108TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
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STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003

MAY 22, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1086]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1086) to encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 1086, the "National Cooperative Standards Development Act of 2003," amends the National Cooperative Research Act (NCRA) to extend limited antitrust protection to specified activities of standard development organizations ("SDOs") relating to the development of voluntary consensus standards. These amendments preserve and promote the ability of SDOs to issue standards by: (1) codifying the "rule of reason" for antitrust scrutiny of their activities; (2) eliminating the threat of treble damages for specified standards development activity if SDOs disclose the scope and nature of this activity to the Department of Justice and Federal Trade Commission; and (3) providing for the recovery of attorney fees to substantially prevailing parties.

As indicated above, H.R. 1086 is an amendment to the underlying NCRA. The NCRA, as originally enacted in 1984 and subsequently amended in 1993, has three operative provisions. The first is a simple codification of the consensus view found in existing law that properly structured joint venture activity will be judged under the rule of reason standard—a reasonableness test—under the antitrust laws. This provision of the NCRA, as further amended by H.R. 1086, would prohibit courts from condemning standards development activity without first considering its potential competitive benefits. The second provision is a voluntary notification system whereby a standards development organization may disclose the nature of its activities to the antitrust enforcement agencies and thereby receive reduced damages exposure from civil suits based on the activities disclosed. Compliance with the reporting procedures would not result in a "certification" that the standards development activity is legal under the antitrust laws; thus, even with disclosure, standards development activity later shown to be anticompetitive could still be challenged through the traditional dual system of private and public enforcement but would be subject to single damages. The third provision awards costs, including a reasonable attorney's fee, to the substantial prevailing parties under certain conditions.

The notification procedure developed in the NCRA now has the advantage of 19 years of operational experience on the part of the antitrust agencies and many private parties. Notification also imposes fewer resource burdens on both the enforcement agencies and private parties seeking to utilize the procedure than would a certification system; unlike certification, notification would have a limited scope of initial review and no requirement of continuous monitoring by the agencies. Additionally, it eliminates the risk of possible misapplication of legal standards, since the antitrust agencies merely act as enforcement "screeners" (as with other business review procedures) and not as adjudicators of the legality of standards development activity.

Finally, the NCRA links the disclosure process to a limitation on private damages against standards development organizations acting within the scope of their disclosure. Because the NCRA merely de-trebles (but does not eliminate) antitrust damages for injured parties, a private right of action is preserved.

BACKGROUND AND NEED FOR THE LEGISLATION

STANDARD DEVELOPMENT ORGANIZATIONS AND ANTITRUST

Voluntary Consensus Standards and Competition

Standard development organizations play a pivotal role in promoting free market competition. Technical standards promote product competition by ensuring a common interface between products that may be substituted for one another. "Voluntary consensus standards" are technical standards written by hundreds of nonprofit standard developing organizations such as the American Society of Mechanical Engineers, the American Society for Testing and Materials, and the National Fire Protection Association. While in most countries standards are promulgated by government agencies, the United States has shifted toward a model whereby standard development organizations develop voluntary consensus standards for use by industry and various levels of government. These standards are then codified in industry and government codes. Technical or compatibility standards benefit consumers and producers alike. As economist Professor David Teece has noted:

> Compatibility standards are essential if products and their complements are to be used in a system. Computers need software, compact disc players need compact discs, televisions need programs, and bolts need nuts. Compatibility standards define the format for the interface between the core and complementary good. . . [i]f products from different manufacturers are compatible, this may intensify rivalry among competitors and make it easier for buyers to compare product attributes. Compatibility standards also ease entry for new and complementary technologies and reduce the risk that a consumer will be "stranded" with a product which is incompatible with others [m]oreover, price competition is enhanced when competing manufacturers can supply substitutable products.[1]

While standards are widely viewed to enhance competition, standard-setting activities might give rise to legitimate antitrust concerns if anti-competitive conduct like output restrictions, market divisions, vertical restraints, or other forms of exclusionary conduct occur.[2] As the Supreme Court has recognized: "[] agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products Accordingly, private standard-setting organizations have traditionally been objects of antitrust scrutiny."[3]

Antitrust challenges to standard-setting activities are currently evaluated under the "rule of reason"—a judicially-created doctrine that seeks to balance the pro-competitive and anti-competitive market effects of a challenged practice before determining whether a violation of the antitrust laws has occurred.[4] The rationale for this antitrust standard is that SDOs, as non-profits serving a cross-section of an industry, are unlikely to engage in anti-competitive con-

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[1] David J. Teece, "Information Sharing, Innovation and Antitrust," 62 Antitrust L.J. 465, 475 (1994).
[2] Samuel Miller, *Antitrust and Standard-Setting*, PRAC.L. INST., July 21, 2001.
[3] *Allied Tube and Conduit Corp.* v. *Indian Head, Inc.* 486 U.S. 492, 500 (1988).
[4] *See Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery and Printing Company*, 472 U.S. 284 (1985).

duct creating market dominance. Potential anti-competitive conduct is also mitigated by the manner in which voluntary consensus standards are developed and implemented. In order to be used by Federal agencies, the process of developing voluntary standards must adhere to principles of openness, voluntariness, balance, cooperation, transparency, consensus, and due process. These requirements were most recently articulated in OMB Circular A–119 (February 19, 1998).[5]

Notwithstanding these safeguards, treble damages may still be awarded against SDOs if their conduct is determined to be anti-competitive under the rule of reason. Until recently, standard-setting activities were largely directed and managed by government entities that were immune from antitrust scrutiny. Beginning in the 1990's, Congress concluded that government could no longer keep pace with rapid technological and market change, and that government-directed standard-setting activity was often cumbersome, duplicative, and inefficient. To address this concern, Congress passed the National Technology Transfer and Advancement Act of 1995 ("NTTAA").[6] NTTAA's express goal was to encourage government agencies to assist in the development of voluntary consensus standards and to adopt such standards in favor of often outmoded government standards whenever possible.[7] While the NTTAA succeeded by almost every measure, SDOs continue to be vulnerable to litigation even after its passage.

Principal Cases

While SDOs have been subject to various civil claims, the experiences of the American Society of Mechanical Engineers ("ASME"), the American Society for Testing and Materials ("ASTM") and the National Fire Protection Association ("NFPA") are particularly instructive.

ASME v. *Hydrolevel*

ASME sets standards for a variety of mechanical devices. In *ASME* v. *Hydrolevel*,[8] a divided Supreme Court held an SDO liable under the treble damages provisions of the Sherman Antitrust Act.[9] Hydrolevel, a water boiler manufacturer, alleged that the Chair and Vice Chair of the Subcommittee overseeing a section of ASME's Boiler and Pressure Vessel Code Committee manipulated an interpretation of ASME's Code in furtherance of a conspiracy in restraint of trade. Hydrolevel contended that this interpretation prevented it from achieving market penetration with a technologically superior low-water-cut-off device. The interpretation was solicited by McDonnell and Miller, long the dominant manufacturer of low-water-cut-off devices used on heating boilers. This interpretation was then rendered by the Subcommittee Vice Chair, who was also a McDonnell and Miller employee, and subsequently transmitted over the signature of his employer before being approved by the Subcommittee Chair. Approval by the Subcommittee

[5] Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8545 (February 19, 1998); available at: <http://www.whitehouse.gov/omb/circulars/a119/a119.html>.
[6] Pub. L. No. 104–113, 110 Stat. 775 (1995).
[7] H.R. Rept. No. 104–390 (1995).
[8] *ASME* v. *Hyrdolevel*, 456 U.S. 556 (1982).
[9] 15 USC §§ 1–7 (2002).

Chair and Vice Chair allegedly occurred after a meeting between these two individuals and representatives from McDonnell and Miller.

This seemingly innocuous interpretation of ASME's Code addressed the use of a time delay feature which was similar to that being offered by Hydrolevel. It was then aggressively used by McDonnell and Miller's sales force to assert that Hydrolevel's device did not meet Boiler Code requirements. These representations were alleged to have thwarted an anticipated market breakthrough from Hydrolevel's purportedly superior device. Hydrolevel's low-water cut-off device was met with stiff market resistance because of the perception that its device did not comply with ASME's Boiler Code, which had been adopted as a regulatory requirement and given the force of law by most States. As a result, Hydrolevel subsequently was forced out of the market.

The initial target of Hyrdolevel's antitrust suit was McDonnell and Miller, the purported beneficiary of the alleged conspiracy. ASME was perceived as a relevant, but not necessary, defendant. However, before trial, McDonnell and Miller settled with Hydrolevel, leaving ASME as the sole defendant. The trial judge instructed the jury that ASME could be found liable only if had ratified or adopted the actions of its Subcommittee officers in order to advance ASME's market interests. Notwithstanding these instructions, the jury returned a verdict against ASME for $3.3 million, prior to trebling.[10]

The appeals court enunciated a novel legal theory to support ASME's liability under the antitrust laws by concluding that liability could attach if ASME's agents had acted within the scope of their "apparent authority."[11] On appeal, a sharply divided Supreme Court affirmed and amplified this view. In a strongly written dissent joined by Justices Rehnquist and White, Justice Powell stated:

> The Court today adopts an unprecedented theory of antitrust liability, one applied specifically to a nonprofit standards-setting association but a theory that could encompass a broad spectrum of our country's nonprofit associations. The theory, based on the agency concept of "apparent authority," would impose the potentially crippling burden of treble damages. In this case, the Court specifically holds that standards-setting organizations may be held liable for the acts of their agents even though the organization never ratified, authorized, or derived any benefit whatsoever from the fraudulent activity of the agency. [S]uch an expansive rule of strict liability, at least as applied to nonprofit organizations, is inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law that the Court purports to apply, and irrelevant to the achievement of the antitrust laws.[12]

ASTM Litigation

ASTM's recent litigation experience points to the need to clarify existing standards of liability for SDOs. The litigation, initiated by

[10] *Supra,* note 8.
[11] *Id.*
[12] *See id.* at 597.

an ASTM member against ASTM and other members, arose after consensus standards were developed in an open and balanced process initiated upon the request of the Environmental Protection Agency ("EPA"). In particular, the EPA requested that ASTM develop alternative assessment standards to supplement its own internal inspection process for assessing underground storage tanks ("USTs") more than 10 years old. This request was issued to help implement an EPA regulation mandating that all USTs be upgraded, replaced, or eliminated by 1998.[13] Following transparent voluntary standards development procedures, ASTM produced a document which incorporated alternative methods of assessment.

This process was vigorously opposed by proponents of the existing method, tank inspectors, and tank liners. ASTM subsequently approved a standard—which received the full backing of the EPA—that enhanced competition by expanding the number of EPA-approved UST assessment methods from one to four. After 6 years of participation in the ASTM process, opponents of the standards filed an antitrust suit naming Corrpro Companies, WRA/Rogers, and ASTM as defendants. While all parties to this suit agreed to a sealed settlement early in 2002, proponents of H.R. 1086 point to the chilling effect of this litigation on standard-setting activities by SDOs.

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*

The NFPA sets and publishes fire protection standards through a member voting process. Standards approved by a majority of NFPA members are generally adopted as State law and codified in the National Electric Code. In 1980, this Code permitted the use of steel, but not plastic electrical conduits. The defendant was the nation's largest steel conduit manufacturer and a NFPA member. Allied Tube, a plastic electrical conduit manufacturer, had proposed the inclusion of plastic electrical conduits in the 1981 Code and received preliminary approval by an NFPA panel. Prior to the 1980 meeting at which the final NFPA vote occurred, however, the defendant and other steel industry and NFPA members agreed to "pack" the NFPA with new members in order to defeat the proposal. The proposal was rejected by a membership that included 230 such "new" members. Allied Tube successfully sued in Federal district court, alleging unreasonable restraints on trade, in violation of the Sherman Act.

After that decision was overturned on appeal, the Supreme Court held for Allied Tube, rejecting defendant's argument that it was immune from the antitrust laws under what is commonly referred to as the *Noerr-Pennington* doctrine (which effectively, makes "concerted efforts to restrain or monopolize trade by petitioning government officials" immune from the antitrust laws). In doing so, the Court held that while standards development activities, by their nature, may provide an opportunity for anti-competitive behaviors, "private standard-setting programs can be pro-competitive when they are based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling com-

[13] 40 C.F.R. Part 280 (1994).

petition." [14] Responding to the defendant's asserted defense, the Court held that the statutory adoption of a private standard does not determine whether that private entity's conduct is immune from the antitrust laws. Rather, the scope of protection afforded by *Noerr-Pennington* "depends on the source, context, and nature of the anti-competitive restraint at issue." [15]

H.R. 1086, THE "NATIONAL COOPERATIVE STANDARDS DEVELOPMENT ACT OF 2003"

H.R. 1086 clarifies the antitrust status of qualifying standards developers to facilitate the development and promulgation of voluntary consensus standards. H.R. 1086 eliminates the threat of treble damages, codifies the rule of reason for antitrust claims against these organizations, and provides for the recovery of attorney fees for substantially prevailing parties.

HEARINGS

The Committee's Task Force on Antitrust held a hearing on H.R. 1086 on April 9, 2003. The following witnesses testified: James M. Shannon, President, National Fire Protection Association; David Karmol, Vice President, Public Affairs, American National Standards Institute; Earl Everett, Director, Division of Safety Engineering, Department of Labor, State of Georgia. Each witness affirmed the important role played by standards developers and expressed strong support for the bill.

COMMITTEE CONSIDERATION

On May 7, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 1086, without amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that during the full Committee consideration of H.R. 1086 the Committee took no rollcall votes.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 1086 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable.

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[14] *Supra,* note 10, at 509.
[15] *Id.* at 511.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 1086, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 19, 2003.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1086, the Standards Development Organization Advancement Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, and Victoria Heid Hall (for the state and local government impact), who can be reached at 225–3220.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1086—Standards Development Organization Advancement Act of 2003.

H.R. 1086 would provide certain protections from antitrust laws to standards development organizations (SDOs) if they disclose the scope and nature of the organization's activity to the Department of Justice and the Federal Trade Commission. (SDOs are nonprofit organizations that plan, develop, establish, or coordinate voluntary consensus standards for use by industry and Government.) Under antitrust laws, the Department of Justice and the Federal Trade Commission are required to publish notices of SDO activities in the Federal Register. CBO estimates, however, that the cost of publishing such routine notifications would not be significant in any year over the 2004–2008 period because of the small number of notices that are likely to be filed.

H.R. 1086 would expand the scope of an existing preemption of state antitrust laws to apply to SDOs. Such a preemption is an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). However, CBO estimates that this mandate would impose no costs on state, local, or tribal governments and would not, therefore, exceed the threshold in UMRA ($59 million

in 2003, adjusted for inflation). This bill contains no new private-sector mandates as defined in UMRA.

The CBO staff contacts for this estimate are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, and Victoria Heid Hall (for the state and local government impact), who can be reached at 225–3220. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title.

Section 1 titles the bill the "National Cooperative Standards Development Act of 2003."

Section 2. Findings.

Section 2 sets forth the findings and purposes of the bill as they relate to standard-developing activities and SDOs. The findings explain why the NCRA was originally enacted and amended. This section also discusses how passage of the NTTAA (which replaced many government-written standards with voluntary consensus standards) inadvertently increased the vulnerability of these organizations to antitrust litigation. This section concludes by affirming the critical importance of SDOs to the competitiveness of the national economy.

Section 3. Definitions.

Section 3 amends the definitions section of the NCRA to include the terms: "standards developments activity;" "standard development organization;" "technical standard;" and "voluntary consensus standard" (as defined in OMB Circular Number A–119).

In addition, this section specifically excludes antitrust protections for standards development activity that involves: (1) the exchange of cost, sales, or pricing information not reasonably required for the purpose of developing a voluntary consensus standard, or (2) any anti-competitive activity for a for-profit entity that stands to financially benefit from participating in any standards development activity.

The definition of "standards development activity," as set forth in section 3(7), is broad enough to encompass any action taken by an SDO in "developing, promulgating—or otherwise maintaining a voluntary consensus standard—including actions related to the intellectual property policies" of the SDO. The Standards Development Organization Advancement Act is not intended to change or influence existing intellectual property policies currently utilized by various SDOs (including, but not limited to, patent searches), nor to affect or influence new intellectual property policies that may be developed in the future. Such policies are vitally important to ensuring a level playing field among all users of a standard that incorporates patented technology. In addition, the legislation is not

intended to change or alter the application of existing antitrust laws with respect to intellectual property.

The Act seeks to encourage disclosure by owners of intellectual property owners of relevant intellectual property owners and proposed licensing terms. It further encourages discussion among intellectual property owners and other interested standards participants regarding the terms under which relevant intellectual property owners would be made available for use in conjunction with the standard or proposed standard.

Section 4. Rule of Reason Standard.

Section 4 amends the NCRA to extend application of the rule of reason to specified standards development activity. Under existing antitrust law, the rule of reason standard requires a balancing of the pro-competitive effects of alleged misconduct against the anti-competitive effects of particular conduct in determining whether a violation of the antitrust laws has occurred.

Section 5. Limitation of Recovery.

Section 5 amends the NCRA to limit recovery of antitrust damages against SDOs if such organizations pre-disclose the nature and scope of the standards development activity to antitrust authorities. SDOs remain liable for treble damages under the antitrust laws if they fail to pre-disclose the nature and scope of standards setting activity.

Section 6. Attorneys' Fees.

Section 6 amends the NCRA to include SDOs within the existing NCRA framework for awarding reasonable attorneys' fees to the substantially prevailing party.

Section 7. Disclosure of Standards Developments Activity.

Section 7 amends the NCRA to require SDOs to adhere to the pre-disclosure framework set out in the NCRA. The pre-disclosure model embraced by the NCRA permits defined joint venture activity to be disclosed to the Department of Justice and the Federal Trade Commission in exchange for limited antitrust protections. To be within the ambit of these protections, SDOs must disclose the scope and nature of standards setting activity within 90 days of the commencement of this activity or 90 days of enactment of this legislation, whichever is later. Additional disclosures of new collaborative activities can be submitted to the antitrust agencies to extend the liability protections—but such disclosures will not protect activity that encompasses per se violations of the antitrust laws. This section also states that an SDO's decision not to avail itself of pre-disclosure requirements will not create a negative inference that the SDO is engaged in anti-competitive conduct.

Section 8. Rule of Construction.

Section 8 states that this legislation shall not be construed to alter or modify the antitrust treatment of parties participating in standards development activity of SDOs within the scope of the legislation or other organizations and parties engaged in standard-setting processes not within the scope of this legislation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1993

* * * * * * *

DEFINITIONS

SEC. 2. (a) For purposes of this Act:

(1) * * *

* * * * * * *

(7) The term "standards development activity" means any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization.

(8) The term "standards development organization" means a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A–119, as revised February 10, 1998.

(9) The term "technical standard" has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

(10) The term "voluntary consensus standard" has the meaning given such term in Office of Management and Budget Circular Number A–119, as revised February 10, 1998.

* * * * * * *

(c) The term "standards development activity" excludes the following activities:

(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.

RULE OF REASON STANDARD

SEC. 3. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct [of any person in making or performing a contract to carry out a joint venture shall] *of—*

(1) any person in making or performing a contract to carry out a joint venture, or

(2) a standards development organization while engaged in a standards development activity,

shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets. For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent that it may be appropriate in the circumstances.

LIMITATION ON RECOVERY

SEC. 4. (a) Notwithstanding section 4 of the Clayton Act (15 U.S.C. 15) and in lieu of the relief specified in such section, any person who is entitled to recovery on a claim under such section shall recover the actual damages sustained by such person, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages as specified in subsection (d) of this section, and the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act if such claim—

(1) results from conduct that is within the scope of a notification that has been filed under section 6(a) of this Act for a joint venture*, for a standards development activity engaged in by a standards development organization against which such claim is made*, and

* * * * * * *

(b) Notwithstanding section 4C of the Clayton Act (15 U.S.C. 15c), and in lieu of the relief specified in such section, any State that is entitled to monetary relief on a claim under such section shall recover the total damage sustained as described in subsection (a)(1) of such section, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such total damage as specified in subsection (d) of this section, and the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 4C of the Clayton Act if such claim—

(1) results from conduct that is within the scope of a notification that has been filed under section 6(a) of this Act for a joint venture*, for a standards development activity engaged in by a standards development organization against which such claim is made*, and

* * * * * * *

(c) Notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person who is entitled to recovery on a claim under such provision shall not recover in excess of the actual damages sus-

tained by such person, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages as specified in subsection (d) of this section, and the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act if such claim—

(1) results from conduct that is within the scope of a notification that has been filed under section 6(a) of this Act for a joint venture*, for a standards development activity engaged in by a standards development organization against which such claim is made*, and

* * * * * * *

(e) Subsections (a), (b), and (c) shall not be construed to modify the liability under the antitrust laws of any person (other than a standards development organization) who—

(1) directly (or through an employee or agent) participates in a standards development activity with respect to which a violation of any of the antitrust laws is found,

(2) is not a fulltime employee of the standards development organization that engaged in such activity, and

(3) is, or is an employee or agent of a person who is, engaged in a line of commerce that is likely to benefit directly from the operation of the standards development activity with respect to which such violation is found.

[(e)**]** *(f)* This section shall be applicable only if the challenged conduct of a person defending against a claim is not in violation of any decree or order, entered or issued after October 11, 1984,, in any case or proceeding under the antitrust laws or any State law similar to the antitrust laws challenging such conduct as part of a joint venture*, or of a standards development activity engaged in by a standards development organization*.

ATTORNEY'S FEES

SEC. 5. (a) Notwithstanding sections 4 and 16 of the Clayton Act, in any claim under the antitrust laws, or any State law similar to the antitrust laws, based on the conducting of a joint venture*, or of a standards development activity engaged in by a standards development organization*, the court shall, at the conclusion of the action—

(1) * * *

* * * * * * *

(c) Subsections (a) and (b) shall not apply with respect to any person who—

(1) directly participates in a standards development activity with respect to which a violation of any of the antitrust laws is found,

(2) is not a fulltime employee of a standards development organization that engaged in such activity, and

(3) is, or is an employee or agent of a person who is, engaged in a line of commerce that is likely to benefit directly from the operation of the standards development activity with respect to which such violation is found.

DISCLOSURE OF JOINT VENTURE

SEC. 6. (a)*(1)* Any party to a joint venture, acting on such venture's behalf, may, not later than 90 days after entering into a written agreement to form such venture or not later than 90 days after October 11, 1984, whichever is later, file simultaneously with the Attorney General and the Commission a written notification disclosing—

[(1)] *(A)* the identities of the parties to such venture,

[(2)] *(B)* the nature and objectives of such venture, and

[(3)] *(C)* if a purpose of such venture is the production of a product, process, or service, as referred to in section 2(a)(6)(D), the identity and nationality of any person who is a party to such venture, or who controls any party to such venture whether separately or with one or more other persons acting as a group for the purpose of controlling such party.

Any party to such venture, acting on such venture's behalf, may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4. In order to maintain the protections of section 4, such venture shall, not later than 90 days after a change in its membership, file simultaneously with the Attorney General and the Commission a written notification disclosing such change.

(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2003, whichever is later, file simultaneously with the Attorney General and the Commission, a written notification disclosing—

(A) the name and principal place of business of the standards development organization, and

(B) documents showing the nature and scope of such activity.

Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.

(b) Except as provided in subsection (e), not later than 30 days after receiving a notification filed under subsection (a), the Attorney General or the Commission shall publish in the Federal Register a notice with respect to such venture that identifies the parties to such venture and that describes in general terms the area of planned activity of such venture*, or a notice with respect to such standards development activity that identifies the standards development organization engaged in such activity and that describes such activity in general terms*. Prior to its publication, the contents of such notice shall be made available to the parties to such venture *or available to such organization, as the case may be*.

* * * * * * *

(d) Except with respect to the information published pursuant to subsection (b)—

(1) * * *

(2) all other information obtained by the Attorney General or the Commission in the course of any investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by the joint venture*, or the standards development activity,* with respect to which such notification was filed,

shall be exempt from disclosure under section 552 of title 5, United States Code, and shall not be made publicly available by any agency of the United States to which such section applies except in a judicial or administrative proceeding in which such information and material is subject to any protective order.

(e) Any **[**person who**]** *person or standards development organization that* files a notification pursuant to this section may withdraw such notification before notice of the joint venture involved is published under subsection (b). Any notification so withdrawn shall not be subject to subsection (b) and shall not confer the protections of section 4 on any person *or any standards development organization* with respect to whom such notification was filed.

* * * * * * *

(g)(1) Except as provided in paragraph (2), for the sole purpose of establishing that a person *or standards development organization* is entitled to the protections of section 4, the fact of disclosure of conduct under section 6(a) and the fact of publication of a notice under section 6(b) shall be admissible into evidence in any judicial or administrative proceeding.

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MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 7, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A quorum is present. Pursuant to notice, I now call up the bill, H.R. 1086, the "Standards Development Organization Advancement Act of 2003" for purposes of markup and move its favorable recommendation to the full House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 1086, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 1086

To encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 5, 2003

Mr. SENSENBRENNER (for himself, Mr. CONYERS, Mr. BOEHLERT, Mr. HALL, Mr. SMITH of Texas, Mr. FRANK of Massachusetts, Mr. COBLE, Mr. ISSA, Mr. BERMAN, Ms. HART, Mr. DELAHUNT, Mr. KELLER, Mr. MEEHAN, Mr. FORBES, Ms. JACKSON-LEE of Texas, Mr. FEENEY, and Mr. WEINER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Standards Development Organization Advancement Act of 2003''.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) In 1993, the Congress amended and renamed the National Cooperative Research Act of 1984 (now known as the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301 et seq.)) by enacting the National Cooperative Production Amendments of 1993 (Public Law 103–42) to encourage the use of collaborative, procompetitive activity in the form of research and production joint ventures that provide adequate disclosure to the antitrust enforcement agencies about the nature and scope of the activity involved.

(2) Subsequently, in 1995, the Congress in enacting the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) recognized the importance of technical standards developed by voluntary consensus standards bodies to our national economy by requiring the use of such standards to the extent practicable by Federal agencies and by encouraging Federal agency representatives to participate in ongoing standards development activities. The Office of Management and Budget on

February 18, 1998, revised Circular A–119 to reflect these changes made in law.

(3) Following enactment of the National Technology Transfer and Advancement Act of 1995, technical standards developed or adopted by voluntary consensus standards bodies have replaced thousands of unique Government standards and specifications allowing the national economy to operate in a more unified fashion.

(4) Having the same technical standards used by Federal agencies and by the private sector permits the Government to avoid the cost of developing duplicative Government standards and to more readily use products and components designed for the commercial marketplace, thereby enhancing quality and safety and reducing costs.

(5) Technical standards are written by hundreds of nonprofit voluntary consensus standards bodies in a nonexclusionary fashion, using thousands of volunteers from the private and public sectors, and are developed under the standards development principles set out in Circular Number A–119, as revised February 18, 1998, of the Office of Management and Budget, including principles that require

openness, balance, transparency, consensus, and due process. Such principles provide for—

(A) notice to all parties known to be affected by the particular standards development activity,

(B) the opportunity to participate in standards development or modification,

(C) balancing interests so that standards development activities are not dominated by any single group of interested persons,

(D) readily available access to essential information regarding proposed and final standards,

(E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections, and

(F) the right to express a position, to have it considered, and to appeal an adverse decision.

(6) There are tens of thousands of voluntary consensus standards available for government use. Most of these standards are kept current through interim amendments and interpretations, issuance of addenda, and periodic reaffirmation, revision, or reissuance every 3 to 5 years.

(7) Standards developed by government entities generally are not subject to challenge under the antitrust laws.

(8) Private developers of the technical standards that are used as Government standards are often not similarly protected, leaving such developers vulnerable to being named as codefendants in lawsuits even though the likelihood of their being held liable is remote in most cases, and they generally have limited resources to defend themselves in such lawsuits.

(9) Standards development organizations do not stand to benefit from any antitrust violations that might occur in the voluntary consensus standards development process.

(10) As was the case with respect to research and production joint ventures before the passage of the National Cooperative Research and Production Act of 1993, if relief from the threat of liability under the antitrust laws is not granted to voluntary consensus standards bodies, both regarding the development of new standards and efforts to keep existing standards current, such bodies could be forced to cut back on standards development activities at

great financial cost both to the Government and to the national economy.

SEC. 3. DEFINITIONS.

Section 2 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301) is amended—

(1) in subsection (a) by adding at the end the following:

''(7) The term 'standards development activity' means any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization.

''(8) The term 'standards development organization' means a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A–119, as revised February 10, 1998.

''(9) The term 'technical standard' has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

''(10) The term 'voluntary consensus standard' has the meaning given such term in Office of Management and Budget Circular Number A–119, as revised February 10, 1998.''; and

(2) by adding at the end the following:

''(c) The term 'standards development activity' excludes the following activities:

''(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

''(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

''(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.''.

SEC. 4. RULE OF REASON STANDARD.

Section 3 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4302) is amended by striking ''of any person in making or performing a contract to carry out a joint venture shall'' and inserting the following: ''of—

''(1) any person in making or performing a contract to carry out a joint venture, or

''(2) a standards development organization while engaged in a standards development activity,

shall''.

SEC. 5. LIMITATION ON RECOVERY.

Section 4 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4303) is amended—

(1) in subsections (a)(1), (b)(1), and (c)(1) by inserting '', for a standards development activity engaged in by a standards development organization against which such claim is made'' after ''joint venture'', and

(2) in subsection (e)—

(A) by inserting '', or of a standards development activity engaged in by a standards development organization'' before the period at the end, and

(B) by redesignating such subsection as subsection (f), and

(3) by inserting after subsection (d) the following:

''(e) Subsections (a), (b), and (c) shall not be construed to modify the liability under the antitrust laws of any person (other than a standards development organization) who—

''(1) directly (or through an employee or agent) participates in a standards development activity with respect to which a violation of any of the antitrust laws is found,

''(2) is not a fulltime employee of the standards development organization that engaged in such activity, and

''(3) is, or is an employee or agent of a person who is, engaged in a line of commerce that is likely to benefit directly from the operation of the standards development activity with respect to which such violation is found.''.

SEC. 6. ATTORNEY FEES.

Section 5 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4304) is amended—

(1) in subsection (a) by inserting '', or of a standards development activity engaged in by a standards development organization'' after ''joint venture'', and

(2) by adding at the end the following:

''(c) Subsections (a) and (b) shall not apply with respect to any person who—

''(1) directly participates in a standards development activity with respect to which a violation of any of the antitrust laws is found,

''(2) is not a fulltime employee of a standards development organization that engaged in such activity, and

''(3) is, or is an employee or agent of a person who is, engaged in a line of commerce that is likely to benefit directly from the operation of the standards development activity with respect to which such violation is found.''.

SEC. 7. DISCLOSURE OF STANDARDS DEVELOPMENT ACTIVITY.

Section 6 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4305) is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively,

(B) by inserting ''(1)'' after ''(a)'', and

(C) by adding at the end the following:

''(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2003, whichever is later, file simultaneously with the Attorney General and the Commission, a written notification disclosing—

''(A) the name and principal place of business of the standards development organization, and

''(B) documents showing the nature and scope of such activity.

Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.'',

(2) in subsection (b)—

(A) in the 1st sentence by inserting '', or a notice with respect to such standards development activity that identifies the standards development organization engaged in such activity

and that describes such activity in general terms'' before the period at the end, and

(B) in the last sentence by inserting ''or available to such organization, as the case may be'' before the period,

(3) in subsection (d)(2) by inserting '', or the standards development activity,'' after ''venture'',

(4) in subsection (e)—

(A) by striking ''person who'' and inserting ''person or standards development organization that'', and

(B) by inserting ''or any standards development organization'' after ''person'' the last place it appears, and

(5) in subsection (g)(1) by inserting ''or standards development organization'' after ''person''.

SEC. 8. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed to alter or modify the antitrust treatment under existing law of—

(1) parties participating in standards development activity of standards development organizations within the scope of this Act, or

(2) other organizations and parties engaged in standard-setting processes not within the scope of this amendment to the Act.

○

Chairman SENSENBRENNER. The Chair recognizes himself for purposes of an explanation. This bill fosters the critical role of standards development while strongly reaffirming the central role of our Nation's antitrust statutes and preserving and promoting free market competition. Standards development organizations play a pivotal role in promoting this competition. Seven years ago, the Congress passed legislation requiring the use of voluntary consensus standards in Federal procurement and regulatory activities.

While this legislation has encouraged Government use of private development standards, it also has increased the vulnerability of private standard developers of the antitrust litigation.

This bill addresses this problem, and it simply limits recovery against standard developments organizations, the actual economic damages, while codifying the rule of reason for antitrust scrutiny of their activities.

I am pleased that the legislation has attracted the cosponsorship of the Ranking Member, Mr. Conyers, as well as 12 Members of the Committee.

I yield the balance of my time now to Mr. Forbes, who chaired the Antitrust Task Force hearing on this legislation for any comments he wishes to make.

Mr. FORBES. Thank you, Mr. Chairman, and I am pleased also to lend my support to H.R. 1086, the "National Cooperative Standards Development Act of 2003." Standards developing organizations play critical but sometimes overlooked roles in promoting market-based competition. Without technical product standards, there would be no compatibility or substitutability among competing consumer products and public health and safety would be severely compromised.

Until recently, standards were often developed by the Federal Government; however, the rapid pace of technological innovation makes nongovernment standard setting activity more efficient and more effective. It is important to stress that this legislation does not create an antitrust exemption for standards developers.

The bill is a narrowly tailored commonsense approach to promoting activity that enhances product choice and consumer welfare.

Mr. Chairman, I commend you for your leadership on this issue, and I urge my colleagues to support this bipartisan legislation.

I yield back the balance of my time.

Chairman SENSENBRENNER. The Chair yields back the balance of his time.

Without objection, all Members may include opening statements in the record at this point.

The gentleman from Virginia has an opening statement?

Mr. SCOTT. Mr. Chairman, apparently I didn't get the word about attendance. I had a question, Mr. Chairman. If someone would respond, it seems to me that if you have got a group setting standards, that there would be much less likelihood for antitrust behavior than if they didn't form standards that everybody could comply with. I guess my question is: How, if this group is actually doing its job, how would there be any liability?

Chairman SENSENBRENNER. Well, people who don't like the standards that the group comes up with, I guess, would possibly have a cause of action, and what this bill does is simply limit the

plaintiffs to the actual economic damages that they could prove, rather than all of the punitive measures for antitrust violations.

Mr. SCOTT. Reclaiming my time. That is, if they can prove anything?

Chairman SENSENBRENNER. Yes.

Are there amendments? Are there amendments? If there are no amendments, without objection, the previous question is ordered. A reporting quorum not being present, we will vote on reporting this bill when a reporting quorum appears.

[Intervening business.]

Because we now have a reporting quorum present, the Chair will put the questions on the bills that have been marked up previously on which the previous question has been ordered relative to a motion to report.

The first motion is on reporting favorably H.R. 1086, the "Standards Development Organization Advancement Act of 2003." The Chair notes the presence of a reporting quorum. The question occurs on the motion to report the bill favorably.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it. The motion to report favorably is adopted.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by the rules, in which to submit additional dissenting, supplemental or minority views.

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