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**ECONOMICS OF THE PRODUCT CERTIFICATION INDUSTRY:
SOME RESEARCH NEEDS**

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Foreword

This report is one of a series of reports published by the Office of Engineering Standards (OES) concerning the impact of standards and certification.

The purpose of this series is to provide NBS decision-makers and others with information that will help them better understand the voluntary standards and certification systems and their economic, social, and other impacts. It is hoped that this information will increase the effectiveness of NBS's participation in voluntary standards work and will contribute to the improved development and use of standards.

This report should be regarded as raising, rather than answering, questions related to the economics of certification. It is hoped that it will stimulate further study of this very important topic.

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Abstract

A number of private organizations certify products for safety and other qualities. With the increase in safety regulation, product liability suits, and interest in encouraging use of new technologies through certification, certification is likely to become more and more important as a way to show conformance with voluntary or regulatory standards. There have been a number of Federal and State government activities related to product certification. However, the potential impact of past and proposed government actions is not clear. One reason may be that there has been insufficient study of the economics of the product certification industry. This paper asserts that such study is needed as a basis for setting government policy and raises issues that should be addressed concerning structure and performance of the product certification industry.

ECONOMICS OF THE PRODUCT CERTIFICATION INDUSTRY: SOME RESEARCH NEEDS

Executive Summary

Purpose and Policy Issues

The purpose of this paper is to make economists and others aware of the need for research into the market for third-party product certification services. This research is needed to help government and private groups make decisions about their activities related to product certification. For example, such research could help in answering the following questions:

1. What is the likely effect of the Federal Trade Commission's (FTC) Proposed Trade Regulation Rule for Standards and Certification on performance of the certification industry?
2. What will be the effects of current or planned programs to accredit testing laboratories or certification programs?
3. How might certification programs be designed to encourage innovation and commercialization of new products?

Overview of the Certification "Industry"

The certification process may include product testing and plant inspection, as well as the listing of products in a directory and/or the authorization of the use of a certification mark. There appear to be at least 100 organizations conducting certification programs, and perhaps many more. Some of the better known certifiers are Underwriters Laboratories (UL) (electrical, fire protection, etc.); the American Gas Association (gas equipment); Factory Mutual (fire control and other equipment); and the American Society of Mechanical Engineers (ASME) (boilers).

Benefits of Certification

Two trends in the American economy seem likely to increase the demand for product certification: the growth in safety regulation, and the rise in product liability suits. Government interest in encouraging innovation in areas such as solar heating and cooling may also increase use of certification. Certification and labeling are seen as a way to increase product reliability and provide product information.

FTC Proposed Trade Regulation Rule

In 1978 the Federal Trade Commission proposed a Trade Regulation Rule for Standards and Certification. This proposal resulted from criticisms of the practices of certifiers and standards-writing organizations. Under the Rule, all certifiers would have to give buyers certain types of information with the seal or listing for each certified or listed product. Certain other duties would apply only to certifiers whose certifications are relied on by government officials and who are effectively the sole source of certification services in the particular market.

Controversies

The proposed Rule and criticisms of certifiers suggest that research is needed in the economics of product certification as an industry. However, to identify research needs, it is important to understand the controversies surrounding certification.

One important issue is whether some certifiers exercise monopoly power. Witnesses at Senate hearings and FTC staff claimed that certain certifiers exercise monopoly power and that this results in competent laboratories being excluded from many certification markets. Other issues surrounding certification include:

- * Whether regulatory use of certifications contributes to market power because building code officials tend to accept certifications only from a few major certifiers.
- * Whether certifications sometimes interfere with innovation and competition among certified products.
- * Whether certifications sometimes mislead buyers.

Organizations such as Underwriters Laboratories and the Association of Home Appliance Manufacturers have disputed these criticisms and argued that specific incidents cited to support the criticisms were incorrectly described by FTC and others. They contend that FTC has not shown that there is a need for regulation.

Research Needs

Research is needed into how well various portions of the certification industry perform. Three important aspects of performance are:

1. Price and quality of certification services;
2. Effects of certification on competition among certified products and on development and commercialization of new products;
3. Reliability and usefulness of certifications.

One way to shed light on these questions would be to examine industry performance in the certification industry. In addition, research is needed into industry characteristics underlying observed performance such as:

- * Market shares.
- * Patterns of integration between certification and testing.
- * Costs, including scale economies, advantages of integration between certification and testing, and their possible effect on ease of entry into various portions of the certification industry.
- * Corporate structure, to determine whether non-profit certifiers (including trade associations) act in ways that ordinary profit-making firms are expected to act.
- * Manufacturer demand for certifications, including any tendency to "shop around" for the most lenient testing laboratories and/or certifiers.
- * Demand by regulatory officials, buyers or procurement agents, insurance companies, and consumers. Do these groups tend to accept certifications only from major certifiers? What types of certification or listing information would affect their decisions?

ECONOMICS OF THE PRODUCT CERTIFICATION INDUSTRY: SOME RESEARCH NEEDS^{1/}

1. INTRODUCTION

Purpose

The purpose of this paper is to enlighten economists and others about the need for research into the market for third-party product certification services--especially, competitive aspects of that market and effects of that market on innovation. This research is needed to help the Government make decisions about those activities that affect certifying organizations.

Definitions

For the purposes of this paper, "certification" is defined as a testimony to the public, by way of a certification mark or listing, that a product performs in a specified way in relation to a standard or meets some standard of quality. Often it implies a broad approval of a product with respect to a major aspect such as safety. Usually, certification is based on some form of product testing or inspection, and the process may include inspection of the manufacturer's plant as well.

Under some uses of the term, only the manufacturer "certifies" a product; a third party "validates" the certification.^{2/} However, in this paper, the "certifier" is the organization, such as Underwriters Laboratories, whose name appears on the seal and/or who maintains the listing of certified products.

"Third-party certification" means certification by someone other than the product manufacturer. The term includes cases in which certifying organizations may be indirectly controlled by manufacturers, such as through trade associations.

"Certification" is not recognized as a separate industry in government census data^{3/}, and any definition of the "certification industry" is somewhat arbitrary. For the purposes of this paper, "certification industry" refers to organizations supplying third-party certification services; it includes testing of prototype products as a basis for marking or listing production units as well as labeling or listing of the production units themselves. Further study might show that some other definition of the industry would be more useful for the purposes of economic analysis.

2. OVERVIEW OF THE CERTIFICATION INDUSTRY

This section provides an overview of the magnitude and nature of the certification industry and describes several well-known certifying organizations.

Size of the Industry

How large is the certification market? There has been little economic study of certification as an industry. An FTC report published in connection with a proposed Trade Regulation Rule for standards and certification, together with statements and reports prepared for the hearings on the proposal, provides the most comprehensive source of information about the economics of product certification that is available.^{4/} Neither this nor any other report reviewed by the author provides a good estimate of the number of certification programs in the U.S. or of the market value of certification services. However, some data is available on revenues, assets, and/or employment of individual certifying organizations. (For some examples, see the descriptions of individual certifiers later in this paper.)

A standardization directory published by the National Bureau of Standards (NBS) lists over fifty organizations which certify products, but there are many certifiers not listed. (See Appendix A.)^{5/} Another NBS publication lists twenty-three organizations which certify consumer products, but does not include certifiers who test against standards written by organizations other than the certifier.^{6/}

There are a large number of product testing laboratories. This is worth noting because of the close relationship between testing and certification.^{7/} This relationship is described later in this section.

Applications of Certification

There are two trends in the American economy which seem likely to increase the demand for product certification. These are the growth in health, safety, and other types of regulation and the rise in product liability suits. Also, Government interest in promoting innovation in such areas as energy conservation may have implications for product certification.

Regulation

There has long been health and safety regulation through state and local building codes. Industry is often required to obtain certification for electrical products, plumbing products, furnaces, fire safety equipment, and other products used in buildings, in order to comply with requirements of these codes.

Since 1962, there has been a marked increase in health and safety regulation at the Federal level^{8/}, and certification is often required as evidence that a product meets regulatory standards. For example, Federal work safety regulations (promulgated after the Occupational Safety and Health Act was passed in 1970) contain various requirements for equipment to be approved by a "nationally recognized" testing laboratory. Welding equipment, for instance, must be of an "approved" type.^{9/} Similarly, regulations for mobile homes promulgated by the Department of Housing and Urban Development (HUD) in 1975 contain a number of requirements for certification and listing.^{10/} There are many other examples of such requirements.

Reducing Product Liability

There has also been growth in product liability litigation which may make sellers and insurers especially interested in product testing and certification by third parties.^{11/}

One reason for obtaining certification is that testing and certification can help prevent accidents. The role of certification in hazard prevention has long been appreciated by insurance companies, who often use certification as evidence of safe product design in areas such as fire protection.^{12/} (However, a 1979 study suggested that availability and cost of product liability insurance are not affected by certification. This observation should probably be verified through further research.^{13/})

Another reason for obtaining certification may be to demonstrate, in court if necessary, that a product has met a reasonable standard of safety. Certification may be one way of showing that a product complies with voluntary and/or mandatory standards, and compliance with standards may be accepted as evidence that a product meets a reasonable standard of safety--although the law is unsettled on this point.^{14/} One possible problem is that certification of the product model does not prove that a particular unit of the model has ever been tested.

Encouraging Innovation

Government interest in encouraging a certain technology may cause it to set up a certification and labeling program. A good example is a California State program to certify solar collectors, discussed later in this report under "Solar Equipment Certification." Such programs may encourage the commercialization and use of new products by reassuring manufacturers, buyers and others about their safety and quality.

Other Uses of Certification

Certification is used in other ways as well. One way is that certification may provide information to buyers concerning a product's attributes so that they can choose the product that best suits their needs--possibly increasing competition based on price and actual product quality.

For example, room air-conditioners are certified as to cooling capacity by the Association of Home Appliance Manufacturers.^{15/} Because this information is based on testing of the product by an independent third party (Electrical Testing Laboratories), and because competing products are rated using consistent definitions and test methods, such certification may be more helpful to consumers who are comparing air-conditioners than the unverified claims of manufacturers.

Certification can simply be a way of providing product information to regulators, buyers, insurers, and others. Buyers and sellers often refer to standards to facilitate their transactions, and certification is a way to show that products meet these standards. Also, insurers may require certification to show that special fire safety features of buildings meet certain standards. Or, government agencies such as the Department of Housing and Urban Development may require certification in connection with government funding. ^{16/}

Types of Certification Programs

There are certification programs for building-related products, boilers, home appliances, fire prevention and control equipment, medical products, and other products ranging from vending machines, baking equipment, and industrial wipers to granite monuments. A partial list of certification programs is provided in Appendix A.

Underwriters Laboratories, Factory Mutual, and the American Gas Association are well known for their testing and certification of home appliances, fire control equipment, and other products, but there are also a number of other organizations which operate certification programs. While some organizations certify a variety of products, most apparently certify only in a fairly narrow product area. For example, an organization might certify nothing but oak flooring or cooling towers or model trains.

Steps Leading to Certification

Product certification may involve some or all of the following steps: 17/

- *Testing or inspection of a prototype product. The product may be tested to see if it meets general performance criteria or to see if it meets a specific written standard; the criteria or standard may or may not be disclosed in the certification mark or listing directory.

- *Periodic testing or inspection of production units from the manufacturer's plant and review of the manufacturer's quality control procedures. In some cases there is 100% testing.

- *Testing or inspection of samples from the open market.

- *Plant inspection to assure adequate quality control in production.

- *Listing in a directory of "approved" products and/or authorizing use of a label or mark on the product to show that it has qualified.

Certifiers who require third party testing and who do not do their own testing must somehow identify qualified testing laboratories. Some do this by operating laboratory accreditation programs or otherwise evaluating laboratories.

Relationship Between Testing and Certification

Some certifiers test products, but others do not. It is possible for an organization to operate a certification program without actually doing any product testing itself. For example, the certifier might accept testing by an independent laboratory as a basis for certification, or it might accept testing by the manufacturer with periodic third-party validation. Thus, although testing is an important input into certification services and is often performed by certifiers, conceptually it is a distinct activity.

To understand the economics of the certification "industry," however, it may be necessary to study that part of the testing industry which relates to certification -- particularly since many testing laboratories are potential suppliers of certification services.

Certification and Standards Writing

Similarly, while certification is closely related to standards writing, it is conceptually distinct. Many certifiers also write the standards on which their certification programs are based, but some test exclusively against standards written by other organizations. While certification is often (perhaps usually) carried out against an existing written standard, some organizations, such as Factory Mutual Research Corporation and Underwriters Laboratories, are willing to test and certify without a written standard. 18/

Some Examples of Certification Programs

The following descriptions may give some feeling for the scope and variety of certification programs. The reader should note that these descriptions cover only a very small proportion of certification programs and do not necessarily include all of the most important ones.

Underwriters Laboratories (UL), a not-for-profit corporation, is one of the major American product certifying organizations. At year end 1977, UL had about 2300 employees and assets of about \$58 million. 19/ According to UL's testimony at Senate hearings, its 1975 revenues were \$41.5 million. 20/ UL tests products for safety at its laboratories in several locations around the country, provides a listing service, and authorizes use of its mark on products which meet UL's requirements for safety or performance. To determine whether products are to be listed, UL generally tests on the basis of published standards; but it can also evaluate products for which no standard has been written. It also inspects factories where the listed devices are manufactured. Besides its listing service, UL offers other services, such as a "classification" service in which it evaluates industrial and commercial products with respect to certain specified hazards, conditions, regulatory codes, and/or standards. According to UL, many insurance underwriters, government authorities, and others recognize UL listing as evidence of product safety. 21/ Underwriters Laboratories is best known for certifying electrical products, but it also tests non-electrical equipment. Products tested include equipment for burglary protection, fire protection, heating, air-conditioning, refrigeration, and marine use. 22/

The American Gas Association (AGA), a trade association for the natural gas distribution industry, operates a certification program for gas equipment through its AGA Laboratories. The AGA Laboratories tests gas equipment such as home furnaces using standards published by the American National Standards Institute (ANSI); certifies designs that comply with the standards; and inspects production models to make sure they conform to the design certified. The products certified are listed by AGA and carry its "blue star" seal.23/

Factory Mutual Engineering and Research (FM), also a major certifier, is owned by the Factory Mutual System of insurance companies. FM is concerned with preventing property damage. It develops standards for, tests, and approves products such as fire control equipment. Items meeting FM standards are listed by FM and usually carry a symbol indicating approval. It has standards for installing automatic sprinklers, safeguarding flammable liquids, gases, dusts, industrial ovens, and dryers, and protection of buildings against wind damage, to give a few examples.24/

The Air-Conditioning and Refrigeration Institute (ARI), a trade association, operates certification programs for certain types of air-conditioning, heating, and refrigeration equipment. Recently it has set up a program to certify solar collectors. The programs involve the use of an ARI seal, with validation of manufacturers' ratings by independent laboratories that have been evaluated by ARI.25/

The Association of Home Appliance Manufacturers (AHAM) is a trade association which, among other activities, sponsors product certification programs. The 1979 budgets for its certification programs were as follows: refrigerator/freezers, \$96,500; room air-conditioners, \$211,000; dehumidifiers, \$33,000; and humidifiers, \$36,000. In AHAM's air-conditioner program, described in a Department of Energy report, Electrical Testing Laboratories is responsible for inspecting manufacturers' testing facilities and quality control procedures. It is also responsible for testing randomly-selected units.26/

The American Society of Mechanical Engineers (ASME) develops a boiler code and authorizes complying manufacturers to put the ASME seal on their products. ASME does not test boilers itself, but it requires in-plant inspection by a qualified, neutral, third-party inspector.27/

The National Sanitation Foundation is a non-profit organization which operates testing and certification programs for a number of health-related products, including plumbing products such as plastic pipe. Its 1978 revenues from "Listing and Inspection Fees" were \$1.3 million.28/

Model building code organizations such as the Southern Building Code Congress, the International Conference of Building Officials, and the Building Officials and Code Administrators International have listing programs under which they approve and list products, for a fee. The listing is based on test results and other information submitted with an application. Local building officials may require this listing as a condition for approving a product in their jurisdiction.29/

Solar Equipment Certification

Federal, state, and industry interest in promoting solar energy has led to efforts to develop standards and certification programs for solar heating and cooling equipment. The first certification programs are for solar collectors.30/ These efforts are described here as an example of certification in an area which has aroused much public interest in the past few years. There are several reasons for certifying solar equipment:

1. The Federal government requires certification to show that solar installations comply with Minimum Property Standards of the Department of Housing and Urban Development (HUD). Compliance with these standards is required to receive Veterans Administration (VA) and Federal Housing Administration (FHA) financing and to receive funding under the HUD Solar Heating and Cooling Demonstration Program, which aims to encourage use of solar energy in buildings.31/

2. Certification is sometimes required to show compliance with requirements for solar installations which state and local governments are beginning to put into their building codes.32/

3. At least one state, California, plans to eventually require certification for solar installations eligible for a state tax credit.33/

4. Insurance companies look for certification as assurance that solar equipment is safe. (Some solar systems use flammable liquids which could present a fire hazard.34/)

5. Certifications can be used in marketing. Certification may assure architects, builders, and consumers that solar equipment meets some minimum standard of performance and safety; and, through labeling, it can help them compare competing products. It may be a way to avoid unverified and perhaps misleading claims by suppliers of solar equipment.35/

A number of organizations are setting up programs to accredit solar equipment testing laboratories or certify solar equipment.36/ For example:

* The Air-Conditioning and Refrigeration Institute has established a program to certify solar collectors for thermal performance;^{37/}

* The Solar Energy Industries Association (SEIA) is offering to certify thermal performance ratings of solar collectors, using data from tests performed by labs accredited under SEIA's laboratory accreditation program. SEIA's program is primarily based on documents developed by the Solar Energy Research and Education Foundation, (SEREF), SEREF has received Federal funding to develop a certification program, including guidelines for labeling collector performance;^{38/}

* The State of Florida has a program for testing and certifying solar collectors;^{39/}

* California certifies solar collectors which have been tested by labs accredited under a State program^{40/}; and

* UL tests solar collectors and water heaters for safety.^{41/}

3. ACCREDITATION PROGRAMS

There has been growing interest over the past few years in accrediting laboratories which test products (for certification or other purposes) and in accrediting certification programs. A 1979 report identified a number of U.S. laboratory accreditation programs and suggested that there were many other programs not identified in the report. These programs aim to improve the reliability of testing conducted for product certification or other purposes. Often, one purpose of such programs is to improve competition among laboratories by helping lesser-known but technically competent laboratories compete with better-known ones. Another is to reduce the number of evaluations a testing laboratory must undergo for its results to be accepted by various government and private bodies. A third purpose is to improve acceptance of local testing by other states or other countries.^{42/}

One important accreditation activity is a Commerce Department program, described below.^{43/}

Department of Commerce Program

The Department of Commerce (DoC) has initiated a voluntary program to accredit laboratories' testing capabilities. It was established in response to the "need to identify technically competent testing laboratories in a more consistent and uniform fashion."^{44/} As of June, 1979, most of the activity had been in the areas of thermal insulation and concrete. Although the DoC program would accredit only testing capabilities (not other things related to certification, such as ability to carry out factory inspections), it could affect the certification "industry" because testing is a major element in most certification programs.

Other Laboratory Accreditation Programs

Some other types of accreditation programs are as follows^{45/}:

- * Private HUD "administrators" approve laboratories to test building products (e.g., carpeting) for acceptance under HUD standards.
- * The Defense Department, General Services Administration, and other Federal agencies accredit laboratories to test products for conformance with procurement specifications.
- * States accredit laboratories to test for compliance with regulatory requirements such as electrical codes.
- * States accredit laboratories to test the purity of water supplies.

* Industry associations operating certification programs accredit laboratories to test products for certification purposes. Products tested include air movement and control equipment, motor vehicle safety equipment, and boiler and pressure vessel relief devices.

* The American Association for Laboratory Accreditation has proposed a voluntary laboratory accreditation program which would use ASTM's criteria for evaluating testing laboratories. 46/

ANSI Program

In 1974, the American National Standards Institute, a private standards organization, published procedures for the voluntary accreditation of product certification programs. So far there has been little activity under this program; the only certification programs accredited are in the areas of aluminum windows and sealed glass for use in buildings. 47/

4. INTERNATIONAL ACTIVITIES

While this paper has focused on domestic effects, product certification may also significantly affect international trade in some products. Certification programs of various countries have been criticized as creating barriers to international trade, since non-complying importers have trouble marketing if they do not meet local certification requirements.

Title IV - Technical Barriers to Trade (Standards), within the Trade Agreements Act of 1979, was approved by the U.S. to implement multilateral trade agreements negotiated under the Trade Act of 1974. The purpose of this title is to prevent standards and certification requirements from creating unreasonable trade barriers. Among other things, it calls for its adherents to avoid setting up certification systems which create unnecessary obstacles to trade and to ensure non-discriminatory access to certification programs for foreign suppliers. 48/

Laboratory accreditation has also been a subject of international attention. Foreign laboratory accreditation efforts were described at three conferences sponsored by the International Conference on Recognition of National Programs for Accrediting Testing Laboratories (ILAC), the first in Copenhagen in 1977, the second in Washington, D.C., in 1978, and a third conference in Sydney in 1979. At the 1978 conference, participants discussed ways to reduce trade barriers due to certification requirements. 49/

5. CONTROVERSIES

Controversies concerning certification, and some of the allegations which stimulated them, are described in this section.

Product certification can provide important safety and other benefits. However, criticisms of product certification have led to a proposal by the Federal Trade Commission to impose certain requirements on certifiers.^{50/} The existence of such criticisms and the growing use of product certification suggest that research concerning the structure and performance of the certification industry might be very useful. The controversies are described here because they show areas where research may be needed before setting public policy.

Controversial issues include the following:

- * Whether some certifiers exercise market power;
- * Whether regulatory use of certification contributes to market power;
- * Whether certification sometimes interferes with innovation and competition; and
- * Whether certifications sometimes mislead buyers.

Each of these controversies is discussed below.

Whether Some Certifiers Exercise Market Power

Senate Hearings

There has been much debate concerning how much market power the major certifiers have and whether they exercise it in potentially harmful ways. Debate on this issue took place at several sets of hearings on standards and certification before the Senate Antitrust Subcommittee. These hearings led to a bill introduced in Congress (but not passed) which would have imposed certain requirements on standards writers and certifiers.^{51/} Senator James Abourezk, who chaired the hearings, expressed the view that practices of product certifiers could lead to anticompetitive consequences. In 1977, he told the Senate that three or four laboratories do the bulk of the testing and certification work. To quote:

" . . . (O)ver the years these laboratories have gained a quasimonopoly position. Government has played a large role in creating this monopoly by writing the names of specific labs into codes, regulations, and procurement specifications . . . Today, a manufacturer of electrical appliances cannot market its product nationally without the UL seal; the same is true for the AGA seal in the gas appliance field."

He went on to say:

The bottleneck in testing and certifying labs . . . serves as a convenient way not only to restrain trade, but also to keep products off the market, because of a 'lack of available testing laboratories.'^{52/}

FTC Report

In 1978 the FTC published a proposed Trade Regulation Rule for standards and certification which was accompanied by a lengthy report.^{53/} This FTC action was the culmination of a long period of FTC concern about standards development and certification.^{54/}

Among other things, the Report describes particular certifier practices which FTC staff believe deceive consumers or hurt competition. According to the Report, some certifiers exercise monopoly power, and competent laboratories are excluded from many certification markets. In the view of the authors, the lack of competition may result in higher testing prices, lower quality services, and the exclusion of products from the market. This and other conclusions of the report appear to be based on individual incidents rather than overall industry data. About twenty or so incidents involving certification are mentioned, many of them involving products which are regulated under building codes.^{55/}

ACIL Report

A 1979 report prepared on behalf of the American Council of Independent Laboratories (ACIL) and funded by the Federal Trade Commission also concluded that at least some certification markets -- particularly those involving safety certification of electric products and fire protection equipment -- are "closed" to competition.^{56/} The conclusions were based on views of people who provide or use certification services, rather than on market share data. In determining whether a market was "open" or "closed," the report focussed on the number of firms providing testing for certification rather than on the number of firms providing the certification (labeling or listing) service itself.

Certifier Reactions

Underwriters Laboratories, the Association of Home Appliance Manufacturers, and others have disputed the general charges concerning monopoly power and have argued that specific incidents cited in support of the charges were incorrectly described by FTC and others. They contend that FTC has not

shown problems significant enough to warrant regulation such as would be put into effect by the proposed Rule. At Senate hearings, UL argued that its leading position came from providing good service, not from anticompetitive activities; and it disagreed with the view that electrical equipment can't be successfully marketed without UL approval.57/

Whether Regulatory Use Contributes to Market Power

A question related to the issue of market power is whether regulatory requirements that certain products be certified are a source of market power for the larger certifying organizations. Building codes and other regulations sometimes require products to be certified by an "approved" or "nationally recognized" organization. For example, the Building Officials and Code Administrators International (BOCA) publishes the Basic Mechanical Code--a model building code upon which local codes are often based. This code requires that: "All heating furnaces shall be approved and bear the label of a nationally recognized testing or inspection agency."58/ Thus, certification by such organizations may have the force of law. Furthermore, it is claimed that regulatory officials often interpret "approved" or "nationally recognized" to mean only well-known organizations such as UL and AGA.59/

A number of arguments have been made on both sides of the question of whether regulatory officials accept only certifications from a few major certifiers. Claims that lack of regulatory acceptance is a barrier to lesser known certifiers are based on arguments such as the following:

* According to FTC's 1978 Report, Occupational Safety and Health Administration (OSHA) "laboratory accreditation regulations specifically name Underwriters Laboratories and Factory Mutual Research Corporation, a reference that has led in practice to the virtual exclusion of other laboratories from OSHA compliance testing, despite efforts for several years by other experienced laboratories to enter this testing market."

* The FTC Report also states: "Several states required that all mobile homes be UL certified. Any producer who wanted to sell in those states had to get UL certification."60/

UL's response to the latter quote was: "This statement is not true. UL has never been the exclusive recognized agency for mobile homes in any state. All states that had a program recognized at least three agencies and some states recognized more (e.g. Iowa - 12 or 13; Pennsylvania - 15 or 16)."61/

* A National Sanitation Foundation brochure states: ". . . in many U.S. regulatory jurisdictions, products in categories covered by NSF standards are required by law, regulation, or departmental policy to have the NSF seal."62/

* The head of a small testing laboratory claimed at Senate hearings that with respect to consumer electrical products, safety products including fire, and gas appliances, "one or two laboratories control the entire marketplace due to the reliance on their data by thousands of 'local authorities having jurisdiction.'"63/

On the other hand, a Department of Commerce report lists several state and local government programs for accrediting laboratories to approve products for electrical safety, and suggests there may be many more such programs.64/

In its 1977 testimony before the Senate Antitrust Subcommittee, Underwriters Laboratories disagreed with the view that regulatory requirements help create monopoly certifiers. It believes that there has been broad acceptance or preference for UL's findings because UL has provided a "public service in a way that other organizations seldom equal" and not because codes or code authorities exclusively specify UL certification. UL testified that of eighteen states which had formally interpreted "approved equipment," all but one recognized testing labs other than UL for certification of electrical equipment.65/

What Is "Nationally Recognized?"

It has been suggested that an important reason certifications from smaller organizations aren't recognized by regulatory officials is that the officials don't have detailed criteria for determining what should be considered a "nationally recognized" or "approved" certifying organization. (One set of criteria is available -- the criteria set forth by HUD for approving "validators" and testing laboratories under its building materials certification programs.66/)

Whether Certification Sometimes Inhibits Competition

There has been much dispute over whether certification requirements sometimes inhibit competition and innovation for certified products.

Watts Regulator

Watts Regulator, which manufactures backflow preventers, claimed that the University of Southern California Foundation for Cross Connection Control (USC/FCCC) had wrongfully kept Watts Regulator's improved plumbing product out of many markets. (The USC Foundation certifies plumbing devices called backflow preventers.) The effect, Watts believed, was to reduce competition and increase the price of backflow preventers in the markets influenced by USC/FCCC approval.^{67/} The Foundation disputed Watts Regulator's arguments and asserted that people in States approving the Watts' device were not being given minimum protection against contamination.^{68/}

Lack of a Standard

In a 1977 report for the Department of Energy, a private consulting firm examined barriers to the introduction of new energy saving technologies in buildings. Specifically, it looked at barriers connected with certifying and listing. It concluded that certification practices sometimes created such barriers. One type of barrier mentioned was the requirement that a standard be in existence in order for a certifier to test and approve a product.^{69/} The FTC Report also saw this as a problem, giving as an example AGA's refusal to certify products without an ANSI standard.^{70/}

However, at least two major certifiers--Underwriters Laboratories and Factory Mutual--have stated that they are willing to test and certify products without a written standard.^{71/}

Discrimination

The authors of the FTC Report also contended that certifiers with monopoly power may engage in various types of discrimination which may inhibit competition.^{72/} The Report asserts that certifiers may favor domestic producers over foreign, trade association members over non-members, factory-installed components over retrofit items, or large customers over small. Many of the specific examples given to back up these claims have been strongly disputed by certifiers in their comments made for the hearings on the proposed Rule.

Antitrust Cases

Standards and certification programs have been mentioned in a few antitrust cases. When they have been attacked legally, it has almost always been because they were part of a larger effort to restrain trade. These cases may provide some information about possible anticompetitive effects of certification.^{73/}

Whether Certifications Sometimes Mislead Buyers

The FTC Report asserts that certifications may mislead buyers, code officials, and others who (according to the Report) often rely heavily (even "blindly") on certification.^{74/} The authors concluded that such reliance may lead to problems for several reasons:

(1) Standards underlying the certification, including standards developed by the certifier itself, may be inadequate. For example, they may not provide the level of safety the buyer expects. One case which FTC staff thought was an example of this concerned UL certification of aluminum electrical wire for use in buildings, which the Report said may create a fire hazard. UL criticized FTC's description of the situation, saying that the staff report "inaccurately summarizes unsupported hearsay statements concerning UL's Listing of aluminum conductors." UL stated that aluminum wire does not present unreasonable hazards when properly installed, and that UL had taken steps to improve the safety of aluminum wire.^{75/}

(2) Information about standards that underlie certification may not be provided to buyers, according to the Report. One problem mentioned is that the certification seal or listing may fail to state limitations of the standards used and of the resulting certification. An example given in the Report concerns standards of the National Ornaments and Electric Lights Christmas Association (NOEL). The Report states that buyers may have believed that lighted Christmas ornaments represented as meeting NOEL standards were safe when, in fact, NOEL standards applied only to the electrical wiring. Other hazards were not covered. Tests showed that portions of the ornaments were highly flammable.^{76/}

(3) Seals and listings might also deceive buyers where certifiers fail to control the use of their certifications, in the view of the Report's authors. As an example of this, the Report states that a manufacturer of building insulation had his product listed at an erroneously high value for insulating capability because a model code organization accepted the manufacturer's test reports without question.^{77/}

Another example cited in the Report concerned misrating of air-conditioners, a product certified by AHAM.^{78/} However, in its comments on the proposed rule, AHAM quoted an FTC attorney as evaluating the problem of misrating as "de minimus." AHAM said that reratings are made promptly as needed.^{79/}

FTC Proposed Trade Regulation Rule

As was mentioned earlier in this paper, in 1978, FTC proposed a Trade Regulation Rule for Standards and Certification which would impose requirements on both standards writers and certifiers.^{80/}

Under the proposed Rule, all certifiers would have to give buyers certain types of information with the certification seal or listing. For example, they would have to reveal what standards underlie the certification and the limitations of these standards. They would also have to police the use of their seals and listings, and keep certain records.^{81/}

Certain "additional duties" apply only to a certifier "whose certification in a particular product area is relied on either in law or in fact by any government entity and who is effectively the sole source of certification services in that product area and market."^{82/}

These "additional duties" include following written procedures and setting up appeals mechanisms. The certifiers subject to these duties are forbidden to (1) discriminate unreasonably against certain customers (four types of discrimination are named), (2) to deny certification based on irrelevant requirements, or (3) to require unnecessary retesting.^{83/}

Certifiers who also develop standards would have to follow some of the standards-writing requirements of the proposed Rule. For example, they would have to take appropriate remedial action if they receive valid complaints about anticompetitive effects of standards which they have developed.^{84/}

Controversies Show Need for Research

It is difficult to determine which criticisms of certifiers are warranted and what, if any, problems arise from lack of competition among certifying organizations. Controversies like the ones described here, together with the Federal Trade Commission's proposed Rule, point up the need for research to find out more about the performance of various portions of the certification industry, reasons for that performance, and the likely effect of government actions related to product certification. The next section of this paper describes research needs in more detail.

6. RESEARCH NEEDS

Despite the rising importance of product certification and current and proposed government activities related to certification, there has not been a comprehensive study of how well the certification "industry" performs or what influences its performance. Such study is needed to help the government make decisions affecting product certification. This section suggests several topics that need study.

Policy Questions

There are several policy questions that need answering, including the following:

(1) What is the likely effect of FTC's Proposed Trade Regulation Rule on performance of the certification industry?

(2) What will be the effects of current or planned programs to accredit testing laboratories or certification programs? For example, how might testing laboratory accreditation affect the reliability of certifications and their acceptance by state and local regulatory officials?

(3) How might certification programs be designed so as to encourage beneficial innovation and use of certified products? For example, how should certification of solar collectors be conducted so that it will assist buyers in their purchasing decisions and promote innovation?

(4) For what products should certifications be required to show compliance with government standards such as HUD Minimum Property Standards, i.e., when are the costs of obtaining certification justified by the benefits?

Industry Performance

Aspects of Performance

To answer these policy questions, it is necessary to understand more about what determines performance in various parts of the certification industry. "Performance" in this context is a measure of how well the industry contributes to the public good. There are three aspects of certification industry performance:

1. The reliability of certifications, i.e., the accuracy with which they describe the product characteristics they purport to cover;
2. Price and quality (e.g., speed) of certification services; and
3. Effects of certification on development and commercialization of new products.

Research is needed to determine how well the industry performs with respect to each of these three aspects.

In analyzing the first aspect of performance, we need to ask whether adequate information is provided with certification seals and listings; whether listed products and products displaying certification seals actually conform to the requirements underlying their certification; and whether these requirements are "reasonable." (Of course, what may be "reasonable" to one person may be unreasonable to others. Criteria are needed for deciding what certification requirements are reasonable.^{85/})

Quality of Performance

The FTC staff alleged in its 1978 Report that there are serious problems in the performance of certifiers. But these charges appear to be heavily based on descriptions of particular incidents, many of which have been challenged by those commenting for the hearings record on the Proposed Rule.^{86/} One way to learn more about the performance of the certification industry is to find out what actually happened in these cases and to estimate the social cost of any associated problems. It would also be useful to study the industry further to see whether there are problems in other areas. This means that study of certification programs which have not become the center of controversy is also needed.

After identifying specific problems, it would be useful to determine the frequency of the problems with respect to the size of the industry and to identify common factors among the incidents. Are problems frequent or rare in light of the number of products certified? Are there a disproportionate number of problems where there is regulatory reliance on the certification, where one certifier has a high market share, or where other specific demand or supply conditions prevail?

Solar equipment is one example of a possible research area. To learn more about possible effects of certifying solar heating and cooling equipment, it would be useful to study not only solar equipment certification, but also certification programs in other industries similar to the solar equipment industry.

Baseline for Judging Performance

In analyzing the effects of product certification, it might be useful to identify industries whose products are not certified, but which are otherwise similar to industries whose products are certified. This might help show to what extent product buyers and manufacturers are better off with a certification program than without one.

Reasons for Performance: Supply Factors

If specific policy actions are to be considered by government groups and others, research is needed to find out how well the certification "industry" performs. However, it would be difficult to judge how well the industry is performing simply by looking at the end result. Therefore, it may be necessary to infer adequacy of performance from certain industry characteristics, which need to be studied. Some important industry characteristics are described below.

Market Shares

Economic theory says that firms facing little competition may lack incentives to offer good service at reasonable prices. This suggests that certifiers facing little competition may lack such incentives. However, another line of reasoning suggests that where there are many sources of certification, there may be incentives to degrade the stringency of certifications. This might happen if manufacturers "shop around" to find certifiers offering the most lenient requirements.^{87/} Whichever line of reasoning is true, it would be useful to determine the market shares of both major and lesser-known certifiers in order to gain insight into how much competition they face. To do this, it would be necessary to determine what definitions of "market" are appropriate.

To understand the implications of large or small market shares, other research is also needed -- research concerning patterns of integration between testing and certification, the nature of costs, the corporate structure of certifiers, and the nature of demand for certification services. Each of these aspects of industry structure will be discussed in turn.

Patterns of Integration

What are the patterns of integration between testing and certification? That is, to what extent do the same firms provide both certification and testing services? These patterns may affect the usefulness of some government activities related to certification. For example, efforts to accredit testing laboratories may be particularly needed to help assure reliability of certifications where certification programs are open to any testing laboratory and the "shopping around" effect mentioned earlier may occur.

Similarly, what are the patterns of integration between certification and standards writing?

Costs

The nature of costs may have an important effect on industry performance. One reason is the presence or absence of scale economics helps determine whether major certifiers must be concerned with the possibility of competition from new entrants. If there are few scale economics, then newcomers (such as firms already certifying other types of products) may be able to set up and operate a certification program at costs comparable to those of existing certifiers. In such cases, threat of entry may stimulate more competitive behavior on the part of certifiers with high market shares.

On the other hand, if there are important scale economies, then public policies aimed at increasing the number of certifiers should take into account possible losses of efficiency, i.e., an increase in costs which may or may not be passed on to users of certification services in the form of higher prices. The loss of efficiency could occur if a smaller scale of operations for each certifier increased costs.

Another possible source of entry barriers is brand preferences, discussed below under "Demand."

Corporate Structure

Corporate structure, including type of control, may affect the performance of certifiers. The corporate structure of many certifiers is different from that of the independent profit-maximizing firm economists generally have in mind when they predict corporate behavior. Many certifiers are non-profit organizations; some are also trade associations. How do such organizations behave in the marketplace? It would be useful to develop and test a theory to answer this question. For example, if non-profit certifiers don't maximize profits, then what do they maximize? In the absence of competition, will they raise prices, as we would expect

profit-maximizing firms to do? How does a trade association or certification council's connection with industry affect its incentives to certify innovative products? To certify products of questionable quality?

Reasons for Performance: Demand Factors

Understanding the nature of demand for certifications can shed light on a number of important issues:

- * Whether certification seals and listings can aid informed choice and improve competition among products;
- * What types of labeling would most help those who rely on certifications;
- * How certification might be used to encourage the commercialization and use of relatively new technologies, such as solar heating and cooling equipment;
- * Effects of programs to accredit laboratories or certification programs; and
- * To what extent certifications (or lack thereof) may cause problems of the sort alleged by FTC in its Report, including problems arising from certifier market power.

There are two layers of demand for certification services: (1) direct demand by the manufacturers who pay for the certifications; and (2) indirect demand by product buyers, regulators, insurance companies, and others. Some questions related to the two types of demand are discussed below.

Manufacturer Demand

When manufacturers obtain certification of their products, and in particular, when they obtain certification from major certifiers, are they responding to requirements of regulators, product buyers and others? If so, there may be no need to study manufacturers as an independent source of demand for certification services.

On the other hand, manufacturers may choose to enter a certification program even though it is not absolutely essential for marketing. If this is true, then more study of manufacturers as an independent source of demand for certification services may be needed.

One important question is: Do manufacturers shop around for the most lenient certification requirements or the most easy-going testing laboratory? "Shopping around" could mean that certifiers or testing laboratories relax their requirements in order to attract business, and that some activity such as laboratory accreditation is needed to reduce variability of testing. This suggests that, in some cases, the government should not try to increase the number of product certification programs.

Secondary Demand

An important source of demand for certifications is reliance on them by the following groups:

- * regulatory officials
- * insurance companies
- * retailers and other buyers
- * procurement officials
- * consumers

It would be useful to know how certifications influence decisions of each of these groups, and why. For example, to what extent do insurance companies use certifications in making decisions on providing product liability insurance? It would be useful to know what kinds of labeling and listing information regulators, buyers, insurers, consumers and others really use (as opposed to what they might "need"). For example, would they pay attention to the types of information the FTC would require to be disclosed under its Proposed Rule? Would their decisions be influenced by the information that a certifier is accredited?

Brand Preference

It would also be useful to determine how much "brand preference" there is for certifications by major certifiers. For example, in actual practice, what certifications are accepted by regulatory officials? A preference for certifications from a few established firms may make it difficult for small certifiers to compete with large ones. It may also make it difficult for new firms to set up certification programs to compete with existing programs, creating an entry barrier that takes away a source of potential competition. Where brand preference exists, is it because of any legitimate advantages of major certifiers, or because of ignorance? If the latter, then further study of demand might show whether it would improve competition among certifiers to accredit certifiers, write guidelines to help regulatory officials decide whether a certifier should be considered "nationally recognized," or undertake a program to educate regulatory officials as was recommended by the American Council of Independent Laboratories at FTC's 1979 hearings.^{88/}

7. CONCLUSIONS

This paper has urged that research be done to evaluate the structure and workings of the product certification "industry." Such research should be helpful in setting government policy toward certifying organizations, in planning activities which use product certification as a tool to accomplish other public goals, and in carrying out programs which have possible effects on product certification, such as testing laboratory accreditation.

The research could also have broader implications. First, as with brand names, certification seals and listings are one way to convey product information to users. Thus, a study of the certification industry could provide information about the economics of information and buyer choice in general.

Second, many of the pros and cons of product certification may also arise with respect to "certification" of people--for example, certification of elevator safety inspectors or lawyers. Research into product certification may help in predicting the effects of other kinds of certification.

Third, since many certification programs are operated by trade associations and other non-profit organizations, study of certifiers would shed light on the economics of the non-profit sector of the economy.

And, finally, as was pointed out in this paper, third-party product certification is closely involved with various kinds of government regulation. Certification may be an aid to enforcing mandatory standards such as building codes, or it may be a method of giving consumers information which will make mandatory standards unnecessary. Thus, a study of certification may help in devising strategies toward regulation in general.

Footnotes

1. The author is an economist at the National Bureau of Standards; however, the views presented here are those of the author and not necessarily those of NBS.

2. In its building products certification program, the Department of Housing and Urban Development uses the term "administrator" for firms which authorize use of their labels on products which comply with HUD standards. The administrator "validates" the manufacturer's certification, based on testing by approved laboratories and quality control inspections. (See HUD, 24 CFR, Part 200, and "Administrator Qualifications and Procedures for HUD Building Products Certification Programs," Federal Register, Vol. 44, No. 65, April 3, 1979, pp. 19394-7.)

3. There are several S.I.C. code groups in the 1972 Standard Industrial Classification Manual, published by the U.S. Office of Management and Budget, which might include third party certifiers. See SIC codes 6411 (Insurance), 7397 (Commercial Testing Laboratories), 8611 (Business Assoc.), and 8621 (Professional Membership Assoc). Some organizations providing third-party certification services may also be included under other SIC codes.

4. U.S. Federal Trade Commission, Standards and Certification: Proposed Rule and Staff Report, GPO, Washington, D.C., December 1978. A report prepared on behalf of the American Council of Independent Laboratories examined competitiveness of certification markets, based on interviews with users and suppliers of certification services. See James French, George Lawrence, Joseph O'Neil, and John Rogers, Product Certification in the United States: I Structure of the Process; II Anticompetitive Aspects: A Study Prepared for the American Council of Independent Laboratories, May, 1979. See also the hearings record for the Proposed Rule, including comments of Underwriters Laboratory and the Association of Home Appliance Manufacturers. A report by David Hemenway, Standards Systems in Canada, the U.K., West Germany and Denmark: An Overview, U.S. National Bureau of Standards, GCR 79-172, 1979, describes certification in four countries and raises some economic issues with respect to certification which may apply in the U.S. as well. A report being prepared by Ileana Martinez of the National Bureau of Standards describes the French certification system. A paper being written by Anastasios Papathanasis of Northwest Missouri State University and Sylvia Lane of the University of California/Davis, "Economics of Private Sector Certifying Agencies," takes a statistical approach to examining economic effects of certification.

5. Directory of United States Standardization Activities, edited by S. J. Chumas, National Bureau of Standards, Washington, D.C., 1975. Not all organizations responded to the survey taken in order to prepare this Directory. Furthermore, the purpose of the Directory was to describe organizations involved in standards development, rather than certifying organizations per se. As a result, many organizations which certify products but which are not involved in standards development may not be included. Conversation with Sophie Chumas, January 1979.

6. William Slattery, Tabulation of Voluntary Standards and Certification Programs for Consumer Products, U.S. Nat'l Bureau of Standards, Tech. Note 948, 1977. According to this tabulation, the number of product-types certified was as follows:

Underwriters Laboratories	212
American Gas Association	20
Glass Tempering Assoc.	8
Amer. Soc. of Sanitary Egrg.	8
Assoc. of Home Appl. Mfctrs	5
Air-Cond. & Refrig. Inst.	5
Architectural Alum. Mfct Assoc.	5

The 16 other organizations listed each certified three products or less.

7. The American Council of Independent Laboratories (ACIL) lists 200 laboratories in its 1978 Directory, published by ACIL in Washington, D.C. The 1972 U.S. Census of Manufacturers listed 1813 firms as Commercial Testing Laboratories (S.I.C. 7397) and gave annual revenues from commercial testing as \$383 million. (These figures were quoted in U.S. Department of Commerce, First Annual Report: National Voluntary Laboratory Accreditation Program, 1977, p. 15.)

8. Murray Weidenbaum describes the growth in Federal regulation since the 1962 Food and Drug Amendments in his book, Government-Mandated Price Increases, published by the American Enterprise Institute, Washington, D.C. 1975.

9. 29 CFR 1910.251-2. (The Code of Federal Regulations, published by the U.S. Office of Federal Register, is cited throughout this paper as CFR.)

10. 24 CFR 3282, promulgated under the National Mobile Home Construction and Safety Standards Act of 1974.

11. This growth was described in the Final Report of the Interagency Task Force on Product Liability, published by the U.S. Department of Commerce in 1978 (p. II-47). The report discusses the role of industry standards in litigation. See also the Task Force's Industry Report, and William Rockwell's background paper for the Task Force called "Standards, Certification, Quality Assurance, and the Products Liability Problem," October, 1976. On the other hand, a 1979 study based on interviews concluded that availability and cost of product liability insurance are not affected by certification. (French et al, 1979, p. 39) Since insurance demand for certification appeared to be a topic of lesser importance in the study, this observation should probably be considered one data point rather than conclusive evidence. Later on, this paper recommends further research into insurance demand for certification.

12. According to Underwriters Laboratories: "Inspection authorities, insurers, consumers, and others, often accept UL's mark as an indication of acceptable product design from a safety standpoint or as evidence that the product will perform in a specified manner." (Testimony of Underwriters Laboratories, U.S. Senate, Subcomm. on Antitrust and Monopoly, Hearings on S.3555: Voluntary Standards and Certification Act of 1976 (Part 1), 94th Cong., 2d Sess., June and July, 1976, p. 252.)

13. French et al, Product Certification in the United States, 1979, p. 39 (see footnote 4, above).

14. See Interagency Task Force, Final Report, 1978, pp. VII-33 through 37 (footnote 11, above); Ralph Manaker, "The Legal Defense of Compliance with Standards," ASTM Standardization News, September 1977, pp. 8-10+; Richard Finegan, "The Product Liability Situation in the United States Has Reached Crisis Proportions," Standards Engineering, April 1977, p. 28; and Department of Commerce, "Draft Uniform Product Liability Law," Federal Register, v. 44, no. 9, Jan. 12, 1979, pp. 2996-3019. Concerning liability risks of certifiers, see ANSI, Products Liability of Members of Standards-Writing Committees, ANSI, New York, 1975, pp. 6-7; and Advertising Age, "Jury Exonerates 'Good Housekeeping' in Seal Litigation," Feb. 1, 1971, pp. 3+.

15. Behrens, C.W., "Testing for Consumers," Appliance Manufacturer, May 1973.

16. French et al, Product Certification in the United States, 1979, p. 38 (see footnote 4, above); and HUD, "Administrator Qualifications," 1979 (see footnote 2, above).

17. See National Business Council for Consumer Affairs, Safety in the Marketplace: A Program for the Improvement of Product Safety, Government Printing Office, Washington, D.C., 1973, p. 50; Underwriters Laboratories, Testing for Public Safety, UL, Chicago, 1974 (pamphlet); American National Standards Institute, The American National Standards Institute Policy and Procedures and Manual of Operations for Accreditation of Certification Programs, ANSI, New York, 1976; and FTC Report, 1978, pp. 76-7 (footnote 4, above).

18. U.S. Congress, Senate Antitrust Subcomm., Hearings on S.825, "The Voluntary Standards and Accreditation Act of 1977", 95th Cong., 1st Sess., April and May, 1977, p. 243; and Underwriters Laboratories, Method of Development, Revision and Implementation of Underwriter Laboratories' Standards for Safety, UL, 1978, p. 14.

19. Underwriters Laboratories, 1977 Annual Report, UL, Chicago.

20. U.S. Senate, Hearings on S.3555, 1976, p. 260 (footnote 12, above).

21. Ibid, p. 252.

22. See UL, Testing for Public Safety, 1974, and 1977 Annual Report; Robert O'Bannon, Building Department Administration, International Conference of Building Officials, Whittier, Ca., 1973, pp. 116-8; U. S. Senate, Hearings on S.3555, 1976 (footnote 12, above), pp. 251-4; and Chumas, Directory, 1975, (footnote 5, above) pp. 161-2. The U.S. National Commission on Product Safety also described UL in its Final Report, 1970, pp. 55-7.

23. Chumas, Directory, 1975, pp. 21-2 (footnote 5, above); U.S. Senate, Subcommittee on Antitrust and Monopoly, Voluntary Industrial Standards--1976: Hearings, 94th Cong., 2d Sess., March 1976, pp. 593-5; and O'Bannon, Building Dept. Admin., 1973, (footnote 22, above) pp. 118-123.

24. Chumas, Directory, 1975, pp. 77-8 and O'Bannon, Building Department Administration, 1973, pp. 125-8.

25. Behrens, "Testing for Consumers," 1973 (footnote 15, above); Chumas, Directory, 1975, (footnote 5, above) p. 5; U. S. Senate, Hearings on S.825, 1977, p. 88; Vitro Laboratories, Appliance Certification Program, 1979, p. 2-35; and Alwin B. Newton, "Certifying Solar Equipment," Solar Age, Dec. 1978.

26. Conversation with Mr. Phillips, AHAM, April 16, 1979; and Vitro Laboratories, Appliance Certification Program: Task 1 Report, prepared for U.S. Department of Energy, February, 1979, pp. 2-29 through 2-33. This report represents part of a research project expected to be completed in 1979. Conversation with Bill McFarland, Vitro Laboratories, April, 1979.

27. American Society of Mechanical Engineers, Boiler and Pressure Vessel Code, Sec. VIII, Div. 1, "Pressure Vessels," ASME, New York, 1977, par. UG 90, 91; Chumas, Directory, 1975, p. 43; U. S. Senate, Hearings on S.3555, 1976, p. 200; and U. S. Senate, Hearings on S.825, 1977, pp. 473-4. The 1976 hearings testimony suggests that inspection is frequently, but not always, carried out by an inspector certified by another voluntary association, the National Board of Boiler and Pressure Vessel Inspectors. (p. 541)

28. Chumas, Directory, 1975, (footnote 5, above) pp. 131-2; O'Bannon, Building Department Administration, 1973, pp. 123-5; and National Sanitation Foundation, 1978 Annual Report, NSF, Ann Arbor.

29. O'Bannon, Building Department Administration, 1973 (footnote 22, above).

30. See D. Waksman et al, Plan for the Development and Implementation of Standards for Solar Heating and Cooling Applications, 1978. (NBSIR 78-1143A)

31. The HUD program is authorized in the Solar Heating and Cooling Demonstration Act of 1974 (PL. 93-409). Also, most of the ten states involved in the HUD Hot Water Initiative rely on the Minimum Property Standards and a list of qualified systems developed by the Polytechnical Institute of New York. See Susannah Lawrence, "An Overview: The Development of Solar Standards and Its Effect on Consensus," in Federal Trade Commission, The Solar Market: Proceedings of the Symposium on Competition in the Solar Energy Industry, U.S. GPO, Washington, 1978, p. 86.

32. For example, some jurisdictions use the Uniform Solar Energy Code of the International Association of Plumbing and Mechanical Officials (IAPMO, Los Angeles, 1979), which requires collectors manufactured as a complete component to be listed. (1979 edition, p. 43) And some Florida counties are adopting solar collector certification requirements into building codes. Lawrence, "An Overview," p. 81.

33. Richard Maullin, "Remarks," in FTC, The Solar Market, 1978.

34. Sheldon Butt, "Standards for the Solar Industry," in FTC, The Solar Market, 1978, p. 13.
35. Butt, "Standards," 1978, pp. 11-12; Lawrence, "An Overview," 1978, (footnote 31, above) p. 80; and FTC, Report, 1978, (footnote 4, above) pp. 52, 97.
36. See Waksman, Plan, 1978 (footnote 30, above).
37. Newton, "Certifying Solar Equipment," 1978, (footnote 25, above) p. 28.
38. Conversation with J. E. Cottongim, SEIA, April 13, 1979; Lawrence, "An Overview," 1978, p. 82; and Butt, "Standards," 1978, pp. 17, 51-55.
39. Lawrence, "An Overview," 1978, (footnote 31, above) p. 81.
40. See Maullin, "Remarks," 1978, (footnote 33, above) pp. 100-101, and W.J. Neissing, Laboratories Technically Qualified to Test Solar Collectors in Accordance with ASHRAE Standard 93-77: A Summary Report, 1978 (NBS-IR 78-1535).
41. Conversation with Hank Collins, UL, April 13, 1979.
42. See Charles Hyer, Principle Aspects of U.S. Laboratory Accreditation Programs, prepared for U.S. Department of Commerce, Washington, D.C., January 1979.
43. For background on this program, see U. S. DoC, "Procedures for a National Voluntary Laboratory Accreditation Program," Federal Register, Feb. 25, 1976, 41 (38), pp. 8163-68, Sect. 7.7(c)(3). (also in 15 CFR 7); and DoC, First Annual Report, 1977
44. National Laboratory Evaluation Program, Annual Report, 1977, p. 3.
45. See Hyer, Laboratory Accreditation, 1979 (footnote 42, above).
46. Standard Recommended Practice for Generic Criteria for Use in the Evaluation of Testing and/or Inspection Agencies (E548-76), 1976; Hyer, Laboratory Accreditation, 1979, (footnote 42, above) p. 52.
47. ANSI, Manual of Operations for Accreditation, 1976; and ANSI Reporter, "Certification Group Working on Manual," Feb. 14, 1975; and conversation with William Rockewell, August, 1979.

48. Jimmy Carter, "International Trade Agreements," Federal Register, January 8, 1979, at pp. 1938-9; and U.S. Congress, House, Trade Agreements Act of 1979: Statements of Administrative Action, June 1979. See "Title IV-Technical Barriers to Trade (Standards)."

49. U.S. Department of Commerce, Office of Product Standards, Summary of Proceedings: Second International Conference on Recognition of National Programs for Accreditation of Testing Laboratories, 1978. For another description of foreign certification activities, see Hemenway, Standards Systems in Canada, 1979 (footnote 4, above).

50. U.S. Federal Trade Commission, "Standards and Certification: Proposed Trade Regulation Rule," Federal Register, 43, Dec. 7, 1978, pp. 57269-84.

51. U. S. Congress, Senate Antitrust Subcomm., Voluntary Industrial Standards: Hearings, 94th Cong., 1st Sess., March 1975; Voluntary Industrial Standards--1976, March 1976; Hearings on S.3555, 1976; Hearings on S.825, 1977; and U.S. Congress, Voluntary Standards and Accreditation Act of 1977, Congressional Record, March 1, 1977 (S. 825 and H. R. 8184, a proposed law).

52. James Abourezk, U. S. Senator, "Statements on Introduced Bills and Joint Resolutions," Congressional Record-Senate, May 1, 1977, p. S3158.

53. FTC, Report, 1978 (footnote 4, above).

54. FTC has previously investigated the area and published a study called: Preliminary Staff Study (Precis): Self-Regulation--Product Standardization, Certification and Seals of Approval. An FTC investigation following completion of the Precis resulted in a 1200-page public record and in a final report which focused on the use of standards and certifications as a basis for providing point-of-sale information to consumers: Final Report of the Task Force on Industry Self Regulation, Performance Information, Standards and Certification Programs--Achieving Socially Desirable Objectives, July, 1972. (See FTC Report, 1978, p. 109.) FTC has also published advisory opinions concerning standards and certifications, at 16 CFR 15.4, .96, .350, and .457. (See FTC Report, 1978, pp. 102-7.)

55. FTC, Report, 1978, (footnote 4, above) p. 203, 271-2; Underwriters Laboratories, Statement of Underwriters Laboratories Inc. on FTC Proposed Trade Regulation Rule on Standards and Certification, May 1979, p. 9; and Association of Home Appliance Manufacturers, Comments on Proposed Federal Trade Commission Trade Rule on Standards and Certification, March 1979, p. 1-2.

56. French et al, Product Certification in the United States, 1979, (footnote 4, above) p. 4.

57. U. S. Senate, Hearings on S.3555, 1976, p. 258; and U. S. Senate, Hearings on S.825, 1977, p. 497, 500.

58. Building Officials and Code Administrators International, The BOCA Basic Mechanical Code, BOCA, Chicago, 1978, p. 54.

59. See U. S. Senate, Voluntary Industrial Standards--1976, March 1976, p. 516; U. S. Senate, Hearings on S.3555, 1976, pp. 211 and 184-5; Hittman Associates, Inc., Barriers Connected with Certifying or Listing of Energy Conserving Products Used in Buildings, U.S. Department of Energy, Washington, D.C., May 1977, p. C-6; Business Week, "Product Standards Under Seige," Sept. 12, 1977, pp. 122E+; U.S. Senate, Hearings on S.825, 1977, pp. 168, 194; O'Bannon, Building Dept. Admin., 1973, (footnote 22, above) pp. 118, 122-3; FTC, Report, 1978, pp. 28, 33, 72, 75; and French et al, Product Certification in the United States, 1979, (footnote 4, above) pp. 4, 20, and 21.

60. FTC, Report, 1978, (footnote 4, above) p. 85; OSHA, "Accreditation of Testing Laboratories," 29 CFR Section 1907; and FTC, Report, 1978, p. 216.

61. Underwriters Laboratories, Statement, 1979, Exhibit IV-15.

62. The National Sanitation Foundation, In Quest of Environmental Quality, NSF, Ann Arbor, 1976, p. 8.

63. U.S. Senate, Hearings on S.825, 1977, p. 193.

64. Hyer, Laboratory Accreditation Programs, 1979 (footnote 42, above).

65. U.S. Senate, Hearings on S.825, 1977, p. 508.

66. 1978 conversation with Gene Rowland, former Director of the NBS Office of Engineering Standards; French et al, Product Certification in the United States, 1979, pp. 4, 27, 29, and 30; 29 CFR 1907; Hyer, Laboratory Accreditation, 1979 (footnote 42, above); and HUD, "Administrator Qualifications," 1979 (footnote 2, above). OSHA sets forth criteria for accrediting testing laboratories, but its accreditation program had not been put into operation as of June, 1979.

67. See Testimony of Robert Tesar in U. S. Senate, Voluntary Industrial Standards, 1975, and Hearings on S.3555, 1976.

68. U. S. Senate, Voluntary Industrial Standards, 1975, Testimony of Kent Springer, especially p. 121.

69. Hittman, Barriers Connected with Certifying, 1977, (footnote 59, above) pp. II-1 and II-2.

70. FTC. Report, 1978, (footnote 4, above) p. 220.

71. U.S. Senate, Hearings on S.825, 1977, p. 243; and UL, Standards for Safety, 1978, p. 14.

72. FTC, Report, 1978. pp. 206-7.

73. Ibid, 1978; Joel Hoffman, "Antitrust Issues in Setting and Enforcing Product Standards," FTC, The Solar Market, 1978; Jon E. King, Antitrust Laws and Standardization -- What Role the Trade Association? (unpublished ms.), Federal Trade Commission, circa 1972; Carol Chapman Rawie, A Guide to Papers Citing Antitrust Cases Involving Standards or Certification, U.S. National Bureau of Standards, forthcoming.

74. FTC, Report, 1978, pp. 221 and 478. An article referenced on p. 83 of the FTC Report suggests that certifications play a significant role in consumer decision-making. See Thomas L. Parkinson, "The Role of Seals and Certifications of Approval in Consumer Decision-Making," Journal of Consumer Affairs, Summer 1975. (The study described in this article involved only eight seals, plus a fictitious seal, including many which would not be considered third-party certification -- e.g. government, manufacturer, and retailer seals.)

75. FTC Report, 1978 (footnote 4, above), pp. 191-2, 202, and UL, Statement, 1979.

76. FTC, Report, 1978, p. 224.

77. Ibid, pp. 227-8.
78. Ibid, pp. 226-7.
79. AHAM, Comments, 1979 (footnote 55, above), Exhibit III-6.
80. FTC, "Proposed Rule," 1978 (footnote 50, above).
81. Ibid, Sections 457.12. and 457.14.
82. Ibid, 457.13(a).
83. Ibid, 457.13.
84. Ibid, see 457.6 and .7 and 457.11.

85. We might call for the certification requirements that would be expected by a "reasonable buyer." Under Section 457.13(d) of FTC's proposed Rule, certain certifiers would not be allowed to set requirements which are unnecessary in light of expectations of a "reasonable buyer" (where buyer is defined on page 492 of the accompanying report to include insurance companies and regulators). But various definitions of "reasonable buyer" seem possible. For example, criteria for what is reasonable might be: (1) court opinions expressed in liability cases; (2) regulatory agency standards; (3) the optimum indicated by economic analysis; (4) what informed buyers and regulators expect; or (5) what most buyers and regulators expect. These criteria may conflict.

86. See UL, Statement, 1979; and AHAM, Comments, 1979 (footnote 55, above).

87. See U.S. Senate, Hearings on S. 3555, 1976, p. 320.

88. Testimony of Gerald McBean on Behalf of the American Council of Independent Laboratories, Inc., on Proposed Trade Regulation Rule on Standards and Certification, Washington, D.C., June 25, 1979.

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APPENDIX A:

PARTIAL LIST OF CERTIFICATION PROGRAMS

PARTIAL LIST OF CERTIFICATION PROGRAMS (a)

Air-Condi. and Refrig. Inst.	Air conditioners, humidifiers, furnaces, solar collectors (b)
Air Diffusion Council	Air diffusion equipment
Air Movement & Control Assoc.	Fans, heaters (c)
Akron Rubber Devel. Lab.	Plywood flooring (HUD) (d)
Am. Assoc. of Motor Vehicle Admin's	Motor vehicle safety equipment
American Bowling Congress	Bowling pins
American Bureau of Shipping	Vessels
American Dental Association	Dental materials and devices
American Gas Association	Gas equipment
Am. Inst. of Timber Construction	Laminated timber
Am. Lumber Standards Committee	Lumber (for HUD) (d)
Am. Petroleum Institute	Petroleum industry stds
American Plywood Association	Plywood
Am. Society of Mechanical Egrs	Boilers, pressure vessels & nuclear plant components; safety & poll. control equip.(e)
Am. Society of Sanitary Egrg	Washing machines, other plumbing-related
American Water Works Assoc.	Paint systems for steel water storage tanks (under devel. in 1975)
American Wood Inspect. Agency	Wood products
American Wood Window Institute	Windows (for HUD) (d)
American Wood-Preservers Bur.	Wood preservative treatments
Applied Research Laboratories	Doors (for HUD) (d)
Approved Engineering Testing Lab.	Aluminum windows and doors (for HUD) (d)
Architectural Aluminum Mfctrs Assoc.	Glass doors, storm doors and windows
Associated Certifiers, Inc.	Mobile home windows (f)
Associated Dallas Laboratories	Windows, aluminum doors, carpets, (for HUD) (d),
Assoc. of Home Appliance Mfctrs	Air-cond., refrig., other appliances
A. W. Williams Inspection	Lumber, plywood (HUD) (d)
Baking Industry Sanitation Stds. Comm.	Baking equipment
Barre Granite Association	Granite monuments
Bicycle Mfctrs Assoc.	Bicycles
Biological Stain Commission	Biological stains
Builders Hardware Mfctrs Assoc.	Cabinet hardware (with Electrical Testing Labs)
Blding Officials & Code Admins. Int'l	Lists bldg. prod. (g)

Certified Ballast Mfrs	Fluorescent lamp ballasts (r)
Chain Link Fence Mfctrs. Inst.	Fences (h)
Cooling Tower Institute	Cooling towers
Crayon, Water Color & Craft Inst.	Children's art materials
El Paso Testing Laboratories	Wood doors (for HUD)(d)
Electrical Testing Laboratories	Conducts and publishes guides for operating certif. programs for products such as consumer appliances (for AHAM) (i); a/c equip. (ARI) (i); cabinet hardware (BHMA); & carpet (HUD) (d).
Facing Tile Institute	Tile & glazed brick
Factory Mutual Egrg & Research	Loss prevention equip. & services, incl. fire prevention & control equipment.
Glass Tempering Association	Glass shower doors, glass tables, other glass items. (h)
Hardwood Dimensions Mfctrs. Assoc.	Hardwood dimension parts
Hardwood Plywood Mfctrs Assoc.	Plywood, doors (HUD)(d)
Hockey Equipment Certif. Council	(r)
Home Ventilating Institute	Vented range hoods, exhaust fans
Houston Chemical Service	Lumber & plywood (HUD)(d)
Industrial Testing Laboratories	Plywood floors (HUD) (d)
Insulating Glass Certif. Council	(r)
Int'l Conf. of Bldg. Officials	Lists building products
Int'l Assoc. of Plumbing and Mechanical Officials	Plumbing products
Int'l Commission on Rules for Approval of Electrical Equip.	Drills, sanders, grinders
Int'l Mobile Air Condit. Assoc.	Mobile a/c equipment
Juvenile Products Mfctrs Assoc.	Highchairs, playpens (j)
Maple Flooring Mfctrs Assoc.	Maple, birch & beech flooring
Metallurgical Engineers of Atlanta	Carpet (for HUD) (d)
Int'l Assoc. of Wiping Cloth Mfctrs	Self-cert. of industrial wipers

NAHB Research Foundation	Glued plywood flooring, plastic plumbing fixtures (for HUD) (d)
Nat'l Autom. Merchandising Assoc.	Vending machines
Nat'l Board of Boiler and Pressure Vessel Inspectors	Boilers and pressure vessels
Nat'l Cargo Bureau, Inc.	Loading of dangerous & other cargo
Nat'l Fluid Power Assoc.	Fluid power components
Nat'l Hardwood Lumber Assoc.	Hardwood lumber, cypress
Nat'l Kitchen Cabinet Assoc.	Kitchen cabinets (k)
Nat'l Mineral Wool Assoc.	Home insulation (e)
Nat'l Model Railroad Assoc.	Model trains
Nat'l Oak Flooring Mfctrs Assoc	Oak flooring
Nat'l Particleboard Assoc.	Stairtreads (for HUD) (d)
Nat'l Sanitation Foundation	Food equip., plastic plumbing, water treatment equip. for swimming pools, and other products.
Nat'l Swimming Pool Inst.	Swimming pools
Nat'l Woodwork Mfctrs Assoc.	Doors (h), windows (for HUD) (d)
Northeastern Lumber Mfctrs Assoc.	Lumber
Northern Hardwood & Pine Mfctrs Assoc.	Lumber
Outdoor Power Equipment Institute	(r)
Pittsburgh Testing Laboratories	Plywood (for HUD) (d)
Plumbing & Drainage Institute	Water hammer arresters
Plywood Fabricator Service	Floors (for HUD) (d)
Polytechnical Institute of New York	Solar energy equip. (l)
Recreational Vehicle Industry Assn.	(r)
Red Cedar Shingle and Handsplit Shake Bureau	Shingles
Redwood Inspection Service	Lumber
Safety Glazing Certification Council	Glazing materials (m)
Safety Helmet Council of America	Helmets (h)
Skeist Laboratories	Flooring (for HUD) (d)
Snowmobile Safety & Certif. Comm.	Snowmobiles (h)
Solar Energy Industries Assn.	(r)
Southern Building Code Congress Int'l	Building products (g)
Southern Cypress Mfctrs Assoc.	Red cypress lumber
Southern Pine Inspection Bur.	Lumber
Southwestern Laboratories	Lumber & plywood (for HUD) (d)
Sump Pump Mfctrs Assoc	Sump pumps

Tile Council of America	Tiles (h)
Timber Engineering Co.	Plywood (for HUD (d)
Timber Products Insp. & Testing Svcs.	Lumber, plywood (for HUD (d)
Underwriters Laboratories	Large range of electrical and other products.
U.S. Auto Club	Auto products (n)
U.S. Consumer Testing Inst.	(f)
U.S. Olympic Committee	(o)
U.S. Testing Co.	Tests a range of goods for certif. & labeling, incl. cellulose insulation (q) and plastic plumbing (for HUD) (d)
USC Found. for Cross Connect. Control	Backflow preventers(p)
Warnock Hersey	Doors (for HUD) (d)
Water Conditioning Foundation	Water filters and softeners
Water Quality Assoc.	Water conditioners, filters, & softeners (h)
Water Systems Council	Pumps (h)
West Coast Lumber Inspect. Bur.	Lumber
West'n Wood Moulding & Millw'k Prod'rs	Wood moulding
Western Wood Products Assoc.	Lumber
Williams Grademarking Services	Lumber & plywood (for HUD) (d)
Zinc Institute	Galvanized roofing sheets

a. In drawing up this list, certifications for occupations and agricultural products (except lumber) were excluded. For products covered, this should be considered only a partial list of programs, and some entries may be out of date. This list is drawn from several sources. Unless otherwise noted, entries are from Chumas, Directory, 1975, which covers certification programs conducted by standards-writing organizations.

b. Newton, "Certifying Solar Equipment," 1978.

c. Hyer, Laboratory Accreditation, 1979, p. 51.

d. TMO Update, Vol. 3, No. 4, June 15, 1978 (The Marley Organization, Ridgefield, Ct.).

e. Hyer, Laboratory Accreditation, 1979, p. 57.

f. FTC, Report, 1978, pp. 70, 71.

g. Ibid, p. 217.

h. Slattery, Tabulation, 1977. (See footnote 6)

- i. Behrens, "Testing for Consumers," 1973.
- j. Phone call to JPMA, 4/16/79.
- k. Hyer, Laboratory Accreditation, 1979, p. 62.
- l. FTC, The Solar Market, 1978, p. 86.
- m. Hyer, Laboratory Accreditation, 1979, p. 65.
- n. FTC, Report, 1978, p. 225.
- o. Ibid, p. 224.
- p. FTC Report, 1978, p. 212.
- q. U.S. Testing Co., 1978 Annual Report, U.S. Testing, Hoboken,, N.J.
- r. French, et al, Product Certification in the United States, 1979, pp. 8, 9, and 12.

APPENDIX B:

FTC PROPOSED TRADE REGULATION RULE

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

(The following has been reprinted from the
Federal Register of December 7, 1978 - 43 FR 57269)

[6750-01-M]

[16 CFR Part 457]

STANDARDS AND CERTIFICATION

Proposed Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of Proposed Rule-making.

SUMMARY: This proposed rule would establish prohibitions and requirements for standards developers, certifiers, and persons who reference standards or certifications in the marketing of products.

This notice sets out the rulemaking procedures to be followed, the text of the proposed rule, a list of general questions upon which the Commission particularly desires comment and testimony, an invitation for written comments, and instructions for prospective witnesses and other persons who desire to testify or otherwise participate in the proceeding.

DATES: Notification of interest in questioning witnesses must be submitted on or before March 2, 1979.

Written comments must be submitted on or before March 16, 1979.

Prepared statements of witnesses and exhibits (if any) must be submitted on or before March 26, 1979 for witnesses at the San Francisco hearings and April 30, 1979 for witnesses at the Washington, D.C. hearings.

Public hearings commence at 9:00 a.m. on April 16, 1979 in San Francisco and at 9:00 a.m. on May 21, 1979 in Washington, D.C.

ADDRESSES: Notifications of interest, written comments, prepared statements of witnesses and exhibits should be submitted, when feasible and not burdensome, in five copies, to Henry B. Cabell, Presiding Officer (PU), Federal Trade Commission, Washington, D.C. 20580, 202-724-1045. The public hearings will be held in Room 15022, Federal Building, 450 Golden Gate Avenue, San Francisco, California and in Room 332, Federal Trade Commission Building, Pennsylvania Avenue and 6th Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Robert J. Schroeder, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, 202-523-3936.

SUPPLEMENTARY INFORMATION:

The proposed rule would apply to the development and use of product standards, to the related activity of product certification, and to the referencing of product standards and use of certifications by sellers in the marketing of their products. The proposed rule requires standards developers to notify specified classes of persons of a standards development proceeding. The notice must describe the proposed action in sufficient detail to enable persons to determine whether they should participate in the proceeding. A general right to participate in all phases of standards proceedings is established. The proposed rule requires standards developers and certifiers to disclose any serious hazards that are not immediately apparent to users. The rule also establishes a redress system that private parties can use to challenge unfair, deceptive or anticompetitive standards. Certain product standard areas are proposed as exempt from the rule, including food and drug standards and certain certifier test methods. In addition, comment is specifically requested as to whether procedural, challenge, and other rights and benefits should be granted only to persons from countries which grant reciprocal rights to United States interests. Nonproduct standards, such as standards of professional competence or financial accounting standards, are considered beyond the scope of this proceeding.

Private standards development and certification activities are in the nature of an intermediate service in commerce. Standards and certifications are relied on extensively in commerce to facilitate communication between sellers and buyers, promote the interchangeability of products and components, transfer technology, assure the safety, fitness and energy efficiency of products, and help achieve efficiencies in design, produc-

tion and inventory. Despite these benefits, standards development and certification activities have frequently caused or contributed to substantial consumer and competitive injuries. The injuries include, among others, denial to consumers of the benefits of superior or lower cost technology, denial to businesses of the opportunity to enter and compete in profitable industries, inadequate product safety levels, unnecessary costs, and failure to provide for disclosure of important product hazard or use information.

The following discussion is intended only to highlight the major provisions of the proposed rule, and to explain the reasons for the rule provisions and their anticipated effect. The full staff report contains a detailed analysis of the proposed rule and the reasons for each rule provision. Copies of the staff report are available in Room 130, Public Reference Room, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, and may be obtained in person or by mail.

Subpart A sets forth the rule's scope and defines relevant terms.

Subpart B imposes procedural safeguards on the standards development process and creates a framework for principled decision-making. Section 457.3 requires that the standards developer establish and follow written procedures. Section 457.4 requires that the standards developer notify specified persons 30 days prior to commencement of any proceeding to develop, revise or withdraw a standard. This notification must contain information describing the purpose of the proceeding and how interested persons may participate. The information that standards developers currently include in their general notices is insufficient to permit persons to make an informed decision as to whether they want to participate in the proceeding.

Section 457.4 requires that the standards developer also notify specified persons of its intention to adopt, revise, or withdraw a standard at least 60 days prior to a final decision. This notification must contain, among other items, a copy or summary of the proposal, and a statement of the

major substantive disputes that occurred during the proceeding and the reasons these disputes were decided as they were. The purpose of this requirement is to provide interested parties with enough information to judge the action prior to reliance on the standard in the market. The statement of major disputes and the reasons for decisions on them is intended to aid interested parties in formulating their input into the process. The section also requires that the standards developer notify specified persons 30 days prior to the effective date of the action.

The time limits that are set throughout the section are necessary to enable recipients of the notices to make use of the information provided. These time limits do require that a standards developer will spend a certain minimum amount of time in the standards proceeding; however, this will not slow the process, as most proceedings appear to take far longer.

The proposed rule specifies classes of persons that must receive notice. These classes include producers, institutional and individual consumers, government procurement and code officials, certifiers, environmental and energy conservation groups and others who may have an interest in the proceeding. Standards developers have often failed to give adequate consideration to all interested parties. To preclude full participation by interested parties is to run the risk of making a decision on incomplete data and without consideration of all viewpoints on critical issues.

It is expected that direct mailings will be the dominant mode of providing the required notice to all interested persons, although the standards developer is free to use other means to achieve actual notice to the required parties. The notice provisions in this section may impose some costs associated with printing and mailing. The costs are limited, however, by the restricted universe of recipients. The provision may also, in some instances, permit fewer notices than are currently provided.

Section 457.5 establishes a general right to participate in all phases of all standards proceedings to all persons. The term participate includes such things as direct involvement in oral deliberations, submission of written materials, and receipt of agenda and minutes. The purpose of the requirement is to expand the universe of inquiry by ensuring that all interests have the opportunity to present their arguments during a standards development proceeding.

Sections 457.6 and 457.7 create a complaint mechanism which private parties can use if they believe that they are being harmed by unfair, de-

ceptive or anticompetitive standards. Section 457.8 permits a complainant to test standards against the following basic principles:

1. Standards should have logical and technical justification in light of their stated or implied policy goals;

2. Standards should not exclude products that are equivalent to products not excluded;

3. Rather than excluding products, standards developers should choose the least restrictive alternative, i.e., one which preserves or increases buyer options and the opportunity of sellers to compete;

4. Standards should avoid raising false presumptions that two or more conforming products are homogeneous in performance or safety;

5. Standards should not be drawn to cause misreliance that results in economic loss to buyers or exposes product users to unforeseen risks.

While the notice and participation requirements of the proposed rule do provide that all viewpoints may be heard, they do not guarantee that the decision will reflect consumer protection and competition policies. The purpose of § 457.6 is to enable private parties to raise these issues to a standards developer and receive consideration. The standards developer is required under § 457.7 to take appropriate action when a complainant prevails in a challenge under § 457.6. Appropriate action consists of actions necessary to cure the harm and must be completed within a reasonable time period. If a standards developer determines that it is not required to take appropriate action, it must notify the complainant of the reason for the decision, and of the existence of an appeal board established under § 457.10 of the proposed rule.

Section 457.8 requires that every standard that is promulgated must disclose its intended scope, and warn of any serious hazards or limitations in conforming products that are not immediately apparent to users. These disclosures are intended to insure informed use of standards and guard against deception and misreliance that might occur in their absence.

Section 457.9 imposes a recordkeeping obligation on standards developers. The provision merely requires retention of written materials compiled in the course of a proceeding. Records would be open to the public.

Section 457.10 requires the standards developer to establish an impartial appeal board to hear disputes relating to procedural matters, or to unfair, deceptive or restrictive standards. Under the section the standards developer cannot unreasonably refuse to abide by appeal board decisions.

Section 457.11 sets out several categories of standards and standards de-

velopment activities that are being proposed as exemptions under the rule. They include certain certifier test methods and standards relating to food, drugs, and other products regulated by the Food and Drug Administration. The exemptions generally reflect an intent either to shield certain standards development activity from procedural or other rule burdens, or to limit the scope of the rule. The rule proceeding will attempt to discern the proper scope of the exemptions, in light of existing practices, costs, and the public interest. One of the questions on which comment is specifically requested is whether an exemption should be included which would limit the ability of a person from a foreign country to exercise rights created by the rule if similar rights were not granted to United States interests in their country.

Subpart C sets out the duties of certifiers. Section 457.12 requires the certifier to use standards properly by following the requirements in the standards and any later requirements issued by the standards developer. Further, under § 457.12 the certifier must require a seller who uses its seal of approval to disclose specified information on or near the seal. The disclosure must include a statement of the product attributes that are covered by the certification, and a statement warning of any serious risks or limitations associated with use of the product which are disclosed in standards as required by § 457.8.

In addition, the section requires a certifier to take action against producers that abuse its seal or listings. This can occur, for example, when products represented as being certified do not comply with relevant standards. The certifier's action may consist of withdrawal of the certification, probation, retesting or other appropriate action. A certifier that has knowledge that a standard it is using in certification violates the § 457.6 complaint criteria must request action on it by the standards developer. The required disclosures and obligations are intended to prevent uninformed use of a product and to prevent deception and consumer misreliance.

Section 457.13 applies only to certifiers who are relied on to such an extent in a market that they, in effect, control access of products to that market. The section prohibits granting or denying certification, or discriminating in the quality of service, based on such factors as a producer's trade association membership, size of the producer, product origin, and whether a product is intended for retrofit rather than installation as original equipment.

The section also prohibits certifiers from imposing test requirements that

are unnecessary in terms of buyer expectations. Superfluous retesting requirements on products tested by competent laboratories or on product changes that do not affect safety or performance are also prohibited. One other requirement for certifiers subject to § 457.13 is that they establish an impartial appeal board to hear disputes relating to duties under that section.

If a certifier refuses to do business with one producer, but not other producers of the same product, the first producer will be excluded from markets that require the certification. Even if the certification is not an absolute requirement, the excluded producer will have a marketing disadvantage to the extent that buyers view the absence of certification as connoting an inferior or unsuitable product. The purpose of the prohibition is to eliminate unfair discrimination in the certification process and thereby expand producer and consumer options.

Section 457.14 imposes a recordkeeping obligation on certifiers. The provision requires that the certifier keep records relating to the certification of individual products, as well as any complaints it receives about deceptive or otherwise improper use of its seal of approval by sellers. The records must be made available to a client in a certification action for inspection and copying. Records are not required to be made available to the general public because of the need to protect trade secrets. The recordkeeping provisions should not be unduly burdensome in that it appears to follow current certifier practices.

Section 457.15 sets forth several categories of certification that are being proposed as exemptions under the rule. These include, among others, certifications relating to food, drugs, and other products regulated by the Food and Drug Administration, and representations such as endorsements which consumers are likely to believe are subjective or not based on controlled testing.

One of the questions on which comment is specifically requested is whether an exemption should be included which would limit the ability of a person from a foreign country to exercise rights created by the rule if similar rights were not granted to United States interests in their country.

Subpart D, § 457.16, sets forth requirements for the impartial appeal board that must be established by standards developers and certifiers pursuant to §§ 457.10 and 457.13(e) respectively. It outlines certain requirements that the appeal board must observe to ensure that the parties are given a fair hearing. These include, among others, that the board be inde-

pendent of the sponsoring organizations and that members have no conflicts of interest relating to the appeal. The appeal board must render a decision within 60 days of its receipt of a complaint.

Subpart E, § 457.17, contains several prohibitions and requirements applying to sellers who represent conformance with standards in the marketing of their products. It requires the marketer to disclose information relating to product attributes covered by the standard and any product hazards or limitations. It prohibits the marketer from marketing a product in a manner contrary to requirements contained in the standard or imposed by the certifier. The purpose of the provision is to ensure that standards are complied with, and that buyers receive the information required in other sections of the rule.

SECTION A. PROPOSED TRADE REGULATION RULE

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, the provisions of Part 1, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.7, *et seq.*, and section 553 of subchapter II, Chapter 5, U.S. Code (Administrative Procedure), has initiated a proceeding for the promulgation of a trade regulation rule concerning the development of standards, certification of products, and use of standards and certifications in marketing.

Accordingly, the Commission proposes the following Trade Regulation Rule and would amend Subchapter D, Trade Regulation Rules, Chapter I of 16 CFR by adding a new Part 457 as follows:

PART 457—STANDARDS AND CERTIFICATION

Subpart A—Scope and Definitions

- Sec.
- 457.1 Scope.
- 457.2 Definitions.

Subpart B—Standards

- 457.3 Written procedures.
- 457.4 Notice.
- 457.5 Participation.
- 457.6 Duty to act.
- 457.7 Appropriate action.
- 457.8 Required disclosures.
- 457.9 Recordkeeping and access.
- 457.10 Appeals.
- 457.11 Exemptions.

Subpart C—Certification

- 457.12 General certifier duties.
- 457.13 Additional certifier duties.
- 457.14 Recordkeeping and access.
- 457.15 Exemptions.

Subpart D—Appeal Board

- 457.16 Appeal board.

Subpart E—Marketing

- Sec.
- 457.17 Use of standards and certifications.

Subpart F—Notes

AUTHORITY: 38 Stat. 717, as amended, 15 U.S.C. 41, *et seq.*

Subpart A—Scope and Definitions

§ 457.1 Scope.

(a) This part shall apply to the development of standards, the certification of products, and the use in marketing of standards and certifications, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*

(b) It is an unfair method of competition and an unfair or deceptive act or practice, within the meaning of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), for any standards developer, certifier, or marketer to violate any applicable provision of this part.

§ 457.2 Definitions.

(a) **Certification.** The grant of a form of approval, as well as the process on which the grant (or denial) is based. The process may include sampling, testing, inspection, followup, and related activities. Certification does not include self-certification, or official governmental acts.

(b) **Certifier.** A person who engages in the process of granting forms of approval. Certifier does not include a governmental entity acting in its official capacity.

(c) **Evidence.** Materials of any kind or written arguments (whether or not accompanied by supporting materials), that are offered in support of a proposition.

(d) **Form of approval.** A seal, statement of conformance, label, classification, listing in a directory, and any other affirmation that a product complies with, or performs in a specified manner in relation to, a standard or other requirement.

(e) **Marketer.** A manufacturer, wholesaler, retailer, or other person who engages in marketing.

(f) **Marketing.** The sale, offering for sale, advertising, or promotion of products.

(g) **Person.** An individual, proprietorship, partnership, corporation, association, federal, state, and local government agency, and any other entity.

(h) **Product.** A finished product, components, equipment, materials, and lighting, heating or other systems. The term includes both personal and real property, and any other consumer or producer good.

(i) **Recognized area of competence.** A product area in which the standards developer holds itself out as competent to do business, or in which persons who rely on the standards devel-

oper would reasonably recognize it as competent to do business.

(j) *Request for action.* Any written communication to an officer or director of a standards developer, or to the chairman or other officer of a standards development committee, which calls into question a standard, proposed standard, interpretation, act or practice of a standards developer, or lack of a standard within the standards developer's recognized area of competence, and which requests the standards developer to change its position with respect to the matter called into question. Requests may relate to matters under consideration in a standards development proceeding under §§ 457.4 and 457.5.

(k) *Self-certification.* Affirmation by the marketer of a product that the product complies with, or performs in a specified manner in relation to, a standard or other requirement.

(l) *Standard.* A prescribed set of conditions or requirements, or portion thereof, applicable to any product in any market, established by agreement among buyers, sellers, professional groups, standards developers, certifiers, or others. A standard may include definitions; methods of test; specifications for performance, design, construction, or composition; classifications; disclosures; guides; codes; and recommended practices. Standard does not include standards which are prepared by one manufacturer or marketer solely for its own procurement, production, or marketing purposes. See § 457.11 Exemptions.

(m) *Standards developer.* A person that develops standards, sponsors the activity of developing standards, or promulgates standards. Standards developer does not include a governmental entity acting in its official capacity.

(n) *Standards development.* The process of development and promulgation of standards. The term includes notice, committee selection, development, review, balloting, resolution of negative votes, adoption, veto, subsequent revision, withdrawal, and all related activities. Standards development does not include official governmental acts.

(o) *Testing.* Evaluation, inspection, controlled experiments, and other methods for determining whether or not a product complies with, or performs in a specified manner in relation to, a standard or other requirement.

Subpart B—Standards

§ 457.3 Written procedures.

(a) The standards developer shall establish operating procedures to implement and administer the requirements of this subpart.

(b) The procedures shall be written and made available without charge to any person upon request.

(c) The standards developer shall follow its procedures.

§ 457.4 Notice.

(a) *Notice of proceeding.* The standards developer shall provide notice of intent to develop, revise or withdraw a standard to those persons specified in paragraph (d) of this section, except in instances in which only employees of the standards developer who have no commercial interest in the matter under consideration will participate. The notice shall be provided at least 30 days prior to commencement of the proceeding. The notice shall contain, at a minimum, a statement of the subject matter and type of action proposed to be taken, reasons for the proceeding, and a summary of the rules and time limits for participation.

(b) *Notice of proposed decision.* The standards developer shall provide notice of intent to make a final decision on adoption, revision or withdrawal of a standard to those persons specified in paragraph (d) of this section. The notice shall be provided at least 60 days prior to the final decision. The notice shall contain, at a minimum, a copy or summary of the proposal, a statement of the major substantive disputes that occurred and the reasons these disputes were decided as they were, likely effects on the classes listed in paragraph (d)(2) of this section, and a summary of the rules and time limits for comment or other participation.

(c) *Notice of final decision.* The standards developer shall provide notice of final decision on adoption, revision or withdrawal of a standard to those persons specified in paragraph (d) of this section. The notice shall be provided 30 days prior to the effective date of the action. The notice shall contain, at a minimum, a copy or summary of the standard, a statement of the major substantive disputes that occurred and the reasons these disputes were decided as they were, likely effects on the classes listed in paragraph (d)(2) of this section, a statement that all persons have the right of access to the records of the proceeding, and a statement explaining how requests for action in accordance with § 457.6 may be made.

(d) Notices required by paragraphs (a), (b), and (c) of this section shall be provided to the following:

(1) All persons requesting notice;

(2) A representative of each of the classes listed below that is likely to be affected by the action and of any other class that is likely to be affected by the action. Representatives shall be selected on the basis of such factors as their interest in the matter, the likelihood that they will participate, and their competence to adequately represent the interest of the class:

(i) Producers (and importers, if foreign producers are not represented) of products covered by the standard, and

producers of competing products. The representatives shall be selected to reflect the range of products and competing products, production processes, size of producers, and other variations within the industry;

(ii) Individual consumers, and consumer groups;

(iii) Institutional and industrial consumers;

(iv) Federal, state, and local procurement officials;

(v) Other persons in the chain of distribution, such as retailers;

(vi) Federal, state, and local building code and other officials who have regulatory jurisdiction over products covered by the standards;

(vii) Environmental groups;

(viii) Energy conservation groups;

(ix) Certifiers.

(3) Representatives of classes may be chosen from those requesting notice under paragraph (d)(1) of this section. All representatives shall be informed that the notice to them is intended to serve as notice to a class that shall be defined as specifically as practicable.

§ 457.5 Participation.

(a) Except as provided in paragraphs (b) and (c), the standards developer shall provide to all persons equal opportunity to participate in all phases of all standards proceedings.

(b)(1) The requirements of paragraph (a) of this section shall not apply to:

(i) A phase of a standards proceeding in which the only participants are employees of the standards developer who have no commercial interest in the matter under consideration;

(ii) A final decision on adoption, revision or withdrawal of a standard (following issuance of a notice under § 457.4(b)) which is made by a board or committee composed of at least one representative of each interest (e.g., producer, small business, consumer, government regulatory, government procurement, environmental, other) affected by the action.

(2) Notwithstanding paragraph (b)(1) of this section, no person shall be denied the right to present written materials at any point in the proceeding.

(c) When the number of persons requesting participation is so large as to be unmanageable, the standards developer may identify classes of persons with the same or similar interests in the proceeding and select a representative or representatives to exercise attendance and oral participation rights on behalf of each such class.

§ 457.6 Duty to act.

(a) The standards developer shall determine under paragraph (b) of this section whether it has a duty to act whenever it receives a request for

action accompanied by substantial evidence (Note 1) that one of its standards, proposed standards, interpretations, acts or practices, or lack of a standard within its recognized area of competence (hereinafter its "position"):

(1) Raises prices or excludes products (Note 2) and lacks factual basis (Note 3); or

(2) Excludes a product that is at least equivalent under actual use conditions to one or more products not excluded (Note 4); or

(3) Excludes a product that is inferior under actual use conditions to one or more products not excluded; and that there is a less restrictive alternative (Note 5); or

(4) Discriminates against a product that is superior under actual use conditions to other products that meet the requirements of the position, by leading reasonable buyers to assume that the product is not superior (Note 6); or

(5) Misrepresents product attributes to reasonable buyers, where such misrepresentations would affect their purchasing decisions (Note 7).

(b) Whenever the standards developer receives a request for action that satisfies the requirements of paragraph (a) of this section, it shall take appropriate action under § 457.7 unless it has substantial evidence on the record as a whole (Note 8):

(1) Where the request has met the requirements of paragraph (a)(1) of this section, that the position is not raising prices or excluding products, or that there is factual basis for the position (Note 9); or

(2) Where the request has met the requirements of paragraph (a)(2) of this section, that the position is not excluding the product, or that the excluded product is not at least equivalent under actual use conditions to products that are not excluded by the position; or

(3) Where the request has met the requirements of paragraph (a)(3) of this section, that the position is not excluding the product; or that the suggested alternative is not less restrictive or cannot be implemented; or that the excluded product is one which a reasonable person would not purchase or which presents an unreasonable risk of injury (Note 10); or

(4) Where the request has met the requirements of paragraph (a)(4) of this section, that the product is not superior under actual use conditions to other products that meet the requirements of the position, or that the position does not lead reasonable buyers to assume that the product is not superior; or

(5) Where the request has met the requirements of paragraph (a)(5) of this section, that the position does not

misrepresent product attributes to reasonable buyers; or that the misrepresentation(s) would not affect the purchasing decisions of reasonable buyers; or

(6) That the higher prices, product exclusions or misrepresentations complained of are *de minimis*; except that this rebuttal shall not be available where the cost of corrective action is less than the magnitude of the injury (Note 11).

(c)(1) When the standards developer determines under paragraph (a) or (b) of this section, that it does not have a duty to act, it shall notify the requester of its decision and the specific reasons therefor and of the existence of the appeal board established pursuant to § 457.10.

(2) The standards developer's determination under paragraph (a) of this section and, where applicable, paragraph (b) of this section, and either the paragraph (c)(1) of this section notification or commencement of appropriate action, shall occur within 60 days of the receipt of the request. Where complainant offers additional evidence on the same request within the 60 day period, the standards developer shall have such additional time as necessary to complete the review of the evidence, but in no case shall the additional time exceed 60 days from the receipt of the additional evidence.

§ 457.7 Appropriate action.

When the standards developer has a duty to take appropriate action under § 457.6(b), it shall take such actions which appear from the record to be necessary to correct or prevent higher prices or product exclusions, or to cure misrepresentations, to the extent that such actions are supported by showings under § 457.6(a) and are not rebutted by showings under § 457.6(b). Appropriate action shall be completed within a reasonable period (Note 12).

(b) When withdrawal of a standard is the appropriate action, the standards developer shall withdraw by issuing a notice complying with § 457.4(c) within 60 days of receipt of the request.

(c) When development or revision of a standard is the appropriate action, the standards developer shall, within 60 days of receipt of the request:

(1) Commence development or revision in compliance with §§ 457.4 and 457.5, prepare a timetable for completion of the action, and include the timetable in all notices provided under § 457.4; or

(2) Issue a notice complying with paragraph (e) of this section.

(d) Whenever the standards developer, under paragraph (c)(1) of this section, undertakes development or revision of a standard and then determines that it cannot complete such effort in accordance with its para-

graph (c)(1) of this section timetable, it shall issue a notice complying with paragraph (e) of this section.

(e) A notice required under paragraph (c)(2) or (d) of this section shall be provided to the persons described in § 457.4(d) and shall contain the following:

(1) The designation of the standard (if a standard exists), and a description of the product area in which the harm is occurring and the attributes that are or would be addressed by the standard [Note 13].

(2) A statement of the problem and harm alleged;

(3) A statement of the course of action determined to be appropriate, and a description of any action taken to date;

(4) As applicable, a statement that the standards developer has elected not to undertake a development or revision effort, or that it is unable to complete the effort in accordance with its paragraph (c)(1) of this section timetable;

(5) A list of standards in the product area, and a statement that the listed standards are withdrawn and should no longer be considered as falling within the standards developer's recognized area of competence and that persons who do or would rely on them should determine the acceptability of products on some other basis.

(f) The standards developer shall withdraw by issuing the paragraph (e) notice, and shall cease distributing any of its standards required to be listed under paragraph (e)(5) of this section, and shall cease representing in any way that such standards and the product area in which the harm is occurring are within its area of competence.

(g) Notwithstanding paragraphs (e)(5) and (f) of this section, a standards developer that has determined that it cannot complete a development or revision of a standard in accordance with its paragraph (c)(1) timetable may continue the action after the expiration of the timetable without withdrawing from the product area involved if:

(i) There has been a reasonable attempt to complete the action within the paragraph (c)(1) timetable;

(ii) There has been substantial progress towards completing the action; and

(iii) There is a high degree of certainty that the action will be completed within 60 days; and

(2) The notice required by paragraph (d) of this section provides, in addition to the information required by paragraphs (e)(1)(4) of this section, a revised timetable not exceeding 60 additional days for the completion of the action.

§ 457.8 Required disclosures.

A standard shall contain the following:

(a) A statement of its intended scope and use, including products and product attributes intended to be covered by the standard;

(b) A disclosure of any products or product attributes not covered by the standard that users of the standard would reasonably presume were covered;

(c) A disclosure of any serious risks or limitations associated with use of products that conform to the standard, when such risks or limitations would not be apparent to reasonable buyers; and

(d) A statement as to how persons voted on the standard if a list of persons who participated in the development proceeding is printed with the standard.

§ 457.9 Recordkeeping and access.

(a) The standards developer shall compile the following records in each standard proceeding:

(1) A copy of each notice given pursuant to § 457.4 and a list of persons and publications to whom notices were sent;

(2) A list of participants under § 457.5;

(3) All written comments under § 457.5; and

(4) All other written materials compiled in the proceeding.

(b) The standards developer shall compile the following records relating to each request for action under § 457.6:

(1) A copy of the request;

(2) Evidence submitted, or generated, relating to the request;

(3) A copy of any notice issued pursuant to § 457.6(c)(1) or § 457.7 (b), (c), or (d); and

(4) A statement describing any action taken in response to the request.

(c) The records specified in paragraphs (a) and (b) of this section shall be retained for at least 5 years from final decision in a matter.

(d) The standards developer shall:

(1) Make available all records specified in paragraphs (a) and (b) of this section to any person for inspection during regular business hours; and

(2) Promptly provide to any person upon request copies of the records at no more than actual cost.

§ 457.10 Appeals.

(a) The standards developer shall establish and maintain an appeal board that meets the requirement of § 457.16, to hear and decide complaints relating to requirements under §§ 457.3-457.9.

(b) The standards developer shall act reasonably in determining whether

and to what extent it will abide by a decision of the appeal board.

(c) The standards developer shall conspicuously include in every standard, and shall provide to each person with a complaint relating to requirements under §§ 457.3-457.9, a statement that the appeal board exists, and the name and address of the person to whom an appeal should be sent or information on any other method of initiating an appeal.

§ 457.11 Exemptions.

Subpart B shall not apply to:

(a) the drafting of a standard by a person solely for the purpose of transmitting the draft standard to a standards developer for a proceeding that is in accord with §§ 457.4 and 457.5 and that does not utilize the "employee" exception of §§ 457.4(a) and 457.5(b)(1); except that if any such standard is used in marketing prior to such a proceeding for purposes not otherwise exempt under this section, then the drafter of the standard shall, for purposes of this one standard, be considered a standards developer subject to §§ 457.6, 457.7, 457.9, and 457.10;

(b) the establishment of test methods or other requirements by a certifier for use in its certification program, when the only participants are employees of the certifier who have no commercial interest in the matter under consideration; except that the certifier shall be considered a standards developer subject to §§ 457.6, 457.7, 457.9, and 457.10 to the extent that such test methods or requirements, or certifications based on them, are used in the marketing of products;

(c) Standards, or development of standards, relating to drugs as defined in 21 U.S.C. 321(g) (but not devices as defined in 21 U.S.C. 321(h)); cosmetics as defined in 21 U.S.C. 321(i); and food as defined in 21 U.S.C. 321(f), including poultry and poultry products as defined in 21 U.S.C. 457 (c) and (f), meat and meat food products as defined in 21 U.S.C. 601(j), and eggs and egg products as defined in 21 U.S.C. 1033.

Subpart C—Certification**§ 457.12 General certifier duties.**

(a)(1) Except as provided in paragraph (a)(2) of this section, whenever the certifier represents that products comply with a standard, the certifier shall not use the standard in a manner contrary to requirements contained in the provision stating its scope, the body of the standard, or an "appropriate action" notice that it has received from the standards developer acting pursuant to § 457.7.

(2) If the certifier deviates from a standard covered in paragraph (a)(1) of this section it shall require disclo-

sure of the deviation under paragraph (b)(2) of this section. The certifier that deviates from a standard shall be considered a standards developer to the extent of the deviation as provided by § 457.11(b).

(b) The certifier shall disclose on or in close proximity to the form of approval, and shall require the marketer using its form of approval to disclose on or in close proximity to the form of approval, the following information:

(1) Name of certifier;

(2) Designation of the standards and other criteria on which the certification is based;

(3) A statement of the product attributes that are covered by the certification;

(4) A statement warning of any serious risks or limitations associated with use of the product which are disclosed in the standard as required by § 457.8(c);

(5) A statement describing the nature of the testing, including whether and to what extent prototype testing, factory inspection, and follow-up testing and inspection were done.

(c) Whenever the certifier has actual knowledge or knowledge fairly implied on the basis of objective circumstances that a producer of a certified product:

(1) Is producing or marketing units that do not comply with relevant standards or other requirements [Note 14]; or

(2) Is using its name or form of approval in an unauthorized manner;

the certifier shall take such actions as are appropriate to end the abuse, which may include withdrawal of certification, probation, retesting, or other actions.

(d) Whenever the certifier has actual knowledge or knowledge fairly implied on the basis of objective circumstances that a producer of a non-certified product is using its name or form of approval, it shall inform the producer that it is in violation of § 457.17 and must cease the unauthorized use.

(e) Whenever the certifier has actual knowledge or knowledge fairly implied on the basis of objective circumstances that a standard it is using in certification violates the § 457.6 complaint criteria, it shall submit an appropriate request for action to the standards developer.

§ 457.13 Additional certifier duties.

(a) This section shall apply only to a certifier whose certification in a particular product area is relied on either in law or in fact by any government entity and who is effectively the sole source of certification services in that product area and market. The section shall apply only to certification actions in the affected product area and market [Note 15].

(b)(1) The certifier shall establish operating procedures which shall include, at a minimum, the steps which must be taken by one seeking certification, the steps the certifier will follow in determining whether to grant, deny or withdraw certification, and other procedures to implement and administer the requirements of this section.

(2) The procedures shall be written and made available without charge to any person upon request.

(3) The certifier shall follow its procedures.

(c) The certifier shall not grant or deny certification, or discriminate with regard to the quality of its services, solely on the basis of factors such as:

(1) Membership of the producer in a trade association or other group;

(2) Size of the producer;

(3) Country of origin of the product;

(4) Whether a product submitted for certification is intended for retrofit rather than installation as original equipment.

(d) The certifier shall not deny certification based on:

(1) Requirements not relating to product attributes that reasonable buyers would presume are addressed by the certification, or requirements not necessary to insure that the product meets reasonable buyer expectations relating to those attributes [Note 16];

(2) Requirements that product attributes already addressed in the test report of another laboratory be retested, unless there is substantial evidence on the record as a whole that the reported results are unreliable [Note 17]; or

(3) Requirements that a product be retested because of a design, component, or other change in the product, or a change in the underlying standards or other requirements, when such retesting would not result in a more accurate representation of the product's actual safety or performance to persons who rely on the certification [Note 18].

(e)(1) The certifier shall establish and maintain an appeal board that meets the requirements of § 457.16, to hear and decide complaints relating to requirements under this section.

(2) The certifier shall act reasonably in determining whether and to what extent it will abide by a decision of the appeal board.

(3) The certifier shall conspicuously include in every certification contract to which this section applies, and shall provide to each person with a complaint relating to requirements under this section, a statement that the appeal board exists, and the name and address of the person to whom an appeal should be sent or information

on any other method of initiating an appeal.

§ 457.14 Recordkeeping and access.

(a) The certifier shall compile the following records:

(1) For each certification action:

(i) Name and model number of the product;

(ii) Designation of standards used to test the product;

(iii) Description of any other criteria on which grant or denial of certification is based; and

(iv) Reports of results on any testing pursuant to standards or other criteria used;

(2) Notices referred to in § 457.12(a);

(3) Information that a product that it has certified does not comply with relevant standards or other criteria, that its name or form of approval is being used in an unauthorized manner, or that a standard it is using violates the § 457.6 complaint criteria; together with such records as will show any action taken by the certifier in response; and

(4) Any complaints received by the certifier relating to requirements under § 457.13; together with such records as will show any action taken by the certifier in response.

(b) The records specified in paragraph (a) of this section shall be retained for at least 5 years.

(c) The certifier shall:

(1) Make available all records specified in paragraph (a) of this section to the client in the particular certification action for inspection during regular business hours; and

(2) Promptly provide to the client upon request copies of the records at no more than actual cost.

§ 457.15 Exemptions.

Subpart C shall not apply to:

(a) A representation which reasonable buyers are likely to believe is subjective, based on personal experience, or not based on controlled testing of the product pursuant to standards or other requirements;

(b) A certification procured by the purchaser of a product which is not for any purpose connected with resale of the product;

(c) Certifications relating to drugs as defined in 21 U.S.C. 321(g) (but not devices as defined in 21 U.S.C. 321(h)); cosmetics as defined in 21 U.S.C. 321(i); and food as defined in 21 U.S.C. 321(f), including poultry and poultry products as defined in 21 U.S.C. 457 (c) and (f), meat and meat food products as defined in 21 U.S.C. 601(j), and eggs and egg products as defined in 21 U.S.C. 1033.

Subpart D—Appeal Board

§ 457.16 Appeal board.

(a) The standards developer or certifier shall establish and operate an appeal board which complies with this section as required by §§ 457.10 and 457.13(e). A standards developer or certifier may establish and operate its own appeal board, or may jointly establish and operate an appeal board with other organizations.

(b) The appeal board shall be sufficiently independent of sponsoring standards developers and certifiers, and of other interest groups, so that it can render fair and impartial decisions.

(c) One or more members of the appeal board, each of whom is competent to decide the appeal and has no affiliation that would create a conflict of interest relating to the appeal, shall hear and decide each appeal.

(d) In establishing the appeal board the standards developer or certifier may reserve the right to have a reasonable opportunity to act on a complaint before it is heard by the appeal board. A reasonable opportunity shall not exceed 60 days from the date the standards developer or certifier receives or is informed of the complaint.

(e) The appeal board shall establish and follow written procedures, copies of which must be made available without charge to any person upon request. These procedures shall contain, at a minimum, the following:

(1) Upon receipt of a complaint, the appeal board shall notify the complainant and all persons whose conduct is the subject of the complaint that the complaint has been received.

(2) Meetings at which oral testimony is received shall be open to observers; except that this requirement shall not apply to an appeal brought against a certifier unless the person making the appeal requests that it apply.

(3) Within a reasonable period of time not to exceed 60 days from receipt of the complaint, the appeal board shall render a written decision based on the record and supported by reasons. A copy of the decision shall be sent to the complainant and to all persons whose conduct was the subject of the complaint.

(4)(i) The appeal board shall compile in each appeal, and retain for at least 5 years, the complaint, evidence gathered by the appeal board, including copies of written material and summaries of oral testimony, and the decision.

(ii) The appeal board shall make available all records specified in paragraph (e)(4)(i) of this section to any person for inspection during regular business hours, and shall promptly provide to any person, upon request, copies of records at no more than

actual cost; except that access to records in an appeal brought against a certifier shall be granted only to the complainant and the certifier.

(f) If the appeal board finds that the standard, act, practice, or failure to act constitutes a violation of the applicable rule provision, then it shall notify the standards developer or certifier of the actions that must be taken to comply with this rule.

Subpart E—Marketing

§ 457.17 Use of standards and certifications.

(a)(1) Except as provided in paragraph (a)(2) of this section, the marketer shall not use a standard in a manner contrary to requirements contained in the provision stating its scope, the body of the standard, or an "appropriate action" notice issued by the standards developer acting pursuant to § 457.7, when it has actual knowledge or knowledge fairly implied on the basis of objective circumstances of the requirements.

(2) If the marketer deviates from a standard covered in paragraph (a)(1) of this section, it shall disclose the deviation as part of the information required under paragraph (c) of this section.

(b) The marketer shall not use a certification in a manner contrary to requirements issued by the certifier relating to the certification, when it has actual knowledge or knowledge fairly implied on the basis of objective circumstances of the requirements.

(c) The marketer shall not use in marketing a certification or self-certification without disclosing on or in close proximity thereto the information specified in § 457.12(b).

(d) Whenever the marketer has actual knowledge or knowledge fairly implied on the basis of objective circumstances that it is producing or marketing units of a self-certified product that do not comply with the underlying certification requirements, it shall cease using the self-certification (see Note 14).

Subpart F—Notes

NOTE 1.—As used in § 457.6(a), "substantial evidence" is such technical, scientific, statistical, economic, theoretical, or other evidence as could lead a person knowledgeable in the area of technology to reasonably conclude that a proposition is true. Evidence may be "substantial" even though other similarly knowledgeable persons could reasonably conclude that the proposition is not true. "Substantial evidence" consists only of such materials that complainant chooses to offer. By contrast, substantial "evidence on the record as a whole" (Note 8) includes this evidence plus any evidence offered by the standards developer.

The purpose of this test is to establish an evidentiary threshold that the person requesting action must meet in order to

compel the standards developer to take cognizance of a claim. It can be expected that on many questions probative evidence will consist of (i) scientific tests, (ii) engineering evaluations and analyses, (iii) field experience, (iv) accident reports, (v) insurance loss experience, (vi) expert opinion, (vii) statistical analyses, (viii) economic, scientific, or other theory, (ix) laws, codes, procurement specifications, and regulations, (x) reasoned approval or disapproval by government code or procurement officials, (xi) consumer surveys, or (xii) price lists. This list is not exhaustive. In other instances a commonsense judgment reduced to writing will suffice.

NOTE 2.—As used in § 457.6(a)(1), a position of the standards developer raises prices or excludes products when, but for reliance on such position by consumers, code officials, architects, insurers, certifiers or others, such effects would not have occurred. The term may include a showing that a position will raise prices or exclude products. A necessary part of such a showing would be that, at the time of the complaint, the position was in a form or status that would not be subject to change by the time injury was expected to occur. Where such a complaint involves potential exclusion of an item not yet in production, complainant would only have to show that production of the item is feasible.

Higher prices includes higher costs to consumers related to selection, purchase, installation, maintenance, energy use, insurance or replacement of products than would otherwise prevail. Showings of higher production, testing, sale or other related costs for sellers constitute showings of higher prices for purposes of § 457.6(a)(1).

Product exclusions include situations in which the sale of a product in any market is barred or to any extent restricted or impeded as a result of the reliance of buyers, code officials, architects, insurers or others on a position of a standards developer.

Products may be totally excluded from some markets, as where under local law only products meeting a standard's requirements are permitted to be marketed. Where local laws do not mandate conformity with standards, voluntary reliance on standards by buyers may result in at least partial exclusion from the market of nonconforming products, especially when buyers cannot easily determine safety or performance attributes of complex products. Marketers of such products may thereby lose sales to substitute products encompassed by such standards.

A standard may cause product exclusions even for conforming products which exceed the standard's minimum requirements. For instance, buyers might assume in certain cases that the standard's failure to differentiate among the conforming products is evidence of their functional equivalence (for examples, see Note 6). Another example might be where a standard incorrectly ranks or grades product types, and complainant is able to show that this impedes the sale of particular products. In sum, a complainant may show any type of restriction of product sales that is caused or will be caused by a standards developer's position.

NOTE 3.—As used in § 457.6(a)(1), "factual basis" is the foundation in logic and fact for that portion of standards developer's position (i.e., standard, proposed standard, interpretation, act or practice, or lack of a standard within its recognized area of com-

petence) that is the subject of a request for action. The distinctions drawn in a standard are necessarily based on certain logical and factual conclusions. A position lacks factual basis whenever any of these necessary conclusions is incorrect, illogical, or not supported by the existing technical, scientific, statistical, economic, theoretical, or other factual evidence. This inquiry may concern facts explicitly asserted in the standard—e.g., a table in the document that ranks certain products—or implicit assumptions—e.g., that cost-adding or exclusionary features are necessary to promote the safety or performance of the product.

Lack of factual basis may be shown by simply showing lack of documented or credible support.

Example 1: A standards developer has promulgated room environment standards calling for specific levels of cooling, light, and ventilation for public school buildings. The stated or implied purpose of these levels is to ensure that X level of health and reading proficiency is achieved. In addition to showings of excessive energy costs, (i.e., higher prices), consumer complainant claims that there is no documentation proving a relationship of the health/proficiency levels to the standards set. Although complainant has not proven there is no relationship, it can nevertheless show lack of factual basis under § 457.6(a)(1).

Where the requirement is not arbitrary on its face, the complainant may have to identify its purpose in specific terms. If the purpose is unknown or ill-defined, complainant can nevertheless proceed by positing a rationale which relying parties reasonably presume supports the requirement. In any paragraph (a)(1) complaint, the only relevant subject is the position's factual or logical relation to the purpose. The underlying policy or value elements are not within the factual basis inquiry.

Example 2: A prominent canoeing association writes a standard for canoes. One of the standard's provisions requires use of a puncture-proof new material. Canoes using this material cost, on the average, \$300 more than other canoes. Complainant seller of aluminum canoes shows that its product is excluded inasmuch as many recreation areas require use of equipment that meets association standards. In the absence of a documented purpose, complainant posits that recreation owners reasonably assume that use of the standard will "save lives" and that there is no factual basis for this assumption. All reported drownings were from overturned canoes in fast water, as to which the new canoes are equally susceptible. Complainant has met its burden. The association rebuts, however, that its purpose was not to "save lives," but to "avoid wet equipment and inconvenience" where canoes take on water due to ruptures. It proves that the new material does in fact rupture less easily. Though a \$300 per canoe price increase might appear unreasonable from a performance/cost standpoint, this is a value judgment that is not part of the factual basis inquiry. (It can be challenged under paragraph (a)(3), however.)

Another variety of action that can be challenged in paragraph (a)(1) is the arbitrary elimination of product types, for reasons unrelated to the performance or safety of those particular types.

Example 3: Heavy cable used in construction is customarily sold in three grades based on strength. A number of sellers have

begun marketing cable in grades that fall between the existing three. An industry standard, incorporated in local building codes, only specifies the traditional three grades. Buyer complains that (i) prices are raised since buyers who need only in-between grades must "step up" to sizes of excessive strength and price, and (ii) that there is no factual basis for the proposition that restriction of grades promotes the safety, performance, interchangeability, or interconnectability of cable. Complainant has carried its burden under paragraph (a)(1).

Note 4: Under § 457.6(a)(2) complainant must show that an excluded product is at least equivalent, as to the performance or safety characteristics subject to dispute, to other products which standards developer treats more favorably. Complainant need only show functional equivalence. The product's price or other characteristics are irrelevant. (Nor is it necessary to prove equivalence with conforming brands actually being sold. For instance, where the complaint regards a product treated as nonconforming under a standard, it is enough that the product is equivalent to hypothetical products that would meet the minimum requirements.)

In certain instances conforming products may be "over-engineered" for the uses to which they are normally put. Complainant need only show that its product is equivalent to conforming products "under actual use conditions."

Example 1: A trade association standard for public address systems in schools requires that speakers be able to transmit sound of a specified decibel level without distortion. Complainant proves that (i) its own product transmits, without distortion, sounds having two-thirds the specified decibel level, and (ii) that state health laws uniformly forbid the generation of more than one-half the specified decibel level within school buildings. Complainant has proven that "under actual use conditions," its product is equivalent to those meeting the minimum requirements.

Note 5: The general effect of § 457.6(a)(3) is to enable complainants to test whether the standards developer could adopt a "less restrictive alternative," i.e., a position that would increase buyer options or the opportunity of sellers to compete.

In addition to showing product exclusions, complainant must (i) identify the proposed alternative in general terms, and (ii) show that the alternative would equally promote the purpose or would adequately inform parties of the safety, performance, or other relevant attributes of the product in question. Section 457.6(b)(3) indicates how these showings may be rebutted.

Example 1: Standards developer requires that each length of metal used for supporting beams in construction be tested under a new stress test. This change was instituted in response to reports of a 2 percent failure rate in the field. The new test requires expensive equipment only possessed by the very largest sellers. Complainant shows that smaller sellers will be put at a disadvantage in having to spread costs of the equipment over fewer units and that the standard will thereby cause product exclusions. Complainant also demonstrates that (i) the alternative of requiring present test methods to be conducted at closer intervals can as effectively reduce the failure rate, and (ii) that in any event, the failure rate of the old

method is well enough known that sellers using that method could be required to disclose its disadvantage. Under either showing complainant has carried its burden under paragraph (a)(3).

In some cases a nonconforming product may not be equivalent to conforming products under actual use conditions, but may nevertheless meet the needs of some buyers. Where complainant requests that the excluded product be treated as conforming, the following specific application of the two-part showing will suffice. Complainant must (i) identify the proposed alternative in general terms, and (ii) submit evidence which accurately describes the safety, performance, or other problems which differentiate the excluded product from conforming products under actual use conditions. As in all paragraphs (a)(3) requests, complainant is not required to initially prove the practicality of implementing the alternative.

Example 2: Seller makes a water pipe that uses a new plastic compound not permitted under the relevant water pipe standard. The only documented problem with the new material is that it cannot be molded to form the simple joint used in competing pipe. Seller (i) states in general terms that it would be less restrictive to treat its product as conforming together with a requirement that the problems with its joint be disclosed on the pipe itself, and (ii) provides evidence that the pipe can be joined according to a method which produces a joint that is as reliable as a simple joint, but lasts only 30 years as opposed to the 50-year life of other joints. Seller has carried its burden under paragraph (a)(3).

Another variant of the above is where products are excluded for interchangeability or interconnectability purposes, or as part of a simplification program to reduce sizes and designs. Complainant must prove that a less restrictive alternative, such as requiring disclosures, could also enable buyers to avoid confusion, unnecessary stocking of parts, or the other problems the standard was intended to correct.

Example 3: The majority of water heater tanks for industrial use can be directly fitted with only one of two basic sizes of pressure relief valves. A standard covering relief valves only encompasses the two sizes permitting a direct fit. The rationale is that the stocking of adaptors can thereby be avoided. Seller of odd-size valves states in general terms that it would be less restrictive to encompass all sizes in the valve standard but require the size of any conforming valve to be stamped on the product so that purchasers could decide for themselves whether they would have to stock adaptors. Seller has carried its burden under paragraph (a)(3).

Another type of less restrictive alternative may be the imposition of a marketing segregation scheme as an alternative to treating a product as conforming. For instance, where a product poses a safety risk only if installed by nonexperts, the standard could require conforming products to be sold only to outlets which use qualified installers.

Note 6: Section 457.6(a)(4) applies where the standards developer's position misleads buyers into assuming that all conforming products are, for all practical purposes, equivalent. Aside from the product exclusion showing (see Note 2), complainant must show that its product is in fact functionally superior under actual use conditions to

other conforming products which buyers believe are its equivalent.

The mere fact that the standard does not classify or "grade" products does not raise a presumption that buyers will assume conforming products are homogeneous. It is necessary to show that the position raises false assumptions. Section 457.6(b)(4) indicates how these showings may be rebutted.

Example 1: A furnace standard establishes pass-fail requirements for all furnaces using a particular type of fuel. A seller claims that its furnace is superior to other furnaces that also conform to the standard, but that the standard mistakenly leads housing contractors to assume that all conforming furnaces have the same essential quality or safety attributes. Seller claims that it loses business to cheaper competitors as a result. Seller proves the superiority of its product with test results. However, because of buyers' exposure to advertising, wide price ranges, and product variations, it cannot show that the standard leads these buyers to assume that all conforming furnaces are homogeneous. Seller has failed to carry its burden under paragraph (a)(4).

Example 2: Standards developer customarily classifies or ranks water safety equipment on a scale of I-V. The higher the number, the safer the product. Its life preserver standard does not adopt this system, but rather adopts a two-tier system. Seller of the most expensive life preserver proves (i) that its preserver will retain the required buoyancy for two seasons longer than the low-priced Class II products; (ii) that there is evidence that retailers believe that the standards developer would have assigned the product a special ranking if that were true, given its past practice, and (iii) that, given its higher price, it cannot sell its product as it could have absent the standard. Complainant has carried its burden under paragraph (a)(4).

Note 7: Section 457.6(a)(5) applies where the standards developer's position in effect "oversells" the performance of a conforming product. Complainant will have to prove that the position raises expectations in the buyers' minds, and that the underlying facts do not support these expectations.

The standard may be a source of misreliance in numerous ways. A partial list includes (i) misleading scope notes which prompt certifiers to apply its requirements to the wrong product; (ii) faulty test methods or requirements which "pass" products not fit for their purpose; (iii) misleading labeling or marking requirements; (iv) ambiguous provisions which result in certification of unfit products; or (v) failure to effectively communicate instructions or warnings necessary to offset false assumptions of safety or performance raised by the standard. The test of effective communication is whether reasonable buyers would receive, read, and understand the information, and be able to use it to their advantage. In certain instances, the certification of unfit products may be due to certifier or marketer failure to carry out understandable requirements in the standards document. These cases are not the subject of paragraph (a)(5) complaints.

Complainant must show that the position deceives reasonable buyers. If complainant can show that deception will occur in other than isolated, atypical cases, it has met this burden. Thus, a complainant may test whether the standards developer took into account the variations in intelligence, moti-

vation, expertise, and knowledge of standards among the parties that rely on the particular standard.

Complainant must also show that the misrepresentation would affect the purchasing decisions of reasonable buyers. It is not necessary to demonstrate actual instances of purchases which would not have occurred absent the standard.

The following illustrate the operation of paragraph (a)(5):

Example 1: A standard for a building material allows products which meet a certain level of performance on tests to be stamped as acceptable for exterior use. Complainant proves that complying products may deteriorate rapidly when exposed to the elements. Complainant has carried its initial burden under paragraph (a)(5).

Example 2: A standard for a product which is marketed as an energy saving device covers only the safety attributes of the product. Complainant proves that reasonable buyers assume that representations by sellers of conformance to the standard validate the seller's safety and energy saving claims. The product is proven not to save energy. Complainant has carried its initial burden under paragraph (a)(5).

Example 3: A type of home insulation presents severe fire hazards if laid on attic floors close to recessed light fixtures. This hazard can be controlled by constructing a special guard around the light fixtures. The standard requires instructions concerning this safeguard to be disclosed on the insulation package. Complainant shows (i) that buyers assume that conformity to the standard means there is no problem with flammability, and (ii) that although contractors read and understand the instructions, even reasonable homeowners who also purchase and install the insulation themselves cannot understand the instructions. Complainant has carried its initial burden under paragraph (a)(5).

Note 8: As used in § 457.6(b), "substantial evidence on the record as a whole" is "substantial evidence" [Note 1], taking together complainant's evidence, evidence in the standards developer's file, plus any other evidence the standards developer may produce.

Note 9: The § 457.6(b)(1) rebuttal to a § 457.6(a)(1) showing simply requires the standards developer to refute complainant's evidence. In certain instances, the standards developer may have to state the purpose of its requirement with sufficient specificity so that its factual basis can be tested, § 457.6(c)(1). (See Note 3, Example 2.) If the purpose of the requirement has been documented in prior proceedings, standards developer is not permitted to rebut that it now serves a different purpose, e.g., a higher level of safety warranting its cost-adding features.

In certain instances the basis for requirements can be explained only as engineering "conservatism." For purposes of paragraph (b)(1), this can be defined as the requirement of certain product features to supply a margin of safety or reliability not strictly required by available evidence. To justify a feature on engineering conservatism grounds, the standards developer must show (i) plausible contingencies whose precise impact cannot be anticipated, or (ii) inability to strictly extrapolate from existing data, given the data's unreliability, limited applicability, or incompleteness.

Example 1: Standard "A" covers all steam pressure vessels and specifies minimum wall thicknesses. Standard "B" covers only steam vessels used in electrical generating plants, and requires 50% thicker walls. A number of states have adopted standard "B", thereby forcing vessel manufacturers to retrofit, which raises costs statewide. Complainant has successfully shown that there is no positive documentation that thicker walls are required for electrical generation uses. Standards developer rebuts (i) that data for standard "A" did not test for the long periods of cyclical stress sometimes occurring in electrical generation; (ii) that unexplained failures of standard "A" vessels have been reported; and (iii) that data does not exist which explains how extended cyclical stress affects wall strength. Standards developer has successfully rebutted under paragraph (b)(1).

Note 10: In § 457.6(b)(3), there are several distinct lines of rebuttal, anyone of which may be sufficient. In addition to disproving the claim of product exclusions, the standards developer may show that "the suggested alternative is not less restrictive or cannot be implemented; or that the excluded product is one which a reasonable person would not purchase or which presents an unreasonable risk of injury."

That the alternative is not less restrictive or cannot be implemented. The alternative is not less restrictive if in general, the alternative does not increase buyer options or the opportunity of sellers to compete, whatever its effect on complainant. The rebuttal as to implementation concerns the practical limits to the standards developer's power to make the alternative work in actual practice. The standards developer can successfully rebut if, as a practical matter, the alternative cannot be implemented to have its intended effect.

A specific subset of this rebuttal is the situation where a complainant claims that a nonconforming product could be treated as conforming if the standard required disclosures to relying parties. (See Note 5, Example 2.) The specific showing on rebuttal is that reasonable buyers would not receive, read, understand, or be able to use the information to their advantage. In general, if the alternative would fail in these respects only in isolated, atypical cases, the standards developer cannot rebut on these grounds. The receive, read, and understand elements are self-explanatory. The "use information to their advantage" criterion is designed to anticipate situations where, even if buyers understand the disclosures, they may not have the expertise, education, or wherewithal to make use of them. This does not imply that the buyer need be able to perform all necessary installation or other steps without assistance.

Example 1: A standard for automobile fuel-saving devices only treats factory-installed devices as conforming. Seller of retrofit devices proves that the steps for safe and effective retrofit installation are known and can be followed by any minimally knowledgeable auto mechanic. The device can save 15 percent of fuel used in older automobiles. Standards developer shows that substantial numbers of automobile owners cannot reliably perform the required installation steps. However, it cannot show that it could not treat the retrofit items as conforming with the condition that sellers disclose at point-of-sale that the devices are only safe or effective if installed by a com-

petent mechanic. Standards developer has failed to rebut.

Reasonable persons would not purchase the product. This rebuttal is met where no reasonable buyer would purchase the product if fully informed of its attributes. "Reasonableness" in this context need not be limited to purely economic concerns. Aesthetics, ethics, experimentation, and other factors may be legitimate considerations for the reasonable person.

The product presents an unreasonable risk of injury. An unreasonable risk of injury is presented where the product's utility is outweighed by the likelihood and severity of injury associated with that product's use. Unreasonable risk may exist even when users are fully informed of the product's safety risks. In certain instances, the utility of the product may not, from a value perspective, outweigh the inordinate number of injuries that would result from its use. Persuasive evidence that a product poses such risks is that under rules promulgated pursuant to the Consumer Product Safety Act, it could be classified as a "banned hazardous consumer product," 15 U.S.C. 2057, or an "imminently hazardous consumer product," 15 U.S.C. 2064(a), or that it presents a "substantial product hazard," 15 U.S.C. 2052(a)(3), or an "unreasonable risk of injury," 15 U.S.C. 2057.

Note 11: The § 457.6(b)(6) rebuttal permits the standards developer to assert that the higher prices or dollar amounts are insignificant. This rebuttal is available only where (i) injury is only short-term and (ii) complainant cannot prove that the competitive position of sellers is appreciably affected or dollar or safety injuries to buyers or users are more than negligible. Even if the injury does not exceed this threshold, this rebuttal is unavailable if the cost of corrective action is lower than the injury, as where an explanatory letter would be sufficient.

Note 12: The basic test of appropriate action as stated in § 457.7(a) is that it "correct or prevent higher prices or product exclusions, or . . . cure misrepresentations . . ." The standards developer is free to choose the course of action that will satisfy this requirement. If withdrawal, revision, or development of a standard is required, the particular duties are set out under provisions in §§ 457.7(b)-(f). Once development or revision of a standard is commenced, the standards developer is not constrained to model its solution only on the evidence submitted in the 60-day complaint/rebuttal period of § 457.6(c). It may consider any evidence that will enable it to successfully rebut subsequent complaints by either the original complainant or other parties.

To discharge its duty under § 457.7(a), the standards developer need only correct or prevent the harm "to the extent which such actions are supported by showings under § 457.6(a) and are not rebutted by showings under § 457.6(b)." This caveat recognizes that there may be times when complainants will request total elimination of their harms, when they have not proven that full relief is justifiable.

Example 1: A standard requires that a transparent shield for welder's masks be made of a certain material and have no more than a specified curvature. A mask using a different material is designed to wrap around the side of the face, thereby providing greater protective coverage. However, the curvature exceeds the maximum

established under the standard. Complainant seller shows that the curvature requirement has no documented support. Standards developer fails to rebut, sets a timetable for reconsidering the evidence, and within the time limits produces evidence which supports a modified curvature requirement. However, even the modified requirement excludes complainant's product. Despite this continuing exclusion, the standards developer has satisfied § 457.7(a). Complainant had not submitted evidence which proved that the standards developer would be justified in treating the product as equivalent to other conforming products (as it might have under the "equivalence" provision, § 457.6(a)(2)).

Paragraph (a) does not establish any one time period as a presumptive "reasonable period." Calculation of this period is, for purposes of this requirement, assumed to be a two-step process. First, a reasonable period is preliminarily determined, based on two assumptions: (i) Commitment of time of individual participants is less than full-time, and (ii) the task involves only drafting, review, or criticism or proposals, plus marshalling evidence and position papers. Any figure that exceeds a time period that is reasonable in light of the above, must be supported on the basis of at least one of four criteria: (i) The necessity for generating new data; (ii) the necessity for advancing the "state of the art", e.g., for devising new test methods; (iii) the number of issues to be resolved and their complexity, and (iv) the necessity of obtaining data or policy approval from governmental bodies. The latter element recognizes that in certain instances collaboration with bodies such as Congress, CPSC, Occupational Safety and Health Administration (OSHA), state agencies, etc. may be desirable. Failure of committee members to provide necessary personnel or resources to the task is a permissible factor only when the failure relates to one of the four criteria. The standards developer cannot lengthen the timetable to accommodate uncooperative members.

Where the appropriate action is development or revision of a standard, § 457.7(c)(1) requires the standards developer to propose a timetable in advance. The reasonableness of the period stated in the timetable is governed by the same criteria as those listed above.

NOTE 13: As used in § 457.7(e)(1), "product area" is that category of products which perform the same specific function and can be substituted for each other. Products may be in the same product area irrespective of such differences as (i) their mode of installation or servicing, e.g., factory installation versus retrofit; (ii) their ease of application, e.g., use of adaptors, special safeguards; (iii) the materials from which they are made; (iv) the engineering theories that are their basis; or (v) their particular level of safety or efficiency.

NOTE 14: Section 457.12(c)(1) requires the certifier to take corrective action when a certified producer is producing and marketing noncomplying product units. This is not intended to mean that there can be no product failures. The intent is to require action when the failure rate reaches such a level as to be unacceptable in terms of general practice in the product area. General practice in the product area can be determined from such sources as the standard or testing procedures, which may specify a failure rate,

generally accepted sampling techniques, or accepted manufacturing practices.

NOTE 15: Section 457.13(a) states that § 457.13 applies only to a certifier whose certifications in a "product area" are relied on by a "government entity." "Product area" is used with the same meaning in § 457.7(d)(1) and is defined in Note 13. The market in which reliance is occurring is limited to "government entities," which includes local, state, and federal jurisdictions, and agencies and officials thereof. For example, the U.S. Air Force would be considered a government entity, so a certifier exclusively relied on in Air Force base purchasing decisions would fall within paragraph (a). Another example would be a city which specifies one certifier in its building code.

The operation of this section is further limited to those situations in which the certifier is "effectively the sole source of certification services" in the affected product area and market. This does not mean that the certifier must be the only one who is relied on in the market, but it must substantially control the area. This may occur because other laboratories which are relied on by the government entity do not do certification in the particular product area, or only have facilities to handle a few clients. It may also occur because, even though the government regulation specifies several acceptable laboratories, the officials enforcing the regulation in practice will accept only the one certifier. For these and other reasons, it may appear that two or more certifiers are providing certification services, when in fact producers are effectively limited to one certifier if they want to sell their products in the market in question. In this situation the certifier would be covered by the requirements of § 457.13.

NOTE 16: Section 457.13(d)(1) addresses the imposition by certifiers of test requirements that are unnecessary in terms of buyer expectations.

The first category of proscribed requirements includes those "not relating to product attributes that reasonable buyers would presume are addressed." "Attribute" may have a broad meaning—e.g., safety versus performance. For instance, where a certifier is testing only for fire hazards, it could not require radios to be tested for range, clarity or other performance attributes, or for easy connectability with both auto batteries and house receptacles. "Attribute" can also have a narrower construction—e.g., various "safety attributes." For instance, unless a certifier disclosed the fact, most buyers would not assume that resistance of an auto tire to deliberate slashing of the tire wall is covered by a certification assuring tire durability. Absent such disclosure, the imposition of tests which simulate such vandalism would be prohibited.

A second category is made up of requirements "not necessary to ensure that the product meets reasonable buyer expectations relating to those attributes." Thus, in the above example buyers would expect tires to be tested for safety under normal or even hard driving conditions. However, a test exposing the tire to open flame for a prolonged period prior to road tests may be excessive, even if an extraordinarily durable tire can be singled out in this manner. Such requirements would mislead buyers and unnecessarily restrict consumer choice since they "are not necessary to ensure that the product meets reasonable buyer expectations."

NOTE 17: The definition of "substantial evidence on the record as a whole" is the same under § 457.13(d)(2) as it is in the standards developer context—"such technical, scientific, statistical, . . . theoretical, or other evidence as could lead a person knowledgeable in the area of technology to reasonably conclude that a proposition is true. Evidence may be substantial even though other similarly knowledgeable and reasonable persons could conclude otherwise" (Note 1). Where a marketer desiring certification carries its burden of providing evidence of the reliability of a test report, the certifier must either (i) omit retesting or (ii) provide such rebuttal evidence that a reasonable person would no longer conclude that the report is reliable. While a time limit for this determination is not stated, the time taken is governed by a general standard of reasonableness.

The issue of reliability will turn on a number of factors, including: (i) Whether the laboratory is independent of manufacturers and vendors of the product tested; (ii) whether the laboratory has adequate staff and test facilities for purposes of such testing; (iii) whether the laboratory employs appropriate standards or other test requirements in such tests; (iv) the laboratory's reputation or record of problems in this area of product testing; and (v) whether the test report itself is based on scientific and well-controlled testing (where scientific and well-controlled testing would be required to establish a product's conformance to relevant standards). The certifier may charge the marketer desiring certification the reasonable costs associated with determining test report reliability.

NOTE 18: Section 457.13(d)(3) prohibits retesting that is unnecessary given the adequacy of prior tests by the same certifier. Where, for instance, the material in the exterior of a television set is changed from one plastic compound to another, retesting of the model for electrical safety would be unnecessary, absent a showing of causal relationship. Similarly, if a portion of the underlying standard for testing television sets which applies only to 100% solid state models was modified and the certified model is not 100% solid state, the validity of the prior test is not undermined. In neither of these cases would retesting "result in a more accurate representation of the product's actual safety or performance to persons who rely on the certification."

SECTION B. STATEMENT OF THE COMMISSION'S REASONS

Pursuant to the direction of the Commission, the staff of the Bureau of Consumer Protection initiated an investigation to determine whether persons and organizations involved in standards development and certification, and in marketing with reference to standards, are engaged in acts or practices in violation of section 5 of the Federal Trade Commission Act. The Commission's determination to commence this rulemaking proceeding is based on consideration of the report of the staff investigation.

The Commission's directive to commence the investigation was given at the time that the Commission provisionally accepted consent orders in a matter involving alleged marketing misrepresentations relating to the flammability of foam plastics used as insulation in buildings. These alleged misrepresentations were based on small scale

¹In re Society of the Plastics Indus., 84 F.T.C. 1253 (1974).

standard test methods of the American Society for Testing and Materials, which did not accurately predict flammability hazards under actual use conditions. In announcing its provisional acceptance of the consent orders, the Commission reported that it had "directed the staff to continue an investigation of ASTM and others engaged in standards-setting and product certification activities that may result in deceptive or unfair standards and certifications."¹

In response to the Commission's directive the staff conducted a broad inquiry into the full range of factual and legal issues presented by private standards and certification activities. The staff has set forth the results of its investigation in a publicly available document entitled *Staff Report on Standards and Certification*.²

In the course of its investigation the staff reviewed numerous specific complaints in which the actions of standards developers and certifiers appeared to raise questions of illegality under section 5 of the Federal Trade Commission Act. Allegations have related to a broad spectrum of products and industries, and to many types of consumer and competitive injury. Staff also made a comprehensive survey of current standards development and certification practices, and attempted to assess their role and importance in commerce. Information and views were solicited from producers, consumers, representatives of federal, state and local government agencies which rely on standards in procurement and regulation, standards development organizations, testing laboratories, trade associations, technical experts, and others. In addition, staff relied on the reports and public record compiled by the FTC Task Force on Industry Self-Regulation,³ which had been established by the Commission in December, 1971.

The Staff Report cites numerous allegations that were reviewed in the investigation, including the following: Lack of adequate notice to consumers, small businesses and others who might wish to participate in a standards proceeding; lack of opportunities for participation; high costs and complex procedures that favor participation and dominance by established firms; failure to update standards in a timely manner; tendency to use narrow design standards rather than performance standards; tendency to use pass-fail standards rather than graded standards; inadequate disclosures in standards of critical product use or hazard information; lack of avenues to challenge deceptive or restrictive standards; the use by

certifiers of deceptive or restrictive standards; arbitrary or discriminatory treatment by certifiers of some sellers; excessive certification fees; inadequate disclosure to consumers of the meaning and limitations of seals of approval; and failure of certifiers to police sellers who falsely represent conformance of their products to standards.

The Report states that these practices have been associated with complaints of various injuries to consumers and competition, which include denying consumers the benefits of superior or lower cost technology, denying businesses the opportunity to enter and compete in profitable industries, inadequate product safety levels, inflated product prices, and deception or nondisclosure of material product information. Staff has concluded that the practices may be unfair and deceptive acts and practices and unfair methods of competition within the meaning of section 5 of the FTC Act, requiring appropriate remedy.

The Commission has carefully and deliberately considered the Report and recommended Trade Regulation Rule. Based upon that Report, the Commission believes that the initiation of a rulemaking proceeding would be in the public interest.

The public is advised that the Commission has not adopted any findings or conclusions of the staff. All findings in this proceeding shall be based solely on the rulemaking record. Accordingly, the Commission invites comment on the advisability and manner of implementation of the proposed rule.

The Commission's Rules of Practice shall govern the conduct of the rulemaking proceeding, except that, to the extent that this notice differs from the rules of practice, the provisions of this notice shall govern. This alternative form of proceeding is adopted in accordance with § 1.20 of the rules of practice (16 CFR § 1.20).

SECTION C. INVITATION TO COMMENT

All interested persons are hereby notified that they may submit data, views, or arguments on any issue of fact, law or policy which may have bearing upon the proposed rule. Such comments may be made either in writing or orally. Written comments should be addressed to Henry B. Cabell, Presiding Officer (PU), Federal Trade Commission, Washington, D.C. 20580, 202-724-1045; they will be accepted until March 16, 1979. To assure prompt consideration, comments should be identified as "Standards and Certification Rule Comment" and furnished when feasible and not burdensome in five copies. Instructions for persons wishing to present their views orally are found in Sections E and F.

While the Commission welcomes comments on any issues which you feel may have bearing upon the proposed rule, listed in Section D are questions on which the Commission particularly desires comment. All comments and testimony should be referenced specifically to either the Commission's Questions or the section of the proposed rule being discussed. Comments should include reasons and data for the position. Comments opposing the proposed rule or specific provisions should, if possible, suggest a specific alternative. Proposals for alternative regulations should include reasons and data that indicate why the alternatives would better serve the purposes of the proposed rule. Comments should be supported by a full discussion of all the relevant facts and/or be based directly on first-

hand knowledge, personal experience or general understanding of the particular issues addressed by the proposed rule.

SECTION D. QUESTIONS AND ISSUES

Interested persons are urged to consider carefully the following questions. Although the proposed rule was drafted in specific language, the Commission retains its authority to promulgate a final rule in ways suggested by these questions and based upon the rulemaking record.

1. In the accompanying statement of reason for the proposed rule (Section B) the Commission has described the consumer protection and competitive problems that may arise from private standards and certification activities. How prevalent are the challenged practices set forth in the statement, and in what manner and context are such acts and practices unfair, deceptive or anticompetitive?

2. Are there benefits that flow from present industry practices that would be lost if the rule is promulgated as presently proposed? Does the proposed rule set out the least restrictive alternatives to achieve the intended goals?

3. What would be the cost of compliance for each of the groups covered by the proposed rule? To what degree would each of the requirements of the proposed rule raise costs, delay the adoption of new standards, or delay the introduction of new products? Might the rule discourage smaller standards developers and certifiers from staying in the market? Would this have any adverse effects in the market? How might the procedures themselves be used by incumbent firms and/or standard setters to deter, delay, or raise the cost of entry for new products?

4. What economic or other effects upon small businesses and consumers, if any, would result from implementation of the proposed rule?

5. Should the definition of "standard" be expanded to include nonproduct standards? Are there additional categories of either product or nonproduct standards that should be excluded or included in the rule? Is the definition of standard overly broad? Might it inadvertently include newspaper stories and other statements about products that do not raise the same problems as industry standards?

6. Do the notice requirements of § 457.4(a)-(c) insure that consumers, small business, and others will receive enough information to decide whether their participation in a proceeding is necessary? For instance, should the § 457.4(a) "notice of proceeding" include a statement of the likely effects of the proposed action on various parties? How specific could such a statement be, given the early stage at which this notice is given?

Do the notice requirements of § 457.4(a)-(c) impose an unnecessary burden on standards developers? Would interested parties, including small business and consumer interests, receive adequate notice if the notice requirements were lessened? For instance, could the § 457.4(a) notice be eliminated without unduly reducing the effectiveness of the rule? Alternatively, could the § 457.4(c) notice be combined with the earlier notice required by § 457.4(b) without unduly reducing the effectiveness of the rule? In what ways could the notice requirements be made less burdensome while still conveying necessary information to persons

¹Federal Trade Commission Order Settles Proceeding Involving Marketing of Plastics Presenting Fire Hazards; Rule Making Proceeding Instituted, FTC Press Release (July 29, 1974).

²Copies of this Report may be obtained either in person or by mail from Room 130, Public Reference Room, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

³Federal Trade Commission Preliminary Staff Study (precis) regarding Industry Self-Regulation—Product Standardization, Certification and Seals of Approval (Nov. 1971); FTC, Final Report of the Task Force on Industry Self-Regulation: Performance Information, Standards and Certification Programs—Achieving Socially Desirable Objectives (July, 1972); Public Record compiled by the Task Force in Industry Self-Regulation (FTC File Nos. 209-1-1, 209-2-1, 209-1-2-2).

or interests who might want to participate in a standards proceeding?

7. Are the time limits for the provision of notice established by § 457.4 (a), (b), and (c), (30, 60, and 30 days respectively), appropriate? Are there instances where these time limits will unduly delay a standards proceeding? If so, how should such instances be handled?

8. To insure that consumers, small businesses, and other interested parties with limited financial resources have an equal and meaningful opportunity to participate in standards proceedings, is it necessary that their costs of participating be borne in whole or in part by other persons or groups? What has been the experience where consumers and small business have had the right to participate but have not been provided funds? Does the Commission have authority under section 5 of the FTC Act to order standards developers, industry members, or others to bear these costs? Should the Commission require the funding? If so, how much funding is necessary and what method should be used to compute the individual obligations of contributors? What criteria should govern allocation of funds, and what types of costs should be funded? What are other possible governmental or private sources of funding for unrepresented interests in standards proceedings?

To what degree would a funding requirement increase participation by small business and consumer interests in standards development process? Should funding be available only to producers or potential producers that would suffer direct economic injury and whose interests would not otherwise be represented? Would limitation of funding to such participants adequately protect consumer and other interests that would not otherwise be represented? If not, what parties should be able to receive funding?

9. Section 457.6 and related provisions set up a mechanism, which includes substantive criteria, for handling standards complaints. Suppose these sections were eliminated, and the proposed rule provided only procedural rights to directly affected parties—i.e., right of notice, opportunity to be heard, access to a meaningful summary of reasons for action, and perhaps a right of appeal to an independent board established by the standards maker or certifier. Would that adequately deal with most or all unfair or anti-competitive practices that may exist in standards making and certification? What evidence is there that unfair or anti-competitive practices would continue to exist if standards development processes contained adequate procedural safeguards? Are private rights of action available to deal with any problems which would remain?

Would such procedures as outlined above, in addition to a requirement that standards developers numerically "balance" some or all standards development committees so that viewpoints of all affected parties are fully represented, prevent most or all unfair, deceptive, or anti-competitive practices that may exist? Even if provisions providing for a challenge mechanism were not eliminated from the proposed rule, are "balancing" and "consensus" procedures necessary to prevent standards developers from drafting standards which injure consumers and/or small businesses? If "balancing" is necessary, what criteria and procedures should be used to determine the interests represented by various members of commit-

tees? Conversely, in light of the possible costs of compliance with §§ 457.3, 457.4, and 457.5, would reliance solely on the § 457.6 challenge procedures be sufficient to ensure adequate remedies for unfair, deceptive, and anti-competitive standards?

10. Should standards developers be required to develop all standards in accordance with the principles of § 457.6, rather than having only to evaluate specific standards with respect to those principles when challenged?

11. If the proposed rule were to go into effect, approximately how many requests for action per year would be submitted to the FTC for violations of the provisions of § 457.6? In the first year? In the fifth year after the proposed rule went into effect? Approximately how many of the complaints would come from parties who currently have no legal way (by antitrust suit or otherwise) to seek redress for alleged injuries?

12. Are there alternative mechanisms which would provide a means for resolving complaints without the necessity of specifying evidentiary burdens and substantive criteria? For example, would a requirement that a standards developer that receives a complaint about a standard set out in detail its evidence and reasoning in the matter result in resolution of most or all complaints?

13. Section 457.6 requires the standards developer to take action on a complaint (assuming that the complainant has met its threshold burden) unless it has "substantial evidence on the record as a whole" that its current standard is correct. Is this the proper evidentiary level that should be required or should a level that shows greater deference (e.g., some evidence) or less deference (e.g., preponderance of the evidence) to the standards developer selected?

14. Are the criteria in § 457.6(a) all of the substantive elements which are relevant to standards decisions, or should additional criteria be specified?

How well do the criteria strike the correct balance between the needs of uninformed buyers and the discouragement of unfair, deceptive, and anti-competitive standards? In particular, do standards by their very nature create possibly false presumptions of equivalence among conforming products? Under what circumstances are disclosures preferred to exclusions or graded standards and vice versa?

Will the criteria be effective in distinguishing legitimate from illegitimate claims? How might the criteria themselves be used by incumbent firms and/or standards setters to deter or delay the acceptance of new products? How might these tactics be stopped?

To what extent could grading criteria in standards misrepresent comparative characteristics of products with multiple attributes, e.g., by manipulation of attribute weighting criteria? In what other ways might unfair, deceptive or anti-competitive standards be adopted even while satisfying the basic principles in § 457.6(a)? How might the rule be altered to minimize this possibility at reasonable cost?

15. Under § 457.6, a standards developer is required to respond to a request for action within 60 days of receipt of the request. Is 60 days an appropriate length of time for a standards developer to determine whether or not a withdrawal, revision, or development of standard is called for?

16. Section 457.7 requires all appropriate actions that are commenced in response to a request under § 457.6 to be completed "within a reasonable period." If the appropriate action is development or revision of a standard, the standards developer is further required to commence action with respect to its own timetable, and to complete action within that timetable or to withdraw from the product area. Should the standards developer be allowed to amend its timetable? If so, for what reasons? If not, does the proposed rule encourage unnecessarily long timetables in order to avoid withdrawing from a product area?

17. Paragraph (g) of § 457.7 allows a 60 day extension of the timetable under certain specified conditions. Are those conditions appropriate? Should other conditions be added? Is the 60 day extension an appropriate length? Would an extension for a "reasonable period" allow completion of actions without encouraging undue delay in ending the harm that is occurring?

18. If there are multiple complainants about a particular position of a standards developer, should a period of time be allowed to consolidate requests before responding to the requests, e.g., should additional evidence on a request for action from any complainant operate to give the standards developer additional time to respond to the initial request (see § 456.6(c)(2))?

19. Should § 457.10 place a time limit on the availability of appeal to an unsuccessful complaint?

20. Should parties who have had notice and an opportunity to participate in a standards proceeding but have failed to participate be allowed to challenge the result of the proceeding, by requesting action under the challenge and appeal sections? Under what circumstances would denial of access to the challenge or appeal process be appropriate? Would this denial to persons who declined to participate in a proceeding provide an incentive for standards developers to provide wider notice and opportunity to participate to interested parties? Would denial of the challenge mechanism to parties that failed to participate in a standards proceeding result in the insulation of standards injurious to the public from challenge?

21. Certain activities are exempted from operation of the rule in §§ 457.11 and 457.15. Section 457.11 exempts some initial drafts of standards, some certifier test method development, and development of food, drug, and cosmetic standards. Should these activities be exempted from the standards development sections? What other activities should be exempted? Are there standards or industries for which this rule is particularly appropriate or inappropriate? Should the certification of used products be treated in the same manner under the rule as that of new products?

Section 456.15 exempts certain endorsements and testimonials, certifications procured by purchasers, and certifications relating to food, drugs, and cosmetics. Should these activities be exempted from the certification sections? What other activities should be exempted?

22. Should there be provisions in the rule for routine certifier duties, such as required factory inspections and use of statistically valid sampling plans, to insure the reliability of reported results? Should the rule permit limited public access to certifier records? If so, how could such access be structured to avoid disclosure of trade secrets?

23. To what extent would the disclosures required on seals of approval and in product listing directories by § 457.12(b) be read and understood by consumers, code officials, and other who rely on seals and listings? Is all of this information necessary? Might these disclosures create confusion for uninformed buyers? On the other hand, are there elements that should be required to be disclosed? Are there alternatives to requiring disclosures on seals, such as having the information available for those persons who request it, which would provide the necessary information without risking consumer confusion?

24. The certifier is required to perform certain duties relating to policing the use of its seal of approval by § 457.12(c) and (d). Is there sufficient uncorrected misuse of seals of approval to justify imposition of these duties on certifiers? Alternatively, are there adequate existing incentives for certifiers to police the use of their seals in marketing?

25. How might the requirements of § 457.13(d) be sidestepped by certifiers in practice? Is the term "reasonable buyer expectations" too vague?

26. Franchising and trademark licensing are technically certifications. However, because of the exemptions of internal company standards from the definition of standard (§ 457.2(1)), franchising and trademark licensing based on internal company standards would not be subject to the requirements of the certification sections of the rule. To what extent are franchising and trademark licensing based on standards which are not internal company standards? Should these activities be excluded from the rule? If so, how can a proper line be drawn between them and other forms of certification?

27. Does the proposed requirement in § 457.16 that an appeal board be "sufficiently independent of sponsoring . . . groups, so that it can render fair and impartial decisions" provide adequate guidance to sponsors of appeal boards and ensure impartiality of appeal boards? What other methods of insuring impartiality are available? What procedures and criteria, if any, should be established to determine whether an appeal board is sufficiently independent and whether individual members have conflicts of interest? Should the rule specify the composition of appeal boards, e.g., at least 51 percent public interest representatives?

28. Does the requirement that standards developers (§ 457.10) and certifiers (§ 457.13(e)) act "reasonably" with respect to the decision of an appeal board accord the proper amount of authority to appeal boards and the proper degree of deference to the standards developer of certifier? Should §§ 457.10 and 457.13(e) be amended to require standards developers and certifiers always to comply with decisions of the appeal board? Would the Commission have the authority to require compliance? Conversely, should the role of the appeal board be totally advisory? If the appeal board decision is not final, should standards developers and certifiers be required to furnish a written explanation of the failure to abide by the decision of the appeal board?

29. Is there reason to believe that practices declared illegal in § 457.17 (Marketing) are numerous (compared to other frauds relating to misuse of endorsements), cause serious consumer or competitive harm, and deserve to be covered separately by a Commission rule?

Additionally, should the rule require manufacturers, retailers or other persons in the chain of product distribution to notify a certifier whenever its seal or listings are being used in connection with the sale of products that do not perform as certified? What means, if any, would be appropriate to assure that consumer complaints about unsafe or shoddy goods sold under a seal of approval are transmitted to the certifier?

30. Section 457.17 imposes requirements relating to proper use of standards and certifications on all producers, distributors, retailers, and others involved in the marketing of products. Are there certain persons or activities covered by this section which should be exempted? Are there persons or activities not covered which should be added?

The section attempts to minimize affirmative burdens, especially on those persons lower in the chain of product distribution. Are there alternatives to the method used which would further minimize burdens while effectively ending misuse of standards and certifications?

31. Does the proposed rule adequately insure that consumer complaints to sellers relating to standards reach standards developers? How might the rule increase the likelihood that consumer complaints do reach standards developers?

32. The rule does not apply to individual participants in the standards process. Should the rule prohibit sellers or others from participating in the process or from using the resulting standards with the intent or effect of restraining trade or deceiving consumers?

33. How and to what extent do insurance companies and insurance rating bureaus affect standards development and certification activities? What are the effects on consumers and competition of basing insurance rates on compliance with private standards or certification requirements?

34. What is the relationship of standards development to rates of technological change? To what extent does the fixing of product quality through standards enhance or impede the introduction and diffusion of new products and the growth of markets? To what extent do current practices enhance or impede competition in the quality, availability, variety and safety of products?

35. What effects upon state and local laws, if any, would result from implementation of the proposed rule?

36. Should exercise of the procedural, challenge, and other rights and benefits established by the proposed rule, by persons or on behalf of products from foreign countries, be conditioned on the availability of substantially equivalent rights and benefits in such countries to persons or on behalf of products from the United States? The purpose of such a condition would be to encourage the elimination by other countries of technical barriers to international trade which might operate against products from the United States.

Such a condition could be accomplished by making revisions in the proposed rule such as the following. The existing paragraphs of § 457.11 would be redesignated as paragraphs (a)(1), (a)(2), and (a)(3), and a new paragraph (b) would be added to that section as follows:

(b) The standards developer shall have no obligation under this subpart with respect to persons or interests from countries in which procedural safeguards, challenge opportunities, and other benefits substantially

equivalent to those provided under this subpart are not available to United States interests. The standards developer shall also have no obligation under §§ 457.6 and 457.7 with respect to claims (from any person) which would benefit only products which have such countries as their country of origin. For purposes of this section, adherence of a country to an international standards code for preventing technical barriers to trade, to which the United States has agreed, shall be deemed to result in the availability of substantially equivalent benefits.

A new paragraph (f) would be added to § 457.13 as follows:

(f) The certifier shall have no obligation under this section with respect to persons or products whose country of origin is one in which nondiscriminatory treatment, challenge opportunities, and other benefits substantially equivalent to those provided under this section are not available to United States interests. For purpose of this paragraph, adherence of a country to an international certification code for preventing technical barriers to trade, to which the United States has agreed, shall be deemed to result in the availability of substantially equivalent benefits.

What should be the scope of such provisions? Is the limitation, as proposed, broader than is necessary to encourage reciprocity by other countries? Would such a broad limitation result in added costs being imposed on consumers and others in this country which would outweigh its benefits?

Issues to be resolved under rule provisions such as those above include the following. What evidence, other than adherence to an international code, would establish that a country provides substantially equivalent benefits? Who would determine that countries are providing substantially equivalent benefits? The standards developer or certifier?

37. United States participation in international standards proceedings and development of U.S. positions for these proceedings are currently carried out by private interests. Should these activities be subject to the rule? If so, should all of the rule's provisions apply, or should the applicable provisions be limited or modified?

Are there other areas of international standards development and certification that should be addressed by the rule?

SECTION E. PUBLIC HEARINGS

Public hearings will be held commencing on April 16, 1979 at 9:00 a.m. in Room 15022, Federal Building, 450 Golden Gate Avenue, San Francisco, California and May 21, 1979 at 9:00 a.m. in Room 332, Federal Trade Commission Building, Pennsylvania Avenue and 6th Street, N.W., Washington, D.C. Persons desiring to present their views orally at the hearings should advise Henry B. Cabell, Presiding Officer (PU), Federal Trade Commission, Washington, D.C. 20580, 202-724-1045, as soon as possible.

The Presiding Officer appointed for this proceeding shall have all powers prescribed in 16 CFR 1.13(c), subject to any limitations described in this notice.

SECTION F. INSTRUCTIONS TO WITNESSES

1. Advance notice. If you wish to testify at the hearings, you must notify the Presiding Officer of your desire to appear and file with him your complete, word-for-word statement no later than March 26, 1979 for

witnesses at the San Francisco hearings and April 30, 1979 for witnesses at the Washington, D.C. hearings. This advance notice is required so that other interested persons can determine the need to ask you questions and have an opportunity to prepare. The written testimony will be entered into the record exactly as submitted. Consequently, it will not be necessary for you to repeat this statement at the hearing. You may simply appear to answer questions with regard to your written statement or you may deliver a short summary of the most important aspects of that statement within time limits to be set by the Presiding Officer. As a general rule, such oral statements and summaries should not exceed twenty minutes.

Prospective witnesses are advised that they may be subject to questioning by designated representatives of groups with the same or similar interests in the proceeding and by members of the Commission's staff. Such questioning will be conducted subject to the discretion and control of the Presiding Officer and within such time limitations as he may impose. In the alternative, the Presiding Officer may conduct such examination himself or he may determine that full and true disclosure as to any issue or question may be achieved through rebuttal submissions or the presentation of additional oral or written statements. In all such instances, the Presiding Officer shall be governed by the need for a full and true disclosure of the facts and shall permit or conduct such examination with due regard for relevance to the factual issues raised by the proposed rule and the testimony delivered by each witness.

2. Use of exhibits. Use of exhibits during oral testimony is encouraged, especially when they are to be used to help clarify technical or complex matters. If you plan to offer documents as exhibits, file them as soon as possible during the period for submission of written comments so they can be studied by other interested persons. Such documents that may be unavailable to you during this period must be filed as soon as possible thereafter but not later than the deadline for filing prepared statements. Mark each of the documents with your name, and number them in sequence, e.g., Jones Exhibit 1. The Presiding Officer has the power to refuse to accept for the public record any hearing exhibits that are not furnished by the deadline.

3. Expert witnesses. If you are going to testify as an expert witness, you must attach to your statement a resume or summary of your professional background and a bibliography of your publications. It would be helpful if you would also include documentation for the opinions and conclusions you express by footnotes to your statement or in separate exhibits.

4. Results of surveys and other research studies. If in your testimony you will present the results of a survey or other research study, as distinguished from simple references to previously published studies conducted by others, you must also present as an exhibit or exhibits in compliance with paragraph 2 above the following:

a. A complete report of the survey or other research study and the information and documents listed in (b) through (e) if they are not included in that report.

b. A description of the sampling procedures and selection process including the number of persons contacted, the number of

interviews completed, and the number of persons who refused to participate in the survey.

c. Copies of all completed questionnaires or interview reports used in conducting the survey or study if respondents were permitted to answer questions in words of their choice rather than to select an answer from one or more answers printed in the questionnaire or suggested by the interviewer.

d. A description of the methodology used in conducting the survey or other research study including the selection of and instructions to interviewers, introductory remarks by interviewers to respondents and a sample questionnaire or other data collection instrument.

e. A description of the statistical procedures used to analyze the data and all data tables which underlie the results reported.

Other interested persons may wish to examine the questionnaires, data collection forms and any other underlying data not offered as exhibits and which serve as a basis for your testimony. This information along with punch cards or computer tapes which were used to conduct analyses should be made available (with appropriate explanatory data) upon request of the Presiding Officer. The Presiding Officer will then be in a position to permit their use by other interested persons or their counsel.

5. Identification, number of copies, and inspection. To assure prompt consideration, all materials filed by prospective witnesses pursuant to the instructions contained in paragraphs 1-4 above should be identified as "Standards and Certification Statement" ("and Exhibits," if appropriate), and submitted in five copies when feasible and not burdensome.

6. Reason for requirements. The foregoing requirements are necessary to permit us to schedule the time for your appearances and that of other witnesses in an orderly manner. Other interested parties must have your expected testimony and supporting documents available for study before the hearing so they can decide whether to question you or file rebuttals. If you do not comply with all of the requirements, the Presiding Officer has the power to refuse to let you testify.

7. General procedures. These hearings will be informal and courtroom rules of evidence will not apply. You will not be placed under oath unless the Presiding Officer so requires. You are also not required to respond to any question outside the area of your written statement, although, if such questions are permitted, you may respond if you feel you are prepared and have something to contribute. The Presiding Officer will assure that all questioning is conducted in a fair and reasonable manner. The Presiding Officer further has the right to limit the number of witnesses to be heard if the orderly conduct of the hearing so requires.

The deadlines established by this notice will not be extended and hearing dates will not be postponed unless hardship to participants can be demonstrated.

SECTION G. NOTIFICATION OF INTEREST

Interested persons who wish to avail themselves of the opportunity to question witnesses must, by March 2, 1979, notify the Presiding Officer of their position with respect to the proposed rule and each individual provision thereof. This notification must be in sufficient detail to enable the Presiding Officer to identify groups with the same

or similar interests respecting the proposed rule. The Presiding Officer may require the submission of additional information from any applicant whose notification is inadequate. Failure to file an adequate notification in sufficient detail may result in the applicant not being considered for purposes of questioning.

Before the hearings commence, the Presiding Officer will identify groups with the same or similar interests in the proceeding. Such groups will be required to select a single representative for the purpose of conducting questioning and, if unable to make this selection, the Presiding Officer may select a representative of each such group. The Presiding Officer will notify all interested persons of the identity of the group representatives at the earliest practicable time.

Group representatives will be given an opportunity to question each witness on any issue relevant to the proceeding and within the scope of the testimony. The Presiding Officer may disallow any questioning which is not appropriate for full and true disclosure as to relevant issues. The Presiding Officer may impose fair and reasonable time limitations on the questioning. Given that questioning by group representatives and the staff will satisfy the statutory requirements with respect to disputed issues, no such issues will be designated by the Presiding Officer.

SECTION H. COMPENSATION OF WITNESSES AND REPRESENTATIVES

Pursuant to section 18(h) of the FTC Act, funds may be available for reimbursement of public participation costs incurred in this proceeding to those who satisfy the requirements of § 1.17 of the Commission's rules of practice. For further information contact Bonnie Naradzy, Special Assistant for Public Participation, Office of the General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, 202-523-3796.

SECTION I. POSTHEARING PROCEDURES

Interested persons will be afforded 40 days after the close of the public hearings to file rebuttal submissions, which must be based only upon identified, properly cited matters already in the record. The Presiding Officer will reject all submissions which are essentially additional written comment in contrast to rebuttal. The 40-day rebuttal period is intended to include the time consumed in securing a complete transcript of the hearings.

Not later than 120 days after the close of the rebuttal period the staff shall submit its report as required by § 1.13(g) of the Commission's rules of practice. The Presiding Officer's report shall be submitted not later than 45 days thereafter and shall be confined to points of difference with the staff report. Post record comments, as described in § 1.13(h), shall be submitted not later than 30 days after the submission of the Presiding Officer's report.

SECTION J. RULEMAKING RECORD

In view of the substantial rulemaking records that have been established in prior trade regulation rulemaking proceedings (and the consequent difficulty in reviewing such records), the Commission urges all interested persons to consider the relevance of any material before placing it on the rulemaking record. While the Commission en-

courages comments on its proposed rule, the submission of material that is not generally probative of the issues posed by the proposed rule merely overburdens the rulemaking record and decreases its usefulness, both to those reviewing the record and to interested persons using it during the course of the proceeding. The Commission's rulemaking staff has received similar instructions.

Material that the staff has obtained during the course of its investigations prior to the initiation of the rulemaking proceeding that is not placed in the rulemaking record will be made available to the public. From time to time during the proceeding the staff may place additional materials on the rulemaking record, and make other additional materials available for inspection by the public. Some of these materials may be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, but will have been determined by the staff to be relevant and helpful to interested persons. Trade secrets or other sensitive exempt materials will not be made available.

The rulemaking record, as defined in 16 CFR 1.18(a), will be made available for examination in Room 130, Public Reference Room, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, D.C.

By direction of the Commission, dated November 29, 1978.

CAROL M. THOMAS,
Secretary.

SEPARATE STATEMENT OF COMMISSIONER
CLANTON

I have no difficulty supporting those aspects of the proposed rule which deal with procedural due-process in the standards setting industry. In fact, if a rule is found to be justified, it may be desirable to go further by requiring consensus action, balanced membership and a binding appeals process. However, I am opposed to the inclusion of §§ 457.6 and 457.7, which deal with the substantive aspect of standards setting. It will be exceptionally difficult to define and enforce substantive standards. In my opinion, the due process sections provide adequate incentives to deter most of the anti-competitive problems that are likely to arise.

In addition, I do not support inclusion of the marketing section (457.17) in the proposed rule. Any problems which may crop up in this area can be adequately dealt with under existing law and Commission precedent.

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15. SUPPLEMENTARY NOTES <input type="checkbox"/> Document describes a computer program; SF-185, FIPS Software Summary, is attached.		14. Sponsoring Agency Code	
16. ABSTRACT (A 200-word or less factual summary of most significant information. If document includes a significant bibliography or literature survey, mention it here.) A number of private organizations certify products for safety and other qualities. With the increase in safety regulation, product liability suits, and interest in encouraging the use of new technologies through certification, certification is likely to become more and more important as a way to show conformance with voluntary or regulatory standards. There have been a number of Federal and State government activities related to product certification. However, the potential impact of past and proposed government actions is not clear. One reason may be that there has been insufficient study of the economics of the product certification industry. This paper asserts that such study is needed as a basis for setting government policy and raises issues that should be addressed concerning structure and performance of the product certification industry.			
17. KEY WORDS (six to twelve entries; alphabetical order; capitalize only the first letter of the first key word unless a proper name; separated by semicolons) Economics; Certification; Product Certification; Certification Industry; Government Policy; Standardization Research Needs; Standards; Accreditation of Testing Laboratories.			
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