

WiMAX FORUM ANTITRUST COMPLIANCE POLICY AND GUIDELINES

Introduction

Through the adoption and issuance of the Worldwide Interoperability for Microwave Access Forum (“WiMAX Forum”) Antitrust Compliance Policy and Guidelines (the “Guidelines”), WiMAX Forum affirms its commitment to abide by the spirit and the letter of all antitrust laws. All members of WiMAX Forum and their representatives must follow the policy and guidelines contained herein as part of their ongoing obligations to WiMAX Forum. These Guidelines apply both to activities within WiMAX Forum and to any joint activities between WiMAX Forum and any other entity, association, or other third party.

Antitrust Policy

It is the policy of WiMAX Forum to comply strictly with all laws that relate to the conduct of its activities, including all antitrust laws. It is the responsibility of each WiMAX Forum member and its representatives, as well as each WiMAX Forum officer and every other person participating in WiMAX Forum-sponsored or WiMAX Forum-related activities to become familiar with the Guidelines, to conduct all WiMAX Forum-sponsored meetings and activities in strict accordance with the Guidelines, and to comply with antitrust laws. The consequences of violating the antitrust laws can be serious to WiMAX Forum, its members, and individuals representing the member companies. Violations of the federal antitrust laws may be felonies, which can subject an individual to substantial monetary fines and to imprisonment for as long as three years, and can subject WiMAX Forum or member companies to monetary fines, civil liability for treble damages, and to injunctions that could impair a company’s ability to compete effectively. In addition, WiMAX Forum may be held liable for member activities at WiMAX Forum sponsored functions or even elsewhere. Actions by a WiMAX Forum member or officer that an outsider could reasonably assume were authorized by WiMAX Forum may be interpreted by the courts to be an act of WiMAX Forum, for which WiMAX Forum bears legal responsibility.

As the following discussion sets forth in greater detail, activities of WiMAX Forum will not include any actions that violate the law. WiMAX Forum, in the course of its activities, shall not agree with, participate in, or give consideration to any activity, plan, understanding, agreement, or other arrangement that constitutes a violation of any federal or state antitrust laws, including but not limited to actions that would (a) raise or stabilize prices or fees, (b) boycott or refuse to do business with any third parties (other than through WiMAX Forum’s bona fide business contractual arrangements), (c) restrict or interfere with the exercise of free and independent judgment by the members in the management or operation of their respective businesses, or (d) obstruct or interfere with commerce or free and lawful competition.

The Guidelines are necessarily general and cannot purport to anticipate every legal issue or fact pattern that may emerge. It is very important, therefore, that the members and staff of WiMAX Forum consult appropriate counsel whenever questions arise as to the specific application of these Guidelines and the antitrust laws in general. In addition, any person with knowledge of an actual or suspected violation of these Guidelines should immediately consult with appropriate counsel.

The Antitrust Laws

The most important antitrust law applicable to WiMAX Forum is Section 1 of the federal Sherman Act, which declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations....” The focus of this law is to prohibit joint activity or an agreement between businesses that unreasonably restrain trade. The “contract, combination, ... or conspiracy” in question need not be written or formal, but may include informal, unwritten, and even unspoken agreements or understandings. In addition, illegal agreements can be established by circumstantial evidence, such as a pattern of conduct or mere presence at a meeting at which illegal agreements were made.

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” The provisions of the Federal Trade Commission Act can be applied to a company acting alone (unlike Section 1 of the Sherman Act) and are written more broadly than the provision of the Sherman Act. It is also important to recognize that other jurisdictions may have antitrust laws that are applicable to the activities of WiMAX Forum, including the laws of the individual states, Article 81 of the European Union, and the laws of the individual countries in which WiMAX Forum members are located or do business. These laws generally parallel the provisions of federal antitrust law but may sometimes regard activities that would be legal under federal laws as illegal anticompetitive acts. Because these Guidelines cannot catalog each state and foreign law that might be applicable to WiMAX Forum, appropriate counsel should be consulted if any questions arise as to the propriety of actions conducted in a particular state.

The development of standards can promote competition and economic efficiency by disseminating product information and by eliminating unnecessary and confusing variations in products. As a result, joint standards development activity is normally subject to treatment under the antitrust laws that focuses on whether or not the activity is reasonably necessary to achieve legitimate pro-competitive ends, and, if so, whether the benefits of the standard outweigh the costs. The benefits of standard setting are considerable, and the vast majority of standard development activities, when conducted properly, have little, if any, antitrust risk. Antitrust problems can arise, however, in both the development of a standard as well as the enforcement of that standard. In the case of standards development activities, antitrust problems may arise in several situations, such as in the following illustrative examples:

- (i) When the members misuse the process to facilitate agreements to restrain trade such as when product standardization has the effect of stabilizing prices;
- (ii) When a member fails to disclose intellectual property rights in the technology selected and then seeks to assert its rights against those who adopt the standard;
- (iii) When a standards development body adopts a specification that non-members are not able to meet, and that gives the members of the standards development group a competitive advantage in manufacturing or marketing; and
- (iv) When an organization's rules and procedures are used to unreasonably exclude some competitors or tip the process in favor of one or more competitor's technology.

Specific Organizational Activities

In order to minimize the antitrust risks associated with standards setting activities, the following guidelines should be followed regarding both the development and adoption of a standard as well as the promulgation of that standard:

1. Membership.

(a) WiMAX Forum membership should be available to all interested network operators, equipment vendors, application developers, and interested members of the academic community on reasonable terms. No applicant for membership, who otherwise meets the qualifications set forth in the Bylaws of WiMAX Forum and the rules promulgated under those Bylaws, should be rejected for any anti-competitive purpose or solely for the purpose of denying such applicant the benefits of membership.

(b) WiMAX Forum should endeavor to ensure that all potential competitors that may be affected by a proposed action be given the opportunity to participate in the process, and that the process includes representatives from various constituencies both upstream and downstream. This will include advertising the objectives and intended activities of WiMAX Forum to the public, providing timely and adequate notice to members of the initiation and development of any proposal, allowing for careful consideration of all views and objections and, where appropriate, multiple proposals, and maintaining careful records.

2. Standards.

(a) All specifications should be based and selected on their technological attributes and ability to address the need to establish the desired interface systems process. The purpose of any specification must be legitimate, reasonable and in the public interest. WiMAX Forum should limit its proposals and investigations to technical matters that facilitate interoperability, and should not seek to promote standardization of sale, license or other commercial terms. Similarly, the representatives to WiMAX Forum should be employees with technical expertise appropriate to the issue under

consideration, and should, if possible, not be employees having more front-line competitive responsibilities (e.g., salespeople).

(b) All specifications established by WiMAX Forum should be voluntary. Members should not discuss, exchange information, or enter into agreements that prohibit or restrict any member from establishing or deploying any other specifications. Members of WiMAX Forum should not be required to adopt any specification developed by WiMAX Forum. Nor should any efforts be undertaken that are intended to prevent the manufacture, sale, or supply of any product or services not conforming to an adopted specification.

3. Meeting Discussions. Discussions in all WiMAX Forum-related meetings should relate solely to the legitimate purposes of WiMAX Forum. Care should be taken to avoid even the appearance of discussing competitively sensitive information, as such discussions may lead to the inference of an illegal agreement on prohibited topics. To this end, there should be no discussion, communication or other exchange between members of WiMAX Forum and/or their representatives regarding any of the following categories of information:

(a) Product prices or pricing strategy. This requirement is to be interpreted broadly, to include, for example, current or projected prices; price changes or differentials; markups; discounts; allowances; terms and conditions of sale, including credit terms, warranty provisions, etc.; or other information that might comprise an element of a product's price, including profits, margins or cost;

(b) Production levels, production capacity, or product inventories;

(c) Current bids or potential bids for particular products, and procedures for responding to bid invitations;

(d) Plans pertaining to the development, production, distribution, marketing, or introduction dates of particular products, including proposed marketing territories and potential customers;

(e) Terms on which any WiMAX Forum members will or will not deal with particular competitors, suppliers, distributors, or customers;

(f) Matters relating to actual or potential individual suppliers or customers that might have the effect of influencing the business conduct of other companies toward such suppliers or customers;

(g) Current or projected cost of procurement, development, or the manufacture of any product; and

(h) Non-public information regarding any company's market share for any product or for all products.

4. Meeting Procedures. Special care should be taken to ensure that all WiMAX Forum meetings are not used as a means of violating the terms of these Guidelines. Accordingly, the following practices should be followed:

(a) Agenda. All meetings should follow a written agenda.

(b) Minutes. Minutes prepared promptly after the meeting should summarize all matters discussed and conclusions, if any, reached. Only minutes approved by the Board and/or counsel should be distributed (even in preliminary form) and only minutes as approved need be retained. The purpose of this is to avoid the preservation of misstatements, ambiguities, fragmentary reports and similar items which may, years later, create misperceptions of the meeting.

(c) Consult Counsel. At appropriate meetings, counsel or staff should be requested to provide compliance reminders concerning current antitrust developments.

(d) No Informal Meetings. Informal meetings should not be held and informal discussions should comply with the standards of these Guidelines. Informal meetings are of particular concern to law enforcement agencies, which may take the view that formal association activities merely provide a cover for improper agreements that were reached in a hotel room, restaurant or similar setting.

5. Sensitive Topics. Members should not discuss, exchange information, or enter into agreements refusing to purchase, sell to, or otherwise deal with competitors, customers or suppliers. For example, members shall not discuss the degree to which members will or will not do business with firms that do not participate in WiMAX Forum.

6. Availability of Information. Any information, materials, or reports of WiMAX Forum available for the use of its members should be made available to non-members on reasonable terms when non-availability of those materials imposes a significant economic disadvantage or cost to nonmembers that significantly limits their ability to compete against WiMAX Forum members. Once a specification is adopted, they and WiMAX Forum's related publications and services related to them should be made available to members and non-members on payment of reasonable fees.

7. Copy of Guidelines. These Guidelines are available on the WiMAX Forum Web site and are available in hard copy form upon request. Each member agrees to abide by them.

Conclusion

This policy statement is designed as a general statement of antitrust principles. Of course, no policy statement can anticipate each issue that will arise in the course of a trade

association's activities; that is why WiMAX Forum must remain vigilant and continually conscious of antitrust concerns. When and if those concerns arise, prompt consultation with counsel is always appropriate.