

In the Senate of the United States,

April 2, 2004.

Resolved, That the bill from the House of Representatives (H.R. 1086) entitled “An Act 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.”, do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

1 ***TITLE I—STANDARDS DEVELOP-***
2 ***MENT ORGANIZATION AD-***
3 ***VANCEMENT ACT OF 2003***

4 ***SEC. 101. SHORT TITLE.***

5 *This title may be cited as the “Standards Development*
6 *Organization Advancement Act of 2003”.*

1 **SEC. 102. FINDINGS.**

2 *The Congress finds the following:*

3 (1) *In 1993, the Congress amended and renamed*
4 *the National Cooperative Research Act of 1984 (now*
5 *known as the National Cooperative Research and Pro-*
6 *duction Act of 1993 (15 U.S.C. 4301 et seq.)) by en-*
7 *acting the National Cooperative Production Amend-*
8 *ments of 1993 (Public Law 103–42) to encourage the*
9 *use of collaborative, procompetitive activity in the*
10 *form of research and production joint ventures that*
11 *provide adequate disclosure to the antitrust enforce-*
12 *ment agencies about the nature and scope of the activ-*
13 *ity involved.*

14 (2) *Subsequently, in 1995, the Congress in enact-*
15 *ing the National Technology Transfer and Advance-*
16 *ment Act of 1995 (15 U.S.C. 272 note) recognized the*
17 *importance of technical standards developed by vol-*
18 *untary consensus standards bodies to our national*
19 *economy by requiring the use of such standards to the*
20 *extent practicable by Federal agencies and by encour-*
21 *aging Federal agency representatives to participate in*
22 *ongoing standards development activities. The Office*
23 *of Management and Budget on February 18, 1998, re-*
24 *vised Circular A–119 to reflect these changes made in*
25 *law.*

1 (3) *Following enactment of the National Tech-*
2 *nology Transfer and Advancement Act of 1995, tech-*
3 *nical standards developed or adopted by voluntary*
4 *consensus standards bodies have replaced thousands of*
5 *unique Government standards and specifications al-*
6 *lowing the national economy to operate in a more*
7 *unified fashion.*

8 (4) *Having the same technical standards used by*
9 *Federal agencies and by the private sector permits the*
10 *Government to avoid the cost of developing duplica-*
11 *tive Government standards and to more readily use*
12 *products and components designed for the commercial*
13 *marketplace, thereby enhancing quality and safety*
14 *and reducing costs.*

15 (5) *Technical standards are written by hundreds*
16 *of nonprofit voluntary consensus standards bodies in*
17 *a nonexclusionary fashion, using thousands of volun-*
18 *teers from the private and public sectors, and are de-*
19 *veloped under the standards development principles*
20 *set out in Circular Number A-119, as revised Feb-*
21 *ruary 18, 1998, of the Office of Management and*
22 *Budget, including principles that require openness,*
23 *balance, transparency, consensus, and due process.*
24 *Such principles provide for—*

1 (A) notice to all parties known to be af-
2 fected by the particular standards development
3 activity,

4 (B) the opportunity to participate in stand-
5 ards development or modification,

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

9 (D) readily available access to essential in-
10 formation regarding proposed and final stand-
11 ards,

12 (E) the requirement that substantial agree-
13 ment be reached on all material points after the
14 consideration of all views and objections, and

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

17 (6) There are tens of thousands of voluntary con-
18 sensus standards available for government use. Most
19 of these standards are kept current through interim
20 amendments and interpretations, issuance of ad-
21 denda, and periodic reaffirmation, revision, or
22 reissuance every 3 to 5 years.

23 (7) Standards developed by government entities
24 generally are not subject to challenge under the anti-
25 trust laws.

1 (8) *Private developers of the technical standards*
2 *that are used as Government standards are often not*
3 *similarly protected, leaving such developers vulnerable*
4 *to being named as codefendants in lawsuits even*
5 *though the likelihood of their being held liable is re-*
6 *mote in most cases, and they generally have limited*
7 *resources to defend themselves in such lawsuits.*

8 (9) *Standards development organizations do not*
9 *stand to benefit from any antitrust violations that*
10 *might occur in the voluntary consensus standards de-*
11 *velopment process.*

12 (10) *As was the case with respect to research and*
13 *production joint ventures before the passage of the Na-*
14 *tional Cooperative Research and Production Act of*
15 *1993, if relief from the threat of liability under the*
16 *antitrust laws is not granted to voluntary consensus*
17 *standards bodies, both regarding the development of*
18 *new standards and efforts to keep existing standards*
19 *current, such bodies could be forced to cut back on*
20 *standards development activities at great financial*
21 *cost both to the Government and to the national econ-*
22 *omy.*

23 **SEC. 103. DEFINITIONS.**

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

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

3 “(7) *The term ‘standards development activity’*
4 *means any action taken by a standards development*
5 *organization for the purpose of developing, promul-*
6 *gating, revising, amending, reissuing, interpreting, or*
7 *otherwise maintaining a voluntary consensus stand-*
8 *ard, or using such standard in conformity assessment*
9 *activities, including actions relating to the intellec-*
10 *tual property policies of the standards development*
11 *organization.*

12 “(8) *The term ‘standards development organiza-*
13 *tion’ means a domestic or international organization*
14 *that plans, develops, establishes, or coordinates vol-*
15 *untary consensus standards using procedures that in-*
16 *corporate the attributes of openness, balance of inter-*
17 *ests, due process, an appeals process, and consensus in*
18 *a manner consistent with the Office of Management*
19 *and Budget Circular Number A–119, as revised Feb-*
20 *ruary 10, 1998. The term ‘standards development or-*
21 *ganization’ shall not, for purposes of this Act, include*
22 *the parties participating in the standards develop-*
23 *ment organization.*

24 “(9) *The term ‘technical standard’ has the mean-*
25 *ing given such term in section 12(d)(4) of the Na-*

1 *tional Technology Transfer and Advancement Act of*
2 *1995.*

3 “(10) *The term ‘voluntary consensus standard’*
4 *has the meaning given such term in Office of Manage-*
5 *ment and Budget Circular Number A–119, as revised*
6 *February 10, 1998.”; and*

7 (2) *by adding at the end the following:*

8 “(c) *The term ‘standards development activity’ ex-*
9 *cludes the following activities:*

10 “(1) *Exchanging information among competitors*
11 *relating to cost, sales, profitability, prices, marketing,*
12 *or distribution of any product, process, or service that*
13 *is not reasonably required for the purpose of devel-*
14 *oping or promulgating a voluntary consensus stand-*
15 *ard, or using such standard in conformity assessment*
16 *activities.*

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

20 “(3) *Entering into any agreement or conspiracy*
21 *that would set or restrain prices of any good or serv-*
22 *ice.”.*

23 **SEC. 104. RULE OF REASON STANDARD.**

24 *Section 3 of the National Cooperative Research and*
25 *Production Act of 1993 (15 U.S.C. 4302) is amended by*

1 striking “of any person in making or performing a contract
 2 to carry out a joint venture shall” and inserting the fol-
 3 lowing: “of—

4 “(1) any person in making or performing a con-
 5 tract to carry out a joint venture, or

6 “(2) a standards development organization while
 7 engaged in a standards development activity,
 8 shall”.

9 **SEC. 105. LIMITATION ON RECOVERY.**

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

12 (1) in subsections (a)(1), (b)(1), and (c)(1) by
 13 inserting “, or for a standards development activity
 14 engaged in by a standards development organization
 15 against which such claim is made” after “joint ven-
 16 ture”,

17 (2) in subsection (e)—

18 (A) by inserting “, or of a standards devel-
 19 opment activity engaged in by a standards devel-
 20 opment organization” before the period at the
 21 end, and

22 (B) by redesignating such subsection as sub-
 23 section (f), and

24 (3) by inserting after subsection (d) the fol-
 25 lowing:

1 “(e) Subsections (a), (b), and (c) shall not be construed
2 to modify the liability under the antitrust laws of any per-
3 son (other than a standards development organization)
4 who—

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

9 “(2) is not a fulltime employee of the standards
10 development organization that engaged in such activ-
11 ity, and

12 “(3) is, or is an employee or agent of a person
13 who is, engaged in a line of commerce that is likely
14 to benefit directly from the operation of the standards
15 development activity with respect to which such viola-
16 tion is found.”.

17 **SEC. 106. ATTORNEY FEES.**

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

20 (1) in subsection (a) by inserting “, or of a
21 standards development activity engaged in by a
22 standards development organization” after “joint ven-
23 ture”, and

24 (2) by adding at the end the following:

1 “(c) Subsections (a) and (b) shall not apply with re-
2 spect to any person who—

3 “(1) directly participates in a standards devel-
4 opment activity with respect to which a violation of
5 any of the antitrust laws is found,

6 “(2) is not a fulltime employee of a standards
7 development organization that engaged in such activ-
8 ity, and

9 “(3) is, or is an employee or agent of a person
10 who is, engaged in a line of commerce that is likely
11 to benefit directly from the operation of the standards
12 development activity with respect to which such viola-
13 tion is found.”.

14 **SEC. 107. DISCLOSURE OF STANDARDS DEVELOPMENT AC-**
15 **TIVITY.**

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

18 (1) in subsection (a)—

19 (A) by redesignating paragraphs (1), (2),
20 and (3) as subparagraphs (A), (B), and (C), re-
21 spectively,

22 (B) by inserting “(1)” after “(a)”, and

23 (C) by adding at the end the following:

24 “(2) A standards development organization may, not
25 later than 90 days after commencing a standards develop-

1 *ment activity engaged in for the purpose of developing or*
2 *promulgating a voluntary consensus standards or not later*
3 *than 90 days after the date of the enactment of the Stand-*
4 *ards Development Organization Advancement Act of 2003,*
5 *whichever is later, file simultaneously with the Attorney*
6 *General and the Commission, a written notification*
7 *disclosing—*

8 “(A) *the name and principal place of business of*
9 *the standards development organization, and*

10 “(B) *documents showing the nature and scope of*
11 *such activity.*”

12 *Any standards development organization may file addi-*
13 *tional disclosure notifications pursuant to this section as*
14 *are appropriate to extend the protections of section 4 to*
15 *standards development activities that are not covered by the*
16 *initial filing or that have changed significantly since the*
17 *initial filing.”,*

18 (2) *in subsection (b)—*

19 (A) *in the 1st sentence by inserting “, or a*
20 *notice with respect to such standards develop-*
21 *ment activity that identifies the standards devel-*
22 *opment organization engaged in such activity*
23 *and that describes such activity in general*
24 *terms” before the period at the end, and*

1 (B) in the last sentence by inserting “or
2 available to such organization, as the case may
3 be” before the period,

4 (3) in subsection (d)(2) by inserting “, or the
5 standards development activity,” after “venture”,

6 (4) in subsection (e)—

7 (A) by striking “person who” and inserting
8 “person or standards development organization
9 that”, and

10 (B) by inserting “or any standards develop-
11 ment organization” after “person” the last place
12 it appears, and

13 (5) in subsection (g)(1) by inserting “or stand-
14 ards development organization” after “person”.

15 **SEC. 108. RULE OF CONSTRUCTION.**

16 Nothing in this title shall be construed to alter or mod-
17 ify the antitrust treatment under existing law of—

18 (1) parties participating in standards develop-
19 ment activity of standards development organizations
20 within the scope of this title, including the existing
21 standard under which the conduct of the parties is re-
22 viewed, regardless of the standard under which the
23 conduct of the standards development organizations
24 in which they participate are reviewed, or

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

4 ***TITLE II—ANTITRUST CRIMINAL***
5 ***PENALTY ENHANCEMENT AND***
6 ***REFORM ACT OF 2003***

7 ***SEC. 201. SHORT TITLE.***

8 *This title may be cited as the “Antitrust Criminal*
9 *Penalty Enhancement and Reform Act of 2003”.*

10 ***Subtitle A—Antitrust Enforcement***
11 ***Enhancements and Cooperation***
12 ***Incentives***

13 ***SEC. 211. SUNSET.***

14 (a) *IN GENERAL.*—*Except as provided in subsection*
15 *(b), the provisions of sections 211 through 214 shall cease*
16 *to have effect 5 years after the date of enactment of this*
17 *Act.*

18 (b) *EXCEPTION.*—*With respect to an applicant who*
19 *has entered into an antitrust leniency agreement on or be-*
20 *fore the date on which the provisions of sections 211 through*
21 *214 of this subtitle shall cease to have effect, the provisions*
22 *of sections 211 through 214 of this subtitle shall continue*
23 *in effect.*

24 ***SEC. 212. DEFINITIONS.***

25 *In this subtitle:*

1 (1) *ANTITRUST DIVISION.*—The term “Antitrust
2 *Division*” means the United States Department of
3 *Justice Antitrust Division.*

4 (2) *ANTITRUST LENIENCY AGREEMENT.*—The
5 term “antitrust leniency agreement,” or “agreement,”
6 means a leniency letter agreement, whether condi-
7 tional or final, between a person and the Antitrust
8 Division pursuant to the Corporate Leniency Policy
9 of the Antitrust Division in effect on the date of exe-
10 cution of the agreement.

11 (3) *ANTITRUST LENIENCY APPLICANT.*—The term
12 “antitrust leniency applicant,” or “applicant,”
13 means, with respect to an antitrust leniency agree-
14 ment, the person that has entered into the agreement.

15 (4) *CLAIMANT.*—The term “claimant” means a
16 person or class, that has brought, or on whose behalf
17 has been brought, a civil action alleging a violation
18 of section 1 or 3 of the Sherman Act or any similar
19 State law, except that the term does not include a
20 State or a subdivision of a State with respect to a
21 civil action brought to recover damages sustained by
22 the State or subdivision.

23 (5) *COOPERATING INDIVIDUAL.*—The term “co-
24 operating individual” means, with respect to an anti-
25 trust leniency agreement, a current or former direc-

1 *tor, officer, or employee of the antitrust leniency ap-*
2 *plicant who is covered by the agreement.*

3 (6) *PERSON.*—*The term “person” has the mean-*
4 *ing given it in subsection (a) of the first section of the*
5 *Clayton Act.*

6 **SEC. 213. LIMITATION ON RECOVERY.**

7 (a) *IN GENERAL.*—*Subject to subsection (d), in any*
8 *civil action alleging a violation of section 1 or 3 of the Sher-*
9 *man Act, or alleging a violation of any similar State law,*
10 *based on conduct covered by a currently effective antitrust*
11 *leniency agreement, the amount of damages recovered by or*
12 *on behalf of a claimant from an antitrust leniency appli-*
13 *cant who satisfies the requirements of subsection (b), to-*
14 *gether with the amounts so recovered from cooperating indi-*
15 *viduals who satisfy such requirements, shall not exceed that*
16 *portion of the actual damages sustained by such claimant*
17 *which is attributable to the commerce done by the applicant*
18 *in the goods or services affected by the violation.*

19 (b) *REQUIREMENTS.*—*Subject to subsection (c), an*
20 *antitrust leniency applicant or cooperating individual sat-*
21 *isfies the requirements of this subsection with respect to a*
22 *civil action described in subsection (a) if the court in which*
23 *the civil action is brought determines, after considering any*
24 *appropriate pleadings from the claimant, that the appli-*
25 *cant or cooperating individual, as the case may be, has pro-*

1 *vided satisfactory cooperation to the claimant with respect*
2 *to the civil action, which cooperation shall include—*

3 *(1) providing a full account to the claimant of*
4 *all facts known to the applicant or cooperating indi-*
5 *vidual, as the case may be, that are potentially rel-*
6 *evant to the civil action;*

7 *(2) furnishing all documents or other items po-*
8 *tentially relevant to the civil action that are in the*
9 *possession, custody, or control of the applicant or co-*
10 *operating individual, as the case may be, wherever*
11 *they are located; and*

12 *(3)(A) in the case of a cooperating individual—*

13 *(i) making himself or herself available for*
14 *such interviews, depositions, or testimony in con-*
15 *nection with the civil action as the claimant*
16 *may reasonably require; and*

17 *(ii) responding completely and truthfully,*
18 *without making any attempt either falsely to*
19 *protect or falsely to implicate any person or en-*
20 *tity, and without intentionally withholding any*
21 *potentially relevant information, to all questions*
22 *asked by the claimant in interviews, depositions,*
23 *trials, or any other court proceedings in connec-*
24 *tion with the civil action; or*

1 (B) *in the case of an antitrust leniency appli-*
2 *cant, using its best efforts to secure and facilitate*
3 *from cooperating individuals covered by the agree-*
4 *ment the cooperation described in clauses (i) and (ii)*
5 *and subparagraph (A).*

6 (c) *TIMELINESS.—If the initial contact by the anti-*
7 *trust leniency applicant with the Antitrust Division re-*
8 *garding conduct covered by the antitrust leniency agree-*
9 *ment occurs after a State, or subdivision of a State, has*
10 *issued compulsory process in connection with an investiga-*
11 *tion of allegations of a violation of section 1 or 3 of the*
12 *Sherman Act or any similar State law based on conduct*
13 *covered by the antitrust leniency agreement or after a civil*
14 *action described in subsection (a) has been filed, then the*
15 *court shall consider, in making the determination con-*
16 *cerning satisfactory cooperation described in subsection (b),*
17 *the timeliness of the applicant’s initial cooperation with the*
18 *claimant.*

19 (d) *CONTINUATION.—Nothing in this section shall be*
20 *construed to modify, impair, or supersede the provisions of*
21 *sections 4, 4A, and 4C of the Clayton Act relating to the*
22 *recovery of costs of suit, including a reasonable attorney’s*
23 *fee, and interest on damages, to the extent that such recov-*
24 *ery is authorized by such sections.*

1 **SEC. 214. RIGHTS, AUTHORITIES, AND LIABILITIES NOT AF-**
2 **FFECTED.**

3 *Nothing in this subtitle shall be construed to—*

4 *(1) affect the rights of the Antitrust Division to*
5 *seek a stay or protective order in a civil action based*
6 *on conduct covered by an antitrust leniency agree-*
7 *ment to prevent the cooperation described in section*
8 *213(b) from impairing or impeding the investigation*
9 *or prosecution by the Antitrust Division of conduct*
10 *covered by the agreement;*

11 *(2) create any right to challenge any decision by*
12 *the Antitrust Division with respect to an antitrust le-*
13 *niency agreement; or*

14 *(3) affect, in any way, the joint and several li-*
15 *ability of any party to a civil action described in sec-*
16 *tion 213(a), other than that of the antitrust leniency*
17 *applicant and cooperating individuals as provided in*
18 *section 213(a) of this title.*

19 **SEC. 215. INCREASED PENALTIES FOR ANTITRUST VIOLA-**
20 **TIONS.**

21 *(a) RESTRAINT OF TRADE AMONG THE STATES.—Sec-*
22 *tion 1 of the Sherman Act (15 U.S.C. 1) is amended by—*

23 *(1) striking “\$10,000,000” and inserting*
24 *“\$100,000,000”;*

25 *(2) striking “\$350,000” and inserting*
26 *“\$1,000,000”; and*

1 (3) *striking “three” and inserting “10”.*

2 (b) *MONOPOLIZING TRADE.—Section 2 of the Sherman*
3 *Act (15 U.S.C. 2) is amended by—*

4 (1) *striking “\$10,000,000” and inserting*
5 *“\$100,000,000”;*

6 (2) *striking “\$350,000” and inserting*
7 *“\$1,000,000”; and*

8 (3) *striking “three” and inserting “10”.*

9 (c) *OTHER RESTRAINTS OF TRADE.—Section 3 of the*
10 *Sherman Act (15 U.S.C. 3) is amended by—*

11 (1) *striking “\$10,000,000” and inserting*
12 *“\$100,000,000”;*

13 (2) *striking “\$350,000” and inserting*
14 *“\$1,000,000”; and*

15 (3) *striking “three” and inserting “10”.*

16 ***Subtitle B—Tunney Act Reform***

17 ***SEC. 221. PUBLIC INTEREST DETERMINATION.***

18 (a) *CONGRESSIONAL FINDINGS AND DECLARATION OF*
19 *PURPOSES.—*

20 (1) *FINDINGS.—Congress finds that—*

21 (A) *the purpose of the Tunney Act was to*
22 *ensure that the entry of antitrust consent judg-*
23 *ments is in the public interest; and*

24 (B) *it would misconstrue the meaning and*
25 *Congressional intent in enacting the Tunney Act*

1 to limit the discretion of district courts to review
2 antitrust consent judgments solely to deter-
3 mining whether entry of those consent judgments
4 would make a “mockery of the judicial func-
5 tion”.

6 (2) *PURPOSES.*—*The purpose of this section is to*
7 *effectuate the original Congressional intent in enact-*
8 *ing the Tunney Act and to ensure that United States*
9 *settlements of civil antitrust suits are in the public*
10 *interest.*

11 (b) *PUBLIC INTEREST DETERMINATION.*—*Section 5 of*
12 *the Clayton Act (15 U.S.C. 16) is amended—*

13 (1) *in subsection (d), by inserting at the end the*
14 *following: “Upon application by the United States,*
15 *the district court may, for good cause (based on a*
16 *finding that the expense of publication in the Federal*
17 *Register exceeds the public interest benefits to be*
18 *gained from such publication), authorize an alter-*
19 *native method of public dissemination of the public*
20 *comments received and the response to those com-*
21 *ments.”;*

22 (2) *in subsection (e)—*

23 (A) *in the matter before paragraph (1),*
24 *by—*

1 (i) striking “court may” and inserting
2 “court shall”; and

3 (ii) inserting “(1)” before “Before”;
4 and

5 (B) striking paragraphs (1) and (2) and in-
6 serting the following:

7 “(A) the competitive impact of such judgment,
8 including termination of alleged violations, provisions
9 for enforcement and modification, duration of relief
10 sought, anticipated effects of alternative remedies ac-
11 tually considered, whether its terms are ambiguous,
12 and any other competitive considerations bearing
13 upon the adequacy of such judgment that the court
14 deems necessary to a determination of whether the
15 consent judgment is in the public interest; and

16 “(B) the impact of entry of such judgment upon
17 competition in the relevant market or markets, upon
18 the public generally and individuals alleging specific
19 injury from the violations set forth in the complaint
20 including consideration of the public benefit, if any,
21 to be derived from a determination of the issues at
22 trial.

23 “(2) Nothing in this section shall be construed to re-
24 quire the court to conduct an evidentiary hearing or to re-
25 quire the court to permit anyone to intervene.”; and

1 (3) in subsection (g), by inserting “by any offi-
2 cer, director, employee, or agent of such defendant”
3 before “; or other person”.

Attest:

Secretary.

108TH CONGRESS
2^D SESSION

H. R. 1086

AMENDMENT