds of decisions over the past 100 years, with varying results.

"Nothing can be done to change past conduct, but schools can plan to monitor and alter future conduct to avoid the pitfalls of the antitrust laws."

Courts agree, however, that three things must be shown to prove a violation of Section 1 of the Sherman Act.

—that a contract, combination or conspiracy exists between two separate entities;
—that the contract, combination or conspiracy restrains trade in interstate commerce;
—that the restraint was unreasonable.

The activities of the Overlap Group may meet at least the first two conditions. The tacit understanding of the members to cooperatively set financial aid awards probably meets the legal definition of a "conspiracy." The conspiracy may "restrain" trade if it prevents an independent analysis of the amount of financial aid awarded. Because applications, tuition, and financial aid awards have multi-state effects, and because members of the Overlap Group conducted their business in different states, the conspiracy probably affects interstate commerce.

The crux issue is whether any resultant restraint is "reasonable." This concept has received extensive judicial attention. Some types of conspiracies—notably price-fixing, division of markets, and some boycotts—have been deemed by the courts to be "per se" unreasonable because they are so plainly anticompetitive. Other restraints are examined more closely under the "rule of reason," by which courts balance the competitive pros and cons of a restraint to determine its legality.

Whether the "per se" rule or the "rule of reason" should be applied to the cooperative setting of financial aid awards is beyond the scope of this article. It requires a careful analysis of case law which itself is not entirely consistent. Some commentators, noting the special position that higher education holds in American society, have argued that courts would carve out an exception for education to the rule that joint price-fixing is "per se" unreasonable and would employ a rule of reason analysis.[9] Whether these predictions are correct, however, is far from certain. There is clearly a large body of case law which would support

application of the "per se" rule and consequently declare the restraint unreasonable without further analysis.

Finally, the above analysis is not necessarily applicable to state universities. As a general rule, the Sherman Act is inapplicable to the states;[10] nevertheless, state universities should consult antitrust counsel relative to an antitrust policy.

Did The Overlap Group Violate the Antitrust Laws?

Assuming the rule of reason analysis is used (and that is by no means certain), the issue is whether the overall pro-competitive effects of cooperatively setting financial aid awards outweigh the anti-competitive effects. Proponents assert that such cooperation prevents a "bidding war" among schools for the best students, thereby saving resources which can be awarded to other students. Jointly setting aid also allows a student to attend the school of his or her choice, without regard to economic considerations. Proponents also note that mistakes in calculations are discovered, and the possibility of dishonesty among applicants is discouraged by a joint review.

Detractors point out that, at least in some instances, cooperative aid-setting lowers the amount of financial aid a student will receive because the student lacks any leverage to negotiate an award. It removes price competition among the schools for students, and the logical result is higher prices.

Nobody can predict how a court would resolve these competing considerations. At least three legal commentators hold the view that cooperative aid-setting is illegal.[11] Others have reserved judgment.[12] Perhaps reasonable people could differ, but it is important to bear in mind that the schools that did set aid jointly, unlike most price-fixing conspirators, did not do so to create excessive profits for distribution to shareholders. They did so to prevent a bidding war for the most sought-after students. When schools spend money inefficiently, they have less money to spend on maintaining the quality of education. Moreover, because additional revenue needed to fund a bidding war would typically come from tuition, the student would generally also benefit because costs would not be required to be increased by this factor.

The Model Policy

The lesson of the Overlap Group's difficulties is that good intentions may not provide protection against the operation of the antitrust laws. Regardless of what they thought they were doing, the Overlap Group members engaged in conduct that invited the scrutiny (and expense) of a federal investigation. Competitors meeting and discussing prices may invite charges of price-fixing. In the case of the Overlap Group, the invitation was accepted.

There is probably no type of litigation more costly to defend than antitrust. The threat of criminal sanctions and treble damages allowed by the law requires a "no holds barred" approach to defense. Good antitrust defense lawyers leave no stone unturned and because of the difficulty of the work, experienced counsel command a higher than

usual hourly fee. The labor-intensive type of work, multiplied by the lawyer's hourly fee, can lead to truly shocking legal bills.

The cost is much greater if an institution loses an antitrust lawsuit. In a criminal case sanctions—including jail time—can be imposed. In a civil action, any damages awarded are multiplied by three. A conspirator is "jointly and severally" liable for all damages caused by his or her actions and by the actions of co-conspirators. Thus, a party with even a very minor role in the conspiracy can be held liable for millions of dollars in damages caused in combination with other more active parties. Insurance generally does not provide any protection because antitrust claims are excluded from coverage as "intentional wrongs."

An antitrust policy can help avoid these expenses by creating a greater awareness among administrators of antitrust issues. Many administrators may honestly have no idea that it is risky business for them to discuss prices—whether it be faculty salaries, tuition, room and board, or financial aid—with their peers at other schools. This is particularly true in the university setting, where a great deal of positive cooperation among institutions exists. A policy sets the parameters of permissible cooperation.

The model policy applies specifically to the setting of financial aid, tuition, fees, and salaries. While these are probably the areas most sensitive to antitrust difficulty, they are certainly not the only ones. Of course, the theory behind the model policy—that the prudent administrator does not participate in discussions of price levels—has a universal application.

College Policy on Exchange of Certain Information

Prospective Data

1. Plans and projections concerning anticipated tuitions, fees, salaries or financial aid levels may not be shared with other institutions.
2. Decisions by the College setting tuitions, fees, salaries and financial aid levels may not be based directly upon projections of tuitions, fees, salaries or financial aid levels provided by other institutions. The College may, however, independently consider anticipated tuitions, fees, salaries, and financial aid levels of other institutions in setting its tuitions, fees, salaries and financial aid levels.
3. Information regarding financial aid offered or to be offered to particular prospective students may not be shared with other institutions.
4. Decisions by the College setting financial aid to be offered to prospective students should not be based upon information received from other institutions relating to financial aid to be offered to the same prospective students.

For these purposes, tuition and fees charged, salaries paid, or financial aid levels set by the College or another institution are considered "projections" until they are approved by the highest level of appropriate authority at the College or the respective other institution.

Historical Data

1. In general, historical data may be shared with other institutions unless disclosure is proscribed (for other reasons) by college regulations.
2. However, historical data about tuition, fees, salary levels or financial aid may not be shared in any context in which a representative of the College expressly or implicitly commits the College to pursue a future course of action based on an extrapolation or other projection of the historical data or exhorts another institution to do so.

Applications of Policy

Tuition Information

1. College officials should not participate in one-on-one or round-table discussions with representatives of other institutions about projected tuitions, fees or other charges (*i.e.*, tuitions, fees or other charges not yet officially approved). If such discussions occur, College officials should excuse themselves. College officials should not solicit information concerning projected tuitions, fees or other charges from colleagues at other institutions.
2. College officials may disclose to representatives of other institutions current or past tuitions, fees or other charges which have been officially approved or released for publication. However, College officials may not commit the College, either expressly or implicitly, to maintain current tuitions, fees or other charges or to modify them in any particular way.
3. College officials may not release projected tuitions, fees or other charges to the press or to commercial or professional publications, regardless of whether the data is to be publicly reported on a disaggregated basis.
4. Subject to compliance with College and/or departmental policy about the referral of press or other outside inquiries to the appropriate office of the College or department, College officials may release current or past tuitions, fees or other charges to the press or to commercial or professional publications.

Salary Levels

1. College officials should not participate in one-on-one or round-table discussions with representatives of other institutions about projected salary levels (*i.e.*, salary levels not yet officially approved), or salaries offered or to be offered to particular prospective employees. If such discussions occur, College officials should excuse themselves. College officials should not solicit information from colleagues at other institutions concerning projected salary levels at other institutions or salaries offered or to be offered to particular prospective employees by other institutions.
2. College officials may disclose to representatives of other institutions current or prior salary levels which have been officially approved and released for publication. However, College offi-

cials may not commit, either expressly or implicitly, the College to maintain current salary levels or to modify salary levels in any particular way.

3. College officials may not release projected salary levels to the press or to commercial or professional publications, regardless of whether the data is to be publicly reported on a disaggregated basis.
4. Subject to compliance with College and/or departmental policy about the referral of outside inquiries to the appropriate office of the College or department, College officials may release current or past salary levels to the press or to commercial or professional publications.

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Financial Aid

1. College officials should not participate in one-on-one or round-table discussions with representatives of other institutions about projected financial aid levels (*i.e.*, financial aid levels not yet officially approved), or financial aid offered or to be offered to particular prospective students. If such discussions occur, College officials should excuse themselves. College officials should not solicit from colleagues at other institutions information concerning projected financial aid levels at other institutions or financial aid offered or to be offered to particular prospective students by other institutions.
2. College officials may disclose to representatives of other institutions current or prior financial aid levels which have been officially approved and released for publication. However, College officials may not commit, either expressly or implicitly, the College to maintain current financial aid levels or to modify financial aid levels in any particular way.
3. College officials may not release projected financial aid levels to the press or to commercial or professional publications, regardless of whether the data is to be publicly reported on a disaggregated basis.
4. Subject to compliance with College and/or departmental policy about the referral of outside inquiries to the appropriate office of the College or department, College officials may release current or past financial aid levels to the press or commercial or professional publications.

Other

1. Historical data (data other than current or prior tuitions, fees or other charges, salary levels, and financial aid discussed above) may be shared with colleagues at other institutions or with the press or commercial or professional publications (subject to compliance with College and/or departmental policy about the referral of press or other outside inquiries to the appropriate office of the College, school or department), provided that such data is not held on a confidential basis pursuant to applicable statutes or College policies.

Limitations of the Model Policy

Colleges and universities often compete with a broad range of traditional commercial businesses by selling textbooks, operating hospitals, selling medical services, and running television and radio stations. A school engaged in a proprietary activity of this sort certainly should be mindful of the antitrust laws.

Another area with antitrust implications is sports, particularly with reference to the restrictions placed on individual schools by the NCAA. A fair amount of antitrust litigation has already taken place over college sports, including a landmark Supreme Court decision in 1984.[13]

Two other areas of antitrust sensitivity are accreditation and joint research activities. A school which is denied accreditation could claim that other schools illegally conspired to do so. Proof of that theory has failed, however, in several reported decisions.[14] As to joint research activities, it is unlikely that cooperative research itself could run afoul of the antitrust laws. The National Cooperative Research Act of 1984 (15 U.S.C. § 4301) generally protects joint research activities from the antitrust laws. To the extent such research has commercial implications, however, antitrust concerns became more relevant.

Especially in large institutions, simply adopting an antitrust policy is not sufficient. The policy must be disseminated and enforced, and it is advisable to appoint someone within the institution to monitor compliance such as an antitrust compliance officer.

A compliance officer can be a valuable resource for administrators with antitrust questions. Once people have become sensitized to antitrust issues, they begin to see the potential problems that may lurk behind contacts with employees of other institutions. While a policy can provide guidelines, a compliance officer can help apply those guidelines to specific situations. A compliance officer can also be responsible for administering an affirmative antitrust compliance program. A compliance program could include, among other things, distribution of the antitrust policy, periodic briefing of those likely to be presented with antitrust issues, and an annual review of those processes with antitrust implications.

Conclusion

Colleges and universities have attracted the attention of the Department of Justice, in some cases resulting in private litigation. A prudent institution should do everything it can to avoid antitrust difficulties by adopting an antitrust policy which administrators can understand and follow to assure compliance and to prevent litigation costs. ✦

Endnotes

[1]At least one private civil class action has been filed relating generally to alleged student financial aid price-fixing. *Kingsepp v. Wesleyan University, et al.*, No. 89 Civ. 6121 (DNE) (U.S. Dist. Ct. S.D.N.Y.).

[2]Dartmouth College reported that it incurred $400,000 in legal fees in connection with the investigation and lawsuit. Mashek, J.W. (1991). "Ivy Colleges Settle Price-Fixing Charges." *The Boston Globe* (May 23, 1991): 1.

[3]Antitrust compliance programs are the subject of much legal literature. See, e.g., American Bar Association "Compliance Manuals for the New Antitrust Era." ABA Document No. 1990-5030085 (1990).

[4]The civil investigative demands sought the following:

1) The income statements and balance sheets of the institutions from 1985–1988;

2) Such documents as are sufficient to show the fees charged students attending the institutions from 1985–1988;

3) Such documents as are sufficient to show the proposed and actual budgets of the institutions for the years 1985–1988;

4) All documents that relate to contracts or agreements between the institutions and one or more other colleges relating to fees, salaries, or to financial aid;

5) All documents (including minutes, notes or memoranda) that relate to any meeting at which any fee charged by any college, salaries paid by any college, or the financial aid to be provided any student was discussed, proposed, considered, recommended, determined, changed, or decided;

6) All documents that relate to any comparison among or between colleges of one or more fees, salaries, or the financial aid to be provided any student;

7) All studies, working papers, strategic plans, business plans and analyses of competitions that relate to fees, salaries, or financial aid;

8) All catalogues, brochures, explanatory materials, promotional materials, publications, and marketing aids that mention fees, salaries or financial aid. Scheske, E. (1990). "Financial Aid and Antitrust: Financial Aid Packages Subject of Justice Department Probe." *Journal of College and University Law* 17(1): 43–63.

[5]*United States v. Brown University, et al.*, Civ. No. 91-CV-3274 (E.D. Pa.).

[6]A June, 1992, trial date was set in the DOJ's suit against M.I.T. Discovery was to have been completed by March 2, 1991.

[7]Under the Antitrust Procedures and Penalties Act, the public is given 60 days to comment on a proposed consent decree. The DOJ received comments from five individuals regarding the consent decree. Three individuals were extremely critical of the DOJ's decision to bring suit. The comments and the DOJ's responses can be found in 56 Fed. Reg. 42068-42073 *(1991)*.

[8]*Other statutes, including* the Federal Trade Commission Act and state antitrust laws, could have some application to the joint setting of financial aid levels.

[9]Citing the "special nature" of the Overlap Group members, a commentator writing in the Syracuse Law Review concludes that the rule of reason analysis is appropriate. Kreisler, D.P. (1991). "The Antitrust Laws and the Overlap Group: Were Colleges and Universities the Robber Barons of the 1990s?" Syracuse Law Review 42: 217–239. An article in the *Journal of College and University Law* reaches the same conclusion. Scheske, *supra*, at 58.

[10]*Parker v. Brown*, 317 U.S. 341 (1943).

[11]Kreisler, *supra*, at 239; Richmond, D.R. (1991). "Private Colleges and Tuition Price-Fixing: An Antitrust Primer. " *Journal of College and University Law* 17(4): 271–306; Smith, E.B. (1990). "Are Schools Violating the Sherman Act by Collaborating on Financial Aid Packages?" *University of San Francisco Law Review*, 24 (Summer): 653–75.

[12]Scheske, *supra*, at 62.

[13]*National Collegiate Athletic Association v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

[14]*See Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools*, 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *Sherman College of Straight Chiropractic v. American Chiropractic Association*, 654 F. Supp. 716 (N.D. Ga. 1986), *aff'd*, 813 F.2d 349 (11th Cir. 1987); *Zavaletta v. American Bar Association*, 721 F. Supp. 96 (E. D. Va. 1989); *Paralegal Institute v. American Bar Association*, 475 F. Supp. 1123 (E. D. N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980).

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