KELLEY DRYE

Client Advisory

Antitrust Laws Amended

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On June 22, 2004 President Bush signed into law the Standards Development Organization Advancement Act of 2004 and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (H.R. 1086), which make four changes to the antitrust laws of which you should be aware:

- the more lenient "rule of reason," not the "per se rule," will be used to evaluate the legality of most activities of organizations involved in standards development
- criminal penalties for violations of the Sherman Act have been increased substantially
- new incentives for participation in the corporate leniency program of the Department of Justice (DOJ) have been provided
- the Tunney Act has been amended to require more detailed reviews of consent decrees for antitrust settlements.

The text of this bill is accessible at: http://www.dsp.dla.mil/documents/HR-1086.pdf. The comments of the ABA Section of Antitrust, some supportive and some critical, can be viewed at http://www.abanet.org/antitrust/comments/increasedcriminalpenalties.pdf.

Title I - The Standards Development Organization Advancement Act of 2004

H.R. 1086 defines a "standards development organization" (SDO) as a "domestic or international organization that plans, develops, establishes or coordinates voluntary consensus standards" using criteria that meet the requirements of Office of Management & Budget Circular No. A-119 (revised Feb. 10, 1998).* House Report 108-125 states that "[s]tandards 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."

The Supreme Court recognized in *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988), that "agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute or purchase certain types of products." This is why SDOs have been vulnerable to antitrust attack. One particular difficulty in standard-setting is that one or more self-serving participants might press for standards favorable to them, to the exclusion of other considerations. Rigorous self-regulation by SDOs helps prevent much of this type of manipulation. Unfortunately, opportunism sometimes manifests itself in a second way, through lawsuits brought by parties dissatisfied with the consensus.

* Available at http://www.whitehouse.gov/omb/circulars/a119/a119.html.

In recognition of the second problem, H.R. 1086 affords greater protection to SDOs – though not to their members or to individuals – for many activities. Formerly, the National Cooperative Research and Production Act of 1993 required that courts apply a rule of per se illegality to claims of anti-competitive behavior involving SDOs. To prevail, a plaintiff had only to establish that the challenged conduct was a facial violation of the antitrust laws, without considering its pro-competitive benefits.

H.R. 1086 now requires courts to evaluate the conduct of SDOs according to the same standard as joint ventures under the National Cooperative Research and Production Act, 15 U.S.C. §§4301-05, "on the basis of its reasonableness, taking into account all relevant factors affecting competition." As a result, when challenged, SDOs will be able to present evidence that ostensibly anti-competitive actions actually result in greater competition or improvements in market conditions. Activities such as price-fixing, market allocation, and certain information exchanges are still considered clearly anti-competitive and continue to be subject to the per se rule.

Another new advantage for SDOs is that a successful defense can result in a recovery of costs including reasonable attorney's fees, if a claim is found to be frivolous. One disadvantage is that the new laws benefit only the SDOs themselves. Individuals and corporations that comprise an organization are still fully liable under antitrust laws.

To become eligible for protection, an SDO must file notice with the DOJ and the Federal Trade Commission within 90 days of commencing standards development activities, or within 90 days of enactment of the Act for existent organizations. The DOJ has already issued a statement, dated June 24, concerning compliance with the Act, which can be viewed at: http://www.usdoj.gov/atr/public/press_releases/2004/204345.htm.

Title II - Antitrust Criminal Penalty Enhancement and Reform Act of 2004

Subtitle A – Antitrust Enforcement Enhancements and Cooperation Incentives

Criminal penalties for violations of the Sherman Act are increased under H.R. 1086, but the heightened sanctions can be avoided if a company or individual qualifies to participate in the DOJ's corporate leniency program.

Under the new system of penalties, the maximum statutory fine for corporations increases tenfold from $10 million to $100 million. For individuals, the maximum fine jumps from $350,000 to $1 million. The maximum jail sentence is now ten years instead of three.

H.R. 1086 offers two new incentives to cooperate with the DOJ: (1) freedom from joint and several liability, and (2) avoidance of treble damages in private suits. Formerly, co-conspirators could be held jointly and severally liable to plaintiffs for all damages caused by the conspiracy and, to aggravate matters, defendants had no rights of contribution. Although DOJ usually offered immunity from criminal prosecution, the prospect of subsequent civil liability was a deterrent to cooperation.

H.R. 1086 addresses this problem through the elimination of joint and several liability and limitation of damages to single instead of treble damages. Such treatment is earned, however, only "if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action…." (§213(b)). Such cooperation includes, according to the bill,

- "providing a full account to the claimant…of all facts potentially relevant to the civil action;"
- "furnishing all documents or other items that are potentially relevant… wherever located;" and
- in the case of an individual, answering questions truthfully in any interview, deposition, or testimony reasonably required by the claimant or, in the case of an organization, "using its best efforts to secure and facilitate from cooperating individuals covered by the [leniency] agreement the cooperation described in [2 and 3] above."

Since it is in a claimant's interest *not* to be satisfied, much skirmishing between cooperating defendants and antitrust plaintiffs' counsel should be expected. Requests for excessive amounts of information and documentation are also foreseeable.

The provisions for cooperation incentives will expire in five years if they are not deemed effective in exposing conspiracies.

Subtitle B - Tunney Act Reform

The aim of this reform is to reinforce the original purpose of the Tunney Act, to wit, ensuring that antitrust settlements are in the public interest. Congress has found that there is the perception that courts will not invalidate consent decrees negotiated by the DOJ unless approval would "make a mockery of the judicial function." (§221 (a)(1)(B)).

The amendment ends perceived rubber-stamping of settlements with the government by requiring "substantial evidence and reasoned analysis" by a court before it confirms that a consent decree is in the public interest. Among other things, the court must consider "the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations…." (§221(b)(2)). This will require the parties to put in more effort than has usually been necessary to justify a consent decree, which could disrupt efforts to close corporate deals on a fast track.

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