MEASUREMENT, CONTROL & AUTOMATION ASSOCIATION

Antitrust Law Compliance Policy and Guidelines

It is the policy of the Measurement, Control & Automation Association and its members to strictly comply with laws and regulations applicable to their activities, including Federal and state antitrust laws. It is further the policy of MCAA to assist its members and volunteers in complying with Federal and state antitrust laws. MCAA members and leaders are expected to conscientiously adhere to antitrust laws. MCAA will neither knowingly permit nor condone anti-competitive behavior, whether willful or inadvertent, in connection with any MCAA activity.

The antitrust laws seek to preserve a free competitive economy. These laws are aimed at conduct that threatens to deprive consumers of the benefits of competition. As a general rule, competitors may not restrain competition among themselves through understandings or agreements as to the price, the production or the distribution of their products, or other agreements that unreasonably restrict competitive capabilities or opportunities of their competitors, their suppliers or their customers. The antitrust laws also prohibit monopolization and attempts to monopolize, unfair methods of competition, unfair or deceptive acts or practices, most discrimination in prices between different purchasers in the sale of a commodity, exclusive dealing arrangements, most tying sales and requirements contracts, some joint ventures/mergers/ consolidations, and similar activities. It is recommended that, for a more complete discussion of the antitrust laws (Sherman Act, Federal Trade Commission Act, the Clayton Act, the Robinson-Patman Act, and California's Cartwright Act), MCAA members should consult legal counsel.

However, antitrust laws are often unclear in terms of applicability to any given context. Whether or not an antitrust violation exists depends purely on the specific conduct and facts involved in each instance. Notwithstanding the nebulous nature of the antitrust laws, penalties for violating them, both civil and criminal, are severe. Certain activities can result in felony criminal convictions with penalties of up to three (3) years in prison and $100,000 fines for individuals and $1,000,000 fines for corporations per offense. Also treble damages are available to private persons enforcing the antitrust laws.

Association members and leaders, in particular, have compelling reasons to understand the comply with antitrust laws because of an antitrust violation commonly consist of two elements (1) concerted action with competitors and (2) an unreasonable restraint of competition. Since MCAA's activities involve meetings and activities between and among competitors (MCAA members), the concerted action element can generally be established without difficulty. The other element necessary for a basic antitrust violation is a showing that the concerted action amounts to an unreasonable restraint of competition. So, agreements or activities of association members that are anti-competitive or have an anti-competitive effect, whether conducted as association business or not, could result in serious antitrust consequences to both the Association and its members.

Member Responsibilities

MCAA programs are carefully designed and monitored on an ongoing basis to ensure compliance with antitrust law. Every MCAA member, whether organizational or individual, has a duty and responsibility under the law to avoid and prevent antitrust violations. Every MCAA member needs to understand basic antitrust laws, to recognize areas of potential antitrust risk, and to overtly object to and refuse to participate in any activity that poses antitrust risk until that risk is properly assessed and cleared by legal counsel or other qualified advisor.

Areas of Risk

It is not possible to provide a complete or specific list of activities that amount to an antitrust violation. However, it is helpful to identify areas of risk, where close attention can be paid to the possible anti-competitive nature of the agreements or activity involved. Some areas of risk include discussions involving pricing, whether controlling or influencing current or future prices (for purchase or sale), controlling or influencing price increases or decreases, or stabilization or standardization of prices. However discussions of prices established by third parties that are not influenced or controlled by the discussing parties are generally not, standing alone, anti-competitive or illegal. Other areas of risk include discussions regarding:

- What constitutes a "fair" profit level
- Procedures for establishing selling prices, cash discounts, credit terms
- Control of sales levels, inventory levels or timing of sales
- Allocation or division of markets or geographical divisions of markets among competitors
- Agreements, recommendations or suggestions that members refuse to deal with certain other persons or firms (i.e. boycott)
- Whether or not the pricing practices of any competitor/industry member are unethical, or constitute an unfair trade practice
- Agreements limiting or restricting advertising

Again, some discussions relating to activities identified above will not amount to antitrust violations. However, discussions relating to them require thorough prior antitrust analysis and guidance in the discussion.

Association Meetings

To avoid even the appearance of impropriety, as well as to avoid inadvertent violation of antitrust laws, all association Board and committee meetings and all other gatherings of members will be conducted in accordance with the following rules:

1. A written agenda will be prepared and distributed in advance of each meeting. Agenda issues with potential antitrust implications will be reviewed and discussed by the chairman, president and legal counsel, if deemed appropriate. Additions to the agenda having potential antitrust implications should be postponed, or discussions of such matters held with legal counsel or other qualified advisor present.
2. Accurate, detailed meeting Minutes of every meeting will be prepared and reviewed. Audio, video or other records of meetings are not permitted. Minutes will be approved at the next meeting.
3. In the event of concern regarding potential antitrust implications of a discussion, discussion must be discontinued pending resolution of the matter through the President or legal counsel, if necessary.

4. In the event that any member has a concern about potential antitrust implications of discussion during a meeting, he or she shall interrupt discussion and state that concern immediately. If discussion is not terminated and the concern resolved, the concerned member(s) should state that he/she is leaving the meeting or that reason, and leave.
5. Conversations involving discussion of matters in violation of this policy will not be tolerated at an association meeting, and violating parties may be asked to leave the meeting by the chairman.

Statistical Surveys and Reports

Associations often collect on a voluntary basis, statistical data from their members. Because of the sensitivity of price and cost data under the antitrust laws, there is risk associated with the exchange of such data among Association members as part of a statistical reporting program. The antitrust risk is manageable, however, if the Association follows a few basic principles. Case law and Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy indicate that such activity should not raise antitrust concerns where (1) there is a legitimate purpose for the sharing of the information; (2) a third party (like MCAA) collects, manages and distributes the data; (3) the information involves historical rather than current or future data; (4) precautions are taken to ensure that specific information cannot be identified with specific participants such as by aggregating the data; (5) the information is widely available to interested parties, such as government agencies and members of the public; and (6) participation is voluntary and no collective action is taken based on the information.

Internal Procedures and Memoranda

Although careful language will not avoid antitrust liability where the conduct merits it, conduct that is lawful may become suspect because Association employees or members use sloppy or inappropriate language to describe it. Such language can have an adverse effect on the outcome of an antitrust investigation or lawsuit. In the event of a government investigation into the Association's activities, only attorney-client communications are exempt from disclosure. Letters and memoranda, including drafts, telephone logs, expense reports, and email messages, whether deleted or not, are all subject to production. Internal correspondence should be written so as to avoid misstatements of fact, inferences or conclusions that may be taken out of context by a third person. With respect to the use of language, keep the following in mind:

1. Do not give the false impression that the Association is a party to any anticompetitive agreement;
2. Do not give the false impression that participation in Association activities is not available to all members on equal terms or that potential members are excluded from membership for competitive reasons;
3. Avoid the misleading suggestion that specific courses of conduct regarding prices or costs are being proposed or agreed upon; and
4. Avoid speculating as to the legal propriety or consequences of specific conduct.

Government Affairs

A primary role of a trade association is to represent its members in association lobbying efforts before Congress, state legislatures, and various federal and state regulatory bodies. Lobbying efforts before governmental bodies or individuals to promote the role, activities and concerns of MCAA members constitutes concerted activity that is protected by the First Amendment and exempt from the antitrust laws under the Noerr-Pennington doctrine even though these activities might adversely affect competitors.

Not all attempts to influence governmental actions are protected. Courts have recognized that there may be situations where activity that is ostensibly directed toward influencing governmental action is "a mere sham" to cover attempts to interfere directly with the business of a competitor. Petitioning the government is not protected if its purpose is to diminish competition by its mere assertion. Further, combinations to influence the government in commercial dealings (for example, as a buyer of goods or services) as distinguished from its regulatory role, can violate the antitrust laws. Finally, no protection from antitrust liability is afforded to MCAA or its members for anticompetitive activity simply because a governmental representative encourages or participates in the activity. A government official's participation in a meeting where inappropriate discussions take place provides no antitrust immunity or shield.

Conclusion

This Compliance Policy and Guidelines should not be regarded as covering all the antitrust issues that MCAA or its directors, officers, employees or members may confront. Rather, it is intended to alert MCAA and its directors, officers, employees and members as to the types of conduct or situations that may raise antitrust concerns. If MCAA directors, officers, employees or members have doubts as to whether a particular course of action or situation raises antitrust concerns, they should err on the side of caution and consult MCAA counsel. Failure to seek advice may result in serious consequences to MCAA, its directors, members, officers and employees.

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