



UPDATE

WHAT DOES 1086 MEAN FOR CONSORTIA

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Background: In the near future, President Bush is scheduled to sign a little-noticed bill entitled the "Standards Development Organization Advancement Act of 2004" (referred to below as the Amendment Act). The effect of this bill will be to amend the National Cooperative Research and Production Act of 1993 (commonly referred to as the NCRPA). Currently, the NCRPA permits parties to joint ventures to make a filing that will protect them from treble damages with respect to various types of collaborative research and development projects.

When the new bill is signed, standards development organizations that employ a consensus process of the type approved for purposes of government purchasing will also be entitled to make a filing under the NCRPA. Once they have done so, they will become immune to the treble damages that otherwise might threaten them under private suits that might allege antitrust violations in the standard setting process. As with joint ventures under the NCRPA in its current form, any challenged actions will also be judged under the "Rule of Reason" test, which permits a court to take the wider benefits as well as the negative aspects of a given activity into account in determining whether a violation of the antitrust laws has occurred.

What could be wrong with that?

The problem with this seemingly innocuous and useful bill is that, like much legislation, it has been narrowly crafted for a single purpose. As a result, the changes to the NCRPA that will shortly go into effect will raise considerable confusion (at best) in other situations, and particularly as respects the standard setting activities conducted by consortia. At worst, the Amendment Act will have stripped consortia, and their members, of valuable protection under the NCRPA.

The Status Quo: Before the Amendment Act, the NCRPA did not specifically address standard setting as such. However, it did include several types of activities in its very broad definitions of protected conduct that are typically carried on by standards setting organizations, including the following:

- The development or testing of basic engineering techniques (*which could encompass test beds projects, for example*)
- The extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes (*which might cover some standard setting, as well as other types of initiatives in which some organizations engage*)
- The production of a product, process, or service (*the creation of test suites might fall under this category*)
- The testing in connection with the production of a product, process, or service by such venture (*certification and interoperability testing might qualify*)

- The collection, exchange, and analysis of research or production information (*consortia commonly engage in such activities, producing studies, white papers and other work product*) NCRPA, Section 4301(a)(6)(a) – (f)

Most significantly, the companies that engaged in these activities, and not just any organization that they formed for the purpose of conducting these activities, were protected. Since technology companies typically have significant assets and consortia have few (if any), this meant that those who were most in need of protection could benefit from the Act.

Given that complying with the NCRPA only requires making a simple filing within 90 days of the time that a consortium is formed, and updating the same filing on a periodic basis to address membership changes, many consortia have registered under the NCRPA, even absent specific language addressing standard setting as such.

All was well until several law suits alleging antitrust violations were filed against a few accredited standards development organizations (SDOs) that had reasonably large budgets and small (read: asset-poor) companies as members. While these nuisance suits were not ultimately successful, they did place a burden on the finances and management of these SDOs. As a result, these organizations sought an expansion of the NCRPA to provide immunity from treble damage, penalties and applicability of the Rule of Reason test. By doing so, they sought to lower the incentives for private parties to bring suit.

What 1086 Changes : Given a magic wand, the NCRPA could simply have been changed to provide that standard setting is expressly included as a protected activity under the Act, and there an end. Unfortunately, the actual changes that were made to the NCRPA came out rather differently, perhaps partially in response to post-Enron sensitivities over providing corporate immunity to big businesses for any reason.

As amended, the NCRPA will cover standards organizations, but only those that meet the following definition:

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. [NCRPA Section 4301(a)(8), emphasis added]

The major issue with this and several related definitions in the Amendment Act is that several of the included criteria are quite vague (what, for example, constitutes adequate “due process” in standard setting?) Of greater concern is that many consortia do not have a formal appeals process at all. Yet their members are quite happy with their methods, and their standards are often respected and broadly adopted.

Most seriously, an important exclusion is noted in the same definition:

The term “standards development organization” shall not, for purposes of this Act, include the parties participating in the standards development organization. [emphasis added]

The definition of protected activity is quite comprehensive, encompassing all activities that reasonably relate to the standards process:

“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. [NCRPA, Section 4103(7)]

The net effect of the amendments is that SDOs conclusively may file for and gain protection under the NCRPA for themselves and their employees with respect to their standard setting activities, so long as those activities employ a process that meets the somewhat vague criteria of the Amendment Act.

What May Change? Many Questions: The harder issues involve what else 1086 may inadvertently change, either by direct language or indirectly by implication. Unfortunately, while Section 108 of the Amendment Act purports to give guidance, the language of this section is convoluted to the point of being useless. It reads in full as follows:

SEC. 108. RULE OF CONSTRUCTION.

Nothing in this title 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 title, including the existing standard under which the conduct of the parties is reviewed, regardless of the standard under which the conduct of the standards development organizations in which they participate are reviewed, or
- (2) other organizations and parties engaged in standard-setting processes not within the scope of this amendment to the title.

If (1) is carefully taken apart word by word (not an easy exercise), it seems to be less helpful to consortia than not, while (2) seems to say that only those organizations that are not involved in proper standard setting activities ("standard-setting processes not within the scope of this amendment") would avoid being affected by the law. This means at best that consortia with good processes would be affected by the Amendment Act.

In short, the construction clause of the Amendment Act not only does not provide any reliable assistance to consortia, but rather introduces even more ambiguity into what impact the new bill will have on such organizations, leading to uncertainty in planning and extra cost in any future litigation. As a result, the following questions are unavoidable:

I. Questions for Individuals and Companies Engaged in Standard Setting:

Can an individual company still be protected with regard to standard setting? In addition to the exclusion noted above, the new Section 4303(e) added by the Amendment Act provides that the limitations of liability under the Act:

...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.

At most, one could attempt to argue that to the extent that the NCRPA would be included in "the antitrust laws", that a company that is part of a consortium that did not meet the process requirements could still be protected. But as regards standard setting, this reading would doubtless be challenged in litigation. Certainly a plaintiff would consider it a worthwhile effort to argue that the clear intention of Congress was

to protect SDOs, and not those companies that actually engage in standard setting, given the explicitness with which the topic is addressed in the Amendment Act.

Could the members of a consortium make a filing as a joint venture, leaving the name of the consortium out of the filing? While nominally this makes sense, one can easily imagine that a plaintiff would argue that the omission of the name of what is, after all, a membership organization would be purely a ploy that the courts should not countenance. Such a filing might be somewhat more effective if the consortium was not incorporated, but it would be regrettable if an organization that intended to have a long and varied existence were forced to forego incorporation, or to set up a contractual relationship with a service company created for that purpose, in order allow members to find protection under the NCRPA.

II. Questions for Consortia

Can consortia still file and be protected? The bill addresses standard setting so specifically that it would appear that a consortium should not bother making a filing relating to standard setting activities unless it intends to follow a very conservative adoptive process, whether or not it believed that such a process would serve it well.

Should a consortium file at all? An organization is now faced with a Hobbesian choice: Should it protect itself, or its members? Since consortia are membership organizations and have no real assets to attract the attention of a plaintiff, there may be little reason for small organizations to make a filing at all.

Could a consortium file with respect to other activities? Since the NCRPA provides protection for other types of activities in which many consortia arguably engage, a consortium could presumably make a filing on behalf of itself and its members, expressly omitting any mention of (or in fact disclaiming coverage as to) standard setting. However, if its members were to seek to independently file as a joint venture with respect to the excluded standard setting activities, a plaintiff would doubtless once again allege that the dual filings represented game playing rather than legitimate practices under the NCRPA.

What activities could be covered? Appropriately for the benefit of SDOs, but inconveniently for consortia, “promulgating” standards, “conformity assessment” and “actions relating to the intellectual property policies” of SDOs are also included in the new definition of “standards development activity.” As a result, initiatives such as creating test suites, administering compliance programs, and licensing specifications may also all have been preempted, even if they were previously protected joint venture activities. The activities that consortia engage in that are left may not be legally problematic enough to worry about, although collaborative text bed activities would be one example of an activity that might reliably lie outside of the ambit of the Amendment Act.

Could a consortium still make a filing on behalf of its members and itself, and deliberately not follow the process requirements of the amended Act? Nominally, this might work, since the bill does state that the protections of the NCRPA relating to SDOs will be limited to organizations that in fact meet the process standard. As with many of the other positions explored above, however, this is at best a very legalistic argument, since the clear intention of the Amendment Act is to set a high bar for conduct that merits protection. In any case, it would be ironic if the passage of the Amendment Act would persuade organizations to disable the due process safeguards in their current standard setting process in order to retain previously-enjoyed protections.

What impact will the amendments have on consortia that are already registered under the NCRPA? Presumably, any actions taken prior to the effectiveness of the amendments will remain protected, to the extent that they qualified under the NCRPA in its prior form. But any future standard setting activities undertaken by a consortium would presumably protect only the consortium, and not any of its members.

Should a consortium that is not now registered do so? This answer seems clearer. Where neither a consortium nor its members are currently protected, there seems little to lose and much to gain by making a filing, assuming that the process of the consortium in question appears to meet the minimum standards

of the NCRPA, post amendment. However, if the consortium has few assets, the risk of suit may not be high enough to merit making the filing.

III. Questions for SDOs and SDO Members

If a given activity may be risky, should SDO members take it outside the SDO process? Subject to the qualifications noted above, in a given instance it may be worth taking a particular activity outside of an SDO, and making it the subject either of a discrete joint venture, or of a new consortium. An example might be an effort that would otherwise be intended to begin within an SDO and then rapidly lead into the creation of a prototype, all of which would fit well within the NCRPA as it applies to joint ventures. A specification derived from the activity could still be offered to the SDO or a consortium after this work was completed.

Could an SDO file under the NCRPA as to non-standard setting activities, and claim protection for its members as well? In principal, this should be possible. In practice, a danger would remain for SDOs as well as consortia that the actions might be colored by close association with the same organization's standards activities. For example, a study relating to standards adoption that involved exchanging information among companies would seem to lie outside the definition of standards development activities, but might nevertheless be challenged.

Should an existing SDO file? If the SDO has no meaningful assets, the likelihood of attracting a law suit may be too low to merit the filing. For larger organizations, a filing would be advisable.

Conclusions: As we noted in an earlier article prior to H.R. 1086 reaching the Senate (What is Congress Up To? Watch out for House Bill 1086 www.consortiuminfo.org/bulletins/apr03.php, it is regrettable that a rare opportunity to improve the protections afforded by the NCRPA was not exercised to greater positive effect. While one type of standard setting entity has benefited, another may have suffered. We sought to avoid that outcome through our earlier article, and did succeed in gaining some recognition in the record that consortia were not intended to suffer as a result of the Amendment Act (see www.consortiuminfo.org/bulletins/may03.php#hr1086. But that mention is in the record, and not the law, and is difficult to square with the language of the Amendment Act itself.

In effect, consortia will now labor under greater uncertainty with respect to the NCRPA as a result of SDOs gaining clarity with respect to antitrust liability. Whatever action an individual consortium and its members may decide to take after the Amendment Act becomes law (other than to forego making filings at all), a plaintiff may be expected to challenge that decision in court if a dispute ever comes to pass. But most inexplicable and regrettable is the exclusion of individual company protection under the amendments. In the case of SDOs, their members have not gained protection that the original proponents of the NCRPA might well have favored. And in the case of consortia, their members may have lost whatever protection to which they were previously entitled. SDOs as well as consortia could have benefited from an explicit change that would have allowed participants in both types of organizations to benefit from protection under the NCRPA.

After all, there is little reason why a small group of head to head competitors may still seek protection to collaborate on a research and development project to create new commercial opportunities, while a broad group of hundreds of vendors, universities, government agencies and customers may not gain similar individual protection to create a Homeland Security standard for reliable first responder communications. Congress turns its attention to standard setting all too infrequently. It's a shame that it did not turn out better this time. Perhaps if consortia, as well as SDOs, had an organization like ANSI to help watch out for their joint interests, the passage of the Amendment Act could have been an event that everyone involved in standard setting could have celebrated.

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Relevant Links:

The NCRPA in its current form may be found at:
<http://www4.law.cornell.edu/uscode/15/ch69.html>

We have prepared a marked copy of the NCRPA as it will read after the bill is signed, showing all changes:
<http://www.consortiuminfo.org/bulletins/ncrpa.pdf>

The final form of H.R. 1086, as approved by Congress and awaiting signature
<http://thomas.loc.gov/cgi-bin/query/F?c108:7:./temp/~c108qqxoof:e0:>

Prior Testimony on H.R. 1086 a hearing before the Task Force on Antitrust of the House Judiciary Committee:

[Available here](#)

Prior CSB article on 1086: <http://www.consortiuminfo.org/bulletins/apr03.php#featured>