[1] Letter of June 9, 2003, to the Office of Policy and Evaluation, Federal Trade

AD&FS proposes to implement a Labeling Compliance Program with two stated objectives: (1) "to assure that all members [of AD&FS] and non-members are in compliance with Industry Standards adopted by the ADA . . . and reaffirmed by a majority vote of the AD&FS," and (2) "to further assure that all representations and claims made on the product, on the packing, and in advertising are truthful and in accordance with Industry Standards and the Law."[2] To that end, AD&FS proposes to implement a Labeling Compliance Program, which involves the physical testing of products, upon receipt of a complaint from a member, to ensure that those products meet Industry Standards. AD&FS proposes to impose various sanctions for non-compliance with Industry Standards. You have explained that the process for considering complaints regarding representations, claims, and advertising, to ensure compliance with Industry Standards and State and Federal law, also will involve physical testing of the product as set forth in the Labeling Compliance Program.[3]

Any member of AD&FS may bring a complaint to the AD&FS Standards and Testing Committee, asserting that another company's product does not comply with Industry Standards, or that another company's representations, claims, and advertising do not comply with Industry Standards or with state law or federal law. The Program will apply only to various home furnishing products in their finished state; it will not apply to intermediate products or inputs into finished goods.[4] Complaints may be brought against non-members as well as members of AD&FS. AD&FS estimates that no more than six non-member entities, primarily importers, would be subject to the AD&FS complaint process.[5] Upon receipt of a complaint, the Committee will initiate a process of testing or evaluation, and, if the accused company is found not in compliance, the AD&FS may undertake sanctions against the company. Our understanding of the details of the proposed Compliance Program is set forth below.

Complaints Regarding Non-Compliance with Industry Standards

The Industry Standards specify the requirements for product attributes in seven categories: (A) Down Cluster content (with different standards depending on whether the product bears a "Down" label, a "Down & Feather" label, or a "Feather & Down" label); (B) Goose Specie content; (C) Filling Power; (D) Oxygen #; (E) Turbidity; (F) Thread Count; and (G) Filling Weight.

Compliance with the Industry Standard is evaluated under a "Weighted Point System"

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[2] Proposed Labeling Compliance Program, Home Fashion Products Association, American Down & Feather Section, dated April 30, 2003, at ¶ 1. We understand the ADA to be the American Down Association, the predecessor to AD&FS.

[3] Letter of June 24, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

[4] Letter of June 24, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

[5] Letter of June 9, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

[6] The Program Manager is a third party retained by AD&FS to administer the

Competitive concerns can arise, for example, when competitors abuse or distort the standard-setting process for the purpose of restricting competition, thus imposing harm on the market and consumers while not providing the procompetitive benefits that can flow from standard-setting programs.[11] In addition, the adoption of a standard may, in effect, be an agreement not to sell non-compliant products.[12] Competitive concerns may arise when the standard is not reasonably necessary to attain procompetitive objectives.[13]

Although the actions of the AD&FS in adopting the Industry Standards are not the focus of this letter, efforts to enforce standards also can raise antitrust concerns.[14] The proposal to test products for compliance with Industry Standards, and to impose sanctions for non-compliance, will be evaluated from two perspectives. First, do the procedures themselves present any risk of unreasonably restraining competition? For example, procedures that can be applied arbitrarily or in a discriminatory manner may, in some circumstances, be used to unreasonably raise rivals' costs to such an extent as to substantially lessen competition. Second, are the proposed sanctions likely to result in a substantial lessening of competition?

Product Testing

Based on the information provided, the procedures for testing products for compliance with Industry Standards do not appear likely to present a risk to competition. The procedures appear to be reasonably formulated to achieve the stated objective. The Industry Standards themselves appear to be clearly defined, and the procedures for testing products for compliance with the standards appear reasonably likely to ensure objectivity in their application. The compliance program requires that sampling and testing satisfy independent third-party standards, and be performed by an independent third party lab. Further, the fact that a complaining party must bear the costs for the first round of samples and testing, and also for the second round if the

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[11] *E.g., Allied Tube*, 486 U.S. at 496 (manufacturers "packed" meeting at which standard was to be voted upon, in order to prevent approval of a competing product); *Hydrolevel*, 456 U.S. at 560-64 (manufacturer manipulated the process to obtain an unjustified interpretation of a safety code, declaring a competitor's product unsafe); *Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order) (failure of a participant in a standard setting process to disclose its patent position, contrary to the rules of the organization; after its technology was adopted in the standard, the company sought to enforce the patent).

[12] *E.g., Allied Tube*, 486 U.S. at 501; *Accrediting Commission on Career Schools and Colleges of Technology*, 119 F.T.C. 977 (1995) (advisory opinion; Commission declined to approve a proposed accreditation standard that would define acceptable tuition levels, reasoning that this would in effect be an agreement among members of the accrediting body to charge no more than the standard would permit).

[13] *E.g., American Soc'y of Sanitary Eng'rs*, 106 F.T.C. 324 (1985) (consent order).

[14] We express no opinion on the substantive reasonableness of the standards. Based on the information presently before us, however, we have no reason to believe that the standards themselves are unreasonably restrictive. This informs our analysis of the proposed Labeling Compliance Program.

testing results in a pass, may lessen the likelihood that complaints will be brought without reasonable cause.[15] In addition, the same procedures are applicable to the products of both members and non-members. These factors tend to ensure impartiality in the application of the compliance program.

The proposed program also incorporates an appeals process that provides for objective retesting of products found not to be in compliance, using additional samples and additional testing labs. Although the antitrust laws do not require standards groups to apply any particular due process procedures, and the presence of such mechanisms is not determinative of the antitrust analysis, adequate procedural safeguards lessen the possibility of exclusionary conduct in the guise of self regulation. *See Allied Tube & Conduit Corp. v. Indian Head Inc*., 486 U.S.492 (1988); *Silver v. New York Stock Exchange*, 373 U.S. 341, 36-67 (1963).

Finally, given the number of firms that manufacture or import down and feather-containing products, it does not appear likely that a competitive disadvantage visited upon any single firm would adversely affect competition in the industry as a whole.[16]

For the forgoing reasons, the procedures themselves do not appear likely to present a risk to competition.

Evaluation of Complaints Regarding Representations, Claims, or Advertising

To the extent that the evaluation of complaints regarding representations, claims, or advertising is limited to the testing of products to determine whether they are in compliance with Industry Standards, as stated in your letter of June 24, 2003, this aspect of the proposed Labeling Compliance Program does not require separate analysis – our observations regarding testing procedures (above) and sanctions (see below) are applicable in this context. We will note, however, that agreements among competitors to restrict truthful, nondeceptive advertising have the potential to restrict competition and harm consumers. *See, e.g., American Medical Association*, 94 F.T.C. at 1005. Such agreements may harm consumers by raising the cost of finding the combination of price, service, and quality that best fits their needs and by reducing the incentive for firms to compete (by preventing them from informing consumers of their prices,

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[15] However, the fact that a complainant may be required to bear some costs is not a guarantee that the complaint will not be motivated by anticompetitive objectives. Under some circumstances, a complainant may be willing to incur those costs if it can reduce the level of competition in the market by disadvantaging competitors, as by raising their costs disproportionately. In the present instance, however, although we lack specific information on the costs that may be imposed upon the complainant and the accused company, it does not appear likely that testing costs would be of such magnitude as to affect the competitive balance.

[16] Although we lack sufficient information to determine the relevant antitrust market, we note that the group of firms that manufactures or imports down and feather-containing products is relatively unconcentrated. AD&FS members constitute a sizeable percentage of that group, but the effects of the testing process on any given firm, standing alone, do not appear likely to affect competition adversely, so long as competition among other firms is not constrained.

services, or quality). *Id*.

Several factors suggest that AD&FS's proposed compliance program regarding representations, claims, and advertising is unlikely to harm competition. First, this aspect of the program is limited to the physical testing of products against Industry Standards. Second, the testing procedures appear to be objective and narrowly tailored to achieve the stated purposes. Third, the proposed program may make consumers more likely to purchase from AD&FS members without concern that they are purchasing substandard merchandise. For these reasons, the restrictions, far from harming competition, may well promote it.

Sanctions for Non-Compliance with Industry Standards

You have asked that this staff opinion letter specifically address three questions:

- Whether AD&FS may report a non-compliant party to state and federal authorities;
- Whether AD&FS may list a non-compliant company on a website or in another public forum; and
- Whether AD&FS may place members that are non-compliant on probation or expel them.

The proposed sanctions do not appear, on their face, to be unreasonably exclusionary. First, the reporting of a non-compliant company to state and federal authorities appears unlikely, in itself, to result in a substantial lessening of competition. Although such action may cause the allegedly non-compliant company to incur some costs, such as legal fees, we have no reason to believe, based on current information, that the rival's costs would increase by such an amount as to substantially impair its ability to compete and adversely affect competition in the market. Further, the reporting of a company that is reasonably believed to be non-compliant may ultimately have a salutary effect on the market by increasing consumer confidence in products found in the market.

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[17] *See American Medical Association,* 117 F.T.C. at 1105.

[18] *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,