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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

IN RE SULFURIC ACID ANTITRUST LITIGATION :	MDL Docket No. 1536 Case No. 03 C 4576
	Honorable Judge David H. Coar Magistrate Judge Jeffrey Cole
This Document Relates To: : ALL RELATED ACTIONS :	

MARSULEX, INC. AND CHEMTRADE LOGISTICS (U.S.), INC.'S MEMORANDUM OF LAW IN SUPPORT OF THEIR AGREED MOTION FOR A FINDING OF "SATISFACTORY COOPERATION" AND LIMITATION OF DAMAGES PURSUANT TO THE ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004

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Defendants Marsulex, Inc. ("Marsulex") and ChemTrade Logistics (U.S.), Inc. ("ChemTrade"), recipients of criminal amnesty from the Department of Justice for their role in cooperating with the Antitrust Division's investigation into an alleged price-fixing conspiracy in the sulfuric acid industry, hereby move for a finding of "satisfactory cooperation" and for a limitation of damages based upon their cooperation with Plaintiffs in this civil litigation, pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

FACTUAL BACKGROUND

On May 1, 1998 Marsulex acquired certain assets of IT Holdings, Inc. ("IT Holdings"), including IT Holdings' Copperhill, Tennessee sulfuric acid smelting facility. During the period of due diligence of this transaction, Marsulex was precluded from inspecting or reviewing certain sales and marketing documents of IT Holdings. Shortly after the May 1st closing, Marsulex discovered certain information in the possession of IT Holdings that raised potential antitrust concerns. Marsulex immediately approached the Department of Justice about participating in Part A of the Antitrust Division's Corporate Leniency Program. (*See* Exhibit A, Corporate Leniency Program.) After several months of discussions and meetings, on October 15, 1998, the Antitrust Division and Marsulex entered into a Leniency Agreement whereby Marsulex agreed to provide the Antitrust Division certain cooperation, including a recitation of relevant facts and a production of documents and witnesses, in exchange for the Antitrust Division's agreement "not to bring any criminal prosecution against Marsulex or any of its subsidiaries for any act or offense it may have committed prior to the date of [the Agreement] in connection with the anticompetitive behavior being reported in the sulphuric acid industry in the United States and Canada." (*See* Exhibit B, October 15, 1998 Leniency Agreement.)

Several years later, on July 18, 2001, for unrelated business reasons, Marsulex decided to sell its United States sulfuric acid business to ChemTrade Logistics Income Fund, the parent company of ChemTrade. The Department of Justice agreed to amend the Leniency Agreement to include this newly formed entity, ChemTrade. (*See* Exhibit C.)

In early 2003, several groups of plaintiffs throughout the country brought lawsuits against defendants Norfalco LLC, Noranda, Inc., Falconbridge Ltd., and E.I. du Pont de Nemours & Co., alleging violations of Section 1 of the Sherman Act. On July 1, 2003, the Judicial Panel on Multidistrict Litigation consolidated those actions and transferred them to this Court for pre-trial discovery. In May 2004, Plaintiffs amended their Complaint to name, *inter alia*, Marsulex and ChemTrade as defendants in this action.

Shortly after naming Marsulex and ChemTrade as defendants, Plaintiffs approached counsel for Marsulex and ChemTrade to inquire about whether they would agree to cooperate with Plaintiffs pursuant to the just-enacted Antitrust Criminal Penalty Enhancement & Reform Act of 2004, whereby "a defendant in a civil antitrust case which had entered into a Leniency Agreement with the Department of Justice may obtain a single damages limit on the amount of damages for which that defendant may be responsible." (*See* Exhibit D, 6/25/04 Letter from S. Asher to R.M. McCareins; Exhibit E, H.R. 1086, Antitrust Criminal Penalty Enhancement & Reform Act of 2004). Marsulex and ChemTrade subsequently entered into a cooperation agreement with Plaintiffs pursuant to the terms of the Act. By this agreed motion, Marsulex and ChemTrade seek to gain the single-damages protection afforded by the Act.[1]

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1 Marsulex's and ChemTrade's cooperation with Class Plaintiffs and their motion for limitation of damages appears to be a matter of first impression in this Court and perhaps in the federal court system. An electronic search of Westlaw© and Lexis© legal research and news databases revealed no other cases decided under, or citing to, the Act.

ARGUMENT

I. Text and History of the Antitrust Criminal Penalty Enhancement & Reform Act of 2004

The Antitrust Criminal Penalty Enhancement & Reform Act of 2004 ("the Act"), signed into law by the President on June 22, 2004, was enacted by Congress to provide an "additional incentive for corporations to disclose antitrust violations by limiting their liability in related civil claims to actual damages." (*See* Exhibit F, Legislative History, H.R. 1086, 108th Cong., 150 CONG. REC. H3654-01, at H3657.) As one Senator noted, without the Act, "the threat of exposure to a possible treble damage lawsuit" provided "a major disincentive" to corporations considering approaching the Department of Justice regarding the leniency program. (*Id.* at 150 CONG. REC. S3610-02, at S3614.)

The Act limits a cooperating party's civil damages to "actual damages . . . attributable to" that party's conduct. It provides:

> . . . in any civil action alleging a violation of section 1 or 3 of the Sherman Act . . . based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the [cooperation requirements] . . . shall not exceed that portion of actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

(Ex. E, § 213(a).)

The Act's legislative history explains that the term "actual damages" means that "the total liability of a successful leniency applicant would be limited to single damages without joint and several liability." (Ex. F., at 150 CONG. REC. S3610-02, at S3614.) *See, e.g.*, H.R. 1086, 108th Cong., 150 CONG. REC. S3610-02, at S3615 ("while a party that receives leniency would only be liable for the portion of the damages actually caused by its own actions, the rest of its non-cooperating co-conspirators would remain jointly and severally liable."); H.R. 1086, 108th

Cong., 150 CONG. REC. H3654-01, at H3657 ("while a cooperating party would be liable only for damages attributable to that party's conduct, noncooperating conspirators will remain jointly and severally liable for treble damages."); *Id.* at H3659 (only "the remaining [noncooperating] conspirators remain jointly and severally liable to treble damages.").

Section 213(b) of the Act provides that a party is entitled to the single-damages limitation of Section 213(a) if the Court determines that the party has "provided satisfactory cooperation" to the plaintiffs, including:

> (1) providing a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action;
>
> (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant . . . wherever they are located; and . . .
>
> (3)(b) . . . using its best efforts to secure and facilitate from cooperating individuals [the cooperation described above].

(Ex. E, § 213(b).)

II. Marsulex and ChemTrade Have Satisfied the Conditions and Requirements of the Act and Are Entitled to an Order of Limitation of Damages

There is no dispute that Marsulex and ChemTrade satisfy the conditions and have fulfilled the obligations set forth in the Act, and are therefore entitled to an order of limitation of damages.

First, this case is a "civil action alleging a violation of section 1 . . . of the Sherman Act.." (*See* Ex. E, § 213(a); Am. Compl. ¶ 1.)

Second, this action is "based on conduct covered by a currently effective antitrust leniency agreement" to which Marsulex and ChemTrade are parties. (*See* Ex. E, § 213(a); Ex. B & C; *see generally* Second Amended Complaint.)

Third, Marsulex and ChemTrade have satisfied the cooperation requirements set forth in Section 213(b) of the Act. Among other things, Marsulex and ChemTrade have: (i) provided Plaintiffs with a detailed account of all known facts relevant to the litigation through, *inter alia,* interviews of current and former Marsulex and ChemTrade corporate representatives and outside counsel; (ii) furnished Plaintiffs with requested documents (roughly 35,000 pages) potentially relevant to the litigation; (iii) furnished Plaintiffs with written responses to interrogatories propounded by Plaintiffs in this action; (iv) provided Plaintiffs with numerous documents and information regarding the Department of Justice's investigation into alleged price-fixing in the sulfuric acid industry; and (v) used their best efforts to locate witnesses with knowledge of the factual underpinnings of this litigation. Plaintiffs agree that Marsulex and ChemTrade have thus far provided "satisfactory cooperation" to them under the Act and, upon the agreement of Marsulex and ChemTrade to continue to provide cooperation to Plaintiffs, Plaintiffs join in Marsulex and ChemTrade's motion.

Marsulex and ChemTrade therefore respectfully request that this Court enter an Order finding that Marsulex and ChemTrade have provided Plaintiffs with "satisfactory cooperation" under Section 213(b) of the Act, and, pursuant to Section 213(a) of the Act, limiting the damages recoverable by Plaintiffs against Marsulex and ChemTrade in this action to the "actual damages sustained" by Plaintiffs (if any) "attributable to" Marsulex's and ChemTrade's alleged wrongful conduct, so that Marsulex and ChemTrade are not subject to treble damages or joint and several liability.

CONCLUSION

For the foregoing reasons, Marsulex and ChemTrade's Agreed Motion for a Finding of Satisfactory Cooperation and Limitation of Damages Pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 should be granted as set forth in the attached Order.

Dated: June 30, 2005

Respectfully Submitted,

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A

Department of Justice

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. **Alternative Requirements for Leniency**

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;

2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. **Leniency for Corporate Directors, Officers, and Employees**

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. **Leniency Procedure**

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993

Exhibit B
Filed Under Seal

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June 25, 2004

Via Facsimile and First Class Mail
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Re: **In re Sulfuric Acid Antitrust Litigation; MDL No. 1536**

Dear Mark:

I am in receipt of your letter dated June 22, 2004 in which you reject plaintiffs' proposal for a possible settlement with your clients. I found your response somewhat puzzling since we had not even discussed the amount of any monetary component to the settlement. Nevertheless, I acknowledge your clients' position and, should your clients wish to resume settlement discussions in the future, I would look forward to discussing this matter with you.

On the same day that I received your letter, June 22, the President signed into law the Antitrust Criminal Penalty Enforcement and Reform Act of 2004 (H.R. 1086). That Act provides that a defendant in a civil antitrust case which had entered into a Leniency Agreement with the Department of Justice may obtain a single damages limit on the amount of damages for which that defendant may be responsible. The single damages limit is subject to court approval and can only be imposed if the court determines that the leniency applicant has provided full cooperation to the civil plaintiffs. If your clients are signatories to a Leniency Agreement and wish to avail themselves of the single damages limit, I would urge you to contact me and arrange to provide plaintiffs with the full measure of cooperation required by the Act. This includes, *inter alia*, a full account of the relevant facts; production of all relevant documents; and making individuals with knowledge available for interviews, deposition testimony and trial testimony.

R. Mark McCareins, Esquire
June 25, 2004
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We look forward to hearing from you at your earliest convenience regarding this matter.

Sincerely,

Steven A. Asher

SAA:jc
cc: Mary Jane Fait, Esquire
Joseph C. Kohn, Esquire
Steven O. Sidener, Esquire

D

H. R. 1086

One Hundred Eighth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twentieth day of January, two thousand and four

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2004

SEC. 101. SHORT TITLE.

This title may be cited as the "Standards Development Organization Advancement Act of 2004".

SEC. 102. FINDINGS.

The Congress finds the following:

(1) In 1993, the Congress amended and renamed the National Cooperative Research Act of 1984 (now known as the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301 et seq.)) by enacting the National Cooperative Production Amendments of 1993 (Public Law 103–42) to encourage the use of collaborative, procompetitive activity in the form of research and production joint ventures that provide adequate disclosure to the antitrust enforcement agencies about the nature and scope of the activity involved.

(2) Subsequently, in 1995, the Congress in enacting the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) recognized the importance of technical standards developed by voluntary consensus standards bodies to our national economy by requiring the use of such standards to the extent practicable by Federal agencies and by encouraging Federal agency representatives to participate in ongoing standards development activities. The Office of Management and Budget on February 18, 1998, revised Circular A–119 to reflect these changes made in law.

(3) Following enactment of the National Technology Transfer and Advancement Act of 1995, technical standards developed or adopted by voluntary consensus standards bodies have replaced thousands of unique Government standards and specifications allowing the national economy to operate in a more unified fashion.

(4) Having the same technical standards used by Federal agencies and by the private sector permits the Government to avoid the cost of developing duplicative Government standards and to more readily use products and components designed for the commercial marketplace, thereby enhancing quality and safety and reducing costs.

(5) Technical standards are written by hundreds of nonprofit voluntary consensus standards bodies in a nonexclusionary fashion, using thousands of volunteers from the private and public sectors, and are developed under the standards development principles set out in Circular Number A–119, as revised February 18, 1998, of the Office of Management and Budget, including principles that require openness, balance, transparency, consensus, and due process. Such principles provide for—

(A) notice to all parties known to be affected by the particular standards development activity,

(B) the opportunity to participate in standards development or modification,

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

(D) readily available access to essential information regarding proposed and final standards,

(E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections, and

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

(6) There are tens of thousands of voluntary consensus standards available for government use. Most of these standards are kept current through interim amendments and interpretations, issuance of addenda, and periodic reaffirmation, revision, or reissuance every 3 to 5 years.

(7) Standards developed by government entities generally are not subject to challenge under the antitrust laws.

(8) Private developers of the technical standards that are used as Government standards are often not similarly protected, leaving such developers vulnerable to being named as codefendants in lawsuits even though the likelihood of their being held liable is remote in most cases, and they generally have limited resources to defend themselves in such lawsuits.

(9) Standards development organizations do not stand to benefit from any antitrust violations that might occur in the voluntary consensus standards development process.

(10) As was the case with respect to research and production joint ventures before the passage of the National Cooperative Research and Production Act of 1993, if relief from the threat of liability under the antitrust laws is not granted to voluntary consensus standards bodies, both regarding the development of new standards and efforts to keep existing standards current, such bodies could be forced to cut back on standards development activities at great financial cost both to the Government and to the national economy.

SEC. 103. DEFINITIONS.

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

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

"(7) The term '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.

"(8) 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. The term 'standards development organization' shall not, for purposes of this Act, include the parties participating in the standards development organization.

"(9) The term 'technical standard' has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

"(10) The term 'voluntary consensus standard' has the meaning given such term in Office of Management and Budget Circular Number A–119, as revised February 10, 1998."; and

(2) by adding at the end the following:

"(c) The term 'standards development activity' excludes the following activities:

"(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

"(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

"(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.".

SEC. 104. RULE OF REASON STANDARD.

Section 3 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4302) is amended by striking "of any person in making or performing a contract to carry out a joint venture shall" and inserting the following: "of—

"(1) any person in making or performing a contract to carry out a joint venture, or

"(2) a standards development organization while engaged in a standards development activity,

shall".

SEC. 105. LIMITATION ON RECOVERY.

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

(1) in subsections (a)(1), (b)(1), and (c)(1) by inserting ", or for a standards development activity engaged in by a standards development organization against which such claim is made" after "joint venture",

(2) in subsection (e)—

(A) by inserting ", or of a standards development activity engaged in by a standards development organization" before the period at the end, and

(B) by redesignating such subsection as subsection (f), and

(3) by inserting after subsection (d) the following:

"(e) Subsections (a), (b), and (c) 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.".

SEC. 106. ATTORNEY FEES.

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

(1) in subsection (a) by inserting ", or of a standards development activity engaged in by a standards development organization" after "joint venture", and

(2) by adding at the end the following:

"(c) Subsections (a) and (b) shall not apply with respect to any person who—

"(1) directly 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 a 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.".

SEC. 107. DISCLOSURE OF STANDARDS DEVELOPMENT ACTIVITY.

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

(1) in subsection (a)—

(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively,

(B) by inserting "(1)" after "(a)", and

(C) by adding at the end the following:

"(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2004, whichever is later, file simultaneously with the Attorney General and the Commission, a written notification disclosing—

"(A) the name and principal place of business of the standards development organization, and

"(B) documents showing the nature and scope of such activity.

Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.",

(2) in subsection (b)—

(A) in the 1st sentence by inserting ", or a notice with respect to such standards development activity that identifies the standards development organization engaged in such activity and that describes such activity in general terms" before the period at the end, and

(B) in the last sentence by inserting "or available to such organization, as the case may be" before the period,

(3) in subsection (d)(2) by inserting ", or the standards development activity," after "venture",

(4) in subsection (e)—

(A) by striking "person who" and inserting "person or standards development organization that", and

(B) by inserting "or any standards development organization" after "person" the last place it appears, and

(5) in subsection (g)(1) by inserting "or standards development organization" after "person".

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.

TITLE II—ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004

SEC. 201. SHORT TITLE.

This title may be cited as the "Antitrust Criminal Penalty Enhancement and Reform Act of 2004".

Subtitle A—Antitrust Enforcement Enhancements and Cooperation Incentives

SEC. 211. SUNSET.

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

(b) EXCEPTION.—With respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.

SEC. 212. DEFINITIONS.

In this subtitle:

(1) ANTITRUST DIVISION.—The term "Antitrust Division" means the United States Department of Justice Antitrust Division.

(2) ANTITRUST LENIENCY AGREEMENT.—The term "antitrust leniency agreement," or "agreement," means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.

(3) ANTITRUST LENIENCY APPLICANT.—The term "antitrust leniency applicant," or "applicant," means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.

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

(5) COOPERATING INDIVIDUAL.—The term "cooperating individual" means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.

(6) PERSON.—The term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act.

SEC. 213. LIMITATION ON RECOVERY.

(a) IN GENERAL.—Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

(b) REQUIREMENTS.—Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

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

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

(c) TIMELINESS.—If the initial contact by the antitrust leniency applicant with the Antitrust Division regarding conduct covered by the antitrust leniency agreement occurs after a State, or subdivision of a State, has issued compulsory process in connection with an investigation of allegations of a violation of section 1 or 3 of the Sherman Act or any similar State law based on conduct covered by the antitrust leniency agreement or after a civil action described in subsection (a) has been filed, then the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's initial cooperation with the claimant.

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

SEC. 214. RIGHTS, AUTHORITIES, AND LIABILITIES NOT AFFECTED.

Nothing in this subtitle shall be construed to—

(1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement;

(2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or

(3) affect, in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title.

SEC. 215. INCREASED PENALTIES FOR ANTITRUST VIOLATIONS.

(a) RESTRAINT OF TRADE AMONG THE STATES.—Section 1 of the Sherman Act (15 U.S.C. 1) is amended by—

(1) striking "$10,000,000" and inserting "$100,000,000";
(2) striking "$350,000" and inserting "$1,000,000"; and
(3) striking "three" and inserting "10".

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

(1) striking "$10,000,000" and inserting "$100,000,000";
(2) striking "$350,000" and inserting "$1,000,000"; and
(3) striking "three" and inserting "10".

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

(1) striking "$10,000,000" and inserting "$100,000,000";
(2) striking "$350,000" and inserting "$1,000,000"; and
(3) striking "three" and inserting "10".

Subtitle B—Tunney Act Reform

SEC. 221. PUBLIC INTEREST DETERMINATION.

(a) CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.—

(1) FINDINGS.—Congress finds that—

(A) the purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest; and

(B) it would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a "mockery of the judicial function".

(2) PURPOSES.—The purpose of this section is to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest.

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

(1) in subsection (d), by inserting at the end the following: "Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.";

(2) in subsection (e)—

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

(i) striking "court may" and inserting "court shall"; and

(ii) inserting "(1)" before "Before"; and

(B) striking paragraphs (1) and (2) and inserting the following:

"(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

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

"(2) Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."; and

(3) in subsection (g), by inserting "by any officer, director, employee, or agent of such defendant" before ", or other person".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

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time and money during tax season, but the good news for all of us is that in fact, all taxpayers will benefit, because simple forms cost the IRS less money to process. So we are cutting government spending with the passage of this act. According to the IRS, the government spends 50 percent more processing the standard 1040 than it does processing the short 1040EZ form.

I appreciate Mr. BURNS' leadership on this issue. I also want to thank a constituent of mine, Roland Boucher, for helping to put this issue on the map and for sharing with me a number of ideas which I shared with Congressman BURNS, who led this lightning-strike campaign to craft a bill, bring it to the House floor, and provide relief for seniors in time for the 2005 tax year. Roland Boucher, who is my delegate to the National Silver Haired Congress and Chairman of United Californians for Tax Reform, has been a tireless advocate for this legislation and similar tax reforms in State and local government. And he has sent a message from Orange County, California. Says Roland, "Please tell Congressman BURNS that he is about to make a lot of seniors very happy. We are tired of being denied a simple option for filing our taxes simply because of age. We're tired of being treated as second-class taxpayers just because we've attained a level of wisdom and experience to which others can only aspire."

Representative BURNS' bill is a valuable reform for America's more than 35 million seniors, all of whom are denied the use of the existing 1040EZ form by IRS regulation. Simplicity and a less time-consuming process at tax time could yield enormous benefits, precisely because the IRS has made the current system so difficult. The Tax Foundation estimates that taxpayers spend almost 6 billion hours per year complying with our Federal income tax system at an annual cost of $194 billion. This difficulty in meeting the demands that the law and the IRS have placed upon Americans is on the rise. The Tax Foundation estimates that by 2007 the cost could soar as high as $350 billion.

You might think that almost all of this time and money is spent by huge corporations with their complicated capital structures and multitudinous business operations. Wrong. 45 percent of the costs are borne by individuals. Does this burden fall most heavily on the rich, with their various assets and more complicated financial lives? No. The Tax Foundation discovered that compliance costs are highly regressive. Taxpayers with adjusted gross income of less than $20,000 pay a staggering 4.5 percent of income merely in compliance costs. This is an outrageous and unacceptable bureaucratic tax on all Americans, but today we focus only on the unfair treatment of seniors. For a moment let us all imagine what it must be like to be a retired low-income senior, working hard to make ends meet on a fixed income, and then to have to devote almost 5 percent of that limited income just to figure out how much money you owe the IRS. Talk about adding insult to injury. It's time to cut the hassle tax, the anxiety tax, the confusion tax of having to complete an endless, complicated tax return.

Mr. BURNS and I want simplicity and an end to the enormous compliance tax for all Americans. Today, I am proud to stand with the gentleman from Georgia as he leads the first phase of the campaign—relief for America's millions of senior taxpayers. This reform is long overdue. I thank the gentleman from Georgia for making it happen.

Mr. COLLINS. Mr. Speaker, I rise to state my strong support of H.R. 4109, the Simple Tax for Seniors Act of 2004, which would require the Internal Revenue Service to offer a simplified tax form for America's senior citizens.

I commend my Georgia colleague, Congressman MAX BURNS, for introducing this legislation. This common sense legislation would create a new form entitled "1040–S" that would enable seniors to file their tax returns in less time and in a simpler format. The new form, which would be similar to the 1040EZ, would be available to seniors for their use when they file their 2005 income tax returns.

Under current law, many seniors cannot use Forms 1040A or 1040EZ, because the IRS limits their use to individuals with less than $50,000 in taxable income.

The bill instructs the IRS to make the form available in spite of the receipt of Social Security benefits, interest or dividends, capital gains or losses, or distributions from a qualified retirement plan, annuity, or other deferred payment arrangement. The IRS is also instructed not to establish an income threshold on the form so that seniors with incomes in excess of $50,000 will be permitted to use the simplified form.

I urge all my colleagues to lend a helping hand to America's senior citizens and vote in favor of the Simple Tax for Seniors Act of 2004.

Mr. FOLEY. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore (Mr. SIMPSON). The question is on the motion offered by the gentleman from Florida (Mr. FOLEY) that the House suspend the rules and pass the bill, H.R. 4109, as amended.

The question was taken.

The SPEAKER pro tempore. In the opinion of the Chair, two-thirds of those present have voted in the affirmative.

Mr. FOLEY. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX and the Chair's prior announcement, further proceedings on this motion will be postponed.

STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003

Mr. SENSENBRENNER. Mr. Speaker, I move to suspend the rules and concur in the Senate amendment to the bill (H.R. 1086) 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.

The Clerk read as follows:

Senate amendment:

Strike out all after the enacting clause and insert:

TITLE I—STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003

SEC. 101. SHORT TITLE.

This title may be cited as the "Standards Development Organization Advancement Act of 2003".

SEC. 102. FINDINGS.

The Congress finds the following:

(1) In 1993, the Congress amended and renamed the National Cooperative Research Act of 1984 (now known as the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301 et seq.)) by enacting the National Cooperative Production Amendments of 1993 (Public Law 103-42) to encourage the use of collaborative, procompetitive activity in the form of research and production joint ventures that provide adequate disclosure to the antitrust enforcement agencies about the nature and scope of the activity involved.

(2) Subsequently, in 1995, the Congress in enacting the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) recognized the importance of technical standards developed by voluntary consensus standards bodies to our national economy by requiring the use of such standards to the extent practicable by Federal agencies and by encouraging Federal agency representatives to participate in ongoing standards development activities. The Office of Management and Budget on February 18, 1998, revised Circular A-119 to reflect these changes made in law.

(3) Following enactment of the National Technology Transfer and Advancement Act of 1995, technical standards developed or adopted by voluntary consensus standards bodies have replaced thousands of unique Government standards and specifications allowing the national economy to operate in a more unified fashion.

(4) Having the same technical standards used by Federal agencies and by the private sector permits the Government to avoid the cost of developing duplicative Government standards and to more readily use products and components designed for the commercial marketplace, thereby enhancing quality and safety and reducing costs.

(5) Technical standards are written by hundreds of nonprofit voluntary consensus standards bodies in a nonexclusionary fashion, using thousands of volunteers from the private and public sectors, and are developed under the standards development principles set out in Circular Number A-119, as revised February 18, 1998, of the Office of Management and Budget, including principles that require openness, balance, transparency, consensus, and due process. Such principles provide for—

(A) notice to all parties known to be affected by the particular standards development activity,

(B) the opportunity to participate in standards development or modification,

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

(D) readily available access to essential information regarding proposed and final standards,

(E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections, and

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

(6) There are tens of thousands of voluntary consensus standards available for government use. Most of these standards are kept current through interim amendments and interpretations, issuance of addenda, and periodic reaffirmation, revision, or reissuance every 3 to 5 years.

(7) Standards developed by government entities generally are not subject to challenge under the antitrust laws.

(8) Private developers of the technical standards that are used as Government standards are

often not similarly protected, leaving such developers vulnerable to being named as codefendants in lawsuits even though the likelihood of their being held liable is remote in most cases, and they generally have limited resources to defend themselves in such lawsuits.

(9) Standards development organizations do not stand to benefit from any antitrust violations that might occur in the voluntary consensus standards development process.

(10) As was the case with respect to research and production joint ventures before the passage of the National Cooperative Research and Production Act of 1993, if relief from the threat of liability under the antitrust laws is not granted to voluntary consensus standards bodies, both regarding the development of new standards and efforts to keep existing standards current, such bodies could be forced to cut back on standards development activities at great financial cost both to the Government and to the national economy.

SEC. 103. DEFINITIONS.

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

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

"(7) The term '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.

"(8) 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. The term 'standards development organization' shall not, for purposes of this Act, include the parties participating in the standards development organization.

"(9) The term 'technical standard' has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

"(10) The term 'voluntary consensus standard' has the meaning given such term in Office of Management and Budget Circular Number A-119, as revised February 10, 1998."; and

(2) by adding at the end the following:

"(c) The term 'standards development activity' excludes the following activities:

"(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

"(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

"(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.".

SEC. 104. RULE OF REASON STANDARD.

Section 3 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4302) is amended by striking "of any person in making or performing a contract to carry out a joint venture shall" and inserting the following: "of—

"(1) any person in making or performing a contract to carry out a joint venture, or

"(2) a standards development organization while engaged in a standards development activity, shall".

SEC. 105. LIMITATION ON RECOVERY.

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

(1) in subsections (a)(1), (b)(1), and (c)(1) by inserting ", or for a standards development activity engaged in by a standards development organization against which such claim is made" after "joint venture",

(2) in subsection (e)—

(A) by inserting ", or of a standards development activity engaged in by a standards development organization" before the period at the end, and

(B) by redesignating such subsection as subsection (f), and

(3) by inserting after subsection (d) the following:

"(e) Subsections (a), (b), and (c) 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.".

SEC. 106. ATTORNEY FEES.

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

(1) in subsection (a) by inserting ", or of a standards development activity engaged in by a standards development organization" after "joint venture", and

(2) by adding at the end the following:

"(c) Subsections (a) and (b) shall not apply with respect to any person who—

"(1) directly 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 a 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.".

SEC. 107. DISCLOSURE OF STANDARDS DEVELOPMENT ACTIVITY.

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

(1) in subsection (a)—

(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively,

(B) by inserting "(1)" after "(a)", and

(C) by adding at the end the following:

"(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2003, whichever is later, file simultaneously with the Attorney General and the Commission, a written notification disclosing—

"(A) the name and principal place of business of the standards development organization, and

"(B) documents showing the nature and scope of such activity.

Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.",

(2) in subsection (b)—

(A) in the 1st sentence by inserting ", or a notice with respect to such standards development activity that identifies the standards development organization engaged in such activity and that describes such activity in general terms" before the period at the end, and

(B) in the last sentence by inserting "or available to such organization, as the case may be" before the period,

(3) in subsection (d)(2) by inserting ", or the standards development activity," after "venture",

(4) in subsection (e)—

(A) by striking "person who" and inserting "person or standards development organization that", and

(B) by inserting "or any standards development organization" after "person" the last place it appears, and

(5) in subsection (g)(1) by inserting "or standards development organization" after "person".

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.

TITLE II—ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2003

SEC. 201. SHORT TITLE.

This title may be cited as the "Antitrust Criminal Penalty Enhancement and Reform Act of 2003".

Subtitle A—Antitrust Enforcement Enhancements and Cooperation Incentives

SEC. 211. SUNSET.

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

(b) EXCEPTION.—With respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.

SEC. 212. DEFINITIONS.

In this subtitle:

(1) ANTITRUST DIVISION.—The term "Antitrust Division" means the United States Department of Justice Antitrust Division.

(2) ANTITRUST LENIENCY AGREEMENT.—The term "antitrust leniency agreement," or "agreement," means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.

(3) ANTITRUST LENIENCY APPLICANT.—The term "antitrust leniency applicant," or "applicant," means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.

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

(5) COOPERATING INDIVIDUAL.—The term "cooperating individual" means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.

(6) PERSON.—The term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act.

SEC. 213. LIMITATION ON RECOVERY.

(a) IN GENERAL.—Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

(b) REQUIREMENTS.—Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

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

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

(c) TIMELINESS.—If the initial contact by the antitrust leniency applicant with the Antitrust Division regarding conduct covered by the antitrust leniency agreement occurs after a State, or subdivision of a State, has issued compulsory process in connection with an investigation of allegations of a violation of section 1 or 3 of the Sherman Act or any similar State law based on conduct covered by the antitrust leniency agreement or after a civil action described in subsection (a) has been filed, then the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's initial cooperation with the claimant.

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

SEC. 214. RIGHTS, AUTHORITIES, AND LIABILITIES NOT AFFECTED.

Nothing in this subtitle shall be construed to—

(1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement;

(2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or

(3) affect, in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title.

SEC. 215. INCREASED PENALTIES FOR ANTITRUST VIOLATIONS.

(a) RESTRAINT OF TRADE AMONG THE STATES.—Section 1 of the Sherman Act (15 U.S.C. 1) is amended by—

(1) striking "$10,000,000" and inserting "$100,000,000";

(2) striking "$350,000" and inserting "$1,000,000"; and

(3) striking "three" and inserting "10".

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

(1) striking "$10,000,000" and inserting "$100,000,000";

(2) striking "$350,000" and inserting "$1,000,000"; and

(3) striking "three" and inserting "10".

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

(1) striking "$10,000,000" and inserting "$100,000,000";

(2) striking "$350,000" and inserting "$1,000,000"; and

(3) striking "three" and inserting "10".

Subtitle B—Tunney Act Reform

SEC. 221. PUBLIC INTEREST DETERMINATION.

(a) CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.—

(1) FINDINGS.—Congress finds that—

(A) the purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest; and

(B) it would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a "mockery of the judicial function".

(2) PURPOSES.—The purpose of this section is to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest.

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

(1) in subsection (d), by inserting at the end the following: "Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.";

(2) in subsection (e)—

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

(i) striking "court may" and inserting "court shall"; and

(ii) inserting "(1)" before "Before"; and

(B) striking paragraphs (1) and (2) and inserting the following:

"(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

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

"(2) Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene."; and

(3) in subsection (g), by inserting "by any officer, director, employee, or agent of such defendant" before ", or other person".

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Wisconsin (Mr. SENSENBRENNER) and the gentleman from Virginia (Mr. SCOTT) each will control 20 minutes.

The Chair recognizes the gentleman from Wisconsin (Mr. SENSENBRENNER).

GENERAL LEAVE

Mr. SENSENBRENNER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks and include extraneous material on H.R. 1086.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. SENSENBRENNER. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 1086, the Standards Development Organization Advancement Act of 2003. This legislation contains several important revisions to America's antitrust laws.

Title I of the legislation contains limited antitrust protection for standards development organizations. Technical standards play a critical role in fostering competition and promoting public health and safety. Without standards there would be no compatibility among broad categories of products and less confidence in a range of building, fire, and safety codes that promote the public welfare.

In the United States, most standards development is conducted by private nonprofit organizations known as Standards Development Organizations, or SDOs. This approach reflects the fact that private organizations are better able to keep up with the rapid pace of technological change. Congress has recognized the importance of SDOs and requires Federal agencies to adopt standards issued by these organizations whenever possible.

Over the last several years, the critical efforts of SDOs have been undermined by sometimes frivolous antitrust lawsuits. The growing frequency of these claims against SDOs stifles their ability to obtain technical information, hampers their effectiveness, and undermines the public goals that the SDOs advance.

I introduced this bill to remedy this problem. This legislation codifies the rule of reason for antitrust scrutiny of SDOs which requires courts to assess whether the standards-setting activities of an SDO are procompetitive. It also limits the SDOs civil liability to actual, rather than treble, damages, and provides for the recovery of attorneys fees to substantially prevailing parties in antitrust actions against these organizations.

To receive these limited safeguards, H.R. 1086 requires the SDO to inform Federal antitrust authorities of the scope and nature of their activities and to devise and issue standards in a fair and open process prescribed by the legislation.

The Senate amendment we consider today also contains important bipartisan provisions that deter antitrust violations while strengthening antitrust enforcement efforts. Title II harmonizes the treatment of criminal antitrust offenders and other white collar criminals by increasing maximum prison terms for criminal antitrust violations from 3 to 10 years while increasing maximum individual fines for antitrust violations from $350,000 to $1 million. These provisions send an unmistakable message to those who consider violating the antitrust laws that if they are caught they will spend much more time considering the consequences of their actions within the confinement of their prison cells.

Title II also increases maximum corporate fines for antitrust violations from $10 million to $100 million. This considerable increase sends a clear signal to corporate officers and board members that a decision to violate antitrust laws will be severely punished.

Title II of the legislation also contains important modifications to the antitrust leniency program used by the Department of Justice to facilitate the detection and prosecution of antitrust violations. Under existing practice, parties that cooperate with Federal antitrust authorities to uncover violations may not be subject to government prosecution, but remain liable in civil actions brought by private parties. The bill creates an additional incentive for corporations to disclose antitrust violations by limiting their liability in related civil claims to actual damages. Furthermore, while a cooperating party would be liable only for damages attributable to that party's conduct, noncooperating conspirators will remain jointly and severally liable for treble damages for the misconduct of all of the conspirators.

As a result, the full scope of antitrust remedies against nonparticipating parties will remain available to the government and private antitrust plaintiffs.

Finally, the legislation clarifies the Tunney Act. This act gives Federal district courts some authority to review the merits of civil antitrust settlements with the United States before they enter final consent decrees.

□ 1515

Specifically, district courts in which an antitrust suit is brought must assess whether these decrees are "in the public interest." The bill provides legislative guidance to the district courts by listing specific factors to be considered during this analysis. In addition, the legislation facilitates the transmission of comments received during Tunney Act proceedings by allowing Federal judges to order their publication by electronic or other means.

Mr. Speaker, H.R. 1086 contains important provisions that enhance the effectiveness of the antitrust laws and the authority of antitrust enforcement agencies to implement them.

The legislation is truly bipartisan and bicameral in nature, and while several people deserve credit for this legislation, I would like to recognize the late Committee on Science Chief Counsel Barry Beringer. Barry's hard work and dedication brought this legislation to the floor last year, and his decades of dedication and service brought great credit to this House. I urge my colleagues to support the legislation.

Pursuant to the general leave already granted, I will be placing into the RECORD a statement of legislative history that the gentleman from Michigan (Mr. CONYERS) and I have agreed to, and I ask that it appear in the RECORD at the end of my statement.

SUPPLEMENTAL LEGISLATIVE HISTORY FOR H.R. 1086, THE "STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003" AS ENROLLED BY THE HOUSE AND SENATE

When the House passed H.R. 1086, the "Standards Development Organization Advancement Act of 2003," it only contained provisions directed at including standards-development activities undertaken by certain standards development organizations (SDOs) within the treatment accorded certain joint ventures by the National Cooperative Research and Production Act "NCRPA." The Senate-passed version of H.R. 1086, which substantially incorporates the provisions of the House-passed version in its Title I, also contains an additional title, the "Antitrust Criminal Penalty Enhancement and Reform Act of 2003." The following legislative history is submitted on behalf of the House Committee on the Judiciary jointly by Chairman Sensenbrenner and Ranking Member Conyers:

Section-by-Section Analysis of H.R. 1086

TITLE I—"STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003"

Section 101 contains the short title.

Section 102 sets forth the findings and purposes of the bill as they relate to standards development activities and standards development organizations (SDOs). The findings explain the purpose(s) behind the original enactment and subsequent amendment of the National Cooperative Research and Production Act (NCRPA). The findings also discuss how passage of the National Technology Transfer and Advancement Act of 1995 (NTTAA) unintentionally heightened the vulnerability of SDOs to antitrust litigation. The findings also explain how SDOs generally do not stand to benefit from any antitrust violation that might occur during the voluntary consensus standards development process. Finally, this section finds that continuing to subject SDOs to potential treble damages liability under the antitrust laws could impede pro-competitive standards development activity.

Section 103 adds to the existing definitions contained in section 2 of the NCRPA: The term "standards development activity" is defined as "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." The definition of "standards development activity" excludes the following activities: exchanges of information, including competitively-sensitive information, among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required in order to develop or promulgate a voluntary consensus standard or in order to use the standard in conformity assessment activities; agreements or other conduct that would allocate a market among competitors; and agreements or conspiracies that would set or restrain prices of any good or service.

The definition of "standards development activity" is broad enough to encompass any action taken by an SDO in "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 SDO." The "Standards Development Organization Advancement Act of 2003" is not intended to change or influence existing intellectually property policies currently utilized by various SDOs (including but not limited to, patent searches), nor to affect or influence new intellectual property policies that may be developed in the future. Such policies are vitally important to ensuring a level playing field among all users of a standard that incorporates patented technology. In addition, the legislation is not intended to change or alter the application of existing antitrust laws with respect to intellectual property. The legislation also seeks to encourage disclosure by intellectual property rights owners of relevant intellectual property rights and proposed licensing terms. It further encourages discussion among intellectual property rights owners and other interested standards participants regarding the terms under which relevant intellectual property rights would be made available for use in conjunction with the standard or proposed standard.

The term "standards development organization" is defined as "a domestic or international organization that plans, develops, establishes or coordinates voluntary consensus standards . . . in a manner consistent with Office Management and Budget (OMB) Circular Number A-119, as revised on February 10, 1998." The definition includes only the voluntary consensus standards body conducting the particular standards development activity, and does not include firms participating in the standards development activity.

The term "technical standard" is defined by reference to section 12(d)(4) of the NTTAA. The term "voluntary consensus standard" is defined with reference to revised OMB Circular A-119.

Section 104 amends section 3 of the NCRPA to apply the rule of reason standard to SDOs with respect to covered standards development activities in which they are engaged.

Section 105 amends section 4 of the NCRPA to include properly structured standard-setting activity undertaken by SDOs as eligible for the protections set forth in that section, provided that such activities have been previously disclosed to the antitrust agencies in accordance with the requirements of the NCRPA, as amended.

Section 106 amends section 5 of the NCRPA to include SDOs, in their involvement in covered standards development activities, within the scope of the NCRPA scheme for awarding attorneys' fees to substantially prevailing parties.

Section 107 amends section 6 of the NCRPA to apply the same disclosure requirements to SDOs as a condition for obtaining the detrebling of damages. In order to obtain the detrebling, the required disclosures must occur not later than 90 days after either the date the SDO commences the standards development activity or the date H.R. 1086 is enacted, whichever is later.

Section 108 provides that the legislation shall not be construed to alter or modify the antitrust treatment of parties participating in a covered standards development activity, except for the SDO conducting the activity, nor of anyone engaged in standard-setting processes that are not within the scope of the legislation.

TITLE II—"ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2003"

Subtitle A—Antitrust Enforcement Enhancements and Cooperation Incentives

Section 201 contains the short title.

Sections 211–214 strengthen the Antitrust Division's corporate criminal leniency program, by providing that an antitrust leniency applicant who cooperates satisfactorily with the Division in its criminal investigation and prosecution can also receive limited damages exposure in a related private civil action in exchange for satisfactorily cooperating with the private plaintiffs. As Senator Kohl, the co-sponsor of S. 1797 (which included the leniency provisions) stated, these provisions "will remove a significant disincentive to those who would be likely to seek criminal amnesty and should result in a substantial increase in the number of antitrust conspiracies being detected." (Statement of Senator Kohl (co-sponsor of S. 1797) upon introduction of the measure, 149 CONG. REC. S13520 (daily ed. October 29, 2003)).

Section 211 states that sections 211–214 of the title shall sunset five years after the date of enactment, except with respect to "an applicant who has entered into an antitrust leniency agreement on or before" the sunset date.

Section 212, defines: "Antitrust Division" as "the United States Department of Justice Antitrust Division"; "antitrust leniency agreement" as "a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement; "antitrust leniency applicant" as "the person who has entered into the agreement" described above; "claimant" as a "person or class that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act (Section 1 of the Sherman Act (15 U.S.C. §1) prohibits contracts or combinations in restraint of trade; section 3 (15 U.S.C. §3) applies §1 to the District of Columbia and to territories) or any similar State law," but specifically excludes plaintiffs who are states or subdivisions of states with respect to civil actions brought to recover damages sustained by the state or subdivision (i.e., civil actions not brought as parens patriae); "cooperating individual" as "a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement"; and "person" as the term is defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. §12).

Section 213 states that conduct covered by a "currently effective antitrust leniency agreement" will subject an antitrust leniency applicant and its cooperating individuals, as defendants in a private or state enforcement antitrust action, to liability only for the actual portion of damages suffered by the claimant "attributable to the commerce done by the applicant in the goods or services affected by the violation" so long as the court in which the civil action is brought determines "that the applicant or cooperating individual . . . has provided satisfactory cooperation to the claimant. . . ." The section does not alter existing provisions of the antitrust laws with respect to recovery of costs, including reasonable attorneys' fees.

Satisfactory cooperation shall include "providing a full account to the claimant of all facts known to the applicant or cooperating individual . . . that are potentially relevant to the civil action" and "furnishing all documents or other items that are potentially relevant to the civil action . . . that are in the possession, custody, or control of the applicant or cooperating individual . . . wherever they are located." The section's use of the term "potentially relevant" is intended to preclude a parsimonious view of the facts or documents to which a claimant is entitled. Documents or other items in the applicant's possession, custody, or control must be produced even if they are otherwise arguably located outside the jurisdiction of the U.S. courts.

If the leniency applicant has applied for a leniency agreement "after a State, or subdivision of a State, has issued compulsory process in connection with an investigation of allegations of violations of either sections 1 or 3 of the Sherman Act or any similar State law based on conduct covered by the antitrust leniency agreement or after a civil action . . . has been filed," the court must consider the timeliness of the applicant's initial cooperation with the claimant. Thus, this section is not intended to allow antitrust defendants in a private lawsuit or state parens patriae investigation or enforcement action to apply to the Department of Justice at the last minute to avoid full treble-damage liability.

The court in which the civil action is brought is empowered to determine whether the necessary cooperation has occurred. The power of the court is the same whether the court is a state or federal court and whether the antitrust claims have been brought under state or federal laws. That cooperation includes providing full factual disclosure of all facts, documents, or other things that are relevant or potentially relevant. Because many leniency agreements may be with organizations rather than individuals, the section provides that any antitrust leniency applicant must use its "best efforts" to obtain and facilitate cooperation from individuals. Recognizing that there are discovery tools that plaintiffs can use in discovery of entities, this section is intended to require cooperation of entities in such discovery. For example, under Fed. R. Civ. P. 30(b)(6), a corporation or another entity may be noticed or subpoenaed to provide a corporate representative to testify on its behalf. If the leniency applicant is an organization, individuals employed by the organization may also qualify for reduced private damages exposure if they cooperate to the court's satisfaction.

Section 214 clarifies that the subtitle does not affect the right of the Antitrust Division "to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement," to prevent the leniency applicant's cooperation "from impairing or impeding" a Division investigation or prosecution. It also states that the subtitle does not create any right to challenge the decision of the Division concerning whether to grant a leniency agreement; nor does it affect the joint and several liability of any of the parties to civil antitrust actions covered by the subtitle other than the "antitrust leniency applicant and cooperating individuals. . . ." In combination with section 213, the rule of construction in this section preserving the application of joint and several liability as to all defendants other than the leniency applicant provides an additional incentive to corporations and individuals who have violated the antitrust laws to be the first to cooperate with the government and private litigants. While the antitrust leniency applicant who cooperates with civil plaintiffs will be liable only for single damages caused by its own unlawful conduct, the remaining defendants will be fully, jointly and severally liable for the treble damages the conspiracy caused, minus only the amount actually paid by the leniency applicant. This could have the effect of increasing the amount of damages the remaining defendants are ultimately required to pay.

Section 215 increases, for violations of sections 1–3 of the Sherman Act, statutory maximum monetary penalties from $350,000 to $1 million for individuals and business organizations other than corporations, and from $10 million to $100 million for corporations; and increases maximum jail sentences from three years to 10 years. These increases reflect Congress' belief that criminal antitrust violations are serious white collar crimes that should be punished in a manner commensurate with other felonies. This section will require the United States Sentencing Commission to revise the existing antitrust sentencing guidelines to increase terms of imprisonment for antitrust violations to reflect the new statutory maximum. No revision in the existing guidelines is called for with respect to fines, as the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guideline levels without the need to engage in damages litigation during the criminal sentencing process.

For example, Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. This presumption is sufficiently precise to satisfy the interests of justice, and promotes efficient and predictable imposition of penalties for criminal antitrust violations. Comments to the guidelines provide that if the actual overcharge caused by cartel behavior can be shown to depart substantially from the presumed ten percent overcharge that underlies the twenty percent presumption, this should be considered by the court in setting the fine within the guideline fine range.

Subtitle B—Tunney Act Reform

Section 221 makes clear that Congress intends for the district court reviewing an antitrust consent decree to go beyond merely considering whether entry of the decree would "make a mockery of the judicial function," (this is currently the standard in the Court of Appeals for the D.C. Circuit) and that the purpose of this section is "to effectuate the original Congressional intent in enacting the Tunney Act. . . ."

The Public Interest Determination provision first amends the existing Tunney Act by allowing, for good cause shown, dissemination of public comments on proposed antitrust consent decrees and responses to them by an alternative to publication in the Federal Register; replaces "may" with "shall" in its directions to district courts reviewing consent decrees; adds to the factors that a reviewing court must consider, in determining whether the proposed decree is in the public interest, "whether its terms are ambiguous" and "the impact of entry of such judgment upon competition in the relevant market or markets"; clarifies that nothing in the section shall be construed as requiring the court to hold an evidentiary hearing or to permit anyone to intervene; and specifies that the written or oral communications made on behalf of a defendant, which the defendant is required to describe to the court under section 5(g) of the Clayton Act, include communications "by any officer, director, employee, or agent of such defendant, or other person."

Mr. Speaker, I reserve the balance of my time.

Mr. SCOTT of Virginia. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 1086, the Standards Development Organization Advancement Act of 2003. This measure has strong bipartisan support in the Committee on the Judiciary, the House and the Senate, as is evidenced by its cosponsors. It provides important and significant improvements to our antitrust laws. We passed the bill last year, and it passed the Senate more recently with amendments, and we are here today to approve the identical version of the bill.

Title I of the bill recognizes that organizations set thousands of standards that keep us safe and provide uniformity for everything from fire protections to computer systems to building construction. When all DVDs are the same size, competitors can manufacture to the standard and compete. When all plugs are the same size, anybody can sell a lamp without having to insist on a particular brand name because they know all lamps have the standard plugs. Without the relief in this bill, industries may be reluctant to agree on a standard out of fear that treble antitrust damages may be available.

So this title provides a common sense safe harbor for standards development organizations. Those who voluntarily disclose their activities to Federal antitrust authorities will only be subject to single damages should a successful antitrust suit arise. Those who refuse to disclose their activities or those who take actions beyond their disclosures will be subject to the treble damages under the antitrust statutes.

The bill does not exempt anyone from antitrust laws but applies the rule of reason to standards development organizations that are acting in an open and forthright manner. If a violation is found, the organizations are still liable for damages, but single damages, rather than treble damages, which would now apply. However, organizations that commit specific serious antitrust violations, such as conspiring about standards on price, market share or territory division, will still be fully liable for their actions.

The rationale for the more favorable treatment of standards development organizations under these circumstances is that standards development organizations, as nonprofits that serve a cross-section of an industry, are unlikely themselves to engage in anticompetitive activities; and, without the risk of treble damages, they can be more innovative in their effort to develop standards which enhance product quality and safety while reducing costs.

Title II of the bill, the Antitrust Criminal Penalty Enhancement and Reform Act of 2003, increases the maximum criminal penalties for antitrust violations so that the disparity is eliminated between the treatment of criminal white collar offenses and antitrust criminal offenses.

This title also incorporates a leniency provision that encourages participants in an illegal conspiracy to turn in their co-conspirators. This provision allows the Department of Justice to limit the damages of the cooperating company's civil liability to actual, rather than treble, damages. The Department of Justice will only grant such leniency if the company provides adequate and timely cooperation to both the government and any subsequent private plaintiffs in civil suits. And because the remaining conspirators remain jointly and severally liable to treble damages, the victims' potential recovery is not reduced by leniency in this situation.

Finally, Title II of the bill reforms the Tunney Act to strengthen the Act's requirements that courts review antitrust consent decrees in a meaningful manner, not simply as a rubber stamp to such decrees.

H.R. 1086 is an important bill that modernizes and enhances enforcement of U.S. antitrust laws. I would like to commend the gentleman from Wisconsin (Chairman SENSENBRENNER) and the gentleman from Michigan (Ranking Member CONYERS) for their leadership and cooperative efforts on this bill, and I urge my colleagues to support it.

Mr. BOEHNER. Mr. Speaker, I submit the following letters for the RECORD:

COMMITTEE ON EDUCATION AND THE WORKFORCE, HOUSE OF REPRESENTATIVES,
Washington, DC, May 28, 2004.

Hon. WILLIAM M. THOMAS,
Chairman, Committee on Ways and Means, Longworth House Office Building, Washington, DC.

DEAR CHAIRMAN THOMAS: Thank you for your May 17, 2004 letter regarding H.R. 3908, the "To provide for the conveyance of the real property located at 1081 West Main Street in Ravenna, Ohio." I agree that the Committee on Ways and Means has jurisdiction over matters concerning the Social Security Act and the effect this bill would have on provisions within your Committee's jurisdiction. While these provisions are within the jurisdiction of the Committee on Ways and Means, I appreciate your willingness to work with me in moving H.R. 3908 forward without the need for additional legislative consideration by your Committee.

I agree that this procedural route should note be construed to prejudice the jurisdictional interest and prerogatives of the Committee on Ways and Means on these provisions or any other similar legislation and will not be considered as precedent for consideration of matters of jurisdictional interest to your Committee in the future.

I thank you for working with me regarding this matter and look forward to continuing our work and cooperation on this bill and similar legislation. This letter and your response will be included in the Congressional Record during the floor consideration of this bill. If you have questions regarding this matter, please do not hesitate to call me.

Sincerely,

JOHN BOEHNER,
Chairman.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
Washington, DC, May 17, 2004.

Hon. JOHN A. BOEHNER,
Chairman, Committee on Education and the Workforce, Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN BOEHNER: I am writing concerning H.R. 3908, "To provide for the conveyance of the real property located at 1081 West Main Street in Ravenna, Ohio," which was introduced on March 4, 2004, and referred to the Committee on Education and the Workforce.

As you know, the Committee on Ways and Means has jurisdiction over matters concerning the Social Security Act. Sec. 1 of H.R. 3908 would convey a property purchased using federal funds authorized under Titles III and IX of the Social Security Act, and thus falls within the jurisdiction of the Committee on Ways and Means. However, in order to expedite this legislation for floor consideration, the Committee will forgo action on this bill. This is being done with the understanding that it does not in any way prejudice the Committee with respect to the appointment of conferees or its jurisdictional prerogatives on this or similar legislation.

I would appreciate your response to this letter, confirming this understanding with respect to H.R. 3908, and would ask that a copy of our exchange of letters on this matter be included in the CONGRESSIONAL RECORD during floor consideration.

Best regards,

BILL THOMAS,
Chairman.

Mr. CONYERS. Mr. Speaker, I rise in support of H.R. 1086, the standards Development Organization Advancement Act of 2003. This measure has enjoyed bipartisan support in the Judiciary Committee, the House, and the Senate. It provides important and significant improvements to our antitrust laws.

Title I of the bill recognizes that standards development organizations set thousands of standards that keep us safe and provide uniformity for everything from fire protections to computer systems to building construction. This Title provides a common sense safe harbor for these organizations. Those that voluntarily disclose their activities to federal antitrust authorities will only be subject to single damages should a lawsuit later arise. Those who refuse to disclose their activities, or those who take actions beyond their disclosure, will still be subject to treble damages under the antitrust statutes.

This bill does not exempt anyone from the antitrust laws, but it does apply the rule of reason to standards development organizations. Therefore the pro-competitive market effects will be balanced against the anti-competitive market effects of an action before a violation of the antitrust laws is found. Organizations that commit per se violations—making agreements or standards about price, market share or territory division, for example—will still be fully liable for their actions.

The rationale for such favored treatment is that standards development organizations, as non-profits that serve a cross-section of an industry, are unlikely themselves to engage in anti-competitive activities. However, if free from the threat of treble damages, they can increase efficiency and facilitate the gathering of a wealth of technical expertise from a wide array of interests to enhance product quality and safety while reducing costs.

Title II, the Antitrust Criminal Penalty Enhancement and Reform Act of 2003, increases the maximum criminal penalties for antitrust violations so that the disparity is eliminated between the treatment of criminal white collar offenses and antitrust criminal violations. At this point, I do not see any reason to revise downward the current Sentencing Guideline presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy.

This Title also incorporates a leniency provision that encourages participants in illegal cartels to turn against their co-conspirators. This provision allows the Department of Justice to limit the damages of the cooperating company's civil liability to actual, rather than treble damages. The Department of Justice will only grant such leniency if the company provides adequate and timely cooperation to both the government and any subsequent private plaintiffs in civil suits. And because the remaining conspirators remain jointly and severally liable for treble damages, the victims' potential total recovery is not reduced by leniency applicant's reduced damages. The central purpose of this provision is to bolster the leniency program already utilized by the Antitrust Division so that antitrust prosecutors can more effectively go after antitrust violators. The Department of Justice has assured me that it will always use these new tools cognizant of the needs of victims.

Finally, Title II of the bill reforms the Tunney Act to strengthen the Act's requirement that courts review antitrust consent decrees in a meaningful manner, rather than simply "rubber-stamping" such decrees.

H.R. 1086 is an important bill that modernizes and enhances the enforcement of U.S. antitrust laws. I'd like to thank the Chairman for his cooperative efforts on this bill and in writing the supplemental legislative history. We worked hard together on both and I'm very proud of the final product. I urge my colleagues to support this bill.

Ms. JACKSON-LEE of Texas. Mr. Speaker, as a co-sponsor of this legislation, I support H.R. 1086, "The Standards Development Organization Advancement Act of 2003."

This Act amends the National Cooperative Standards Development Act to provide antitrust protections to specific activities of standard development organizations (SDOs) relating to the development of voluntary consensus standards.

Among other provisions, H.R. 1086 amends the NCRA to limit the recovery of antitrust damages against SDOs if the organizations pre-disclose the nature and scope of their standards development activity to the proper antitrust authorities. H.R. 1086 also amends the NCRA to include SDOs in the framework of NCRA that awards reasonable attorneys' fees to the substantially prevailing party.

The provisions of H.R. 1086 protect SDOs, and in turn, SDOs help protect consumers and the public. SDOs are non-profit organizations that establish voluntary industry standards. These standards ensure competition within various industries, promote manufacturing compatibility, and reduce the risk that consumers will be stranded with a product that is incompatible with products from other manufacturers.

The nature of the standards development process requires competing companies to bring their competitive ideas to the voluntary standards development process. When one of the companies believes its market position has been compromised by the standards development process that company will likely resort to litigation. It is not uncommon for the SDO to be named as a Defendant. For non-profit organizations like SDOs, litigation can be very costly and disruptive to their operations, and treble antitrust damages can be financially crippling.

Under H.R. 1086, the recovery of damages against SDOs is limited if the organizations pre-disclose the nature and scope of their standards development activity to the proper antitrust authorities. Furthermore, SDOs are only liable for treble damages under antitrust laws if they fail to disclose the nature and scope of their voluntary standards setting activity.

H.R. 1086 strikes a good balance. It does not grant SDOs full antitrust immunity, but it provides SDOs with protection from treble damages when they provide proper disclosure.

H.R. 1086 also benefits the consumer. It enables the SDOs to develop industry standards that promote price competition, intensify corporate rivalry, and encourage the development of new products.

Mr. Speaker, I support H.R. 1086.

Mr. SCOTT of Virginia. Mr. Speaker, I yield back the balance of my time.

Mr. SENSENBRENNER. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time as well.

The SPEAKER pro tempore (Mr. SIMPSON). The question is on the motion offered by the gentleman from Wisconsin (Mr. SENSENBRENNER) that the House suspend the rules and concur in the Senate amendment to the bill, H.R. 1086.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the Senate amendment was concurred in.

A motion to reconsider was laid on the table.

ANABOLIC STEROID CONTROL ACT OF 2004

Mr. SENSENBRENNER. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 3866) to amend the Controlled Substances Act to provide increased penalties for anabolic steroid offenses near sports facilities, and for other purposes, as amended.

The Clerk read as follows:

H.R. 3866

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Anabolic Steroid Control Act of 2004".

SEC. 2. INCREASED PENALTIES FOR ANABOLIC STEROID OFFENSES NEAR SPORTS FACILITIES.

(a) IN GENERAL.—Part D of the Controlled Substances Act is amended by adding at the end the following:

ANABOLIC STEROID OFFENSES NEAR SPORTS FACILITIES

"SEC. 424. (a) Whoever violates section 401(a)(1) or section 416 by manufacturing, distributing, or possessing with intent to distribute, an anabolic steroid near or at a sports facility is subject to twice the maximum term of imprisonment, maximum fine, and maximum term of supervised release otherwise provided by section 401 for that offense.

"(b) As used in this section—

"(1) the term 'sports facility' means real property where athletic sports or athletic training takes place, if such property is privately owned for commercial purposes or if such property is publicly owned, but does not include any real property described in section 419;

"(2) the term 'near or at' means in or on, or within 1000 feet of; and

"(3) the term 'possessing with intent to distribute' means possessing with the intent to distribute near or at a sports facility.".

(b) TABLE OF CONTENTS AMENDMENT.—The table of contents for Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by inserting after the item relating to section 423 the following new item:

"Sec. 424. Anabolic steroid offenses near sports facilities.".

SEC. 3. SENTENCING COMMISSION GUIDELINES.

The United States Sentencing Commission shall—

(1) review the Federal sentencing guidelines with respect to offenses involving anabolic steroids;

(2) consider amending the Federal sentencing guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid use; and

(3) take such other action that the Commission considers necessary to carry out this section.

SEC. 4. AMENDMENTS TO THE CONTROLLED SUBSTANCES ACT.

(a) DEFINITIONS.—Section 102 of the Controlled Substances Act (21 U.S.C. 802) is amended—

(1) in paragraph (41)—

(A) by realigning the margin so as to align with paragraph (40); and

(B) by striking subparagraph (A) and inserting the following:

"(A) The term 'anabolic steroid' means any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone), and includes—

"(i) androstanediol—

"(I) 3β,17β-dihydroxy-5α-androstane; and

"(II) 3α,17β-dihydroxy-5α-androstane;

"(ii) androstanedione (5α-androstan-3,17-dione);

"(iii) androstenediol—

"(I) 1-androstenediol (3β,17β-dihydroxy-5α-androst-1-ene);

"(II) 1-androstenediol (3α,17β-dihydroxy-5α-androst-1-ene);

"(III) 4-androstenediol (3β,17β-dihydroxy-androst-4-ene); and

"(IV) 5-androstenediol (3β,17β-dihydroxy-androst-5-ene);

"(iv) androstenedione—

"(I) 1-androstenedione ([5α]-androst-1-en-3,17-dione);

"(II) 4-androstenedione (androst-4-en-3,17-dione); and

Mr. REID. No objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

AUTHORIZATION TO SETTLE CLAIMS ARISING OUT OF DISCOVERY OF LETHAL RICIN POWDER IN SENATE COMPLEX

Mr. McCONNELL. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Res. 329, which was introduced by Senators LOTT and DODD earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 329) authorizing the Sergeant at Arms and Doorkeeper of the Senate to ascertain and settle claims arising out of the discovery of lethal ricin powder in the Senate Complex.

There being no objection, the Senate proceeded to consider the resolution.

Mr. McCONNELL. I ask unanimous consent that the resolution be agreed to, the motion to reconsider be laid upon the table, and that any statements relating to this matter be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 329) was agreed to, as follows:

S. RES. 329

Resolved,

SECTION 1. PAYMENT OF CLAIMS ARISING FROM THE RICIN DISCOVERY.

(a) SETTLEMENT AND PAYMENT.- The Sergeant at Arms and Doorkeeper of the Senate-

(1) in accordance with such regulations as the Committee on Rules and Administration may prescribe, consider, and ascertain any claim incident to service by a Member, officer, or employee of the Senate for any damage to, or loss of, personal property, for which the Member, officer, or employee has not been reimbursed, resulting from the discovery of lethal ricin powder in the Senate Complex on February 2, 2004, or the related remediation efforts undertaken as a result of that discovery; and

(2) may, with the approval of the Committee on Rules and Administration and in accordance with the provisions of section 3721 of title 31, United States Code, determine, compromise, adjust, and settle such claim in an amount not exceeding $4,000 per claimant.

(b) FILING OF CLAIMS.- Claimants shall file claims pursuant to this resolution with the Sergeant at Arms not later than July 31, 2004.

(c) USE OF CONTINGENT FUND.- Any compromise, adjustment, or settlement of any such claim pursuant to this resolution shall be paid from the contingent fund of the Senate on a voucher approved by the chairman of the Committee on Rules and Administration.

STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003

Mr. McCONNELL. I ask unanimous consent that the Senate now proceed to the immediate consideration of Calendar No. 376, H.R. 1086.

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (H.R. 1086) to encourage the development and promulgation of volunteer 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.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary, with an amendment to strike all after the enacting clause and insert in lieu thereof the following:

[Strike the part shown in black brackets and insert the part shown in italic.]

H.R. 1086

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[SECTION 1. SHORT TITLE.

[This Act may be cited as the "Standards Development Organization Advancement Act of 2003".

[SEC. 2. FINDINGS.

[The Congress finds the following:

[(1) In 1993, the Congress amended and renamed the National Cooperative Research Act of 1984 (now known as the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301 et seq.)) by enacting the National Cooperative Production Amendments of 1993 (Public Law 103-42) to encourage the use of collaborative, procompetitive activity in the form of research and production joint ventures that provide adequate disclosure to the antitrust enforcement agencies about the nature and scope of the activity involved.

[(2) Subsequently, in 1995, the Congress in enacting the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) recognized the importance of technical standards developed by voluntary consensus standards bodies to our national economy by requiring the use of such standards to the extent practicable by Federal agencies and by encouraging Federal agency representatives to participate in ongoing standards development activities. The Office of Management and Budget on February 18, 1998, revised Circular A-119 to reflect these changes made in law.

[(3) Following enactment of the National Technology Transfer and Advancement Act of 1995, technical standards developed or adopted by voluntary consensus standards bodies have replaced thousands of unique Government standards and specifications allowing the national economy to operate in a more unified fashion.

[(4) Having the same technical standards used by Federal agencies and by the private sector permits the Government to avoid the cost of developing duplicative Government standards and to more readily use products and components designed for the commercial marketplace, thereby enhancing quality and safety and reducing costs.

[(5) Technical standards are written by hundreds of nonprofit voluntary consensus standards bodies in a nonexclusionary fashion, using thousands of volunteers from the private and public sectors, and are developed under the standards development principles set out in Circular Number A-119, as revised February 18, 1998, of the Office of Management and Budget, including principles that require openness, balance, transparency, consensus, and due process. Such principles provide for-

[(A) notice to all parties known to be affected by the particular standards development activity,

[(B) the opportunity to participate in standards development or modification,

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

[(D) readily available access to essential information regarding proposed and final standards,

[(E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections, and

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

[(6) There are tens of thousands of voluntary consensus standards available for government use. Most of these standards are kept current through interim amendments and interpretations, issuance of addenda, and periodic reaffirmation, revision, or reissuance every 3 to 5 years.

[(7) Standards developed by government entities generally are not subject to challenge under the antitrust laws.

[(8) Private developers of the technical standards that are used as Government standards are often not similarly protected, leaving such developers vulnerable to being named as codefendants in lawsuits even though the likelihood of their being held liable is remote in most cases, and they generally have limited resources to defend themselves in such lawsuits.

[(9) Standards development organizations do not stand to benefit from any antitrust violations that might occur in the voluntary consensus standards development process.

[(10) As was the case with respect to research and production joint ventures before the passage of the National Cooperative Research and Production Act of 1993, if relief from the threat of liability under the antitrust laws is not granted to voluntary consensus standards bodies, both regarding the development of new standards and efforts to keep existing standards current, such bodies could be forced to cut back on standards development activities at great financial cost both to the Government and to the national economy.

[SEC. 3. DEFINITIONS.

[Section 2 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301) is amended-

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

["(7) The term '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.

["(8) 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.

["(9) The term 'technical standard' has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

["(10) The term 'voluntary consensus standard' has the meaning given such term in Office of Management and Budget Circular Number A-119, as revised February 10, 1998."; and

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

["(c) The term 'standards development activity' excludes the following activities:

["(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

["(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

["(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.".

[SEC. 4. RULE OF REASON STANDARD.

[Section 3 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4302) is amended by striking "of any person in making or performing a contract to carry out a joint venture shall" and inserting the following: "of-

["(1) any person in making or performing a contract to carry out a joint venture, or

["(2) a standards development organization while engaged in a standards development activity,

[shall".

[SEC. 5. LIMITATION ON RECOVERY.

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

[(1) in subsections (a)(1), (b)(1), and (c)(1) by inserting ", or for a standards development activity engaged in by a standards development organization against which such claim is made" after "joint venture", and

[(2) in subsection (e)-

[(A) by inserting ", or of a standards development activity engaged in by a standards development organization" before the period at the end, and

[(B) by redesignating such subsection as subsection (f), and

[(3) by inserting after subsection (d) the following:

["(e) Subsections (a), (b), and (c) 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.".

[SEC. 6. ATTORNEY FEES.

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

[(1) in subsection (a) by inserting ", or of a standards development activity engaged in by a standards development organization" after "joint venture", and

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

["(c) Subsections (a) and (b) shall not apply with respect to any person who-

["(1) directly 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 a 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.".

[SEC. 7. DISCLOSURE OF STANDARDS DEVELOPMENT ACTIVITY.

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

[(1) in subsection (a)-

[(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively,

[(B) by inserting "(1)" after "(a)", and

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

["(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2003, whichever is later, file simultaneously with the Attorney General and the Commission, a written notification disclosing-

["(A) the name and principal place of business of the standards development organization, and

["(B) documents showing the nature and scope of such activity.

[Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.",

[(2) in subsection (b)-

[(A) in the 1st sentence by inserting ", or a notice with respect to such standards development activity that identifies the standards development organization engaged in such activity and that describes such activity in general terms" before the period at the end, and

[(B) in the last sentence by inserting "or available to such organization, as the case may be" before the period,

[(3) in subsection (d)(2) by inserting ", or the standards development activity," after "venture",

[(4) in subsection (e)-

[(A) by striking "person who" and inserting "person or standards development organization that", and

[(B) by inserting "or any standards development organization" after "person" the last place it appears, and

[(5) in subsection (g)(1) by inserting "or standards development organization" after "person".

[SEC. 8. RULE OF CONSTRUCTION.

[Nothing in this Act 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 Act, or

[(2) other organizations and parties engaged in standard-setting processes not within the scope of this amendment to the Act.]

TITLE I—STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2003

SEC. 101. SHORT TITLE.

This title may be cited as the "Standards Development Organization Advancement Act of 2003".

SEC. 102. FINDINGS.

The Congress finds the following:

(1) In 1993, the Congress amended and renamed the National Cooperative Research Act of 1984 (now known as the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4301 et seq.)) by enacting the National Cooperative Production Amendments of 1993 (Public Law 103-42) to encourage the use of collaborative, procompetitive activity in the form of research and production joint ventures that provide adequate disclosure to the antitrust enforcement agencies about the nature and scope of the activity involved.

(2) Subsequently, in 1995, the Congress in enacting the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) recognized the importance of technical standards developed by voluntary consensus standards bodies to our national economy by requiring the use of such standards to the extent practicable by Federal agencies and by encouraging Federal agency representatives to participate in ongoing standards development activities. The Office of Management and Budget on February 18, 1998, revised Circular A-119 to reflect these changes made in law.

(3) Following enactment of the National Technology Transfer and Advancement Act of 1995, technical standards developed or adopted by voluntary consensus standards bodies have replaced thousands of unique Government standards and specifications allowing the national economy to operate in a more unified fashion.

(4) Having the same technical standards used by Federal agencies and by the private sector permits the Government to avoid the cost of developing duplicative Government standards and to more readily use products and components designed for the commercial marketplace, thereby enhancing quality and safety and reducing costs.

(5) Technical standards are written by hundreds of nonprofit voluntary consensus standards bodies in a nonexclusionary fashion, using thousands of volunteers from the private and public sectors, and are developed under the standards development principles set out in Circular Number A-119, as revised February 18, 1998, of the Office of Management and Budget, including principles that require openness, balance, transparency, consensus, and due process. Such principles provide for-

(A) notice to all parties known to be affected by the particular standards development activity,

(B) the opportunity to participate in standards development or modification,

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

(D) readily available access to essential information regarding proposed and final standards,

(E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections, and

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

(6) There are tens of thousands of voluntary consensus standards available for government use. Most of these standards are kept current through interim amendments and interpretations, issuance of addenda, and periodic reaffirmation, revision, or reissuance every 3 to 5 years.

(7) Standards developed by government entities generally are not subject to challenge under the antitrust laws.

(8) Private developers of the technical standards that are used as Government standards are often not similarly protected, leaving such developers vulnerable to being named as codefendants in lawsuits even though the likelihood of their being held liable is remote in most cases, and they generally have limited resources to defend themselves in such lawsuits.

(9) Standards development organizations do not stand to benefit from any antitrust violations that might occur in the voluntary consensus standards development process.

(10) As was the case with respect to research and production joint ventures before the passage of the National Cooperative Research and Production Act of 1993, if relief from the threat of liability under the antitrust laws is not granted to voluntary consensus standards bodies, both regarding the development of new standards and efforts to keep existing standards current, such bodies could be forced to cut back on standards development activities at great financial cost both to the Government and to the national economy.

SEC. 103. DEFINITIONS.

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

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

"(7) The term '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.

"(8) 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.

"(9) The term 'technical standard' has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

"(10) The term 'voluntary consensus standard' has the meaning given such term in Office of Management and Budget Circular Number A-119, as revised February 10, 1998."; and

(2) by adding at the end the following:

"(c) The term 'standards development activity' excludes the following activities:

"(1) Exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.

"(2) Entering into any agreement or engaging in any other conduct that would allocate a market with a competitor.

"(3) Entering into any agreement or conspiracy that would set or restrain prices of any good or service.".

SEC. 104. RULE OF REASON STANDARD.

Section 3 of the National Cooperative Research and Production Act of 1993 (15 U.S.C. 4302) is amended by striking "of any person in making or performing a contract to carry out a joint venture shall" and inserting the following: "of-

"(1) any person in making or performing a contract to carry out a joint venture, or

"(2) a standards development organization while engaged in a standards development activity,

shall".

SEC. 105. LIMITATION ON RECOVERY.

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

(1) in subsections (a)(1), (b)(1), and (c)(1) by inserting ", or for a standards development activity engaged in by a standards development organization against which such claim is made" after "joint venture", and

(2) in subsection (e)-

(A) by inserting ", or of a standards development activity engaged in by a standards development organization" before the period at the end, and

(B) by redesignating such subsection as subsection (f), and

(3) by inserting after subsection (d) the following:

"(e) Subsections (a), (b), and (c) 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.".

SEC. 106. ATTORNEY FEES.

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

(1) in subsection (a) by inserting ", or of a standards development activity engaged in by a standards development organization" after "joint venture", and

(2) by adding at the end the following:

"(c) Subsections (a) and (b) shall not apply with respect to any person who-

"(1) directly 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 a 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.".

SEC. 107. DISCLOSURE OF STANDARDS DEVELOPMENT ACTIVITY.

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

(1) in subsection (a)-

(A) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively,

(B) by inserting "(1)" after "(a)", and

(C) by adding at the end the following:

"(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2003, whichever is later, file simultaneously with the Attorney General and the Commission, a written notification disclosing-

"(A) the name and principal place of business of the standards development organization, and

"(B) documents showing the nature and scope of such activity.

Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.",

(2) in subsection (b)-

(A) in the 1st sentence by inserting ", or a notice with respect to such standards development activity that identifies the standards development organization engaged in such activity and that describes such activity in general terms" before the period at the end, and

(B) in the last sentence by inserting "or available to such organization, as the case may be" before the period,

(3) in subsection (d)(2) by inserting ", or the standards development activity," after "venture",

(4) in subsection (e)-

(A) by striking "person who" and inserting "person or standards development organization that", and

(B) by inserting "or any standards development organization" after "person" the last place it appears, and

(5) in subsection (g)(1) by inserting "or standards development organization" after "person".

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, or

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

TITLE II—ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2003

SEC. 201. SHORT TITLE.

This title may be cited as the "Antitrust Criminal Penalty Enhancement and Reform Act of 2003".

Subtitle A—Antitrust Enforcement Enhancements and Cooperation Incentives

SEC. 211. SUNSET.

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

(b) EXCEPTION.- With respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.

SEC. 212. DEFINITIONS.

In this subtitle:

(1) ANTITRUST DIVISION.- The term "Antitrust Division" means the United States Department of Justice Antitrust Division.

(2) ANTITRUST LENIENCY AGREEMENT.- The term "antitrust leniency agreement," or "agreement," means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.

(3) ANTITRUST LENIENCY APPLICANT.- The term "antitrust leniency applicant," or "applicant," means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.

(4) CLAIMANT.- The term "claimant" means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision.

(5) COOPERATING INDIVIDUAL.- The term "cooperating individual" means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.

(6) PERSON.- The term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act.

SEC. 213. LIMITATION ON RECOVERY.

(a) IN GENERAL.- Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that *portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.*

(b) REQUIREMENTS.- Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include-

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3)(A) in the case of a cooperating individual-

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

(c) TIMELINES.- If the initial contact by the antitrust leniency applicant with the Antitrust Division regarding conduct covered by the antitrust leniency agreement occurs after a civil action described in subsection (a) has been filed, then the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's initial cooperation with the claimant.

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

SEC. 214. RIGHTS AND AUTHORITY OF ANTITRUST DIVISION NOT AFFECTED.

Nothing in this subtitle shall be construed to-

(1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement; or

(2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement.

SEC. 215. INCREASED PENALTIES FOR ANTITRUST VIOLATIONS.

(a) RESTRAINT OF TRADE AMONG THE STATES.- Section 1 of the Sherman Act (15 U.S.C. 1) is amended by-

(1) striking "$10,000,000" and inserting "$100,000,000";

(2) striking "$350,000" and inserting "$1,000,000"; and

(3) striking "three" and inserting "10".

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

(1) striking "$10,000,000" and inserting "$100,000,000";

(2) striking "$350,000" and inserting "$1,000,000"; and

(3) striking "three" and inserting "10".

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

(1) striking "$10,000,000" and inserting "$100,000,000";

(2) striking "$350,000" and inserting "$1,000,000"; and

(3) striking "three" and inserting "10".

Subtitle B—Tunney Act Reform

SEC. 221. PUBLIC INTEREST DETERMINATION.

Section 5 of the Clayton Act (15 U.S.C. 16) is amended-

(1) in subsection (d), by inserting at the end the following: "Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments."; and

(2) in subsection (e)-

(A) in the matter before paragraph (1), by-

(i) inserting "independently" after "shall";

(ii) striking "court may" and inserting "court shall"; and

(iii) inserting "(1)" before "Before"; and

(B) striking paragraphs (1) and (2) and inserting the following:

"(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous and any other competitive considerations bearing upon the adequacy of such judgment necessary to a determination of whether the consent judgment is in the public interest; and

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

"(2) The Court shall not enter any consent judgment proposed by the United States under this section unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest. In making its determination as to whether entry of the consent judgment is in the public interest, the Court shall not be limited to examining only the factors set forth in this subsection, but may consider any other factor relevant to the competitive impact of the judgment.".

Mr. HATCH. Mr. President, I rise today to support passage of H.R. 1086, the Standards Development Organization Advancement Act of 2003. This legislation, along with provisions added to it during the Judiciary Committee markup and by the substitute amendment that I have offered along with Senators LEAHY, DEWINE, and KOHL, provides several important and significant improvements to our antitrust laws.

This legislation incorporates the limited antitrust protection for Standards Development Organizations that Senator LEAHY and I introduced as S. 1799, and that Chairman SENSENBRENNER introduced in the House as H.R. 1086. Under this provision, the civil liability for Standards Development Organizations or "SDOs" will be limited to single, rather than treble, damages for standards-setting activities about which they have informed the Department of Justice and Federal Trade Commission using a newly-created notification procedure.

The bill also increases the maximum criminal penalties for antitrust violations so that they are more in line with other comparable white collar crimes. I will note that this provision of the legislation is substantially the same as the one included in S. 1080, a Leahy-Hatch bill.

This legislation also provides increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with the Justice Department's Antitrust Division in prosecuting the other members of these criminal antitrust conspiracies. This is accomplished by allowing the Justice Department, in appropriate circumstances, to limit a cooperating company's civil liability to actual, rather than treble, damages in return for the company's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct.

Finally, this substitute would amend the Tunney Act to end the problem of courts simply "rubber-stamping" antitrust settlements reached with the Justice Department. In my view, this amendment essentially codifies existing case law, while reemphasizing the original congressional intent that lead to passage of the Tunney Act. When this provision was added to H.R. 1086 in the Senate Judiciary Committee, I noted that, although I supported it in principal, I thought that continued modifications of the actual language might be necessary to respond to concerns that had been raised. I am pleased to be able to state that, largely through the efforts of Senator KOHL and his staff, a compromise on this language was reached that is supported- or at least not strongly objected to- by the parties involved.

With that introduction, I will briefly discuss the four principal sections of the legislation.

The section Protection of Standards Development Organizations, which comes from S. 1799, a bill that Senator LEAHY and I introduced as a Senate companion to H.R. 1086, is designed to extend limited antitrust protection to Standards Development Organizations, or "SDOs".

In the United States, most technical standards are developed and promulgated by private, not-for-profit organizations called SDOs. Numerous concerns have been raised that the threat of treble damages deters SDOs from their pro-competitive standard-setting activities. This legislation addresses those concerns by providing a notification process whereby SDOs may inform DOJ and the FTC regarding their intended standards-development activities. If the authorities do not object to the proposed activities but the SDO is subsequently sued by a private plaintiff, the SDO's civil liability is limited to single rather than treble damages. Importantly, this legislation does not in any way immunize industry participants who cooperate in the development of standards from antitrust liability for using the standards-setting process for anti-competitive purposes.

I thank Senator LEAHY and Chairman SENSENBRENNER and their staffs for their vigilant efforts toward passage of the Standards Development Organization Advancement Act of 2003.

The legislation also amends the antitrust laws to provide corporations and their executives with increased incentives to come forward and cooperate with the Department of Justice in prosecuting criminal antitrust cartels. It does so by enhancing the effectiveness of the already-successful Corporate Leniency Policy issued by the Justice Department's Antitrust Division.

In general, the leniency policy provides that a corporation and its executives will not be criminally charged if the company is not the ringleader of the conspiracy and it is the first of the conspirators to approach the division and fully cooperate with the division's criminal investigation. The program serves to destabilize cartels, and it causes the members of the cartel to turn against one another in a race to the Government. Cooperation obtained through the leniency program has led to the detection and prosecution of massive international cartels that cost businesses and consumers billions of dollars and has led to the largest fines in the Antitrust Division's history.

Though this important program has been successful, a major disincentive to self reporting still exists, the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy. Under current law, the successful leniency applicant is not criminally charged, but it still faces treble damage actions with joint and several liability. In other words, before voluntarily disclosing its criminal conduct, a potential amnesty applicant must weigh the potential ruinous consequences of subjecting itself to liability for three times the damages that the entire conspiracy caused.

This provision addresses this disincentive to self-reporting. Specifically, it amends the antitrust laws to modify the damage recovery from a corporation and its executives to actual damages. In other words, the total liability of a successful leniency applicant would be limited to single damages without joint and several liability. Thus, the applicant would only be liable for the actual damages attributable to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy.

Importantly, this limitation on damages is only available to corporations and their executives if they provide adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct. I should also note that, because all other conspirator firms would remain jointly and severably liable for three times the total damages caused by the conspiracy, the victims' potential total recovery would not be reduced by the amendments Congress is considering. And again, the legislation requires the amnesty applicant to provide full cooperation to the victims as they prepare and pursue their civil lawsuit.

With this change, more companies will disclose antitrust crimes, which will have several benefits. First, I expect that the total compensation to victims of antitrust conspiracies will be increased because of the requirement that amnesty applicants cooperate. Second, the increased self-reporting incentive will serve to further destabilize and deter the formation of criminal antitrust conspiracies. In turn, these changes will lead to more open and competitive markets.

The enhanced criminal penalties provision, which was originally part of S. 1080, which I introduced with Senator LEAHY, improves current law by increasing the maximum prison sentences and fines for criminal violations of antitrust law. This change puts the maximum prison sentences for antitrust violations more in line with other white collar crimes. By increasing these criminal penalties, we are recognizing the profoundly harmful impact that antitrust violations have on consumers and the economy.

This legislation also amends the Tunney Act to end what some have seen as courts simply "rubber-stamping" antitrust settlements reached with the Justice Department without providing meaningful review. As I have stated, while I agree with the principle behind this proposal, I had significant concerns with the specific language that was reported out of the Judiciary Committee. After several months of discussions, I am happy to say that the current language appears to have answered most, if not all, of the principal concerns that were raised regarding the amendments to the Tunney Act.

In conclusion, I would like to thank Senators LEAHY, KOHL, and DEWINE and their staffs for their efforts on this bill. In particular, I would like to thank Susan Davies of Senator LEAHY's staff, Jeff Miller and Seth Bloom of Senator KOHL's staff, and Pete Levitas and Bill Jones of Senator DEWINE's staff. I also appreciate the expert and energetic efforts of my own antitrust counsel, Dave Jones. And finally, I thank Makan Delrahim, my former chief counsel, for all of his "technical assistance."

I urge my colleagues to support this bill.

Mr. LEAHY. Mr. President, I am delighted that Senator HATCH, Senator KOHL, Senator DEWINE, and I have been able to work together to develop a version of this bill that can pass today as the Standards Development Organization Advancement Act. Technical standards help to promote safety, increase efficiency, and allow for interoperability in a variety of products Americans use every day. Despite the fact that they go largely unnoticed, we would be markedly less safe without airbags that deploy properly in serious automobile collisions, more vulnerable were there not technical standards for fire retardant materials in homes. And consumers would be less likely to make the purchases that drive our economy without the technical standards that ensure a light bulb will fit in its socket or allow DVDs to function properly regardless of the manufacturer.

In the United States, most technical standards are developed by private, not-for-profit Standards Development Organizations, which often possess superior knowledge and adaptability in highly technical matters. Rather than Government overregulation of technical standards, SDOs promulgate guidelines that frequently are then adopted by State and Federal governments. Like many conveniences we take for granted, technical standards are so deeply infused in our lives that they may attract little or no individual attention.

While standards serve this vital societal role, there exists a natural tension between the antitrust laws that prohibit businesses from colluding and the development of technical standards, which require competitors to reach agreement on basic design elements. The Standards Development Organization Advancement Act reduces this tension, providing relief for SDOs under current law while preserving the trademark features of antitrust enforcement that benefit consumers.

Without creating an antitrust exemption, the Standards Development Organization Act allows SDOs to seek review of their standards by the Department of Justice or Federal Trade Commission prior to implementation. If these agencies do not object to the standard during this "screening" phase, but the organization is later sued by a private plaintiff, the SDO would be limited to single damages, rather than the treble damages levied under existing law.

Additionally, this bill amends the National Cooperative Research and Production Act of 1993, by directing courts to apply a "rule of reason" standard to SDOs and the guidelines they produce. Under existing law, standards may be deemed anticompetitive by a court even if they have the effect of better serving consumers. Courts should be able to balance the competing interests of safety and efficiency against any anticompetitive effect, making certain that the law is doing everything possible to meet the needs of the one constituent we all share- the American consumer. The Standards Development Organization Advancement Act gives our courts the authority to do so.

We may fail to notice the technical standards that provide dependability, security, and convenience in our lives, but they serve an increasingly vital role in a country driven by technological change but devoted to safety and reliability.

Title II of the Standards Development Organization Advancement Act also addresses several areas of our antitrust laws that merit updating, as our experience with the actual practice in the world has shown. First, the act strives to eliminate the disparity between the treatment of criminal white collar offenses and antitrust criminal violations. Without this legislation, offenders who violated the criminal provisions of the antitrust laws would face much less significant penalties than would their wire fraud or mail fraud counterparts. The act increases the maximum penalty for a criminal antitrust violation from 3 years to 10 years and raises the maximum fines to corporations from $10 million to $100 million per violation. Senator HATCH and I had introduced this provision in S. 1080, the Antitrust Improvements Act of 2003, and I am pleased that this useful update to the penalties for criminal violations of the antitrust laws can be made as part of this bill.

Title II will also update the Justice Department's amnesty program in the criminal antitrust context. We have worked with the antitrust division of the Department of Justice and our States' attorneys general to give prosecutors the maximum leverage against participants in criminal antitrust activity. The Department has long had an "amnesty" or "leniency" policy that is generally available to the first conspirator involved in a criminal cartel that offers to cooperate with the authorities. But under the current policy, the Department may only agree to not bring criminal charges against a corporation, and its officers and directors, in exchange for cooperation in providing evidence and testimony against other members in the cartel. Under this bill, to qualify for amnesty, a party must provide substantial cooperation not only in any criminal case brought against the other cartel members, but also in any civil case brought by private parties that is based on the same unlawful conduct.

This bill would then give our prosecutors the authority to effectively limit a cooperating party's potential civil liability as well, and to limit that liability to single damages in any subsequent civil lawsuit brought by a private plaintiff. And while a party that receives leniency would only be liable for the portion of the damages actually caused by its own actions, the rest of its non-cooperating co-conspirators would remain jointly and severally liable for the entire amount of damages, which would then be trebled, to ensure that no injured party will fail to enjoy financial redress.

Finally, the Standards Development Organization Advancement Act makes some useful adjustments to the Tunney Act. That law provides that consent decrees in civil antitrust cases brought by the United States must be reviewed and approved by the District Court in which the case was brought. Under the Tunney Act, before entering a consent decree, the court must determine that "the entry of such judgment is in the public interest." In making this determination, the court may, but is not required to, consider a variety of enumerated factors. As currently drafted, the court has discretion in making this public interest determination, and some have expressed concerns that this lack of guidance results in courts that are overly deferential to prosecutors' judgments. Thus, this bill intends to explicitly restate the original and intended role of District courts in this process by mandating that the court make an independent judgment based on a series of enumerated factors. In addition, the legislation makes clear that this amendment to the Tunney Act will not change the law regarding whether a court may be required, in a particular instance, to permit intervention or to hold a hearing in a Tunney Act proceeding.

A final and important technical change would allow a judge to order publication of the comments received in a Tunney Act proceeding by electronic or other means. Currently, the Tunney Act requires the Antitrust Division to publish in the Federal Register the public comments received on its proposed consent judgments, along with the Division's response to those comments. This can be very expensive- it cost almost $3 million in the Microsoft case- with little benefit, because those materials are, if anything, more accessible on the Web than in a library. Of course, interested people who lack Internet access will need to go to a library, but they would have had to do that for a paper copy as well.

This is an important bill that makes necessary, well-conceived, and bipartisan reforms.

Mr. KOHL. Mr. President, I rise today in strong support of the Antitrust Criminal Penalty Enhancement and Reform Act of 2003. It passed the Judiciary Committee unanimously in November 2003. Today, along with Senators HATCH, LEAHY, and DEWINE, we offer a substitute amendment to H.R. 1086. This legislation will enhance and improve the enforcement of our nation's antitrust laws in several important respects.

In light of the importance of this legislation to the administration of our antitrust laws, as well as the infrequency with which we amend major provisions of the antitrust laws, it is essential to describe in detail the reasons we our advancing this bill. Our proposal will accomplish four important goals. First, our legislation will restore the ability of Federal courts to review the Justice Department's civil antitrust settlements to be sure that these settlements are good for competition and consumers. We will amend the Tunney Act, the law passed in 1974 in response to concerns that some of these settlements were motivated by inappropriate political pressure and failed to restore competition or protect consumers. Congress concluded then, and it is still true now, that judicial review will ensure that cases are settled in the public interest. Unfortunately, in recent years, many courts seem to have ignored this statute and do little more than "rubber stamp" antitrust settlements. This practice is contrary to the intent of the Tunney Act and effectively strips the courts of the ability to engage in meaningful review of antitrust settlements. Our bill will overturn this precedent and make clear that the courts have the authority to do this vital job.

Second, our legislation enhances criminal penalties for those who violate our antitrust laws. It will increase the maximum corporate penalty from $10 million to $100 million; it will increase the maximum individual fine from $350,000 to $1 million; and it will increase the maximum jail term for individuals who are convicted of criminal antitrust violations from 3 to 10 years. These changes will send the proper message that criminal antitrust violations, crimes such as price fixing and bid rigging, committed by business executives in a boardroom are serious offenses that steal from American consumers just as surely as does a street criminal with a gun.

Our legislation will give the Justice Department significant new tools under its antitrust leniency program. The leniency program helps the Government break up criminal cartels by encouraging wrongdoers to cooperate with the authorities. Our bill will give the Justice Department the ability to offer those applying for leniency the additional reward of only facing actual damages in antitrust civil suits, rather than treble damage liability. This will result in more antitrust wrongdoers coming forward to reveal antitrust conspiracies, and thus the detection and ending of more illegal cartels.

Finally, our bill incorporates a provision in the original House passed version of H.R. 1086. This provision limits the liability that standards setting organizations face under the antitrust laws to single damages in most circumstances. It will protect these important organizations from the threat of liability. However, it will not in any way limit the damages available to any company that is a member of such an organization for antitrust violations, nor limit damages should a standard setting organization engage in conduct that is a per se violation of antitrust law.

It is important to explain clearly and specifically why it is necessary to amend the Tunney Act and what we intend to accomplish with these changes. In recent years, courts have been reluctant to give meaningful review to antitrust consent decrees, and have been only willing to take action with respect to most egregious decrees that make a "mockery" of the judicial function. Our bill will effectuate the legislative intent of the Tunney Act and restore the ability of courts to give real scrutiny to antitrust consent decree.

The Tunney Act was enacted in 1974 and provides that consent decrees in civil antitrust cases brought by the United States must be reviewed and approved by the district court in which the case was brought to determine if they are in the public interest. However, the text of the statute contains no standards governing how a court is to conduct this review. While the legislative history of the law is clear that it was meant to prevent "judicial rubber stamping" of consent decrees, the leading precedent of the D.C. Circuit Court of Appeals currently interprets the law in a manner which makes meaningful review of these consent decrees virtually impossible. Leading cases stand for the proposition that only consent decrees that "make a mockery of the judicial function" can be rejected by the district court. The changes in the Tunney Act incorporated in this legislation, as well as the statement of Congressional findings, will make clear that such an interpretation misconstrues the legislative intent of the statute.

The amendments to the Tunney Act found in our bill will restore the original intent of the Tunney Act, and make clear that courts should carefully review antitrust consent decrees to ensure that they are in the public interest. It will accomplish this by, No. 1, a clear statement of congressional findings and purposes expressly overruling the improper judicial standard of recent D.C. Circuit decisions; No. 2, by requiring, rather than permitting, judicial review of a list of enumerated factors to determine whether a consent decree is in the public interest; and No. 3, by enhancing the list of factors which the court now must review.

The Tunney Act was enacted in 1974 to end the practice of courts "rubber stamping" antitrust consent decrees, and to remove political influence from the Justice Department's decision as to whether to settle antitrust cases. There were several prominent decisions in the preceding years in which antitrust settlements by the Justice Department came under strong criticism as inadequate or motivated by illegitimate purposes, and which were not scrutinized by the courts. One of the leading early cases applying the Tunney Act noted that

> the legislators found that consent decrees often failed to provide appropriate relief, either because of miscalculations by the Justice Department [citation omitted] or because of the "great influence and economic power" wielded by antitrust violators [citing S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973)]. The [legislative] history, indeed, contains references to a number of antitrust settlements deemed "blatantly inequitable and improper" on these bases [citing 119 Cong. Rec. 24598 (1973) (Remarks of Sen. Tunney)].

U.S. v. *American Telephone and Telegraph*, 552 F.Supp. 131, 148 (D.D.C. 1982), aff'd sub nom., *Maryland* v. *U.S.*, 460 U.S. 1001 (1983).

While there were several notable cases which gave rise to the concern that the government was settling for inadequate remedies for antitrust violations, see *U.S.* v. *AT&T*, 552 F.Supp. at 148 n. 72; 119 Cong. Rec. 24598, Remarks of Sen. Tunney, the most prominent case was the Government's settlement in 1971 of an antitrust suit brought against ITT. Critics alleged that the Nixon administration had been influenced by campaign contributions to the Nixon reelection effort in 1972. The reasons for the settlement were not publicly disclosed, and the settlement was strongly criticized by consumer advocates. The settlement's critics attempted to have the settlement overturned by the district court, but the court rejected these efforts. "[T]here was no meaningful judicial scrutiny of the terms of the consent decree and no consideration of whether it was in the public interest." *Anderson*, supra, 65 Antitrust Law Journal at 8.

The legislative history of the original Tunney Act is clear that the purpose of the statute was to give courts the opportunity to engage in meaningful scrutiny of antitrust settlements, so as to deter and prevent settlements motivated either by corruption, undue corporate influence, or which were plainly inadequate. In introducing the bill, Senator Tunney highlighted his concern that antitrust settlements could result from the economic power of the companies under scrutiny. He noted that "[i]ncreasing concentration of economic power, such as occurred in the flood of conglomerate mergers, carries with it a very tangible threat of concentration of political power. Put simply, the bigger the company, the greater the leverage it has in Washington." 119 Cong. Rec. 3451, Feb. 6, 1973.

Senator Tunney also pointed with concern at the lack of scrutiny the courts were applying to antitrust settlements. He argued that "too often in the past district courts have viewed their rules [sic] as simply ministerial in nature- leaving to the Justice Department the role of determining the adequacy of the judgment from the public's view." Id. at 3542. Thus, his legislation was intended to substantially expand the role of the court in considering an antitrust consent decree. Senator Tunney described the criteria in the bill under which the courts to review the settlements, and stated that

> The thrust of those criteria is to demand that the court consider both the narrow and the broad impacts of the decree. Thus, in addition to weighing the merits of the decree from the viewpoint of the relief obtained thereby and its adequacy, the court is directed to give consideration to the relative merits of other alternatives and specifically to the effect of the entry of the decree upon private parties aggrieved by the alleged violations and upon the enforcement of antitrust laws generally.

In a later floor debate on the legislation, Senator Tunney cited the testimony of Judge J. Skelley Wright of the U.S. Court of Appeals for the D.C. Circuit, who had testified at an earlier hearing of the Senate Antitrust and Monopoly Subcommittee expressing concern as to whether antitrust settlements "might shortchange the public interest." 119 Cong. Rec. 24597, July 18, 1973. Commenting on this testimony, Senator Tunney stated that "I think Judge Wright gets to the heart of the problem- it is the excessive secrecy with which many consent decrees have been fashioned, and *the almost mechanistic manner in which some courts have been, in effect, willing to rubber stamp consent judgments*." *Id.* at 24598 (emphasis added). The bill passed the Senate that day on a 92 to 8 vote.

The later House debate in which the bill was passed echoed Senator Tunney's concern. Congressman Seiberling of Ohio commented that, in considering antitrust consent decrees, "too often the courts have, in fact, simply rubber-stamped such agreements, and the public or competitors that might be affected have had an effective way to get their views before the court . . ." 120 Cong. Rec. 36341, Nov. 19, 1974. Similar sentiments were expressed by Congressman McClory, id., Congressman Jordan, id. at 36343, and Congressman Heinz, id. at 36341. Congressman Holtzman of New York commented that these procedures would "insure that our antitrust laws are not for sale." Id. at 36342.

The House and Senate Committee Reports on the legislation also echo the floor debate. The Report of the House Judiciary Committee states that

> [o]ne of the abuses sought to be remedied by the bill has been called "judicial rubber stamping" by district courts of proposals submitted by the Justice Department. The bill resolves this area of dispute by requiring district court judges to determine that each proposed consent judgment is in the public interest.

House Rep. No. 93-1463, 93rd Cong., 1st Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6535, 6538.

In one of the first cases to construe the statute, the Government's case to break up the AT&T phone monopoly, Judge Greene of the U.S. District Court for the District of Columbia reviewed, and then summarized, the legislative history of the Tunney Act. He concluded that:

> To remedy these problems [that led to the passage of the Tunney Act], Congress imposed two major changes in the consent decree process. First, it reduced secrecy by ordering disclosure by the Justice Department of the rationale and the terms of proposed consent decrees and by mandating an opportunity for public comment. Second, it sought to eliminate "'judicial rubber stamping' of proposals submitted to the courts by the Department," by requiring an explicit judicial determination in every case that the proposed decree was in the public interest. *It is clear that Congress wanted the courts to act as an independent check upon the terms of decrees negotiated by the Department of Justice*. . . .

U.S. v. *AT&T*, 552 F. Supp. at 148-149 (emphasis added) (citations omitted).

This conclusion is supported by a recent law journal article co-authored by

John J. Flynn, who was special counsel to the Senate Antitrust Subcommittee during the period when the Tunney Act was drafted and adopted. Professor Flynn writes that, in enacting the Tunney Act, Congress rejected the "notion that courts must give deference to the DOJ when determining if a consent decree is in the public interest. Instead, Congress wanted the courts to make an independent, objective, and active determination without deference to the DOJ." Flynn and Bush, The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies", 34 Loyola U. Chicago L. J. 749, 758 (2003).

The early case law that followed the adoption of the Tunney Act in 1974 imposed fairly stringent requirements on courts reviewing antitrust settlements reached by the Justice Department.

The leading early case is the district court's review of the Government's proposed settlement with AT&T in the massive antitrust case that broke up the telephone monopoly, U.S. v. AT&T, supra (D.D.C. 1983). Judge Greene of the U.S. District Court for the District of Columbia rejected an argument for a highly deferential review of the proposed consent decree. The court stated that

> It does not follow . . . that courts must unquestionably accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the "rubber stamp" role which was at the crux of the congressional concerns when the Tunney Act became law.

U.S. v. *AT&T*, 552 F. Supp. at 151.

Instead the standard the court applied to determine if the public interest was served by the consent decree was rather exacting. The court stated it would only enter the proposed consent decree "if the decree meets the requirements for an antitrust remedy that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest." Id. at 153.

The more recent precedent under the Tunney Act have sharply retreated from Judge Green's opinion in AT&T to a much more deferential standard of review. It is this misinterpretation of the Tunney Act that our bill corrects. In describing the recent Tunney Act precedent, one commentator has called it a "retreat toward rubber stamping." Anderson, supra, 65 Antitrust Law Journal at 19. We agree. It is this overly deferential standard review which makes reform of the Tunney Act necessary so that the legislative intent can be effectuated and courts can provide an independent safeguard to prevent against improper or inadequate settlements. The changes we make to the Tunney Act today address these problems and correct the mistaken precedents.

The precedent continues to recognize that the Tunney Act is intended "to prevent 'judicial rubber stamping' of the Justice Department's proposed consent decree," and for the court to "'make an independent determination as to whether or not entry of a proposed consent decree [was] in the public interest.'" *U.S.* v. *Microsoft*, 56 F.3d 1448, 1458 (D.C. Cir. 1995), quoting S. Rep. No. 298 at 5. Further, in reviewing the proposed consent decree, the court should inquire into "the purpose, meaning, and efficacy of the decree." *Microsoft*, 56 F.3d at 1463.

However, these same decisions improperly and strictly circumscribe the role of the trial court and give it little leeway to fail to approve an antitrust consent decree. The D.C. Circuit has stated that:

> [T]he district judge is not obligated to accept [an antitrust consent decree] that, on its face and even after government explanation, appears to make a mockery of judicial power. *Short of that eventuality*, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General.

Id., 56 F.3d at 1462 (emphasis added). In other words, under this precedent, unless the proposed decree would "make a mockery of judicial power," the consent decree must be entered by the Court. In another portion of this opinion, in language much cited by lower courts, the D.C. Circuit held that the court should not insist that the consent decree is the one that will "*best* serve society," but only confirm that the resulting settlement is "within the *reaches* of the public interest." Id. at 1460, citations omitted; emphasis in original.

In a subsequent decision, the D.C. Circuit summarized a district court's review under the Tunney Act, as follows:

> The district court must examine the decree in light of the violations charged in the complaint and should withhold approval *only* if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes "a mockery of judicial power."

Massachusetts School of Law v. *U.S.*, 118 F.3d 776, 783 (D.C. Cir. 1997) (emphasis added) (quoting *Microsoft*, 56 F.3d at 1462). This is plainly quite a limited standard of review, which contains no admonition to review the likely effects of the consent decree on competition, and makes it very unlikely that a court would fail to enter almost any consent decree.

In the opinion of a leading academic commentator on the Tunney Act,

> the court of appeals in Microsoft made a potentially serious mistake by formulating a rule that, so long as procedural niceties are followed, all antitrust consent decrees must be approved unless they are a "mockery." Once the real threat of meaningful scrutiny is eliminated, the benefits of deterrence and mediation would be destroyed and the Tunney Act would be nullified.

Anderson, supra, 65 Antitrust Law Journal at 38. Professor Flynn, who was involved in drafting the Tunney Act, agrees with this criticism of the D.C. Circuit's approach. Professor Flynn states that "from the language of the Tunney Act and its legislative history, this is precisely the sort of deferential standard the drafters of the Tunney Act did not want. . . . [T]he D.C. Circuit chose to ignore the legislative intent and cast judicial review of consent decrees back to the days when rubber-stamping was prevalent." Flynn and Bush, supra, 34 Loyola U. Chi. L. J. at 780-781.

As originally written, the Tunney Act serves two goals deterrence and mediation. The prospect of judicial scrutiny deters the Justice Department from heeding political pressure to enter into a "sweetheart" settlement. And real Tunney Act review also provides an opportunity for a judge to act as a mediator, obtaining modifications to deficient settlements. As Professor Anderson points out, "[i]f the government and antitrust defendants come to perceive that meaningful [judicial] scrutiny is not a real threat, the door will be wide open for attempts to swing sweetheart deals and for the public to lose confidence in antitrust enforcement by the government." 65 Antitrust Law Journal at 38.

In sum, as the Tunney Act is currently interpreted, it is difficult if not impossible for courts to exercise meaningful scrutiny of antitrust consent decrees. The "mockery" standard is contrary to the intent of the Tunney Act as found in the legislative history. Our legislation will correct this misinterpretation of the statute. Our legislation will insure that the courts can undertake meaningful and measured scrutiny of antitrust settlements to insure that they are truly in the public interest, and to remind the courts of Congress' intention in passing the Tunney Act.

In an effort to explain how the revisions to the Tunney Act in H.R. 1086 correct the mistaken standard used by certain courts in applying the law, it is important to describe each of the specific provisions of section 221 of H.R. 1086. Today we have introduced, with Senators HATCH, LEAHY, and DEWINE, a Managers' Amendment to H.R. 1086. These comments address H.R. 1086 as amended.

First, section 221(a) of our bill contains Congressional Findings and Declarations of Purposes. These provisions clarify that we are determined to effectuate the original Congressional intent of the Tunney Act. In other words, after the enactment of this legislation, courts will once again independently review antitrust consent decrees to ensure that they are in the public interest. The Congressional Findings expressly state that for a court to limit its review of antitrust consent decrees to the lesser standard of determining whether entry of the consent judgments would make a "mockery of the judicial function" misconstrues the meaning and intent in enacting the Tunney Act. The language quoted paraphrases the D.C. Circuit decisions in

Massachusetts School of Law v. *U.S.*, 118 F.3d 776, 783 (D.C. Cir. 1997) and *U.S.* v. *Microsoft*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). To the extent that these precedents are contrary to section 221(a) of our bill regarding the standard of review a court should apply in reviewing consent decrees under the Tunney Act, these decisions are overruled by this legislation. While this legislation is not intended to require a trial de novo of the advisability of antitrust consent decrees or a lengthy and protracted review procedure, it is intended to assure that courts undertake meaningful review of antitrust consent decrees to assure that they are in the public interest and analytically sound.

Section 221(b)(2)(A) of our bill amends the existing subsection of Section 5 of the Clayton Act (codified at 15 U.S.C. § 16(e)) containing the requirement that courts review antitrust consent decrees to determine that these consent decrees are in the public interest. Our bill modifies the law by stating that, in making this determination, the court "shall" look at a number of enumerated factors bearing on the competitive impact of the settlement. The current statute merely states that the court "may" review these factors in making its determination. Requiring, rather than permitting, the court to examine these factors will strengthen the review that courts must undertake of consent decrees and will ensure that the court examines each of the factors listed therein. Requiring an examination of these factors is intended to preclude a court from engaging in "rubber stamping" of antitrust consent decrees, but instead to seriously and deliberately consider these factors in the course of determining whether the proposed decree is in the public interest.

Our bill, in section 221(b)(2)(B), also revises and enhances the factors which the court is now required to review in making its public interest determination. In addition to the factors enumerated under current law, the court must examine whether the terms of the proposed decree are ambiguous. While complete precision when dealing with future conduct may be impossible to achieve, an overly ambiguous decree is incapable of being enforced and is therefore ineffective. A mandate to review the impact of entry of the consent judgment upon "competition in the relevant market or markets" is also added by our bill. This will ensure that the Tunney Act review is properly focused on the likely competitive impact of the judgment, rather than extraneous factors irrelevant to the purposes of antitrust enforcement. Finally, this list is not intended to be exclusive, as the court is directed to review any other competitive consideration "that the court deems necessary to a determination of whether the consent judgment is in the public interest."

Under the existing statute, the trial court is granted broad discretion as to how to conduct Tunney Act proceedings. Our amendments make no changes to these procedures. In deciding whether to approve the consent decree, the court may, but is not required to, hold a hearing on the proposed decree. Id. § 16(f). In such a hearing, the court may take the testimony of Government officials or expert witnesses. The court may also take testimony from witnesses or other "interested persons or agencies" and examine documents relevant to the case. The court may also review the public comments filed during the sixty-day period pursuant to the Tunney Act. In addition, the court may appoint a special master or outside consultants as it deems appropriate. Finally, the court is granted the discretion to "take such other action in the public interest as the court may deem appropriate." Id. While the court may do any of the preceding, it is not required to follow any of these procedures.

Our amendments to section five of the Clayton Act add language stating that nothing in that section will be "construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." This language is not intended to make any changes to existing law, but merely to restate the current interpretation of the law. Under the statute, the court is not required to conduct an evidentiary hearing, but is permitted to do so or to take testimony if it wishes to do so. See 15 U.S.C. § 16(f). This will remain the procedure, a court will be permitted, but not required, to conduct evidentiary hearings in making its Tunney Act determination. Additionally, the statute currently permits in 15 U.S.C. § 16(f)(3) intervention by interested parties in the Tunney Act review proceeding. This will remain the procedure a court will be permitted, but not required, to allow parties to intervene.

Our amendments also make two other minor and technical changes to Tunney Act procedures. First, section 221(b)(1) of the bill permits the district court to authorize an alternative means of publication, rather than publication in the Federal Register, of the public comments received in response to the announcement of the proposed consent decree. A court may only authorize such alternative means of publication if it finds the expense of Federal Register publication exceeds the public interest benefits to be gained from such publication. This provision is intended to avoid unnecessary expense in publishing proposed consent decrees if alternate means are available, such as, for example, posting the proposed decrees electronically, which are sufficient to inform interested persons of the proposed consent decree.

The second technical amendment, found in section 221(b)(3) of our bill, amends the provision of the Tunney Act codified in 15 U.S.C. § 16(g) which requires that defendants notify the court of all communications with the Government relevant to the consent decree, except for communications between the defendant's counsel of record and the Justice Department. Our bill adds language which clarifies the statute's language to make clear that only communications with the defendant, or any officer, director, employee, or agent of such defendant, or other person representing the defendant must be disclosed. The defendant is not required to disclose contacts with the Government concerning the settlement by persons not affiliated with, representing, or acting on behalf of the defendant, for example, competitors of the defendant. The defendant's obligation to disclose contacts by agents or persons representing the defendant, including outside lobbyists, is unaffected by this technical change.

In sum, our bill will mandate that courts engage in meaningful review of the Justice Department's antitrust consent decrees and not merely "rubber stamp" the decrees. It will make clear that it is a misinterpretation of the Tunney Act to limit a court's review to limit judicial review of these consent decrees to whether they make a mockery of judicial function, and therefore overrule recent D.C. Circuit decisions holding to the contrary. The bill is expressly intended to effectuate the legislative intent of the Tunney Act and ensure the ability of courts to effectively review consent decrees to ensure that they are in the public interest. It will require, rather than permit, a court to review a list of enumerated factors to determine whether a consent decree is in the public interest. By restoring a robust and meaningful standard of judicial review, our bill will ensure that the Justice Department's antitrust consent decrees are in the best interests of consumers and competition.

Mr. DEWINE. Mr. President, I rise today, along with Senator HATCH, Senator LEAHY and Senator KOHL, as a sponsor of H.R. 1086, the Standards Development Organization Advancement Act of 2003. H.R. 1086 was passed unanimously by the Judiciary Committee in November 2003, and I am proud to say that H.R. 1086 encompasses many of the provisions of S. 1797, the Antitrust Criminal Penalty Enhancement and Reform Act of 2003, which Senator KOHL and I introduced in October 2003. H.R. 1086 is a comprehensive bill that will enhance and improve the enforcement of U.S. antitrust law in four key areas.

First, and perhaps most important, this bill will raise the penalties for criminal violations of antitrust law and bring those penalties more into line with penalties for other, comparable white collar offenses. Antitrust crimes such as bid rigging or cartel activity cheat consumers and distort the free market just as surely as any other type of commercial fraud, and should be strongly punished. Under current antitrust laws, the maximum criminal penalties for individuals guilty of price-fixing are three years incarceration and $350,000 in fines. For corporations, the maximum fine is $10 million. This bill will, No. 1, raise the maximum prison term to 10 years; No. 2, raise the maximum fine for individuals to $1,000,000; and No. 3, raise the maximum corporate fine to $100 million. By increasing the prison terms for individuals, this bill brings criminal antitrust penalties closer in line with the maximum penalties assessed for mail fraud and wire fraud, which are both 20 years. Executives and other antitrust offenders need to know that they face serious consequences when they collude with their competitors, and this bill will send that message to the marketplace.

Second, this bill improves on an investigative and prosecutorial tool already being employed effectively by the Justice Department. Since 1993 the Antitrust Division has successfully used a revised corporate amnesty program to help infiltrate and break-up criminal antitrust conspiracies. In short, if a corporate conspirator self-reports its illegal activity to the Antitrust Division and meets certain conditions- it must be the first conspirator to confess, it cannot be the ringleader of the conspiracy, and it must agree to cooperate fully with the investigation, among other things- it will receive a "free pass" from prosecution. This program has been extremely successful in cracking conspiracies, because it creates a strong uncertainty dynamic among co-conspirators; members of the cartel can never be sure that one of the other conspirators will not confess its illegal activity to the Antitrust Division in order to avoid criminal liability. This uncertainty decreases the likelihood of cartels forming to begin with, and makes cartels less stable when they do form.

H.R. 1086 helps to enhance the Division's corporate amnesty program by expanding its reach. The current amnesty program does not affect the civil liability of the conspirators; that is, a corporation cooperating with the Division through the amnesty program receives protection from government prosecution, but may still be sued in court by private parties for treble damages. This bill decreases that liability by limiting the damages a private plaintiff may recover from a corporation that has cooperated with the Antitrust Division. Specifically, the conspirator is not liable for the usual treble-damages; instead, it is only liable for actual damages. This modification recognizes that a corporation that has fully cooperated with the Antitrust Division is less culpable than other conspirators, and provides a far greater incentive for corporations to cooperate with the Antitrust Division.

Third, H.R. 1086 addresses a concern raised recently by a string of court opinions that appear to limit the depth of review required by the Tunney Act. In brief, the Tunney Act requires that prior to implementing an antitrust consent decree a court must review that decree to assure that it is in the public interest; historically, that requirement has been understood to require that the courts engage in more than merely "rubber-stamping" those decrees. A number of recent opinions have led some to question the depth of review required by the Tunney Act. This bill makes clear that the Tunney Act requires what it has always required, and that mere rubber-stamping is not acceptable. In addition, H.R. 1086 makes a small number of minor modifications and revisions to ensure both that the Tunney Act accurately reflects its original intent and that it effectively functions in the modern legal and economic environment.

Finally, this bill will treat Standard Development Organizations (SDOs) more favorably under the antitrust laws. SDOs are private, voluntary non-profit organizations that set standards for industry products- e.g., one SDO sets the standard for the required depth of a swimming pool before a diving board may be installed. Under the bill, qualifying SDOs which pre-notify the Antitrust Division of their standard-setting activities will not be subject to treble damages in private suits brought against them. Moreover, SDO activities will be scrutinized for antitrust violations under the less strict "rule of reason" legal standard, and SDOs may be awarded certain costs and attorney fees if they substantially prevail in litigation which is later held to be frivolous.

In all of these ways, H.R. 1086 modernizes and enhances the enforcement of U.S. antitrust laws, and I am proud to sponsor it.

Mr. McCONNELL. I ask unanimous consent that the Hatch-Leahy amendment at the desk be agreed to, the committee-reported substitute, as amended, be agreed to, the bill, as amended, be read a third time and passed, the motions to reconsider be laid upon the table en bloc, and any statements relating to the bill be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 3010) was agreed to.

(The amendment is printed in today's RECORD under "Text of Amendments.")

The committee amendment, in the nature of a substitute, as amended, was agreed to.

The bill (H.R. 1086), as amended, was read the third time and passed.

ORDERS FOR MONDAY, APRIL 5, 2004

Mr. McCONNELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 1 p.m. on Monday, April 5. I further ask that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved for their use later in the day, and the Senate then begin a period for morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

AUTHORITY TO FILE

Mr. McCONNELL. I ask unanimous consent that notwithstanding the Senate's adjournment, it be in order for the Commerce Committee to file legislative matters until 2 p.m. today.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. McCONNELL. On Monday, the Senate will be in a period for the transaction of morning business throughout the day. There will be no rollcall votes on Monday, but Senators are encouraged to come to the floor to deliver morning business statements if they have any.

As a reminder, earlier today the majority leader propounded a unanimous consent request that would have allowed us to take up and begin debate on S. 2207, the Pregnancy and Trauma Care Access Protection Act of 2004. There was an objection to that request, and the majority leader was forced to file cloture on the motion to proceed.

The cloture vote on the motion to proceed to S. 2207 will occur on Wednesday of next week at 2:15, and that vote will be the next rollcall vote.

ORDER FOR ADJOURNMENT

Mr. McCONNELL. If there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the previous order, following the remarks of Senator WYDEN for up to 15 minutes and Senator SESSIONS for up to 15 minutes.

Mr. REID. Mr. President, I ask unanimous consent to add Senator CORZINE for 10 minutes following that.

Mr. McCONNELL. Senator CORZINE for 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. WYDEN pertaining to the submission of S. Res. 330 are printed in today's RECORD under "Submitted Resolutions.")

The PRESIDING OFFICER (Mrs. DOLE). The Senator from Alabama is recognized.

INCREASE IN EMPLOYMENT

Mr. SESSIONS. Madam President, I would like to celebrate the good employment news we received today.

I think it is important for us to at least take a few moments to celebrate what was revealed today in the March employment figures released by the Department of Labor statistics.

I just left a hearing of the Joint Economic Committee, of which I am a

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2005, I caused to be served a copy of **MARSULEX, INC. AND CHEMTRADE LOGISTICS (U.S.) INC.'S MEMORANDUM OF LAW IN SUPPORT OF THEIR AGREED MOTION FOR A FINDING OF "SATISFACTORY COOPERATION" AND LIMITATION OF DAMAGES PURSUANT TO THE ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004** to be served on counsel of record by facsimile and U.S. Mail:

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