Voluntary Standards, Self Governance & Competition Law

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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