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iNEMI Antitrust Policy and Guidelines

Introduction

The International Electronics Manufacturing Initiative, Inc. ("iNEMI") is an industry-led consortium that performs procompetitive research and development projects to improve the global electronics manufacturing infrastructure. With a membership that includes approximately 70 electronics manufacturers, suppliers, associations, government agencies, and universities, iNEMI provides an environment in which partners and competitors alike can collectively anticipate future technology and business needs and develop responses to meet those needs.

iNEMI's primary objective is to facilitate research and development in connection with materials, components, manufacturing-related technologies and equipment for the manufacture of electronic information products. In that connection, iNEMI creates technology roadmaps and establishes technical goals for materials, components, equipment, and manufacturing processes. iNEMI's project participants will collect, exchange, and, where appropriate, license or make public the results of the evaluations, research, and development; work closely with government, universities, and private agencies; and perform other activities contemplated by the National Cooperative Research and Production Act that would advance iNEMI's objective.

Involvement in an antitrust investigation or lawsuit is singularly distasteful. Usually it is embarrassing. If a criminal antitrust case is lost, fines or jail terms are frequently imposed. On occasion, associations have been ordered to disband. Even if an antitrust case is won, the demands upon the time of those involved can be immense; the legal fees and costs can be astronomical.

From the date of its formation, iNEMI has required that all of its activities be conducted strictly in accordance with federal and state antitrust laws. To help remain consistent with that policy, the Guidelines outline those areas of the antitrust laws that should be of particular concern to iNEMI and its members, the obvious dangers they should avoid to minimize the risk of antitrust liability, and the policies and procedures they should follow in order to comply with the law. These Guidelines do not pretend to be an all-encompassing delineation of potential antitrust problems and the means to avoid them. In instances of doubt, iNEMI members should always seek the assistance of legal counsel experienced in antitrust.

Special Antitrust Problems for Associations

The legality of activities of consortium and associations, such as iNEMI, under the antitrust laws is determined by the application of the same standards as are applicable to for-profit businesses and individuals. Special problems do arise, however, from the fact that an association is, by definition, a combination of competitors, and the act of bringing these competitors together creates the means by which collusive action in violation of the antitrust laws could occur. A second antitrust problem is that many of an association's most valuable activities directly involve areas of particular antitrust concern including product standards, manufacturer and supplier relationships, and activities that may reduce incentives for members to engage in competing research. Nevertheless, collaboration in industry organizations is common and is recognized by both antitrust enforcers and the courts as a means both of enhancing competition and commerce and benefitting the public.

Antitrust Laws Are International in Scope

For historical reasons the federal antitrust laws of the United States are the most developed and extensive body of statutes, governmental regulations, guidance, precedent, and commentary on restraints of trade. As a result, these Guidelines for iNEMI's operations as a research consortium and association are necessarily focused in U.S. law. The European Union, however, now also has a well-developed body of competition laws and an active competition enforcement agency. As relevant to iNEMI's collaborative activities, the EU's competition laws largely coincide with the requirements of U.S. law. It is critical, however, that members be aware of the requirements of EU competition law as well as requirements imposed under existing and emerging antitrust laws around the world, including those in China, Japan, Korea and other sovereign states as well as the antitrust laws of individual states within the U.S. iNEMI and its members must be familiar with the laws of such jurisdictions that impact on particular projects and activities relating to iNEMI.

United States Antitrust Laws

The purpose of the antitrust laws is to preserve competition for the benefit of consumers. Both the Federal Trade Commission and the Department of Justice have regarded exchanges of certain types of information as tending to threaten or eliminate competition. Associations such as iNEMI have naturally been subject to scrutiny under the antitrust laws, because they are vehicles that bring competitors together and result in sharing of information. The unique exposure of associations such as iNEMI to antitrust scrutiny dictates that measures should be taken to minimize the risks of their involvement in antitrust investigations or litigation.

The federal antitrust statutes applicable to associations are the Sherman Act, the Clayton Act, as amended by the Robinson-Patman Act; the Federal Trade Commission Act; the National

Cooperative Research Act of 1984, as amended by and renamed in the National Cooperative Research and Production Act of 1993 and the Standards Development Organization Advancement Act of 2004; and the Foreign Trade Antitrust Improvements Act. In April 2000, the Federal Trade Commission and Department of Justice issued "Antitrust Guidelines for Collaborations Among Competitors," which provides guidance on the government agencies' approach to conduct by trade associations and research joint ventures.

The Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. It also condemns monopolization and attempts and conspiracies to monopolize. The Clayton Act prohibits various kinds of business behavior that tend to lessen competition or monopolize trade. Among the activities prohibited are exclusive dealing arrangements, acquisitions and mergers that tend to lessen competition, and certain interlocking directorates. The Federal Trade Commission Act, in addition to prohibiting the anticompetitive activities made illegal by the Sherman and Clayton Acts, bans unfair methods of competition and unfair or deceptive acts and practices. The Robinson-Patman Act prohibits price discrimination where the effect is to lessen competition. The Foreign Trade Antitrust Improvements Act limits liability for certain actions in non-U.S. markets that do not have a direct, substantial, and reasonably foreseeable anticompetitive effect in the United States. The National Cooperative Research and Production Act of 1993 provides that qualifying research joint ventures will be judged by a "rule of reason," not a "per se," standard and limits exposure to actual, not "treble," damages. In addition to the federal laws, most states have enacted statutes similar to the Sherman and Federal Trade Commission Acts.

Antitrust Enforcement

The Sherman Act is enforced by the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission, as well as suits by private parties for treble damages, attorneys' fees, and injunctive relief instituted by persons or firms injured by antitrust violations. Government suits maybe either civil or criminal in nature. The remedy on the civil side in an action brought by the government is an injunction issued by a federal judge prohibiting the offender from future violations and, in some instances, disgorgement of any allegedly ill-gotten gains. The Federal Trade Commission, which can choose to enforce the FTC Act through actions in its internal administrative court (rather than proceeding in federal court), can also issue cease-and-desist orders for practices found to violate the FTC Act. The violation of an FTC order may result in thousands of dollars in daily penalties. In addition, any association adjudged to be in violation of the antitrust law can be dissolved by court order. The punishment for criminal violations of the Sherman Act is severe. A violation is a felony, punishable by imprisonment for up to ten years. In addition, the fine for Sherman Act violations is a maximum of $100 million for corporations (or twice the amount the defendant gained from its illegal acts or twice the money lost by victims, if that amount exceeds $100 million) and $1 million for individuals. Further, state attorneys general have authority to file treble damage suits on behalf of citizens who have allegedly been injured by antitrust violations.

Antitrust Laws Applicable to Activities of Associations

Of principal concern to individuals and firms that take part in iNEMI activities are Section 1 of the Sherman Act and Section 5 of the FTC Act. These laws make illegal agreements ("contracts, combinations, and conspiracies") in restraint of trade.

The Supreme Court has interpreted these statutes as prohibiting agreements that have the likely effect of unreasonably restraining trade. A court evaluating an antitrust claim will ordinarily apply what is referred to as the "rule of reason" and examine all the facts and circumstances surrounding the conduct in question to ascertain whether the contract or combination is in violation of the law by unreasonably restraining trade. Certain activities, however, have been regarded as unreasonable by their very nature and are, therefore, considered illegal "per se." Individuals and firms are conclusively presumed to engage in such conduct for no other purpose than to restrain trade. Practices within the "per se" category include agreements to fix prices or rig bids; agreements to boycott competitors, suppliers, or customers; agreements to allocate markets or limit production; and certain tie-in sales. A tie-in sale is one in which the customer is required to purchase an unwanted item in order to purchase the product or service desired.

As discussed above, associations can provide opportunities for competitors to discuss competitively sensitive subjects and, in egregious circumstances, reach price-fixing or other agreements subject to "per se" condemnation. Most association activities, however, would be evaluated under the "rule of reason," including, of particular concern for associations, the exclusion of competitors from membership, activities that discourage research or independent thinking, and exclusionary standard setting.

Conspiracy in Restraint of Trade

As noted above, Section 1 of the Sherman Act prohibits any agreement in restraint of trade. The prohibition extends to any such agreement, whether oral or written, formal or informal, expressed or implied. For example, a "gentleman's agreement" to hold the line on prices is sufficient evidence of a "per se" unlawful conspiracy to fix prices.

In some cases, antitrust enforcers possess direct evidence of an illegal agreement, such as a wiretap recording of a meeting in which alleged price fixers enter their agreement. Direct evidence of an illegal agreement is rare, however, and antitrust liability is frequently proven based upon circumstantial evidence of a course of business conduct from which a jury infers the existence of an illegal conspiracy. A set of circumstances may be entirely innocent and lawful when viewed separately, but the same set of circumstances, when viewed together with other evidence suggestive of the existence of an agreement, may be found to establish an illegal conspiracy. For example, a jury might infer the existence of a conspiracy from the fact of price instability in an industry; a meeting of competitors at which prices are discussed; and subsequent price increases by those participating in the discussion. The fact that, without the

price discussion it would be impossible to prove a conspiracy, is an indication of why it is crucial to avoid price discussions at association meetings. Mere attendance at a meeting where business persons engage in a discussion concerning price fixing may imply acquiescence and make a nonparticipant criminally responsible and subject to as great a penalty as the active participants in the discussion.

Basic Antitrust Rule for iNEMI Members

The essential principle that should guide the policies and activities of iNEMI to avoid antitrust violations is that not only must no illegal agreements be either reached or carried out through the association, but iNEMI also must avoid conduct that might give the appearance of an illegal agreement. Antitrust investigations and litigation may be triggered by exaggerated statements in documents. Staff, officers, directors, and members of iNEMI should be particularly on guard as to conduct or agreements affecting areas of particular antitrust concern—especially pricing, association membership, and standardization. Counsel should be consulted concerning the Initiative's policies and programs and should attend all Board of Directors meetings.

Do's and Don'ts

Members can participate fully in iNEMI activities and projects with minimal possibility of antitrust problems by following a few simple do's and don'ts:

1. DO schedule and attend meetings only when there are proper items of substance to be discussed that justifies your attendance.

2. DO review the meeting notice or agenda in advance of every meeting. It should be specific, without broad topics, such as "marketing practices," that might look suspicious from an antitrust standpoint.

3. DO adhere strictly to the stated agenda. In general, subjects not included on the agenda should not be considered at the meeting.

4. DO ensure that no matter of doubtful legality is brought up for discussion. This, of course, is counsel's responsibility; but in his or her absence, the staff representative or any member present who becomes aware of legal implications of a discussion should attempt to halt the discussion.

5. DO make sure that minutes of all meetings are kept and that they accurately report what actions were taken.

6. DO use iNEMI as a vehicle for promoting research and the industry as a whole.

7. DO send copies of all iNEMI-related correspondence to iNEMI and advise the Secretariat of any inaccuracies in proposed statements to be made by iNEMI.

8. DO ensure that iNEMI counsel is in attendance at Board of Directors meetings and at Council meetings, when legally sensitive subjects might be discussed. Counsel should be consulted on any legally sensitive subjects arising at technical committee meetings.

9. DO check with iNEMI staff, who will likely contact counsel, if there is doubt about the legality of any iNEMI policy, program, or project.

10. DO cooperate with iNEMI counsel in all matters, particularly when counsel has ruled adversely about a particular activity.

11. DO limit joint activities to what is necessary to achieve the efficient operation of the activity.

12. DON'T seek to limit independent decision-making.

13. DON'T allow or participate in secret or "rump" meetings. At best, these meetings raise questions as to the propriety of what is discussed. They could seriously jeopardize legitimate iNEMI activities and create a risk that those activities will be investigated.

14. DON'T allow or participate in any discussions that discourage research or research projects by persons outside of iNEMI.

15. DON'T, without specific authorization, make public or private communications about policies or positions of iNEMI.