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MEMORANDUM

July 2, 2001

RE: POTENTIAL LIABILITY FOR ACTA AND ITS MEMBERS

I. INTRODUCTION

This memorandum addresses the potential liability that may exist for the Administrative Council for Terminal Attachments ("ACTA") and its members in carrying out the responsibilities assigned to ACTA pursuant to the Federal Communication Commission (the "FCC" or the "Commission") Report and Order *In the Matter of 2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations* (the "R&O").[1] In particular, potential liability issues are addressed in connection with claims that might be alleged under the antitrust laws and tort theories of negligence.[2]

As discussed below, assuming that ACTA and its members engage only in conduct that is consistent with and in furtherance of the responsibilities assigned by the R&O, risks of antitrust and tort liability should be limited. This does not mean, of course, that claims alleging unlawful

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1 CC Docket No. 99-216, FCC 00-400, adopted November 9, 2000 and released December 21, 2000.

2 This memorandum is not intended to address, and should not be construed as addressing, every potential type of claim that might be asserted against ACTA or its members, including under the antitrust laws or negligence theories. Nor does this memorandum seek to be a substitute for, and it should not be construed as such, legal advice relating to specific issues and conduct that may occur in connection with ACTA and its members performing the responsibilities assigned by the R&O. Further, the discussion in this memorandum is limited to addressing solely conduct that is consistent with and in furtherance of the directives of the R&O.

conduct will not be asserted. Rather, applicable legal authority indicates that such claims should be unlikely to succeed. To reduce the risks even further, we suggest certain actions that should be considered by ACTA in pursuing its activities.

II. BACKGROUND

A. Creation of ACTA

The R&O, among other things:

- Eliminates the detailed regulations in the FCC's rules establishing technical criteria for terminal equipment and requiring terminal equipment registration with the Commission;
- Privatizes the establishment of technical criteria to ensure that terminal equipment does not harm the public switched telephone network ("PSTN") through Standards Development Organizations ("SDOs") accredited by the American National Standards Institute ("ANSI"); and
- Requires the industry to establish ACTA to assume the responsibility for, among other things, compiling and publishing standards adopted as technical criteria for terminal equipment.

(R&O at ¶¶ 2, 31.)

ATIS and TIA are designated as the sponsors of ACTA (R&O at ¶ 43), and they are directed to ensure that the industry populates ACTA in a manner consistent with ANSI criteria for a balanced and open membership. (R&O at ¶ 40.) The R&O also requires ACTA to be fair and impartial, and its membership to be fairly balanced in terms of the points of view represented, and not controlled or dominated by any particular telecommunications industry segment. (R&O at ¶¶ 40, 50, 51.)

ACTA's specific purpose and functions are also defined. Thus, the R&O states that ACTA's purpose "is to act as the clearing-house publishing technical criteria for terminal equipment developed by ANSI-accredited standards development organizations." (R&O at ¶ 49.) Its role is "administrative in nature," and not to develop standards or engage in policymaking or dispute resolution. (R&O at ¶¶ 31, 55.) Nor is ACTA authorized to make any "substantive decisions regarding the development of technical criteria." (R&O at ¶ 49.)

The R&O directs that ACTA is to fulfill the foregoing purpose by providing certain functions.

First, ACTA is to adopt technical criteria for terminal equipment "through the act of publishing criteria developed by ANSI-accredited standards development organizations." (R&O at ¶ 52.) Such criteria, however, need not have achieved the status of an American National Standard. (R&O at ¶ 60.) ACTA must ascertain that the SDOs have made certifications that the proposed criteria do not conflict with existing criteria, and that they address the specific harms identified in the R&O. (R&O at ¶¶ 60-61.) ACTA is also charged with the responsibility of providing public notice of the technical criteria and the SDO responsible for its submission. (R&O at ¶¶ 52, 54.) Any appeals of the technical criteria will be to the relevant SDO, ANSI or the Commission, not ACTA. (R&O at ¶¶ 52, 69, 71.) If no appeals are filed within the prescribed period for appeals, ACTA will publish the technical criteria and the criteria will be considered presumptively valid by the Commission. (R&O at ¶ 52.)

Second, ACTA is directed to establish and maintain a database of terminal equipment approved as compliant with the technical criteria based upon certifications issued by Telecommunications Certification Bodies ("TCBs") or Suppliers Declarations of Compliance

("SDoC"). (R&O at ¶ 53; *see also generally*, R&O at ¶¶ 85-106.) The details of the database's structure, content and maintenance are left for ACTA to establish. (R&O at ¶¶ 53, 108.)

Third, ACTA is directed to develop any terminal equipment numbering and labeling requirements it deems reasonable and necessary. (R&O at ¶ 114.) In connection with this function, the Commission declined to promulgate specific rules, and instead deferred to ACTA "to resolve, as it deems reasonable and necessary, specific issues regarding labeling and numbering" consistent with certain specific requirements. (*Id.*) ACTA is required, however, to adopt a numbering and labeling scheme "that is nondiscriminatory, creating no competitive advantage for any entity or segment of the industry." (R&O at ¶ 115.)

B. Implementation of the R&O

We understand that the initial ACTA meeting was held on May 2, 2001, and Operating Principles and Procedures ("OP&P") have been adopted. The OP&P states the Mission, Scope and Responsibilities for ACTA consistent with the R&O and the FCC's implementing regulations. The OP&P also establishes membership and governance criteria in compliance with the R&O's directives concerning balance, fairness and the absence of dominance. Finally, the roles of ATIS and TIA, as ACTA's sponsors, are addressed.

III. DISCUSSION

A. Potential Antitrust Liability

1. General Principles

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade. 15 U.S.C. § 1. Accordingly, to establish a violation of Section 1, a requisite showing of concerted action (*i.e.*, an agreement) involving two or more parties must be made. *Fisher v. Berkeley*, 475 U.S. 260, 266 (1986). In addition, the challenged conduct must be

shown to be an "unreasonable" restraint of trade. *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978).

To establish the first element of a Section 1 violation – concerted action – it is unnecessary to prove a formal agreement. Rather, an agreement for antitrust purposes may be inferred from conduct or the circumstances of the challenged conduct. *See, e.g., Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963).

For purposes of establishing that conduct unreasonably restrains trade, the antitrust laws recognize that certain conduct is so anticompetitive that it will be considered unreasonable *per se* without consideration of the economic effects of such conduct. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Examples of *per se* unlawful conduct include agreements among competitors to fix prices, limit output, allocate customers, and divide territories. *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (horizontal price fixing); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (market division); *California Retail Liquor Dealers Ass'n v. Midcal*, 445 U.S. 97 (1980) (vertical price fixing); *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959) (group boycotts); *International Salt Co. v. United States*, 337 U.S. 293 (1949) (tying arrangements).

Other conduct, including conduct resulting from concerted action among competitors, which is recognized as potentially procompetitive, is evaluated under the "rule of reason." A rule of reason analysis involves consideration of the competitive effects of the conduct at issue within a properly defined relevant market, as well as a balancing of the procompetitive effects that may occur as the result of such conduct against any potential anticompetitive effects that may arise. *Federal Trade Comm'n v. Indiana Fed. of Dentists*, 476 U.S. 447, 458 (1986) (under

rule of reason, "the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition").

2. The Trade Association and Standards-Setting Context

Section 1 of the Sherman Act has been applied in the standards-setting context and it has been held that an association and/or its members may be held liable for antitrust violations.[3] *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). However, an association or its members can only be held liable if they act collectively in connection with the challenged conduct; mere participation in a trade association will not suffice:

> [C]oncerted action does not exist every time a trade association member speaks or acts. Instead, in assessing whether a trade association (or any other group of competitors) has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association.

Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1007, 1009 (3d Cir. 1993), *cert. denied*, 514 U.S. 1063 (1995) (footnote omitted). *See also Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293-94 & n.30 (5th Cir. 1988) (when analyzing activities of a trade association "the mere showing of relationships between alleged conspirators is insufficient to imply a conspiracy"); *Wilk v. American Med. Ass'n*, 895 F.2d 352 (7th Cir.), *cert. denied*, 496

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[3] The *Hydrolevel* Court, relying on general principles of agency law, determined that the American Society of Mechanical Engineers ("ASME") could be held liable for the actions of its officers and agents taken with apparent authority. The Court held that imposing liability based upon apparent authority comported with the intent of the antitrust laws because ASME possessed great power and the codes and standards it issued influenced policies and affected entities' abilities to do business. *Hydrolevel*, 456 U.S. at 570. "When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* at 570-571. Imposing antitrust liability on the association for the actions of its agents would encourage ASME to police its ranks and prevent the use of associations by one or more competitors to injure another. *See generally id.* at 571-73.

U.S. 927 (1990) (same); *Five Smiths, Inc. v. National Football League Players Ass'n*, 788 F. Supp. 1042, 1049 n.5 (D. Minn. 1992) (same).

Assuming concerted action can be established, courts have typically applied a rule of reason analysis in the standards-setting context to judge the competitive effects of an alleged restraint. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988). *See also Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 786 F. Supp. 1518 (C.D. Cal. 1991), *rev'd on other grounds*, 17 F.3d 295 (9th Cir.), *cert. denied*, 513 U.S. 813 (1994). While "[t]here is no doubt that the members of [standards-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm,"[4] *Allied Tube*, 486 U.S. at 500, standards-setting can, and indeed does, perform important procompetitive functions.[5]

Cases involving antitrust claims in the trade association context recognize this procompetitive potential, and make clear that absent an anticompetitive purpose or effect, antitrust liability should not arise. For example, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985), the United States Supreme Court, observing that a wholesale purchasing cooperative would seem to be "designed to increase economic efficiency and render markets more, rather than less competitive," concluded that the expulsion of a member from the cooperative buying group should be judged under the rule of reason "[u]nless the cooperative possesses market power or exclusive access to an element

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[4] Standards activity may result in anticompetitive effects by facilitating collusion among competitors, thereby: (i) depriving consumers of desired products; (ii) eliminating competition on quality or price; and (iii) excluding competitors.

[5] The procompetitive functions of standards-setting have been recognized to include: (i) serving as an efficient means of buyers and sellers to exchange information on complex product attributes; (ii) easing the introduction of new technologies; (iii) allowing innovative manufacturers to demonstrate advantages of new products; and (iv) reducing production and distribution costs by eliminating superfluous product variation.

essential to effective competition." 472 U.S. at 295 (internal quotations omitted). Finding that the plaintiff did not make a threshold showing that these "structural characteristics" were present, the Court remanded the case for further proceedings. *Id. See also Consolidated Metal Prods., supra* (trade association's delay in licensing of monogram for manufacturer's sucker-rods not motivated by anticompetitive animus; "[e]ven if user reliance gives [the trade association] influence over the market, that influence may enhance, not reduce, competition and consumer welfare"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (the promulgation of a standard by a trade association lowers information costs and creates a better product -- the very benefits that the antitrust laws seek to promote); *Moore v. Boating Indus. Ass'ns*, 819 F.2d 693 (7th Cir.), *cert. denied*, 484 U.S. 854 (1987) (determination of trade associations that they could not certify boat trailers which used lamps manufactured by plaintiff, in the face of an independent test report showing that the lamps did not comply with federal standards, did not violate federal antitrust laws absent evidence that conduct of trade associations had anticompetitive effect); *In re Circuit Breaker Litig.*, 984 F. Supp. 1267 (C.D. Cal. 1997) (decision of standards-setting organization not to adopt a standard for rebuilt circuit breakers was reasonable, non-discriminatory, and based entirely on technical feasibility and did not cause any competitive injury).

The cases in which antitrust liability has been imposed against standards-setting organizations have involved particular factual situations in which the alleged conduct has been deliberately aimed at manipulating the standards process or otherwise causing an anticompetitive effect. For example, in *Allied Tube, supra*, a jury, instructed under the rule of reason, found that the defendant, a member of the National Fire Protection Association ("NFPA"), had violated the

antitrust laws by seeking to block inclusion of flexible plastic electrical conduits manufactured by the plaintiff in the 1981 edition of the National Electrical Code (the "Code").

Prior to the meeting of NFPA members at which plaintiff's proposal would have been voted upon, defendant (the leading U.S. producer of steel conduit), met with members of the steel industry, other steel conduit manufacturers and independent sales agents, and agreed to exclude plaintiff's plastic conduit from inclusion in the Code. To effectuate this plan, defendant recruited 230 people to become new members of NFPA so that they could attend the meeting specifically to vote against plaintiff's proposal. *Id.* at 496-97. The recruits had their expenses paid, were instructed where to sit, had group leaders appointed to instruct them how to vote by walkie-talkies and hand signals, were provided box lunches, and were told to stay "nailed to their seats." *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 941 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988). Plaintiff's proposal was defeated by a vote of 394 to 390. *Allied Tube*, 486 U.S. at 497. An appeal to the NFPA Board of Directors was taken, but denied on the ground that although the NFPA's rules had been circumvented, they had not been violated. *Id.* In awarding plaintiff $3.8 million in damages for lost profits, the jury made special findings that defendant's actions had an adverse impact on competition, were not the least restrictive means of expressing opposition to the use of plastic conduit in the marketplace, and unreasonably restrained trade. *See also Hydrolevel, supra* (standards body liable under apparent authority theory for a member's manipulation of standards process; member [competitor of plaintiff] instigated and received a letter from one of association's committees declaring plaintiff's device unsafe and exhibited such letter to customers to discourage them from buying plaintiff's products); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (antitrust liability rested on members' conspiratorial refusal to sell gas to consumers for use with

gas burners not approved by the association; plaintiff's product was refused association's "seal of approval" on the basis of standards that were influenced by members who were competitors of plaintiff).

3. ACTA and Its Members

Under the foregoing authority, assuming ACTA and its members engage only in conduct consistent with the R&O and the OP&P, there should be minimal risk of antitrust liability. Even assuming members' conduct in ACTA is considered sufficient to constitute concerted action for antitrust purposes, the effect of such conduct should hardly be considered anticompetitive.

As an overarching matter, principles of openness and due process required by the R&O and reflected in the OP&P should compel decisions to be made in a manner that is advantageous to the industry as a whole, and thus procompetitive. (*See* R&O at ¶¶ 30, 50, 51, 58.) This would apply in particular to those areas of responsibility for which the R&O has assigned ACTA certain discretion – *i.e.*, in connection with establishing the database and a numbering and labeling scheme. (*See* R&O at ¶¶ 108, 114.) As respects populating the database, ACTA is even further removed from engaging in potentially anticompetitive conduct because its role is to rely upon TCB or SDoC certifications for such purposes, rather than make its own judgments in this regard. (*See generally,* R&O at ¶¶ 85-106.) Therefore, unless members purposefully act to subvert ACTA's procedures and responsibilities for their own competitive gain, the likelihood that any anticompetitive effect occurring should be *de minimis*.

Further, specifically in connection with the publication of technical criteria, the likelihood of antitrust liability arising should be even less than in the typical standard-setting context. Distinct from SDOs that substantively effectuate the development of particular standards, the R&O and OP&P limit the involvement of ACTA, and per force its members, to

solely an administrative role in acting as a clearinghouse for the publication of the technical criteria. (R&O at ¶¶ 31, 49, 55.) ACTA expressly is not to partake in any substantive decision-making regarding the development of technical criteria. (R&O at ¶ 49.) Nor is it to engage in policymaking activities. (R&O at ¶ 55.) ACTA's role in determining whether a particular technical criteria is non-duplicative and addresses the specific harms identified in the R&O is also administrative; it is simply to rely upon certifications from the contributing SDOs that such requisites are met. (R&O at ¶¶ 60-61.)

In addition, the fact that only ANSI-accredited SDOs are permitted to contribute technical criteria should provide a further layer of procedural protection against potential liability. (*See* R&O at ¶ 58.) The SDOs, as a condition of ANSI accreditation, are required to comply with procedures based upon principles of openness, due process and fairness. (*See* R&O at ¶¶ 30, 58.) The United States Supreme Court and other courts have recognized that such procedures militate against potential antitrust liability. "The hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standards-setting process from being biased by members with economic interests in restraining competition." *Allied Tube*, 486 U.S. at 509.[6] ACTA's own similar procedures, and the limitations on its activities, should further reduce the likelihood of a finding of antitrust liability.

The appeal procedures established by the R&O, and those afforded in the OP&P, also should serve to insulate ACTA and its members from antitrust exposure. (*See* R&O at ¶¶ 71-72.) Again, ACTA is precluded from taking any role in the appeals process relating to technical criteria. (*See id.*) Instead, complaining parties are directed to address issues in the first instance

[6] *See also Pretz v. Holstein Friesian Ass'n of America*, 698 F. Supp. 1531 (D. Kan. 1989) (presence or absence of fair hearing "certainly affects the factfinder's determination of defendant's motive or intent and the reasonableness of defendant's restraints under a rule of reason analysis"); *Brant v. United States Polo*

to the relevant SDO, then to ANSI and to the FCC in appropriate circumstances. (R&O at ¶ 71.) Moreover, the OP&P appeals process affords redress for actions taken specifically by ACTA in a manner consistent with due process principles of fairness and openness. Thus, no basis for a claim that any of the appeals processes were manipulated for anticompetitive purposes or with an anticompetitive effect should be successful against ACTA.

The potential for antitrust liability exposure may be even further reduced for ACTA and its members on the basis of the *Noerr-Pennington* doctrine. This judicially-created exemption renders the antitrust laws inapplicable to individual or group action intended to influence legislative, executive, administrative or judicial decision-making, provided that such action is not a mere "sham" to cover what is in actuality nothing more than a baseless interference with a competitor's ability to compete. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (extending the *Noerr-Pennington* exemption to activity directed at influencing administrative agencies). The *Noerr-Pennington* doctrine sweeps broadly and is implicated by federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of federal government.

While *Allied-Tube* holds that the *Noerr-Pennington* doctrine does not protect lobbying efforts directed at private organizations, 486 U.S. at 499-500, the Supreme Court there also indicated that the doctrine might extend to activities of private standards-setting groups that influence government bodies, depending upon "the context and nature of the activity." *Id.* at 504. The Ninth Circuit's decision in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc., supra*, is

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Ass'n, 631 F. Supp. 71, 78 (S.D. Fla. 1986) ("[p]laintiff could argue…that the lack of procedural due process and fair play…somehow evidences an anticompetitive motive or intent").

instructive. There, defendant/manufacturer, through deliberate misrepresentations, caused a standard-setting organization to amend its model fire code to disadvantage the plaintiff/competitor. The Ninth Circuit held that the defendant was shielded from antitrust liability by *Noerr-Pennington* immunity because the injuries that the plaintiff complained of were the direct result of governmental action (*i.e.*, local governments' formal adoption of the amended fire code as law), and that plaintiff never proved that it sustained injuries from anything other than the actions of municipal authorities. 17 F.3d 299-300.

> To rule otherwise and hold [defendant] liable for injuries flowing from governmental decision-makers' imposition of an anticompetitive restraint, we would have to find that the restraint was imposed *because of* [defendant's] petitioning efforts. Proof of causation would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue. This inquiry runs afoul of the principles guiding the [*Noerr-Pennington* doctrine].

Id. at 300.

Noerr-Pennington immunity, thus, arguably would similarly apply to the activities of ACTA's members, assuming it can be shown that the nature of the claimed injuries of a putative plaintiff result from the Commission's acceptance of published technical criteria as presumptively valid. If, on the other hand, a plaintiff presents evidence that its injuries flow directly from the conduct of ACTA other than as directed by the Commission, *Noerr-Pennington* immunity would less likely apply.

4. Antitrust Conclusion

In sum, the structure of ACTA and the limitations on its activities should insulate it and its members from antitrust exposure. Its conduct, for the most part, should be purely administrative in nature, and it should not be susceptible to manipulation for anticompetitive purposes or for an anticompetitive effect. To the extent that ACTA has been assigned tasks requiring certain discretion, its own procedures should provide adequate protections against such results as well. Of course, concerning these latter activities, greater attention to potential antitrust exposure should be made.

B. Potential Tort Liability

1. General Principles

Trade associations, including in the standards-setting context, have been subject to claims for negligence. To be liable under such a claim, a plaintiff must prove: (i) a duty owed by the defendant to the plaintiff; (ii) breach of that duty by the defendant; and (iii) damages proximately caused by that breach. *See, e.g., Wayburn v. Madison Land Ltd. Partnership*, 724 N.Y.S.2d 34 (1st Dep't 2001). *See also* W. Prosser, *Law of Torts* §30 at 143 (1971).

Negligence liability may also be imposed pursuant to a "voluntary assumption of duty" theory, as articulated in Restatement of Torts § 324A. Section 324A provides:

> One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if:
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> (1) his failure to exercise reasonable care increases the risk of such harm;
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> (2) he undertakes to perform a duty owed by the other to the third person; or
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> (3) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Accordingly, even where a duty is not legally imposed, one who undertakes to aid another is under a duty to exercise due care in acting and may be liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relies on the undertaking. *Paz v. California*, 994 P.2d 975, 980 (Cal. 2000). *See also Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784 (Alaska 1993); *Diaz v. Johnson Matthey, Inc.*, 869 F. Supp. 1155 (D.N.J. 1994).

2. The Standards-Setting Context

Under these theories, the conduct of SDOs has been challenged pursuant to claims alleging tortious conduct in the form of negligent misrepresentation, negligent promulgation of or failure to comply with standards, or negligent failure to warn. Such claims could also conceivably include a claim for negligent publication of inaccurate technical specifications. However, perhaps even more so than in the antitrust context, the likelihood of a plaintiff succeeding on such claims, assuming that ACTA and its members act pursuant to the R&O and OP&P, should be limited.[7]

As a general matter, courts have been reluctant to impose negligence liability on entities such as trade associations that set industry standards. Such courts have declined to impose a duty on the trade associations because they did not manufacture the injury-causing products or because they did not exercise control over the manufacturers of those products. Courts have

[7] It is notable that the members of an unincorporated association such as ACTA are recognized to be engaged in a joint enterprise. The negligence or fault of each member in the prosecution of that enterprise is therefore imputable to each and every other member. *See Johnston v. Albritton*, 134 So. 563, 565 (Fla. 1931) ("unincorporated, voluntary associations organized for business or other purposes were not considered or recognized as having any other character than that of a partnership in whatever it undertook…."); *McCaskill v. Welch*, 463 So.2d 942, 949 (La. App. 1985) (every member of a partnership is jointly and severally liable for torts committed by other members of the partnership acting within the scope of the firm business).

found control to be lacking particularly where the trade association is involved in only the distribution of guidelines or recommendations that are not mandatory.[8]

For example, in *Beasock v. Dioguardi Enter., Inc.*, 494 N.Y.S.2d 974 (Sup. Ct. Monroe Co. 1985), the court held that the Tire and Rim Association ("TRA") did not owe a duty of care to an injured consumer because it did not actually develop the standards followed in the industry. Rather, TRA only published information reflecting the standards that were being practiced. The court stated:

> TRA neither mandates nor monitors the use of its standards by any manufacturer. The yearbook reiterates that which is the fact, i.e., that the information contained in it is advisory only and that any use made of the information "is entirely within the control and discretion of the user and is wholly voluntary." Although TRA's dimensional standards have become industry standards, it has not been shown that discontinuing publication of the specifications for certain size rims or tires would result in the manufacturers ceasing their production. It would be unreasonable to impose a duty of control upon TRA solely by virtue of its limited function of publishing dimensional specification for interchangeability purposes, and then only after such specifications have been accepted by the industry at large.

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[8] *See e.g.*, *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178 (Ill. 1999), *app. denied*, 724 N.E.2d 1266 (Ill. 2000) (trade association did not owe duty of care to carpenters who relied on installation commentary released to industry by association nor did it assume such duty); *Waters v. Autuori*, 676 A.2d 357 (Conn. 1996) (the American Institute of Certified Public Accountants did not owe a duty of care with respect to the development of professional accounting standards); *Meyers v. Donnatacci*, 531 A.2d 398 (N.J. Super. Ct. 1987) (National Spa and Pool Institute ["NSPI"] did not have a duty of care to an injured consumer because the association had not contracted with the consumer, violated any statute or controlled the use of its standards); *Howard v. Poseidon Pools, Inc.*, 506 N.Y.S.2d 523 (Sup. Ct. Allegheny Co. 1986) (NSPI was not liable for negligent misrepresentation because it did not owe a duty to the consumer as the consumer was not among those entitled to rely upon the association's representations nor did it assume such duty), *aff'd*, 522 N.Y.S.2d 388 (4th Dep't 1987), *aff'd*, 534 N.Y.S.2d 360 (N.Y. 1988); *Friedman v. F.E. Myers Co.*, 706 F. Supp. 376 (E.D. Pa. 1989) (under Pennsylvania law, trade association that, among other things, collected and disseminated industry operating statistics and engineering standards, did not owe or assume a duty to the consumer, since the services it performed were for the benefit of its members); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987) (under Pennsylvania law, association that disseminated information about the tobacco industry, but did not manufacture, sell or distribute tobacco products did not assume a duty to warn plaintiff of the dangers of cigarette smoking); *Klein v. Council of Chemical Ass'ns*, 587 F. Supp. 213 (E.D. Pa. 1984) (negligence claim against research institute that published information regarding toxic chemicals dismissed because institute had no duty to warn consumers nor did it assume such duty); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990) (trade association owed no duty to the plaintiff to communicate dangers of working with pesticide).

Id. at 979. Determining that the TRA did not approve or establish designs or specifications, but merely accepted them for publication, and that its purpose was limited to the approval and dissemination of industry norms, the *Beasock* court found that the TRA did not control tire manufacturers, even though its dimensional standards had become industry standards. *Id.* Noting that the TRA neither mandated nor monitored the use of its standards, the court concluded that a duty of control could not be imposed based solely on the publication of the size specifications where there was no evidence that discontinuing publication of certain size specifications would cause manufacturers to cease production. *Id. See also Howard, supra* (since the National Spa and Pool Institute ["NSPI"] neither manufactured the pool nor controlled those who did, liability for negligence could not be imposed).

Recently, however, certain cases, e.g., *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036 (N.J. 1996), have sustained negligence claims advanced against trade associations. In *Snyder*, the Court held that the American Association of Blood Banks (the "AABB") owed the plaintiff a duty of due care, based in part on its position as the primary entity that established standards in the blood banking industry: "[b]y words and conduct, the AABB invited blood banks, hospitals, and patients to rely on the AABB's recommended procedures. The AABB set the standards for voluntary blood banks. At all relevant times, it exerted considerable influence over the practices and procedures over its member banks…. In many respects, the AABB wrote the rules and set the standards for voluntary blood banks." *Id.* at 1048.[9]

[9] *See also Weigand v. University Hosp. of New York Univ. Med. Ctr.*, 172 Misc.2d 716, 659 N.Y.S.2d 395 (Sup. Ct. N.Y. Co. 1997) (AABB, which set standards and guidelines for collection of blood, owed duty of ordinary care to patient who received blood from a member blood bank which was allegedly contaminated with HIV). Notably, the AABB is not ANSI-accredited. American National Standards, by definition, are voluntary in nature. *See also* discussion *infra*, at 19-20, concerning *N.N.V. v. American Ass'n of Blood Banks*, 89 Cal. Rptr.2d 885 (1999).

Another recent decision finding the existence of a duty of care surfaced in 1998. In *Meneely v. S.R. Smith, Inc.,* a Washington State jury awarded $11 million in damages, 60% of which was to be paid by NSPI to a plaintiff who became a paraplegic after diving into a backyard pool. The plaintiff alleged that NSPI was negligent in setting its residential pool safety standards.[10] On appeal, the Washington State Court of Appeals upheld the verdict. *Meneely v. S.R. Smith, Inc.*, 5 P.3d 49 (Wa. App. 2000), *cert. denied*, 21 P.3d 290 (Wash. 2001).

The Court of Appeals in *Meneely* framed the primary issue on appeal as "whether a trade association such as NSPI owes a duty of care to the ultimate consumer." 5 P.3d at 51. It then held that it does "when…it undertakes the task of setting safety standards and fails to change those standards or issue warnings after it becomes aware of a risk posed by the standards." *Id.* Thus, in holding NSPI liable, the court appears to have relied on the distinguishing facts that NSPI had in fact investigated safety issues associated with the pool, found potential problems and then failed to change the standard or notify the public at risk in any meaningful way. As such, the impact of the *Meneely* holding may be limited to the specific facts of the case, where the association had knowledge that continued implementation of its standard could put the public at large at risk.[11]

The *Meneely* decision must also be considered in light of directly contrary precedent in other cases addressing NSPI's standards. For example, in *Meyers v. Donnatacci,* 531 A.2d 398 (N.J. Super. 1987), the court framed the key issue as whether a trade association/standards developer that performs research, conducts surveys, promulgates standards, and holds "itself

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[10] NSPI is an ANSI-accredited standards developer but the standard at issue in *Meneely* had not been approved as an American National Standard. Accordingly, the judge did not permit the introduction at trial of any evidence related to ANSI.

[11] *See also King v. National Spa & Pool Inst., Inc.*, 570 So.2d 612 (Ala. 1990), *appeal after remand*, 578 So.2d 1285 (Ala. 1991) (trade association could be held liable for negligence where, although it had no duty to formulate standards, it had nevertheless done so and therefore, assumed the duty).

out…as an expert in the area of safety standards in swimming pools" owes a duty of care to a consumer who is using a product manufactured and/or installed by one of its members. The court in *Meyers* held as a matter of law that there is no such duty, noting that not-for-profit trade associations "serve many laudable purposes in our society," including developing voluntary consensus standards and suggested that such public interest benefits should not be lightly discouraged. *See also Beasock, supra* (holding that a duty of care will not be imposed on a standards developer absent a relationship with the manufacturer "sufficient to exercise control over the culpable conduct"); *Howard, supra* (holding that NSPI owed no duty to the plaintiff and that for the standards developer "to be responsible for the [alleged] negligence of the manufacturer, it must appear that such defendant controlled the tort feasing manufacturer").

Moreover, since the decision in *Synder* and the lower court holding in *Meneely*, at least three decisions have been issued holding that standards developers do not owe a duty of care such that they would be liable for tort damages. First, in *Commerce and Indus. Ins. Co. v. Grinnell Corp.*, 1999 WL 508357 (E.D. La. 1999), plaintiffs alleged that the NFPA failed to provide sufficient warnings and was negligent in promulgating safety standards relating to the storage of warehouse merchandise. In holding it to be improper to impose such a duty on NFPA, the court found that the relationship between NFPA and the occupant of the building in question was too remote. The court also dismissed the plaintiffs' claims that NFPA was negligent in developing the standards in question, and distinguished the circumstances from those in *Synder*:

> [T]he NFPA does not list, inspect, certify or approve any products or materials for compliance with its standards. It merely sets forth safety standards to be used as minimum guidelines that third parties may or may not choose to adopt, modify or reject. Thus, NFPA has no control over whether or which jurisdictions adopt its voluntary standards….
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> * * *

> [M]ost courts have focused on the amount, if any, of control a trade association wields over the behavior of its members concerning, for example, the proper implementation of its standards….
>
> * * *
>
> Finally, even if plaintiffs could establish a duty on the part of the NFPA, they point to no evidence that the NFPA failed to exercise reasonable care in promulgating its standard….

Grinnell, 1999 WL 508357 at *4 (citations omitted). The *Grinnell* Court further admonished:

> Promoting public safety by developing safety standards is an important, imperfect, and evolving process. The imposition of liability on a nonprofit, standards developer who exercises no control over the voluntary implementation of its standards under circumstances like those presented here could expose the association to overwhelming tort liability to parties with whom its relationship is nonexistent and could hinder the advancement of public safety.

Id. at *3. ACTA would play an analogous, if not more constrained, role as compared to the NFPA given its limited administrative role in publishing technical criteria and populating the database solely pursuant to certifications from terminal equipment manufacturers.

Similarly, in *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178 (Ill. App. 1999), *app. denied*, 724 N.E.2d 1266 (Ill. 2000), *Synder* and its progeny were distinguished. In that case, the court held that the Truss Plate Institute ("TPI"), which had disseminated a pamphlet that a manufacturer of a truss system had provided to carpenters, owed no duty to the carpenters. In so doing, the court emphasized that TPI had no ability to oversee or control access to their recommendations or their use. The court also reiterated that standards developers provide a significant benefit to society and that public policy considerations mitigated in favor of not finding a duty under the circumstances presented in *Bailey*.

The third recent decision holding that no duty was owed to third parties by standard-setting organizations again involved the AABB. In *N.N.V. v. American Ass'n of Blood Banks,* 89 Cal. Rptr.2d 885 (1999), the plaintiff was a child who contracted AIDS in 1984 from a blood transfusion administered to him during surgery shortly after his birth to correct a congenital heart defect. The arguments raised by the plaintiff against AABB were very similar to those raised in the *Synder* case.

In *N.N.V.*, however, the California Court of Appeals held that AABB did not owe a duty of care to third parties when it voluntarily undertook to set blood-bank safety standards. 89 Cal.Rptr.2d at 905. The court based its decision, among other things, on the lack of scientific evidence presented by the plaintiff to show that there was "a close connection between the AABB's recommendations and his injury; he presented only speculation that adoption of the particular standards might have prevented his infection." *Id.* at 900-01. The court further noted that the problem of how best to test blood for the AIDS virus was, at the time in question, still a matter of contested debate in the medical and scientific community. If under then-current medical thinking there were acceptable alternative approaches, it would be unfair in hindsight to require that the medical community always make the correct selection:

> We conclude a professional medical association such as the AABB should not face liability for making a choice among competing scientific and medical opinions when the medical and scientific community has reached no consensus on the proper approach to a medical situation and there is no showing the association was involved in any fraud or bad faith.

Id. at 909.

The court further noted that as a matter of public policy, society benefits from the work done by private sector standards developers:

> Leaving these matters solely in the hands of government agencies, which is a possible result of imposing liability here, would not

> further the public's interests nor guarantee the safety of the nation's blood supply. It would limit the debate and would deprive medical practitioners, scientists and governmental agencies of a valuable resource.

Id. at 905.

Finally, the *N.N.V.* court directly addressed the conflicting decision in *Synder*. *Id.* at 905-09. The *N.N.V.* court found the reasoning in *Synder* to be flawed because there was insufficient evidence presented that in 1984 the injuries to these types of plaintiffs was foreseeable given the unresolved debate within the community of relevant experts and accused the *Synde*r court of using a "hindsight analysis". *Id.* at 907-08. The *N.N.V.* court also noted that, contrary to the *Synder* court's view, imposing liability on AABB would not further the goal of preventing future harm. *Id.* at 908-09. Instead, it would likely chill debate on public health issues and deter private sector associations from undertaking this valuable work. *Id.* Accordingly, the *N.N.V.* court's refusal to impose a duty of care upon a blood bank that voluntarily undertook to set blood-bank safety standards, makes the weight of *Snyder* and its progeny somewhat limited.

3. ACTA and Its Members

The foregoing cases establish a strong prevailing sentiment that the public interest is both served and protected if standards-setting organizations, particularly those that neither mandate nor monitor the use of their standards by any manufacturer, are not burdened with a legally imposed or voluntarily assumed duty of care to ultimate consumers. In the few cases where a trade association has been held liable for negligence, the trade association exercised a degree of control over their members well above that which ACTA would enjoy in publishing the technical criteria and maintaining the database or developing numbering and labeling procedures. *See Snyder, supra* (AABB "sought and cultivated" responsibility for blood safety and today dominates "the establishment of standards for the blood-banking industry); *Weigand, supra*

(same); *King, supra* (NSPI promulgated safety standards, seeking to influence its members' design and construction practices after studying "the needs of the consumer").[12]

In contrast, ACTA and its members will have no control over the SDOs and even less control over the SDOs' members, who will be developing the technical criteria. Even more remote would be the users of the technical criteria developed by the SDOs and published by ACTA, *i.e.*, terminal equipment manufacturers, or consumers of such equipment. Accordingly, ACTA would be so far removed from those likely to be in a position to assert a tort claim that it should be unlikely that any court would conclude that ACTA owes a duty to such persons.

Further, the structure for ACTA established by the R&O, which limits ACTA's role to performing only administrative functions, should afford additional insulation from tort liability. (*See* R&O at ¶¶ 31, 49, 55.) ACTA has no control over the substance of the technical criteria submitted by SDOs, nor will it have control over whether particular terminal equipment included in the database meets the established technical criteria. (*See id.* and ¶ 108.) Regarding this latter point, under the R&O, all terminal equipment will be included in the database for which certifications are provided from a TCB or via the SDoC process. (*See* R&O at ¶ 108; *see also generally*, R&O at ¶¶ 85-106.)

The voluntary nature of the ANSI process also should limit potential tort liability for ACTA and its members. Under the R&O, only ANSI-accredited SDOs may contribute technical criteria to ACTA for publication. (R&O at ¶ 58.) Even assuming the technical criteria has not attained the status of becoming an American National Standard, adherence thereto under ANSI procedures is wholly voluntary, and in all events such adherence will be neither monitored nor controlled by ACTA.

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[12] As respects *Meneely*, as discussed above, the particular facts at issue there involving foreknowledge of potential risks sets it apart.

In sum, even more so than in the context of potential antitrust liability, ACTA's structural constraints should protect it and its members from potential tort liability. Such constraints define the relationship of ACTA to potential users of terminal equipment as, at best, distant, and therefore the likelihood of any duty being imposed upon ACTA in favor of such users should be small. (*See* R&O at ¶¶ 31, 34, 49, 50, 51.) Moreover, conduct by ACTA members that may be contrary to the organization's governing principles will not alter the fundamental relationship with those users. Thus, while it is possible that ACTA members may undermine the organization's procedures in a manner that might give rise to an antitrust claim, such conduct should not provide a basis for a tort claim.

Further reducing the likelihood of tort liability exposure is the possible application of a qualified immunity defense.[13] When a private organization performs a quasi-governmental task that the state would otherwise have to perform, public policy compels a grant of immunity. *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 406 (7th Cir. 1993). As it does for public officials, immunity alleviates the fear and expense of litigation, the diversion of personal energy from pressing public issues, and the deterrence of qualified private parties from serving the public interest. *See Sherman, supra*.

Whether a trade association may enjoy qualified immunity, thereby remaining liable only for the failure to act in good faith, may depend upon whether the government, by statute or contract, delegates a typically-governmental function to the association.

> Relevant to the determination whether a private association is entitled to qualified immunity as a quasi-governmental entity are

[13] Under the doctrine of qualified immunity, government officials are protected from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Good faith" giving rise to qualified immunity exists where an official's acts do not violate clearly established law (i.e., state and/or federal constitutions, statutes, regulations and/or common law) of which the official reasonably should have known. *Id.*

> both the association's activities and its relationship to government. In each case in which a court has recognized a private entity's claim of immunity, the entity had performed quasi-governmental functions pursuant to a governmental grant of authority.

Snyder, 676 A.2d at 1051 (citations omitted). For example, in *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985), the court held that because the NASD was performing disciplinary functions pursuant to a congressional mandate, the court accorded it "absolute immunity from civil liability for actions connected with the disciplining of its members." *Id.* at 692.[14]

The Commission created and authorized ACTA to perform certain functions – to act as the clearinghouse publishing technical criteria developed by ANSI-accredited SDOs and to maintain the database – that had previously been performed by the Commission. (R&O at ¶¶ 2, 5, 52, 53.) Moreover, ACTA's conduct in such regard is directly pursuant to the FCC's directives. Accordingly, at least arguably, ACTA and its members should be granted immunity for their good-faith performance of the quasi-governmental tasks delegated to it by the Commission in the R&O.

C. Suggested Actions

Notwithstanding that ACTA's potential liability, and that of its members, may be limited, ACTA should, as it already has in the OP&P, take actions that would protect against potential antitrust and tort liability, and even the assertion of such claims. This is particularly true for ACTA in terms of its database and its numbering and labeling responsibilities, as the R&O mandates that both such functions be executed pursuant to certain discretion exercised by ACTA.

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[14] *See also Sherman, supra* (qualified immunity from tort liability extended to mental hospital operating under a court order to admit a patient on an emergency basis); *Citrano v. Allen Correctional Ctr.*, 891 F. Supp. 312 (W.D.La. 1995) (granting qualified immunity to employees of private corporation operating prison under contract with state).

(*See* R&O at ¶¶ 108, 114.) Thus, special heed should be given to ensuring that all such conduct be undertaken in an equitable and non-discriminatory manner. (R&O at ¶¶ 110, 115.) Further, no particular entity or segment of the industry should be permitted to engage in conduct directed toward achieving an anticompetitive purpose or effect or in pursuing a result that may involve known risks. (*Id.*) Thus, ACTA should:

(1) Ensure that meetings of the organization have the sole purpose of furthering the organization's purpose and mission as set forth in the OP&P.

(2) Conduct meetings and other related activities openly and fairly.

(3) Maintain agendas and minutes or recordings of meetings.

(4) To the extent the R&O permits ACTA to make any decisions or judgments, such decisions or judgments should be based upon objective criteria and, to the extent possible, in a manner that would serve the industry as a whole consistent with the R&O.

In addition, ACTA might also consider using various disclaimers. For example, in connection with giving notice of technical criteria submitted by SDOs, ACTA should consider use of a disclaimer stating the source of the technical criteria, that the technical criteria was developed solely by the SDO and not ACTA, that the technical criteria is not approved by ACTA, and that ACTA is playing solely an administrative role. In addition, a disclaimer should be considered in connection with ACTA's publication of technical criteria. In this regard, ACTA might include an express statement that the technical criteria is being published pursuant to certification of an SDO, that ACTA has not undertaken any independent certification of the criteria, that substantive comments or appeals should be properly directed to the developing SDO, and that use of the criteria is entirely within the control and discretion of the user. For purposes of both the notice and publication of technical criteria, ACTA may also wish to include

a notice that all intellectual property rights remain with the developing SDO. In the published version, appropriate copyright and other applicable IPR notices should be included as well.

Further, ACTA's database might carry forms of disclaimer. First, ACTA should consider disclaiming all responsibilities for accuracy, fitness, appropriateness or otherwise, for previously available equipment data assumed from the Commission's database and the existing Part 68 technical criteria. Second, disclaimers such as discussed above in connection with the use of the published technical criteria should be considered for the database. Third, to the extent criteria is newly contributed, ACTA should clearly and unequivocally disclaim such responsibilities, among others, by language such as the following:

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While these procedural safeguards will not, in and of themselves, eliminate the possibility of antitrust or tort liability, they are additional tools to minimize such risks. In connection with specific conduct and activities, however, consideration should be given regarding the particular legal ramifications that may arise from such conduct.

IV. CONCLUSION

For the foregoing reasons, even more so than as respects traditional standards-setting organizations, the activities of ACTA, assuming they are conducted within the established mission and scope of the organization and consistent with established procedures and in good faith, should not give rise to likely antitrust or tort liabilities for the organization or its members. While a claim can always be asserted, the likelihood that such a claim would succeed should be limited. Moreover, to the extent that proper procedural steps are followed, including as reflected in the OP&P and as discussed above, the likely liability risks should be lessened even further.