

Trade & Professional Association Bulletin

September 2004

NEW ANTITRUST PROTECTIONS FOR STANDARDS DEVELOPMENT ORGANIZATIONS

President Bush signed the “Standards Development Organization Advancement Act of 2004” (the “SDO ACT”) into law on June 22, 2004. The SDO Act safeguards organizations engaged in standards-setting activities from certain antitrust liabilities and protects organizations that file a proper notice with the Federal Trade Commission (“FTC”) from treble damages. The SDO Act applies broadly to all standards development organizations (“SDOs”) that plan, develop, establish, or coordinate voluntary consensus standards using procedures that “incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus...” 15 U.S.C. §4301. Organizations involved in standards-setting and organizations that develop standards for a professional certification program should consider filing a proper notice with the FTC to ensure favorable antitrust protection from treble damages in the future.

Protections

The SDO Act recognizes a national need for SDOs and extends the antitrust “rule of reason” analysis to standards-development activities. The “rule of reason” analysis allows SDOs to defend behavior that may have otherwise been viewed as a *per se* antitrust

violation with evidence of a pro-competitive rationale for their activities. While the FTC already applies the “rule of reason” analysis to most activities conducted by SDOs, the SDO Act codifies this practice and guarantees an automatic “rule of reason” approach to SDOs engaged in standards-setting activities in both federal and state antitrust actions.

The “rule of reason” approach will only apply when an SDO’s standards-setting activities are challenged; challenges relating to price fixing, market allocation and certain information exchanges are still subject to the *per se* rules that do not allow for a defense based on a pro-competitive rationale.

The SDO Act seeks to deter frivolous antitrust claims by providing that an SDO that successfully defends a state or federal antitrust action may recover reasonable costs and attorneys’ fees from the plaintiff if the suit was “frivolous, unreasonable, without foundation, or in bad faith.” 15 U.S.C. §4304.

The SDO Act also limits damage liability in federal and state antitrust actions to actual damages for SDOs that file a notice with the FTC. In a statement released by the Department of Justice, R. Hewitt Pate, Assistant Attorney General in charge of the Antitrust Division, stated: “Standards development organizations develop technical standards that are essential to

the efficient functioning of our national economy. 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. The [SDO Act] relieves SDOs from certain antitrust concerns and facilitates the development of pro-competitive standards.”

Filing a Notification

SDOs seeking protection from treble damages must file a proper notice with both the FTC and with the Department of Justice Antitrust Division within 90 days of the passage of the SDO Act, (September 20, 2004), or within 90 days of commencing a new standards development activity. One of the agencies will then publish the notice in the Federal Register. Notifications should contain the name of the SDO and its principal place of business and enclose documents exhibiting the nature and scope of the standards development activity. SDOs should submit one copy of their notification to the FTC and two copies to the Department of Justice at the following addresses:

Federal Trade Commission
Bureau of Competition
Office of Policy and Coordination
600 Pennsylvania Ave., NW, Room 394
Washington, DC 20580

Department of Justice
Antitrust Division
Office of Operations
Patrick Henry Building
601 D. St., NW, Room 10-013
Washington, DC 20530
(FedEx Zip Code: 20004)

Additional notifications may be filed if an SDO significantly changes its activities in the future. The FTC is collecting the filings but will not review any filings or seek more information from organizations that file incomplete notices. A sample original notice

is available at <http://www.usdoj.gov/atr/public/guidelines/ncrpa/204123e.htm>. Organizations wishing to file a notice with the FTC may follow this format and enclose documents that further detail the nature and scope of the organization’s activities. Notices will remain on file with the FTC unless and until an SDO is engaged in antitrust litigation, at which time the filing may be produced for protection from treble damages.

Professional Certification and Accrediting Programs

While the SDO Act itself does not specifically refer to professional certification or accrediting organizations, an FTC representative indicated recently that the SDO Act offers broad protections and would be equally applicable to organizations conducting certification or accrediting programs. Organizations that develop the standards on which their professional certification or accrediting programs are based should consider filing a notice with the FTC before September 20, 2004 to avoid the potential for treble damages in any future antitrust dispute.

Should you have any questions regarding this bulletin, please contact Michael E. Reed at 312/609-7640 or Thomas G. Abram at 312/609-7760.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with approximately 200 attorneys in Chicago, New York and Roseland, New Jersey.

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Vedder, Price, Kaufman & Kammholz, P.C. has assembled a team of attorneys with knowledge and experience in the particular and various areas of law that impact today's trade and professional associations. Whether your association is local, national or international, whether it has its own executive staff or is administered by an outside management firm, Vedder Price is uniquely qualified and experienced in the issues which confront you, including:

- Antitrust matters;
- Tax issues;
- Insurance coverage;
- Standard setting, certification and accreditation;
- Publication activities;

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- Intellectual property protection;
- Meeting and convention concerns;
- Employee benefits matters;
- Personnel considerations; and
- Membership issues.

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