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HOW DUE PROCESS IN THE DEVELOPMENT OF VOLUNTARY STANDARDS CAN REDUCE THE RISK OF ANTI-TRUST LIABILITY

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AUTHOR'S PREFACE

In a recent article published in ASTM's "Standardization News" (January, 1990 p.46), Ms. Judy Whally, Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice, wrote:

"The U.S. Supreme Court's two most recent antitrust decisions relating to standards -- Hydrolevel and Allied Tube -- have created substantial concern in the standards making community about the risks of exposure to antitrust liability, and concomitant treble damages, for standards making. Some have gone so far as to ask whether there is not an underlying antipathy between the antitrust laws and the whole standards making process. To the extent this concern about antitrust liability deters the legitimate and strongly procompetitive standards setting process, that is an unfortunate result, and one that it is unlikely the Supreme Court in any way intended."

Intended or not, it would be tragic if the recent Supreme Court decisions had an adverse affect on the development of voluntary standards. It would be ironic if this were the case, because the impact of these decisions could and should be quite the opposite. That is to say, if every standards development organization were to examine its procedures from the point of view of fairness, and make whatever modifications were necessary to assure the utmost due process, then the ultimate result of these recent Supreme Court decisions would be to help the standards community, not hurt it. Again to quote Ms. Whally:

"A standards making body's attention to procedural due process is important not only because it suggests fairness, but because fair procedures are more likely to produce a correct decision, one that the courts need not review. The fairer the decision making process appears, the less inclined the courts will be to question the merits of the standards making decision."

Most of the managers of the voluntary standards development process and the overwhelming majority of the participants in the

process of writing the standards are not attorneys. It is to this group of interested persons -- those affected by the law but not privy to the shaping of it -- that the report is directed. Its purpose is to give to the sponsors and managers of voluntary standards development a working knowledge of how due process affects the process, so that each may be encouraged to review his or her own procedures to determine whether and how additional due process protections might be adopted. The author will consider the report a success if it motivates even one standards developer to review its process in light of the information presented herein.

I would like to thank the Office of Standards Services at the National Institute of Standards and Technology (NIST) for its assistance and encouragement in the development of this study, and for publishing it. The author, of course, bears sole responsibility for the opinions expressed herein, and for any errors of omission or commission.

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TABLE OF CONTENTS

DISCLAIMER.....	
AUTHOR'S PREFACE.....	i
I. INTRODUCTION.....	1
A. Origins of the Study.....	1
B. Significance of the <u>Hydrolevel</u> and <u>Allied</u> <u>Tube</u> Cases.....	2
C. Applicable Legal Principles: The Relationship Between Procedural Due Process and Antitrust Liability.....	7
II. DESIGN OF THE STUDY.....	10
III. THE ELEMENTS OF DUE PROCESS APPLIED TO THE DEVELOPMENT OF VOLUNTARY STANDARDS.....	13
IV. ASSURING DUE PROCESS: SOME GOOD EXAMPLES.....	16
A. Notice.....	16
B. Openness.....	19
C. Balance.....	22
D. Consideration of Views and Objections.....	28
E. Appeals.....	33
1. Access.....	33
2. Unbiased appellate body.....	33
3. Powers of the appeals board.....	36
4. Right to appear.....	36
5. Timely action and complete records.....	36
F. Record Keeping and Rationale Statements....	38
G. General Provisions to Assure Against Standards That Unreasonably Restrain Trade.....	41
V. SUMMARY.....	46

APPENDIX A

I. Introduction

A. Origins of the Study

On June 13, 1988, the U.S. Supreme Court decided the case Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, (1988). The Court ruled 7-2 that a company can incur antitrust liability for its anticompetitive actions during the development of a voluntary standard. The decision raised new concerns within the voluntary standards development community compounding the consequences of a 1982 Supreme Court decision, American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), which rocked the standards setting community with fear and uncertainty. In many ways, the potential impact of the Allied Tube decision on participants in the voluntary standards-writing process is far greater than that of the Hydrolevel decision.

In Hydrolevel, ASME was held responsible under the antitrust laws for the illegal acts of volunteers acting under the apparent authority of ASME, even though their acts violated ASME's rules. In the Allied Tube case, however, the rules of the standards body involved, NFPA, were followed. Thus, Allied Tube stands for the proposition, that unless a voluntary standards body's rules are so fool-proof that they are unlikely to be used to restrain trade or interfere with competition, there is a risk that a lawsuit will succeed, leaving the voluntary standards body, the participating companies, and perhaps even the volunteer participants vulnerable.

It is quite possible that unless the risk is reduced, some companies may have second thoughts about allowing their employees

to participate in the development of voluntary standards. Such an eventuality would be unfortunate, since a viable voluntary standards community is very much needed to further the public interest. Many standards-development organizations, aware of these risks, have adopted excellent provisions in their operating procedures to minimize the potential for abuse. This study identifies some of these provisions and explains why they appear to be effective.

It would be a serious setback if rules of procedure were not updated to permit participants in the voluntary standards-setting process to feel secure against the likelihood of antitrust prosecution. It would be tragic if the result of Allied Tube were to hamper the good work of the voluntary standards organizations by drying up their greatest resource -- knowledgeable participants.

B. Significance of the Hydrolevel and Allied Tube Cases.

Although this study is not intended to be a legal treatise, it is important that readers understand how the cases arose and appreciate the significance of the Supreme Court's rulings for the voluntary development process and for the organizations that develop standards.

The Hydrolevel Case

On May 17, 1982, the United States Supreme Court handed down a 6-3 decision under which one of the country's major certification bodies - The American Society of Mechanical Engineers (ASME) -- was held civilly liable under the antitrust laws for treble damages due to the illegal actions of its volunteer members.

The issue in this case was whether a new product that did not technically meet one of the provisions of the Boiler and Pressure Vessel Code should have been interpreted to be equivalent. With most model code bodies, interpretation letters evaluating whether new products offer equivalent levels of safety are issued by committees made up of volunteer members. In the case at hand, some of these volunteers were found by the court to have had a commercial interest in keeping Hydrolevel's new low-water fuel cut-off device off the market. They subsequently abused their positions of trust in ASME by issuing a letter casting doubt on the safety equivalency of Hydrolevel's competing product.

The case was decided on what lawyers call a theory of apparent authority. That is to say, since ASME held itself out to the public as an organization that issues model codes and interpretations of those codes, it should be liable for the illegal acts of its members even though (1) ASME did not know about those acts, (2) ASME did not ratify those acts, and (3) ASME did not benefit (in fact, was harmed!) by those acts. The reason for such a rule, according to the Court, is that code bodies wield tremendous economic power, even though they themselves are non-profit organizations. Thus the key to the decision is in understanding how the Court perceives code-setting bodies. To quote the Supreme Court:

"ASME can be said to be in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce....When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of business and thus gives them the power to frustrate competition in the

marketplace."

The key question facing standards developers after Hydrolevel was this: What can organizations such as ASME do to limit their exposure to triple damage suits?

The Court itself suggested an answer to that question in its decision, namely to tighten the organization's procedures and to include all conceivable due process protections within them. The Court said:

"Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps....Indeed, ASME has initiated procedures to protect against similar misadventures in the future."

From all reports, a number of standards developing organizations did indeed re-examine their rules of procedure to see whether they could be easily violated. Then, seven years later, the Allied Tube case, where the rules were followed, came along and posed an even greater threat to standards development organizations than did Hydrolevel.

The Allied Tube Case

In this case, the U.S. Supreme Court ruled 7-2 that a company can incur antitrust liability for its anticompetitive actions during the development of safety or product standards, even though the company is in full compliance with the rules of procedure of the standards-setting organization.

In the Allied Tube case, a manufacturer of steel conduit (Allied) joined with other steel conduit manufacturers in an attempt to exclude polyvinyl chloride (PVC) conduit from the

National Fire Protection Association's (NFPA) National Electric Code (NEC).

This is how the Supreme Court described Allied's efforts to bar PVC's acceptance under the NEC. Allied, alarmed that a subcommittee of NFPA was proposing to allow PVC conduit into the NEC, met with other steel conduit manufacturers to plan a strategy to keep PVC out of the code. They jointly agreed to exclude PVC conduit from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the PVC proposal at the annual meeting.

In planning the strategy, the manufacturers abided by all the written rules of procedures of NFPA. They "recruited" 230 people to join the Association and to attend the annual meeting. Among the new members were employees, executives, sales agents, and even a relative of a national sales director. Allied and other steel conduit manufacturers paid more than \$100,000 for the membership, registration, and attendance expenses of these voters.

At the annual meeting, the newly recruited members were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communications. None of these new delegates spoke at the meeting to give any reasons for voting against the PVC proposal. With their solid vote in opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Indian Head Corporation, a major manufacturer of PVC tubing, appealed this membership vote to the NFPA Board of Directors, but the Board

denied the appeal on the grounds that, although the NFPA's rules had been circumvented, they had not been violated.

In the lower courts, Allied Tube had argued that it should not be held liable for an antitrust violation because it believed it had engaged in what was primarily a "political action" activity; if true, that would have exempted it from antitrust liability. The company's argument was based on the fact that the NEC is ultimately incorporated into most building codes, and its action at the NFPA meeting should be protected in the same way as if the company were to appear before state and local building code officials to oppose PVC conduit.

The court rejected this argument, and further rejected the notion that, because Allied Tube had complied with all the procedural rules of NFPA, it should be immune from antitrust liability. The Supreme Court said:

"An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercising decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no...immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace (emphasis added)."

It is easy to see why the Allied Tube decision could make some participants in voluntary standards activities nervous about their risk of antitrust liability. In his minority opinion, Justice White speculated on how this might play itself out:

"The Court's decision is unfortunate....There are now over 400 private organizations preparing and publishing an enormous

variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens...

There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged. The Court's decision today will surely do just that. It must inevitably be the case that codes such as the NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will now think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not) they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives."

The Hydrolevel case forced the voluntary standards community to take a hard look at their rules of procedures to be certain that they were not being violated by members and participants. The Allied Tube case will require these same organizations to take an even closer look at their rules of procedure to be certain that, even when they are followed, they are not abused for anticompetitive purposes.

C. Applicable Legal Principles: The Relationship Between Procedural Due Process and Antitrust Liability

In a March 7, 1989 speech to the American National Standards Institute (ANSI) 1989 Public Conference, Federal Trade Commissioner Terry Calvani spoke about the various ways in which the antitrust laws have an impact on voluntary standards-writing bodies. These were among the points he made:

- o The antitrust laws only condemn standards activity when

it unreasonably restrains trade; and

- o The reasonableness of standards rests more on whether the standards have a technical basis than on procedural niceties.

These points are important. Procedural safeguards per se do not assure immunity from antitrust liability. Rather, good procedural safeguards need to be thought of as good tools of risk management.

That same thought was expressed even more directly in a November 18, 1988 memorandum to the ANSI Board of Directors from its counsel, Cadwalader, Wickersham & Taft. ANSI's lawyers said:

"A major objective of the ANSI Procedures has been to minimize the possibility of antitrust liability resulting from participating in voluntary standards activities. By stressing due process, balanced participation, and other appropriate standards development criteria, the ANSI Procedures provide a road map for those who seek to pursue legitimate standards development. At the same time, the ANSI Procedures reflect a system designed to expose potential antitrust problems before they evolve into an actual violation."

The lawyers went on to warn:

"Even the best written procedures are capable of being circumvented or undermined by a person intent on doing so. For this reason, monitoring to assure compliance will always be of vital importance in the effort to minimize antitrust liability."

The applicable legal principle may be summed up this way. Unreasonable behavior that restrains trade unreasonably can never be legitimized by a defense that is based merely on following the rules of the organization. By the same token, as ANSI and others have stated repeatedly, good rules, well monitored for compliance, can and do protect against both unreasonable behavior and

unreasonable restraints in trade.

II. Design of the Study

Because there are so many different standards-development procedures, it is inappropriate to attempt to produce a "model" set of procedural rules. First, it would be difficult, if not impossible, to draft a "model" to fit the diverse needs of the more than 750 organizations that develop voluntary standards in the United States. Small organizations that produce few standards with limited use are unlikely to adopt elaborate procedures than might be necessary for larger, more market-oriented standards groups. Organizations with full-time professional staffs engaged in standards development have needs different from those of all-volunteer bodies with no staffs at all. Bodies that set standards and also engage in certification activities need to adopt due process procedures that are not required of organizations that only set standards, but which do not certify.

It is also apparent that different standards organizations are comfortable with different types of standards development processes, and would not be likely to make wholesale changes absent a compelling need. Groups that utilize a balanced committee structure face different challenges than are encountered by bodies that rely on the canvass method in their efforts to assure due process.

For all these reasons, the notion of drafting a model set of procedural rules was rejected.

Instead, it was decided that it would be more productive and useful to examine and comment upon the due process rules and

procedures of a diverse group of voluntary standards developers, small and large, well-known and not so well-known, which individually employ very different methods and procedures, and which collectively represent the procedural diversity that exists within the voluntary standards development community. Therefore, this study highlights a number of different approaches to the assurance of procedural due process. The objective is to allow any standards developer to pick and choose from a wider menu than would be the case if we provided only a single prescribed set of model rules.

The following eleven organizations, listed alphabetically, were selected somewhat arbitrarily to represent a variety of the characteristics mentioned above. Each was contacted, informed of the study and its purposes, and asked to provide a copy of its current rules, procedures and/or regulations: ^{1/}

- o American National Standards Institute, Inc. (ANSI)
- o American Petroleum Institute (API)
- o American Society of Mechanical Engineers (ASME)
- o American Water Works Association (AWWA)
- o ASTM
- o Builders Hardware Manufacturers Association, Inc. (BHMA)
- o Electronic Industries Association (EIA)

- o Institute of Electrical and Electronic Engineers, Inc. (IEEE)

^{1/} See Appendix A for the full name, addresses, phone numbers, and person to contact for each of these eleven organizations.

- o National Electric Manufacturers Association (NEMA)
- o Underwriters Laboratories, Inc. (UL)
- o U.S. Department of Commerce, National Institute of Standards and Technology (NIST)

All of them responded in a timely fashion and thereby made this study possible; for that we thank them.

III. The Elements of Due Process as Applied to the Development of Voluntary Standards

There is widespread agreement about what constitutes the elements of due process. In a 1975 ASTM publication entitled The Voluntary Standards System of the United States of America, eight elements are listed, namely:

1. Timely and adequate notice of a proposed standard undertaking to all persons likely to be materially affected by it.
2. Opportunity of all affected interests to participate in the deliberations, discussions, and decisions concerned both with procedural and substantive matters.
3. Maintenance of adequate records of discussions and decisions.
4. Timely publication and distribution of minutes of meetings of both main committees and subcommittees.
5. Adequate notice of proposed actions.
6. Meticulously maintained records of drafts of a proposed standard, proposed amendments, action on amendments, and final promulgation of the standard.
7. Timely and full reports on the results of balloting.
8. Careful attention to minority opinions throughout the process.

A ninth due process element was also identified:

9. A duly appointed review body with authority to set

requirements ^{2/} for:

- (a) Committee organization and operation
- (b) Balance of committee membership
- (c) Voting and public review
- (d) Resolution of negative votes
- (e) Appeals

This list matches up very well with the elements of due process identified in the early 1980's by the Federal Trade Commission during its rulemaking proceeding: Standards and Certification. Notwithstanding all of the controversy and acrimony surrounding that proposed rulemaking effort (which was ultimately abandoned), there was no controversy over the identification of the elements of due process identified in the ASTM list. ^{3/}

The American National Standards Institute, in its publication Procedures for the Development and Coordination of American National Standards, provides an excellent list and rationale for each of the elements of due process. ANSI states (p. 7 Procedures):

"1.2 Due Process Requirements. Due process means that any person (organization, company, government agency, individual, and the like) with a direct and material interest has a right to participate by: (1) expressing a position and its basis, (2) having that position

^{2/} Some of these requirements are germane only to an organization like ASTM which develops consensus standards via a committee method.

^{3/} The staff of the FTC had incorporated additional aspects of due process that were controversial, such as the "duty to act." This study does not include the "duty to act" as an element of due process.

considered, and (3) appealing if adversely affected. Due process allows for equity and fair play."

ANSI then lists these elements:

- o Openness
- o Balance
- o Written Procedures
- o Appeals
- o Notification of Standards Development
- o Consideration of Views and Objections
- o Consideration of Standards Proposals
- o Records

IV. Assuring Due Process: Some Good Examples

This section utilizes the ANSI list that appears at the end of Section III as a point of departure. In the discussion that follows, the order has been modified to follow the typical flow, or process, of standardization. The ANSI explanations as to the significance of each element of due process, as explained in their Procedures, or in their 1978 "National Policy on Standards for the United States and Implementation Plan," are also incorporated in this section. ANSI criteria were selected for two reasons: First, ANSI is in fact the nation's largest coordinating and approval organization. It is looked to for leadership by a wide array of standards developing organizations. And, in the author's opinion, their criteria are both complete and excellent.

A. Notice

"Notification of standards activity shall be announced in suitable media as appropriate to demonstrate provision of opportunity for participation by all directly and materially affected persons."
(ANSI Procedures, Sec. 1.2.6)

Assurance of notice to all affected parties that a standards activity is about to take place protects a standards developer against the possible charge that some interested party was uninformed of the impending development in a timely fashion. This due process element is already well in place within the U.S. standards community. As long ago as 1983, the Presiding Officer in the aborted Federal Trade Commission rulemaking concluded that:

"The notice procedures of standards developers are generally adequate to permit informed participation in their activities by those who are genuinely interested."
(FTC, Report of the Presiding Officer on Proposed Trade

Regulation Rule: Standards and Certification, p. 44)

Large standards-developing organizations (for example, ASME, ASTM, and UL) use a variety of publications, lists, and committees to notify interested parties of standards activities that are about to commence. The task is somewhat harder for smaller organizations. Yet, even they are in a position to use their own newsletters, magazines, and other publications to inform interested parties. For example, the American Water Works Association (AWWA) provides:

"5.4.3 Public Notice

(1) When work is to be initiated by a committee to develop a new standard or related publication or to determine whether an existing standard or related publication should be revised, reaffirmed or withdrawn, public notice of this activity shall be given in Mainstream and such other publications as are deemed appropriate by the council...

(2) THE NOTICE SHALL PROVIDE INFORMATION SUPPLIED BY THE COMMITTEE CHAIRMAN CONCERNING THE SCOPE OF WORK, THE INTENDED PRODUCT, AND A PERSON TO CONTACT FOR MORE INFORMATION." [EMPHASIS ADDED]

COMMENT: This is a particularly good notification rule because it specifies, in generic terms, the contents of the required notice. It also assigns responsibility for the input to the committee chairman.

The Legal Guides, published by the Electronic Industries Association (EIA), provides an excellent "performance standard" for notification, as follows:

"Section E. NOTICE OF MEETINGS

Advance notice shall be given to all participating representatives as to the matter to be considered for standardization and the nature of the action being

contemplated. Procedures should provide reasonable means for making available all data, specifications, and other technical information relating to a product proposed for standardization to all persons participating in or contributing to the program involved irrespective of their membership in EIA."

COMMENT: Without timely and adequate notice, subsequent aspects of fairness and due process can become less meaningful. This provision makes it clear that interested parties may or may not be members of the trade association, but have equal rights to notice.

B. Openness

"Participation shall be open to all persons who are directly and materially affected by the activity in question. There shall be no undue financial barriers to participation. Participation shall not be conditional upon membership in any organization, nor unreasonably restricted on the basis of technical qualifications or other such requirements."

(ANSI Procedures, Sec. 1.2.1)

Whereas notice informs potentially interested parties that a standards activity is to take place, openness allows all interested individuals and groups to participate in the development of the standard. Depending upon the type of procedure utilized by a standards developer and the levels of interest of different participants, the interpretation of the term openness varies. Although the relative merits of different standards development processes will not be debated here, it is important to point out that different processes require different due process protections.

For organizations that use the committee method for developing standards, the rules should provide for access to committee activities. ASTM rules read as follows:

"9. Rules for Conduct of Business

9.1 Open Meetings - The meetings of committees and subcommittees shall be open to visitors when technical matters relating to the development of standards are to be discussed.

9.2 Closed Meetings - It is permissible to hold closed meetings of Executive Subcommittees when technical matters relating to the development of standards are not discussed."

COMMENT: These rules allow closed meetings only for the administrative business of a committee, but

not when any technical issues are addressed.

The Builders Hardware Manufacturer's Association (BHMA), a trade association, has language that makes it absolutely clear that meetings are open to non-members of the association. Their rules state:

"Section meetings where criteria for standards are being discussed shall be held at least once a year and shall be open to all BHMA members and manufacturers who are not members of BHMA. Notice of such meetings shall be sent to all BHMA members and to identified non-member manufacturers at least 30 days prior to the meeting."

COMMENT: This wording recognizes the particular importance to trade associations that interested parties who are not members of the association be treated in a non-discriminatory manner.

For those who cannot attend meetings, organizations need to assure that drafts of proposed standards are readily available for review. The Electronic Industry Association (EIA) does this in a simple, straightforward manner:

"4.5.3 Copies of Standards Proposals shall be available on request by anyone during the period for comments."

The American Petroleum Institute (API) thinks it sufficiently important not only to require that meetings be open to interested parties, but also to define the term "interested parties" as follows:

"API standards meetings are open to all interested parties. Interested parties include consumers, manufacturers, contractors, distributors, designers, and the general public. The presiding officer shall invite expressions in writing from all present and record or summarize such expressions in the minutes."

COMMENT: Note that this language also places an

affirmative duty on the presiding officer (chairman) to encourage active participation. In general, this duty might be assigned to the staff, the chairman, or both.

C. Balance

"The standards development process should have a balance of interests and shall not be dominated by any single interest category.

Dominance means a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints. The requirement implicit in the phrase 'shall not be dominated by any single interest category' normally will be satisfied by the historical criteria for balance; that is, (1) no single interest category constitutes more than one-third of the membership of a committee dealing with safety, or (2) no single interest category constitutes a majority of the membership of a committee dealing with product standards.

Unless it is claimed by a directly and materially affected person that a single interest category dominated the standards development process, no test for dominance is required."

(ANSI Procedures, Sec. 1.2.2)

Standards developing organizations provide for balance in diverse ways -- so varied, in fact, that to excerpt any single set of requirements would not be of particular use to any group that chose to handle balance requirements differently from the example chosen. It may be more useful to examine some generic issues that arise whenever balance is under consideration. (It is noteworthy that the basic procedural flaw that gave rise to the Allied Tube case was the ability of one group to violate the concept of balance by "packing" the electorate at an annual meeting.)

Before examining "balance" per se, it is important to look at the ways in which standards developers differentiate between individual and organizational participation. This is a critical issue due to the amount of influence a single individual, or group of individuals, can wield in a standards development proceeding.

The American Society of Mechanical Engineers (ASME) recognizes the difference between individual and organizational members by defining the terms as follows:

"3.1 Types of Members...

3.1.1 Individual-members are technically qualified individuals with a concern and willingness to participate in work within the scope of the committee. They are recommended by the standards committee to the cognizant board for a five year term. Selection shall include consideration of the business of the employer, if any, type of experience or expertise the individual brings to the committee, to maintain a proper balance... IN THEIR COMMITTEE ACTIVITIES THESE MEMBERS PARTICIPATE, INCLUDING VOTING, AS INDIVIDUALS RATHER THAN AS REPRESENTATIVES OF THEIR EMPLOYER OR OF ANY OTHER ORGANIZATION. [EMPHASIS ADDED]

3.1.2. Organization-members are organizations having a concern and competence in the subject within the scope of the standards committee and willing to participate. They are recommended by the standards committee to the cognizant board for a five year term. Selection shall include consideration of the classification of the business interest of the organization...to maintain a proper balance. AN ORGANIZATION PARTICIPATES IN COMMITTEE ACTIVITIES THROUGH AN INDIVIDUAL DESIGNATED AS ITS VOTING REPRESENTATIVE. Each organization is entitled to one or more representative(s) as established by the cognizant board. Appointment of standards committee membership by the cognizant board shall be based on acceptance of member organizations. The organizations are responsible for designating their voting representatives." [EMPHASIS ADDED]

The Institute of Electrical and Electronic Engineers, Inc. (IEEE) takes a different approach. While encouraging participants to "ballot as concerned professionals" and not as representatives of particular organizations, IEEE recognizes that this may not always be the case. IEEE also makes it the joint responsibility of the chairs of both the working group and subcommittee to protect against undue influence. IEEE provides:

"4.1 Organizational Representation to Working Groups. Organizational representation to Working Groups or to the Standards Subcommittee or both is encouraged. However, except for those individuals for whom a specific letter nominating them as organizational representatives has been received by the IEEE Standards Board, individuals on Working Groups or Balloting Groups do not represent their organizations, but rather themselves. In this context they should work and ballot as concerned professionals in the field, not as representatives of a particular organization.

4.2 Organizational Bias. It is the responsibility of the Standards Subcommittee Chairperson, jointly with the Working Group Chairperson, to ensure that Balloting Groups and Working Groups are not unduly influenced by members belonging to a particular organization. This may take the form of reviewing membership lists or other methods as considered appropriate. Methods to avoid organizational bias may include the following:

- 1) Encouraging open membership of Working Groups and Balloting Groups.
- 2) Holding Working Group meetings at geographically-dispersed locations.
- 3) Providing advance publicity on the schedule of Working Group meetings."

COMMENT: IEEE's approach is particularly good. It not only recognizes the need to protect against organizational bias, but lists some of the ways to deal with the issue.

In attempting to assure balance, many standards developers look to the ANSI Procedures for types of interest groups to be included in the balance. ANSI identifies three basic groups: 1) producer, 2) user, and 3) general interest. ANSI also provides a more detailed breakdown for use "where appropriate." This is:

- | | |
|-----------------------------|-------------------------|
| 1) Consumer | 7) Manufacturer |
| 2) Directly affected public | 8) Professional society |

- | | |
|-----------------------------|------------------------|
| 3) Distributor and retailer | 9) Regulatory agency |
| 4) Industrial/commercial | 10) Testing laboratory |
| 5) Insurance | 11) Trade associations |
| 6) Labor | |

Standards developers often pick and choose from both lists, depending upon the type of standard being developed. For example, ASME provides:

"(a) Product Standards Committees. The members on standards committees dealing with product standards shall be classified from among the following categories:

- (1) Producer or manufacturer interests - those directly concerned with the production of the product involved.
- (2) Distributor and retailer interests - those independently concerned with the marketing of the product between producer and consumer.
- (3) Consumer or user interests - those who use the product involved but are not involved with its production or distribution.
- (4) Federal, state or local government - those employed by government.
- (5) General interest - those who have interests other than those described above.

TO ENSURE SUBSTANTIAL BALANCE, NO ONE CLASSIFICATION SHALL HAVE A MAJORITY EXCEPT WITH THE RECORDED ASSENT OF THE OTHER CLASSIFICATIONS AND THE APPROVAL OF THE COGNIZANT BOARD." [EMPHASIS ADDED]

However, for safety standards, ASME goes further and requires a more elaborate balance of interests:

"(b) Safety Codes and Standards Committees. The members on standards committees dealing with safety codes and standards shall be classified in accordance with their major interests from among the following categories, as appropriate.

- (1) Manufacturers of the product, product component, or material
- (2) Employers - purchasers or owners of the product
- (3) Employees affected by the safety standard
- (4) Governmental bodies having regulatory power or influence over the field in question
- (5) Specialists having expert knowledge in the field of the Committee's work, representatives of independent laboratories, or representatives of technical or other societies
- (6) Insurance interests
- (7) Installers and erectors
- (8) Utilities
- (9) Independent distributors and retailers
- (10) Consumer interests
- (11) Labor

THE PUBLIC INTEREST SHALL BE REPRESENTED AND, TO ENSURE BALANCE, NOT MORE THAN ONE-THIRD OF THE MEMBERSHIP SHALL COME FROM ANY ONE CATEGORY WITHOUT THE WRITTEN CONSENT OF THE OTHER CLASSIFICATIONS AND THE APPROVAL OF THE COGNIZANT BOARD." [EMPHASIS ADDED]

COMMENT: Not only does ASME provide for a broader mix of interests when developing safety standards, but the organization also tightens up on the percentage of control any one category may have.

The National Electric Manufacturer's Association (NEMA), because it is a trade association, goes to great lengths to specify and define user input, since users are by definition non-members of the association. NEMA provides:

"7.12 USER INPUT

NEMA Standards, even though voluntary, have achieved the status of nationally recognized standards through acceptance and use, in many cases without seeking further approvals by other standards organizations. To assist in the continuance of this broad acceptance and to obtain adequate user input, NEMA Subdivisions shall observe the following guidelines in developing proposed NEMA Standards.

"7.12.1 REQUIREMENTS FOR USER INPUT STATEMENTS

...A User Input Statement is required to accompany any submission to the Codes and Standards Committee of a proposed new or revised NEMA Standard, Suggested Standard for Future Design, Authorized Engineering Information, or Official Standards Proposal.

The simple statement that the user input was 'through normal marketing channels' is generally unsatisfactory for new or completely revised Standards. In the case of revisions of Standards, assessment of user needs by this method may be considered adequate, depending on the extent and nature of the revision. Where such input is submitted in lieu of more direct and affirmative canvassing, the Subdivision's User Input Statement shall provide adequate explanation.

Contacts with users for the purposes of obtaining input, like other outside contacts on technical matters, are subject to approval by the Codes and Standards Committee, as delegated by the President and Counsel. It is anticipated that in order to expedite matters, the Engineering Department will continue to be delegated such clearance function in routine situations where no major new contact is involved and where no conflict with other ongoing NEMA contacts seems likely..."

COMMENT: NEMA has additional language in its rules dealing with the development of User Input Statements. Trade associations, in particular, might wish to contact NEMA and examine the entire set of rules.

D. Consideration of Views and Objections

"Prompt consideration shall be given to the written views and objections of all participants, including those commenting on the listing in Standards Action. A concerted effort to resolve all expressed objections shall be made, and each objector shall be advised of the disposition and the reasons therefor." (ANSI Procedures, Sec. 1.2.7)

Whether identified as "minority views," "negative votes," "unfavorable comments," "dissents," "objections," or by some similar term, no due process protection is more important to fairness than the assurance that all viewpoints are considered and appropriately dealt with.

First, there is a need to provide a mechanism for filing objections that is not burdensome to the objector. Most organizations do so in a straight forward manner, requiring only that the objection be in writing, with reasons stated.

Second, there is a need to assure that the negative vote is considered, and that the objector's reasons can be understood by the standards writers and all others who may have a say in amending the standard if the objection is to be taken into account. There are a variety of good provisions in place and worthy to be considered as models.

In its Procedures for the Development of Voluntary Product Standards, the U.S. Department of Commerce specifies:

"Any member of the committee casting a negative ballot shall have the right to support an objection by furnishing the chairman of the committee and the Department with a written statement setting forth the basis for the objection. The written statement of objection shall be filed within 15 days after the date of the meeting during which the voting on the standard was accomplished, or, in the case of a letter ballot, within

the time limit established for the return of the ballot.

At the time a recommended standard is submitted to the Department, the Chairman of the Standard Review Committee shall furnish a written report in support of the committee's recommendation. Such report shall include a statement with respect to compliance with the requirements as established by these procedures, a discussion of the manner in which any objections were resolved, and a discussion of any unresolved objections together with the committee's reasons for rejecting such unresolved objections."

COMMENT: This is a good provision for a number of reasons, including the fact that the section places a specific duty on the chairman of the review committee to assure complete consideration of all objections.

The BHMA, in a single sentence, assures negative voters a right to have their voices heard:

"The primary opponent(s) and proponent(s) of the debated criterion shall prepare a one page position paper statement and these statements shall be circulated with the ballots."

COMMENT: If the length of the statement is restricted to a single page or two, provisions might need to be made for access to additional information, on request by voters or triggered in some other manner.

The IEEE's Guide to Standards Development contains a particularly well-written provision dealing with the need to resolve negative votes in a fair fashion. Because it is so good, the entire section is quoted here:

"4.7.2 Inadequate Resolution of Negative Votes. This is

a point of great sensitivity, as it directly affects the value of the consensus that is being achieved...

- 1) Every attempt should be made to resolve comments, objections and negative votes:
 - a) Review all the comments, objections, and negative votes to ascertain if they can be accommodated by changing the draft. If so, then process them into the document.
 - b) Make a written record of all the comments from the negative voters that could not be accepted, together with the reasons why they could not be accepted. This should be at the granularity to where each objection or negative comment from a negative voter is clearly identified to one and only one issue. SOME OBJECTIONS OR NEGATIVE COMMENTS MAY NOT BE WELL-POSED, MAY NOT BEAR ON THE TOPIC OF THE DRAFT, ETC. EVEN IN THIS CASE, HOWEVER, IT IS RECOMMENDED THAT THE VOTER'S WORDS NOT BE EDITED. The words should be extracted verbatim from the response and enclosed in quotation marks. THIS AVOIDS A LATER APPEAL ON THE PART OF A NEGATIVE VOTER USING AS A BASIS FOR THE APPEAL THAT THE REASONS FOR THE NEGATIVE VOTE WERE NOT ACCURATELY REPRESENTED in the material sent to the Balloting Group. [EMPHASIS ADDED]
 - c) Provide the written reason why that negative comment or objection could not be accepted immediately under each comment.
 - d) Contact the negative voter by telephone and discuss each negative comment. These may then be resolved by use of alternate wording in the areas of concern, or the reasons why the comments could not be implemented may be accepted by the negative voter.

Judgment should be exercised in these resolution actions, however. Cases have arisen where the negative voter desired to expand the negative comments to other areas outside his original objections, provide additional reasons why changes should be made, etc. This can degenerate to where the negative voter would like to take an additional 30 days to provide additional written reasons, etc. If that situation begins to appear, the voter should be informed that the balloting period has closed and that the comments to be discussed are those

that have been previously provided.

2) Recognizing that the Standards Board has a duty to ensure that every attempt has been made to resolve negative votes, IT IS IMPORTANT THAT THE WRITTEN RECORDS SENT TO THE BOARD PROVIDE THE DETAILED BASIS ON WHICH THEY CAN COME TO THAT CONCLUSION...This material is to be provided to the Standards Board with the balloting results." [EMPHASIS ADDED]

COMMENT: Any standards development process that meets all the provisions in this Guide will offer the standards developer good protection against a charge of unfairness.

EIA puts an affirmative duty on its committee chairs that is designed to assure that the objector is informed as to the disposition of his or her negative comment. EIA goes so far as to require the use of registered letters:

"Committee chairmen must attempt to resolve adverse comments either by modification of the content of the Standards Proposal or by explanation of the background to the person initiating the comment. (If modifications are more than 'editorial' the Standards Proposal will be revised and reissued.) Copies of all correspondence must be sent to the Engineering Department to become part of the record of action incident to the particular standard development action.

Fifteen working days after the Chairman has responded to a commentor who submitted an unfavorable comment, the Engineering Department Staff will send a reminder letter to the commentor. IF NO RESPONSE IS RECEIVED WITHIN AN ADDITIONAL FIFTEEN WORKING DAYS, THE ENGINEERING DEPARTMENT STAFF WILL SEND A REGISTERED LETTER TO THE COMMENTOR indicating that if we do not receive an answer to the Chairman's original letter within fifteen days, EIA will consider that the commentor is no longer dissatisfied or that his objections have been reconciled and EIA will proceed with the standards development project." [EMPHASIS ADDED]

ASTM ensures that a negative voter who is dissatisfied with

the handling of his or her negative at a subcommittee meeting has an opportunity to make the case in writing to those persons who did not attend the meeting. ASTM provides:

"Negative votes received on subcommittee letter ballots shall be acted upon either (1) at a meeting of the subcommittee, or (2) by letter ballot of the subcommittee. When action is taken at a subcommittee meeting, it is recommended that the written statement accompanying a negative vote be available to the subcommittee members in attendance prior to a subcommittee action on that negative vote. If the negative vote is submitted to a subcommittee letter ballot for disposition, the written statement accompanying each negative vote and the reasons for recommending that the negative vote be found not persuasive or not related shall be included in the ballot."

COMMENT: This provision is particularly strong in that it protects an objector's right to have his/her viewpoint known whether or not all voters have been in attendance at a meeting where the objection was considered and dealt with.

E. Appeals

"The written procedures shall contain an identifiable, realistic, and readily available appeals mechanism for the impartial handling of substantive and procedural complaints regarding any action or inaction."

(ANSI Procedures, Sec. 1.2.5)

Appeals provisions range from simple to complex, but the most protective ones, no matter how complicated, provide for:

- o easy access;
- o an unbiased body to hear the appeal;
- o a clear statement of the power of the appeals board;
- o a right for the objector to appear and argue his or her case in person; and
- o timely action and complete records.

There is an abundance of examples of strong appeals provisions in each of these areas:

1) Access

NEMA makes certain that any interest party has a right to appeal:

"Any decision of the Codes and Standards Committee may be appealed to the EMSC. When hearing such appeals, notice of such hearings shall be provided to all members of the interested Subdivision(s) and any interested parties who are not members of NEMA."

2) Unbiased Appellate Body

NEMA provides:

"10.22 DISQUALIFICATION TO HEAR APPEALS

When hearing an appeal from any action of the Codes and Standards Committee, any member of the EMSC shall be disqualified from voting on the issue of participating in the Council deliberations on the issue after other parties to the controversy are excluded from the

proceedings if that member is personally involved in presenting a position on the issue or if a person from the member's company is one of a delegation presenting one side of the issue to the Council. If the matter before the EMSC is on appeal from the Codes and Standards Committee, any member of the Council who is also a member of the Committee shall similarly be disqualified from voting and participating in the issue. If the disqualification of EMSC members to hear a particular matter results in a loss of a quorum, the Chairman of the Board of Governors shall appoint substitutes for the disqualified members solely for the purpose of hearing the particular matter on appeal."

The U.S. Department of Commerce provides:

" The Deputy Director of NBS will name two other persons, who have not been directly involved in the matter in dispute and who will not be directly or materially affected by any decision made or to be made in the dispute, to sit on the panel with the Deputy Director, who will act as a presiding officer. The presiding officer will have the right to exercise such authority as necessary to ensure the equitable and efficient conduct of the hearing and to maintain an orderly proceeding..."

The American Petroleum Institute (API) has enacted one of the strongest provisions to assure impartiality, giving the appellant an opportunity to challenge the objectivity of appellate board members:

"Competing suppliers or manufacturers of the product, process or service which is the subject of the appeal shall not participate in the appeals process. Appeals Boards shall consist of three (3) or five (5) individuals selected by the Director in consultation with the Committee Chairman and the Office of the General Counsel. Board members shall not have been directly involved in the disputed matter. The Board may call upon experts familiar with the issues of the dispute. The appellant must be notified of the Board's composition and given the opportunity to object to members on the board. Objections must be substantiated to be considered."

(3) Powers of the Appeals Board

The best provisions allow the appeals board to hear challenges of both a procedural and substantive nature. For example, API

provides:

"The appeals body shall consider whether applicable API policies and procedures were satisfied and whether the procedural and substantive actions or requirements complained of merit corrective action."

Underwriters Laboratories (UL) provides:

"All comments, complaints, and requests for interpretations received during the development of a UL Standard for Safety are considered, and are either resolved or answered in detail. UL's operating procedures contain, as an essential part, the right to appeal any decision, including a decision dealing with comments, complaints, and interpretations regarding UL's Standards for Safety and their development.

This right to appeal exists through each successively higher level of authority in UL's supervisory chain up to and including the office of the President....To serve as a supplement, but not as a replacement, for the other appeals mechanisms, there is also available the 'Technical Appeals Board' (TAB) of UL. The specific purpose of the TAB is to serve as an advisory body to consider matters of technical substance, but not matters of policy, about which any party and UL may hold an unresolved difference of opinion. The TAB serves as a body to which the views of UL and the party appealing a UL decision may be submitted. This method of resolving a difference of opinion is used only after all other administrative appeals channels in UL have been exhausted."

The U.S. Department of Commerce specifies:

"If the Department determines that a recommended standard is not supported by a consensus, the Department may:

- (a) Return the recommended standard to the Standard Review Committee for further action, with or without suggestions;
- (b) Terminate the development of the recommended standard under these procedures; or
- (c) Take such other action as it may deem necessary or appropriate under the circumstances."

(4) Right to Appear

NEMA provides:

"Such notice (of an appeals hearing) shall set forth the substance of the matter in dispute, and shall indicate that any interested member or nonmember shall have a right to be heard by the EMSA before any decision is made by the Council."

API provides:

"The appellant shall be given the opportunity to appear before the appeals body and present arguments in support of his objection."

(5) Timely Action and Complete Records

API not only sets time limits to assure against delay, but also allows these limits to be waived for good cause, building in a flexibility that, wisely used, improves the provision. API also specifies that appellants be given access to the complete record.

"Appeals must be submitted in writing to the Director of the responsible API Department. The appeal shall include a statement identifying specifically the action or inaction objected to, the basis for the objection including any adverse impacts on the complainant, and suggested remedial action. The appeal must be filed with API within forty-five (45) days of the date of notification of the action causing the complaint. Further, challenges to published standards must be initiated within one year of their distribution, unless it can be demonstrated that the objection is based on grounds which have subsequently arisen. APPEALS OF INACTIONS MAY BE INITIATED AT ANY TIME. The API Director shall investigate the objections raised and respond promptly to them in writing within forty-five (45) calendar days of receipt. [EMPHASIS ADDED]

"If the objections cannot be resolved by the Director, a hearing by the appropriate committee or its designated appeals board shall be convened. The hearing should be held within forty-five (45) calendar days of the date on which it is agreed that an informal resolution is not feasible.

"The appeals body shall issue a written decision following the hearing, within forty-five (45) calendar days. The decision shall indicate the conclusions reached, their basis, and the right of further appeal. The Director shall ensure that a complete record of the appeal is compiled and maintained in conformance with API Policy 804, "Files and Records." The

appellant shall be permitted access to the record.

"Specified time limits in this policy may be modified by the API Vice President responsible for the appealed standards upon demonstration of reasonable cause."

COMMENT: The appealability of a lack of action is an important protection that API deals with nicely. Standards developers often fail to specify this particular appeal right.

The U.S. Department of Commerce allows for a full transcript, if the appellant is willing to pay for it:

"A record will be made of the hearing. Copies of the written statements and the record of the hearing will be available at cost."

As a final example, BHMA ensures that unsuccessful appellants are informed of their rights to take their appeals further:

"If the appeal board rules against the appealing party, such party will be advised of the right to take further appeals pursuant to the provisions of ANSI's Procedures for the Development and Coordination of American National Standards."

F. Record Keeping and Rationale Statements

"V.2.f. Records. Reasonable records of national standards development activities shall be prepared, maintained, and be accessible to interested parties under reasonable conditions of time, location, and convenience to all concerned. Such records shall include, but not necessarily be limited to, the status and history of the project, reports of meetings, including discussion, disposition of dissenting views, rationale and principal supporting data for key variables and wordings, etc.

"The records maintained should allow an overall review of what transpired rather than be a verbatim transcript, and need be retained for only a reasonable period of time." (The National Policy on Standards for the United States, and Implementation Plan, ANSI, 1978.)

In addition to providing an essential history for further review when revising or replacing a standard, good records protect the standards developer in several ways. First, they provide documentation that the rules of the organization have been followed and that the process has been conducted in a fair manner.

Secondly, they make it possible for the standards developer to receive an early warning that a procedural deficiency has occurred. If review of the records shows a due-process deficiency, it can be cured and prevent the organization from being placed in jeopardy.

There are any number of excellent record-keeping provisions.

AWWA addresses record keeping in a short but relatively complete paragraph:

"A record shall be kept of committee proceedings. Copies of all aspects of the record, including but not limited to correspondence, meeting minutes, drafts, ballots, ballot results, ballot comments, resolution or disposition of negative votes and ballot comments, and other related material shall be transmitted as they are developed to the designated representative of the council secretary for use and filing as appropriate at AWWA headquarters."

ASME specifies the contents of a complete record in terms of

preparing a submittal to ANSI.

"7.2 The information to be submitted by the Secretary to the American National Standards Institute shall include:

- (a) The title and designation of the proposed American National Standard.
- (b) Whether the submittal is a revision, reaffirmation, or withdrawal of an existing American National Standard.
- (c) A copy of the proposed American National Standard as finally approved by the standards committee and the cognizant board.
- (d) Final results of the letter ballot of the standards committee, including identification of those voting 'against' (with reasons therefor) and those not responding (despite follow-up).
- (e) A list of the committee personnel at the time of balloting.
- (f) Identification of negative votes outstanding and a history of the attempts to resolve them.
- (g) A brief history of the development of the standard.
- (h) A statement that these procedures were followed in the promulgation of the proposal.
- (i) A statement that the proposal was approved by the cognizant board.
- (j) A statement regarding compliance with the criteria of 7.1."

NEMA places the record keeping responsibility on its staff, and specifies that the rationale behind the development of the standard also be included, as follows:

"7.13.1 MINUTES

The Staff Executive shall take the minutes of all meetings of the Subdivision, Technical Committee, and all Subcommittees, and shall file such minutes in accordance with the By-Laws. Minutes, while not a verbatim transcript, shall concisely record the substance of discussion and actions taken at a meeting.

"7.13.2 RECORD KEEPING

The Staff Executive of the Subdivision shall keep records regarding the development of a standard. Such records shall contain drafts, correspondence, reports, and other such documents to reflect both the rationale behind and the development of any Standard."

The U.S. Department of Commerce specifies the publication of a rationale statement, under limited circumstances, as follows:

"[A proposed standard] shall be accompanied by rationale statements pertaining to the requirements and test methods contained in the standard, if deemed necessary by the Department."

COMMENT: In addition to their contribution to understanding the basis for the standard's development, rationale statements offer the standards developer strong protection against allegations that the standard is anti-competitive, especially since the real reasons for its requirements have been set forth.

G. General Provisions to Assure Against Standards that Unreasonably Restrain Trade

To this point, this study has dealt with the specific components of due process. Some standards developers, in addition to providing due process protections, impose a specific, affirmative duty on themselves or their agents to make a finding that the standard will not restrain trade. This is especially important for bodies whose standards have a direct affect on the marketplace.

For example, AWWA provides:

"Prior to authorization of preparation, revision or withdrawal of a standard, the council will as a minimum assure itself:

- a. That the action, if taken or not taken, will not induce or cause restraint of trade.
- b. That the subject of the proposed new or revised standard has a period of satisfactory use experience by established water utilities in North America for not less than five (5) years.
- c. That the product of the type, kind and quality to be described in the proposed new or revised standard is available for purchase in North America from a manufacturer who can supply full product information to the user.

The Legal Guides, published by EIA, is even more specific:

"Section C. BASIC RULES FOR CONDUCTING PROGRAMS

All EIA standardization programs shall be conducted in accordance with the following basic rules:

They shall be carried on in good faith under policies and procedures which will assure fairness and unrestricted participation;...

They shall not involve any agreement, expressed or implied, to adhere, or require adherence, to a standard or the use of any coercion, directly or indirectly, with respect thereto;

They shall not be proposed for or indirectly result in effectuation of a price fixing arrangement, facilitating price uniformity or stabilization, restricting competition, giving a competitive advantage to any manufacturer, excluding competitors from the market, limiting or otherwise curtailing production, or reducing product variation..."

BHMA addresses the restraint-of-trade issue in a different manner, calling for performance criteria where feasible. BHMA states:

"Sections shall prepare standards incorporating performance criteria where feasible. Material and dimensional criteria shall be avoided unless performance criteria cannot successfully be used in their place. If safety or compatibility with other products is a factor, material and dimensional criteria may then be appropriate. Standards of definitions and terminology are not subject to this requirement."

Showing its concern over restraint-of-trade vulnerability, BHMA also provides:

"Unless inappropriate, because of safety considerations or the state of the art, more than one level of performance shall be established in order for the user to have a choice of quality levels.

"Appropriate reaffirmation, revisions, or withdrawal of standards shall be made at least every five years.

"Any BHMA Standard that may for some reason not be submitted to ANSI for approval shall not be circulated outside BHMA.

"BHMA counsel shall review all BHMA standards prior to publication or submission to ANSI. Counsel shall attend all BHMA Section meetings when the agenda for such meetings includes items of other than technical nature such as promotional projects, advertising, and similar subjects. When controversy over technical criteria occurs, counsel shall be advised and shall give appropriate guidance.

"BHMA standards shall not contain provisions of an exclusionary nature or that involve practices in restraint-of-trade."

Standards developers also recognize the potential liability

they incur when they interpret the meaning of their standards. Some try to control the process by making the staff exclusively responsible for issuing interpretations. For example, API states:

"For purposes of this policy, interpretation means the answer to a question on the meaning of a standard. The answer to a question about the factual content of a standard is not an interpretation. API will consider written requests for interpretations of its standards. Full-time employees of API designated by Executive Staff members shall be the only persons authorized to issue interpretations of API standards. Interpretations of API standards are the responsibility of the API department responsible for such standards. API staff shall make such interpretations in writing after consultation, if necessary, with the appropriate committee officers and members and the API Office of General Counsel, provided that no such consultation may be made with competing suppliers or manufacturers of the product or services to which the standard applies or might apply. If consultation is made with committee members, the Office of General Counsel should also be consulted. Copies of interpretations will be made available to the appropriate API committee and, upon request, to others. Departments shall publish interpretation requests and interpretations periodically."

On the other hand, EIA prohibits its staff from issuing interpretations.

"Interpretation of Standards. The interpretation of standards, insofar as it may relate to a specific product or manufacturer, is a proper matter for individual company concern and should not be undertaken by EIA staff members or any person acting in the capacity of an EIA committee member. EIA staff comments, if any, shall be limited to an explanation or clarification of technical language or provisions in a standard but not related to its application to specific products or manufacturers."

COMMENT: Each standards-developing organization must first decide, as a matter of policy, the kind of protection it desires. No matter the choice, it then becomes necessary to monitor the situation constantly to ensure compliance with the established rules.

Organizations also differ in their policies concerning the inclusion of patents in standards. ANSI states:

"There is no objection in principle to drafting a proposed American National Standard in terms that include the use of a patented item, if it is considered that technical reasons justify this approach."

NEMA, accepting this general principle, turns around and conditions it greatly, as follows:

"3.9 PATENTED ITEMS

There is no objection in principle to drafting a proposed NEMA Standard in terms that include the use of a patented item, if it is considered that technical reasons justify this approach...

"3.9.1 STATEMENT FROM PATENT HOLDER

Prior to approval of such a proposed NEMA Standard, NEMA shall receive from the patent holder (in a form approved by NEMA) either assurance in the form of a general disclaimer to the effect that the patentee does not hold and does not anticipate holding any invention whose use would be required for compliance with the proposed NEMA Standard, or assurance that:

- a. A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the Standard, or
- b. A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

The terms and conditions of any license shall be submitted to NEMA for review by its Counsel, together with a statement of the number of independent licensees, if any which have accepted or indicated their acceptance of terms and conditions of the license."

On the other hand, ASTM discourages standards that include any requirement covered by a patent, as follows:

"15. Patents in Standards

15.1. When a technical committee proposes to include in

a standard a material, product, process, or apparatus or constituent thereof, covered by a patent or a pending patent, the committee shall make efforts to determine whether there exist reasonable alternatives to the patented item. The committee shall then consider whether, in the best interest of the users of the standard, reference shall be made to such alternatives.

15.2 As a minimum, the committee shall include in the balloting process a statement of willingness to consider alternatives. Whenever a standard requires the use of a patented material, product, or apparatus, the committee shall include in the standard, a note requesting interested parties to submit information regarding the identification of reasonable alternatives to the patented items.

COMMENT: These two approaches attempt to offer protection against liability in quite different ways. The author personally believes that the ASTM policy is stronger and offers better risk management protection because it allows patents to be knowingly incorporated into the requirements of a standard only when there is no alternative. This deters the allegation that a standards developer unfairly gave a competitive advantage to a patent holder.

V. Summary

This report has explained, in lay terms, how good due process protections can help reduce the risk of antitrust liability faced by all standards developers, and in some instances their volunteer standards writers. In brief, the rule of thumb is: the better the procedural protections, the less the liability.

After identifying the key elements of due process that collectively constitute fairness, the study presents the actual language used by a number of different standards developers. The eleven organizations represent a mix that is representative of the wide range of groups that develop voluntary standards. The study makes extensive use of commentaries to point out why particular language offers good protection.

This study is not, and cannot be relied upon, as an all-inclusive analytical "check list" that standards developers can adopt "as is." Rather, it is intended to be a stimulus to standards developers to review, on a regular basis, their rules of procedure, and come to their own conclusions whether changes or additions are needed. The discussion in Section IV will, hopefully, give those interested in making the process as fair as possible (thereby reducing the risk of antitrust liability) a point-of-view from which the review of the processes can be undertaken.

The study has tried to take into account the great diversity among standards developers, and rather than tell each how their rules should be written, offers instead a test against which their

rules can be measured. If it is helpful to the standards community in this respect, it will have achieved its objective.

APPENDIX A

Names, addresses, phone numbers, and contact persons for the eleven organizations whose rules are cited in this report, and date of rules cited.

American National Standards Institute, Inc. (ANSI)
1430 Broadway
New York, NY 10018
212-354-3300

Contact: William H. Rockwell
Vice President

1987 Procedures for the Development and Coordination of American National Standards

American Petroleum Institute (API)
1220 L Street, NW
Washington, DC 20005
202-682-8145

Contact: J.K. Walters, Director
Measurement Coordination

1987 Policies and Procedures

American Society of Mechanical Engineers (ASME)
345 East 47th Street
New York, NY 10017
212-705-7822

Contact: Mel R. Green, P.E.
Associate Executive Director

1984 Codes and Standards Development Committee Procedures

American Water Works Association (AWWA)
6666 West Quincy Avenue
Denver, CO 80235
303-794-7711

Contact: Robert R. Lamson, PE
Director of Standards

1989 Governing Documents

ASTM
1916 Race Street
Philadelphia, PA 19103
215-299-5400

Contact: James A. Thomas
Executive Vice President

1988 Regulations Governing ASTM Technical Committees

Builders Hardware Manufacturers Association, Inc. (BHMA)
355 Lexington Ave., 17th Floor
New York, NY 10017
212-661-4261

Contact: J. Dudley Waldner, CAE
Executive Director
1989 Procedures for Establishing BHMA Standards

Electronic Industries Association (EIA)
1722 Eye Street, NW, Suite 300
Washington, DC 20006
202-457-4961

Contact: John M. Kinn
Staff Vice President of Engineering
1985 Manual of Organization and Procedure

Institute of Electrical and Electronics Engineers, Inc. (IEEE)
345 East 47th Street
New York, NY 10017-2394
212-705-7966

Contact: Andrew Salem
Staff Director
1989 Guide to Standards Development

National Electrical Manufacturers Association (NEMA)
2101 L Street, NW
Washington, DC 20037
202-457-8479

Contact: F.K. Kitzantides
Manager, Engineering
1988 Standardization Policies and Procedures

Underwriters Laboratories, Inc. (UL)
333 Pfingsten Road
Northbrook, IL 60062
312-272-8800

Contact: Jack Bono
President
1989 Method of Development, Revision, and Implementation of UL
Standards For Safety

U.S. Department of Commerce
National Institute of Standards and Technology (NIST)
Gaithersburg, MD 20899
301-975-4010

Contact: Stanley Warshaw
Associate Director for Industry and Standards
1986 Procedures for the Development of Voluntary Product Standards

NIST-114A
(REV. 3-89)

U.S. DEPARTMENT OF COMMERCE
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY

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5. AUTHOR(S)
David A. Swankin

6. PERFORMING ORGANIZATION (IF JOINT OR OTHER THAN NIST, SEE INSTRUCTIONS)
U.S. DEPARTMENT OF COMMERCE
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY
GAITHERSBURG, MD 20899

7. CONTRACT/GRANT NUMBER	
8. TYPE OF REPORT AND PERIOD COVERED	

9. SPONSORING ORGANIZATION NAME AND COMPLETE ADDRESS (STREET, CITY, STATE, ZIP)
National Institute of Standards and Technology
Gaithersburg, MD 20899

10. SUPPLEMENTARY NOTES

DOCUMENT DESCRIBES A COMPUTER PROGRAM; SF-185, FIPS SOFTWARE SUMMARY, IS ATTACHED.

11. ABSTRACT (A 200-WORD OR LESS FACTUAL SUMMARY OF MOST SIGNIFICANT INFORMATION. IF DOCUMENT INCLUDES A SIGNIFICANT BIBLIOGRAPHY OR LITERATURE SURVEY, MENTION IT HERE.)
In view of two recent Supreme Court cases concerning potential antitrust liability faced by standards developers, this study identifies the key elements of due process that collectively constitute fairness. Eleven organizations, representative of a wide range of standards developers, were chosen for examination of and commentary on applicable portions of their rules. All standards developing organizations are encouraged to reexamine their own rules periodically, testing them against appropriate criteria as discussed here.

12. KEY WORDS (6 TO 12 ENTRIES; ALPHABETICAL ORDER; CAPITALIZE ONLY PROPER NAMES; AND SEPARATE KEY WORDS BY SEMICOLONS)
antitrust, due process, liability, standards development, voluntary standards

13. AVAILABILITY

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