



Standards and Certification Training

Module C – Legal
C2. Antitrust

MODULE C COURSE OUTLINE

C1. Conflict Of Interest/Code Of Ethics

C2. Antitrust

C3. Torts

C4. Intellectual Property

C5. Speaking For The Society

REVISIONS

<u>Date</u>	<u>Change</u>
09/26/18	Revised entirely.
01/08/16	Reformatted entirely and revised or added notes throughout. Removed redundant slides from previous edition 6, 10, 15, 16, 20, 22, 24, 48, 49, 51, 53 and 55. Revised slides 3, 5, 9, 12, 14, 16, 18-21, 40, 42 and 45-47. Added slides 17, 41, 43 48 and 49.
07/07/08	Revised entirely.

LEARNING OBJECTIVES

At the end of this module, you will understand:

- How antitrust laws affect ASME
- The guidelines for complying with antitrust law:
 - Codes and standards development
 - Conformity assessment activities
 - Interpretations

At the end of this module, you will understand:

- How antitrust laws affect ASME
- The guidelines for complying with antitrust law as they relate to
 - Codes and standards development
 - Conformity assessment activities, and
 - Interpretations

MODULE OUTLINE

- I. The Antitrust Laws
- II. Standards Development Organization Advancement Act of 2004
- III. ASME and Antitrust
- IV. A Brief History of ASME and Antitrust Cases
- V. Related Antitrust Cases
- VI. General Guidelines
- VII. Basic Do's and Don'ts

This Module will cover the following topics:

- I. The Antitrust Laws
- II. Standards Development Organization Advancement Act of 2004
- III. ASME and Antitrust
- IV. A Brief History of ASME and Antitrust Cases
- V. Related Antitrust Cases
- VI. General Guidelines
- VII. Basic Do's and Don'ts

I. THE ANTITRUST LAWS

ANTITRUST LAW

- Federal antitrust law is intended to encourage and preserve business competition
- Statutory and case law which is designed to protect trade and commerce from unlawful restraints, monopolies and price-fixing

Antitrust Law consists of:

- Federal antitrust law is intended to encourage and preserve business competition
- Statutory and case law which is designed to protect trade and commerce from unlawful restraints, monopolies and price-fixing.

FEDERAL ANTITRUST STATUTES

- Sherman Act (1890)
- Clayton Act (1914)
- Federal Trade Commission Act (1914)

Federal Antitrust statutes include the Sherman Act (1890), the Clayton Act (1914) and the Federal Trade Commission Act (1914). These Acts will be reviewed over the next several slides.

SHERMAN ACT

- First Major Federal Antitrust Act (1890)
- Two Main Sections
 - §1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal [Violators] ... shall be guilty of a felony
 - §2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony

The Sherman Act of 1890 was the First Major Federal Antitrust Act

It's two main sections state that

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SHERMAN ACT

- §1: Generally focuses on concerted action between two or more individuals or entities. The language of the Sherman Act is very broad. This essentially delegated the responsibility for actually defining violations of the Sherman Act to the Courts.
- §2: Focuses upon the establishment or maintenance of a monopoly. This could be accomplished by a single individual or organization.

Section 1 Generally focuses on concerted action between two or more individuals or entities. The language of the Sherman Act is very broad. This essentially delegated the responsibility for actually defining violations of the Sherman Act to the Courts

Section 2 of the Sherman Act forbids monopolization and attempts to monopolize a certain industry or to keep other competitors from accessing a specific market covered by a standard.

SHERMAN ACT

- The Sherman Act is violated where there is a joint action, agreement or common understanding between two or more parties or organizations that unreasonably restrains competition
 - A plaintiff does not have to establish existence of a formal agreement
 - An illegal agreement can be inferred through circumstantial evidence, such as unexplained meetings/email correspondence outside of normal committee activities

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SHERMAN ACT

- “Per se” illegal agreements:
 - These are agreements that are so anticompetitive on their face that courts do not engage in any analysis of competition
 - If an agreement exists, there is a Sherman Act violation
 - Such “per se” violations include, for example, agreements among competitors to fix prices (whether maximum, minimum, or a range of prices); to divide territories, customers, or products; or to limit production.

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SHERMAN ACT

“Rule of Reason”

- Most Courts agreements, however, will be assess under the “rule of reason”
- The “rule of reason” examines the facts and circumstances surrounding the questioned conduct and analyzes whether the conduct’s anticompetitive effects outweigh its procompetitive benefits

It is often not clear whether a particular action or activity violates the antitrust laws. Therefore, Courts have applied the “rule of reason” when interpreting Section 1 of the Sherman Act.

The “rule of reason” examines the facts and circumstances surrounding the questioned conduct and analyzes whether the conduct’s anticompetitive effects outweigh its procompetitive benefits.

SHERMAN ACT

- Penalties
 - Prosecuted by the Department of Justice
 - Violation is a crime – a “felony” punishable by a fine up to \$100,000,000 for a corporation.
 - Fine can increase to two times conspirators’ gains or victims’ losses, if either amount is greater than \$100 million
 - Individuals can be imprisoned for up to 10 years and fined up to \$1,000,000
 - The Justice Department may also punish a violator through civil injunctive relief or monetary penalties, such as requiring the sale of part of a business or the disgorgement of profits.

There are penalties for violating the Sherman Act.

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CLAYTON ACT (1914)

- **§3:** Prohibits sales agreements made on the condition that one party not purchase goods from a competitor (such agreements are also subject to Sherman Act and FTC Act)
- **§4:** Private Parties can also bring lawsuits alleging that they have been injured by the defendants' anti-competitive acts. If successful, an antitrust plaintiff can be awarded treble damages or three times the amount of its actual damages.

Section 3: Prohibits sales agreements made on the condition that one party not purchase goods from a competitor (such agreements are also subject to Sherman Act and FTC Act).

Section 4: Private Parties can also bring lawsuits alleging that they have been injured by the defendants' anti-competitive acts. If successful, an antitrust plaintiff can be awarded treble damages or three times the amount of its actual damages.

FEDERAL TRADE COMMISSION ACT

- Created the Federal Trade Commission
- Federal Trade Commission has enforcement authority with respect to the FTC Act and holds administrative hearings to determine if the Act has been violated
- States that: “[u]nfair methods of competition . . . , and unfair and deceptive acts in or affecting commerce are unlawful.”
- Limits FTC remedies to obtaining equitable relief, such as injunctions, disgorgement of profits, and restitution for injured consumers.

The Federal Trade Commission Act was created by the Federal Trade Commission.

- The Federal Trade Commission has enforcement authority with respect to the FTC Act and holds administrative hearings to determine if the Act has been violated
- The Act states that: “[u]nfair methods of competition . . . , and unfair and deceptive acts in or affecting commerce are unlawful.”
- And it limits FTC remedies to obtaining equitable relief.

II. Standards Development Organization Advancement Act of 2004

Standards Development Organization Advancement Act of 2004

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Definition

Defines “standards development activity” as “any action taken by a standards development organization for the purpose of developing, promulgating, revising, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities”

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Standards Development Organization Advancement Act of 2004

- This Act offers qualified protections for standard developing organizations in their standard development activities as well as conformity assessment activities
- The following activities are excluded from protection under the Act:
 - Exchanging information relating to cost, sales, profitability, prices, marketing, or distribution that is not reasonably required for development of a voluntary consensus standard, or use in conformity assessment activities.
 - Entering into any agreement that would allocate a market with a competitor.
 - Entering into any agreement that would set or restrain prices of any goods or services.

This Act offers qualified protections for standard developing organizations in their standard development activities as well as conformity assessment activities.

The following activities are excluded from protection under the Act:

- Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.
- Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.
- Entering into any agreement or conspiracy that would set or restrain prices of any goods or services.

Standards Development Organization Advancement Act of 2004

Rule of Reason and Damages

- The SDOAA provides that the “rule of reason” analysis will be used to analyze the conduct of standards development organizations
- Any damages are limited to actual (as opposed to treble) damages in federal civil proceedings
- At the end of private litigation the court may award damages (costs) to the “substantially prevailing party”
- This provision applies to standards development organizations and their full time employees

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Standards Development Organization Advancement Act of 2004

- The following entities or individuals are not covered by the SDOAA:
 - Any person, other than an SDO, who participates in a standards development activity found to be in violation of any of the antitrust laws.
 - Any person who is an employee or agent of a person who is engaged in a line of commerce that is likely to benefit directly from the operation of the standards development activity with respect to which such violation is found.

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III. ASME AND ANTITRUST

ASME AND ANTITRUST

ASME AND ANTITRUST

Introduction

- Private standards organizations like ASME and ASTM have been recognized as providing a benefit to society
- Imagine, for example, trying to build a product without standardization for nuts and bolts
- Standards development involves cooperation and agreements by competing companies. This may trigger an antitrust analysis.

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ASME AND ANTITRUST

ASME Safeguards

- The standards development process is open to all competitors in the industry affected
- Standards committees are balanced, which means there are members of industry, government, regulatory bodies, academia and other third parties on standards setting committees
- Proposed new standards and modifications of current standards are published

For that reason, ASME has put the following safeguards in place:

- The standards development process is open to all competitors in the industry affected.
- Standards committees are balanced, which means there are members of industry, government, regulatory bodies, academia and other third parties on standards setting committees.
- Proposed new standards and modifications of current standards are published.

ASME AND ANTITRUST

- ASME Safeguards continued:
 - Negative comments about proposed new standards or modifications of current standards are carefully considered
 - Complaints about existing standards have established procedures for review. Complaints are reviewed by balanced committees.
 - There is a standard certification process open to any entity that wants to seek certification
 - Individual volunteer and staff members have a fundamental responsibility to insure that their own participation is consistent with antitrust laws

Additional safeguards include:

- Committee must carefully consideration of negative comments about proposed new standards or modifications of current standards.
- Complaints about existing standards have established procedures for review. Complaints are reviewed by balanced committees.
- There is a standard certification process open to any entity that wants to seek certification.
- Individual volunteer and staff members have a fundamental responsibility to insure that their own participation is consistent with antitrust laws.

IV. A BRIEF HISTORY OF ASME AND ANTITRUST CASES

A brief history of ASME and antitrust cases

U.S. v. ASME (1972)

- Complaint
 - ASME accreditation available only to companies with plants in the U.S. and Canada
 - Foreign companies effectively prohibited from selling products in the U.S. and Canada
- Outcome
 - ASME B&PV accreditation extended to manufacturers worldwide

In 1972 a complaint was filed against ASME stating that ASME accreditation available only to companies with plants in the U.S. and Canada. Foreign companies were effectively prohibited from selling products in the U.S. and Canada.

As a result, ASME B&PV accreditation was extended to manufacturers worldwide.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982)

- Facts
 - Hydrolevel was a manufacturer of low-water fuel cut-offs for boilers
 - McDonnell and Miller, Inc. (“M&M”) manufactured a competing fuel cut-off valve. The pertinent difference for purposes of the lawsuit was that the Hydrolevel fuel cut-off included a time delay.
 - An M&M Vice President was Vice Chairman of the BPV subcommittee that drafted, interpreted and revised the pertinent Code section
 - In early 1971 Hydrolevel secured an important customer of M&M, Brooklyn Union Gas

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 1982

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- Hydrolevel alleged that the M&M Vice President and other officers met with the Chairman of the BPV subcommittee to seek an interpretation of the Code asking whether a fuel cutoff with a time delay would satisfy code requirements. The Chairman of the committee then developed and issued an interpretation (which at the time did not have to be approved by the committee) that stated “fuel cut-offs that incorporated a time delay were not in compliance with Code requirements”.
- Hydrolevel argued that M&M salesmen used the interpretation to discourage customers from buying Hydrolevel’s product

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- Hydrolevel argued that M&M salesmen used the interpretation to discourage customers from buying Hydrolevel’s product.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556 (1982)

- At issue in the Hydrolevel case was whether ASME could be held liable for the acts of volunteers who acted with “apparent authority”
- Apparent authority is a legal doctrine which provides that if a principal holds out an agent as having certain authority to third persons, the principal will be responsible for the agent’s acts--whether or not the agent had actual authority to perform the act at issue.
- The Supreme Court held that ASME could be held liable under the anti-trust laws for the acts of volunteers committed within their apparent authority

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V. OTHER ANTITRUST CASES

Other antitrust cases

INDIAN HEAD v. ALLIED TUBE & CONDUIT CORP

- Complaint
 - Metal conduit manufacturers packed 1980 NFPA conference and voted down proposal to revise Fire Code to allow plastic conduit for building wiring
 - Proposal recommended by NFPA panel of experts

Other antitrust case brought against the standards development organizations include:

INDIAN HEAD v. ALLIED TUBE & CONDUIT CORP

The Complaint was that the

- Metal conduit manufacturers packed 1980 NFPA conference and voted down proposal to revise Fire Code to allow plastic conduit for building wiring.
- Proposal recommended by NFPA panel of experts

INDIAN HEAD v. ALLIED TUBE & CONDUIT CORP

- Outcome: Findings were
 - No “balance” of interest groups was observed.
 - All members of the association were allowed to vote on a proposal.
 - The recommendation of an unbiased panel of experts was unjustifiably ignored.
 - A proposal was allowed to fail without valid and objective criteria.
 - A manufacturer was precluded from selling its product on the open market.

The Outcome/Findings were that:

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SESSIONS TANK LINERS v. JOOR MANUFACTURERS

- Complaint
 - A manufacturer used his position as an NFPA Code Committee member to defeat a proposed revision allowing a competitor's process.

SESSIONS TANK LINERS v. JOOR MANUFACTURERS

The complaint was that a manufacturer used his position as an NFPA Code Committee member to defeat a proposed revision allowing a competitor's process.

SESSIONS TANK LINERS v. JOOR MANUFACTURERS

- Outcome: Findings of a member's misconduct
 - Misrepresented data
 - Sent anonymous letters opposing the revision
 - Questioned the safety of the competitor's process
 - Warned of legal implications
 - Called for a vote after the competitor had left the meeting, even though vote not on agenda

The Outcome was Findings of a member's misconduct

- Misrepresented data
- Sent anonymous letters opposing the revision
- Questioned the safety of the competitor's process
- Warned of legal implications
- Called for a vote after the competitor had left the meeting, even though vote not on agenda

VI. GENERAL GUIDELINES

All of ASME's committees and subcommittees responsible for codes and standards development, or oversight of certification activities should be aware of what to avoid and when to question actions or decisions that may present antitrust issues.

CODES AND STANDARDS DEVELOPMENT

- Things to keep in mind
 - Adoption or revision may:
 - Increase the cost of a product
 - Make nonconforming products unacceptable to buyers.
 - A standard or revision should be reasonable and objective, and should not discriminate unfairly between products.
 - Every volunteer is responsible for ensuring that all provisions of codes and standards have an objective technically sound basis.

Things to keep in mind

- Adoption or revision of a standard may:
 - Increase the cost of a product
 - Make nonconforming products unacceptable to buyers.
- A standard or revision should be reasonable and objective, and should not discriminate unfairly between products.
- Every volunteer is responsible for ensuring that all provisions of codes and standards have an objective technically sound basis.

CODES AND STANDARDS DEVELOPMENT

- Ask yourself these questions:
 - Does the code or standard have a proper objective (e.g., safety or quality)?
 - Is the form the code takes suitable for the industry in question?
 - Is the code or standard based upon valid and objective criteria?
 - Is it the least restrictive standard possible?

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CODES AND STANDARDS DEVELOPMENT

- Ask yourself these questions:
 - Is the Standards Committee broadly based?
 - Are any potential conflicts of interest in the group considered and publicized?
 - For example do any ASME code committee members hold patents, the possession of which is required to meet the standard or code? If yes:
 - Has this code committee's member's IP been disclosed to ASME?
 - Did the IP holder, as required, agree to license the IP on fair, reasonable, and non-discriminatory terms (often referred to as "FRAND" or "RAND")?
 - Have opposing views been considered?
 - Are the procedures followed in developing or referencing a code or standard *fair*?

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- Are any potential conflicts of interest in the group considered and publicized?
- Have opposing views been considered?
- Are the procedures followed in developing or referencing a code or standard *fair*?

FAIRNESS

- Means the following:
 - Adequate public notice of the proposed adoption of a standard
 - An accurate record of the considerations available
 - A formal and publicized appeals process
 - Periodic review and revision of standards to reflect current technology
 - All industry members have an opportunity to conform to the standards
 - For example, have the holders of the IP agreed to license the IP in compliance with RAND and FRAND requirements?

Fairness means the following:

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 - For example, have the holders of the IP agreed to license the OP in compliance with RAND and FRAND requirements?

ISSUING INTERPRETATIONS

- Interpretations potentially implicate the antitrust laws as well
- Individuals who participate on interpretation committees must insure that the interpretation of a ASME Code or standard does not in itself appear to have an unreasonable effect on competition

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ISSUING INTERPRETATIONS

- Follow ASME Guidelines
- Objectivity and technical accuracy are essential.
- They must be supported by specific wording in the code or standard.
- Volunteers should avoid even the appearance of conflict of interest.
- Report doubts to next highest level.

When considering interpretations, the ASME Guidelines that were previously outlined shall be followed. In addition:

- Objectivity and technical accuracy are essential.
- They must be supported by specific wording in the code or standard.
- Volunteers should avoid even the appearance of conflict of interest.
- Report doubts to next highest level.

CERTIFICATION

- Certification may be necessary to satisfy governmental or insurance carrier requirements
- Decisions based on issuance of ASME certification or accreditation must be based solely upon objective evidence and technically justifiable criteria
- Denial of ASME certification could have a serious impact on the companies involved
- Safeguards with respect to conflict of interest of decision-makers are important due to the serious impact to companies who may be affected by the interpretation

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CERTIFICATION

- ASME has established procedures that allow for ready access to appeal ASME denial of certification/accreditation to an Applicant
- These procedures (“due process”) allow for ready access to those denied certification/accreditation to appeal ASME’s decision to withhold or withdraw ASME certification

- In the event of a denial or withdrawal of certification, the grounds for the negative decision are disclosed to the company/organization affected by the decision and they are given the opportunity to show the responsible committee why the decision was incorrect or to correct whatever Findings were reported during the review or survey that lead to the committee decision.
- For companies that already have obtained ASME certification and either are facing expiration due to failing the renewal or facing allegations of Code non-conformance ASME will extend the companies current certification/accreditation until all aspects of “due process (appeal)” have been satisfied.

EXCHANGES OF INFORMATION

- Because industry competitors may be present at the same ASME meetings and events, ASME, its employees, and its members must be vigilant that competitively-sensitive information is not exchanged or shared between competitors
- Topics to avoid: prices, costs, production, capacity, utilization, inventory, terms of sale, credits, allowances, discounts, geographic sales territories, dealings with specific customers, and strategic or marketing plans

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EXCHANGES OF INFORMATION

- Competitive information should only be disclosed at meetings if absolutely necessary for standard development, certification and interpretation.
 - The disclosure should be cleared by the legal counsel for the holder of the information prior to the meeting.
 - ASME Legal should be made aware of the disclosure prior to the committee meeting.

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EXCHANGES OF INFORMATION

- Remember, even if ASME is not alleged to have engaged in a conspiracy, if its members are, then it might receive third-party document and deposition subpoenas, to which responding costs time money
- If you have any concerns, please report it to the Committee Officers and ASME Staff

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- If you have any concerns, please report it to the Committee Officers and ASME Staff.

VII. BASIC DO'S AND DON'TS

Next we will go through some basic do's and don'ts.

BASIC DO'S AND DON'TS

Don't:

- Attend any meetings under ASME auspices that do not have a fixed agenda of matters to be covered
- Take part in any "rump" sessions at which matters before a committee or other body as a whole are to be discussed
- Discuss prices, costs, sales, customers, production, or any competitively-sensitive information of competing or potentially competing products and don't disparage any particular product--whether or not it meets ASME standards
- Attempt to influence ASME standards activities and programs to benefit your own business activities or those of your employer in a manner not available to the public
- Discriminate against nonmembers of ASME or give preferential treatment to ASME Committee members

The following is a list of what not to do.

Don't :

- Attend any meetings under ASME auspices that do not have a fixed agenda of matters to be covered.
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- Discuss prices, costs, sales, customers, production, or any competitively-sensitive information of competing or potentially competing products and don't disparage any particular product--whether or not it meets ASME standards.
- Attempt to influence ASME standards activities and programs to benefit your own business activities or those of your employer in a manner not available to the public.
- Discriminate against nonmembers of ASME or give preferential treatment to ASME Committee members.

BASIC DO'S AND DON'TS

Do:

- Make your company's interest in the subject clear to other members of your committee, when revising or interpreting a code or standard
- Bring to the attention of ASME's officers or staff immediately any actual harm or potential harm related to a code, standard, revision, or interpretation

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- Make your company's interest in the subject clear to other members of your committee, when revising or interpreting a code or standard.
- Bring to the attention of ASME's officers or staff immediately any actual harm or potential harm related to a code, standard, revision, or interpretation.

MODULE SUMMARY

- The antitrust laws are complicated
- Remember to 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?
 - When in doubt, bring your concerns to the attention of the Committee officers AND ASME Staff

Points to remember

- The antitrust laws are complicated.
- Remember to 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?
 - When in doubt, bring your concerns to the attention of the Committee officers AND ASME Staff

REFERENCES

- Legal Implications of Codes and Standards Activities:
 - A Guide to Antitrust Compliance for ASME Volunteer and Staff Members
- <https://cstools.asme.org/csconnect/NewMemberResources.cfm>

ASME policies are available online through the attached link under Policies and Procedures, Item 1 Legal Implications of Standards and Certification Activities.

<https://cstools.asme.org/csconnect/NewMemberResources.cfm>