

Anti-Trust Policy

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Policy

It is the policy of BCSP, its members and employees to comply strictly with all laws applicable to BCSP activities. Since BCSP activities involve cooperative undertakings and meetings among competitors, the Board of Directors emphasizes the ongoing commitment of BCSP and its members to full compliance with federal and state antitrust laws. This statement is to be distributed at all BCSP Board meetings to remind each Director and employee of this commitment to antitrust compliance and as a general guide for BCSP activities and meetings.

Scope

Although BCSP programs have been reviewed to ensure their conformity with antitrust standards, each BCSP Director and employee has an equivalent responsibility for antitrust compliance. Each business enterprise and BCSP depend upon good judgment by all to avoid discussions and activities which could involve improper subject matter or procedures -- or even an appearance of improper activity. All concerned have an important and individual responsibility for assuring antitrust compliance.

The commitment by the Board of Certified Safety Professionals (BCSP) to careful surveillance of its meetings and activities is intended to ensure that neither BCSP nor its Directors violate the antitrust laws. Antitrust violations are punishable by jail time, fines, and substantial damages. This guide has been prepared for the Board of Directors and employees for the purpose of providing basic antitrust information and to acquaint the reader with BCSP antitrust policy. Each BCSP Director and employee has a responsibility to understand these principles and to prevent any activity which may give even the appearance of improper conduct.

Meeting Procedures

To avoid even the appearance of questionable activity, all BCSP meetings will be conducted in accord with the following procedures:

1. A written agenda will be prepared in advance of every meeting.
2. Accurate minutes of every meeting will be prepared, expeditiously sent to the counsel and participants, and approved at the next meeting.
3. In case of doubt about the propriety of a topic of discussion, consult BCSP staff or counsel.
4. If a Director has a reservation concerning remarks made at a BCSP meeting, officially state the reservation; if the discussion is not terminated or resolved satisfactorily, the concerned member should leave the meeting.
5. Rump sessions involving the discussion of business matters should be avoided.

Avoidance of Antitrust Implications at BCSP Meetings

All members of the Board of Directors, an Advisory Board, employees as well as representatives of BCSP, should receive copies of this antitrust guide. In addition, the guide is available for free upon request by any interested party. Close working relationships are maintained between BCSP staff and legal counsel to ensure current communication of the latest antitrust laws and court decisions which concern organization activities. New programs, or changes in current programs which might have antitrust implications, are reviewed by counsel prior to implementation. All meetings, whether of the full Board or of Committees, or other interests must be scheduled

and authorized through an appropriate member of BCSP staff; non-sanctioned meetings are prohibited. Staff members and counsel are entitled to participate in all BCSP activities. Proper representation of the interests of any participating BCSP member includes an awareness of the basic potential antitrust problems and an alertness to head off any potential problems before they materialize. Participants in any BCSP meeting or activity are invited immediately to raise any antitrust questions with respect to that particular activity, and the chairperson of that meeting is directed to respond to the inquiry immediately before continuing with the particular activity. BCSP staff and counsel are available to respond to any antitrust issues raised at BCSP sanctioned meetings and activities.

Applicable Federal Antitrust Statutes

The most important antitrust statutes governing BCSP activities are Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission (“FTC”) Act.

Section 1 of the Sherman Act prohibits “every contract, combination....or conspiracy, in restrain[t] of trade....” Any understanding which restrains trade or impairs competition, regardless of the purpose of such understanding, is illegal. For example, members reaching any form of an understanding or agreement concerning price could not justify the understanding on the grounds that it would benefit the consumer. The Sherman Act is a criminal statute and extends to active and inactive participants in any illegal discussion concerning price fixing or other restraints of trade. Thus, participants who attended such a meeting may be criminally liable and subject to as great a penalty as those who actively agree to fix prices.

Section 2 of the Sherman act makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize a line of commerce. The statute does not speak in terms of the existence of a monopoly; rather, its focus is on the act of monopolization. Unlawful monopolization arises where a firm has willfully acquired or maintained “monopoly power” by means that are viewed as being exclusionary. Exclusionary practices may include group boycotts, exclusive dealing arrangements, and unfair business practices.

Section 5 of the FTC Act declares as unlawful “unfair methods of competition” and “unfair or deceptive acts or practices” in, or affecting, commerce. In contrast to the Sherman Act, the FTC Act empowers the Commission to reach anti-competitive activities committed by individual persons or organizations whether or not there is any agreement or “combination.” The FTC Act, like the Sherman Act, covers joint actions.

Penalties for Violations of Federal Antitrust Statutes

Penalties under the federal antitrust statutes are severe and may be enforced against members and staff by the government and by private parties utilizing treble damage remedies. Penalties under the Sherman Act include fines up to \$350,000 and three years’ imprisonment for individuals, and fines as high as \$10 million for corporations. Violations of the FTC Act are subject to cease and desist orders which impose significant restraints upon an association and its activities. Violations of these provisions can result in fines as high as \$10,000 per day.

Case Law

The courts have repeatedly recognized that testing and certification bodies can have pro-competitive or anti-competitive effects, depending on the factual setting involved. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *American Society of Sanitary Engineering*, 106 F.T.C. 324 (1985). Thus, BCSP, its Directors and employees must guard against the misuse of tests or standards to exclude competitors from the market, facilitate price fixing, or otherwise restrain trade.

Potential Problem Areas

Potential antitrust problem areas include: (1) price fixing; (2) agreements to divide territories or customers (or even an agreement to keep out of another's territory); (3) certification restriction, where members, candidates, or certificant derive economic benefit and the denial of certification to candidate, without just cause, would limit that candidate's or certificant's ability to compete; (4) voluntary industry standards or certification requirements which favor some competitors and discriminate against others; and (5) industry self-regulation through establishment of codes of ethics where efforts to enforce such codes would result in economic injury to certain members.

Topics to be Avoided at Meetings and With Other Organizations, Directors or Employees

There are certain topics which directors and employees should not discuss with other organizations, directors or employees at meetings or on the telephone. These include:

- Prices.
- What constitutes a "fair" profit level.
- Possible increases or decreases in price.
- Standardization or stabilization of prices.
- Pricing procedures.
- Cash discounts.
- Credit terms.
- Control of sales.
- Allocation of markets.
- Refusal to deal with a corporation because of its pricing or distribution practices.
- Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice.