

February 13, 2006

OSHA Docket Office
United States Department of Labor
200 Constitution Avenue, NW, Room N-2625
Washington, DC 20210

Re: Docket No. NRTL03-SDOC

This comment by the America Council of Independent Laboratories (ACIL) is in response to a Federal Register Request for Information (RFI) dated November 15, 2005, seeking comments on a specific Information Technology Industry Council (ITIC) proposal submitted to OSHA to permit the use of a Supplier's Declaration of Conformity (SDoC) as part of, or as an alternative to, the Nationally Recognized Testing Laboratories (NRTLs) product approval process.

ACIL was founded in 1937 as the national trade association representing independent scientific laboratory, testing, consulting, product certifying, and R&D firms; manufacturers' laboratories; and consultants and suppliers to the industry. ACIL defines an independent testing firm as a commercial entity engaged in analysis, testing, inspection, materials engineering, sampling, product certifying, research or development, and related consulting services for the public. An independent laboratory is not affiliated with any institution, company or trade group that might affect its ability to conduct investigations, render reports, or give professional counsel objectively and without bias. ACIL's 250 member companies, which include the majority of NRTLs, operate approximately 1,800 facilities across the U.S. and abroad. They range from one-person specialty laboratories to multi-disciplined, international corporations employing thousands of analysts, risk management specialists, consultants, and support staff. ACIL committees carry out programs of broad member interest covering issues such as laboratory accreditation, government relations, and risk management.

This RFI is not the first time that OSHA has been requested to consider SDoC as an alternative to NRTL product approval. Three and one-half years ago the identical proposal was offered to OSHA. Informal meetings were held among interested parties, including ACIL. One of the conclusions drawn from these meetings was that the NRTL program needed to be promoted more broadly, not eliminated or modified for certain industry sectors. Hence, the OSHA-ACIL Alliance was born. Attached, as Appendix A to this comment, is the latest version of the alliance agreement.

OSHA has prepared a list of broad questions to provide a framework for responses to the RFI. ACIL's comments will follow this list of questions, and when appropriate, respond directly to relevant aspects of the ITIC proposal.

Prior to addressing the specific questions raised in the RFI, ACIL feels compelled to address two points raised in the ITIC proposal. First, ACIL rejects the characterization of the NRTL program for IT products by ITIC as consisting of "redundant" testing. The NRTL program uses the UL standard (60950), which is a harmonized international standard used worldwide. The ITIC proposal states that "(f)or mass marketed (non-custom made) IT equipment to be deemed "approved," it must undergo a second round of testing and certification by a Nationally Recognized Testing Laboratory." This is patently incorrect.

Second, the rationale that underlies ITIC's proposal is fundamentally flawed. ITIC states "that problem facing the IT industry is not one of delays by US-based NRTLs;" instead, ITIC proposes to compromise the highly effective NRTL program in order for the Office of the United States Trade Representative to be in a position to advocate on behalf of the IT industry worldwide. This is contradictory to the letter and spirit of the OSHA statute.

1. What quality controls and procedures do equipment manufacturers/suppliers now follow to effectively perform, document and issue SDoCs for their products?

ACIL has no knowledge of the quality controls and procedures equipment manufacturers/suppliers follow to effectively perform, document and issue SDoCs for their products.

2. What kinds of problems do product manufacturers and product users now encounter with their SDoCs and how are they resolved or addressed?

Where SDoC is allowed, predominantly in Europe, numerous compliance problems have been documented. ACIL would not recommend such a system to OSHA for this very reason. In addition, because most ITE products have already been tested by third parties to a harmonized EU standard there would be relatively little data existing to demonstrate that this type of system can be assessed for benefits.

Perhaps the best source of information for ongoing compliance problems in the Europe is RAPEX, a rapid alert system for dangerous products circulating in the EU. The system is sponsored by the European Commission and is available at the

following link:

http://europa.eu.int/comm/dgs/health_consumer/dyna/rapex/rapex_en.cfm.

Not only are IT products an area of notification under the RAPEX system, major categories of danger listed in the RAPEX 2004 Annual Report are electrical shock and fire, which are key areas of testing and certification for IT products. ACIL encourages OSHA to review this website for further information and understanding.

Regarding compliance issues for IT equipment, *ACIL's Product Failure Survey*¹ asked what percentages of products comply with the standard(s) as submitted by a manufacturer with no additional re-testing or modification required. The survey found that up to 50% of both IT and Office Equipment do not comply with the standard(s) as first submitted by the manufacturer.

This is clearly a major workplace safety issue and if there were no third party certification the probability exists that 50% of non-compliant IT products would be placed directly on the market by the manufacturer.

Another major problem for manufacturers under an SDoC system is counterfeiting. This is even a challenge for product manufacturers that are required to use third party certification.

Counterfeiting is estimated to be more than a \$500 billion/year business and is now impacting all kinds of products and businesses from automotive parts, prescription drugs, and food additives as well as many products covered under the NRTL program. With the globalization of manufacturing into many developing countries, counterfeit safety products that fall under the NRTL program are now appearing in the marketplace. In addition to the manufacturers and distributors of these products, the NRTL's are an integral part of the efforts to combat this growing problem. NRTL's have developed close relationships with law enforcement agencies around the world and work closely to take action against the counterfeiters. They are attacking this problem not because of the commercial impact, but because of the impact on safety to the public and the workforce. Legitimate manufacturers, responsible retailers and NRTL organizations all form part of the arsenal to combat this problem. If the third party marks are dropped, the counterfeit products have one less deterrent.

¹ ACIL conducted a product failure survey of the NRTLs to assess the number and types of product failures that take place once the laboratory begins its testing and certification process. Product categories were drawn from the IECEE (CB Scheme), except for hazardous location equipment. Attached as Appendix B is a sample copy of the survey.

3. What kinds of products are now approved or not approved using SDoCs, and why?

As there are millions of products in the marketplace, generally the type of conformity assessment required is commensurate to the level of risk associated with the product in the end use. Due to the high level of risk associated with electrical products, which includes IT equipment, they are subject to NRTL certification.

4. Is there any reduction in the “time-to-market” for products? If so, how much of a reduction is there, how much is due to improvements in product safety, and what is the savings in costs to the manufacturer if SDoC is used instead of third-party approval?

The argument that products approved under an SDoC would reduce the “time-to-market” is specious. To prove compliance a manufacturer must conduct tests to the same international standard as the NRTL, so there is no real potential for a reduction in time. In reality, the NRTLs have well-established processes and systems to test products more efficiently.

Data supplied through the *ACIL Product Failure Survey* indicate that it takes one to five weeks to receive certification from an NRTL if the submitted product is compliant with the standard when received. Typically, if there is one non-compliance, the time for certification doubles; it may take two to ten weeks to achieve full certification. Therefore, delays in time to market are not related to third party testing and certification, but to non-compliant product discovered during the testing and certification process.

As for the issue of cost savings under an SDoC system, there appears to be none. A manufacturer needs to use the same type of test equipment, must use the same test methods and must use the same type of trained personnel to run the tests. The only cost savings might be in the area of factory surveillance. However, even if OSHA were to adopt an SDoC system for *any* products, there would need to be some type of market surveillance. Post-market surveillance, its problems and costs, is discussed in greater detail *infra*.

ACIL believes that under an SDoC system, manufacturer’s costs would actually *increase* because they don’t have the *economies of scale* of the NRTLs.

5. Do third-party product certifiers currently use SDoCs in approving products or play a role in issuing SDoCs, and if so, how?

NRTL Program Option #5 allows NRTLs to accept test data from non-independent organizations, such as manufacturers. As ACIL stated in their comments in June 2002 (attached as Appendix C), the NRTL program gives manufacturers significant flexibility, including the use of their own test data. It stops short of allowing a non-independent organization from self declaring compliance. Clearly the *ACIL Product Failure Survey* indicates that allowing self-declaration would not be a wise course of action.

6. What kinds of testing and testing capabilities are required for using SDoCs?

The identical testing and testing capabilities that are required of NRTLs are required for any organization using SDoCs. As we stated in our response in question 4, a manufacturer needs to use the same type of test equipment, must use the same test methods and must apply the same training and competency requirements for personnel to run the tests. However, for the test data to be credible there must be independent oversight.

7. Have there been any incidents involving “unapproved” IT equipment, or IT equipment approved through SDoC, creating hazards?

ACIL is unaware of any incidents involving “unapproved” IT equipment, or IT equipment approved through SDOC, creating hazards as ACIL member NRTLs are engaged in the approval of IT equipment under the NRTL program.

The ITIC proposal touts the industry’s stellar safety record as justification for allowing the implementation of an SDoC system for IT equipment. What the ITIC proposal fails to mention is that the reason for this laudable record is because all IT products are currently third-party certified.

To reiterate some of the findings of the *ACIL Product Failure Survey*:

- 50% of IT and Office Equipment products were non-compliant after first submittal to the NRTL;
- 5% of IT and Office Equipment products never comply with the relevant and required standards;
- 50% of the non-compliances are major safety and health related; and
- 10% are non-compliant even with factory surveillance.

8. What has changed with respect to IT equipment in the 17 years since OSHA adopted the NRTL program that could warrant a reconsideration of the third-party testing criterion?

We believe that nothing has changed that should warrant a change in the current NRTL program. In fact, the increasingly rapid evolution, complexity and sophistication of IT equipment and convergence of technologies make the case for a strengthened NRTL program. For example, individual pieces of equipment or a network of IT equipment are now tied into a manufacturer's assembly line. Failure of even one PC in a network system could set off a chain reaction that could potentially expose a large number of workers to workplace hazards.

9. Should OSHA consider allowing SDoC in the approval process for IT equipment, and if so, to what extent? If allowed, what restrictions, safeguards, or other requirements would be necessary to provide employers, employees, and OSHA with equivalent assurance of safety to that currently provided by NRTL testing and certification? Should OSHA require manufacturers performing SDoCs to meet all the requirements of an NRTL except independence? How, specifically, should OSHA evaluate the effects on worker safety of SDoCs versus NRTL approvals?

OSHA should not consider allowing SDoC in the approval process for IT equipment. There is no evidence to support consideration of SDoC because the existing safety data are generated by products that have been certified by third-party NRTLs as we noted in our response to Question 7, *supra*. As we also stated earlier, the NRTL program is flexible enough that it allows the manufacturer to use their own data up to but not including SDoC, thus ensuring the independent process of certification.

ACIL has published a position paper that addressed the circumstances under which an SDoC system could be considered in the United States. This statement is attached as [Appendix D](#). One of the key components of such a system would be the creation of a post-market surveillance system. Under a tight Federal budget, it is unlikely that OSHA would have the resources to develop a program to provide the same level of worker safety that is currently provided under the NRTL program. OSHA cannot exempt manufacturers using SDoC from the independence requirements of the NRTL program. The pressures of producing product, performance and profit may result in the primacy of commercial interests as opposed to product safety compliance requirements. This is one of the main reasons why prevailing international guides require independence for third party certification.

Using an independent third-party NRTL, products are evaluated on an objective basis by product safety engineers. Employers rely on the independence of the NRTL to ensure that they purchase safe products for the workplace.

Under an SDoC system, OSHA would only be able to evaluate the effects of a product failure once there had been an incident (i.e., a failure of a product in the workplace resulting in employee injury or death). Under the NRTL program, continual safety data are being monitored by the NRTL prior to product introduction and through factory surveillance in order to assure continual product compliance.

Again, the *ACIL Product Failure Survey* supports the conclusion that allowing SDoC for IT and Office Products is a bad idea. To reiterate some of the findings of the *ACIL Product Failure Survey*:

- 50% of IT and Office Equipment products were non-compliant after first submittal to the NRTL;
- 5% of IT and Office Equipment products never comply with the relevant and required standards;
- 50% of the non-compliances are major safety and health related; and
- 10% are non-compliant even with factory surveillance.

The effects of an SDoC system on worker safety are discussed in Question 11.

10. If OSHA were to adopt SDoC, should OSHA limit its use to computers, computer peripherals, and telecommunications equipment only, as suggested by ITIC, or to all IT equipment, as defined by the relevant US test standard, or restrict its use to low voltage (for example, 50 volts or less) IT equipment for components? In the alternative, should OSHA allow its use for other types of equipment? If so, what criteria, requirements, or data should OSHA use to determine the types of products or components eligible for SDoCs? What types of equipment would not be suitable for SDoC?

The governing principle on the extent to which OSHA could determine the scope of IT equipment eligible for SDoC is based on "end use." Fire and shock is found in the smallest of IT products (which are subject to NRTL requirements). However, these type of systems are used in larger networks that are integral parts of major switching centers in large buildings, control centers for air traffic, and any other process control plants (e.g., chemical). Many products that are being mentioned as eligible for SDoC are smaller components of larger systems that pose danger to life and property if not properly tested and certified.

Once again, the *ACIL Product Failure Survey* data do not support ITIC's suggestion that SDoC could be limited to computers, computer peripherals, and telecommunications equipment (see our responses in Questions 7 and 9) as 50% of the non-compliances in these products areas are major safety and health related. In addition, even in follow up surveillance, 10% of products are still non-compliant. This issue is further discussed in Question 11.

11. What advantages or benefits would workers, employers or OSHA derive if OSHA were to allow SDoC? What disadvantages or detriments would result? What other groups or parties would consider it beneficial or damaging, and how?

There are no discernable benefits or advantages to workers, employers, or OSHA in allowing an SDoC system for IT and Office Products.

The ITIC proposal estimates that between 1994-2000, approximately 200 million, PC-only, units were shipped. This is only a single product type of all types of IT equipment shipped. The *ACIL Product Failure Survey* showed that 5% of IT and Office Equipment products never comply. This level of non-compliance is simply too great a hazard for US workers and workplaces. In such a scenario, confidence in the US product safety system would be damaged, placing the burden on employers and employees to determine what products are safe for purchase.

Also under an SDoC system it would be up to OSHA to determine what is acceptable risk. Currently, this determination is the responsibility of the NRTL, who has the qualified, trained safety personnel to apply relevant safety standards.

12. If allowed, should OSHA limit the use of SDoCs to particular kinds of manufacturers, and if so, what would be the selection criteria?

OSHA should not adopt any form of SDoC for IT products specified in the ITIC proposal.

Further, OSHA would have to satisfy itself that the selection criteria does not inadvertently create unfair, adverse competitive consequences,

Finally, the global supply chain in the IT industry would require OSHA to police and enforce any type of limitation

13. If OSHA were to adopt some form of SDoC, what kind of mechanisms would be necessary to ensure effective monitoring of manufacturers and products, and to handle complaints and product recalls?

Considering the scope of products under OSHA's jurisdiction, such mechanisms (like a surveillance system) would be extremely expensive and not as efficient and effective. The current NRTL program is a shining example of conservation of resources and privatization at work (see ACIL Position Statement of SDoC, Attachment D).

As made abundantly clear in the ACIL position statement on SDoC, OSHA would need to develop and fund a system of post-market surveillance of products along with a plan to determine how to resolve and punish incidents of non-compliance. This is no small undertaking and would require significant resources to develop and implement.

The case studies in the OSHA docket clearly support ACIL's position statement.

14. Are there ways in which OSHA could incorporate the SDoC into its current process of NRTL approvals?

No, independent testing and certification by an NRTL and SDoC are two separate concepts that are supported by international standards and guides. There is no independence with an SDoC and it cannot be integrated into the NRTL program.

And as we stated earlier, NRTL Program Option #5 allows NRTLs to accept test data from non-independent organizations, such as manufacturers. The NRTL program gives manufacturers significant flexibility, including the use of their own test data; however, it precludes a non-independent organization from declaring compliance for all the previously stated reasons.

The "De Minimus" Argument

As a final point, ACIL objects to ITIC's attempt to deprive affected parties the opportunity to fully participate in OSHA's deliberations on this important matter. ITIC claims that its proposed modification "may properly be accomplished efficiently and without sapping OSHA resources in a lengthy rulemaking" because "the safety risk being addressed is de minimis." ITIC also offers to provide information supporting its request to OSHA legal staff. As has been discussed, the safety risk posed by the change sought by ITIC is substantial. Therefore, the abbreviated rulemaking sought by ITIC is entirely inappropriate. To the extent that ITIC has possession of information that it believes would justify its request, ACIL calls upon ITIC to produce it so that it may be considered by all affected parties.

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ACIL appreciates the opportunity to comment on this RFI. Should OSHA have any questions, please do not hesitate to contact us.

Sincerely,

Joan Walsh Cassedy, CAE
Executive Director

Attachments: Appendix A - ACIL/OSHA Alliance Agreement
Appendix B - Product Failure Survey
Appendix C - June 2002 Presentation to Secretary Henshaw
Appendix D - ACIL Position Statement on SDOC