Module C - Legal

The next submodule on ASME and legal issues is C2, Antitrust.
### REVISIONS

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Objectives

ASME is particularly concerned with the impact of federal antitrust laws on its public service of promulgating, revising and interpreting industry-wide codes and standards and administering conformity assessment programs.

This submodule will:
Explain how antitrust laws affect ASME
Provide guidelines for avoiding antitrust violations in codes and standards development and in conformity assessment
AGENDA

I. The Antitrust Laws
II. A Brief History of ASME and Antitrust Cases
III. Related Antitrust Cases
IV. General Guidelines
V. Basic Do’s and Don’t’s

Agenda

Part I of the presentation will introduce you to the antitrust laws and the aspects of ASME’s activities that make ASME potentially vulnerable to antitrust actions. Part II will describe some of the antitrust cases ASME has been involved in and show how some of the procedures and controls ASME now employs have derived from those actions. Part III will describe some of the antitrust cases that other standards-developing organizations have been involved in. Part IV will provide you with some general guidelines to help you avoid antitrust violations when developing codes and standards, issuing interpretations and administering conformity assessment programs. Finally, part V will provide some good general do’s and don’t’s.
Part I - The Antitrust Laws
The Antitrust Laws

The Sherman Act:
The basic federal antitrust law—the Sherman Act—was enacted in 1890 to regulate certain business activities in interstate commerce. In sweeping terms, it forbids "every contract, combination, or conspiracy, in restraint of trade or commerce" and also prohibits monopolization and attempts or conspiracies to monopolize trade. Most of the substantive antitrust law that governs business today comes from analysis and application of Sections 1 and 2 of the Sherman Act by the federal courts.
The Antitrust Laws (cont’d)

The FTC and Clayton Acts:
The Clayton Act of 1914 and the Federal Trade Commission Act (also passed in 1914) elaborate upon and extend some of the Sherman Act's concepts and provide additional enforcement mechanisms. Like the Sherman Act, the FTC Act contains general prohibitions. It prohibits "unfair methods of competition" and "unfair or deceptive acts or practices".

The Clayton Act, as amended by the Robinson-Patman Act in 1936, forbids or regulates specific kinds of business transactions, including exclusive dealing and tying arrangements, and certain mergers, acquisitions and joint ventures.

NOTE: A “tying arrangement” is an arrangement in which a person agrees to sell one product, the “tying product,” only on the condition that the buyer also purchase another product, the “tied product.”

An example of this would be some of the recent allegations and findings against Microsoft.
Penalties - Government Action

For Sherman Act violations:
Violation of the Sherman Act is a crime—a felony—punishable upon conviction by a fine of up to $1 million for a corporation. For individuals the result can be a fine of up to $100,000 and imprisonment for up to three years.
Penalties - Government Action (cont’d)

For Sherman Act violations (cont’d):
Alternatively, or in addition to criminal prosecution, the Justice Department may attempt to
punish a violator through civil injunctive relief, such as requiring sale of part a business, or
prohibiting certain conduct found to be illegal.

For FTC Act violations:
The Federal Trade Commission has enforcement authority with respect to the FTC Act and may
institute administrative proceedings and issue cease-and-desist orders against offending business
entities.
Penalties - Damaged Parties

Private Right of Action:
In addition to Government action, lawsuits may also be brought by anyone who alleges that he has been damaged by the defendant's anti-competitive acts. Private antitrust actions, if successful, result in damage awards three times the amount of actual damages proved. Private parties can also sue for injunctive relief against violations of the antitrust laws.
The Costs of Antitrust Actions

Costs:
Obviously, it is not only the prospect of conviction or a treble damage award that makes antitrust enforcement actions so costly for companies and individuals alike. Successful private action would also result in the defendant being assessed the plaintiff’s attorneys’ fees and costs. Antitrust litigation, even for the successful party, is lengthy, complicated and extremely expensive, especially for the defendant.
Cost is measured not only in dollars spent on legal fees and expert witnesses, but in hours of productive time lost for many company employees and officers. Finally, an antitrust violation or lawsuit may forever tarnish the reputation and name of an individual or company.
Interpreting the Sherman Act

Section 1:
Section 1 of the Sherman Act is written so broadly that it could be interpreted to forbid all joint action that affects interstate or foreign commerce—even if the results actually increase competition or protect public health and safety. Section 1 has not been interpreted by the courts that expansively, however. Much joint action has been found to be legitimate when it has a worthy motive and does not unreasonably restrain trade.

However, any kind of arrangement or understanding between competitors that directly or indirectly relates to prices, volumes of production, or sales territories are clearly forbidden. Even if the motives are good—for example, self-regulation by a certain industry to improve everyone's products, the courts will find a practice illegal if it adversely affects competition.

NOTE: A major difficulty for defendants is that a plaintiff does not need to establish the existence of a formal agreement; formal agreements and even conspiracies can be inferred from circumstantial evidence, such as, the existence of an unexplained meeting between competitors and changes in the particular industry that do not appear to result from natural market forces.
Interpreting the Sherman Act (cont’d)

Section 1 (cont’d):
Certain business activities are seen as so unreasonable that the courts require no more than a showing that they occurred to find that the Sherman Act has been violated. These so-called "per se" violations include price-fixing between competitors, or terms and conditions of sale; agreements among competitors to divide territory, customers, or products, or to limit production; or acts that result in boycott of a competitor's products or otherwise have the effect of driving him out of market. All violations, if successful, seriously damage competition.
The “Rule of Reason”
- Requires examination of all facts and circumstances to determine:
  - Intent to restrain competition
  - Public unreasonably deprived of access to competing goods or services
- Makes compliance difficult to determine

Interpreting the Sherman Act (cont’d)

The Rule of Reason:
This standard, known as "The Rule of Reason," requires the courts to examine all the facts and circumstances surrounding questioned conduct to decide whether the participant intended to restrain competition, and whether their action unreasonably deprived the public of access to competing goods or services. Because the "Rule of Reason" depends so greatly on the facts of each case, it is often not clear whether a particular agreement, business practice or other activity will violate antitrust laws. This gray area of the law makes compliance difficult.

NOTE: Some specific examples of this will be given later in this presentation, in the context of standards development activities, as general guidelines and as basic Do’s and Don’t’s.
Interpreting the Sherman Act (cont’d)

Section 2:
Section 2 of the Sherman Act forbids monopolization and attempts to monopolize. Monopolization is defined as deliberate acquisition or maintenance of power to control prices or foreclose access to a market.
**Pop Quiz #1**

Which of the following would most likely be allowed under the Sherman Act?

a. A friendly agreement between all competitors to put no more than two competing stores in any area.

b. Any joint action that has a worthy motive.

**Answer:** Neither. Friendly agreements like the one in part a. are never allowed.

A joint action, b., with a worthy motive might be allowed if it did not unreasonably restrain trade, but a worthy motive is not enough by itself to make the action acceptable under the Act.
ASME and Antitrust

Scrutiny under the antitrust laws:
Societies and associations like ASME that bring together competitors and potential competitors in a spirit of cooperation have always been subject to close scrutiny under the antitrust laws. ASME is a scientific and technical organization, whose members come from a broad spectrum of industry, academia, government and the general public. Compared to members of a trade association, ASME’s members do not run as great a risk of their cooperative work on behalf of ASME being viewed as a collusive effort to help their own particular employers.
ASME AND ANTITRUST

- Vulnerable ASME activities include codes & standards development and conformity assessment.
  - Legal, recognized as beneficial, often required by regulation
  - BUT may affect competition by
    • Limiting competition to those products that meet the standards
    • Increasing the cost of producing a product
  - Have enormous economic importance

ASME and Antitrust (cont'd)

Vulnerable ASME activities:
From an antitrust perspective, ASME's principal vulnerability is in its codes and standards development and conformity assessment activity.
Codes and standards writing and conformity assessment programs are perfectly legal. Courts and government regulators have long recognized the need for such programs and their beneficial effect.
Nevertheless, by setting standards and establishing industry codes, ASME is engaged in an activity that may have the effect of limiting competition to those products that meet its specifications. The adoption or revision of a code or standard will often add or change the requirements for compliance. These changes or additions may increase the cost of producing a product that complies with the code. Also, existing products may not conform to a new or revised standard, and as a result may make these non-conforming products unacceptable to buyers.
Since ASME's codes and standards serve as the basis for governmental and industry regulations, ASME has even more power as a standards-setting body. For a large number of enterprises, compliance with ASME codes and standards, or accreditation by ASME, or certification by ASME are virtual requirements for doing business. Consequently, these programs have enormous economic importance.
The keys to avoiding antitrust problems are:
- Ensuring a principled and controlled impact on competition
- Reasonable, impartial, open programs that safeguard the rights of individual manufacturers and users
- Commitment of volunteers and staff to participation consistent with antitrust laws

ASME and Antitrust (cont’d)

The keys to avoiding antitrust problems:
ASME and the individual volunteer and staff members who assist it bear a heavy responsibility to ensure that ASME's unavoidable impact on competition is principled and controlled.
Generally speaking, antitrust problems can be avoided by maintaining codes and standards and conformity assessment programs that are reasonable, impartial and open, and that provide procedures for appeal that safeguard the rights of individual manufacturers or users.
ASME's codes and standards and conformity assessment programs have been designed to provide adequate safeguards for those individuals and companies who are affected by their operation.
Individual volunteer and staff members have a fundamental responsibility, however, to insure that their own participation in these programs is consistent with the requirements of the antitrust laws. Adherence to these guidelines will help ASME and all of its volunteer and staff members avoid potential liability under the antitrust laws.
Pop Quiz #2

Answer: Because they can seriously affect competition.
Pop Quiz #3

Some possible answers:
A new standard can make non-conforming products unacceptable in the marketplace.
A revised standard can make inventories of existing products unacceptable in the marketplace.
New or revised standards can add significant production costs to a product.
Part II - A Brief History of ASME and Antitrust Cases

In this part, we’re going to take a look at the two major antitrust cases ASME has been involved in. The purpose is to show you the kinds of activities that have prompted the cases and also to show you the controls and procedures introduced as a result of these cases.
U.S. versus ASME

Complaint:
1972, the U.S. Department of Justice filed an antitrust suit against ASME charging that ASME’s accreditation program, only available to companies with plants located in the U.S. and Canada, effectively prohibited foreign companies from selling their products in the U.S. and Canada.

Outcome:
Under a Consent Decree signed in 1972, ASME agreed to extend their Boiler and Pressure Vessel accreditation program to manufacturers around the world thereby opening up the U.S. and Canadian markets, effectively beginning the globalization of ASME.
ASME v. Hydrolevel

Complaint:
Two Code Committee members (a Subcommittee Chair and Vice Chair) used their positions on the Subcommittee to submit an inquiry and provide a response to the “inquiry” on ASME letterhead (an interpretation) that effectively prohibited one of their employer’s competitors from marketing his product (a delayed water level safety device for use in Code-stamped heating boilers).

Outcome:
The Supreme Court of the U.S. determined that a standards development organization is liable for antitrust violations arising from activities of its volunteers or staff even when the organization does not know about, approve of, or benefit from those activities, as long as the volunteers or staff appear to outsiders to be acting with the association’s approval (i.e., with its “apparent authority”).
ASME v. Hydrolevel (cont’d)

ASME’s response:
In response to the Supreme Court’s decision and directive that ASME be self-policing to guard against future antitrust law violations, ASME substantially revised its policies and procedures, including the following:
Enhanced due process guidelines and rights of an aggrieved party to appeal any action or inaction
Formed Interpretation Committees (previously, interpretations were answered by Chair, Vice Chair or staff secretary)
Published responses to technical inquiries, so that not solely the inquirer would have access to the response and provided means to reconsider an interpretation if additional information is available
Developed an “Agree to Adhere” form (now the Participation Agreement form) and Engineering Ethics material for New Members
Introduced Leadership and Training Sessions for Committee Chairs and upper tier Committee members and staff
Introduced a Conflict of Interest Policy
Part III – Related Antitrust Cases

In this part, we’re going to take a look at some antitrust cases that other standards-developing organizations have been involved in.

Complaint:
This manufacturer of metal conduit packed the 1980 annual conference of NFPA with other manufacturers of the same type of conduit and their employees who were recently signed up as members of NFPA. There, they voted against a proposal to revise the Fire Code to allow the use of plastic conduit for wiring buildings. The proposal had been recommended to the membership by an NFPA panel of experts.
Indian Head v. Allied Tube & Conduit Corp., 817 F.2d 938 (2nd Cir., 1987), aff’d in part, 486 U.S. 492 (1988) (cont’d)

Outcome:
The case seems to be an illustration of what a standards writing body should not do. Findings were as follows:
A special interest group was permitted to overwhelm the input of other interests. No “balance” of interest groups was observed.
All members of the association were allowed to vote on the proposal even though they had no knowledge of the proposal and a vested interest in its outcome.
The recommendation of an unbiased panel of experts was unjustifiably ignored.
Without valid and objective criteria, a proposal was allowed to fail which in turn adversely affected a manufacturer that was precluded from selling its product on the open market.

NOTE: NFPA was let out of the case before trial.
Session Tank Liners V. Joor Manufacturers

Complaint:
Here, a manufacturer used his position as an NFPA Code committee member to defeat a proposed revision allowing a competitor’s process of repairing leaks in underground tanks by lining the tanks with epoxy.
Sessions Tank Liners V. Joor Manufacturers (cont’d)

Outcome:
The finding was misconduct on the part of a member (manufacturer), which consisted of:
- Misrepresenting data, although the member was considered an expert in the field
- Sending anonymous letters to the committee opposing the revision
- Questioning the safety of the use of epoxy
- Warning of legal implications if the revision was approved
- Calling for a vote on the revision after the competitor had left the meeting, even though a vote on the proposed revision was not on the regular committee agenda

NOTE: NFPA was not named as a defendant in this case.
Part IV – General Guidelines
Codes and Standards Development

Things to keep in mind:
The adoption or revision of a code or standard will often add or change the requirements for compliance. These changes or additions may increase the cost of producing a product that complies with the code. Also, existing products may not conform to a new or revised standard, and as a result may make these non-conforming products unacceptable to buyers.

Putting the “Rule of Reason”, and the broad wording of the Sherman Act, into perspective: If the standard is reasonable and objective, and does not discriminate unfairly between particular products, its adoption or revision should not be found to be unlawful. Every member of a committee or subcommittee responsible for developing a code or standard should be careful that all of its that provisions can be justified.
Codes and Standards Development (cont’d)

Questions to ask:
Here are questions to ask to minimize antitrust issues in codes and standards development:
Does the code or standard have a proper objective? If it does, it is more likely to be found *reasonable* by the Justice Department or a court. Certainly safety is a proper objective, as is quality assurance in highly technical areas. Most ASME-developed codes and standards have one of those two purposes. Standards may be judged *unreasonable*, however, if they are intended to assist one business or group at the expense of others or if they do not have an objective, technically sound basis.

Is the form the code takes suitable for the industry in question? That is, is the code fair, is it reasonable in light of the objective it seeks to further, and does it allow room for innovative products and designs?

Is the code or standard based upon valid and objective criteria? That is, can it be justified technically and logically?

Is the code or standard the least restrictive standard possible that will lead to the desired result of safety or quality?
Codes and Standards Development (cont’d)

Questions to Ask (cont’d):
Is the Standards Committee that develops or references the standard broadly based?
Are any potential conflicts of interest on the group considered and publicized?

NOTE: In order to provide a balanced review of standards, ASME requires that its Standards Committees include individuals from all affected interests—producers, distributors, regulators, academics, consumers and the technically qualified public at large. ASME also requires review of a proposed standard by a Supervisory Board before it promulgates a new or revised standard. This approach helps to ensure that any new or revised standard will not have a discriminatory impact on any particular group.
Have opposing views been considered? If they are, then chances are the harm to particular manufacturers or products has been minimized.
Are the procedures followed in developing or referencing a code or standard fair? ... Let’s take a closer look at what is meant by “fair.”
Fairness

Fairness means that:
The public has been given adequate notice of the proposed development of a standard. An accurate record of the consideration of the group is available to interested people. A formal and publicized appeals process is in place to allow parties to contest decisions they feel were unfair. Standards are reviewed periodically to ensure that they reflect current technologies. All industry members have an opportunity to conform to the standards.
Issuing Interpretations

Special consideration:
Interpretations of ASME standards do not revise the requirements of the standard. Therefore, there is less opportunity for the general public or uninformed parties who may be affected by an interpretation to become involved in the process of writing one.

Guidelines:
Individuals who serve on a special committee, subcommittee or standards committee responsible for interpretations of ASME codes and standards must exercise extreme care to ensure that their interpretation of a valid standard does not in itself appear to have an unreasonable effect on competition.
Objectivity and technical accuracy are essential.
If a member has any doubt as to the correctness of an interpretation, or has any reason to believe that it will have a particular impact on (or damage the competitive position of) any business, he must refer it for consideration to the next higher committee or board.
Furthermore, individuals participating in the interpretation process must be alert to avoid even the appearance of a conflict of interest. If a proposed interpretation might help or hurt a company or organization with which a member is affiliated, that individual should, at a minimum, disclose to the ASME staff member involved the nature of the company's interest and where appropriate, decline to participate in the preparation of the interpretation.
Accreditation Guidelines

Accreditation may be necessary to satisfy governmental or insurance carrier requirements and may even be required for a company to stay in business. Therefore: Decisions with respect to certificates of authorization must be based solely upon objective, non-discriminatory and technically justifiable criteria. Safeguards with respect to conflicts of interest of decision-makers, or those conducting surveys or investigations of businesses seeking accreditation, are critical since denial of accreditation will have an immediate and serious impact on the company involved.

NOTE: ASME's accreditation programs have valid purposes, and are conducted in a reasonable and objective manner. Furthermore, ASME has established procedures that allow for ready access to appeal mechanisms for those denied accreditation, and has provided those companies with what is described in legal terms as due process. That is, in the event of a denial of or a withdrawal of accreditation, the grounds for the decision are disclosed and the affected organization is given ample opportunity to correct whatever problems led to the decision or to show why the accrediting group was wrong.
Part V - Basic Do’s and Don’t’s
Basic Do’s and Don’t’s

Don't attend any meetings under ASME auspices that do not have a fixed agenda of matters to be covered.

The agenda should be followed carefully and the addition of items not on the agenda should be fully explained by the Chairman of the committee, subcommittee or other group holding the meeting, or by the person proposing the addition.
Basic Do’s and Don't's (cont’d)

Don't take part in any "rump" sessions at which matters before a committee or other body as a whole are to be discussed.
Basic Do's and Don't's (cont’d)

Don't discuss prices of competing or potentially competing products and don't disparage any particular product--whether or not it meets ASME standards.
Basic Do’s and Don't’s (cont’d)

Don't attempt to influence ASME programs and standards writing activities to benefit your own private business activities or those of your employer in a manner not available to the public.
Basic Do’s and Don’t’s (cont’d)

**Don’t** discriminate against nonmembers of ASME or give preferential treatment to ASME Committee members.
Basic Do’s and Don't's (cont’d)

If you serve on a committee or subcommittee that is responsible for revising or interpreting a code covering areas in which your company does business, do make your company's interest in the subject clear to other members of the group, before you participate in the work of that group.
Basic Do's and Don't's (cont’d)

If it comes to your attention that any company is harmed, or may be harmed as a result of an ASME written code or standard or written interpretations of an ASME code or standard, don't ignore the situation, but do bring it to the attention of ASME's officers or staff immediately.
In Conclusion

The antitrust laws are complicated. Compliance is largely a matter of common sense and fairness.

Ask:

Does any action taken by ASME or its volunteers lead to an unreasonable restraint of trade?

Is any particular business hurt by a code, standard, or interpretation, when it need not be to achieve a justifiable technical or public interest objective?

With these considerations in mind—and an ever-watchful eye out for possible conflicts of interest—

ASME and its members should not go wrong.

If there is any doubt whether any program or action might violate these guidelines, an ASME officer or staff member should be consulted.
POP QUIZ #4

Which of the following could lead to antitrust problems?

a. An acquaintance mentions that a recent interpretation will have a devastating effect on a certain company. You say ho-hum and forget it.
b. A committee chairman uses his office to delay the approval of a revision to a standard
c. A committee member’s request for interpretation is moved up on the agenda, causing other items to be delayed due to lack of time.

Pop Quiz #4

Answers:
All three situations could cause problems.
In a., you have an obligation to notify an ASME officer if you become aware of harm done or expected.
In b., you have a right to present your point of view, but not to use influencing tactics not available to the public.
In c., you have given preferential treatment to committee members.
POP QUIZ #5
(Extra Credit)

Which of the following could lead to antitrust problems?

a. You are having lunch with two other members of your committee and you get into a serious discussion regarding the accreditation of a company under consideration by the committee.

b. You are under pressure to get your committee together and decide to dispense with a formal agenda. “Everyone knows what we have to talk about, anyway,” you think to yourself.

Pop Quiz #5

Answers:
Both a. and b. could lead to problems.
In a., you should not discuss committee issues without the full committee being present.
In b., you should always have a formal agenda and stick to it.
SUMMARY

I. The Antitrust Laws
II. A Brief History of ASME and Antitrust Cases
III. Related Antitrust Cases
IV. General Guidelines
V. Basic Do’s and Don’ts

Summary
REFERENCES

Legal Implications of Codes and Standards Activities:


References