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Jonathan T. Howe  
*Jenner & Block*

Leland J. Badger  
*Jenner & Block*

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# THE ANTITRUST CHALLENGE TO NON-PROFIT CERTIFICATION ORGANIZATIONS: CONFLICTS OF INTEREST AND A PRACTICAL RULE OF REASON APPROACH TO CERTIFICATION PROGRAMS AS INDUSTRY-WIDE BUILDERS OF COMPETITION AND EFFICIENCY

JONATHAN T. HOWE\*  
LELAND J. BADGER\*\*

## I. INTRODUCTION

The paramount antitrust challenge for nonprofit product certification programs is to demonstrate aggressively that such programs strengthen the competitive market system on an industry-wide basis. Industry-wide certification programs should be recognized not merely as consumer protection devices,<sup>1</sup> but as increasingly valuable elements for building competition and manufacturing efficiency and productivity in the marketplace hierarchy. More urgently now than at any time since the Great Depression, antitrust analysis and law, the “umpire” of the market system, must focus on these key benefits of certification programs in the attempt to eliminate crippling anticompetitive market structure and conduct. The economic realities and perils of the 1980s make this assessment imperative.

Increased concentration with smaller numbers of companies<sup>2</sup> and an alarming decline in the growth of manufacturing productivity in seg-

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\* Senior Partner, Jenner & Block, Chicago, Illinois. B.A., 1963, Northwestern University; J.D., 1966, Duke University.

\*\* Partner, Jenner & Block, Chicago, Illinois. A.B., 1970, Dartmouth College; J.D., 1973, Harvard University.

1. Wachtel, *Products Standards And Certification Programs*, 13 ANTITRUST BULL. 1, 1-4 (1968).

2. *E.g.*, Interview of William F. Baxter, Assistant Attorney General, Antitrust Division, Department of Justice, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1025, at AA1-3 (July 30, 1981). *See also* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 2-11, 90-133, 163-262, 310-30 (1978); M. GREEN, B. MOORE & B. WASSERSTEIN, RALPH NADER'S STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT: THE CLOSED ENTERPRISE SYSTEM 3-29 (1972).

ments of the economy have heightened antitrust debate and economic concern.<sup>3</sup> In the midst of these economic currents, industry-wide certification programs, based upon product performance standards,<sup>4</sup> offer unique opportunities to stimulate competition and manufacturing productivity on an industry-wide basis. Certification programs build competition by lowering artificial barriers to market entry, including unnecessary product differentiation<sup>5</sup> and undue capital requirements.<sup>6</sup> Certification programs increase the manufacturing productivity of all competitors within an industry by facilitating certain manufacturing efficiencies and systematic quality control disciplines.<sup>7</sup>

This affirmative challenge is, however, limited by another urgent antitrust challenge still closer to the courtroom door. This challenge, requiring advance organizational and litigation planning, is to avoid or defeat a possible plaintiff's claim of antitrust abuses by a certification organization whose decisionmaking participants may be caught in alleged conflicts of interest.

These two challenges must be met for certification programs to survive and progress. The only way successfully to meet these antitrust challenges is to make product performance certification programs synonymous with industry-wide competition and productivity and with systems of safeguards against conflicts of interest. Further, this must be proved to the judge and jury.

This Article will discuss two critical questions that flow from an analytical approach to these two challenges: First, whether a coherent basis exists for viewing nonprofit certification programs as structural elements in the marketplace hierarchy that advance urgent antitrust goals, including increased competition and productivity; and second, whether a distinct duty to safeguard certification organizations against conflicts of interest would, if met, demonstrate that a certification organization under antitrust scrutiny in court should be found to be without conspiratorial intent.

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3. *See, e.g.*, President's State of the Union Address, 1982 U.S. CODE CONG. & AD. NEWS D3 (Jan. 26, 1982).

4. A performance standard, as contrasted to a design standard, is one in which a product in question is capable of achieving or exceeding the desired result in performance without concern as to design. A design standard establishes product design and structural criteria, with the net result of yielding performance based solely on pre-determined product structure.

5. *See* notes 58-59 *infra* and accompanying text.

6. *See id.*

7. *See* note 62 and accompanying text.

## II. *HYDROLEVEL*—"A LOOSE (SECOND CIRCUIT) CANNON ON THE DECK"

Commercial conflicts of interest in certification organizations and possible anticompetitive restraints on competitors<sup>8</sup> constitute the current most significant antitrust problem facing industry-wide certification programs. This antitrust problem highlights the need for businessmen and courts to view the conflicts of interest issue side-by-side with the distinct duty imposed upon certification organizations to possess safeguards against these conflicts of interest. This duty is suggested both by due process considerations and by the extent to which certification programs play an industry self-regulation role. To the attorney, either as advisor or litigator, such a side-by-side examination is vital because it demonstrates that carefully structured and administered certification programs with such safeguards can lead to increasingly unique antitrust benefits on an industry-wide basis in the economy.

This antitrust problem is highlighted in *Hydrolevel Corp. v. American Society of Mechanical Engineers*.<sup>9</sup> The case provides an excellent example of confusion in assessing a practical solution to the conflict of interest problem.<sup>10</sup> In *Hydrolevel*, the Second Circuit Court of Appeals failed to make a side-by-side examination. The court affirmed an antitrust liability judgment for conspiracy to restrain trade against the American Society of Mechanical Engineers (ASME), a nonprofit engineering and standards organization. The court attributed conspiratorial intent to ASME<sup>11</sup> from the collusive exclusionary interpretations of organization standards by two ASME committee members whose pri-

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8. See discussion in text at III F *infra*. Possible anticompetitive restraints are due to an inability to obtain product certification, following adverse administrative interpretations by committees of organization members. See generally Hoffman, *Industry-Wide Codes, Advertising, Seals of Approval and Standards: As Participated In By The Trade Association*, 13 ANTITRUST BULL. 595, 600-01 (1968); Hummell, *Antitrust Problems of Industry Codes of Advertising, Standardization, and Seals of Approval*, 13 ANTITRUST BULL. 607, 614-17 (1968).

9. 635 F.2d 118 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3078 (1981) (oral argument heard on January 13, 1982).

10. Inasmuch as this Article has been written during the interregnum between the Second Circuit decision and United States Supreme Court decision in *Hydrolevel*, the *Hydrolevel* case is treated herein principally as an example of the need to propose a workable solution to the conflict of interest problem in certification organizations; the Second Circuit decision, however, also warrants criticism regarding the novel use of an "apparent agency" theory of liability for an organization due to the misconduct of certain organization members. See notes 86-95 *infra* and accompanying text.

11. 635 F.2d at 127.

vate corporate interests led to decisions adverse to a competitor. The court did reverse the 7.5 million dollar damage award against ASME, though, and remanded the case for a new trial on damages. The liability judgment emphasized, however, the need to determine how non-profit certification programs<sup>12</sup> may best advance their unique commercial and procompetitive antitrust benefits yet still avoid being victimized by the antitrust sins of small numbers of their own participants.<sup>13</sup>

For the certification organization, the solution to the conflict of interest problem lies in recognizing a distinct duty to use a practical system of due process-related safeguards in its ongoing program activities. For the court, the solution rests in analyzing the injury and intent issues of antitrust liability with a rule of reason approach and with an evidentiary standard that focuses on the existence, or nonexistence, of those safeguards. This is especially appropriate in view of the unique industry-wide antitrust benefits that certification programs may have.

Since the Supreme Court's decision in *Chicago Board of Trade v. United States*,<sup>14</sup> the rule of reason<sup>15</sup> has been applied to standards and

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12. Standards-development organizations such as ASME may be viewed as "first cousins" of organizations which are primarily involved in certification activities.

13. The *Hydrolevel* decision has gained wide attention. More than a dozen amicus curiae briefs were filed, including an amicus curiae brief by the Justice Department and Federal Trade Commission in support of the liability judgment against ASME.

14. 246 U.S. 231 (1918). In *Chicago Board of Trade*, the Supreme Court confronted a challenge to the "Call" rule adopted by the Board in 1906. The "Call" was a session at the end of each trading day at which members set the price for commodities "to arrive," that is, commodities either already in transit to Chicago or to arrive in Chicago by a specified date. The "Call" rule prohibited members of the Board from purchasing shipments of wheat, corn, oats or rye "to arrive" at any price other than the price set at the Call between the Call and the beginning of the next business day. *Id.* at 236-37. The Court, finding that the "Call" rule improved market conditions, held that it did not violate the Sherman Act. *Id.* at 240-41.

15. In *Chicago Board of Trade*, Justice Brandeis formulated the classic statement of the rule of reason:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Id.* at 238. For prior statements of the rule of reason, see *United States v. American Tobacco Co.*,

certification programs of trade associations and other industry self-regulation programs<sup>16</sup> for claims other than outright collusion and “garden variety” price-fixing.<sup>17</sup> The courts have regularly upheld organization programs with redeeming procompetitive effects (and therefore reasonable restraints) that produce no antitrust injury.<sup>18</sup> In addition, observing due process standards, both substantive and procedural, historically has been one of the legal duties of trade associations and related industry programs under a rule of reason approach.<sup>19</sup>

In *Hydrolevel*, however, the Second Circuit ignored the practicalities of safeguards against conflicts of interest and unduly limited the rule of reason approach. It adopted a vicarious antitrust liability principle and a narrow “apparent agency” evidentiary standard<sup>20</sup> for the conflicts of interest of the two ASME committee members in determining whether ASME possessed the conspiratorial intent necessary for antitrust liability. In the context of certification programs, this approach creates four problems. First, it is illogical. Second, it greatly and unnecessarily increases the risk of antitrust liability by creating a strict liability standard, or virtual per se rule of liability, for limited participant misconduct. Third, it is inconsistent with the rule of reason standard

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221 U.S. 106, 178-80 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911). For a subsequent formulation of the rule of reason, see *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 687-92 (1978). See generally Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Divisions* (pts. I-II), 74 YALE L.J. 775 (1965); Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemption, Expanding Coverage, and Refining the Rule of Reason*, 27 U.C.L.A.L. REV. 265 (1979); 75 YALE L.J. 375 (1966). See also notes 82-84 *infra* and accompanying text.

16. See, e.g., *Maple Flooring Ass’n v. United States*, 268 U.S. 563 (1925); *National Macaroni Mfrs. Assoc. v. FTC*, 345 F.2d 421 (7th Cir. 1965); *Milk and Ice Cream Can Inst. v. FTC*, 152 F.2d 478 (7th Cir. 1946); *Los Angeles Mem. Coliseum Comm’n v. National Football League*, 468 F. Supp. 154 (C.D. Calif. 1979), 484 F. Supp. 1274 (C.D. Calif.) (temporary injunction), *rev’d*, 634 F.2d 1197 (9th Cir. 1980); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass’n*, 261 F. Supp. 154 (D. Or. 1966), *aff’d*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

17. See, e.g., *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979 (4th Cir. 1949); *Milk and Ice Cream Can Inst. v. FTC* 152 F.2d 478, 480, 484 (7th Cir. 1946).

18. See, e.g., *Tag Mfrs.’ Inst. v. FTC*, 174 F.2d 452 (1st Cir. 1949).

19. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *McCreery Angus Farms v. American Angus Ass’n*, 379 F. Supp. 1008 (S.D. Ill.), *aff’d*, 506 F.2d 1404 (7th Cir. 1974); *FTC Adv. Op.* (File No. 713 7002), 78 FTC 1628 (1971) codified at 16 C.F.R. § 15.457 (1981). See generally Wachtel, *supra* note 1, at 23-25, 31-32.

20. 635 F.2d at 127. The court stated, “[f]or ASME to be liable, then, *Hydrolevel* had to demonstrate only that ASME’s agents acted within their apparent authority when participating in the company; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions.” *Id.* For definitions of apparent authority, see RESTATEMENT (SECOND) OF AGENCY § 8, 159 (1957).

for the general issue of liability. Finally, it leaves unsettled the liability and evidentiary standards to be used in determining conspiratorial intent. The Second Circuit *Hydrolevel* evidentiary rule invites only chaotic and confusing proof before a trier of fact as to the scope of the rule of reason standard. This approach, then, should be rejected as unsuitable for the proper antitrust analysis of nonprofit certification programs. For properly structured certification programs, the risk of antitrust liability should be minimal if weighed according to a broad and consistent rule of reason standard. Because practical structural frameworks exist for certification programs to meet the discreet duty to safeguard against conflicts of interest, there is every reason for certification programs to achieve their unique promise of becoming industry-wide builders of competition and efficiency.

### III. AN OVERVIEW OF THE CERTIFICATION PROCESS

#### A. *Product Certification in General*

Product certification is a process of product evaluation, including testing and analysis, administered and managed by a third-party certification agency. It allows manufacturers to attest that their products satisfy the applicable standards and related procedural requirements of the certification program.<sup>21</sup>

Over one thousand private sector laboratories perform testing and services related to certification.<sup>22</sup> Many of the laboratories are affiliated with third-party certification programs sponsored and administered by nonprofit certification organizations or trade associations, often with public interest representatives.<sup>23</sup> In addition, numerous in-house manufacturers' laboratories, as well as nonprofit entities such as

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21. See Hoffman, *Antitrust Issues In Setting And Enforcing Standards*, in BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION, THE SOLAR MARKET: PROCEEDINGS OF THE SYMPOSIUM ON COMPETITION IN THE SOLAR ENERGY INDUSTRY 59, 61 (1978). See also S. 825, 95th Cong., 1st Sess. § 5(18) 123 CONG. REC. 5651, 5659 (1977) (proposed Voluntary Standards and Accreditation Act of 1977, considered but not reported out of the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary); Lane, *Trade and Professional Associations: Ethics and Standards*, 46 ANTITRUST L.J. 653, 654-55 (1977) (purpose of Act is to provide for a uniform national standardization process).

22. See BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STANDARDS AND CERTIFICATION, PROPOSED RULE AND STAFF REPORT 75 (1978) [hereinafter cited as FTC PROPOSED RULE AND STAFF REPORT].

23. *Id.* at 70.

Underwriters Laboratories and various commercial entities,<sup>24</sup> also engage in certification testing. Those resulting types of certification, however, lead to representations of certification status either by the manufacturers without the involvement of industry-wide third-party administrative bodies or by the laboratories rather than the manufacturers.

### B. *Certification Has A Dynamic Impact on the Public*

The numerous nonprofit certification programs help assure that participating manufacturers comply with an important range of product standards<sup>25</sup> having a significant, but often overlooked, impact on the American public.<sup>26</sup> Over 400 private standards-developing organizations are responsible for promulgation of these standards.<sup>27</sup> Compliance with such standards, which is influenced by certification

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24. *Id.* at 71-72.

25. Perhaps the bulk of these standards concern product performance, efficiency, durability, safety or health-related concerns. Some such standards are "grading" standards, including different performance classifications, while others are "pass-fail" standards. Numerous other standards are structural, design, or processing standards, such as those relating to heat treatment of steel.

26. Curran, *Industrial Standards, Antitrust, and the Logic of Public Action: An Historical Search for a Rational Public Policy*, 17 DUQ. L. REV. 717, 717-18 n.4 (1978) (quoting CENTER FOR THE STUDY OF RESPONSIVE LAW, QUESTIONS AND ANSWERS ABOUT TRADE PRODUCT STANDARDS: A PRIMER FOR CONSUMERS PREPARED FOR THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, 95th Cong., 1st Sess. 1 (1977)).

Trade product standards are an area of our economy known to few consumers. Yet, as is often the case with such backwaters of corporate activity, trade standards have an enormous impact on our lives. Over 20,000 trade standards at least partly determine the safety, availability and price of products ranging from household gas stoves to nuclear reactors. For consumers, trade product standards determine such things as the length of shoelaces, width of auto tires, ingredients of house paint, the specifications of lawn mowers, sizes of door frames, and safety of child car seats.

*Id.*

27. National Bureau of Standards, *Directory of Standardization Activities*, NBS Special Publication 417 (1975). *E.g.*, American National Standards Institute (ANSI); American Society for Testing and Materials (ASTM); National Fire Protection Association (NFPA); Illuminating Engineering Society (IES); Institute of Electrical and Electronic Engineers (IEEE); the Instrument Society of America (ISA); the Society of Automotive Engineers (SAE); the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE); the American Society of Mechanical Engineers (ASME); Aerospace Industries Association of America (AIAA); American Gear Manufacturers Association (AGMA); Association of Home Appliance Manufacturers (AHAM); Electronic Industries Association (EIA); Gas Appliance Manufacturers Association (GAMA); National Electrical Manufacturers Association (NEMA); Tile Council of America (TCA); Building Officials and Code Administrators International (BOCA); International Association of Plumbing and Mechanical Officials (IAPMA); International Conference of Building Officials (ICBO); Southern Building Code Congress (SBCC); and the American Insurance Association (AIA).



programs, has such an element of public interest that standards and certification programs have been said to represent a virtual quasi-governmental public function.<sup>28</sup>

### C. *Administrative Aspects of Certification Programs*

The administrative practices of certification programs may vary according to the needs of product buyers, insurers or code authorities. In general, the process includes five elements.<sup>29</sup> First, an independent third party program administrator initially selects sample products in accordance with standard sampling plans. Second, approved laboratories test or evaluate sample products in accordance with standard test methods for conformance with established industry performance standards. Third, results are reported in a standard format. Fourth, quality control and verification procedures are established to compare test results for samples originally tested with those of units produced on the assembly line.<sup>30</sup> Finally, registered certification marks<sup>31</sup> are used on registered products to show compliance with applicable standards and procedures.<sup>32</sup>

Each of these steps is interdependent and, as a whole, the administration of the certification process provides, in a dynamic fashion, a credible quality control mechanism for the participating manufacturer, industry, product buyers, insurers, and code authority. As test methods and performance standards change over time, the certification program is able to adopt those changes and its administrative organization can make the evolving test methods and standards immediately meaningful in the marketplace.

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28. Curran, *supra* note 26, at 717-21.

29. FTC PROPOSED RULE AND STAFF REPORT, *supra* note 22, at 77-82.

30. These procedures may include unannounced periodic factory visits and further random testing of assembly line produced units.

31. Trademarks owned by certification organizations may be registered with the United States Patent and Trademark Office as "certification marks," which may be used by those licensed by a certification organization to represent successful participation in the certification program according to the standards and procedures used by the program.

32. Certain third party certification organizations, such as Underwriters Laboratories, in which the organization actually puts a "seal of approval" on a product, may act as virtual guarantors or warrantors of the product. Other types of organizations, including the ones principally discussed herein, allow the use of "certification marks" to show validation of the manufacturer's certification or representation of compliance with program standards and procedures.

#### D. *Use of Certification Program Participant Committees and Boards*

The vast bulk of nonprofit certification organizations are composed of groups of industry competitors who utilize third party program administrators to execute assigned ministerial responsibilities. In the form of committees and boards, representatives of participant companies possess the authority to establish program operational guidelines and interpretations for the program that assist in application of the industry standards to the certification process. As a result, a program participant's ultimate judge and jury, while truly one of peers, is also one of competitors in the marketplace.

These representatives typically are skilled engineers and manufacturing executives carefully chosen by their companies and laboratories for their expert backgrounds and leadership abilities. These industry representatives serve on a certification organization's various working committees, but ultimately all reports and decisions are submitted to the organization's board of directors for review and possible ratification. Members of the board are elected in democratic fashion from among the representatives of the participant companies according to the by-laws of the certification organization. Because the board, as well as the committees, may also include public interest representatives from consumer groups, university graduate school faculties, and expert consulting firms, the board is truly an open marketplace of ideas and opinions. It maintains enough continuity and technical competence, however, to provide stability and perspective in reviewing and ratifying proposed solutions to administrative problems.

#### E. *The Realities of Program Guidelines, Interpretations and Decisions*

Committees and boards of certification programs formulate guidelines and interpretations that mix objective and subjective judgments. These decisions, an unavoidable fact of administrative life, are critical in maintaining the confidence of participant companies in the integrity of certification programs. They are also crucial in maintaining the confidence of the public in the integrity of the certification claims made by the participant companies. These program guidelines and interpretations concern the standards, test methods, and procedures of the program. They principally serve to provide for the following participant and organization needs: development of general budget economies; avoidance of time delays and expenses from unnecessary repetitive test-

ing; enhancement of program efficiency in the scheduling and conducting of laboratory tests and plant inspections; and formulation of rational responses to changes in the standards and test methods that are issued over time by the various standards-development organizations.

The decisions of the certification program committees and boards on the above issues additionally reflect an overall fundamental consideration. In view of the extraordinary commercial significance of certification programs and the type of industry self-regulation which they represent, it is well settled that a due process requirement exists for the open and unfettered opportunity for each of the parties principally affected by the program to submit their own views, and to comment on each other's views, as to the program's administrative matters. This due process requirement is clear for standards-development organizations<sup>33</sup> and, in light of the equal or greater commercial power of the certification programs implementing those standards, also extends to industry-wide certification programs.<sup>34</sup>

Among the types of issues debated and decided by certification program committees and boards are two very important questions: first, whether a nonmarketed research product may undergo precertification testing and checks; and second, whether various changes in manufacturing methods and components from those used with a certified product constitute inconsequential changes of form or significant changes of substance in the overall product as a whole. When a new product has come into being a new round of certification tests and assembly-line inspections, involving appreciable time and expense, is necessary for the manufacturer to represent the product as certified. When the changes are inconsequential matters of form and the product is not new or different in substance and performance, the issue will arise whether a new round of testing and inspections can be avoided. To answer these questions inevitably requires the use of both objective and subjective judgments.

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33. See Office of Management and Budget (OMB) Circular A-119, "Federal Participation in the Development and Use of Voluntary Standards" (January 17, 1980); Department of Commerce "Final Procedures" to implement OMB Circular A-119, 46 Fed. Reg. 1574 (1981). See also FTC Adv. Op. No. 457 (File No. 713 7002), 78 FTC 1628 (1971), *codified at* 16 C.F.R. § 15.457 (1981).

34. See FTC Adv. Op. No. 457 (File No. 713 7002), *codified at* 16 C.F.R. § 15.457 (1981); FTC Adv. Op. No. 152, 72 FTC 1053 (1967), *codified at* 16 C.F.R. § 15.152 (1981); FTC Adv. Op. No. 96, (File No. 673 7006) 70 FTC 1878 (1966), *codified at* 16 C.F.R. § 15.96 (1981).

1. *Certification Program Arrangements For Experimental Prototype Products*

A manufacturer that has produced an experimental prototype product may desire to know whether the product, when introduced into the market, may immediately be marketed as certified. Due to the experimental prototype nature of the product, however, no regular assembly line exists for its production. In addition, the manufacturer may decide to modify various aspects of the product depending upon the results of ongoing research. If marketed, however, acceptance of the product by various customers may depend partly or completely upon whether the product bears a certification program label immediately upon introduction into the marketplace.

Because testing delays would occur and because by definition in-plant inspections cannot be conducted for a prototype model, a certification program dealing only with final products and not prototype models would seriously interfere with the marketing of such a new product. As a result, the general administrative procedures of a certification program usually must be supplemented by administrative guidelines for the prototype situation. Otherwise, a manufacturer will not remain an interested and contributing participant in the certification program.

The appropriate guidelines for prototype evaluation, and scope of the debate thereon, may vary by industry. Advance testing arrangements for various numbers of prototypes, conducted by laboratories approved under the certification program and reviewed by the certification program administrator, may be part of the guidelines. Provision for in-plant inspections scheduled not on a random unannounced basis but at the request of the manufacturer immediately upon its decision to begin regular production of the unit, is another possible guideline component. The original decision to adopt prototype arrangements, however, as well as the details of guidelines relating to those arrangements, requires both subjective and objective judgments as to the appropriateness of prototype provisions in a certification program.

2. *Frequency and Location of Inspection of Manufacturers' Product Assembly Lines and Laboratories' Test Equipment and Procedures*

Another administrative problem concerns the frequency of unannounced in-plant inspections by the certification program administrator and his staff. These inspections are conducted to view each manufacturer's production procedures and equipment and to gather random product samples that are tested and compared with test results of the manufacturer's originally submitted units. The judgment of the program committees and boards as to the appropriate frequency and scope of the inspections may well raise different views from the production executives, professional engineers, program administrators, and public interest representatives in certification organizations. The budgets of the manufacturer and the certification program, the availability of certification program inspection staff, the detail required of the certification program inspector when visiting a manufacturer's plant, and the availability of testing time and space at approved laboratories are factors to be considered in the final judgment. In reconciling the different views of committee members on these factors, it is apparent that the appropriateness variable as to frequency and location of inspections is a highly subjective one.

The testing laboratories used in the certification program also must be inspected periodically and approved by the certification program administrator and his staff. With periodic changes in laboratory test equipment models and the periodic entry and departure of various laboratories either from the market or from approved status with the certification program, assuring uniform testing conditions for the products within the certification program becomes a complex task.

The certification program committees and boards usually have no alternative but to develop guidelines to assist the program administrator in assessing desirable laboratory test equipment calibration and sufficiency and reviewing laboratory personnel and procedural matters.<sup>35</sup> This will ensure that standard test methods are in fact being applied in uniform fashion by the laboratories affiliated with the program. Because the laboratories often differ markedly in reputation, physical plant size or numbers of branches, educational background and skill of

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35. The program administrator also reviews laboratory staff personnel and procedural matters.

laboratory personnel in reading instrumentation and conducting tests, and management philosophies of the laboratory owners, the extent of control of the certification program over the laboratories is usually a sensitive issue. Which laboratory facilities and equipment will need inspection, and the scope of the inspection and access to equipment records, are, again, judgments of "appropriateness" that are very subjective.

A serious issue related to program oversight of laboratories is the extent to which the certification program committees and boards choose to permit communications between the manufacturers and the laboratories. During the product test periods, communications may occur as to the status of the tests, the diagnosis of possible causes of product failure, and the resumption of testing after in-test failures. Manufacturers, which are paying substantial sums for the services of the test laboratories, believe it is imperative to be kept informed on the status of the testing of their products. If permitted to engage in those communications, however, the manufacturers easily may be in a position to harass the laboratories and to influence improperly the conduct and results of the testing. As a result, the outcome of deliberations by the certification program committees and boards as to the form and substance of permitted manufacturer-laboratory communications is a difficult and inherently subjective judgment.

Another difficult judgment is the determination of the number of a manufacturer's plants that the certification program staff should inspect. A manufacturer's assembly lines may be designed in the same way for different plants across the country, but the operation of those assembly lines by different personnel and the use of components produced by different suppliers raises serious questions as to the uniformity of the assembly-line conditions for the products in question. The certification program committees and boards must establish practical guidelines to provide adequate assurances that sufficient uniformity exists between the plants to permit a uniform certification product listing to apply to the products manufactured at those plants. What constitute sufficient indicia of uniform conditions between plants is a difficult question to resolve. Large companies may have sophisticated in-house quality control programs to provide evidence of uniformity and consistency in product output. Many smaller companies, however, may have only a primitive in-house quality control program, if any at all. Hence, program committee judgment will again be subjective.

Finally, program committees and boards face another question related to the issue of uniform manufacturing conditions for products subject to the certification program. They must decide how to deal with interruptions of manufacturing conditions, either temporary as to equipment or personnel, or permanent, such as changes in responsible supervisors, personnel and craftsmen, or equipment producing the items subject to certification. Certification program guidelines must define "temporary" breakdowns and substitutions of "different" assembly-line machinery to permit reasonable waivers and exceptions to certification program inspection rules and procedures. When permanent changes in personnel or in machinery are made, the workmanship on items subject to certification may be affected. In this instance, waivers may be inappropriate and guidelines may be required to define the use of either planned or unannounced in-plant inspections to verify the supposed uniformity and consistency of manufacturing conditions. In industries where personnel changes or machinery changes occur frequently, the judgment of the program committees and the board as to the appropriate guidelines will be critical.

3. *Treatment of "Equivalency" Between Products Made of Very Similar Structural Components and Performance Characteristics*

The essence of a certification program is to provide a third party validation of a manufacturer's affirmation that its product is produced similarly to specimens inspected, tested, and found to pass performance standards. Thus, a manufacturer may seek to extend the certification status<sup>36</sup> of its product *X* to product *Y*, without retesting and conducting plant inspections for product *Y*. The manufacturer justifies the extension because the only structural difference between product *X* and product *Y* is that one (or a small number) of the components of product *Y*, though produced by different suppliers, are proven separately to be equivalent or superior in performance to the related components in product *X*. The manufacturer may want to change to the components in product *Y* for reasons such as price considerations or incremental performance improvements in product *Y* components as compared to the related components in product *X*.

The possibility that performance of products is equivalent or supe-

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36. Certification status means a certification program product listing or number.

rior is one reason for favoring product performance standards over structural or design standards.<sup>37</sup> It is also one of the most criticized aspects of structural or design standards.<sup>38</sup> If similar performance is the preferred indicator of production similarity, it is reasonable to believe that, under certain circumstances, the notion of "equivalency" may logically be used to extend the certification status of certified product *X* of a manufacturer to the very closely related product *Y* of the same manufacturer. The difference in product *Y* is so minimal that a new overall product, in terms of performance, has not been created.

If the principle of "equivalency" for certification purposes is accepted, important benefits result to manufacturers in avoiding time-consuming and expensive testing and assembly line inspection of product *Y*-type units. Criteria for proof of performance "equivalency" of product *X* and product *Y* can become, however, a much debated subject for certification program committees and boards.<sup>39</sup> The purpose of product performance certification programs is neither to wander afield into the subject of equivalency of product components nor to establish lists of specific approved equivalent component items. It is, therefore, generally left for the product manufacturer to demonstrate to a certification program committee, on an ad hoc but scientific basis pursuant to program guidelines, that the overall performance of product *X* and product *Y* is equivalent. This offer of proof usually is based on statistical and laboratory evidence developed by the manufacturer or by a laboratory retained by the manufacturer. Only in this way, however, can a needless and economically punishing distinction of form over substance be avoided and a meaningful characterization of new or different overall products be made, in performance terms, without paralyzing the certification program. The professional judgments necessary for this task are certainly among the most challenging ones to face certification committees and boards.

Finally, an ultimately significant judgment task for program committees and boards is to consider the possible objections or appeals that a program participant or participants might make to adverse administrative determinations by the program administrator. These determinations may include analysis of specific technical matters, the general

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37. See FTC PROPOSED RULE AND STAFF REPORT, *supra* note 22, at 162-71.

38. *Id.*

39. The truism that "a meeting of three professional engineers will produce at least four professional opinions," certainly applies in this instance.



delisting of a certified product due to a laboratory test failure, or other noncompliance by the manufacturer with program procedures. The due process requirements providing for the prompt hearing and resolution of such objections and an appeals mechanism is well established in this context.<sup>40</sup>

The certification program committees and boards, composed of representatives of participant companies, help provide program management effectiveness, flexibility, and technical expertise for the competent operation of nonprofit certification programs. Furthermore, this participant input attracts the voluntary support of a substantial number of participants so that the certification programs can be economically viable. These vital management decisions, which inevitably must be made, involve the exercise of many subjective as well as objective judgments. This reality, however, belies the assumption of some commentators<sup>41</sup> that judgment matters seldom truly arise in this circumstance and, thus, that a minimal conflict of interest problem exists in certification programs.

Technical experts and business executives with "hands on" experience from participating companies serve as the decisionmakers on certification program committees and boards. The process of establishing the needed program guidelines and interpretations necessarily invites a vigorous clash of engineering experience and viewpoints, laboratory experience and viewpoints, practical manufacturing experience and viewpoints, and possible public interest representative or consumer criticism and viewpoints. The adversary process in which these different viewpoints are heard actually assures the very fullest range of expression on the technical and administrative questions at hand. The openness of these committee and board discussions, a basic due process requirement, is well justified in light of the complex administrative issues which must be resolved for certification programs to operate with continuity and integrity.

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40. FTC Adv. Op. No. 457 (File No. 713 7002), 78 FTC 1628 (1971), *codified at* 16 C.F.R. § 15.457 (1981). See *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008 (S.D. Ill.), *aff'd*, 506 F.2d 1404 (7th Cir. 1974).

41. Wachtel, *supra* note 1, at 31.

F. *The Potential Conflicts of Interest Which May Surface During the Discussions and Decisionmaking of Program Committees and Boards*

Certification programs, as an aspect of industry self-regulation, viewed in light of necessary administrative decisionmaking, may become fraught with antitrust dangers. The core problem is the potential conflicts of interest that are present when persons with a direct stake in the outcome of their decisions make critical judgments. A company employee may be as reluctant to vote in favor of a decision harmful to his own company as he is to approve a decision beneficial to a specific competitor. The temptation to vote in favor of a decision harmful to a competitor may be strong. Such a decision may also give rise to anti-trust problems, unless the record in support of that decision, procedurally and substantively, indicates fairness and openness in the consideration of all available relevant evidence.

Commercial conflicts of interest of the decisionmaking representatives of participant companies would quickly compromise the integrity of certification programs were the decisionmaking not subject to an adequate system of fairness and openness safeguards. In the absence of such safeguards, company representatives might disregard the stated purposes of the certification program and exploit its market influence for unilateral corporate advantage through too narrow or too stringent guidelines, interpretations, decisions, and the anticompetitive exclusion of products from the marketplace. Similarly, conflicts of interest could sway decision makers into being too lax or too broad in their guidelines, interpretations, and decisions, thus rendering the importance of the certification program so uncertain as to create a virtual fraud or misrepresentation of product quality and performance on the public. Overall, commercial conflicts of interest, without safeguards, would also threaten the basic public interest in the objective evaluation of technical and policy certification questions.

Requiring safeguards against conflicts of interest, and ensuring the admissibility of evidence setting forth the existence and scope of these safeguards, appears to be the best rule<sup>42</sup> for successfully advancing and protecting: (1) due process interests of openness in necessary interpre-

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42. See Brief for National Commission for Health Certifying Agencies as Amicus Curiae at 6, *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, cert. granted, 101 S. Ct. 3078 (1981) (No. 80-1765) [hereinafter cited as *Certifying Agencies Brief*] (on file with the *Washington University Law Quarterly*).

tative discussions, (2) public interests in the exercise of technical expertise and competence, and (3) antitrust interests such as lowering barriers to market entry and increasing productivity.

#### IV. THE ANTITRUST LOGIC OF CERTIFICATION ORGANIZATIONS IN LIGHT OF THE OVERVIEW OF ORGANIZATION DECISIONMAKING

##### A. *A Sound Basis Exists, Legally and Economically, to View Certification Programs as Industry-Wide Builders of Competition and Productivity*

###### 1. *The Rule of Reason Framework*

Justice Brandeis' famous exposition of the rule of reason standard was set forth in *Chicago Board of Trade v. United States*,<sup>43</sup> the original decision of the United States Supreme Court in 1918 applying the rule of reason to the activities of an industry self-regulation group.<sup>44</sup> In *Chicago Board of Trade* the various Board of Trade rules and regulations for brokers were recognized as beneficial industry self-regulation matters and were upheld by the Court as not unduly inhibiting competition.

Subsequently, in 1925, the Supreme Court in *Maple Flooring Manufacturers Associations v. United States*<sup>45</sup> expressly approved, under a rule of reason standard, the practice of product standardization by a trade association. The Court noted that use of the standards, despite some restraints on competition, was beneficial to the industry and to consumers.<sup>46</sup> Since 1925 courts have viewed industry self-regulation activities with favor. In each case, however, the courts have examined the specific self-regulation activities of the industry groups to determine whether their redeeming procompetition benefits, in light of pertinent surrounding circumstances, will outweigh any possible restraints on

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43. 246 U.S. 231 (1918).

44. Basically, the rule of reason calls for an in-depth analysis of all factors present in the case. For further discussion and the specific language employed by Justice Brandeis in *Chicago Board of Trade*, see notes 14-15 *supra*.

45. 268 U.S. 563 (1925).

46. *Id.* at 566. In *Maple Flooring*, the association members, all manufacturers of hard-wood flooring, exchanged information on past and present prices, stock on hand and transportation costs. *Id.* at 566-67. The Court stated, "[w]e do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information . . . bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses." *Id.* at 584. See note 68 *infra*.

competition also posed by the activities.<sup>47</sup>

Recent cases also have specifically expressed approval of standards and certification programs which meet a rule of reason standard.<sup>48</sup> In *Structural Laminates, Inc. v. Douglas Fir Plywood Association*<sup>49</sup> the originator of three-ply half-inch plywood was unable to sell its lumber because the certifying association refused to adopt the view that such plywood was satisfactory for use in the construction industry. In applying a rule of reason standard, the court acknowledged that a weighing of the benefits and detriments to competition caused by a certification program could lead to an acceptable justification for its rules and procedures.<sup>50</sup>

Similarly, in *Milk and Ice Cream Can Institute v. FTC*<sup>51</sup> and *National Macaroni Manufacturers Association v. FTC*,<sup>52</sup> although the government prevailed on various price-fixing charges, the courts emphasized that they were not holding all standards-related programs unlawful under the antitrust laws. In *Milk and Ice Cream Institute* the court expressly declined to enjoin the association's future standardization program.<sup>53</sup>

Because industry-wide certification programs will be viewed in light

47. *E.g.*, Los Angeles Mem. Coliseum Comm'n v. National Football League, 468 F. Supp. 154 (C.D. Calif. 1979), 484 F. Supp. 1274 (C.D. Calif.) (temporary injunction), *rev'd*, 634 F.2d 1197 (9th Cir. 1980).

48. *See, e.g.*, National Macaroni Mfrs. Assoc. v. FTC, 345 F.2d 421 (7th Cir. 1965); Milk and Ice Cream Can Institute v. FTC, 152 F.2d 478 (7th Cir. 1946); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

49. 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

50. The court held:

[A]ny system of standards pre-supposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade to some extent is restrained. This much however is Congressionally sanctioned and the court is of the opinion that, in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to antitrust liability.

261 F. Supp. at 159 (footnote omitted).

51. 152 F.2d 478 (7th Cir. 1946).

52. 345 F.2d 421 (7th Cir. 1965).

53. 152 F.2d at 483. The court stated that:

The present plan has been tested and found unlawful and we see no reason why some other plan of which the Commission might complain should not be tested in the usual way rather than in a proceeding for violating the cease and desist order, as would be the case if this provision should remain in the order.

*Id.*

of these precedents, it is evident that full attention to the complexities of market structures, the validity of underlying standards, and the demonstrable procompetitive benefits of a certification program in a given industry will be required. Furthermore, the administrative practices, guidelines, interpretations and decisions of a certification program will be essential elements in a successful defense in court against charges of improper and collusive exclusion of products from the marketplace.

Among the market complexities to be found in today's economy which deserve the greatest attention are the phenomena of increased industrial concentration<sup>54</sup> and declines in the growth of industrial productivity<sup>55</sup> in various segments of the economy. While the causes, effects, and dangers of these economic situations have been debated at length,<sup>56</sup> it can be agreed that considerable evidence exists to the effect that oligopolistic markets resulting from increased concentration impair competition and promote cartel or monopoly-like pricing.<sup>57</sup> Further, the stagnant, if not declining, level in the economy of industrial productivity and efficiency, whether absolute or relative, is the antithesis of the ultimate goals of antitrust policy.

Those elements of the marketplace hierarchy, such as certification programs, which arguably work to counter these economic problems, thus deserve urgent attention today. Such attention is essential not only for a better understanding of their unique characteristics as builders of competition and productivity in general, but also because these characteristics are crucial under a rule of reason standard when antitrust plaintiffs attack such programs in court.

## 2. *The Numerous Economic Benefits to the Marketplace from Certification*

The economic benefits and antitrust interests advanced by properly administered product performance certification programs are becoming increasingly significant, especially with respect to concentrated indus-

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54. See note 2 *supra* and accompanying text.

55. See note 3 *supra* and accompanying text.

56. See notes 2-3 *supra* and accompanying text. See also E. MANSFIELD, *PRINCIPLES OF MICROECONOMICS*, 217-39 (3d ed. 1980).

57. See generally C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 27 (1959); Adams, *Antitrust and Monopoly: A New Law is Needed*, 9 *ANTITRUST L. & ECON. REV.* 49, 49 (1977); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 *STAN. L. REV.* 285, 298 (1967).

tries. These aspects thus provide a sound rationale for the protection and promotion of certification programs.

In general terms, product performance certification programs present eleven economic benefits. First, certification programs present the opportunity to market certified products. This may lower artificial barriers to market entry to new firms, which can demonstrate the value of their products quickly, objectively, and convincingly.<sup>58</sup> Certification programs may thus maximize the number of competitors and the number of product choices within an industry by facilitating the entry of new and smaller producers into the market.

The facilitation of market entry also occurs because these new producers can avoid unnecessary product differentiation and undue capital requirements as a result of certification programs.<sup>59</sup> Unnecessary product differentiation is that which is "artificial" in economic terms and exists in form, not substance. It may be due to excessive image-related and nonfunctional information advertising which does not relate to performance, or marginal real differences in product performance or differences extremely difficult to measure.<sup>60</sup> Undue capital requirements for a new, innovative, firm are those which are "artificial" or excessive to the extent that they relate to attempts to meet high production quality targets but for products with no pre-established measurable basis of comparison to supposedly comparable competitive products, or unnecessary research and development or market development expenses.<sup>61</sup>

Great advantages exist especially from certification programs in increasingly concentrated and oligopolistic industries, such as various specialty machinery industries. The corporate "David" with a certified product has a means of effectively competing with the corporate "Goliaths," and stronger competition will develop as certification programs function to allow more "Davids" to enter the market. Certification programs thus provide a unique means to counter the antitrust dangers of overconcentrated industries.

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58. See generally Hoffman, *supra* note 21, at 61.

59. See generally Tag Mfrs. Inst. v. FTC, 174 F.2d 452, 462 (1st Cir. 1949); FTC PROPOSED RULE AND STAFF REPORT, *supra* note 22, at 44-53.

60. See R. BORK, *supra* note 2, at 312-30; M. GREEN, B. MOORE & B. WASSERSTEIN, *supra* note 2, at 13.

61. See R. BORK, *supra* note 2, at 320-24; M. GREEN, B. MOORE & B. WASSERSTEIN, *supra* note 2, at 13.

In times of high interest rates, the speed of product acceptance may also be the life-or-death key to the survival for new companies, whose cash flow is an important business planning factor. Certification programs assist in the realization of faster product acceptance in the market and therefore facilitate market entry by new firms in this fashion as well.

Second, certification programs may increase the manufacturing productivity of all competitors in an industry. They facilitate the production cost efficiencies and the quality control associated with longer production runs and methods proven to yield desired and demonstrable quality performance in the manufacturer's products.<sup>62</sup>

To the extent that minimum- or graded-performance standards can serve to eliminate needless variety (assuming needless variety can be demonstrated), product certification programs may also substantially reduce manufacturers' production costs which, in turn, reduce prices. Certification programs also increase industry manufacturing productivity by providing an incentive to manufacture products that meet and possibly exceed standardized levels of performance.

Third, certification programs may provide accurate, shorthand information facilitating comparative cost and quality purchasing by direct buyers and by those indirect buyers who can influence product choices and purchases. This enables such product selectors, whether professionals or members of the public, to allocate their dollars most efficiently. Certification programs may thereby maximize well-informed purchasing decisions.<sup>63</sup>

Fourth, to the extent that certification programs promote product uniformity, potential buyers may benefit from product interchangeability, convenience, and increased price competition.<sup>64</sup>

Fifth, certification programs and the standards they embrace may also serve as a channel for acceptance and spreading of product innovation.<sup>65</sup>

Sixth, certification programs may provide market incentives for providing products of improved quality, without precluding the availability of less costly lower quality products acceptable to a "reasonable

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62. See generally Hoffman, *supra* note 21, at 61.

63. *Id.*

64. *Id.* a 59-61.

65. *Id.*

man.”<sup>66</sup> At the same time, certification programs provide a disincentive to produce “junk” products unacceptable to a “reasonable man.”

Seventh, certification programs may lessen the likelihood of anti-competitive pricing and sales conspiracies. They create generic aspects to products that, to the extent the products are sold on a more fungible or commodity-like basis and less on a custom-made or brand-name basis, will mean market transactions may approach more closely the economists’ model of perfect competition. Resulting market transactions may also principally reflect buyer price preferences, product cross-elasticity, and a reduced chance of successful collusion and price conspiracies.<sup>67</sup>

Eighth, certification programs may deter frivolous, unfair, or deceptive advertising claims by producers generally. They create publicly available third party inspection and validation records of product quality and performance in light of meaningful standards. This will benefit both producers and buyers because certification programs help avoid confused buying decisions by providing an alternative to overly technical and overly complicated product claims.

Ninth, certification programs may maximize competition between a product industry as a whole and other industries. They maximize the availability of information on ranges of product performance for an industry with a view for what is identified as important product qualities reflected in product standards.

Tenth, certification programs may provide an opportunity and a role for the effective expression of public interest. The concerns of technical experts who render advice to the public, such as engineering professors, and those who make choices on behalf of the public, such as architects, can be voiced. Participation by consumer or public interest representatives in certification programs facilitates this. The expression of these concerns thus may impact on product manufacturing at an early stage of product marketing. These representatives will continue to review carefully the underlying validity of the standards used by the certification program. This may help avoid undue, wasteful, and nonproductive trial and error in manufacturer decisions regarding market needs. This opportunity may also provide a forum for voicing long-range pub-

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66. See Wachtel, *supra* note 1, at 1-4.

67. See generally E. MANSFIELD, *supra* note 56.



lic concerns which may complement necessarily short-term corporate business planning and profitability concerns.

Finally, in general, certification programs serve as an overall force to enhance competition by simply highlighting the strengths and weaknesses of each manufacturer's products.

Recognizing these types of considerations, the Supreme Court more than fifty years ago pointed out that standardization-related industry activities, which include certification programs, definitely can be beneficial to the industry and to consumers.<sup>68</sup>

Certification programs, however, due to their reliance on standards, may have anticompetitive potential as well. Certification that promotes reliance on standards may eliminate some alternatives as to quality and price.<sup>69</sup> Several examples exist of industry-wide certification programs being disapproved in Federal Trade Commission advisory opinions. These programs were invalidated on grounds of anticompetitive potential and failure to provide for necessary due process openness in the development of program guidelines and decisions.<sup>70</sup>

On balance, certification programs justifiably may be described as possible builders of industry-wide competition and productivity. In view of the dangers posed by possible conflicts of interest of program decision makers, however, clear recognition of the indicia of innocent intent on the part of certification organizations not to engage in illegal conduct is needed. Moreover, these indicia must be admissible as evi-

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68. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 566 (1925). The court stated, "[t]he defendants have engaged in many activities . . . which are admittedly beneficial to the industry and to consumers; such as co-operative advertising and the standardization and improvement of its product." *Id.*

69. See generally *Hoffman*, *supra* note 21, at 59-61. It has been pointed out that:

[Reliance on] a standard may drive a desirable but non-standard product off the market. Thus, an industry may promulgate a standard [and implement a certification program] ostensibly designed to upgrade quality which also raises price; the consumer may be forced to pay more for quality he does not want, or possibly does not even get [to the extent he relies on certification and standards]. Standards [and implementing certification programs] can also be used to fix prices and allocate markets, by limiting the diversity of products. Competitive patterns can be distorted if standards [implemented through certification programs] artificially classify functionally-interchangeable products into separate groups, or if certification criteria are adopted which cannot be applied with equal ease to all products in a market. [Reliance on standards through certification programs] may enshrine the status quo and actually inhibit innovation. A competitor offering a [noncertified] nonstandard product—e.g., one using a particular raw material—may be shut out of the market altogether.

*Id.*

70. See, e.g., *FTC Adv. Op.* (File No. 783 7008), 91 FTC 1204 (1978); *FTC Adv. Op.* (File No. 773 7001), 89 FTC 668 (1977); *FTC Adv. Op.* (File No. 773 7003), 89 FTC 654 (1977).

dence on the issue of conspiratorial intent for them to be of value in antitrust litigation. Only in this manner may certification programs meet the promise of becoming synonymous with building industry-wide competition and productivity and also avoid being victimized by possible abuses of their participants. The intent for a certification program to achieve the economic advantages noted above, in terms of the reasonably foreseeable results of the organization's activities, is certainly one relevant factor in proving innocent antitrust intent. The intent to resist conflicts of interest and any resulting antitrust abuses is another relevant factor in disproving wrongful conduct.

The overview of the actual administrative practices of certification programs suggests that any possible antitrust abuses actually flow specifically from those conflicts of interest which may surface as the certification organization dutifully observes the technical interest of expertise and competency in program administration, and the due process interests of openness in decisionmaking concerning program guidelines and interpretations. These two interests, however, are not inconsistent or necessarily contradictory. Rather, both interests can be protected, and the opportunity for possible conflicts of interest neutralized, by safeguards against those conflicts of interest. The relevant questions become whether a distinct legal duty exists for the existence of safeguards; what the effect of proof of meeting any such duty should be on the issue of conspiratorial intent; and how these safeguards may be achieved.

B. *A Distinct Duty Exists for Certification Programs to Provide Safeguards Against Participant Conflicts of Interest*

A distinct duty exists, derived from various due process considerations, for certification organizations to provide safeguards against participant conflicts of interest. The 1963 decision of the United States Supreme Court in *Silver v. New York Stock Exchange*,<sup>71</sup> and subsequent court decisions, have clearly established that industry-wide organizations with substantial commercial importance and powers of industry self-regulation have a special duty to administer their programs fairly. In *Silver* the Court ruled that the Exchange's right to self-regulation would be lost if the Exchange took disciplinary action against a member without affording due process procedural safeguards,

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71. 373 U.S. 341 (1963).

including notice and a hearing.<sup>72</sup>

Subsequent courts, relying on *Silver* and requiring due process procedures to be followed in disciplinary proceedings by industry-wide groups, have fashioned a right of fairness in the conduct of those disciplinary matters which, if violated, may lead to an antitrust violation. The courts have, for example, relied on the procedural requirements established by the Supreme Court in *Silver* to invalidate on antitrust grounds the expulsion of an association member when the association failed to provide adequate notice to the member of the charges against him, adequate opportunity to respond to those charges, and the opportunity to cross-examine his accusers.<sup>73</sup>

It is also clear that nonprofit industry groups of competitors that offer a service conferring a market advantage on products, such as that provided by sponsorship of a certification program, must be held to a special duty of care in ensuring the fair and impartial administration of the program.<sup>74</sup> Taking cognizance of the substantial economic power, public influence, and self-regulatory nature of certification programs, courts under *Silver* and its progeny, as well as *United States v. Terminal Railroad Association of St. Louis*,<sup>75</sup> have established the duty to assure fairness and integrity in certification programs.

In the case of standards-development organizations, specifically ASME, the duty to protect and safeguard program integrity was clearly noted by the Second Circuit in *Hydrolevel*. The court noted that ASME's influence created by its code of standards required it to safe-

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72. *Id.* at 361-63. The Court specifically found that:

The concerted action of the Exchange and its members [in disconnecting the direct-wire connections which a member had with the other Exchange members] was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to complete effectively as broker-dealers in the over-the-counter securities market.

*Id.* at 347.

73. *Rearick v. Holstein-Friesian Ass'n*, 472 F. Supp. 464 (W.D. Pa. 1979); *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008 (S.D. Ill.), *aff'd*, 506 F.2d 1404 (7th Cir. 1974).

74. *See United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) (association involved in determinations of which companies may enter a market must deal fairly and impartially with all applicants).

75. 224 U.S. 383 (1912). In *Terminal Railroad* the Supreme Court found that an association of railway terminal systems formed for the express purpose of obtaining control over all means of railway access to, and from St. Louis over the Mississippi River violated the Sherman Act. *Id.* at 409-10.

guard against misuse of that influence.<sup>76</sup>

The economic power and influence of certification organizations is at least as strong as the economic power of standards-development organizations. Certification programs provide the visible and credible evidence of compliance with those standards and certification marks that serve as the recognizable indicia of quality in the marketplace. Accordingly, the duty of a certification organization to guard against conflicts of interest must be at least as strong as that of a standards-development organization. Any less responsibility would immediately serve to discredit the value of certification programs where objectivity and reliability must, practically speaking, be a fundamental goal of the certification system.

The applicable due process standards for certification programs are slightly different from those applicable to standards-development organizations. Considerations of notice, applicable to standards-development organizations, are not included. In resolving the disputes and questions that may arise at committee and board meetings relating to administrative guidelines, interpretations, and responses to participants' requests for clarification, the due process required is best described as fairness, or fair play.<sup>77</sup>

This principle of fairness has procedural and substantive aspects. In procedural terms, fairness includes three elements:<sup>78</sup> a right to adequate disclosure of the grounds of a program guideline, interpretation, or adjudicative decision; a right for any complainant to show why the guideline, interpretation, or decision may be in error; and, a right for the complainant to attempt to satisfy the objections of the committee or board as to the basis of the dispute. Fairness in substantive terms requires that the certification guidelines, interpretations, and decisions as to disputed matters be supported by a demonstrable factual basis that is neither arbitrary nor inconsistent with reference to other organization decisions.

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76. *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118, 126 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 3078 (1981).

There is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product.

*Id.*

77. *Wachtel*, *supra* note 1, at 31.

78. *Id.*

This due process interest in fairness is one step removed from the due process interest in openness at general certification organization committee and board meetings. Both relate to the need for preserving full, unfettered, and open technical and policy discussions.

The *distinct* duty to safeguard against conflicts of interest is created by the joining of the due process duty to provide fairness with the due process duty to provide openness. It is not a matter of semantics;<sup>79</sup> the procedures relating to openness are different from the procedures relating to fairness. It is these types of procedures, when viewed together, that serve the larger and separate purpose of neutralizing the conflicts of interest discussed earlier. When faced with charges of antitrust liability stemming from the possible misconduct of small numbers of its decisionmaking members it is critical for a certification organization to recognize such a distinct duty in these terms. Only in this manner will the organization find the analytic means by which it can establish a basis in evidence for demonstrating the lack of conspiratorial intent.<sup>80</sup>

C. *If a Certification Organization Meets the Duty to Provide Safeguards Against Conflicts of Interests, the Organization Should be Found to be Free of Conspiratorial Intent*

A rule of reason standard, as the applicable test for possible antitrust conspiracy liability of a nonprofit certification organization, actually encompasses an examination of two interrelated subissues. The first issue concerns the reasonableness of any claimed restraint on competition, based upon weighing the alleged anticompetitive and procompetitive aspects of the restraint, together with the possibility of any less restrictive alternative,<sup>81</sup> to accomplish the redeeming benefits claimed for the restraint. Fundamentally, this examination would be an inquiry into whether the certification organization has caused any cognizable economic antitrust injury. The second issue concerns the intent of a certification organization and whether it knowingly participated in any conspiracy to create an unreasonable restraint of trade. The issue of

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79. The only cases to date in which certification organizations have been held liable for violations of antitrust law relate to apparent violations of the "openness" duty or the "fairness" duty and arbitrary and capricious denials of certification status. *E.g.*, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

80. Various practical suggestions as to how best to implement combined "openness" and "fairness" procedures are discussed in text at IV D *infra*.

81. P. AREEDA, *ANTITRUST ANALYSIS* 257-87 (1967).

intent is also intrinsically bound with the issue of the reasonableness of any claimed restraint, because an understanding of intent “may help the Court to interpret [economic] facts and to predict consequences.”<sup>82</sup> Intent is also a separate issue, however, for a finding, necessary for liability, of participation in a conspiracy.<sup>83</sup> Judging the intent of a collective entity such as a certification organization may be very difficult, especially because under a rule of reason standard, virtually all aspects of the organization’s processes would seem, at first blush, relevant for scrutiny.

The broad rule of reason standard applicable to certification programs under *Structural Laminates*<sup>84</sup> may, however, provide some relief. If a certification organization meets the legal duty to provide safeguards against conflicts of interest, then it would be most appropriate to find no conspiratorial intent in any antitrust case arising out of claimed abuses stemming from conflicts of interest. The evidence of meeting that duty is provided by the existence and use of organizational processes that guarantee due process openness and fairness. Safeguards against conflicts of interest therefore constitute not only the most probable evidence of existence of nonconspiratorial intent, but in fact would encompass the only relevant evidence on the issue of intent. This is so inasmuch as a finding that the legal duty to provide safeguards against conflicts of interest had been met would then be contradictory, as a matter of law, with any finding that the organization itself had lent its program in any way to serve the singular anticompetitive purposes of any members.

A broad rule of reason approach, but so focused, certainly would provide the most liberal opportunity for certification programs to serve their unique role as industry-wide builders of competition and productivity. One commentator has speculated that “it is doubtful that the relaxed attitude taken by the court in *Structural Laminates* . . . would

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82. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

83. Under the law of conspiracy, several tests exist to permit a finding of “knowing participation” in a conspiracy: (1) knowing acquiescence, (2) pervasive participation in a common scheme or plan, (3) the natural or probable consequences of acts, (4) specific intent. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 146-47 (1948); *Eastern States Lumber Retail Dealers’ Ass’n v. United States*, 234 U.S. 600, 612 (1919). In criminal felony antitrust cases, the typical criminal “specific intent” test would appear to apply.

84. *Structural Laminates, Inc. v. Douglas Fir Plywood Ass’n*, 261 F. Supp. 154 (D. Or. 1966), *aff’d*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

find wide judicial acceptance today.”<sup>85</sup> Contrary to this view, once it is recognized that a distinct duty exists for certification programs to provide safeguards against conflicts of interest, it would be highly appropriate to expect a revitalization of a liberal *Structural Laminates* approach in conflict of interest antitrust cases.

Confusion persists, however, as to the appropriate legal standard applicable in conflict of interest cases attempting to resolve the issue of conspiratorial intent. It is the *Hydrolevel* litigation which provides the best example of this confusion and of the sort of approach that can drastically undermine the logic of a rule of reason standard in determining the possible antitrust liability of a certification organization.

In *Hydrolevel*<sup>86</sup> a conflict of interest arose when two ASME members, selected by ASME to interpret boiler standards,<sup>87</sup> were paid by competitors of Hydrolevel and intentionally used their positions in the ASME standards program to drive Hydrolevel out of the boiler safety device business.<sup>88</sup> The public was first notified of the incident in a newspaper article.<sup>89</sup> Thereafter, ASME’s Professional Practice Com-

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85. Blecher, *Product Standards and Certification Programs*, 46 BROOKLYN L. REV. 223, 227 n.30 (1980).

86. “Hydrolevel Corporation (Hydrolevel) made safety devices to protect the public against personal injury and death from exploding boilers.” Certifying Agencies Brief, *supra* note 42, at 2-4.

87. “The American Society of Mechanical Engineers (ASME) conducts a process for establishing and interpreting standards for boilers and over 400 other devices. These standards are relied on by the public and incorporated in state legislation as impartial and objective evaluations of quality. ASME represents them to be such.” *Id.* at 2.

88. The chief ASME members who were selected by ASME to interpret standards and who participated in this scheme were Messrs. T. R. Hardin, executive vice-president of Hartford Steam Boiler Inspection and Insurance Company (Hartford, the country’s leading seller of boiler insurance to the industry) and John James, vice-president of research at McDonald & Miller (M&M, a corporation manufacturing up to 85 percent of the float cutoffs that were directly competitive with Hydrolevel’s probe device). Hardin and James secretly drafted a letter to ASME requesting a code “interpretation.” The ASME “answer” was written by Hardin, but signed by Mr. W. Bradford Hyott, an ASME official who routinely signed such letters without supervising or reviewing the conditions of their preparation or their content. This misleading letter was used by M&M to disparage Hydrolevel’s product to the trade.

*Id.*

89. In July 1974 a reporter for the Wall Street Journal, Ms. Priscilla S. Meyer, published an article concerning ASME. Myer, *How Rival’s Use of ‘Industry Code’ Report Created Problems for a Tiny Company*, Wall St. J., July 9, 1974, at 44, col. 1. Shortly thereafter, Mr. Paul T. Howse, Jr., a member of ASME’s governing board and ASME regional vice-president, wrote the ASME president, Dr. Rogers B. Finch: “If the facts are as stated in the article, it would seem that Mr. James should not only be relieved of his duties on the boiler code committee but he should also be kicked out of ASME for unethical conduct.” Certifying Agencies Brief, *supra* note 42, at 3.

mittee (PPC) conducted an official investigation and promulgated a resolution that was circulated to ASME's 90,000 members, public libraries, and others through ASME's official magazine, *Mechanical Engineering*.<sup>90</sup>

In March 1975 one of the two ASME members admitted before the United States Senate Subcommittee on Antitrust and Monopoly that he had destroyed relevant and material documents.<sup>91</sup> In 1979 a jury sitting in the United States District Court for the Eastern District of New York found ASME to be a coconspirator to an unreasonable restraint of trade in violation of the Sherman Act.<sup>92</sup> In 1980 the judgment of liability under section 1 of that act was affirmed.<sup>93</sup>

In view of these facts, the Second Circuit proceeded to adopt a vicarious antitrust liability principal and "apparent authority" agency standard by which it upheld the antitrust liability of ASME for the misconduct of its two members. This approach, however, was totally unrealistic because it completely begged the question of how, in view of admittedly existing openness and breadth in the ASME committee organization, ASME might have avoided a finding of conspiratorial intent despite the actions of the two. For certification programs as well as ASME, the approach adopted by the Second Circuit in *Hydrolevel* can be viewed only as a tragic and confusing chapter in antitrust history.

The main defect of the vicarious liability principle and "apparent agency" evidentiary standard, however, is that together they create a strict liability standard or virtually a per se rule of liability. It is a sham to call such an unduly narrow evidentiary standard as to conspiratorial intent an example of a rule of reason approach to liability. The United States Supreme Court taught in *Continental Ore Co. v. Union Carbide & Carbon Corp.*<sup>94</sup> that it is a broad rule of proof, not a narrow theory of

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90. That November 19, 1974 resolution stated: "PPC investigated the entire [Hydrolevel] incident and found no basis for further consideration of the issue. . . . This official resolution commended James for his "forthright manner," condemned "harassment" for ASME members serving "in their line of duty," and concluded that ASME procedures for handling code interpretation inquiries were "extremely well-founded." Certifying Agencies Brief, *supra* note 42, at 3.

91. *Id.*

92. 15 U.S.C. §§ 1 & 2 (1976).

93. 635 F.2d 118, 131 (2d Cir. 1980).

The Court of Appeals did not conclude that ASME maintained a serious, systematic program to prohibit, detect, investigate, or discipline conflict of interests. Hardin and James were never disciplined by ASME. Certifying Agencies Brief, *supra* note 42, at 2-4.

94. 370 U.S. 690 (1962).



agency, that is appropriate under a rule of reason approach.<sup>95</sup> The Second Circuit's application of agency law to the ASME standards program and the court's analogy to tort liability was thus totally unnecessary. The analytic means exist by which to recognize the distinct duty of a standards-related organization to safeguard against conflicts of interest and to determine whether that duty has been met.

Most pragmatically, the narrow evidentiary approach of agency law also is confusing because a rule of reason standard supposedly remains applicable to the issue of overall liability and the subissue of antitrust injury but, in substance, is to be abandoned on the subissue of conspiratorial intent. What a jury is to make of the proof of liability under such an internally contradictory approach is anyone's guess. The only apparent result is that the *Hydrolevel* split standard of evidence would increase the risk of certification program liability, have an undesirable chilling effect on certification programs, and, by diminishing the popularity of certification programs, would be fundamentally anticompetitive.

In view of the availability, for analytic as well as practical purposes, of the certification organization duty to provide safeguards against conflicts of interest, proof of "apparent agency" simply should not be admissible. It is irrelevant and contradicts, as a matter of law, the broad rule of reason liability and evidentiary standard permitted by *Structural Laminates*. A rule of reason evidentiary approach, already the rule as to deciding the issue of antitrust injury, should remain the standard for conspiratorial intent as well. In view of the desirability of protecting the unique role of certification programs as industry-wide builders of competition and efficiency, such an approach is most appropriate and, quite practically, constitutes a much less confusing evidentiary standard.

#### D. *Practical Means Exist to Implement Safeguards Against Conflicts of Interest*

Some practical suggestions for providing a highly visible system of openness and fairness due process safeguards for a certification pro-

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95. "The character and effect of a conspiracy are not judged by dismembering it and viewing its separate parts, but by looking at it as a whole." *Id.* at 699 (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)).

gram include several elements that should, taken together, help meet the duty to provide safeguards against conflicts of interest.

1. *Use of a broadly constituted certification organization Board of Directors, numerous broadly-constituted working committees, and an independent third-party program administrator ineligible to provide laboratory testing for companies within the program*

Broadly constituted representative groups of organization decision makers assure the greatest openness in the expression of various technical and policy views necessary for organization guidelines, interpretations, and decisions. Secrecy and closed executive session meetings should be avoided. As Justice Brandeis observed: "Sunlight is said to be the best of disinfectants."<sup>96</sup> The presence of public interest representatives on the board of directors, with veto control over industry representatives, is a salutary means for ensuring the fullest exposition of both public interest views and the views of industry representatives in support of or in opposition to proposed courses of action. In addition, it is important to keep the certification organization administrator's functions separate from any laboratory testing arrangements under the certification program for program participants. This is an effective method for completely avoiding conflicts of interest that the administrator might otherwise suffer and that could prove extremely sensitive for program participants.

2. *Use of "Quick-Action Committees" to resolve promptly matters of interpretation of program guidelines, standards, and test methods, subject to later ratification by the organization's Board of Directors*

Speed is essential to the practical and fair resolution of many participant inquiries and problems concerning program guidelines, standards, and test methods. The regularly held meetings of organization boards and committees often do not address such matters with the requisite speed. The use of special "Quick-Action Committees" is an excellent means to address this problem. Decisions adverse to a participant and to which the participant objects are stayed pending ratification in due course by the organization's committees and boards. "Quick-Action

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96. L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

Committees” also provide an excellent practical means of weeding out frivolous objections or innocent misunderstandings that can be resolved once competent technical attention is focused on a given question or complaint.

3. *Use of internal organization due process procedures for hearings on contested decisions of the organization administrator and committees*

Due process fairness requires that careful provision be made for a participant’s right, after proper objection, to a reexamination of program decisions or determinations adverse to that participant. The best record of due process fairness can be established through the use of a specific appeals procedure allowing review of administrator and committee determinations by the organization’s board of directors.

4. *Use of published organization guidelines, interpretations, and determinations as to program procedures and such matters as “equivalency,” “prototypes-in-test,” and inspections of manufacturing plants and test laboratories, together with the use of organization license agreements with participants spelling out the respective rights and duties of the program participant*

Due process fairness also suggests the need for a published record of organization guidelines and decisions. This will provide clear authority and precedent for organization determinations as well as avoidance of inconsistent determinations over time by the organization’s changing decisionmakers. Referring to these guidelines in a license agreement concerning the rights and duties of a participant regarding the certification program provides a clearly defined contractual basis for the organization to enforce its program procedures and guidelines. In addition, a clearly defined basis exists for a program participant to exercise various due process procedural rights.

These suggestions should provide a practical basis for building a clear record of the existence of due process openness and fairness as part of a certification program. If these and supplemental procedures are carefully followed in a highly visible manner, charges of prejudicial actions arising out of alleged conflicts of interest may be rebutted.

## V. CONCLUSION

Nonprofit organizations that conduct certification programs and their officers and staffs are not the only parties in need of reassurance that falling victim to the antitrust sins of their participants can be avoided. The many persons who represent participant companies in industry-wide certification programs also need to be assured that the means exist to avoid being trapped by personally disparaging, frivolous, and unfair charges of conflicts of interest. The many competing companies who participate in certification programs also require the assurance of fair administrative treatment on interpretative questions in those programs. Finally, the public needs the assurance that rather than being victimized by fraudulent and deceptive programs it is being well served by programs that promote increased product quality, competition, and economic productivity.

Careful attention to the legal duties and rule of reason approach may help provide the appropriate assurances. Above all, the unique benefits of certification programs in building industry-wide competition and productivity can be maximized only when a practical rule of reason approach is used to scrutinize certification organizations charged with antitrust abuses relating to conflicts of interest of certain of their decisionmaking representative members. Defining a distinct duty of certification organizations to provide safeguards against conflicts of interest, and the means to meet that duty, represents a step forward in the exposition of such a practical rule of reason approach.

