

SD ASSOCIATION

ANTITRUST POLICY AND GUIDELINES

The purpose of this Antitrust Policy and Guidelines is to provide a brief overview of the antitrust and competition laws applicable to the SD Association's ("SDA") activities and to provide general guidelines for compliance with those laws.

The SDA is a global open industry standards organization established in January 2000 and comprised of close to 1,000 companies. The SDA provides industry standards and promotes SDA standards acceptance in a variety of applications. The goal of the SDA is to promote and foster innovation and support consumer choice by creating standards that allow the interoperability of different components. The SDA's activities are a coordinated effort among competitors whose interest or objective involves the design, development or application of a next generation flash memory card with security methods that prevent unauthorized use or copying. As with any collaboration among competitors and potential competitors, these activities must comply with antitrust and competition laws and are subject to regulatory scrutiny.

The SDA cannot fulfill its purpose if the conduct of its members does not comply with competition and antitrust laws. A violation (or claims of violation) of antitrust laws jeopardize what all participants are working so hard to build; impede SDA's mission; and may expose participants and their employers to the risk of imprisonment and other criminal penalties, civil remedies, and significant litigation costs. The penalties for violating antitrust laws can be quite severe, including large fines and even imprisonment of individuals found guilty of illegal conduct. Contrary to the popular belief that recent administrations have relaxed antitrust enforcement, the Justice Department has recommended jail sentences for the majority of persons convicted of violating antitrust laws. The Justice Department also reports that the number of criminal charges and terms of sentences have increased in recent years for violations of the antitrust laws. Moreover, the U.S. Supreme Court has ruled that a trade association may be held legally responsible for the unauthorized, as well as authorized, acts of its members. Accordingly, every effort must be made to avoid even the appearance of impropriety.

Antitrust litigation brought by private parties and investigations by the Department of Justice and the Federal Trade Commission are costly. Although many SDA participants receive antitrust compliance training from their employers, SDA wants to help all of its participants avoid potentially expensive litigation and investigation by reinforcing such training and highlighting for those participants that have not received such training the antitrust risks that are most pertinent to standards development and to explain the SDA's policies with respect to antitrust law matters.

GENERAL BACKGROUND ON U.S. ANTITRUST LAWS

In the U.S., antitrust and unfair competition law is called “antitrust law,” and elsewhere it is called “competition law.” But regardless of the label, most countries have substantially similar laws regarding this matter. In general, most of the world prohibits agreements and certain other activities that unreasonably restrain trade.

There are two antitrust statutes in the U.S. which are of principal concern to individuals and firms who take part in non-profit organizational activities: the Sherman Act and the Federal Trade Commission Act. These laws prohibit contracts, combinations, and conspiracies in restraint of trade. The Supreme Court has said that not every contract or combination in restraint of trade constitutes a violation, rather only those which unreasonably restrain trade are unlawful. This means that courts will look at all of the facts and circumstances surrounding the conduct in question in order to determine whether it unreasonably restrains trade and therefore violates antitrust law.

Competition authorities throughout the world uniformly condemn actions that are referred to as “naked restraints on trade” – that is, agreements that do nothing more than limit competition between competitors. The conduct is exclusively presumed to be unreasonable and therefore unlawful *per se* because it clearly restrains competition and has no other redeeming benefits. The classic examples that could arise in the standards process – and the kinds of violation that most frequently result in significant jail time for the participants – include:

- Agreements to establish price (price fixing)—for example, where standards participants or other competitors agree on the prices that they will charge for compliant products;
- Agreements to restrict output—for example, where standards participants or other competitors agree on how much of a compliant product they will each produce;
- Agreements to allocate customers or territories—for example, where standards participants or other competitors agree on where or to whom they will each sell compliant products;
- Agreements to refuse to deal with third parties (boycotts); and
- Tie-in sales which require the customer to buy an unwanted item in order to buy the product desired.

Other kinds of violations can also arise in the standards process. For example, selecting one technology for inclusion in a standard is lawful, but an agreement to prohibit standards participants (or implementers) from implementing a competing standard or rival technology would be unlawful – although as a practical matter, a successful standard may lawfully achieve this result through the workings of the market.

Industry associations like the SDA by their very nature present potential antitrust problems. One reason is that in bringing competitors together into a consensual

standards setting organization, they have the means and opportunity to collude in violation of the antitrust laws. Both the Sherman and Federal Trade Commission Acts prohibit agreements in restraint of trade and an industry organization by its very nature reaches agreements which means that one element of a possible violation is already present; all that is missing is action to restrain trade in order for there to be a violation.

Single entity conduct can also violate U.S. antitrust law. Monopolization is the obtaining of a monopoly – the ability to obtain profit by restricting output and selling at a higher price – through wrongful means. For example, a company might unlawfully convert its patents into monopoly power by misleading other participants in the standards organization into incorporating the company's patented technology into a standard under the false impression that no patents were involved.

What if SDA meetings occur outside the U.S.? Whose law governs? Most countries will apply their antitrust and competition laws to any conduct that has a substantial effect in their country, regardless of where that conduct took place. The SDA's Antitrust Policy and Guidelines apply to SDA activities wherever the meetings occur.

LAWFUL ACTIVITIES

As a basic premise, the goals of the SDA to foster innovation and consumer choice are clearly lawful. Regulators recognize that standard setting organizations offer pro-competitive benefits when they help promote innovation and allow consumers to make educated choices. The proposed activities, if properly conducted, will not be found to violate the antitrust laws because they will not have an adverse effect on the competitive market place.

The SDA may rely on the judgment of legal counsel who may be present at the SDA meetings to ensure that topics which may give an appearance of an agreement that would violate antitrust laws are not discussed at these meetings. However, the presence of counsel at a meeting should not invite probing to determine how far a discussion can proceed before it becomes apparent that it is improper and is cut off. Each member has the responsibility in the first instance to avoid raising improper subjects for discussion.

UNLAWFUL ACTIVITIES

The most common violations of the antitrust laws are agreements among competitors to fix prices or allocate customers. As for the SDA, the most important thing to keep in mind is that its purpose is to define standards for, and promote market acceptance of, a next generation flash memory card technology. The SDA does not involve individual member's activities in the marketing of particular products. Accordingly, it is not the business of the SDA to consider or discuss matters relating to product development, marketing, purchasing or pricing

decisions of individual companies.

SDA participants should refrain from any discussion that could provide the basis for an inference that the members agreed to take any action that might restrain trade. An “agreement” among members in antitrust terms is a very broad concept: it may be oral or written, formal or informal, expressed or implied. A “gentleman’s agreement” to “hold the line” on prices is more than sufficient to evidence an unlawful conspiracy to fix prices. It is not up to you to decide whether your words and conduct amount to an agreement – in the U.S., that decision gets made by a judge using the peculiar rules of evidence that only courts use and by a jury that is unlikely to know anything about your industry or business. The whole question about your actions will come up after the fact, and with the sure vision of hindsight, any questionable discussion or debate could be seen to have led to a tacit if not an explicit agreement that is prohibited by law. Because an “agreement” is subject to interpretation, members should refrain from discussing topics if agreeing on the subject would be unlawful (such as the respective selling prices of compliant products), then that subject should not be discussed.

Do not put the SDA, your company, your colleagues in the standards community, or yourself at risk by discussing

- Prices (current and projected) at which products or services implementing the standard should be sold, price changes, price differentials, markups, discounts, allowances, terms and conditions of sale, including credit terms, etc., or data that bear on prices, including profits, margins or cost;
- Industry pricing policies, price levels, price changes, differentials, or the like;
- Individual company current or projected cost of procurement, development or manufacture of any product;
- Individual companies’ market shares and sales territories;
- Allocation of customers, markets, production levels, or territories; or restricting the customers to whom, or territories in which, a company may sell or resell products;
- Matters relating to actual or potential individual suppliers that might have the effect of excluding them from any market or of influencing the business conduct of firms toward such suppliers or customers;
- Plans of individual companies concerning the design, characteristics, production, distribution or marketing or introduction dates of particular products, including proposed territories or customers;

- Changes in industry production, capacity or inventories;
- Using standards or certification programs to exclude suppliers or competitors from the marketplace for any reason other than cost-performance or technical considerations;
- Conditioning the implementation of a standard on the implementer's use of products or services from a particular supplier [such as requiring use of a particular manufacturer's components];
- Bidding (or terms of bids) or refraining from bidding to sell any product or service; and
- Any matter which restricts any company's independence in setting prices, establishing production and sales levels, choosing the markets in which it operates, or the manner in which it selects its customers and suppliers.

In addition to topics that are prohibited on purely competition-law grounds, certain topics are not productively discussed in technical standards-development meetings, including:

- The status or substance of ongoing or threatened litigation;
- The essentiality, interpretation, or validity of patent claims;
- Desirable versus undesirable terms of patent licenses;
- Specific patent license terms or other intellectual property rights,

These unlawful topics identified in this section shall not be discussed, and no information should be exchanged relating thereto, during any SDA meetings, social gatherings incidental to the SDA-sanctioned meetings, even in jest. Likewise, those topics should not be discussed in e-mail reflectors or other electronic communications provided under the auspices of the SDA, hallway conversations, luncheons, social events, or in any gathering held in connection with SDA standards-development activities.

COMPETITION

Nothing contained in the SDA's Antitrust Policy and Guidelines shall in any manner be deemed to prohibit or limit a member from making, using or selling any competing product which does not embody any specification standard adopted by the SDA.

BEST PRACTICES TO MINIMIZE ANTITRUST RISK

The SDA's policy is to discuss thoroughly with legal counsel any proposed programs or policy decisions before they are implemented. If any participant has

any question as to the legality of a proposed course of action, the matter should be immediately referred to the SDA Board, who will discuss it with legal counsel. In this manner, the SDA can ensure continued pursuit of its legitimate objectives with maximum protection for its participants.

Below are the best practices that SDA believes help minimize the antitrust risk inherent in standards-setting organizations like SDA:

1. Participants in SDA meetings should consult with the SDA's legal counsel or your company's counsel in all cases involving specific situations, interpretations or advice, including antitrust questions related to antitrust meetings.
2. Participants in SDA meetings should comply at all times with this Antitrust Policy and all other Policies of the SDA, including the IP Policy.
3. Adhere to prepared agendas for all SDA meetings.
4. Insist that meeting minutes be prepared and distributed to all participants, and object whenever meeting minutes do not accurately reflect the matters which transpired.
5. Understand the purposes and authority of each SDA committee or other group in which you participate.
6. Protest against any discussions or meetings which appear to violate the antitrust laws, disassociate yourself from any such discussions or activities, leave any meeting in which they continue and report the activity to the SDA Board so that similar conduct can be avoided in the future.