

MEMORANDUM

To: Donny Seyfer
From: Steven J. Cernak, Bona Law, PC
Date: October 25, 2024
Re: **Antitrust Review**

At the request of you and Bob Stewart, I have reviewed the formation and operation of NASTF from an antitrust point of view. That review has not revealed any antitrust issues. Below, I explain my rationale.

Some background on me. I have practiced antitrust law for over 35 years, representing all types of clients, from big defendants to small plaintiffs. I have taught antitrust law as an adjunct professor at three law schools, including the University of Michigan. I have been active in the American Bar Association Antitrust Law Section leadership for decades and currently serve as Section Chair. The views expressed below are my own.

Antitrust law and policy are designed to protect competition and the competitive process in hopes of benefiting consumers and other players in the marketplace. Importantly here, antitrust has long recognized that competition can sometimes be advanced when competitors join forces for the good of consumers.

Antitrust courts have long supported such joint efforts, whether joint ventures, trade associations, standard-setting bodies, or some other form, so long as the joint effort has procompetitive aims that will benefit consumers and the joint effort's actions, on balance, tend to advance those aims.

Examples of such procompetitive joint efforts abound in the auto industry – I have even advised members of such joint efforts. For example, GM, Ford and then-Chrysler have long saved money and increased innovation by jointly conducting certain research efforts as part of the U.S. Council on Automotive Research. GM and Toyota came together in limited but important ways to build several high-quality vehicles for decades in NUMMI. And the Society of Automotive Engineers has long set standards in ways that provide assurances to consumers of well-built and -engineered vehicles while allowing OEMs the freedom to individually design and build innovative vehicles.

Similarly, the procompetitive rationale for the existence of NASTF is obvious. Automotive OEMs as well as their dealers and other industry players and customers have a serious interest in vehicle security. On the other hand, those same entities periodically require that certain important but sensitive information be made available to the right people in the right way at the right time to properly service customers' vehicles. Having each OEM and customer vet every entity every time such a need arises would be prohibitively expensive if not impossible. An entity like NASTF solves many of those problems by ensuring that only the right people obtain such sensitive information and customer needs are handled efficiently.

However, having a rationale for existence does not immunize an organization such as yours from all antitrust risk – you still must be run properly. For example, an organization cannot be used to favor certain groups over others, especially if that favoritism could be interpreted as harmful to your overall goal of serving consumers.

NASTF, however, seems to be well run in those respects. Your management and governance are broadly based to reflect several types of participants in the industry. Your decisions are objective and your processes, including appeals, are fair and based on doing what is best for the customer. Finally, it is relatively inexpensive and easy for anyone who wants to deal with NASTF to do so. Anyone in the right business with the right state or local license (if required) and a drivers license and appropriate insurance can join. It is clear that NASTF is not being used by one part of the industry to harm another part, all to the detriment of consumers.

Another possible antitrust concern could be that you become the only entity that does what you do AND you then take steps designed solely to maintain that position, again all to the detriment of consumers and the competitive process.

Again, you do not act that way. Your relationships with OEMs and others are such that if others in the automotive community were dissatisfied with your performance, an additional or different organization could be formed to compete with or replace you. You have not locked up any relationships that are necessary for a competitor organization to be formed. Also, you work with any and all appropriate parties in the industry and only impose obligations – such as certain licensing and insurance requirements and non-exorbitant fees – that effectively make your services available to all. The procedures you have in place also seem fair and do not harm or penalize any class of competitors who might choose to deal with NASTF.

It might also be an antitrust problem if some group of competitors use NASTF meetings or policies to collude among themselves or punish their competitors or others in the industry. Again, such concerns do not apply to NASTF. To your knowledge, no entities that compete with one another, such as OEMs, have used your meetings as

opportunities to exchange information that raises antitrust issues, such as vehicle prices or future product information. Also, as stated above, your policies or procedures are fair to all industry participants so as to benefit consumers and so obviously are not a product of collusion among one group of competitors.

In particular, I have reviewed the SDRM Aftermarket Tool Security Validation Licensing Agreement. Nothing in that Agreement changes my conclusions. Again, the license requirements seem reasonable and necessary to achieve the goals of NASTF, namely to balance vehicle security with the ability of various members of the automotive service community to compete for customers.

In sum, any organization like NASTF that brings together various players in the industry, especially competitors, needs to be careful about antitrust concerns. Such an organization cannot allow itself to be dominated by one set of those players to the detriment of others in the industry and, ultimately, consumers. Such an organization cannot allow itself to become a means for competing interests to collude or police such collusion.

Ways to avoid such issues include ensuring that all policies and procedures are objective, reasonable, and fair to all the players in the industry, as you have done. Such policies and procedures should facilitate open competition among the members and others in the industry while still meeting the goals of vehicle security. Members of the organization should be reminded of these goals periodically. Meetings of the organization should focus on those goals and any documents and discussions related to those meetings should clearly indicate that those goals, and not any anticompetitive actions, are being pursued.

Based on my discussions to date, I think NASTF and its policies and procedures are on the safe side of the antitrust laws. I would be pleased to discuss these conclusions with you at your convenience.