

Antitrust Policy

ANTITRUST COMPLIANCE GUIDELINES FOR THE INDUSTRY COUNCIL FOR EMERGENCY RESPONSE TECHNOLOGIES (ICERT)

1. INTRODUCTION

The Industry Council for Emergency Response Technologies (“ICERT”) and its member companies are committed to full compliance with all laws, regulations, and ethical standards, including federal and state antitrust laws. Compliance with both the letter and spirit of the antitrust laws is an important goal for ICERT and is essential to maintaining ICERT’s reputation for the highest standards of ethical conduct.

This discussion provides a broad overview of applicable antitrust standards, as well as concrete discussions of the problems that can arise during the activities of ICERT and other contacts between employees of member companies. While ICERT has designed a system to ensure antitrust compliance, that system is not effective unless each party does its part. Antitrust lawsuits and investigations can be brought on mere appearances of impropriety; therefore, all parties should do everything to guarantee strict adherence to these Guidelines.

2. THE ANTITRUST LAWS

(a) BASIC FRAMEWORK

Antitrust laws are designed to promote vigorous and fair competition and to provide American consumers with the best combination of price and quality. Accordingly, agreements or understandings among competitors that inhibit firms in an industry from competing freely and effectively are frequently contrary to the antitrust laws. These guidelines focus mainly on the federal antitrust and trade regulation laws created by the Sherman Act, Clayton Act, Robinson-Patman Act and Federal Trade Commission Act. Most states and the District of Columbia have their own antitrust laws, which frequently (although not always) parallel the federal laws. Many countries in which ICERT or its members may conduct activities also have similar antitrust laws.

The United States Department of Justice (“DOJ”) is authorized to prosecute corporate and individual violators of the antitrust laws as criminal felons. Conviction for a single violation may result in severe fines, and in the case of individuals, imprisonment for up to three years. Further, the DOJ, Federal Trade Commission, and state attorneys general may bring civil suits, seeking injunction of prohibited activities. Private parties may also bring civil suits, which can result in the recovery of three times (treble) damages, in addition to fees and costs.

Most trade association activities are procompetitive or competitively neutral. For example, trade associations may help to establish industry standards that protect the public or allow components from different manufacturers to operate together. Further, the association may represent its members before legislatures or government agencies, providing valuable information to inform government decisions. Trade association activities do not typically pose significant antitrust risk, if they are performed with adequate safeguards.

(b) POTENTIAL VIOLATIONS

Despite the procompetitive benefits of trade associations, forming a trade association does not shield joint activities from antitrust scrutiny. Dealings that would otherwise violate the antitrust laws still

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violate these laws even if they are done through a trade association. For these reasons, it is essential for participants in trade association meetings and activities to appreciate fully:

- (c) the types of conduct that might be considered evidence of an agreement or collusion, and
- (d) the types of agreements that may be found to restrain trade unlawfully.

The most common antitrust violations affecting trade associations fall within Section 1 of the Sherman Act. This provision prohibits agreements, understandings, or joint actions between two or more companies that restrict competition. The Sherman Act is of principal concern to trade association members, as a trade association by its very nature includes groups of competitors that can easily and inadvertently undertake collective actions that restrain trade.

The first element of a Sherman Act violation requires an agreement or understanding between two or more companies. Agreements can be oral or written, formal or informal, expressed or implied. In practice, proof of an agreement is often circumstantial in nature, consisting of evidence that creates the mere appearance of a violation. Although the actual circumstances may in fact be entirely innocent and lawful, their appearance may cause an antitrust investigator or a jury to conclude that an illegal agreement existed. For example, an agreement may be implied because competing firms all acted in a similar manner following a meeting or exchange of information. While the meeting or exchange of information may not in fact have prompted action, the inferences made from the circumstances may be difficult to overcome. Thus, actual compliance with the antitrust laws is only the first step in protection from antitrust scrutiny. It is necessary for companies to avoid not only action that violates the antitrust laws, but also lawful action that may create an impression of impropriety.

The second element of a Sherman Act violation focuses on whether an agreement unreasonably affects competition. While not every agreement to restrain trade will be deemed to automatically violate the Sherman Act, certain conduct is presumed to be unreasonable and therefore unlawful “per se” under the antitrust laws. In this circumstance, there can be no defense that the activity involved was well-intended, is reasonable, or should otherwise be found lawful. The per se violations of greatest concern to trade associations generally involve:

- a. Price Fixing and Bid Rigging: where two or more competitors establish by agreement, or by a pattern of conduct which amounts to an agreement, a coordinated price or pricing policy for the products they sell or inventory they purchase;
- b. Market Allocation: agreements between competing companies to divide up products, customers, territories, or to agree on output;
- c. Group Boycotts and Collective Refusals to Deal: group activities among competitors that cause significant competitive injury to third parties, such as the “blackballing” or boycotting of customers or suppliers; and
- d. Agreements to Control Production: agreements among competitors to increase or restrict the quantity or quality of production levels.

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Other joint activity may also violate the antitrust laws, even if it does not rise to the level of a per se violation. In non-per se situations, illegality depends on an analysis of whether an activity unreasonably restrains trade. This inquiry requires examination of all the facts and circumstances surrounding the conduct, and a balancing of the pro-competitive benefits of the activity against the potential anti-competitive consequences. Examples of non-per se violations that still may be problematic in certain circumstances include exclusive dealing arrangements, reciprocal sales and purchase agreements, and agreements to establish industry product standards. Frequently, this so-called “rule of reason” approach does not lend itself to specific guidelines, and it is often necessary to consult with legal counsel to determine whether an activity might constitute an unlawful restraint of trade.

3. ANTITRUST GUIDELINES

(a) PRICING: DO NOT DISCUSS OR EXCHANGE INFORMATION ON PRICES OR ANY PRICE-RELATED ASPECT OF COMPETITION.

Pricing is the most sensitive subject under the antitrust laws. Agreements between two or more competitors that fix, stabilize, or tamper in any way with the price of goods or services, whether express or implied, is generally a per se violation of the antitrust laws. When such an agreement is present, the activity is illegal without any further analysis of its reasonableness, arguable benefits to the public, or extenuating circumstances.

“Price” in this context includes all the elements of terms of sale that directly or indirectly affect price or pricing decisions, including: sales prices, discounts, allowances, freight, credit terms, costs of production, cost and unavailability of raw materials, inventory levels, profit margins, or levels of capacity utilization. An “agreement” to affect price may be no more than an informal understanding among competitors based upon “casual remarks” or a “knowing wink or nod” from which an inference of concerted action may be raised. Examples of behavior found to potentially violate the Sherman Act include:

Prices: Plaintiff sued a group of truck dealers alleging a conspiracy to refrain from price competition. The plaintiff offered testimony that at a dealer meeting, two defendants approached him and “told him that ‘the way it works’ in New Jersey is that ‘dealers don’t compete on price.’” The plaintiff also introduced handwritten notes taken by a consultant at a dealer sales meeting that stated there was a “gentleman’s agreement among...truck dealers that they would sell only in their own areas of responsibility.” The Third Circuit found this evidence was enough for a jury to find an agreement to restrict prices.

Discounts: A vice-president at an advertising company sent a letter to the president of its trade association requesting that discounting be discussed at the next association meeting. Following this meeting, the advertising company eliminated discounts to local accounts to “align” itself with other competitors’ decisions to follow the industry’s “standard practices and procedures.” In subsequent testimony, a company employee justified this elimination of discounts as showing “consistency” with the trade association’s “minimum standard.” The trade association also circulated a document which listed a “strong concern” about the practice of discounting. The court held that the above

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information could be enough to support a jury finding that the members of the trade association unlawfully conspired to fix prices.

Price Verification: Sales officials of corrugated cardboard box manufacturers in the Southeast followed a practice of occasionally calling each other to “verify” competitive quotes given on current sales to specific customers. The Supreme Court held the practice illegal because it had the effect of stabilizing prices as it tended to limit price reductions and the range of price changes. The decision was reached despite an express finding that the calls did not result in an agreement on actual price levels.

Information Exchange: A trade association that included manufacturers, distributors, and dealers of musical instruments allegedly organized meetings at which its members were encouraged to communicate, and did communicate, about prices and business strategies in the music industry. The FTC sued the trade association, alleging that its activities could facilitate the implementation of collusive strategies amongst competitors that would ultimately harm consumers. As part of a consent order to settle the case, the trade association was: (a) prohibited from coordinating discussion of certain topics involving the purchase or sale of products, including price; (b) prohibited from aiding members in forming anticompetitive agreements related to price or terms of dealing; and (c) required to implement an antitrust compliance policy, including establishing antitrust counsel that could provide guidance and review all written materials and prepared remarks by any director or employee of the trade association related to price.

Due to the wide range of conduct that potentially violates the Sherman Act, avoid discussing topics or making announcements related to current, proposed, or planned changes in price, product costs, terms of sale, and marketing policies. Such discussions, however informal or unintended, can be used as evidence to establish illegal agreements on price.

Similarly, ICERT, its committees, staff, and members should refrain from making any reference in meetings, literature, or writings of any kind to prices, costs, terms of sale, or other elements of doing business that may affect prices or pricing decisions without specific legal advice to the contrary. Such references can be viewed as ICERT advocating that its membership conform to specific pricing practices or policies.

Association activities or programs that may have some indirect impact on price could also evoke scrutiny. Refrain from discussion or implementation of “best practices” with an indirect impact to price. For example, agreement upon uniform warranty or delivery terms, competitive bidding procedures, and programs, activities, agreements, or understandings that tend to facilitate common pricing or price movements in the industry could all become the target of antitrust attack.

The essential rule to keep in mind is that each seller must determine on its own the prices and terms at which it purchases and sells. Avoid even the appearance or inferences of agreement or collusion that might affect price.

- (b) **COMPETITORS: AVOID JOINT ACTION THAT WOULD DISCRIMINATE AGAINST OR DISADVANTAGE A COMPETITOR.**

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i. Membership

One of iCERT's functions is to provide information and services that afford commercial benefit to all members. Each member of the industry should have an equal opportunity to participate in and receive the benefits of ICERT's activities. Further, membership should be open to all companies in the industry that satisfy basic membership requirements. ICERT members should be encouraged to participate in committees that perform functions of interest to the members, and ICERT services should be offered to members on a non-discriminatory basis. Any decision to deny membership or expel a member company should be reviewed with counsel before implementation.

ii. Codes, Standards, and Certification Programs

Reasonable industry codes, standards, and certification programs may promote quite valid interests, including the protection of safety, health, and the environment, and the maintenance of high standards of ethics and conduct. Nevertheless, remain alert as to any anticompetitive effects that a standard may have. For example, a product standard that is unreasonably biased in favor of one competitor's product at the expense of another's may raise significant antitrust problems. Care should be used both in creating and applying codes, standards, and certification criteria, and in influencing other organizations as they do so. Any standard setting or certification programs should be reviewed with counsel before implementation.

(c) CUSTOMERS AND SUPPLIERS: REFRAIN FROM ANY ACTIVITY THAT HAS THE APPEARANCE OF DIVIDING UP MARKETS, AGREEING TO CONTROL PRODUCTION, OR JOINTLY DISCRIMINATING AGAINST CERTAIN CUSTOMERS AND SUPPLIERS.

i. Division of Markets

Agreements or understandings among competitors about who will or will not sell in a geographic market, to certain customers, or identified products are generally per se illegal. Discussions between company representatives about plans for a product, geographic markets, or regarding certain customers may be interpreted as creating an understanding that the companies will restrain competition between one another. For example, a criminal conviction resulted when two companies agreed not to solicit business from the other company's existing customers and reported to one another when a customer became unhappy and was considering switching suppliers. For these reasons, avoid discussions among competitors relating to customers, specific products, or territories.

ii. Control of Production

Agreements among competitors to increase or restrict services or production levels are problematic under the antitrust laws. The same is true of agreements among competitors to limit the quality of production, restrict the products or services sold to a customer, refrain from introducing new products and services or eliminating old ones, or accelerate the introduction or withdrawal of a product or service. Avoid discussions of any current or plans to change levels of production or output.

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iii. Discrimination Against Customers and Suppliers

Discrimination against customers or suppliers may also be problematic in certain circumstances. When iCERT or one of its committees is contemplating action that may have a significant commercial impact on other parties, review the proposed action with antitrust counsel before implementation to ensure it does not violate the antitrust laws.

(d) GOVERNMENT RELATIONS: ENSURE LOBBYING EFFORTS ARE DESIGNED TO ACHIEVE GOVERNMENT ACTION AND NOT MERELY INJURE COMPETITION.

There is a constitutional right to petition legislatures and government agencies for action and, if properly undertaken, such activity is not subject to the antitrust laws. The right to petition, however, does not provide unlimited antitrust protection. If the activity in question is not really designed to achieve legitimate government action but rather amounts to a sham used to injure competition, for example, it may raise serious antitrust problems.

For example, a pharmaceutical firm filing a citizen's petition with the FDA regarding a pending drug application by a potential competitor containing baseless claims or deliberate misrepresentations as to verifiable facts would not enjoy protection from antitrust scrutiny. Moreover, activities are not immunized from the antitrust laws simply because a government representative encourages and happens to participate in them. Any substantial lobbying efforts, particularly if they have the potential to adversely affect members of the industry, should be reviewed with counsel before implementation.

(e) RECORDS: KEEP SIMPLE AND ACCURATE RECORDS.

"Records" refer to a wide array of communication – documents, e-mail, videotapes, audio recordings (such as voicemail), text messages, and the like. As records are frequently subject to misinterpretation, it is important to create records with the thought that it could be produced to the government or a plaintiff's lawyer. Use language that is clear, simple, and accurate, avoid speculation about the legality of specific conduct, and avoid language that may arouse suspicion (i.e. "Dominate the market" or "Destroy after reading"). When possible, limit the creation of records that are not necessary for business or legal purposes, and do not retain records longer than necessary for business or legal purposes.

(f) MEETINGS: PREPARE AND FOLLOW AN AGENDA AND AVOID DISCUSSION OF SENSITIVE INFORMATION.

ICERT meetings regularly bring together representatives of companies that are market competitors. For this reason, it is important to eliminate any suspicion that a meeting might be used for anticompetitive purposes. Before the meeting begins, create an agenda that antitrust counsel can review. Attempt to follow that agenda as closely. Unless otherwise approved by counsel, participants should avoid discussion of the topics discussed above, as well as other competitively sensitive information. Finally, keep accurate meeting minutes that can be reviewed by counsel before circulation.

(g) REPORTING: REPORT ANY SUSPECTED ANTITRUST VIOLATIONS IMMEDIATELY

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Any suspected antitrust violations should be immediately reported to the executivedirector@theindustryCouncil.org. Among the reasons this is so essential is that several countries, including the U.S. and European Commission, have leniency programs that allow corporations to avoid criminal liability if they are the first to report participation in a criminal antitrust violation.

4. CONCLUSION

Discussion of every situation which may implicate the antitrust laws in a single set of Guidelines is impossible. While these Guidelines attempt to provide instruction across a range of antitrust issues, they are by no means exhaustive. If you have any question about whether certain actions, activities, or agreements violate antitrust laws, please consult legal counsel. July 2005