

# Voluntary Standards, Self Governance & Competition Law

June 10, 2013

Ryan Tisch

Crowell & Moring LLP

# What Are Voluntary Standards?

## EPA's Definition:

- Voluntary standards are developed by industry, nonprofit organizations, trade associations, and others.
- A generally accepted definition of standards states that they are sets of rules, conditions or requirements concerned with the definition of terms, classification of components; delineation of procedures; specification of dimensions, materials, performance, design or operations; measurement of quality and quantity in describing materials, products, systems, services or practices; or descriptions of fit and measurement size.

# The Legal Regime

- Sherman Act: prevents contracts and combinations “in restraint of trade,” and monopolization/attempts to monopolize
- Clayton Act: permits private actions (with treble damages) for violations of the Sherman Act
- Bottom Line: The “potential for procompetitive benefits . . . has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations.”
- Key inquiry is whether anticompetitive effects are outweighed by procompetitive benefits.

# “Significant Procompetitive Advantages”

- “The public and private benefits of industry self-regulation are many.”
  - Promotes consumer benefits
  - Lowers production costs to manufacturers
  - Lowers information costs to consumers
  - Lowers cost of governance (to industry and the public)

# So What's the Risk?

- “Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.”

-Supreme Court, *Allied Tube*

- “Self-regulation creates competitive concerns in the limited group of cases in which rivals are foreclosed from the market without justification.”

-FTC Chair Robert Pitofsky

# Anticompetitive Impacts

- Self-regulation/standards can limit competition in a number of ways:
  - Are rivals excluded?
  - Is output restricted/are prices likely to rise?
- *Effective* self-regulation/standards limits competition almost by definition:
  - What good is a standard everyone ignores?
  - Standards consumers take to have stronger competitive effects.
  - Effects grow even stronger when standards are adopted by government.

# Justifications

- As noted above, private regulation is associated with myriad procompetitive benefits.
- Which are legitimate and strong enough to justify associated restraints?

# Emphasize Merit and Process

- Private regulation offers the most benefit when “based on the **merits** of objective expert judgments and through procedures that prevent the standard-setting **process** from being biased by members with economic interests in stifling product competition”

*-Allied Tube*



# Indicia of Merit

- Involvement of independent experts
- Consideration of a broad cross-section of scientific review
- Inclusion of voices beyond those that would benefit commercially
- Avoidance of vagueness or impractical standards
- Limitation of standards to the four corners of what is necessary to effect the promised benefit

# Elements of Process

- Broaden participation in the regulation process
- Set rules for adoption of standards that promote transparency and information-sharing
- Set clear “rules of engagement” for adjudicating disputes about conformance to standards or other requirements

# Voluntary or Coercive: Competitive Effects

- Truly voluntary standards are unlikely to raise competitive effects
- But *effective* standards and self-regulation *do* constrain producer behavior
- Governmental adoption increases effectiveness but in many cases will not provide immunity

# How *Not* to Do It

- Don't set standards that limit producers' ability to advertise/compete on price (*AMA/Professional Engineers*)
- Don't set standards that lower output without apparent procompetitive benefits (*NAB*)
- Don't set standards set under non-objective criteria (*Radiant Burners*)
- Don't adopt procedures that permit bias against outsiders, or assume protection because of adoption by government (*Allied Tube*)

# Key Risk Trends

- Proliferation of green self-regulatory regimes
- Increased government adoption
- Internationalization/Globalization of standards, organizations, and regulation