



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Bureau of Competition

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Re: American Down & Feather Section  
Home Fashion Products Association  
Request for Staff Opinion Letter  
FTC File No. P002501

Dear Ms. Weinberg:

This letter responds to your request on behalf of the American Down & Feather Section of the Home Fashion Products Association (AD&FS) for a staff opinion letter regarding a proposed Labeling Compliance Program. You have asked whether, based on the facts submitted, the Commission Staff would recommend that the Commission bring an enforcement action challenging implementation of the AD&FS proposal. On the basis of information you provided in your letters of May 1, 2003, June 9, 2003, and June 24, 2003, Commission staff have no present intention to recommend a challenge to AD&FS's implementation of the Compliance Program as proposed.

### **AD&FS and the Proposed Labeling Compliance Program**

We understand that AD&FS is a voluntary association of dealers, buyers, sellers and processors of raw feathers and down in home fashion products. As of June 9, 2003, AD&FS had 21 members, of which 18 were manufacturers of finished products containing down and feather, two were importers of finished products, and one was a supplier of processed down and feathers.<sup>1</sup>

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<sup>1</sup> Letter of June 9, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

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.”<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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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<sup>2</sup> 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.

<sup>3</sup> Letter of June 24, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

<sup>4</sup> Letter of June 24, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

<sup>5</sup> Letter of June 9, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

that rates a product in each category of performance covered by the standard. A product that meets the standard for a given category is deemed to “pass” that standard. A non-complying product is assigned a specified number of “points” depending on the degree of failure. Four samples of the product are tested in each category, and the final score for each category is calculated by averaging the four tests. A product that receives 1-7 total points is deemed to pass; 8 or more total points, or 5 or more points in any one category, results in a failure. The tolerances applied in this system are said to be consistent with Industry Standards. All sampling, classification, and testing of the filling material is required to satisfy the International Down and Feather Bureau (“IDFB”) Standards and be performed by one of three certified IDFB testing labs.

If the initial round of testing of four samples results in a failure, the Program Manager will purchase a second round of four samples of the same or similar product and repeat the testing.<sup>6</sup> If the second round of testing results in a failure, the company that failed the testing will have an opportunity to appeal the findings and request additional testing at its expense.<sup>7</sup>

Under the appeal process, the Program Manager will purchase four more samples of the same or similar product for a third round of testing. Third round samples will be tested in all three certified labs. The results of the second and third round of testing will be averaged together to determine pass or fail. The same procedures for sampling and testing, and the same appeal rights, apply to members and non-members.

An AD&FS member found not in compliance with Industry Standards is subject to one year of probation, whereby the company is de-listed from the membership roster and is required to pay for additional rounds of sampling and testing. If the company passes the additional rounds of testing, it is taken off probation and all membership rights are reinstated. If the company fails the additional rounds of testing, refuses to participate and fund the additional rounds of testing, or does not pay its dues and its share of AD&FS expenses during the probation period, it will be expelled from membership. Ongoing violations may be reported to appropriate governmental agencies.

A non-member that is found not in compliance with Industry Standards will be notified in writing that failure to comply will result in notification to the appropriate governmental authorities.

### Complaints Regarding Representations, Claims, or Advertising

The proposed Labeling Compliance Program states that “[i]f the complaint being

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<sup>6</sup> The Program Manager is a third party retained by AD&FS to administer the Program.

<sup>7</sup> The cost of the first round of samples and testing is the responsibility of the party bringing the complaint. The AD&FS will initially pay for the second round of samples and testing; in the event of a pass the complaining company will be billed for the samples and testing, and in the event of a failure the accused company will be billed for the samples and testing.

submitted is regarding representations, claims, or advertising, the AD&FS will consider each on a case by case basis and determine the appropriate action;” the proposal does not describe the process for evaluating such complaints, the standards to be applied, or the actions that may be taken if claims are determined not to be correct. Based on your letter of June 24, 2003, it now appears, and we will assume for purposes of the analysis set forth in this letter, that the evaluation of complaints regarding representations, claims, and advertising will involve no more than a testing of products to determine whether the representations, claims, or advertising at issue are consistent with actual product attributes. We will also assume that the actions that may be taken by AD&FS, in the event claims are not substantiated, will be limited to the sanctions that may be imposed in the event a product is found not to comply with Industry Standards.<sup>8</sup>

### **Analysis of the Proposed Compliance Program**

We begin with the observation that the antitrust laws do not forbid legitimate self-regulation that benefits consumers. As the Commission has stated, “[s]uch self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than injure, competition and consumer welfare.” *American Academy of Ophthalmology*, 101 F.T.C. 1018 (1983) (advisory opinion); *see also American Medical Association*, 117 F.T.C. 1091 (1994) (advisory opinion); *American Medical Association*, 94 F.T.C. 701, 1029 (1979), *aff’d as modified*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982) (“AMA”). On the other hand, conduct that unreasonably restricts competition is inconsistent with the antitrust laws.

We also note that voluntary private standards generally have the potential to promote competition by providing useful information to consumers and making it easier for them to select among providers of a product or service. By providing information about quality and performance of products or services, voluntary private standards may facilitate quality competition and price/quality comparisons, increase consumer confidence in product quality and thereby increase demand, and facilitate entry of new sellers.

It is inherent in a standards system, however, that some products may fail to satisfy the standards, and therefore may tend to be excluded from the marketplace.<sup>9</sup> The effect is not inherently anticompetitive, but an unreasonable restraint on competition may arise under some circumstances. The actions of standard-setting bodies, therefore, are subject to scrutiny under the antitrust laws.<sup>10</sup> *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *American Soc’y of Mechanical Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 (1982).

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<sup>8</sup> Should either of these assumptions be incorrect, our analysis of the proposed program may require modification insofar as it relates to the program for handling complaints regarding representations, claims, and advertising.

<sup>9</sup> Products that do not meet the standard may be disfavored, and, even under a voluntary standards program, non-compliant products may be disadvantaged in the market.

<sup>10</sup> The actions of standards groups controlled by entities with horizontal business relationships (*i.e.*, competitors) are deemed concerted action.

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.<sup>11</sup> In addition, the adoption of a standard may, in effect, be an agreement not to sell non-compliant products.<sup>12</sup> Competitive concerns may arise when the standard is not reasonably necessary to attain procompetitive objectives.<sup>13</sup>

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.<sup>14</sup> 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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<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> E.g., *American Soc’y of Sanitary Eng’rs*, 106 F.T.C. 324 (1985) (consent order).

<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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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<sup>15</sup> 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.

<sup>16</sup> 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.

Second, the listing of a non-compliant company on a website or in another public forum appears unlikely, in itself, to result in a substantial lessening of competition. The public identification 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. Thus, unless the underlying disciplinary action itself violates the antitrust laws, publication of a disciplinary action or the fact of non-compliance is not likely to violate the antitrust laws.<sup>17</sup>

Third, expulsion from AD&FS of a member found to be non-compliant, or placing such a member on probation, does not appear, on the basis of the information provided, to be unreasonably exclusionary. In general, expulsion from a trade group characteristically is not

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<sup>17</sup> See *American Medical Association*, 117 F.T.C. at 1105.

likely to result in predominantly anticompetitive effects.<sup>18</sup> As stated by the Supreme Court, “[u]nless the organization has market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted.”<sup>19</sup>

Based on the information before us, probation or expulsion of a member from AD&FS likely would not result in denial of “access to an element essential to effective competition.” You have stated that the primary benefit of AD&FS that would be lost if a member is placed on probation or expelled because of violating Industry Standards would be the inability to participate in the association’s decision-making.<sup>20</sup> Such participation does not appear to rise to the level of an “element essential to effective competition.” In addition, although the members of AD&FS represent a sizeable percentage of the manufacturers and importers of products containing down and feathers, the information presently before us does not suggest that competition in the industry would be significantly affected by the expulsion of one member.<sup>21</sup>

## Conclusion

For the reasons discussed above, Commission staff have no present intention to recommend a challenge to AD&FS’s proposed conduct. This letter sets out the views of the staff of the Bureau of Competition, as authorized by Rule 1.1(b) of the Commission’s Rules of Practice, 16 C.F.R. § 1.1(b). Under Commission Rule 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time. In addition, this office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke the opinion if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, if facts change significantly, or if it would be in the public interest to do so.

Sincerely yours,

Alden F. Abbott  
Assistant Director  
for Policy & Evaluation

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<sup>18</sup> See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 286 (1985).

<sup>19</sup> *Id.*

<sup>20</sup> Letter of June 9, 2003, to the Office of Policy and Evaluation, Federal Trade Commission.

<sup>21</sup> In contrast, for example, expulsion could raise serious questions if it were intended to reinforce a price or output restraint.