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Recommended Citation

E. Compton Timberlake, *Standardization and Simplification under the Anti-Trust Laws*, 29 Cornell L. Rev. 301 (1944)
Available at: <http://scholarship.law.cornell.edu/clr/vol29/iss3/6>

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STANDARDIZATION AND SIMPLIFICATION UNDER THE ANTI-TRUST LAWS

E. COMPTON TIMBERLAKE

This article is devoted to the various antitrust and practical problems which arise from group standardization and simplification programs, not only in normal times, but also under the present emergency procedures and legislation. No consideration will be given to individual standardization or simplification since no antitrust questions arise from the independent determination of one manufacturer to standardize his line or eliminate items therefrom.

Although very little has been written concerning the legal aspects of standardization and simplification, this activity is not novel. The production of goods in large quantities makes it essential that the products and the parts thereof be uniform and readily interchangeable. The manufacture of automobiles furnishes an excellent example of standardization within an industrial plant. In order to have mass production of automobiles it is necessary that each part be exactly the same size and have the same operating characteristics as all other like parts. This has not only created the assembly-line method of manufacture, thereby reducing costs to the public, but has also facilitated repairs at points remote from manufacture. Standardization can truly be said to be the basis of mass production.

It was inevitable that company standardization and the mass production system would lead to group standardization. Group standardization has been extremely popular, and numerous technical societies and trade associations have developed standards. It has become one of the chief activities of many trade associations and one of the dominating factors in social and industrial progress.

In 1927 the Secretary of Commerce established the Division of Trade Standards within the National Bureau of Standards to encourage the voluntary establishment by industrial groups of "commercial standards," covering grades, quality, and dimensional interchangeability. Several years ago the Department of Commerce transferred a great deal of this activity to the American Standards Association, a private and independent body. It is interesting to note that in 1942 the American Standards Association, the War Production Board, and the Office of Price Administration signed a contract which provides that the American Standards Association will carry on standardization work in connection with war measures, such as the conservation of critical materials.

Group simplification on the other hand had not made a great deal of headway until the impetus given to the movement by the War Industries Board in 1917 and 1918. "At the time American industry was mobilized for World War purposes, the War Industries Board in various surveys disclosed an overdiversity in sizes and varieties of industrial products, as well as a vital need for improved products. The Board insisted upon immediate simplification in certain fields, thus calling for simplification by a number of trade associations. Nonessential varieties and grades of many individual products were eliminated."¹

When American industry returned to a peacetime basis it was faced with industrial overcapacity. Manufacturers thus had a natural tendency to feature new sizes and styles in an appeal to individuals in order to capture a larger share of the market. This undue diversification of individual products led to activity by trade associations, technical societies, and government agencies to stop the trend.² The creation of the Division of Simplified Practice of the National Bureau of Standards, separately treated in another section of this article, was one of the steps taken to correct this situation.

Standardization and simplification activities by trade associations have greatly increased in the last twenty years. In a survey conducted by the Temporary National Economic Committee during 1938 and 1939, it was found that 725, or 58.3%, of the 1,244 national and regional trade associations responding to the questionnaires engaged in standardization and simplification activities.³

This tremendous increase in standardization and simplification makes it important to examine the antitrust aspects of group standardization and simplification programs. This article will first discuss the legality of such activity. In a separate section the effect upon such group activity of procedures and legislation adopted during the present emergency will be discussed.

I. DEFINITIONS

A great deal of confusion has resulted from the fact that the terms "standardization" and "simplification" have not been precisely defined. The term "simplification" has been loosely used to describe various types of activity and this has led to misunderstanding. For example, simplification has been used as meaning the elimination of sizes, types, grades or colors

¹Temporary National Economic Committee Monograph No. 18, *Trade Association Survey* (1941) 310.

²*Ibid.*

³*Id.* at 374.

of a product, as well as to describe the activity of the Department of Commerce in formulating recommendations. The term "simplification" was originally used by Secretary of Commerce Herbert Hoover to describe the process of formulating Simplified Practice Recommendations which it was hoped would result in the voluntary elimination of unnecessary sizes, types, grades and colors of a product. Because of the convenience of the term "simplification" it appears to have been applied to the result hoped to be attained, rather than the process, and this confusion in the use of the term appears in consent decrees, letters and writings upon the subject.

It has been said that "logically simplification is one kind of standardization"⁴ and that "simplification upon a national scale is the negative phase of standardization."⁵ That standardization and simplification are closely related cannot be disputed. The Department of Commerce in an official publication did not differentiate between the two activities.⁶ The Federal Trade Commission has recognized the close relationship between standardization and simplification but pointed out that they involve separate steps.⁷

The Temporary National Economic Committee defined standardization and simplification and quoted with approval Mr. E. W. Ely of the National Bureau of Standards as follows:⁸

Standardization is primarily technical and creative. Its function is to determine and establish in use the best design, quality, method, or process for performing a desired function.

Simplification, on the other hand, is commercial and selective. Its function is to determine which sizes or items of a product are most important and to concentrate production upon them whenever possible. It may be applied to articles already standardized as to design or size, or it may be applied as a step preliminary to standardization by reducing the number of items to be standardized.

The difference in the various definitions can be accounted for in part by the differences in approach. Some writers look at the process which is followed in standardization or simplification and define the terms in this light, while others are swayed by the result.⁹

⁴Agnew, *Legal Aspects of Standardization and Simplification* (Oct. 1941) INDUSTRIAL STANDARDIZATION.

⁵KIRSCH, *TRADE ASSOCIATIONS—THE LEGAL ASPECTS* (1928) 219.

⁶DEPT OF COMMERCE, *TRADE ASSOCIATION ACTIVITIES* (1927) 84: "Industrial standardization consists in singling out specific products and materials, in settling upon their performance properties and dimensions, and in concentrating upon them both in production and in use to the end of bringing about the greatest possible industrial efficiency."

⁷FEDERAL TRADE COMMISSION, *OPEN-PRICE TRADE ASSOCIATIONS* (1929) 210.

⁸TNEC Monograph No. 18, *Trade Association Survey* (1941).

⁹This approach is made in an article by P. G. Agnew, *Legal Aspects of Standard-*

The terms "standardization" and "simplification" are closely related, but they do involve entirely different approaches and are intended to achieve entirely different results. In standardization the approach is from a technical standpoint to define all products suitable for a particular purpose with reference to their physical and technical properties. In simplification the standard product lines are defined upon the basis of what sizes, types, shapes, colors or varieties of products consumers are demanding. This has sometimes been referred to as type standardization. Having in mind these facts and defining *the process followed and not the hoped-for results*, the following definitions have been evolved which it is believed are correct from a legal standpoint:

Standardization means the formulation of standards defining a product or process with reference to composition, construction, dimension, quality, operating characteristics, performance, nomenclature and other like factors.

Simplification means the formulation of standard product lines consisting of types, sizes, shapes, grades, colors and varieties of product most frequently demanded by consumers.

The legality of group standardization and simplification programs under the antitrust laws will be discussed as well as certain practical problems encountered by trade associations in this field. There are many factors distinguishing the Simplified Practice Recommendation of the Department of Commerce from such activity by trade associations, and for that reason a separate section will be devoted to a discussion of that subject.

II. THE LEGALITY OF STANDARDIZATION AND SIMPLIFICATION

A. Court Decisions

No court decisions directly involving the legality of standardization or simplification activities have been found; however, there are several cases dealing generally with these activities. The *Maple Flooring* complaint¹⁰ charged that standardization of grades was one of the means used to effectuate the price-fixing conspiracy. The decree which was entered did not

ization and Simplification (Oct. 1941) INDUSTRIAL STANDARDIZATION, where it was said: "Simplification differs from other kinds of standardization, for example from dimensional standardization, mainly in the method of approach. In simplification work, first consideration is usually given to sales records so as to eliminate slow-moving items; while in setting up other kinds of standards technical considerations are usually of prime importance. In simplification we fix our attention upon the things which we wish to eliminate; while in other kinds of standardization we fix our attention upon the things we wish to keep and to concentrate upon. In simplification we 'eliminate unnecessary types, sizes, and grades of products.' In standardization we 'concentrate upon the optimum number of types, sizes and grades of products.'"

¹⁰United States v. Maple Flooring Manufacturers' Assn., (W. D. Mich. 1923).

cover the standardization activities of the association. The defendants appealed and the decree was reversed by the Supreme Court.¹¹ While the standardization activities of the Maple Flooring Manufacturers' Association were not squarely before the Supreme Court, in stating the facts Mr. Chief Justice Stone (then an associate justice) said: "The defendants have engaged in many activities to which no exception was taken by the government and *which are admittedly beneficial to the industry and to consumers*; such as co-operative advertising and the *standardization and improvement of the product.*"¹² [Emphasis supplied.]

Standardization was also mentioned in the *Appalachian Coals* case.¹³ There the Supreme Court sustained a plan whereby the coal producers in the Appalachian area agreed to sell coal through a joint selling agency which the government alleged would result in fixing the price. The Supreme Court noted¹⁴ that the plan involved an agreement "to establish standard classifications" and also pointed out¹⁵ that the lower court had found that the lack of standardization of sizes and the misrepresentation as to sizes had been injurious to the coal industry as a whole. Thus the Supreme Court tacitly approved standardization in order to prevent misrepresentation. It should be pointed out that the Supreme Court found¹⁶ that "no attempt was made to limit production" and it was clearly shown that the group performing the standardization work did not dominate any market.

These cases show that the Supreme Court has, at least inferentially, approved standardization and improvement of the product, provided, however, that it is not part of a price-fixing scheme and does not unreasonably limit production.

In 1940 the Department of Justice filed a civil complaint against manufacturers of gypsum and gypsum products charging a violation of Sections 1, 2 and 3 of the Sherman Act.¹⁷ The complaint alleged that the defendant companies "have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area by" the five means alleged, including the following:

- (a) concertededly raising and fixing at arbitrary and noncompetitive

¹¹Maple Flooring Mfrs.' Assn. v. United States, 268 U. S. 563, 45 Sup. Ct. 578 (1925).

¹²*Id.* at 566, 45 Sup. Ct. at 579.

¹³Appalachian Coals, Inc. v. United States, 288 U. S. 344, 53 Sup. Ct. 471 (1933).

¹⁴*Id.* at 358, 53 Sup. Ct. at 473.

¹⁵*Id.* at 363, 53 Sup. Ct. at 475.

¹⁶*Id.* at 367, 53 Sup. Ct. at 476.

¹⁷United States v. United States Gypsum Company, *et al.*, Civil Action No. 8017 (D. C. D. C. filed Aug. 15, 1940). Trial of this case was begun in November, 1943.

levels the prices of gypsum board manufactured and sold by said companies in the Eastern area;

(b) concerted standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board, for the purpose, and with the effect, of eliminating competition arising from variations in methods of production and in kinds of board manufactured and distributed in the Eastern area; . . .

The same complaint set forth provisions of the license agreements allegedly used to control the prices and terms and conditions of sale for gypsum board. One of those alleged provisions is as follows:

(f) standard sizes of gypsum board, with specified differentials of nonstandard sizes and prohibition of sales to dealers of board of nonstandard sizes; . . .

This complaint appears to charge an agreement to misuse a standardization program for the purpose of eliminating nonstandard processes and products. The complaint is primarily directed against price fixing, and clearly alleges the use of the standardization program as a means of effectuating the price-fixing conspiracy.

During May, 1942, a New York grand jury returned an indictment alleging a conspiracy to allocate and divide the market in violation of the Sherman Act.¹⁸ The indictment alleged that the Flexible Metal Hose and Tubing Institute maintained a standardization committee "ostensibly to standardize and make uniform the products of the industry, but actually and in fact to attempt to give legal sanction to the division and allocation of the Flexible Hose and Tubing market among the defendant corporations to the exclusion from such market of manufacturers who are nonmembers of the defendant institute." It was alleged that one of the means of effectuating the conspiracy was the misuse of standardization to force nonmembers to join the Institute or, as an alternative, to exclude them from the market.¹⁹

¹⁸United States v. American Brass Co., *et al.* (S. D. N. Y.). On Oct. 9, 1942, the trial of this case was postponed for the duration of the war.

¹⁹The means and methods are extremely interesting and allege that the conspiracy was to be effectuated by holding the committee out as representing 90% of the industry when in fact it represented only 60%; by inducing customers and bureaus of the government to adopt recommendations and specifications for particular types of flexible metal hose and tubing; by having the recommendations and specifications descriptive of only the members' products; by preparing specifications for only one type of flexible metal hose and tubing for a particular use or purpose regardless of the suitability of other types for the same use; by refusing and failing to give notice to nonmembers of the activities and recommendations and proposed specifications prepared by the committee; and by using the standardization committee as a means of forcing nonmembers to join the Institute or, as an alternative, of excluding them from the market.

The indictment really charges a conspiracy to exclude competitors from the field and it is evidently the position of the government that while standardization standing alone may be legal, under well-defined authority, an activity lawful in itself may become unlawful when made part of an unlawful conspiracy.²⁰

The allegations of this indictment, concerning the preparation of specifications for only one type of flexible metal hose and tubing for a particular use or purpose regardless of the suitability of other types for the same use, involve a matter of extreme importance to trade associations. Frequently a trade association will begin a standardization program and for some reason the work is abandoned when only partially completed. The result is that only some of the products for a particular use are standardized while others equally suitable have not been considered. Such activity might raise an unfavorable inference, since this indictment indicates that where the abandonment of the standardization programs is with the *intent* to exclude certain items, the Department of Justice believes that it constitutes a restraint of trade. It does not appear to preclude the abandonment in good faith of a standardization program, but only abandonment or the disregard of other suitable products where there is the alleged intent to exclude others from the field. If a trade association does abandon a standardization program before considering the suitability of all items for a particular use, this should be pointed out when the standards are published and any misrepresentation of the standards carefully avoided. These precautions would negate any intent to exclude certain items.

From the above cases we may tentatively conclude that standardization is not an unreasonable restraint of trade, provided that it is not part of a price-fixing scheme, does not restrict production, prevent the sale of seconds, and is not intended to exclude competitors from the field.

No court decisions involving simplification activities by trade associations or other private groups have been found. The Simplified Practice Recommendations of the Department of Commerce have been mentioned by the Supreme Court but the Court did not discuss the legality of those recommendations. In *Federal Trade Commission v. Algoma Lumber Co., et al.*,²¹

²⁰In a letter dated March 26, 1940, from Thurman Arnold, then Assistant Attorney General in charge of the Antitrust Division, to the Editor of the Journal of Commerce, the *Southern Pine Association* consent decree was discussed and Mr. Arnold's letter concluded: "Thus it will be seen that standardization programs in and of themselves are not condemned by the Department. It is the wrongful use to which such programs have been put that has been questioned."

²¹291 U. S. 67, 54 Sup. Ct. 315 (1934).

the Commission had issued a cease and desist order upon the ground that the name "California White Pine," as applied to lumber made from *pinus ponderosa*, was an unfair method of competition. The term "California White Pine" was listed as a trade equivalent of *pinus ponderosa* in a list of standard commercial names for lumber forming a part of a report of Simplified Practice Recommendations issued by the Bureau of Standards. It was noted that the circuit court had held that the recommendations of the Bureau of Standards "are in a high degree persuasive, and that in conjunction with other evidence they are even controlling."²² The Supreme Court rejected this contention as misconceiving "the significance of the Government's endeavor to simplify commercial practice" and held that the recommendation of the Bureau of Standards "is of little weight." The Supreme Court then said:²³

The recommendations of the Bureau of Standards for the simplification of commercial practice are wholly advisory. Dealers may conform or diverge as they prefer. The Bureau has defined its own function in one of its reports. The Purpose and Application of Simplified Practice, National Bureau of Standards, Department of Commerce, July 1, 1931, pp. 2, 7, 10, 17. "Simplified practice, is a method of eliminating superfluous variety through the voluntary action of industrial groups." "The Department of Commerce has no regulatory powers" with reference to the subject and hence "it is highly desirable that this recommendation be kept distinct from any plan or method of governmental regulation or control. . . ." [Emphasis supplied.]

The Court considered the aims of the Federal Trade Commission and the Division of Simplified Practice and stated that the aim of the latter "is to simplify business by substituting uniformity of methods for wasteful diversity, and in the achievement of these ends to rely upon co-operative action." This does not mean that the Supreme Court sanctioned agreements to eliminate, but merely co-operative action in formulating recommendations which are "wholly advisory."

As the Supreme Court pointed out, there is no statutory authority for the formulation of Simplified Practice Recommendations. Probably for this very reason Secretary of Commerce Herbert Hoover wrote to Attorney General Daugherty on February 3, 1922, and requested an informal opinion as to the legality of co-operative trade association activity. It is interesting to note that Mr. Hoover had first requested a formal opinion, but after a suggestion by the Attorney General an informal opinion was requested.

²²*Id.* at 73, 54 Sup. Ct. at 318.

²³*Id.* at 74-5, 54 Sup. Ct. at 318.

Mr. Hoover asked, among other things, if a trade association may "in cooperation with its members, advocate and provide for the standardization of quality and grades of product of such members, to the end that the buying public may know what it is to receive when a particular grade or quality is specified; . . . and may the association co-operate with its members in determining means for the elimination of wasteful processes in production and distribution and for the raising of ethical standards in trade for the prevention of dishonest practices?" The reply of Attorney General Daugherty dated February 8, 1922, was so hedged that it is of little practical assistance. In effect he stated that if the activity did not restrain trade, it was not illegal.²⁴ The letter did approve co-operative action in formulating methods which would result in the elimination of wasteful processes in production, but it did not approve an agreement to eliminate.

B. Consent Decrees in Antitrust Cases

The numerous consent decrees which have been entered in antitrust cases have been examined.²⁵ Some of these decrees contain interesting provisions casting light upon the legality of standardization and simplification.

In *United States v. Tile Manufacturers' Credit Association, et al.*,²⁶ a consent decree was entered which provided that nothing in the decree restrained the defendants from maintaining an association for, among others, the following purpose:

(h) To secure and maintain the standardization of quality and of technical and scientific terms, and the elimination of nonessential types, sizes, styles or grades of products.

The complaint in that case alleged in detail a price-fixing agreement. After describing the various means by which the conspiracy was to be effectuated, the complaint listed seventeen other practices which were alleged to be part of the conspiracy. Among these was the allegation that the defendants conspired "to standardize the shapes, etc., of tile made, eliminating many now sold, and establish the use of standardized catalogues of said association (catalogues now being prepared)."²⁷

²⁴"I can now see nothing illegal in the exercise of the other activities mentioned, provided always that whatever is done is not used as a scheme or device to curtail production or enhance prices, and does not have the effect of suppressing competition . . . if in the actual practice of any of them it shall develop that competition is suppressed or prices are materially enhanced, this Department must treat such a practice as it treats any other one which is violative of the Anti-Trust Act."

²⁵During the period from 1918 to 1932 some of the consent decrees are not reported and some, therefore, have not been examined.

²⁶*United States v. Tile Manufacturers' Credit Association, et al.* (S. D. Ohio, 1923).

²⁷It is interesting to note that on October 20, 1924, R. M. Hudson, Chief of the

The *Tile Manufacturers'* decree should be contrasted with the recent decree entered against the Institute of Carpet Manufacturers of America, Inc.²⁸ In that decree the elimination of product lines was enjoined. The complaint charged an agreement to fix prices of particular products and to fix differentials in prices between different widths, lengths, sizes and qualities of products. The decree enjoined agreements "to limit the kinds, quality, grade, quantity or the number of lines of merchandise to be manufactured and sold."

These two decrees appear to be contradictory. It is believed that the *Tile* decree permitted the formulation of standard product lines only when there was no agreement to adhere, while the *Carpet Manufacturers* decree specifically prohibited agreements to make only standard items or agreements to eliminate items. In other words, under the *Tile* decree the decision to eliminate was to be individually made by each manufacturer. This interpretation seems to be correct from a legal viewpoint, but even if we assume that the *Tile* decree permitted agreements to eliminate, then the *Carpet* decree makes it clear that the view of the Department of Justice has changed since the *Tile* decree was entered in 1923.

There are other decrees relating to standardization activities which are of interest. In *United States v. Southern Pine Association, et al.*,²⁹ the decree enjoined the association from carrying on standardization activities in connection with certain other matters under the control of that association, namely the exclusion of nonmembers from the association. It should

Division of Simplified Practice of the Department of Commerce, wrote to Stephen B. Davis, Solicitor of the Department of Commerce, which letter indicated that there had been some reluctance on the part of business men and trade associations to take part in simplification programs by reason of legal doubts as to the propriety of such activity. He requested Mr. Davis to adduce all the authorities sustaining this activity which might be cited to settle such doubts and to draft a standard reply to the following question: "Is it legally permissible for a trade association to determine upon a restricted number of standards for sizes and kinds of product, and for the members of such association to agree with each other to restrict their product accordingly?" Mr. James J. O'Hara, Acting Solicitor, replied on October 29, 1924, and suggested a standard letter mentioning the *Tile Manufacturers* consent decree and the *Maple Flooring* case and concluding: "The standardization and simplification programs as carried out by the Department do not involve any agreement on the part of those interested to restrict production. They comprehend that the standards, sizes, types or styles agreed upon shall be recognized by the industry as the standards and that anyone a party thereto is free to manufacture other styles, sizes or types than those which it is agreed shall be recognized as the standards." [Emphasis added.] This letter in effect stated that the answer to Mr. Hudson's specific question was "no." Mr. O'Hara clearly stated that as long as there is no agreement to make only standard items, in his opinion the activity is legal.

²⁸*United States v. Institute of Carpet Manufacturers of America, Inc.*, C. C. H. Trade Reg. Service (9th ed.) ¶ 52,517 (S. D. N. Y. 1941).

²⁹C. C. H. Trade Reg. Service (8th ed.) ¶ 25,394 (E. D. La. 1940).

be noted, however, that the decree specifically provided that standardization, inspection and grade-marking activities could be carried on by a newly-created inspection bureau open to members and nonmembers on the same basis.³⁰ In a somewhat similar situation a decree enjoined the grading and grade marking of lumber when not carried on in good faith "to promote competence in rendering grading and inspection services."³¹

The most recent decree dealing with standardization is the *Synthetic Nitrogen* decree.³² This decree prohibited the defendants from fixing and determining the kind and amount of nitrogen-bearing fertilizer to be sold, and from fixing and determining the amount of nitrogen to be contained in any nitrogen-bearing fertilizer sold by them to others. The indictment in this case, which was returned on September 1, 1939, shows that a price-fixing scheme was charged and that the standardization activities were alleged to be the means by which the defendants were enabled to fix prices of synthetic nitrogen products. This decree restates the proposition that standardization becomes unlawful when it is part of a price-fixing scheme.

These decrees are extremely enlightening as to what standardization activities, the Antitrust Division considers to be unreasonable restraints of trade. The *Tile* decree specifically permits standardization, but when standardization was tied to a price conspiracy it was enjoined in the *Synthetic Nitrogen* decree. The *Southern Pine* and *National Lumber* decrees permit standardization (grade marking of lumber) when it is open to all manufacturers on an equal basis, is carried on in good faith and does not exclude competitors from the field. The *Associated Marble* decree³³ is particularly important for there "concerted action" to establish "standards for marble with respect to sizes, dimensions, colors, quality" was permitted, provided that it does not "discriminate against any competitor or have the effect of restraining or preventing the sale or installation of marble." Probably the

³⁰The decree in the *Southern Pine* case caused a great deal of confusion in circles interested in standardization and made many business men and trade associations wary of standardization programs. On March 26, 1940, Mr. Thurman Arnold (then Assistant Attorney General) wrote to the Editors of the *New York Journal of Commerce* explaining the position of the Department of Justice in regard to standardization and pointing out the permissive provisions allowing standardization of grades and sizes. The letter was in reply to an article appearing in the *New York Journal of Commerce*. Mr. Arnold's letter concluded: "Thus it will be seen that standardization programs in and of themselves are not condemned by the Department. It is the wrongful use to which such programs have been put that has been questioned."

³¹*United States v. National Lumber Manufacturers Association*, C. C. H. Trade Reg. Service (9th ed.) ¶ 52,593 (D. C. D. C. 1941).

³²*United States v. Synthetic Nitrogen Products Corporation et al.*, C. C. H. Trade Reg. Service (9th ed.) ¶ 52,700 (S. D. N. Y. 1941).

³³*United States v. Associated Marble Companies, et al.*, C. C. H. Trade Reg. Service (9th ed.) ¶ 52,612 (N. D. Calif. 1941).

most significant part of that decree is that standardization may be carried on "provided no such standard for marble shall forbid the production or sale of nonstandard marble which is identified as such." Thus, the Antitrust Division clearly believes that agreements on the part of manufacturers to make or sell only items which are standardized constitute unreasonable restraints of trade and violations of the Sherman Act.

C. Federal Trade Commission Complaints and Orders

In a number of recent complaints the Federal Trade Commission has attacked standardization and simplification programs when such programs have, in the opinion of the Commission, operated to restrain and suppress competition. *In the Matter of the Tennessee Products Corporation, et al.*, Docket 4535 (issued July 9, 1941, pending) the complaint charged that the respondents had engaged in a conspiracy to eliminate and suppress all price competition among themselves and to monopolize the sale of hardwood charcoal in a certain locality. The complaint charged that the defendants, among other things, had conspired to establish and had established "the sizes of the packages in which hardwood charcoal is to be packed for retail sale." When analyzed, it is apparent that this complaint is not directed at standardization activities as such, but indicates the opinion of the Commission that standardization becomes illegal when used in connection with a price-fixing conspiracy.

A similar complaint was issued on September 30, 1941, entitled *In the Matter of the Crown Manufacturers Association of America, et al.*, Docket 4602 (pending). This complaint also charged a price-fixing conspiracy and alleged that in furtherance thereof the Association had adopted regulations for the standardization of commodities produced by the respondent members.

On October 7, 1941, the Federal Trade Commission again acted to enjoin a standardization program which was used in connection with an alleged price-fixing conspiracy. *In the Matter of National Crepe Paper Association of America, et al.*, Docket 4606 (pending), the complaint, after charging a price-fixing conspiracy, alleged that the respondents had adopted and maintained "standard uniform colors, sizes and ratios in order to facilitate and maintain identity of prices." Two days later another complaint, *In the Matter of Crouse-Hinds Company, et al.*, Docket 4610 (pending), was issued charging a conspiracy to fix identical prices on traffic-signal devices, and the Commission charged that one of the means and methods used by the respondents in effectuating the alleged conspiracy was a standardization program. A similar situation was alleged in the complaint entitled *In the Matter*

of *Liquid Tight Paper Container Association, et al.*, Docket 4675 (January 22, 1942).

On March 16, 1943, the Federal Trade Commission issued a cease and desist order *In the Matter of the Electrical Alloy Section, et al.*, No. 4558. The order directed the respondents to cease and desist from fixing prices, exchanging price information, submitting uniform bids, or fixing and maintaining uniform resistance standards or other uniform standards for use in connection with the manufacture of their wire products, for the purpose or with the effect of fixing or attempting to fix identical prices at which such products are sold.

All of these cases involve alleged price-fixing conspiracies, and the standardization program carried on by the respondents was allegedly ancillary thereto for the alleged purpose of facilitating the comparison of prices.³⁴

A recent order of the Federal Trade Commission is particularly important because of its possible implications. The original complaint was issued on June 20, 1934 (*In the Matter of Keiner Williams Stamping Co., et al.*, Docket 2199). On July 31, 1941, this complaint was dismissed without prejudice and a new complaint was issued (*In the Matter of the Milk and Ice Cream Can Institute, et al.*, Docket 4551). A cease and desist order was issued on September 18, 1943. In the original complaint it was charged that in furtherance of an alleged competition-suppressing and price-fixing conspiracy the respondents had standardized the construction of milk and ice cream cans so that they were of uniform material, weight and general construction. The complaint contained the following caveat: "(The Commission is not here complaining against the alleged standardization as such, but only against the use thereof as a means of carrying out the price-fixing conspiracy hereinbefore charged.)" *In the superseding complaint it is significant that the caveat is dropped.* It may be that the caveat was eliminated because it is not considered good pleading to insert such a statement in a complaint, yet it may have other implications.

³⁴These cease and desist orders are all in line with the statement made in the *Report of the Federal Trade Commission on Consideration of High Prices of Farm Implements in 1920* at 350 that "while standardization and elimination (of superfluous or little-used farm equipment) do not of themselves involve any questionable legal issue, the necessity for standard specifications in order that costs and prices may be compared is apparent." They are also in accord with a letter dated March 12, 1931, written by Mr. C. W. Hunt, chairman of the Federal Trade Commission, at the direction of the Commission, to the Secretary of Commerce which stated: "In no matter has the Commission ever held standardization of commodities by members of an industry to be violative of any of the statutes it has the duty of enforcing." It is interesting to note that almost every complaint in recent years against a trade association for price fixing has alleged standardization to be one of the means used to effectuate the conspiracy.

The new complaint charged an unlawful combination "to suppress, hinder, lessen and restrain competition in the manufacture, sale and distribution of milk and ice cream cans" in interstate commerce. It then alleged, among the means and methods, price-fixing and freight-equalization plans and further alleged:

Respondent corporations, by mutual agreement and understanding, *eliminate models and styles of cans, change the design of cans and otherwise standardize their products* independently of and beyond any requirements for standardization prescribed by the Federal or State Governments, or any commissions or authorities thereof, *for the purpose of eliminating competition in the attractiveness of their products to buyers*, and furthering their aforesaid common purpose to lessen, suppress, hinder and restrain competition.

Respondent corporations, through the respondent Institute and by means of meetings, conferences and interchanges between themselves, deliver to one another in advance, or during the production of new models and improvements on models and styles of milk and ice cream cans all of the pertinent information concerning the same, and *otherwise co-operatively promote uniformity of design and pattern in their products and restrain each other from competitively seeking to excel one another in the development and improvement of their products*. [Emphasis supplied.]

This is the first instance in which standardization has been attacked in and of itself and, although the complaint also charged an agreement to eliminate models and styles of cans, the attack upon standardization seems to be independent thereof. It is true that the complaint as a whole charged a price-fixing conspiracy, but a reading of this complaint and order cannot help but lead to the conclusion that the Federal Trade Commission is looking askance at standardization programs even when not connected with price fixing, if it feels that the purpose or effect is to eliminate competition among the products of the members engaging in the standardization program. The fact that the caveat contained in the original complaint was eliminated from the superseding complaint may, therefore, have grave implications. On the other hand, it may be that all that the Commission intended to allege was that standardization was used as the means of effectuating a price-fixing conspiracy.

As has been pointed out, the above complaint and order also attack an agreement to eliminate "models and styles of cans." It is important to compare that complaint and order with the order entered *In the Matter of Joseph Dixon Crucible Company, et al.*³⁵ That order dealt with a standardization

³⁵29 F. T. C. 749 (1939).

program which had as its alleged purpose the elimination of the number, style, grade and quality of wood-cased lead pencils. In view of the fact that the alleged purpose was to reduce the number and grade of lead pencils, it is felt that what the Commission actually enjoined was an agreement to make only standard items, *i.e.*, an agreement to eliminate nonstandard items. The complaint in that case charged a conspiracy to fix uniform prices, terms and conditions of sale and alleged that in furtherance of the agreement the respondent members, among other things, have agreed to "Investigate and consult with each other, . . . with respect to a standardization program having as its objective a limitation of the number, style, grade and quality of wood-cased lead pencils manufactured and offered for sale." The cease and desist order enjoined the price-fixing conspiracy and also prohibited the respondents from "Investigating or consulting with each other with respect to a standardization program having as its objective the limitation of the styles, grades or qualities of wood-cased lead pencils manufactured and offered for sale by any of the respondents." The order, however, contained an interesting provision which is as follows:

It is further ordered, That nothing herein shall be construed to prevent the respondents, or any of them, from investigating or consulting with one another, for the purpose of attempting to work out a simplification program for the pencil industry, whether said investigation or consultation is done in conjunction with the National Bureau of Standards, in accordance with the procedure of said Bureau or amongst any or all of respondents: *Provided,* however, that such investigation or consultation shall not be for the purpose of effectuating any agreement or combination among any or all of said respondents to fix or maintain uniform prices on comparable wood-cased lead pencils or to commit any of the other acts or things from which they are ordered herein to cease and desist.

The proviso clearly contemplated the formulation of standard product lines and did not envision agreements to eliminate. This order presents, therefore, an entirely different case from the *Milk and Ice Cream Can* case.

It is interesting to note that the Commission has not complained of standardization, except possibly in the *Milk and Ice Cream Can* case, but only of its use to effectuate a price-fixing conspiracy. In addition, the Commission has complained against agreements to make only standard items or to eliminate certain items, but has specifically permitted the formulation of standard product lines.

D. The Legality of Standardization and Simplification

The Sherman Act condemns all contracts, conspiracies and agreements

which restrain interstate trade and commerce.³⁶ In 1911 the Supreme Court read into the statute the "rule of reason." This rule limits the words "restraint of trade" to those acts which operate "to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade."³⁷ In other words, only those agreements which unreasonably restrain trade are within the purview of the Sherman Act.

The rule of reason applies to all cases under the Sherman Act. The courts have said, however, that because certain types of activity are so prejudicial to the public interest, they are unreasonable *per se*. Price fixing was held to be unreasonable *per se* in the *Trenton Potteries* case³⁸ and the *Socony Vacuum* case³⁹ and boycotts were apparently held to be unreasonable *per se* in the *Fashion Guild* case.⁴⁰ It thus seems that under the present state of the law, if standardization, simplification or agreements relating thereto are questioned, their legality will be tested by the rule of reason, but if they are used as part of a price-fixing scheme or in connection with a boycott, they will be condemned as part of the scheme and held to be unreasonable as a matter of law regardless of the surrounding circumstances.

In the *Chicago Board of Trade* case,⁴¹ the Supreme Court laid down "the true test of legality." The defendants in that case admitted the adoption and enforcement of the call rule, the legality of which had been attacked. The defendants stated that the purpose of this rule was not to prevent competition or control prices, "but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago." The Supreme Court noted that "Every agreement concerning trade, every regulation of trade, restrains"⁴² and then pointed out that the restraint must be viewed in the light of all of its surrounding circumstances to determine whether it merely regulates and perhaps thereby promotes competition or whether it suppresses or destroys competition.⁴³ The court then concluded

³⁶15 U. S. C. § 1 (1940).

³⁷*United States v. American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 648 (1911).

³⁸*United States v. Trenton Potteries Co.*, 273 U. S. 392, 47 Sup. Ct. 377 (1927).

³⁹*United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 223, 60 Sup. Ct. 811, 844 (1940).

⁴⁰*Fashion Originators' Guild v. United States*, 312 U. S. 457, 61 Sup. Ct. 703 (1941).

⁴¹*Chicago Board of Trade v. United States*, 246 U. S. 231, 38 Sup. Ct. 242 (1918).

⁴²*Id.* at 238, 38 Sup. Ct. at 244.

⁴³The language of the court in the *Chicago Board of Trade* case, *ibid.*, is as follows: "The true test of legality is whether the restraint imposed is such as merely regulates

after viewing the "call" rule and the surrounding circumstances that it merely regulated commerce and was not an unreasonable restraint of trade. The Supreme Court has not overruled this decision, nor has it limited its applicability, except to the extent that it is not applicable to price-fixing or boycott cases.

In applying the doctrine of the *Chicago Board of Trade* case, the fact that standardization programs result in advantages to the consumer, such as lower prices due to savings in manufacturing costs and interchangeability of parts, should have great weight with any court in determining whether the program is a reasonable restraint of trade. Simplification also has advantages to the public in the elimination of wasteful practices in manufacturing and distribution.

Standardization and simplification by a trade association, *i.e.*, the formulation of standards and standard product lines, are in their legal aspects analogous to agreements by members to set up credit bureaus, statistical services and price reporting systems. When those activities have not been tainted by other factors (such as an agreement to adhere to filed prices), they have been held by the courts not to be violative of the antitrust laws.⁴⁴ These decisions are of help as indicating that the adoption of certain activities without an agreement to adhere to them is lawful. When this is viewed with the statement of the Supreme Court in the *Maple Flooring* case that standardization is "admittedly beneficial to the industry and to consumers," a strong case is made out that standardization as such is perfectly legal. Of course, a different result would be reached if standardization programs were part of a price-fixing conspiracy or were used to cloak or effectuate a restraint of trade.

Simplification under these analogous authorities would seem to be lawful, provided that there is no agreement to eliminate. The two consent decrees point out that the formulation of standard product lines is unobjectionable, while agreements to eliminate are looked upon as illegal.⁴⁵

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."

⁴⁴*Cement Manufacturers' Protective Association v. United States*, 268 U. S. 588, 45 Sup. Ct. 586 (1925); *Maple Flooring Manufacturers Association v. United States*, 268 U. S. 563, 45 Sup. Ct. 578 (1925).

⁴⁵This conclusion is reinforced by Mr. Arnold's letter to Undersecretary of Com-

It is important to distinguish the agreement adopting standards and standard product lines from agreements to adhere to the standards, to make only standard items or to eliminate. This is an important distinction. Compare the *Maple Flooring*⁴⁶ and *Cement*⁴⁷ cases, which allowed an agreement to file prices, with the *Sugar-Institute*⁴⁸ case, which specifically condemned an agreement to adhere to filed prices.

An agreement to make only products conforming to the standards or the standard product lines limits the freedom of action of the parties to that agreement.⁴⁹ When agreements unduly restrict the freedom of action of the parties, such agreements have been condemned by the courts as unreasonable restraints of trade. In the *First National Pictures* case,⁵⁰ the Supreme Court held that an agreement between motion-picture distributors, whereby no distributor would deal with an exhibitor except upon the credit terms prescribed, unduly limited the freedom of action of the distributors and constituted an unreasonable restraint of trade.

Agreements to adhere to standards and standard product lines or to make only standard items limit the freedom of the parties and limit production, and thus are in restraint of trade.⁵¹ Such agreements have not been declared

merce Taylor on August 12, 1941. In that letter Mr. Arnold stated that he concurred fully in the proposition that more general adoption of Simplified Practice as developed by the National Bureau of Standards "would constitute an important aid to national defense." He further stated: "I understand from your plan of procedure that simplification and standardization proposals will originate with defense agencies, the Department of Commerce and industry, and that conferences will be held with representatives of specific industries and interested Government agencies to obtain advice and information on particular proposals. In my view, continued adherence to the specific purpose of simplification will not raise any questions under the Federal Antitrust laws."

The Department of Commerce in a press release dated August 14, 1941, stated:

To allay any fears in the minds of manufacturers that *they might run foul of the antitrust laws if they took concerted action to reduce the number of styles and sizes in the interest of national defense*, Assistant Attorney General Thurman Arnold has written a letter to Undersecretary of Commerce Wayne C. Taylor indicating the sympathetic attitude of the Department of Justice toward simplification as developed by the National Bureau of Standards. [Emphasis supplied.]

This press release claimed more than the letter stated, for Mr. Arnold did not state that manufacturers may take concerted action to eliminate *after* the Department of Commerce has formulated Simplified Practice Recommendations.

⁴⁶*Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563, 45 Sup. Ct. 578 (1925).

⁴⁷*Cement Mfg. Assn. v. United States*, 268 U. S. 588, 45 Sup. Ct. 586 (1925).

⁴⁸*Sugar Institute v. United States*, 297 U. S. 553, 56 Sup. Ct. 629 (1936).

⁴⁹TOULMIN, *TRADE AGREEMENTS AND THE ANTITRUST LAW* (1937) 98: "A code of standardization which would provide that no member of the industry could manufacture and sell an apparatus unless it was according to the standards of the association would be clearly illegal as restraining development and independent initiative in design."

⁵⁰*United States v. First National Pictures*, 282 U. S. 44, 51 Sup. Ct. 45 (1930).

⁵¹The Supreme Court in *American Column & Lumber Co. v. United States*, 257 U. S.

by the courts to be so prejudicial to the public interest that they are unreasonable *per se* and, therefore, their legality under the antitrust laws would be tested by the "rule of reason" and each case considered upon its own facts. It should be noted, however, that the fact that the parties may have the very best intentions and the highest motives cannot justify an activity which unreasonably restrains trade.⁵²

Members of trade associations and other groups engaged in standardization and simplification activities would be well-advised to avoid anything which might be construed as an agreement to eliminate, *i.e.*, to adhere to standards and standard product lines or to make only standard items. It should be made clear to all members of such trade associations and other groups that all parties are free to conform or not to the standards or standard product lines as they wish, and there should be no attempt by the association or any of its members to exert compulsion of any type upon other members, or to invoke moral sanctions, in an attempt to have them confine their manufacturing to products conforming to the standards or to only those items included in the standard product lines.⁵³ The importance of this is graphic-

377, 42 Sup. Ct. 114 (1921) held that an elaborate system for the exchange of statistical information, which had the purpose and effect of curtailing production and enhancing prices, was in restraint of trade. The same view was taken in *Gibbs v. McNeeley*, 118 Fed. 120 (C. C. A. 9th, 1902) and in *Cravens v. Carter-Crume Co.*, 92 Fed. 479 (C. C. A. 6th, 1899).

⁵²The classic statement of that principle is that: "The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted." *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 613, 34 Sup. Ct. 951, 954 (1914).

⁵³The moral sanctions doctrine also demonstrates that the standardization program or the program formulating standard product lines should have a sound basis and be for the benefit of the public. This doctrine was first enunciated in *American Column and Lumber Co. v. United States*, 257 U. S. 377, 399, 42 Sup. Ct. 114, 116 (1921) where the court said: "It is plain that the only element lacking in this scheme to make it a familiar type of competition suppressing organization is a definite agreement as to production and prices. But this is supplied: By the disposition of men 'to follow their most intelligent competitors,' especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals." It was thought as a result of *Cement Manufacturers' Protective Association v. United States*, 268 U. S. 588, 45 Sup. Ct. 586 (1925) and *Maple Flooring Manufacturers' Association v. United States*, 268 U. S. 563, 45 Sup. Ct. 578 (1925) that this doctrine would be applied by the courts only after an agreement had been implied, as evidence of the probability of that implied agreement. However, a district court in *United States v. Hartford-Empire Co., et al.*, 46 F. Supp. 541, 588-9 (N. D. Ohio, 1942)

ally demonstrated by the decision of the Supreme Court in *Cement Manufacturers Association v. United States*,⁵⁴ where the court held legal the association's activity designed to prevent a fraud upon cement manufacturers, and where the decision clearly shows that the Supreme Court was strongly influenced by the fact that *the members were left free to use or not to use the specific job contract or to make or refuse to make deliveries in excess thereof*. The decree entered in *United States v. Associated Marble Companies et al.*⁵⁵ also illustrates the importance of these statements. That decree permitted standardization of marble "provided no such standard for marble shall forbid the production or sale of nonstandard marble which is identified as such."

Standardization and simplification are the formulation of standards and standard product lines, and it is obvious that this involves an agreement on what the standards or standard product lines shall be. It is also entirely natural that a manufacturer who has taken part in setting up these standards and standard product lines will, in all probability, follow them. When the manufacturer freely, voluntarily and in good faith does this, no one can complain of any injury. It is only when the standardization and simplification programs are not carried on in good faith, or there are agreements to adhere to or to make only the standard items or those in the standard product lines, that the possibility of injury arises. This is true of either express or implied agreements. In such cases the programs might restrict production, eliminate competitors or result in standardizing only the higher-priced products.⁵⁶

It might be argued that the adoption of standards and standard product lines means that all persons participating therein have impliedly agreed to make only items conforming thereto. It is believed, however, that the fact that all parties who have participated in the programs follow and adhere to the standards and standard product lines does not demonstrate that the

revived this doctrine in holding that the glass association there involved was by these sanctions made the vital arm of the overall control of the glass container industry, thus returning to the original use of the doctrine. The *Hartford-Empire* case is now before the Supreme Court.

⁵⁴268 U. S. 588, 45 Sup. Ct. 586 (1925).

⁵⁵C. C. H. Trade Reg. Service (9th ed.) ¶ 52,612 (N. D. Calif. 1941).

⁵⁶The National Industrial Conference Board pointed out that "the arbitrary elimination of cheaper grades, because they are less profitable than higher grade products or because they interfere with the sale of goods the production of which is rendered exceptionally remunerative by patents or a skilled labor monopoly or some other supply curtailing factor, would seem hard to justify under the rule of reason. Similarly, agreements not to market 'seconds,' which are sometimes made in certain industries, may eventually be brought under attack." TRADE ASSOCIATIONS—THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS (1925) 186.

parties have agreed to do this. In the *Maple Flooring* case the Supreme Court pointed out that dissemination of information would tend to stabilize prices, but that the plan was not illegal for that reason. The Supreme Court refused to infer that the parties participating agreed to follow the price information. The same result was reached in the *Cement* case where the Supreme Court found that there was no agreement to refuse to deliver cement in excess of the specific job contract, even though it pointed out that if the members drew their contracts to apply to the specific job, certainly they would not deliver cement in excess thereof.

In 1939 the Supreme Court handed down a decision which bears upon this problem.⁵⁷ In the *Interstate Circuit* case a letter was sent by an exhibitor to each of six distributors and thereafter each of the distributors adopted the course of conduct outlined in the letter. There was some other evidence of an unlawful agreement, but the Supreme Court said that such an agreement "was not a prerequisite to an unlawful conspiracy," and that "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."⁵⁸ This case makes it imperative that trade associations clearly advise their members and that each member understand that concerted action to conform to the standards or standard product lines is not requested or invited and that members are free to conform or not, as they desire.

The *Interstate Circuit* case might not be applied to trade association standardization and simplification activities. The purposes of such activities are entirely different from those involved in the *Interstate Circuit* case, since they operate ultimately for the benefit of the consumer by preventing misrepresentation, improving the quality of the products, providing interchangeability of parts and promoting concentration on a limited number of sizes, grades, and colors, in order to reduce the price and prevent waste.

These principles are merely broad general helps. Each case stands upon its own facts and must be judged in the light of the surrounding circumstances. If, however, trade associations act in good faith and bear constantly in mind that standardization and simplification programs must ultimately be for the benefit of the consumer, and if such programs are fair and reasonable, little difficulty should be encountered. In addition, the association and its members, in determining what factors may be considered in formulating standards and standard product lines, should always bear in mind that these factors must be fair and reasonable. It must be remem-

⁵⁷*Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 59 Sup. St. 467 (1939).

⁵⁸*Id.* at 226, 59 Sup. Ct. at 474.

bered that since the legality of such activity rests primarily upon the fact that it is in the public interest, *a fortiori*, the factors to be considered should not be selfish ones, but should be those factors which promote the public interest. If a trade association or other group acts in good faith and confines itself to the formulation of standards and standard product lines, and so long as the members are clearly advised that they are under no compulsion to adhere thereto, there would seem to be little chance of running foul of the antitrust laws.

III. SIMPLIFIED PRACTICE RECOMMENDATIONS

The Department of Commerce has since 1921 been engaged in assisting manufacturer, distributor and consumer groups to formulate Simplified Practice Recommendations.⁵⁹ The activities of the Division of Simplified Practice have not been sanctioned by any act of Congress, and this fact has raised problems of importance to any trade association, group or individuals participating in the formulation of Simplified Practice Recommendations.

The procedure involves a survey by an industry committee to determine the sizes, shapes, etc. of a product made during a certain period and what items can be eliminated; preparation of a statement to a general industry conference of "all interested groups representing producers, distributors, and consumers"; adoption by the conference "of a simplified practice recommendation, usually in the form of a list of sizes or types of the product which appear adequate to meet all normal demands"; appointment of a general committee "to maintain the recommendation, through revisions when necessary"; circulation by the Bureau of a full report of the conference

⁵⁹The primary functions of the Division of Simplified Practice are summarized in REP. SEC'Y COMM. (1932) XXII:

Standards that are developed by industry are determined either by technical consideration of the material or article, or on the commercial basis of actual production and demand for that material or article.

The Division of Simplified Practice of the Bureau of Standards is concerned with assisting industry to apply the second of the two methods in the elimination of needless variety. In this activity the division has three primary functions:

First, to disseminate information as to the principles of simplified practice so that the various industries may determine the extent to which it is practicable and desirable to apply this waste elimination method; second, to assist industry in applying simplified practice in a practical way, and to publish their recommendations in such form as to make them available to all, at a nominal cost; third, to assist representative standing committees of the various industries in conducting periodic surveys to determine the adherence being accorded their respective recommendations, and to secure an expression of opinion from the acceptors on such changes as the committee finds it desirable to suggest.

action; and "promulgation of the program by the Department of Commerce, through the National Bureau of Standards, and publication of the recommendation, upon receipt of adequate written support by manufacturers, distributors, and consumers."⁶⁰

Mention has already been made of the *Algoma Lumber Co.* case⁶¹ where the Supreme Court mentioned the activity of the Division of Simplified Practice and said: "The recommendations of the Bureau of Standards for the simplification of commercial practice are wholly advisory. Dealers may conform or diverge as they wish."⁶² The Supreme Court, as shown by its decision, was relying upon statements made in the Annual Report of the Secretary of Commerce dated July 1, 1931, and was not considering the facts of the program, nor the form of the acceptance by manufacturers, distributors and consumers. For this reason the statements of the Supreme Court concerning this program cannot be taken as binding upon the question as to whether it is "wholly advisory." Especially is this true since the decision in the *Interstate Circuit* case.⁶³

The Department of Commerce is extremely careful to point out that its recommendations are only advisory and that the parties are not bound to produce only the products in the simplified list. Undoubtedly, having in mind the questionable character of an agreement to eliminate, the Department of Commerce phrased the blanks sent to parties for acceptance and signature very carefully in an attempt to negative an agreement.⁶⁴ The prior acceptance blank stated that it was voluntary, but said that the "purpose of simplification is to limit regular lines of stock items to those described in the schedule."⁶⁵

⁶⁰TNEC Monograph No. 18, *Trade Association Survey* (1941) 311.

⁶¹Federal Trade Commission v. *Algoma Lumber Co., et al.*, 291 U. S. 67, 54 Sup. Ct. 315 (1934).

⁶²*Id.* at 74, 54 Sup. Ct. at 318.

⁶³*Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 59 Sup. Ct. 467 (1939).

⁶⁴Dep't of Commerce, Simplified Practice Recommendations R101-40, *Metal Partitions for Toilets and Showers* (December 1, 1940) 10:

Acceptance of any recommendation is entirely voluntary, and implies that the acceptor will use his best efforts to adhere to the recommended practice where requirements are not special. Instances may occur when it may become necessary to supply or purchase items not covered by a simplified practice recommendation, and acceptors should understand that such departures are not precluded.

⁶⁵Dep't of Commerce, Simplified Practice Recommendation R56-35, *Carbon Brushes (Carbon, Graphite, and Metal Graphite) and Brush Shunts* (July 1, 1935) states: "2. *The acceptor's responsibility.* You are entering into an entirely voluntary agreement, whereby the members of the industry, together with the distributors and consumers of the product, and others concerned, hope to secure the benefits inherent in simplified practice. It is obvious that instances will occur in which it will be necessary to supply or purchase items not included in the simplified list. The purpose of sim-

The effect of such a program is to class as "specials" items not on the list. Naturally this has a tendency to increase the price of those "specials," since it costs more to produce in small lots. A manufacturer who receives an acceptance blank knows that it has been sent to all other interested parties, including his competitors. He thus knows that it is an invitation to act in concert with his competitors.⁶⁶ His acceptance, therefore, raises the serious question as to whether he has entered into an agreement to manufacture only items on the list for stock purposes and to make others only as specials.

The *Interstate Circuit* case, previously discussed, involved this precise situation. In that case there was some other evidence of an unlawful agreement, but the Supreme Court said that such an agreement "was not a prerequisite to an unlawful conspiracy," and that "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."⁶⁷ This doctrine has not as yet been applied to Simplified Practice and whether or not it will remains to be seen. It has, however, given rise to grave doubts as to the legality of a manufacturer or distributor's signing an acceptance blank.

Simplified Practice is undertaken with the assistance, knowledge and approval of a government department. What effect that fact would have in determining whether such activity constitutes an unreasonable restraint of trade is not entirely clear. Only four antitrust cases have been found in which action alleged to be illegal was taken with the prior approval or knowledge of a government official. These cases indicate that where action restrictive in nature is taken at the request of, or with the approval of, government officials, evidence of that fact is admissible in determining the reasonableness or unreasonableness of the action.⁶⁸ It further appears that

plication is to limit regular lines of stock items to those described in the schedule, and to place all others in the class of specials. Consumers can make the program more effective if they will make a definite effort to confine their purchases to the sizes, etc., specified in this simplified practice recommendation."

⁶⁶"Simplified practice, meaning the collective effort of an industry to reduce waste in the production and distribution of its products, through eliminating unnecessary varieties in sizes, dimensions, grades, or qualities, is now a widely recognized and well-established trade association activity. . . . The establishment of the division of simplified practice in the Department of Commerce in November, 1921, provided a clearing house or centralizing agency through which manufacturer, distributor, and consumer groups could meet to discuss their common problems and could decide upon eliminations of mutual benefit." DEP'T OF COMMERCE, TRADE ASSOCIATION ACTIVITIES (1927) 75.

⁶⁷*Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 226, 59 Sup. Ct. 467, 474 (1939).

⁶⁸*United States v. United States Steel Corp.*, 251 U. S. 417, 446, 40 Sup. Ct. 293, 297 (1920) and *Fosburgh v. California & Hawaiian Sugar Refining Company*, 29 Fed. 29, 35 (C. C. A. 9th, 1923).

where the action taken results in fixing the price or in a boycott, which the courts have held to be so prejudicial to the public interest that they are unreasonable as a matter of law, the fact that it was requested or approved by government officials will not make such action reasonable under the anti-trust laws.⁶⁹

The various letters discussed herein show that the Department of Commerce has secured expressions of approval of its Simplified Practice work from the Department of Justice and the Federal Trade Commission. It should also be pointed out that no action has been brought against manufacturers for having taken part in these programs. On the other hand, Simplified Practice does not have any statutory approval and mere approval by government officials leaves much to be desired. In addition, the signing of the acceptance blank raises grave problems relating to an agreement to make for stock purposes only items listed, and other items as specials, probably at higher prices. In such a situation, where numerous lawyers and business executives are uncertain as to the legality of Simplified Practice, it seems the duty of Congress by appropriate legislation to clarify the situation.

IV. THE EFFECT OF THE EMERGENCY LEGISLATION AND PROCEDURES

The importance of standardization and elimination has increased daily since the beginning of the present war emergency. Hardly a week passes without the promulgation of some new regulation designed to standardize products or processes or to eliminate product lines. Standardization is ideally adapted to the work of the Office of Price Administration, for its use eliminates some of the difficulties of price regulations and adjustments.⁷⁰ By

⁶⁹United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 225-7, 60 Sup. Ct. 811, 846 (1940):

As to the knowledge or acquiescence of officers of the Federal Government little need be said. . . . Though employees of the Government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice.

⁷⁰The Wall Street Journal, Dec. 28, 1942, p. 1, carried an article entitled, "Simple & Standard." This article described the plan of Howard Coonley, Deputy Conservation Chief of W.P.B., Willis S. McLeod, head of the Standards Division in the O.P.A., and Dr. P. G. Agnew, Secretary of the American Standards Association, "to provide America with certain simple, standard products and take away the rest." "Now in preparation are orders to reduce the types and simplify the manufacture of a long list of items from adhesive plaster to wrenches. . . . This scheme of establishing standards, eliminating undesired models and grading the desired ones is the key to O.P.A.'s future price policy. . . . Officials term the simplification crusade 'an answer to the businessman's prayer.' Many a WPB edict merely makes official what the industry wants to do in eliminating rarely sold items or in manufacturing articles with interchangeable

the process of standardization of products, O.P.A. has been able to make products uniform and issue price regulations for the uniform products.⁷¹

The War Production Board has found that elimination of product lines has been helpful in the conservation of critical materials by eliminating non-essential sizes and products. Many of the standardization and elimination programs have resulted from recommendations of trade associations made at the request of W.P.B. or O.P.A. This important role could not have been played by trade associations without the emergency legislation and policies.

It was during the period of vigorous enforcement of the antitrust laws under Mr. Arnold that the present emergency arose necessitating conservation of critical materials and the standardization of products in order to establish and enforce price ceilings. Industry was thus placed on the horns of a dilemma: if it agreed to eliminate items and thus conserve material, it perhaps violated the antitrust laws, but if it did not it was unpatriotic. Government officials quickly recognized this precarious position of industry⁷² and as a result of correspondence between Mr. John Lord O'Brian, General Counsel of the Office of Production Management [now WPB], and Attorney General Jackson, the Department of Justice on April 29, 1941, formulated a policy to be followed by the Department of Justice in "its relations with the Office of Production Management [now WPB] and the Office of Price Administration and Civilian Supply [now OPA] and with all industries or contractors acting in compliance with the orders or requests of either of these organizations." This letter laid down the procedure to be followed by industry when it desired to carry on any co-operative action under the defense program relating to the allocation of orders, the curtail-

parts. (A Command from Washington has the advantage of letting firms avoid anti-trust suits—a danger which retarded some peacetime standardization.)"

⁷¹Particularly interesting is the statement contained in Office of War Information Release No. 212, July 31, 1942. The release dealt with the contract between W.P.B., O.P.A. and the American Standards Association providing for the development of standards. The statement was made that: "The increasing importance of standards for pegging the price of goods to their quality has been pointed out recently by Mr. Henderson in connection with the enforcement of price control. O.P.A.'s most recent action of this kind was its order forbidding reduction in the size or quality of soap."

⁷²Attorney General Jackson, now a member of the United States Supreme Court, made the following statements in a Department of Justice press release dated April 26, 1941:

I believe that business men are justified in expecting that so far as possible uncertainties as to the application of antitrust law will be eliminated, when they are asked by the Government to join in a co-operative effort. This is not for the purpose of sanctioning violations but for the purpose of seeing that violations do not take place and at the same time that the defense effort is served.

ment of production, the establishment of price ceilings and other similar activities.⁷³

While Attorney General Jackson's letter states that no criminal prosecutions will be instituted for acts performed in good faith and within the fair intendment of instructions by OPM [now WPB] or OPA pursuant to the procedure, it is interesting to note that there is no statutory authority for the procedure. But as a practical matter there is adequate protection if the procedure is carefully followed.⁷⁴ The mere fact that the action is requested or approved by some government official does not necessarily cloak the activity with legality. The cases in which knowledge or approval of government officials was involved have previously been discussed. These cases show that government approval is only *evidence* of reasonableness, and that in price-fixing and boycott cases such evidence is not material as those activities are unreasonable *per se*. An oral request by WPB or OPA or

⁷³The important points of this policy are: (1) Meetings of industry with OPM and OPA are not illegal; (2) Industry committees may be formed at the request of OPM or OPA; (3) Industry may co-operate in selecting members for these committees; (4) Questions as to the need for industry committees, how they shall be chosen, and by whom constituted are the sole responsibility of OPM and OPA; (5) Industry committees shall confine themselves to collecting and analyzing information and making recommendations to OPM and OPA and shall not determine industry policies or attempt to compel or coerce anyone to comply with any request or order made by a public authority; (6) Requests for action shall be made directly to industry units by OPM or OPA and not by industry committees; (7) Requests for action within a given field shall be made only after the general character of the action has been cleared with the Department of Justice; (8) If the general plan is approved, thereafter each request for specification in carrying out the general plan shall be made *in writing* and approved by the office of General Counsel of OPM and OPA; (9) Acts done in compliance with such specific requests will not be viewed by the Department of Justice as a violation of the antitrust laws and no prosecution will be instituted for acts performed in good faith and within the fair intendment of instructions by OPM or OPA pursuant to this procedure; and (10) the Department of Justice reserves complete freedom to institute civil actions.

⁷⁴On September 25, 1941, a letter was sent by General Counsel of OPA David Ginsburg to Attorney General Biddle outlining a proposed plan to be followed by OPA in formulating standardization and simplification plans. This letter conformed with the requirements of Attorney General Jackson's letter of April 29, 1941, except that such proposals would originate with manufacturers and consumers. The general character of this plan was approved on September 27, 1941, in a letter from Mr. Biddle to Mr. Ginsburg. Mr. Francis E. Neagle questioned the plan as not within the scope of Attorney General Jackson's letter upon the ground that the procedure did not authorize manufacturers and consumers to originate such plans. On October 18, 1941, Mr. Arnold, in clarifying the plan set up by OPA, wrote to Mr. Neagle that the doubt is apparently occasioned by the provision that "proposals for simplification and standardization will be made to the Office of Price Administration not only by Defense Agencies and Government departments, but by manufacturers." He then pointed out that the Attorney General's letter makes "it clear that the decision as to what simplification and standardization programs are to be adopted is to be made by the Office of Price Administration and that requests for action by the members of an industry in pursuance of such a program are to be made by that office." Mr. Neagle replied that he was not

a written request from some other agency of the government is, therefore, not sufficient protection, and industry should not take action of a doubtful nature without a *prior written* request from WPB or OPA.

As a result of correspondence between Mr. John Lord O'Brian, General Counsel of OPM [now WPB] and Attorney General Biddle, dated December 22 and 24, 1941, a revised procedure was set up to be followed by industry in carrying on co-operative activity under the defense program in the field of simplification,⁷⁵ conservation, substitution, preparation of specifications, and other similar activities. In his letter of December 22, 1941, Mr. O'Brian stated that the proposed change is necessitated by the fact that OPM [now WPB] now has statutory authority to enforce priorities and allocations and these activities need no longer be cleared with the Department of Justice. This correspondence points out that in the field of simplification and in other fields where WPB may not have specific statutory authority to promulgate legally enforceable orders, the Attorney General will give assurance against criminal prosecution only if activities in these fields comply strictly with the approved procedure. The Department of Justice reserved the right to institute equity actions to enjoin any acts or practices which are not in the public interest.⁷⁶

In view of the fact that WPB has no specific statutory authority in connection with elimination of products, neither a trade association nor any other group is justified in taking any step in regard to elimination of products, except *after a written request* from WPB. It is believed that no dangers would be encountered by making recommendations to WPB based upon factual surveys, when such recommendations are made in good faith, are circulated to all known members of the industry, and no facts are misrepresented. As pointed out in the first section of this article, no antitrust questions arise from the individual and independent acts of a manufacturer to standardize or eliminate from his line. Thus an individual manufacturer acting alone is justified in making recommendations and taking such action *without* a prior written request from WPB.

If a trade association or other group does receive a written request for recommendations or decides to make recommendations as set forth above, it would seem advisable to file a copy with the Department of Justice. This gives added protection against a criminal suit and demonstrates the good

satisfied. It seems that Mr. Neagle's objections were well taken and that manufacturers and consumers should not originate such plans.

⁷⁵Simplification seems to be here used in the sense of elimination.

⁷⁶WPB Regulation No. 12 (January 14, 1942) and General Administrative Order No. 2-7 (January 17, 1942) detail the procedure of WPB in setting up and dealing with Industry Advisory Committees.

faith of the recommendation. When action is requested in writing by WPB, no attempt should be made to compel or coerce any manufacturer to comply with the request, and there should be no agreement, either express or implied, as to what manufacturers will or will not do in connection with these orders.

No mention has been made of Section 12 of the Small Business Mobilization Act.⁷⁷

An individual manufacturer or a trade association which has taken action in the field of standardization or simplification in response to a certificate under Section 12 is protected from civil suits as well as criminal prosecutions. In contrast, action taken in the same field in response to written requests of WPB or OPA is subject to civil suits, not only by the government but by any damaged individual for treble damages. In addition, the letters previously set forth do not remove the taint of illegality, but only provide a practical protection from criminal prosecution.

Trade associations and manufacturers should, therefore, be extremely careful to follow the procedure laid down, and in no event should they go beyond the action covered by the certificate under Section 12 or the written request from WPB in connection with agreements to adhere to standards or to eliminate.

In conclusion, it appears that standardization and simplification are legal and unobjectionable. Agreements to adhere to the standards, to make only standard items or to make only the items in the standard product lines, are probably unlawful restraints of trade, unless because of the peculiar facts of the case they can be justified under the rule of reason. In addition, standardization, if (1) it is used as a part of a price-fixing scheme, (2) it is used to exclude competitors from the field, (3) it is used to curtail production, or (4) it is used otherwise to restrain trade, would probably be condemned as part of the unlawful scheme. There is also the danger in an agreement to adhere that it might increase the cost of products not in the standard line by having them made only as specials. An agreement having such a result would probably be held to be unreasonable *per se* as a price-fixing conspiracy. In addition, there are doubts which should be removed by appropriate legislation concerning the legality of participation in, and acceptance of, Simplified Practice Recommendations.

⁷⁷56 STAT. 1112 (1942), 50 U. S. C. § 1112 (Supp. 1942). This section provides that no prosecution or civil action shall be commenced under the antitrust laws after a certificate in writing has been issued by the chairman of WPB, after consultation with the Attorney General, when that certificate states "that the doing of any act or thing, or the omission to do any act or thing, by one or more persons . . . in compliance with any request or approval made by the Chairman in writing, is requisite to the prosecution of the war." In such a case no written request from WPB is necessary.