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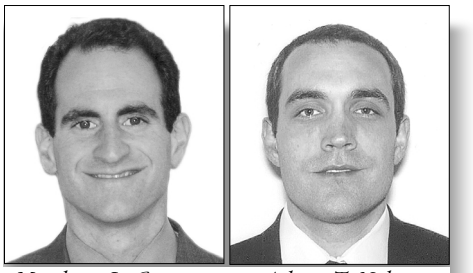
Congress Limits Antitrust Liability for Standard-Setting Groups

Reflecting a concern that settled antitrust maxims could chill industry self-regulation over acceptable product quality or safety standards, Congress enacted the Standards Development Organization Advancement Act (SDOAA).

The SDOAA, which took effect on June 22, 2004, provides that entities engaged in "standards development" no longer face the threat of per se condemnation under the antitrust laws.

In other words, to prove that a standards development organization (SDO) has violated the antitrust laws, actual proof must necessarily be submitted that demonstrates that the standards developed have resulted in higher prices, reduced output or stunted innovation. Further, the SDOAA negates the application of the Sherman Act's treble damages provision to benign SDOs that submit a simple notification to federal antitrust enforcers.

Unfortunately, while appropriately granting more leeway under antitrust law for legitimate standard setting— an undisputed procompetitive activity—the SDOAA offers opportunities to those who would abuse the standard development process to circumvent antitrust principles. Specifically, as the referenced notification need not be "certified" by the antitrust agencies before treble damages immunity is provided, entities that are engaging in anticompetitive activity under the guise of standards development activity (as defined by the statute) may be wrongly blanketed with SDOAA protection.



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To prove a standards development structure has violated antitrust laws, proof must be submitted that shows the standards developed have resulted in higher prices or less output or innovation.

In this article, we discuss the SDOAA's provisions and detail our concerns over its future application.

Important Statutory Definitions

The SDOAA extends the provisions of the National Cooperative Research Act of 1984 (NCRA)—a statute that benefits organizations engaging in research and development activities—to "standards development organizations" engaging in "standards development activities."

"Standards" includes rules and guidelines for products, production methods, specifications of product components and materials and measurements of product quality, quantity and strength, among many other things.[1] Professional standards of personal conduct and ethical rules are not covered.[2] A "standards development organization" is a domestic or international organization that plans, develops, establishes or coordinates standards, using a process characterized by openness, balance of interest, due process, appellate rights and decisions made by consensus (unanimity is not required).[3] A "standards development activity" is an action whose purpose is to develop, promulgate, revise, amend, reissue, interpret or maintain standards or to use them in assessing industry conformity with those standards.[4]

Conduct that amounts to market allocation or price fixing, two business practices that courts have long held per se violations of §1 of the Sherman Act, are explicitly excluded from the definition of "standards development activity."[5] Also "standards development activity" does not include competitors' exchange of information concerning cost, sales, profitability, prices, marketing or distribution of any product if the exchange is not "reasonably required" to develop or use standards.[6]

An example of an SDO protected by the statute would be ASTM International, a group that develops standards for a wide variety of industrial and consumer products.[7] Its diverse membership includes such entities as 3M Corp., General Motors Corp., the Toy Industry Association of America, the U.S. federal government, and many state governments, agencies and universities. ASTM develops standards for a variety of industries, from guidelines for the construction of safe

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playground equipment to procedures for testing the strength of cement.[8]

The SDOAA provides one automatic benefit to all standards development activities conducted by an SDO: those activities are subject to judicial review under the Rule of Reason standard rather than the rule of per se illegality.[9] In other words, the act bars courts from holding standards development activity illegal without demanding proof of substantial anticompetitive effects and an inquiry into its potential competitive benefits.

• ***The Statute Limits the Potential Antitrust Exposure of SDOs.*** An SDO that makes a voluntary disclosure of its activities to federal antitrust agencies receives a potent reward. If it is later held liable for antitrust violations involving the conduct that it voluntary disclosed, its liability is limited to the claimant's actual damages and not the treble damages normally provided by the Sherman Act.[10]

To benefit from the remedial limitation, an SDO must send simultaneous written notifications to the Department of Justice (DOJ) and Federal Trade Commission (FTC) within 90 days after commencing a standards development activity.[11] The notification must disclose the SDO's name and principal place of business as well as documents showing the nature and scope of the standards development activity in which it is engaging.[12]

Then, within 30 days of receiving a disclosure, the agencies must publish in the Federal Register a notice that identifies the SDO and describes "in general terms" the activity that it disclosed.[13] Before publishing it, the agencies must show the SDO a draft and hear any concerns the SDO may have about it.[14] The SDOAA's protections take effect on the earlier of (1) the date that the notice is published or (2) 30 days after the SDO made the disclosure.[15] Thus, inadvertent failure of the agencies to meet the 30-day deadline will not delay the statutory protections' effect.

Enforcement 'Screeners'

Moreover, the statute does not empower the antitrust agencies to "certify" the appropriateness of the notification. Rather, benefits of the statute are automatically accorded by virtue of notification alone. In fact, during congressional hearings, the notification procedure to be used under the SDOAA was described as one where "antitrust agencies merely act as enforcement 'screeners'… and not as adjudicators of the legality of standards development activity."[16] Thus, it is critical to distinguish the role that the agencies must play regarding the notification from the role that they may play regarding the underlying conduct summarized in the notification. With respect to the notification, the agencies must rubber-stamp an SDO's decision to make the voluntary disclosure that entitles it to reduced damages and rule-of-reason treatment. To reinforce this point, the SDOAA provides that any action that an agency takes, or fails to take, regarding an SDO's notification is not subject to judicial review.[17] With respect to the conduct that is the subject of the notification, the agencies will continue to have independent statutory authority to investigate and challenge anticompetitive conduct that may injure the United States.[18] However, the SDOAA limits recovery by the United States (or by any other plaintiff) only to actual damages.

In our opinion, the automatic exemption from treble damages for SDOs that file the subject notifications is overbroad and problematic. A more prudent statutory regime would permit the agencies, upon receipt of an SDO's notification, to conduct a brief preliminary review for the limited purpose of determining whether the conduct summarized in the disclosure should qualify for de-trebling. Such a preliminary "screening" is crucial, especially where the filer's activity will likely harm competition on its face. Unfortunately, due to the gross laxness countenanced by the Congress to weeding out abusers of the statute, we expect numerous joint ventures— whether or not engaging in some type of standard setting—to claim that antitrust's powerful treble damages remedy does not apply to their conduct. Such a result takes the teeth out of antitrust's oversight of collaborative conduct and could result in the distortion of competition in a host of markets.

To be sure, legitimate standard-setting activities must be permitted to flourish without facing unwarranted antitrust scrutiny. While the SDOAA accomplishes this goal, its procedure for granting entities treble damages immunity without governmental certification undermines the prospect of vigorous antitrust enforcement and poses great risks for American consumers.

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1. 15 USC §4301(a)(7) (2005); Office of Management & Budget Circular No. A-110, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8545, available at www.standards.gov (last visited March 13, 2005) (hereinafter "OMB Circular No. A-110"). The SDOAA incorporates by reference several definitions used in the Circular, so definitions of these key statutory terms can be found only by reading the two documents together. The Circular directed agencies in their procurement policies to use standards developed by voluntary industry groups rather than by the government. The policy behind the Circular, and now behind the SDOAA, was that members of an industry understand better than the government the industry's needs in the development of standards.
2. OMB Circular No. A-110, supra note 2, at §3(b).
3. Id. SDO members are not protected by the statute. 15 USC §4301 (a)(8).
4. 15 USC §4301(a)(7). Covered activities also include actions relating to the standards development organization's intellectual property policies.
5. 15 USC §4301(c)(2)-(3).
6. 15 USC §4301(c)(1).
7. www.astm.org (last visited March 14, 2005).
8. Id.
9. 15 USC §4302.
10. 15 USC §4303(a). This treble damages provision is a significant deterrent for would-be antitrust violators.
11. 15 USC §4305(a)(2). The statute does not define what conduct constitutes "commencing" a standards development activity.
12. Id.
13. 15 USC §4305(b).
14. 15 USC §4305(b); H.R. CONF. REP. NO. 98-1044 at 20 (1984).
15. 15 USC §4305(c).
16. H.R. REP. NO. 108-125 at 2 (2003).
17. 15 USC §4305(f).
18. 15 USC §15a. The SDOAA clearly contemplates that the federal agencies may someday challenge the conduct whose disclosure the statute required them to publish in the Federal Register. It provides that in addition to the information disclosed by the SDO in its notification, "all other information obtained by [the agencies] in the course of any investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by the [SDO] with respect to which [a] notification was filed, shall be exempt from disclosure" under the federal Freedom of Information Act (FOIA). 15 USC §4305(d).