

**STANDARDS DEVELOPMENT ORGANIZATION
ADVANCEMENT ACT OF 2003**

HEARING
BEFORE THE
TASK FORCE ON ANTITRUST
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 1086

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Note: The Task Force on Antitrust was established on March 26, 2003 and consists of all the Members of the full Judiciary Committee.

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STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003

WEDNESDAY, APRIL 9, 2003

HOUSE OF REPRESENTATIVES,
TASK FORCE ON ANTITRUST,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force on Antitrust met, pursuant to call, at 9 a.m., in Room 2141, Rayburn House Office Building, Hon. J. Randy Forbes [Chairman of the Task Force on Antitrust] presiding.

Mr. FORBES. The Task Force will come to order. Today's meeting marks the inaugural hearing of the House Committee on the Judiciary Antitrust Task Force. We convene today to conduct a legislative hearing on H.R. 1086, the "Standards Development Organization Advancement Act of 2003."

This legislation would foster the critical role of standard development organizations while strongly reaffirming the central role of our Nation's antitrust statutes in preserving and promoting free market competition.

Standard development organizations play a pivotal role in promoting free market competition. Technical standards form the basis of product competition by ensuring a common interface between technically suitable substitutable products. Standards development in the United States is conducted largely by private not-for-profit standard development organizations which are best suited to keep pace with rapid technological change. The standard setting process is governed by principles of openness, balance transparency, consensus and due process in a nonexclusionary manner that permits the views of all interested parties to be fully considered.

In 1996, Congress passed legislation requiring the use of voluntary consensus standards in Federal procurement and regulatory activities. While this legislation has encouraged Government use of privately developed standards, it has also increased the vulnerability of private standards developers to antitrust litigation. The frequency in which standards developing organizations are named in lawsuits hampers their effectiveness and efficiency. H.R. 1086 remedies this problem. It must be stressed that H.R. 1086 does not immunize standard development organizations from scrutiny under the antitrust laws; rather, it limits recovery against these organizations to actual economic damages while codifying the rule of reason for antitrust scrutiny of these activities.

To further address the potential for anticompetitive misconduct, H.R. 1086 requires standard development organizations to disclose

the nature and scope of their activities to the Department of Justice and to the Federal Trade Commission in order to come within the protections of the legislation.

I am pleased that this legislation has attracted the cosponsorship of the Chairman and Ranking Member of this Committee as well as 12 of its Members. In this respect, H.R. 1086 continues this Committee's bipartisan tradition of striking the proper balance between procompetitive activity while ensuring the active role of Federal antitrust agencies in the preservation and promotion of competition in our market economy.

I look forward to the testimony of our distinguished panel and now yield to Congressman Delahunt for his opening remarks.

Mr. DELAHUNT. I thank the Chair and I am pleased to be here. I also want to commend the Chairman of the full Committee, and the Ranking Member for agreeing to the creation of this particular Task Force. It certainly makes good sense and I am confident that it will be productive.

Like you, Mr. Forbes, I look forward to the testimony of our witnesses and I especially want to welcome my friend, the former Attorney General of Massachusetts, Jim Shannon, who also served with great distinction in this House, many years ago now, I understand. He certainly has been an eloquent champion of this bill and I want to say how good it is to have him here, and I know that I echo the sentiments of his other dear friend on this Committee, Mr. Meehan.

Nearly 20 years ago Congress passed legislation known as the National Cooperative Research Act, which permitted certain cooperative ventures to reduce their exposure to treble damages under the antitrust laws by making advanced disclosures of their activities. The bill before us would provide similar relief to nonprofit organizations that develop voluntary technical standards known as standard development organizations or SDOs. The standards developed by these organizations play an essential role in enhancing public safety, facilitating market access and promoting trade and innovation. Yet despite these procompetitive effects, SDOs can find themselves named as defendants in suits between business competitors alleging violations of the antitrust laws. Once they are sued, these organizations are forced to expend considerable resources on protracted discovery proceedings before they are finally able to prevail on motions to dismiss.

The bill, like the NCRA before it, takes a moderate approach toward addressing this problem. It does not create a statutory exemption, as Mr. Forbes indicated, or defer immunity from the operation of the antitrust laws. It merely detrebles, if you will, antitrust damages in cases where accurate predisclosure of collaborative activities has been made to the Department of Justice. I would submit that this is the right approach. Congress should allow the antitrust laws to operate as they were meant to without creating special exemptions and carveouts for particular industries.

This bill does not create an exemption for SDOs; instead, it grants them limited relief in the same type and same manner as the relief provided by the NCRA to certain cooperative joint ventures. It is a moderate approach. It has worked well.

And again, Mr. Chairman, I thank you for holding this hearing and I look forward to the testimony of our witnesses. I would like to at this point in time introduce, to my left, to the panel, Congresswoman Zoe Lofgren from California. And I would also, with the indulgence of the Chair, would inquire from Mr. Meehan if he also wishes to join me in welcoming Mr. Shannon, in particular, to this hearing.

Mr. MEEHAN. I thank my colleague. I would like to welcome Jim Shannon to the Judiciary Committee. Jim Shannon actually gave me my first job in the Congress as a congressional staffer. And I would point out to my colleague from Massachusetts, it wasn't that long ago. In fact, it was 1979.

Just for a little bit of history, in the 96th Congress in 1979, Jim Shannon was the youngest Member of Congress at 26 years old. And Jim also served with distinction as the Attorney General of the Commonwealth, and during his tenure he took a leadership role on antitrust issues. He was the Chairman of the Antitrust Committee of the National Association of Attorneys General.

So I am delighted to have Mr. Shannon here and look forward to the testimony.

Mr. FORBES. Any other Members wish to make any other opening remarks? The Chair recognizes the distinguished Member from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I will be very brief. This hearing has the trappings of a Massachusetts conspiracy. Mr. Shannon, you sent two good men here in Mr. Delahunt and Mr. Meehan. And Mr. Chairman, I regret that I have two other hearings simultaneously being conducted, so I may have to come and go. But I agree with Mr. Delahunt, I appreciate you and the Chairman of the full Committee for having formulated this hearing. I look forward to hearing it while I can be here. Thank you.

Mr. FORBES. We will take you when we can get you and we know that it is quality and not quantity. We appreciate the minutes that we have.

Any other Member? The distinguished Member, from Ohio, Mr. Chabot.

Mr. CHABOT. Mr. Chairman, I wish we had one of our Republican House Members from Massachusetts who could also extend our greetings here, but of the 13 Members—I think it is still 13, they are all Democrats, but at least as one Republican, my dad was from Massachusetts. He was the one Republican in his family and he moved out of the State. So we all welcome you here and look forward to what you have to say.

Mr. FORBES. Any other Members wish to make any other opening remarks?

Before we begin, I would like to briefly introduce today's distinguished panel of witnesses. Our first witness is Mr. James Shannon, the President and Chief Executive Officer of the National Fire Protection Association. Before assuming this position, Mr. Shannon was Senior Vice President and General Counsel for the Association. The National Fire Protection Association is an international organization which develops fire safety codes and standards which are adopted by State and local jurisdictions throughout the United

States by the Federal Government and by governments around the world.

Prior to joining the National Fire Protection Association, Mr. Shannon served as Attorney General of the Commonwealth of Massachusetts where he argued several antitrust cases and testified before this Committee on antitrust legislation.

Mr. Shannon began his political career with his election to the United States House of Representatives in 1978. He was the youngest Member of the 96th Congress and served in the House until 1985. Mr. Shannon received his BA from Johns Hopkins University and his JD from George Washington University. Mr. Shannon, thank you for appearing today.

Our second witness is David Karmol who serves as Vice President for Public Policy and Government Affairs at the American National Standards Institute, ANSI. In this position, Mr. Karmol is responsible for advocacy and outreach programs designed to better educate Federal, State and local government officials on the role of standard developing organizations and promoting the competitiveness of U.S. Businesses and enhancing public health and safety. ANSI is a nonprofit organization that has administered and coordinated the U.S. private sector voluntary standardization system for more than 80 years.

Prior to joining ANSI, Mr. Karmol spent 10 years as General Counsel and Director of Public Affairs at the National Spa and Pool Institute. Mr. Karmol is no stranger to this setting, having served as counsel to the Judiciary Committee from 1979 to 1983. Mr. Karmol also served in the Ohio House of Representatives. Mr. Karmol received his BA from Miami University of Ohio and his JD from the Ohio State University College of law. Mr. Karmol, welcome back to the Committee.

Our final witness is Earl Everett, the Director of Safety Engineering for the Georgia State Department of Labor. In his present capacity, Mr. Everett oversees the enforcement of a variety of codes and standards that promote public health and safety.

Prior to joining the Georgia Department of Labor, Mr. Everett was the Assistant Regional Manager in the Southeast for Hartford Steam Boiler Inspection and Insurance Company. Mr. Everett holds a business administration degree from Orlando College in Florida, and served in the United States Navy from 1962 until 1974. Mr. Everett, thank you for appearing before the Committee to provide a State perspective upon this legislation.

And before recognizing our first witness, I don't believe there are any other Members that have joined us. Any other Members wish to make any opening remarks?

Mr. FORBES. If not, we will turn to our first witness, Mr. Shannon and we look forward to your remarks.

STATEMENT OF THE HONORABLE JAMES M. SHANNON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL FIRE PROTECTION ASSOCIATION

Mr. SHANNON. I am honored to appear before this Committee again. I am Jim Shannon. I am President and Chief Executive Officer of NFPA. NFPA is an international organization that develops voluntary consensus codes and standards that are adopted by State

and local jurisdictions throughout the United States and are widely used by the Federal Government and other governments around the world. As you indicated, before joining NFPA, I served as Attorney General of the Commonwealth of Massachusetts and was involved in antitrust matters with the National Association of Attorneys General where I had the honor to testify before this Committee on antitrust matters, and I served in the House of Representatives for three terms prior to that. As a public official, I sought to understand and improve and enforce the antitrust laws to further the goals of enhanced competition.

And the bill I am here to support today, the Standards Development Organization Advancement Act of 2003, will help standards developers continue their important work on behalf of all of our citizens while reaffirming the central role of our antitrust statutes in a free market economy.

Let me take a minute if I might to describe NFPA, to give you a sense of the organizations that are covered by this proposal and why it is in the public interest to adopt the legislation. NFPA was founded over 100 years ago and has as its mission the protection of lives and property from fire and related hazards. This mission is accomplished principally through the development of nearly 300 codes and standards in a consensus process under rules sanctioned by the American National Standards Institute. These codes include the National Electrical Code, which is used in just about every jurisdiction in America; the National Fire Codes; and the Life Safety Code, which under law must be used in health care facilities that receive Medicare and Medicaid reimbursement.

Our rules require that standards be developed using procedures that ensure due process, openness, fairness and the participation of materially affected interests. Our technical committees that draft and update our codes are balanced to ensure that no single group of interested persons can dominate the process. Decisions are reached by consensus after consideration of all of the technical arguments. And in our system, any party who disagrees with a decision may file an appeal and receive a hearing before a standard or code is issued.

The wide acceptance of NFPA codes and standards and codes and standards of similar nonprofit organizations is testament to the benefits provided by these activities. The legislation before you today is necessary, because standards development by its nature places competitors or potential competitors in a position where they may carry their competition into a standards development process. If one of these actors believes that its position in the market has been unfairly hindered by a particular standards decision, it may sue its competitor who has advocated that decision, alleging violations of the antitrust laws, and in many cases will sue the standard development organization. This happens even though the standard development organization is a nonprofit organization with no profit or other motive to violate the antitrust laws.

Because of the complexity of the antitrust laws and the continuing uncertainty of their potential application to standard development organizations, the prospect is that standards developers will continue to be named as pattern defendants in antitrust cases

alleging anticompetitive conduct of business competitors carried out in the standard development context.

NFPA, for example, has been named in several antitrust suits that have arisen in this way. When we met with individuals from the Justice Department, there was one person who had been there for some length of time and he said, gee, in all my years, you are the first organization that has come looking for relief from the antitrust laws who has actually been sued—which I thought was a signal honor for us. It has never been found, however, liable for any antitrust violation.

These suits, however, are very costly and disruptive to defend, even when the court dismisses the standard development organization's defendant. And merely the threat of substantial treble damages severely restrains the operations of nonprofit organizations that develop codes and standards.

Now, while I believe that a compelling case can be made for full antitrust immunity for nonprofit standard development organizations, the relief that we are seeking today is far more moderate and similar to an approach adopted by this Committee when it wrote the 1984 National Cooperative Research Act and amended that act in 1993. In those instances, the Committee adopted an approach whereby procompetitive joint venture activity could be predisclosed to antitrust agencies. In return for such disclosure, the parties received not immunity but detrebled actual damages, provided that their subsequent conduct stays within the bounds of their disclosure to the Department of Justice.

The NCRA, I think, has been a great success, allowing cooperation to bring about technical innovation without sacrificing the procompetitive protection of antitrust law. This proposed legislation would simply amend the existing statute to allow SDOs to use the very same predisclosure system that is now used for R&D ventures and production joint ventures. Thus the bill would leave the statutory scheme in place and simply include properly disclosed standards development activity as being eligible for the protections established by the NCRA.

As in 1984 and again in 1993, the proposed bill would ensure that the definition of standard setting would never include any of the per se offenses like price fixing, boycott, or dividing territories. In order to qualify for this treatment, the SDO would have to follow the open, voluntary, and nonexclusionary principles embodied in the OMB circular. And the protections provided in the act would apply only to activities that had been disclosed in advance to the Department of Justice and not to other activities of the standard development organizations.

These changes in the law would not mean that standard development organizations could never be joined as a defendant in an antitrust suit involving standard development activities. These changes would mean the potential antitrust plaintiffs would be on notice that to the extent that a standard development organization stayed within the bounds of its predisclosure to the antitrust reviewing agency, it would be subject only to actual and not treble damages.

Mr. Chairman, Members of this Committee, in summary, the Standards Development Organization Advancement Act of 2003 is an act that alleviates what has become a significant problem for

the nonprofit organizations that develop codes and standards that provide protection for the health and safety of American workers and our whole citizenry. The procedures embodied in the act have proven to be very successful with regard to cooperation, research, and development as allowed in the NCRA. Just as with that act, this legislation will remove a growing obstacle to activity that is clearly in the public interest, while leaving intact the important protection provided by strong antitrust laws, laws that I have long fought to protect. Thank you.

Mr. FORBES. Thank you for your testimony.

[The prepared statement of Mr. Shannon follows:]

PREPARED STATEMENT OF THE HONORABLE JAMES M. SHANNON

Mr. Chairman, ranking Member Conyers and Members of the Committee, I am honored to appear before this Committee again. I am James M. Shannon and I am President and Chief Executive Officer of NFPA (the National Fire Protection Association). NFPA is an international organization that develops voluntary consensus codes and standards that are adopted by state and local jurisdictions throughout the United States and are widely used by the federal government and other governments around the world. Before joining NFPA I served as Attorney General of the Commonwealth of Massachusetts from 1987 to 1991 and I was Chairman of the Antitrust Committee of the National Association of Attorneys General. In that capacity, I appeared before this committee to testify on antitrust matters. Before that I had the great honor of representing the Fifth Congressional District of Massachusetts as a member of this body from 1979 to 1985 and served on the Ways and Means Committee.

As a public official I sought to understand, improve, and enforce the antitrust laws to further the goals of enhanced competition. The bill that I am here to support today, the Standards Development Organization Advancement Act of 2003, will help standards developers continue their important work on behalf of all of our citizens while reaffirming the central role of our competition statutes in a free-market economy.

Let me take a minute to describe NFPA to give you a sense of the organizations that are covered by this proposal and why it is in the public interest to adopt this legislation.

NFPA was founded over one hundred years ago and has as its mission the protection of lives and property from fire and related hazards. This mission is accomplished principally through the development of nearly 300 codes and standards in a consensus process under rules sanctioned by the American National Standards Institute. These codes include the National Electrical Code, which is used in just about every jurisdiction in America, the National Fire Codes and the Life Safety Code which, under law, must be used in healthcare facilities that receive Medicare and Medicaid reimbursement.

Our rules require that standards be developed using procedures that ensure due process, openness, fairness and the participation of all materially affected interests. Our technical committees that draft and update our codes are balanced to ensure that no single group of interested persons can dominate the process. Decisions are reached by consensus after consideration of all the technical arguments. In our system, any party who disagrees with a decision may file an appeal and receive a hearing before a standard or code is issued. The wide acceptance of NFPA codes and standards and codes and standards of similar nonprofit organizations is testament to the benefits provided by these activities.

What is unique about the United States standardization process is that these activities, so vital to our citizens, are conducted by private organizations, not governmental agencies, but with broad participation, acceptance and support by public authorities. In fact, it has been federal policy since at least the Reagan Administration both through OMB Circular A-119 and more recently (in 1996) with the adoption of the National Technology Transfer and Advancement Act (NTTAA) to require the use of voluntary consensus standards to the extent possible in all procurement and regulatory activities.

The legislation before you today is necessary because standards development, by its nature, places competitors or potential competitors in a position where they may carry their competition into a standards development process. If one of these actors believes that its position in the market has been unfairly hindered by a particular

standards decision, it may sue its competitor who has advocated that decision, alleging violations of the antitrust laws and in many cases will sue the standards development organization as well. This happens even though the standards development organization is a nonprofit organization with no profit or other motive to violate the antitrust laws. Because of the complexity of the antitrust laws and the continuing uncertainty of their potential application to standards development organizations, the prospect is that standards developers will continue to be named as pattern defendants in antitrust cases alleging anticompetitive conduct of business competitors carried out in the standards development context.

NFPA, for example, has been named in several antitrust suits that have arisen in this way. It has never been found liable for any antitrust violation. These suits, however, are very costly and disruptive to defend even when the court dismisses the standards development organization defendant, and, merely the threat of substantial treble damages severely restrains the operations of a nonprofit organization that develops codes and standards.

While I believe that a compelling case can be made for full antitrust immunity for nonprofit standards development organizations, the relief we are seeking today is far more moderate and similar to an approach adopted by this committee when it wrote the 1984 National Cooperative Research Act (NCRA) and amended that act in 1993. In those instances, this committee adopted an approach whereby procompetitive joint venture activity could be predisclosed to the antitrust agencies. In return for such disclosure, the parties receive not immunity but “detrebled” damages (actual damages), *provided that their subsequent conduct stays within the bounds of their disclosure to the Department of Justice.*

The NCRA has been a great success allowing cooperation to bring about technical innovation without sacrificing the procompetitive protection of antitrust law. With regard to the R&D activities covered by that Act, a balanced approach of not granting immunity but establishing a voluntary and transparent predisclosure process in return for reduced liability was in the best interests of both innovation and safeguarding competition. The same approach for standards development will provide similar benefits for the public.

The proposed legislation would simply amend the existing statute to allow SDO’s to use the very same predisclosure system as now used for R&D joint ventures and production joint ventures. Thus, the bill would leave the statutory scheme in place and simply include properly disclosed standards development activity as being eligible for the protections established by the NCRA. As in 1984 and again in 1993, the proposed bill would ensure that the definition of “standards setting” would never include any of the per se offenses, like price fixing, boycott or dividing territories. In order to qualify for this treatment the SDO would have to follow the open, voluntary and non-exclusionary principles embodied in the OMB circular. The protections provided in the Act would apply only to activities that had been disclosed in advance to the Department of Justice, and not to other activities of the standards development organizations.

These changes in law would not mean that standards development organizations could never be joined as a defendant in an antitrust suit involving standards development activities. These changes would mean that potential antitrust plaintiffs would be on notice that, to the extent that a standards developing organization stayed within the bounds of its pre-disclosure to the antitrust reviewing agency, it would be subject only to actual, not treble damage. In addition, under the proposed legislation, joinder of an SDO in an antitrust suit along with the actual business competitors could no longer be done lightly. As with the National Cooperative Research Act, this legislation provides for court awarded costs and attorneys fees where an Act-compliant SDO is sued unreasonably or in bad faith.

Mr. Chairman and Members of the Committee, in summary, the Standards Development Organization Advancement Act of 2003, is an act that alleviates what has become a significant problem for the nonprofit organizations that develop the codes and standards that provide protection for the health and safety of American workers and our whole citizenry. The procedures embodied in the Act have proven to be very successful with regard to cooperation in research and development as allowed in the National Cooperative Research Act. Just as with that Act this legislation will remove a growing obstacle to activity that is clearly in the public interest while leaving intact the important protection provided by strong antitrust laws.

Thank you.

Mr. FORBES. And Mr. Karmol, we look forward to your comments.

**STATEMENT OF DAVID KARMOL, VICE PRESIDENT OF PUBLIC
POLICY AND GOVERNMENT AFFAIRS, AMERICAN NATIONAL
STANDARDS INSTITUTE**

Mr. KARMOL. Thank you, Mr. Chairman, Members of the Committee. My name is Dave Karmol. I am the Vice President of Public Policy and Government Affairs for the American National Standards Institute, also known as ANSI.

I am honored to join the two gentlemen at the table this morning who represent two ANSI-accredited standards developers, NFPA and ASME. These two groups are respected around the world, and the work they do is a large part of the reason this Nation is as safe a place as it is to live, work, and play.

Voluntary consensus standards produced by the hundreds of groups this bill would benefit are documents intended to improve the utility and safety of products and services, stimulate competition for products by facilitating interchangeability and interoperability, and enhance international trade. Use of a standard offers a benchmark of basic product characteristics which allows buyers to compare products.

The voluntary standardization system in the United States is the most effective and efficient in the world. For almost 100 years, this system has been administered and coordinated by ANSI, a private 501(c)(3) organization with the cooperation of Federal, State and local governments. ANSI itself does not write standards, but accredits nearly 300 standard development organizations, SDOs, who have together developed over 11,000 American national standards. ANSI determines whether the standards developed by these groups meet the criteria to be approved as American national standards. ANSI's approval of these standards verifies that the principles of openness and due process have been followed. American national standards provide dimensions, ratings, terminology and symbols, test methods, interoperability criteria and performance and safety requirements for everything from children's toys to nuclear reactor vessels.

Today, standards development continues in such critical areas as health care, the environment, and homeland security. In the conformity assessment area—that is, measuring compliance with standards—ANSI accredits 36 organizations that certify products meet standards. ANSI is also involved in the process of accrediting organizations that register quality systems conforming to ISO 9000 and ISO 14000 series of standards.

As you may know, ANSI was created in 1918 as a joint effort by the Departments of War, Navy, and Commerce and several standards developers. More recently, when Congress enacted the National Technology Transfer and Advancement Act of 1995, it specifically encouraged the participation of the Federal Government in the development of voluntary standards. It was the clear intent of Congress that Federal employees play an active role in the development of standards to be used in regulation, procurement, and trade.

Other recent legislation gives evidence of the intent of Congress that Federal agencies should use voluntary standards whenever possible. That includes the Consumer Product Safety Act, the Health Insurance Portability and Accountability Act or HIPPA, the

Telecommunications Reform Act of 1996, the FDA Modernization Act of 1997, and the National Defense Authorization Act of 2002.

Today, the Department of Defense alone has adopted over 9,000 voluntary standards for procurement purposes, and the use of these standards helps makes our military the best in the world. Replacing milspecs with voluntary standards has also saved taxpayers billions of dollars in procurement costs.

The benefits and procompetitive effects of voluntary standards are not in dispute. Standards do everything from solving issues of product compatibility to addressing consumer safety and health concerns. They also are a fundamental building block for international trade. As a result of laws passed by Congress encouraging Government adoption and use of standards, our community is now performing some functions that were previously the exclusive province of Government agencies. As standards developers take on these roles, it makes sense that they should have some of the exemptions from liability that the Government has traditionally enjoyed, such as relief from potentially onerous antitrust liability.

The National Cooperative Research and Production Act recognized the need to balance the interest and avoiding anticompetitive conduct with procompetitive results of cooperative ventures in the areas of research and production. The NCRPA eliminates the possibility of treble damages when participants file their intent with the Justice Department and the FTC.

H.R. 1086 creates an explicit filing opportunity for SDOs that mirrors the requirements and restrictions currently placed on companies filing under existing law. H.R. 1086 recognizes the new functions SDOs have taken on and recognizes the need for a filing method that is clearly available to these SDOs.

SDOs and the experts that populate these groups serve an important public service function in devising voluntary consensus standards. The entire voluntary consensus standard system will be hindered in its ability to continue its work if SDOs are subject to possible antitrust claims and the legal expenses that such claims entail.

We ask you favorably to consider H.R. 1086. And by acting on this, Congress will take a step to offer some protection to the SDOs on which the Government depends for assistance in devising reasonable regulations and procurement standards that fulfill Government needs.

ANSI shares this Committee's desire to see that the antitrust laws protect American citizens and businesses from illegal practices while at the same time not unduly restricting the ability of American firms to work together to address the challenges they face in the global marketplace. We also believe that along with the responsibilities that have been assumed by the hundreds of organizations that sponsor the development of standards, there is a need for some protection from the high costs of defending against this type of litigation.

This legislation strikes a good balance and provides some recognition of the contribution that standards developing organizations make to American society and our economy and increasingly as partners with the Federal Government.

We thank you for the opportunity to testify. And I would be very happy to answer questions.

Mr. FORBES. Thank you, Mr. Karmol.

[The prepared statement of Mr. Karmol follows:]

PREPARED STATEMENT OF DAVID L. KARMOL

Good morning, Mr. Chairman and members of the Committee. My name is David Karmol and I am the Vice President of Public Policy and Government Affairs at the American National Standards Institute, usually referred to as ANSI.

It is with great pleasure that I appear before you today to discuss the merits of H.R. 1086, a bill "to encourage the development and promulgation of voluntary consensus standards . . . by providing relief under the antitrust laws to standards development organizations" (SDOs). Voluntary consensus standards are documents intended to improve the utility and safety of products and services, stimulate competition for products by facilitating interchangeability and interoperability, and enhancing international trade. Standards that are approved as American National Standards are created by accredited organizations that focus on reaching consensus among all affected stakeholder groups that may include industry, government, organizations, consumers/labor interests, and other experts. These standards provide technical guidance on the production and operation of a wide array of materials, products, and services across a multitude of industry sectors.

Beyond their use as a means of enhancing consumer safety, standards provide a method for creating products that are interoperable in spite of being manufactured by different corporations. Wide acceptance of a standard offers a benchmark of basic product characteristics, which allows consumers to compare products. This not only benefits large corporations, but also small businesses that are able to market products that can be independently certified as having equivalent functionality, safety characteristics or other common factors.

ANSI'S ROLE

The voluntary standardization system in the United States is the most effective and efficient in the world. For almost 100 years, this system has been administered and coordinated by the private sector through ANSI, with the cooperation of federal, state and local governments. ANSI does not write standards; it serves as a catalyst for standards development by its diverse membership. The Institute is a unique partnership of industry; professional, technical, trade, labor, academic and consumer organizations; and some 30 government agencies. These members of the ANSI federation actually develop standards or otherwise participate in their development, contributing their time and expertise in order to make the system work.

ANSI accredits various standards developers to develop American National Standards. Thousands of individuals from companies, organizations (such as labor, consumer and industrial groups), academia, and government agencies voluntarily participate and contribute their knowledge, talent and efforts to the standards development process.

ANSI determines whether standards developed by ANSI-accredited standards developers meet the necessary criteria to be approved as American National Standards. ANSI's approval of these standards is intended to verify that the principles of openness and due process have been followed and that a consensus of all interested parties has been reached. In addition, ANSI considers any evidence that the proposed American National Standard is contrary to the public interest, contains unfair provisions or is unsuitable for national use.

The voluntary consensus standards development process has proven its effectiveness across a diverse set of industries and in federal, state and local government processes. These industries include telecommunications, safety and health, information technology, petroleum, banking and household appliances. There are now approximately 11,000 ANSI-approved American National Standards that provide dimensions, ratings, terminology and symbols, test methods, interoperability criteria, and performance and safety requirements. These efforts continue today and are being applied to new critical areas such as the environment and healthcare.

ANSI also is the United States representative to the two major, non-treaty international standards organizations: The International Organization for Standardization (ISO) and, through the United States National Committee, the International Electrotechnical Commission (IEC). In the conformity assessment area, ANSI accredits organizations that certify that products meet certain standards. In addition, through a joint program, ANSI and the Registrar Accreditation Board (RAB) ac-

credit organizations that register quality systems conforming to the ISO 9000 and ISO 14000 series of standards.

In fulfilling its roles and responsibilities, ANSI continues to pursue its mission to “[e]nhance both the global competitiveness of U.S. business and the U.S. quality of life by promoting and facilitating voluntary consensus standards and conformity assessment systems and safeguarding their integrity.” In summary, ANSI ensures the integrity of the U.S. voluntary consensus standardization system by serving as (1) an open, national forum for standards-related policy issues, (2) the only accreditor of standards developers, ISO Technical Advisory Groups (TAGs) and certain certification programs, and (3) a primary source of information and education on standards and conformity assessment issues.

ANSI PROCESSES AND PROCEDURES¹

As the only accreditor of U.S. standards developing organizations, ANSI ensures the integrity of the voluntary consensus standards development process and determines whether standards meet the necessary criteria to be approved as American National Standards. The goal of the ANSI process is to obtain a document that a balanced consensus of materially affected interest groups believes is an appropriate standard. Due process is critical when it comes to determining if that consensus has been fairly achieved. Accordingly, ANSI requires that a draft proposed standard be appropriately circulated (both to the consensus body and the public at large) and that an attempt is made to resolve all negative comments. There must be an appeals process. If a balanced consensus body then votes on and approves the proposed document after reviewing all unresolved negative comments and any substantive changes to the text, consensus has been achieved and due process has been satisfied. This basic formula has been the hallmark of the ANSI process for decades, and it has earned widespread respect and acceptance.

If a standard is developed according to ANSI requirements, there should be sufficient evidence that the standard has a substantive reasonable basis for its existence and that it meets the needs of producers, users and other interest groups. If a vote on a standard was or is somehow perceived as having been subtly manipulated, any person or entity who is materially affected by or otherwise interested in the standard—whether a voting member of the consensus body or a public commentator—can appeal the decision. The grounds for an appeal to ANSI include issues such as lack of balance on the consensus body, dominance by any person or entity, inadequate response to a negative comment (again whether from a voting member of the committee or a public commentator), and improper restraint of trade concerns. The appeals process, and the requirement that all consensus bodies seek to have representatives from a balanced group of stakeholder interests, assures that no one interest can manipulate the process unfairly. The ANSI system is designed so that contrary evidence proffered by opponents of the standard must be properly addressed and responded to or else the standard will fail to achieve ultimate approval.

In addition, proper procedures are of little value if they are not followed in practice. As a result, in addition to the review ANSI undertakes when a standard is submitted to it for approval as an American National Standard, the Institute also has implemented a mandatory standards developer audit program. The program is designed both to verify an accredited developer’s compliance with current ANSI requirements and to provide guidance on more efficient or effective ways to address various aspects of the standards development process.

While all American National Standards must be developed in accordance with these basic hallmarks of the ANSI process, accredited developers may satisfy these requirements in innovative ways and rely extensively on electronic communications. If there is a ready consensus by the interested parties on a proposed standard, the standard can meet the procedural requirements for, and be approved as, an American National Standard in a matter of months.

ANSI recognizes that there are many ways to develop standards, and that in many instances other methods and the resulting standards are entirely appropriate for the targeted user community. ANSI has no objection whatsoever to the existence of organizations that develop standards outside the so-called “formal” process used within the ANSI community. ANSI has never had—nor has it ever sought—exclusivity in promulgating a standards development process.

¹The ANSI procedural requirements for accrediting standards developers and for designating American National Standards are available on ANSI Online at <<http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ER2003.doc>>

THE PUBLIC-PRIVATE PARTNERSHIP

While the term “public-private partnership” has been in vogue in Washington in recent years, it has been a reality for ANSI since our creation. In fact, ANSI was founded in 1918 by a group of private sector organizations and government agencies that recognized the need to have a forum in which they could address common concerns. As a private sector organization with many government members, ANSI has a strong tradition of working cooperatively with government as well as industry, organizations, and consumer interests.

ANSI is a private sector organization in which many government representatives are active at all levels, from our Board of Directors to the committees that promulgate, maintain and implement the procedures pursuant to which standards developers are accredited and American National Standards are developed and approved. Government representatives participate in ANSI delegations addressing international standardization issues, thereby strengthening the U.S. voice in international standardization negotiations.

When Congress enacted the National Technology Transfer and Advancement Act of 1995 (NTTAA),² it specifically and strongly encouraged the participation of the U.S. government in the development of voluntary consensus standards. It was the clear intent of Congress that federal employees play an active role in the development of standards that will be used in regulation, procurement, and trade. This action by the Congress confirmed a basic principle of the U.S. standardization system—that standards-setting is a partnership process in which government and the private sector are equal partners. The importance of the private-public partnership was reaffirmed in a series of laws enacted by Congress in recent years, including these:

- Consumer Product Safety Improvement Act of 1990
- The National Technology Transfer and Advancement Act of 1995 (P.L. 104–113)
- Health Insurance Portability and Accountability Act of 1995
- Telecommunications Reform Act of 1996
- FDA Modernization Act of 1997

Each of these laws reinforced the principle that the Federal government should rely heavily upon private sector standards, and that the government should participate actively in the development of those standards.

The U.S. is an example to the rest of the world on how the public and private sectors can work cooperatively. Using voluntary standards allows the government to achieve economies of scale and have access to the most modern technologies and a wide range of technical experts. If federal participation in standards development were curtailed, over time these benefits might be lost to the federal government—costs would go up and the advantages of government use of products meeting consensus standards would be lost. While the private sector would suffer the loss of the expertise of often uniquely knowledgeable government experts, the government would lose the benefit of critical, timely access to private sector expertise and standards.

In an era of constant technological change, we cannot afford to sacrifice our economic advantage because of laws that stifle development of standards that provide many pro-competitive benefits.

THE STANDARDS DEVELOPING ORGANIZATION ACT AND THE U.S. ECONOMY

The benefits and pro-competitive effects of voluntary standards are not in dispute. Standards do everything from solving issues of product compatibility to addressing consumer safety and health concerns. Standards also allow for the systemic elimination of non-value-added product differences (thereby increasing a user’s ability to compare competing products), provide for interoperability, improve quality, reduce costs and often simplify product development. They also are a fundamental building block for international trade. As the U.S. Court of Appeals for the First Circuit explained:

The *joint* specification, development, promulgation, and adoption efforts would seem less expensive than having each member of CISPI [a trade association] make duplicative efforts. On its face, the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the stand-

² Op.cit.

ard. It may also help to assure product quality. If such activity, in and of itself, were to hurt Clamp-All by making it more difficult for Clamp-All to compete, Clamp-All would suffer injury only as result of the defendants' joint efforts having lowered information costs or created a better product. . . . And, *that* kind of harm is not "unreasonably anticompetitive." It brings about the very benefits that the antitrust laws seek to promote.³

As a result of the increasing number of laws passed by the Congress since the early 1990's mandating government adoption and use of standards, and participation in private standards development, the standards community actually is performing some critical development functions that were previously the exclusive province of government agencies. As standards developers take on the role of government in formulating consensus standards, they arguably deserve some of the exemptions from liability that the government has traditionally enjoyed, such as relief from potentially onerous antitrust liability exposure.

The National Cooperative Research and Production Act of 1993 recognized the need to balance the governmental interest in avoiding anti-competitive conduct with the efficiency and pro-competitive results of certain types of cooperative ventures in the areas of research and production. H.R. 1086 creates an explicit filing opportunity for SDOs which mirrors the requirements and restrictions currently placed on organizations and companies filing under the existing law.

SDOs—and the experts that populate these groups—serve an important public interest function in devising voluntary consensus standards. The public interest is both served and protected if the standards developer is adhering to the hallmarks of the ANSI process: Openness, balance, consensus, public notice and review, opportunity to appeal, and other due process safeguards. The entire voluntary consensus standards system will be severely hindered in its ability to continue its valuable work if SDOs are subjected to possible antitrust claims and forced to incur substantial legal and other costs in their defense.

We ask that you favorably consider H.R. 1086, by which Congress will take a step to offer some protection to the SDOs on which the government depends for assistance in devising reasonable regulations and procurement standards that fulfill government needs.

CONCLUSION

ANSI shares this Committee's desire to see that the antitrust laws continue to protect American citizens and businesses from harmful anti-competitive practices, while at the same time not unduly restricting the ability of American firms to work together to address the common challenges they face in the global marketplace. We also believe that along with the responsibilities that have been assumed by the hundreds of organizations that sponsor the development of standards, there is a need for some protection from the high costs of defending against litigation. This legislation strikes a good balance, and provides some recognition of the contribution that standards developing organizations make to the American society and economy, and increasingly, as partners with the Federal Government.

We want to work with you to promote the development of quality standards that serve all our citizens.

Thank you for this opportunity to testify. I would be very happy to answer any questions you might have.

Mr. FORBES. Mr. Everett, looking forward to your comments.

STATEMENT OF EARL EVERETT, DIRECTOR, DEPARTMENT OF LABOR, DIVISION OF SAFETY ENGINEERING, STATE OF GEORGIA

Mr. EVERETT. Thank you, Mr. Chairman, and Members of the Committee. Thanks for allowing me to be here with you today. My name is Earl Everett, and as Director of the Safety Engineering Division within the Georgia Department of Labor, I have responsibility for administration and enforcement of various codes and standards accepted by the State of Georgia. Some of the most notable standards are those developed by the American Society of Me-

³ *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 487 (1st Cir. 1988) (Breyer, C.J.) (citation omitted; emphasis in original), *cert. denied*, 488 U.S. 1007 (1989).

chanical Engineers, National Fire Protection Association, American Society of Testing Materials, American Society of Safety Engineer, and the National Board Inspection Code.

Codes of these standard developing organizations are generally accepted as proper and effective guidelines in determining safety and quality of various products. For example, the ASME Boiler and Pressure Vessel Code and the National Board Inspection Code have been proven to be effective in ensuring the safety of our citizens. And since their inception in the early 1900's, these standards have been adopted by 49 States. They are developed by over 800 volunteer members, representing all segments of the boiler and pressure vessel industry, including manufacturers, users, and enforcement authorities. These codes are continuously reviewed to ensure that the latest materials and technology are incorporated. And without the consensus standards being available for State and local governments, there would be no uniformity or reciprocity among the States. Products manufactured in one State may not meet the standards of another State. If State and local governments tried to develop and promulgate independent standard, there would be so many outside influences it would be virtually impossible to arrive at an acceptable consensus. State and local governments also do not have the expertise or the resources to expend the development of any standards.

The importance of these standards and the volunteers who develop them cannot be overstated. They touch our lives and the lives of our family and friends and everything that we do. We are so dependent on standards that we are able to take safety, convenience, comfort, and longevity for granted. Somewhere right now, some highly trained and experienced person is volunteering his or her time to make this a better and safer place for all to live.

Mr. Chairman, I appreciate the opportunity to be of service and would welcome any questions.

Mr. FORBES. Thank you, Mr. Everett.

[The prepared statement of Mr. Everett follows:]

PREPARED STATEMENT OF EARL EVERETT

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. MY NAME IS EARL EVERETT. AS DIRECTOR OF SAFETY ENGINEERING WITHIN THE GEORGIA DEPARTMENT OF LABOR, I HAVE RESPONSIBILITY FOR ADMINISTRATION AND ENFORCEMENT OF VARIOUS CODES AND STANDARDS ACCEPTED BY THE STATE OF GEORGIA. SOME OF THE MOST NOTABLE STANDARDS ARE THOSE DEVELOPED BY THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS (ASME), NATIONAL FIRE PROTECTION ASSOCIATION (NFPA), AMERICAN SOCIETY OF TESTING MATERIALS (ASTM), AMERICAN SOCIETY OF SAFETY ENGINEERS (ASSE) AND THE NATIONAL BOARD INSPECTION CODE (NBIC). CODES OF THESE STANDARD-DEVELOPING ORGANIZATIONS ARE GENERALLY ACCEPTED AS PROPER AND EFFECTIVE GUIDELINES IN DETERMINING SAFETY AND QUALITY OF VARIOUS PRODUCTS. FOR EXAMPLE: THE ASME BOILER AND PRESSURE VESSEL CODE AND THE NBIC, HAVE BEEN PROVEN TO BE EFFECTIVE IN ASSURING THE SAFETY OF OUR CITIZENS. SINCE THEIR INCEPTION IN THE EARLY 1900'S, THESE STANDARDS HAVE BEEN ADOPTED BY 49 STATES. THEY ARE DEVELOPED BY OVER 800 VOLUNTEER MEMBERS REPRESENTING ALL SEGMENTS OF THE BOILER AND PRESSURE VESSEL INDUSTRY, INCLUDING MANUFACTURERS, USERS AND ENFORCEMENT AUTHORITIES. THESE CODES ARE CONTINUOUSLY REVIEWED TO ENSURE THAT THE LATEST MATERIALS AND TECHNOLOGY ARE INCORPORATED. WITHOUT THE CONSENSUS STANDARDS BEING AVAILABLE FOR STATE AND LOCAL GOVERNMENTS, THERE WOULD BE NO UNIFORMITY OR RECI-

PROCITY AMONG THE STATES. PRODUCTS MANUFACTURED IN ONE STATE MAY NOT MEET THE STANDARDS OF ANOTHER STATE. IF STATE AND LOCAL GOVERNMENTS TRIED TO DEVELOP AND PROMULGATE INDEPENDENT STANDARDS, THERE WOULD BE SO MANY OUTSIDE INFLUENCES, IT WOULD BE VIRTUALLY IMPOSSIBLE TO ARRIVE AT AN ACCEPTABLE CONSENSUS. STATE AND LOCAL GOVERNMENTS DO NOT HAVE THE EXPERTISE OR RESOURCES TO EXPEND IN DEVELOPMENT OF ANY STANDARDS.

THE IMPORTANCE OF THESE STANDARDS AND THE VOLUNTEERS WHO DEVELOPED THEM CANNOT BE OVERSTATED. THEY TOUCH OUR LIVES AND THE LIVES OF OUR FAMILIES AND FRIENDS IN EVERYTHING WE DO. WE ARE SO DEPENDENT ON STANDARDS THAT WE ARE ABLE TO TAKE SAFETY, CONVENIENCE, COMFORT AND LONGEVITY FOR GRANTED. SOMEWHERE, RIGHT NOW, SOME HIGHLY TRAINED AND EXPERIENCED PERSON IS VOLUNTEERING HIS OR HER TIME TO MAKE THIS A BETTER AND SAFER PLACE FOR US ALL TO LIVE.

MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO BE OF SERVICE AND WELCOME ANY QUESTIONS.

Mr. FORBES. And I would like to recognize myself for 5 minutes for a couple of questions.

First of all, Mr. Shannon, I know you have had a lot of experience with antitrust laws. And two things if you could elaborate on for clarification for the Committee. First of all, you mentioned in your written testimony the concept of pattern defendants. Could you just describe for us what a pattern defendant is, and, along with that, if you could describe for us the rule of reason standards so we are clear on that.

Mr. SHANNON. Mr. Chairman, thank you. I appreciate those questions because I think that some people—I think some people have some difficulty understanding why this is of concern to us. But I got to tell you it is a real concern to us because there has been over the last generation some movement toward—in the standards area toward trying to broaden and bring in more standards developers whenever antitrust litigation is contemplated.

We operate under the theory in private standards development that the best standards that protect the public are going to be developed if we have the people who are the most familiar with the topic at the table. And so with NFPA, for instance, while we operate under the ANSI rules that require balance with regard to our standards development activities, we want to have anybody who has got an interest, including an economic interest. That means if we are developing a fire standard, we want to have the fire service people there, we want representatives of firefighters, the fire chiefs and enforcement agencies. But if it is an area that involves sprinklers, for instance, or it involves some other type of fire equipment, we want to have the manufacturers there, we want to have the installers there. And we think by getting all of those people around the table that we are going to have the best decisions made.

And the rules that ANSI requires us to follow require that no group can dominate. And so we operate under that philosophy. I think it is a philosophy that the Federal and State governments have recognized for a long time that produces quality standards. It does bring competitors to the same table. And as I said in my testimony, from time to time, we will have somebody who will say, well, the way you wrote that standard kept us out of the marketplace, and they will sue one of their competitors who might be involved in the standards development, a manufacturer for instance. When

they bring that lawsuit alleging antitrust activity, they oftentimes now will, just as a matter of course, throw in as a defendant the standard development organization, which is a nonprofit organization, which has no interest in the marketplace.

We are not a market actor at all. We have no economic incentive to assist in antitrust—to assist in any kind of antitrust conspiracy, and yet we get thrown in just because as part of the litigation they try to throw in everybody.

Sometimes ANSI will be named as a defendant in the lawsuit as well. We write 300 standards and we have 7,000 people sitting on our technical committees. We do a pretty good job of policing that system. But unfortunately, we do get named in these suits and we almost always get dismissed pretty early. But before we get dismissed, we have expended hundreds of thousands of dollars, and it is extremely disruptive to our process. And that is what I mean by that.

And so we are looking for some level of protection against the threat of excessive damages. And the reason we get thrown in, of course, is because of treble damages. The plaintiffs will take a shot of naming us just on the theory that the treble damages are so high that maybe we will throw money into a settlement. We don't do that.

This activity is accelerating and it is continuing. We are looking for no protection if there is, in fact, an antitrust violation, if we in fact assist in one of the per se violations. But against the normal type of threat we face and the disruption we face, I think this would provide us a good deal of relief while denying nobody who has a legitimate claim the right to make those claims.

Mr. FORBES. Mr. Karmol, has ANSI ever been sued in one of these cases?

Mr. KARMOL. I don't believe we have been named in an antitrust action. We have been named in several tort liability type actions.

Mr. FORBES. Yet you are obviously concerned about this. Can you tell us why, and also give us an idea of the cost of defending this litigation? Mr. Shannon suggested several hundred thousand dollars.

Mr. KARMOL. I guess I am probably not the right person to answer that question because I am not our general counsel. I do know that we have expended well into the hundreds of thousands of dollars defending litigation just over the past year. And certainly the concern is that as these—as standards developers are named, the same situation ensues that Mr. Shannon referred to. When the attorneys look to name all possible parties, if an organization is using the ANSI process and is accredited by ANSI, there is the possibility that they will name ANSI as well, even though we are another step removed from the process that Mr. Shannon described. In fact, obviously we accredit these organizations. We look at their process to make sure it meets due process requirements, and then we audit their process at least once every 5 years to make sure that they are in fact doing what they say they are doing, to make sure that there is balance, openness, transparency and due process. That really is our only role. We are not involved in the substance of the creation of the standard, just maintaining the process.

But there is still the possibility that as attorneys look for additional pockets to get at, they name ANSI; and that has happened and we are definitely concerned that it will, because we have 300 developers like ASME and NFPA that accredit with some 11,000 American national standards out there.

Mr. FORBES. My time has expired and now I recognize the gentleman from Massachusetts, Mr. Delahunt for 5 minutes.

Mr. DELAHUNT. Thank you, Mr. Forbes. Before I—and I just have a single question. But before I pose that, I would ask unanimous consent that the statement of the Ranking Member, Mr. Conyers be included in the record.

Mr. FORBES. Without objection that will be included in the record.

Mr. DELAHUNT. Jim, I think what you said should be repeated in terms of SDOs. There is no anticompetitive motive here. It just simply doesn't exist. I think for me that really is the bottom line. But I would also ask if you could give us a real-life example in terms of litigation where you have been named in an antitrust suit and allude, if you can, if you know, what the costs were and what it did in terms of draining the resources of your particular organization.

Mr. SHANNON. Thank you, Mr. Delahunt. If I could, because I served as general counsel at NFPA prior to becoming president, we face the threat of it all the time. We get letters from counsel of people who participate in our process who say if you don't give us the result we are looking for, we are going to sue you. That is notwithstanding the fact that we have a system, and ANSI systems are generally replete with opportunities to appeal a decision within our process. So if you are not happy with the technical committee, you take it to the members' meeting, you take it to our Standards Council, you can appeal all the way up to our board of directors. If you are not happy with that, you can appeal it to ANSI. There are lots of opportunities for people to be heard.

A few years ago, and it is probably maybe 10 years ago now, one day we were served with a complaint charging that NFPA had involved itself in an antitrust violation. I had never heard of the complaint before. Nobody in our system had ever heard of the complaint before, but there was an individual, I think in the Atlanta area if I remember correctly, who said he made a proposal on one of our very technical standards that a method of calculation that he had developed and, I think, developed some software for, should be used—having to deal with hydraulics, and it was a very technical thing. He had never availed himself of any of the appeals processes within our system. He had never carried it any further than submitting a proposal. The committee looked at the proposal and did not accept the proposal. The next we heard was a couple of years later when he filed—when he filed an antitrust suit against us and against the members of the technical committee who he said had kept him out of the market. We engaged in some discussions with his attorney in the Atlanta area.

I went down for the discussions. He was present, and I said to this antitrust plaintiff who had sued our organization, "What do you think we have done wrong here?" And he said, "You have done nothing wrong here." Of course, his lawyer almost strangled him

for saying that. He said, "I think your organization is terrific. You haven't done anything wrong."

And so what are we doing here? What we were doing here, the lawyer said, we have to find somebody with some deep pockets. And if we can push this thing far enough, and maybe this organization has some insurance, of course you can't get insurance for anti-trust damages, but maybe they would be willing to throw some money into the pot to get rid of this thing. It was a basic nuisance suit.

He decided to dismiss us because he realized that he had a client who wasn't going to want to pursue this against us. I can tell you that just going that far and bringing that through some discovery and dismissal cost us over \$200,000, not counting the time of our in-house staff.

Mr. DELAHUNT. That would have been considerable dollars.

Mr. SHANNON. But it is very disruptive. It is very costly. And if there were any basis for that type of litigation, I wouldn't be here. And that is what we are trying to avoid, the nuisance situation which is becoming a really big threat, a much bigger threat in recent years.

Mr. DELAHUNT. Hopefully this Committee can address that. But I would be remiss in not asking you where is your organization located?

Mr. SHANNON. Happily, we are located in Quincy, Massachusetts. We moved there from Boston, and we were seeking greener pastures, a few years ago.

Mr. DELAHUNT. And you are aware, of course, two Presidents of the United States were born in Quincy, MA.

Mr. SHANNON. And we are very pleased with the distinguished representation we have had in Congress for a long period of time, going back to John Quincy Adams.

Mr. DELAHUNT. To the current day. With that, I yield back.

Mr. FORBES. Gentleman yields back. The gentleman from Virginia, Mr. Goodlatte, is recognized for 5 minutes.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding this hearing. I find it very important and useful, but I don't have any questions.

Mr. FORBES. The gentleman from Massachusetts, Mr. Meehan, is recognized for 5 minutes to put in a further plug for the Commonwealth of Massachusetts.

Mr. MEEHAN. Mr. Chairman, I was going to ask Mr. Shannon is there no office space available in Lawrence or Lowell or the other areas in some of the other districts that he so ably represented.

This is a great piece of legislation and I think there has been a lot of bipartisan work that has been done on this, and I think it is a bill that this Committee will move on and the House will move on relatively quickly. I am curious to ask Mr. Shannon, through his position with the National Fire Protection Association, what have we learned—it is a little off the subject—what have we learned in terms of standards from the attack on the World Trade Towers and even to the extent that you want to touch on it, the recent fire in Rhode Island.

Mr. SHANNON. Thank you for that question, because I think one of the things of standards development that is somewhat frus-

trating for all of us is I don't think a lot of people, and the public generally, and even, frankly, some public officials don't understand the important role of private standards development when it comes to protecting safety.

You know, one of the great stories on the darkest day in American history, September 11, 2001, one of the great stories that I think hasn't been focused on enough is the evacuation that took place at the World Trade Center and the fact that virtually every person who was in those towers below the floors of impact got out. Now, there are a lot of reasons for that. But one of the reasons is after the first attack in 1993, NFPA and other organizations got together and worked—to work on the evacuation of those very buildings. And I would recommend to you and I will provide for you, if you like, because I think it is instructive, photographs of the exits in that building prior to the 1993 blast and after the 1993 blast, which were all determined by safety officials working with private organizations like NFPA—and we are very proud to have been involved in that. And, they changed the lighting, the backup power for the lighting, the railing, and the exits in the World Trade Center, and that is just one example of what private organizations like ours do to help promote life safety.

And we are so glad that the Federal Government has adopted a policy of saying to Federal agencies, you know, use private standards. Don't develop yourselves. Use private standards because the process we have to develop them really brings all of the people to the table.

The same is true with the West Warwick Rhode Island fire, a horrible, horrible tragedy. And I think the greatest part of that tragedy from my perspective, when you have a horrible loss of life, that if the codes that had been adopted had been enforced there, that never would have happened. The fire would have never taken place and you wouldn't have had that kind of loss of life.

I think the development of codes and standards is hugely important. And you have to have implementation and enforcement, and those are the pieces we are working on as well.

And I also want to say we are very, very proud to be working with the Department of Homeland Security on questions that might come up in light of the current threat that we are facing. We write dozens of standards that are important to our homeland security. NFPA last year, for instance, after the anthrax scare, was pleased to make available to every fire department in the country our protective clothing standards for fire departments or hazardous materials standards. And we are working on that and we are working on building evacuation questions.

We just did a study for FEMA on the capabilities of first responders and the needs of first responders, given the terrorist threat we are going to be facing, and I am glad we have got this partnership with the governmental agencies. And I think I speak for everybody in the private standards development world in saying that we think we have a big role to play and we look forward to playing it and we appreciate your assistance in making that possible for us.

Mr. MEEHAN. Thank you very much, Mr. Shannon.

Mr. FORBES. Let me thank all of the Members of the panel for taking time to be here today for your testimony, for your written statements, and also for the work you are doing in this area. I want to remind everybody that the legislative record to submit additional materials for the hearing record will be open for 7 days.

I also want to thank the staff on both sides of the aisle for the hard work that they have done on this legislation and also on the hearing. If there is nothing else, then the hearing is adjourned.

[Whereupon, at 10:50 am., the task force was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN

I am pleased to be a co-sponsor of this legislation offered by Mr. Sensenbrenner and I am glad that after several years of work on this bill, we are now holding a hearing and will hopefully be moving this bill through committee soon. We have worked hard, along with a number of standard development organizations, technology companies and other private interests to craft a bill that will provide some protections to encourage non-profit standard development organizations, or SDOs, to continue their important work of collaborating to set pro-competitive standards in their industries.

This bill provides a common sense safe harbor for standard development organizations. Those that voluntarily disclose their activities to federal antitrust authorities will only be subject to single damages should a lawsuit later arise. Those who refuse to disclose their activities, or those who take actions beyond their disclosure, will still be subject to treble damages under the antitrust statutes. This bill does not exempt anyone from the antitrust laws, but it does apply the rule of reason to SDOs—so pro- and anti-competitive market effects of an action will be considered before a violation is found. Organizations that commit per se violations—making agreements or standards about price, market share or territory division, for example, would still be fully liable for their actions.

This policy has worked well for research and joint ventures under the National Cooperative Research and Production Act of 1993. An expansion of this policy to standard development organizations will allow them to improve their innovative efforts, involve a wider range of industries and technical entities, and improve product safety and development.

I look forward to hearing from our witnesses today and I hope you can elaborate on how this legislation will assist standards development across a broad range of industries and products.

LETTER IN SUPPORT OF H.R. 1086 SUBMITTED ON BEHALF OF
THE INTERNATIONAL CODE COUNCIL

April 16, 2003

The Honorable Jim Sensenbrenner, Jr.
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Mr. Chairman:

The International Code Council® (ICC) commends you for introducing, H.R. 1086, "Standards Developing Organizations Advancement Act of 2002", legislation that encourages the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to not-for-profit standards developing organizations.

ICC supports your desire to protect American codes and standards developers from anti-competitive practices while at the same time providing these organizations protection against costly and disruptive litigation. ICC strongly believes that protection would be further enhanced with clarification in the legislative language that such relief under the antitrust laws would not permit standards developing organizations to use their market dominance to keep other standards developing organizations out of the free market of products and ideas.

ICC is a not-for-profit organization whose mission is to promulgate a compatible regulatory system for the built environment through consistent performance-based regulations that are effective, efficient and meet government, industry and public needs. ICC and its statutory members share over 190 years of collective experience in developing model building codes. The International Codes® (I-Codes) are a comprehensive and coordinated family of construction codes that cover new commercial and residential building, energy conservation, plumbing, mechanical, property maintenance, private sewage disposal, zoning, urban-wildland interface, existing buildings and more.

The I-Codes are currently in effect in 46 states, Puerto Rico and the District of Columbia, and are referenced in federal regulations, including in the Unified Facilities Criteria of the U.S. Department of Defense. More and more jurisdictions are updating their building regulations to reflect the latest editions of the I-Codes. For more information on the widespread use of the codes, please visit our website at www.iccsafe.org

ICC commends Congress for its visionary approach when it passed the legislation that became PL 104-113 in 1995. This law encourages the public and private sectors to work cooperatively and supports the development of state-of-the-art codes and standards that incorporate the latest technology and product development.

The I-Codes are developed through a governmental consensus process that meets the principles defined by the National Standards Strategy; the OMB Circular A-119 (Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities) and complies with PL 104-113, National Technology Transfer and Advancement Act of 1995. Those principles are openness, transparency, balance of interest, due process, an appeals process and consensus.

Standards development in the U.S. follows a sectoral approach that appropriately targets the user community. There are over 600 standards developers in the U.S. ANSI accredits over 200 standards developers. ICC is an ANSI accredited standards developer. ICC supports the intent of the Standards

Development Organization Advancement Act of 2003 as necessary protection for both ANSI *and* non-ANSI accredited standards developers.

ICC supports your desire to protect standards developing organizations against counter-productive anti-competitive practices while at the same time allowing such organizations to cooperatively and collaboratively develop codes and standards that appropriately address the needs of all stakeholders and protect the public.

Thank you for the opportunity to submit these comments for the record of the hearing held on April 9, 2003. If I may be of any assistance to you, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Sara C. Yates". The signature is written in a cursive, flowing style.

Cc: Bob Heinrich, CEO
Dominic Sims, Senior Vice President