

***NEW FEDERAL LAW PROTECTS STANDARDS DEVELOPMENT ORGANIZATIONS, INCREASES PENALTIES IN CRIMINAL ANTITRUST CASES, AND STRENGTHENS DOJ LENIENCY PROGRAM***

On June 22, 2004, President Bush signed into law legislation that amends the antitrust laws in several important respects. The law contains three distinct acts. The first is the Standards Development Organization Advancement Act 2004 (the “SDOAA”). The SDOAA in part limits the civil antitrust liability of standards development organizations (“SDOs”). In addition, the law includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which greatly increases the maximum penalties for antitrust violations and strengthens the existing amnesty program offered to whistleblowers by the Department of Justice (“DOJ”). Finally, the legislation alters the Tunney Act, which applies to a district court’s review of an antitrust consent decree.

Typically, SDOs are established by competitors to develop product and industry standards that apply to, for example, health and safety. The SDOAA provides clearer rules for the SDOs to help protect them from potential litigation resulting from joint standard setting activity which otherwise might be alleged to constitute illegal collaboration under the antitrust laws.

The legislation results from recognition by Congress of a tension between the antitrust laws that prohibit businesses from colluding and developing technical standards, which require competitors to reach agreement on basic design elements. The Act eases this tension, allowing SDOs to continue their important work while preserving antitrust laws that enhance competition and protect American consumers. As stated by R. Hewitt Pate, Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, “Congress has determined that the threat of treble damages pressures SDOs to restrict their standards development activities at a great cost to the United States.”

Specifically, the SDOAA provides that the rule of standard applies to SDOs while they are engaged in standards development activities, and provides special rules for attorneys’ fees in any antitrust case challenging a SDOs standard development activity. The Act also provides SDOs the opportunity to limit their antitrust liability for standards development activities to actual, as opposed to treble, damages. The rule of reason and attorneys’ fees provisions automatically apply to all SDOs covered by the Act. However, to obtain damage limitation protections, SDOs must file proper notification with the DOJ and the Federal Trade Commission.

Title II of the legislation contains the Antitrust Criminal Penalty Enhancement and Reform Act. The Act imposes dramatically higher fines and penalties for Sherman Act violations. Maximum prison sentences for antitrust violations are increased from three to ten years. Maximum fines for individuals are increased from \$350,000 to \$1,000,000, and the maximum fine for a corporation is now \$100,000,000, up from \$10,000,000. The actual effect of the increase of the maximum fine is debatable because under prior law, the government was able to (and in some instances, in fact, did) obtain fines well above the \$10,000,000 statutory maximum by relying on

the alternative statutory provision that allows for a fine in an amount up to “double the gain or loss” caused by the anti-competitive activity.

The act also increases incentives for antitrust whistleblowers. Under current law, corporations with a leniency agreement who cooperate with the DOJ remain liable for treble damages in private and state antitrust suits that typically follow a DOJ criminal investigation. The act limits civil liability of corporations participating in the DOJ’s corporate leniency program to single damages attributable to its own share of commerce (as opposed to joint and several liability for all conspirators’ shares) effected by the violation. This section of the Act contains a five-year sunset provision and will terminate unless renewed by Congress.

Finally, the legislation alters the language of the Tunney Act. The primary change requires (previous law only allows) a court reviewing an antitrust consent decree to consider specified factors, such as the competitive impact of a judgment and the impact of any such judgment upon competition in the relevant markets. The new legislation is intended to overrule case law attempting to limit the rule of a district court in analyzing and approving antitrust settlements.

*Because of the changing nature of this area of the law and the importance of individual facts, this information is not meant to provide legal opinions and is not a substitute for the advice of legal counsel. For more information, please contact the Business Law Practice Group at Lane Powell Spears Lubersky LLP:*

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