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**United States Antitrust Law Regarding
Standard Setting Bodies**

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While industry-wide standards are widely viewed to enhance competition, standard-setting activities might give rise to legitimate antitrust concerns if anti-competitive conduct like output restrictions, market divisions, vertical restraints, boycotts, or other forms of collusive conduct occur. Moreover, standard setting in industries with rapidly changing technology may be manipulated in a way to provide firms that have undisclosed patents or other undisclosed intellectual property bearing on the standard with the power to cause a “hold up.”

Background

There are thousands of organizations throughout the world that are involved in setting or developing “standards” for products. Some are international or regional organizations, such as the International Standards Organization (“ISO”), while others are national standards bodies, such as the American National Standards Institute (“ANSI”). But by far the largest number of standards setting bodies are organized along trade association or industry lines or around particular topics.

Standard setting serves many useful purposes. In some markets, for example, customers may lack the expertise and/or the time to make informed judgments about professional services or technology and products where safety, complexity, and/or compatibility are important. Standard setting can be invaluable if uniformity and interchangeability are important.¹

On the other hand, there can be competitive (and in turn antitrust) risks from standard setting. Indeed, private standard-setting associations have been traditional objects of antitrust scrutiny.² Why is that? Simply because those best equipped to develop a standard in a particular line of business are those

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¹ The potential benefits of joint R&D or standard-setting activities among competitors in encouraging creativity and production have been recognized by the U.S. Congress. The federal legislature enacted in 1984 – and expanded in 1993 and 2004 – protections for certain joint activities in the National Cooperative Research and Production Act, 15 U.S.C. §§ 4301 to 4305. Under this statute, a joint venture created to research or produce a “product, process or service” (as defined in § 4301), or an organization that develops or promulgates “voluntary consensus standards,” is provided certain limited protections under the antitrust laws so long as the venture files notification with the U.S. Department of Justice’s Antitrust Division and the Federal Trade Commission. A joint venture making the required filing “shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition” Once the notification is filed, only single (as opposed to treble) damages may be recovered if a private party files a lawsuit challenging the venture or the standard-setting activity.

² See *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 41 (1912); FTC Bureau of Consumer Protection, Standards and Certification Final Staff Report, at 28, 34 (April 1983).

already working in that marketplace. As a result, standard-setting activities typically include competitors who might have economic incentives to restrain competition. Since, from a literal perspective, an agreement on a product standard is an agreement not to manufacture, distribute, or purchase certain types of products, product standards set by a organization that includes competitors have the potential for anticompetitive harm. As one well-known antitrust scholar observes, product standardization “might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals’ ability to monitor each other’s prices.”³

Moreover, even single-firm behavior in the context of standard setting has the possibility of harming competition.⁴ As the U.S. Federal Trade Commission has recently stated:

[S]tandard setting . . . potentially yields significant efficiencies – especially when the standards facilitate interoperability among various components, to the likely benefit of industry participants as well as consumers. Although standard setting displaces the normal process of selection through market-based competition – by which, without any agreement, the purchasing decisions of customers determine which interoperable combinations of products and technologies ultimately will survive – the efficiency benefits of consensus standard setting easily can outweigh that loss of competition.

Even under the best of circumstances, however, the standard-setting process has a unique potential to skew the competitive process by aligning supply and demand in a prescribed direction. The risk of competitive harm is heightened in the face of exclusionary conduct that does not constitute competition on the basis of efficiency and that interferes with the cooperative nature of the standard-setting process. Exclusionary conduct such as deception may distort the selection of technologies and evade protections designed by [standard-setting organizations (“SSOs”)] to constrain the exercise of monopoly power, with substantial and lasting harm to competition. Additionally, unlike misleading statements made in advertising – which can be corrected quickly by a competitor’s counter-advertising – there are fewer “quick fixes” available to correct the competitive harm caused by deception in the SSO context, once a standard has been chosen and the industry has become locked in. If exclusionary conduct reduces or destroys the efficiencies to be gained through consensus standard setting, it may cause considerable

³ 7 P. Areeda, *Antitrust Law* ¶ 1503, p. 373 (1986). In this regard, the FTC-DOJ Antitrust Guidelines For Collaborations Among Competitors (2000) at page 2 n. 5, do not “take into account . . . the possible anticompetitive effects of standard setting in the context of competitor collaborations” but note that “these effects may be of concern to the Agencies and may prompt enforcement actions.”

⁴ The 1980s saw a number of antitrust lawsuits brought against leaders in office technology markets, claiming that the firms had intentionally designed or introduced their product innovations in ways that would disadvantage competitors. Generally these suits were unsuccessful. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1983) (“any firm, even a monopolist, may generally bring its products to market whenever and however it chooses”); *Transamerica Computer Corp. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981). But courts did caution against unjustified efforts to create incompatibility with competitors’ products without compensating benefits in performance or price. See *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 95 (2d Cir. 1981).

harm to competition. If the anticompetitive harm exceeds any remaining efficiencies, standard setting is no longer beneficial on balance.⁵

Conspiracies to Manipulate the Standard-Setting Process

The possibility of a conspiracy to manipulate a standard-setting process is illustrated by the fact situation in the *Indian Head* case.⁶ There, the National Fire Protection Association's standard-setting process for creating the National Electrical Code ("NEC") had been manipulated by manufacturers of steel conduit.

Among the types of products covered by the NEC is electrical conduit (the hollow tubing used to carry electrical wires through the walls, floors, and ceilings of buildings). In the 1970s, the NEC only certified electrical conduit made of steel. Starting in 1980, however, plaintiff Indian Head, Inc. began offering electrical conduit made of polyvinyl chloride and initiated a proposal to obtain NFPA approval of PVC conduit in the NEC. Indian Head's proposal was scheduled for consideration at the 1980 annual NFPA meeting, where it could be rejected or adopted by a simple majority of the members present.

Defendant Allied Tube and Conduit Corporation, which was the largest producer of steel conduit in the U.S. at the time, feared that PVC conduit would cut into its market, so it met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude Indian Head's product from the National Electric Code by "packing" the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal. Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to vote against the proposal.

The recruits included employees, executives, sales agents and their employees, and spouses of employees. The conspirators paid for membership fees and transportation to the 1980 meeting. The vast majority of these individuals did not have the technical expertise or background necessary to understand the discussions held at the meeting; indeed, none of them spoke at the meeting or participated in any manner except voting. With Allied Tube's "ringers" in place, Indian Head's proposal was easily defeated.

Thereafter, Indian Head brought suit, alleging that Allied Tube and the others conspired to unreasonably restrain trade in the electrical conduit market in violation of Section 1 of the Sherman Act.⁷ A jury found Allied Tube liable under the antitrust "rule of reason."⁸ The jury indicated that Allied Tube, by

⁵ *In the Matter of Rambus, Inc.*, Docket No. 9302, at page 33 (FTC Opinion, August 2, 2006), avail. at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

⁶ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

⁷ Section 1 of the Sherman Act (15 U.S.C. § 1) declares that "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is ... illegal."

⁸ Unlike the *per se* rule, the "rule of reason" requires the jury to balance the anticompetitive effects of the conduct against the procompetitive effects the conduct might have had. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978). The *per se* category consists of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958). The decision to apply the *per se* rule turns on "whether the practice facially appears to be

packing the meeting, had “subverted” the consensus standard-making process of the NFPA and thereby illegally restrained trade. *Indian Head*, 486 U.S. at 498. On appeal, the United States Supreme Court upheld the jury verdict. The Court held that an entity's conduct at a standard-setting organization may run afoul of the antitrust laws even if that entity did not violate the organization's express rules.⁹

Similarly, in the *Radiant Burners* case,¹⁰ the Supreme Court considered allegations that a manufacturers of gas burners had violated Section 1 of the Sherman Act by conspiring to manipulate the American Gas Association's certification tests for such products. The plaintiff claimed that its competing product had been excluded from the market as a result of tests that were not based on objective standards, that competitors of those seeking certification improperly influenced the Association's decisions, and that the Association and its utility members agreed to refuse to sell gas for use in burners that were not certified. The trial court dismissed the complaint, but the U.S. Supreme Court reversed, stressing the potential for harm to competition, stating: “It is obvious that petitioner cannot sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers cannot buy gas for use in those burners.”¹¹

Moreover, another Supreme Court decision has made clear that a standard-setting organization itself may be held liable for antitrust damages if its agents or employees, acting within their apparent authority, collude with private parties to harm competitors by manipulating the organization's quality or safety standards. In the *Hydrolevel* case,¹² the defendant was the American Society of Mechanical Engineers, a nonprofit corporation that developed safety codes for boilers and other heavy equipment. One of ASME's members (a competitor of the plaintiff) persuaded the chairman of one of ASME's subcommittees to provide an unofficial (and unjustified) letter stating that plaintiff's product was unsafe. Thereafter, the competitor used that response to discourage customers from buying plaintiff's product. Hydrolevel sued the employer of the subcommittee chairman, the competitor, and ASME for violating Section 1 of the Sherman Act. The Supreme Court affirmed a jury verdict against the standard-setting organization based on the “apparent authority” of the subcommittee chairman, noting the absence of any “meaningful safeguards”.¹³

one that would always or almost always tend to restrict competition and de-crease output ... or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

⁹ *Id.* at 509 (“The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the association”).

¹⁰ *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

¹¹ 364 U.S. at 659.

¹² *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

¹³ 456 U.S. at 570-573.

Single-Firm Behavior: the *Rambus* case

Last year, significant notoriety was given to the Federal Trade Commission's decision regarding the participation by a technology company, Rambus, Inc., in standard setting in the computer industry.¹⁴ The FTC found that Rambus had violated the federal antitrust laws by engaging in a course of deceptive conduct that contributed significantly to Rambus's acquisition of monopoly power by distorting the standard-setting organization's technology choices and undermining the ability of the organization's members to protect themselves against patent hold-up, thus harming competition and driving up licensing fees to DRAM manufacturers.¹⁵ In contrast to *Indian Head* and the other cases discussed above which involved conspiracies among competitors, the *Rambus* case involved single-firm misconduct.

The *Rambus* case involved the design of semiconductors used for dynamic random access memory (DRAM), which most computers use to store and process information while the computer is operating. Rambus develops, secures patents on, and licenses technologies to companies that manufacture these sorts of semiconductor memory devices. Rambus was founded in March 1990 by two professors who wanted to commercialize their concept for a new DRAM design that would break the "memory bottleneck."¹⁶ Rambus does not manufacture semiconductors.

For more than four years during the 1990s, Rambus participated as a member of the Joint Electron Device Engineering Council (JEDEC), an industrywide standard-setting organization that operated on a cooperative basis. JEDEC required that its members participate in good faith and reveal the existence of patents and patent applications that later might be enforced against those practicing the JEDEC standards. In addition, JEDEC members were obligated to offer assurances to license patented technologies on reasonable and non-discriminatory ("RAND") terms, before members voted to adopt a standard that would incorporate those technologies. The intent of JEDEC policy and practice was to prevent anticompetitive "hold-up."¹⁷

Rambus, however, chose to disregard JEDEC's rules, as well as the duty to act in good faith. Instead, Rambus deceived the other JEDEC members. Rambus capitalized on JEDEC's policy and

¹⁴ *In the Matter of Rambus, Inc.*, Docket No. 9302 (Opinion of the Commission filed August 2, 2006), avail. at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>. The Commission's decision has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit and will be considered by the court in 2008. The following discussion is based on the facts set forth in the FTC's opinion.

¹⁵ Ironically, some of the victims of Rambus' misconduct were discovered to have been involved in their own antitrust misconduct. A criminal investigation by the Department of Justice disclosed that, during the period 1999 to 2002, several manufacturers of semiconductors participated in an international conspiracy to fix prices in the multi-billion dollar DRAM market. See, e.g., DOJ Press Release, "Korean Company – Hynix -- Agrees to Plead Guilty to Price Fixing and Agrees to Pay \$185 Million Fine for Role in DRAM Conspiracy," April 21, 2005, http://www.usdoj.gov/atr/public/press_releases/2005/208655.htm

¹⁶ In the early 1980s, an imbalance emerged in the speed at which CPU technology was developing relative to memory technology. While CPU speeds had doubled every eighteen months since the 1960s, memory speeds had increased more slowly, thus creating a "memory bottleneck."

¹⁷ When a standard has been set and as time passes, the industry commits greater levels of resources to developing products that comply with the standard, and the costs of switching to alternative technologies rises. Once switching costs become prohibitive, a "lock-in" occurs, and the owner of the standardized technology may be able to "hold up" the industry by charging supracompetitive rates.

practice – and also on the expectations of the JEDEC members – in several ways. Rambus refused to disclose the existence of its patents and applications, which deprived JEDEC members of critical information as they worked to evaluate potential standards. Rambus took additional actions that misled members to believe that Rambus was not seeking patents that would cover implementations of the standards under consideration by JEDEC. Rambus also went a step further: through its participation in JEDEC, Rambus gained information about the pending standard, and then amended its patent applications to ensure that subsequently-issued patents would cover the ultimate standard. Through its successful strategy, Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market was locked in. Only then did Rambus reveal its patents – through patent infringement lawsuits against JEDEC members who practiced the standard.

The FTC concluded that Rambus violated Section 2 of the Sherman Act¹⁸ and Section 5 of the FTC Act, holding that:¹⁹

By hiding the potential that Rambus would be able to impose royalty obligations of its own choosing, and by silently using JEDEC to assemble a patent portfolio to cover the SDRAM and DDR SDRAM standards, Rambus's conduct significantly contributed to JEDEC's choice of Rambus's technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future royalty rates – which, in turn, significantly contributed to Rambus's acquisition of monopoly power.²⁰

The FTC further found a causal link between Rambus's exclusionary conduct and JEDEC's adoption of various DRAM standards, holding that:

Evidence that a properly-informed JEDEC may have selected a substitute technology suggests a causal link between Rambus's deceptive course of conduct and JEDEC's decision-making process. This evidence – combined with the evidence of Rambus's strategy, JEDEC members' overriding concern with costs, and the magnitude of the potential royalties in the absence of RAND assurances or the opportunity to negotiate ex ante – is enough to show that JEDEC's adoption of the SDRAM and DDR SDRAM standards was linked to Rambus's exclusionary conduct.²¹

¹⁸ Section 2 of the Sherman Act provides that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony” A violation of Section 2 may also be punished civilly.

¹⁹ Section 5 of the Federal Trade Commission Act prohibits “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” The Commission's authority under Section 5 of the FTC Act reaches conduct that violates the Sherman Act.

²⁰ FTC Opinion in *Rambus*, at 118-19.

²¹ *Id.* at 77.

In February 2007, the FTC issued an opinion and order on remedy in the *Rambus* case.²² The order bars Rambus from making future misrepresentations or omissions to standard-setting organizations and, importantly, directs Rambus to license its SDRAM and DDR SDRAM technology based on certain-specified maximum allowable royalty rates it can collect for the licensing. The order also requires Rambus to employ a Commission-approved compliance officer to ensure that Rambus's patents and patent applications are disclosed to industry standard-setting bodies in which it participates. The Commission vote to issue the opinion and order was 3-2, with two Commissioners dissenting. In separate opinions, those Commissioners argued that the FTC should have ordered royalty-free licensing because "licensing on terms above zero would enable Rambus to obtain royalties it would not have obtained in the 'but for world' [and] ... to continue to reap the fruits of its ongoing violation of Section 2."²³

The Proper Way to Set Standards

By contrast to the misconduct illustrated by the collusion in *Indian Head*, *Radiant Burners*, and *Hydrolevel* or the exclusionary conduct in *Rambus*, a standard-setting organization and its members that go about the business of standard setting in a reasonable and objective fashion can avoid antitrust risk. If the organization promulgates safety or other standards "based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition,"²⁴ the resulting standards can have significant procompetitive advantages and will not lead to antitrust liability. It is this potential for procompetitive benefits that has led most lower courts to apply the "rule of reason" analysis to product standard-setting involving private actors, rather than the more onerous *per se* test.²⁵

W.M.H.

²² *In the Matter of Rambus, Inc.*, Docket No. 9302, Opinion of the Commission on Remedy and Final Order, issued February 2, 2007, as modified April 27, 2007, available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>.

²³ *Id.*, Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part, at 14.; See also Remedy Statement of Commissioner Pamela Jones Harbour, Concurring in Part and Dissenting in Part. In response, the majority "reaffirm[ed] that the Commission has the authority to order royalty-free licensing when the factual circumstances justify it" (at 11) but, "hav[ing] examined the record for the proof that the courts have found necessary to impose royalty-free licensing, ...do not find it." Opinion of the Commission on Remedy, at 11, 12.

²⁴ *Indian Head*, 486 U.S. at 501.

²⁵ *Id.* A trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate Section 1 of the Sherman Act when, for whatever reason, it fails to evaluate a product favorably to the manufacturer. See *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 292 (5th Cir. 1988); *Eliason Corporation v. National Sanitation Foundation*, 614 F.2d 126, 129 (6th Cir. 1980).