

# Standards Development Rules and Risks

**Q:** Our board of directors would like to facilitate opportunities for competitors to work together to develop standards for the industry. How risky is that?

**A:** Competitors...working together...to develop standards? I know what you're thinking—antitrust violation. But, take a deep breath—this can be done. In an attempt to allay the fears of standard development organizations (SDOs) stemming from the threat of antitrust litigation, the U.S. Congress adopted the “Standards Development Organization Advancement Act.” The Act extends the antitrust protections of the National Cooperative Research and Production Act (NCRPA) to qualifying organizations involved in “standards development activity” (as defined in the Act). The Act creates the opportunity for competitors to work together to conduct the beneficial work of developing standards without such collaboration automatically constituting a violation of the antitrust laws (i.e., a “per se” violation).

Recognizing that standards development is a beneficial activity that can have pro-competitive effects, the Act provides that standard-setting activities conducted by qualifying SDOs must be evaluated under the “rule of reason” standard. So, if the activity has more pro-competitive effects than anticompetitive effects, the activity is not unreasonably anticompetitive

and does not violate the antitrust laws.

To qualify for the Act's protection, an organization must (i) file, within 90 days of the commencement of a standards development activity, written notice with each of the FTC and DOJ disclosing the name of the SDO and its principal place of business, and attaching documents showing the nature and scope of the standards development activity; (ii) qualify as an SDO; and (iii) be engaged in “standards development activity.”

An SDO is an organization “that plans, develops, establishes or coordinates voluntary

standards, achieves consensus (not necessarily unanimity), and assures due process including appeals procedures.

“Standards development activity” is “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.”

SDOs engaged in stan-

and imposition of rule-of-reason standards apply only to antitrust suits brought against an SDO.

The Act specifically excludes from its scope any person (other than an SDO) who (i) 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; (ii) is not a full-time employee of the standards development organization that is engaged in such activity; and (iii) is, or is an employee or agent of a person who is, engaged in a line of commerce that is likely to benefit from the operation of the standards development activity with respect to which such violation is found. The Act's protection does not extend to the member companies or individuals serving on a qualified SDO's standard development committee or otherwise involved in its standard setting activities.

While competitors working together, and associations facilitating such cooperation, always present some degree of antitrust risk—and always require antitrust vigilance—the Act does provide a level of safeguard and protection. Most important, it codifies general principles of fairness and balance that should be used in any standards development activity. ■

*The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.*

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consensus standards” in a way that is open (with notice to all affected parties), includes a balance of interests (so that no single group of interested persons dominates the process), affords participation in standards development or modification, allows easy access to essential information regarding proposed and final

dards development activity that have taken the steps necessary to qualify for protection under the Act will enjoy a codified rule of reason standard for judicial antitrust inquiries and a limitation on damages to actual rather than treble damages. However, it is important to note that the Act's limitation of damages