



**USING THE PRO-COMPETITIVE BENEFITS OF
INDUSTRY STANDARDS, ACCREDITATION AND
CERTIFICATION PROGRAMS
TO OVERCOME ANTITRUST LAW
RESTRICTIONS ON RESTRAINING TRADE**

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Standards promote economic efficiency; enhance consumer safety and lower consumer costs.

1. Promote economic efficiency by defining minimum performance characteristics and creating opportunities for interoperability across brand names (i.e., defining a 2 x 4; standardized tire sizes)
2. Standards promote safety; baby car seats, lawn mowers)
3. Lower costs - - TVs

Certification Programs Provide Consumers With Third Party Evaluations Of Professionals

1. Certified auto mechanic
2. Board certified physician

Accreditation Programs Provide Consumers With A Means Of Evaluating Service Vendors

1. Accredited hospital
2. Accredited university

All standards programs, certification programs and accreditation programs restrain trade by limiting the ability of those who can't produce a product to meet the standard, or can't pass the certification test or don't meet the accreditation requirements to stay in business.

The Antitrust Laws

Section 1 of the Sherman Act prohibits every contract, combination or conspiracy in restraint of trade. The Sherman Act carries criminal penalties, fines and treble damage remedies.

Question - - Since all standards set limitations on the ability of persons to conduct trade and therefore restrain trade, how do we set standards, establish certification programs or create accreditation standards without violating the Antitrust Laws - - going to jail or getting stuck with huge fines and treble damages?

The Antitrust Rule of Reason or “Trust Me”

Although Section 1 of the Sherman Act, enacted in 1890, outlaws every contract, combination or conspiracy in restraint of trade, the Supreme Court held in 1911 that the term “every” really means “every unreasonable.”

The Supreme Court recognized that, since all business contracts have the effect of limiting trade in some way, the law adopted by Congress cannot outlaw every agreement or contract but only those agreements or contracts that are “unreasonable.” However, the court also held that some agreements or contracts are so restrictive that they are “illegal per se.”

What antitrust lawyers refer to as the “Rule of Reason” is a series of court cases explaining when a contract, combination or conspiracy is “reasonable” in such a manner that there is no antitrust violation.

Agreements or contracts that are illegal
“per se” include:

- Price fixing
- Territory or customer allocation
- Bid rigging
- Group boycotts

In evaluating “reasonableness,” Courts:

- Balance pro-competitive benefits versus anti-competitive risks
- Examine effects on consumers
- Look at the reason behind the restrictive conduct
- Look at the market power of the company or group imposing the restriction

When you establish standards, accreditation or certification programs, you must:

- Establish a justifiable rationale
- Get broad based input
- Respond to possible objections
- Provide a reasonable level of document process
- Have relevant and valid exams
- Require continuing education and/or re-accreditation
- Have a mandatory process for updating your program

A Justifiable Rationale

In order to pass the “rule of reason” test you must have a supportable rationale for your standard. Such rationales would include:

- Safety - - i.e., building codes / healthcare
- Need for interoperability - - i.e., gasoline / broad usages
- Consumer’s need for confidence in professionals
- - i.e., doctors and lawyers’ licenses to practice
- Need for standards / credential
- Public policy / public benefit

Get Broad Based Input

- Consensus v. non-consensus standards
- Even in non-consensus settings, put draft documents out for comments
- Seek input from all relevant stakeholders, including manufacturers, distributors, raw material suppliers, consumers, academics, and government officials
- Transparency and opportunity for all to participate

Make a Thorough Evaluation of All Comments

Have a standards, certification or accreditation committee that includes recognized experts

- Committee composition – leaders, knowledgeable, credible, broad based
- Set up conflict of interest rules and procedures
- Require decisions to be objective and justifiable
- Be “generic” wherever possible
- Deal with IP issues – who owns what
- Confidentiality
- Delivery of product to public must be planned – one voice

Make a Thorough Evaluation of All Comments

Have a written record of how the Committee decides questions raised and deals with comments submitted.

Have a written record of Committee's substantive choices.

Make a Thorough Evaluation of All Comments

Create an appeals process

- For accreditation and certification
- For standards

Continuing Education and Re-Accreditation

Require continuing education, re-accreditation and re-certification

- Assures public safety and confidence
- Need to update based on new information, new skill sets
- Need to update based on new technology
- Need a basis for testing or measuring compliance
- Testing and measuring must be non-discriminatory and be supported by acceptable testing methodologies

Exams

- Exams must be valid – psychometrics
- Exams must be secure
- Exams must be fresh
- Exams must be relevant
- Exam content must rotate
- IP protection for exam and exam content

Update Your Programs

- Have a defined cycle for updating
- Include broad based input
- Follow established appeals process
- Be transparent
- Protect your content

Antitrust Enforcement - - Case Law

There have been many litigated cases and consent orders involving standards, codes of ethics, accreditation and certification. A quick look at some of these cases demonstrates that the courts and the antitrust agencies usually take a common sense approach when applying antitrust principles to such a setting.

Silver v. N.Y. Stock Exchange 373 US 341 (1963)

The New York Stock Exchange (a membership organization) voted to cancel Mr. Silver's direct telephone lines with NYSE members. Mr. Silver, a non-member, asked why NYSE members were not permitted to have direct lines to his offices.

Silver v. N.Y. Stock Exchange 373 US 341 (1963)

NYSE said we are covered by the Security Exchange Act not the antitrust laws. Silver sued under the Sherman Act.

Silver v. N.Y. Stock Exchange 373 US 341 (1963)

The Supreme Court held that the NYSE had to comply with the Sherman Act and the Sherman Act required that before the members of the NYSE could collectively refuse to deal with Silver, he was entitled to procedural safeguards including a reasonable method of informing a protesting non-member why the rule was invoked and giving the non-member the right to reply and explain his position.

**Allied Tube & Conduit Corp. v.
Indian Head, Inc.
486 US 492 (1988)**

The National Fire Protection Association (NFPA) publishes various standards including The National Electrical Code. In considering whether to expand the provision of the National Electrical Code to include plastic conduit as well as steel conduit, the proposal was submitted for a vote at an NFPA meeting.

**Allied Tube & Conduit Corp. v.
Indian Head, Inc.
486 US 492 (1988)**

All members of NFPA at the meeting were entitled to vote. A majority vote determined the winner.

**Allied Tube & Conduit Corp. v.
Indian Head, Inc.
486 US 492 (1988)**

Steel conduit manufacturers had 230 people join the association and all voted against plastic pipe. These people communicated by walkie-talkies at the meeting and were told how to vote.

**Allied Tube & Conduit Corp. v.
Indian Head, Inc.
486 US 492 (1988)**

The court said antitrust principles apply and this was not a government rulemaking activity but a private association standard setting. You can't pack the house.

American Society of Mechanical Engineers v. Hydrolevel 456 US 556 (1982)

The American Society of Mechanical Engineers (ASME) publishes many codes including a Boiler and Pressure Vessel Code (Boiler Code).

The Boiler Code required that boilers have a low water fuel cut off.

American Society of Mechanical Engineers v. Hydrolevel 456 US 556 (1982)

McDonnell-Miller dominated the market for low water fuel cut offs. Hydrolevel entered the market with a low water fuel cut off valve that included a time delay.

American Society of Mechanical Engineers v. Hydrolevel 456 US 556 (1982)

Through its leadership position on ASME committees, McDonnell-Miller got ASME to issue an opinion that a low water fuel cut off with a time delay did not meet the standard. The court found there was no factual basis for such a conclusion.

American Society of Mechanical Engineers v. Hydrolevel 456 US 556 (1982)

The Supreme Court held that the ASME was responsible for the actions of its committees even if it was not actually aware what was happening. ASME gave its committee apparent authority to speak for ASME and thus assumed responsibility for the committee's actions.

**FTC v. Music Teachers
National Association
(Consent Order April 4, 2014,
Docket C-4448)**

The Music Teachers National Association represents over 20,000 music teachers in the U.S. and has 500 state and local chapters.

**FTC v. Music Teachers
National Association
(Consent Order April 4, 2014,
Docket C-4448)**

The Association's Code of Ethics provided:

The teacher shall respect the integrity of other teacher's studios and shall not actively recruit students from another studio.

**FTC v. Music Teachers
National Association
(Consent Order April 4, 2014,
Docket C-4448)**

The Association signed a Consent Order with the FTC requiring the Association to change its Code of Ethics and implement an antitrust compliance program.

FTC v. California Association of Legal Support Professionals (Consent Order April 4, 2014, Docket C-4447)

The Association's Code of Ethics stated:

It is not ethical to cut the rates you normally and customarily charge when soliciting business from a member firm's clients. . . .

FTC v. California Association of Legal Support Professionals

The Association's Code of Ethics stated:

It is not ethical . . . to speak despairingly of another member. . . .

. . . never discuss the bad points of your competitor

It is unethical to contact an employee of another member firm to offer employment with your firm, without first advising the member of your interest

FTC v. California Association of Legal Support Professionals

The FTC ordered the Association to change its Code of Ethics, put notices on publications and its website telling members it will not enforce the offending parts of the Code of Ethics and constitute an antitrust compliance program.

How Do You Know What Is Permitted?

- FTC Advisory Opinions
- DOJ Business Review Letters
- Opinions of Counsel

Conclusion

As technology use continues to grow and the economy becomes more and more global, consumers will place more and more reliance on standards, certification and accreditation to assist them in deciding what products and what services to purchase.

Conclusion

Associations have a most important role in developing the standards and accreditation and certification programs that will enhance the growth of the industries and professions they represent.

Conclusion

To properly utilize this opportunity, you need to fully understand the basic antitrust principles that apply to such activity.

QUESTIONS ????

Thanks for participating in this webinar.

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