K&L ALERT

Antitrust & Trade Regulation

JULY 2004

President Bush Signs Into Law Important Changes to U.S. Antitrust Laws

President Bush signed into law on June 23, 2004 H.R. 1086, a bill that includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") and the Standard Development Organization Advancement Act of 2004 ("SDOAA"). H.R. 1086 makes a number of significant changes to U.S. antitrust laws. ACPERA, among other things, increases significantly the penalties for criminal violations of the antitrust laws and bolsters incentives for companies to self-report antitrust violations in order to take advantage of the Department of Justice's amnesty program. SDOAA, among other things, mandates rule of reason treatment for certain qualifying standard development efforts.

ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT OF 2004

ACPERA increases significantly the penalties for businesses and individuals found guilty of violating Sections 1 through 3 of the Sherman Act, 15 U.S.C. §§ 1 through 3. ACPERA increases the statutory maximum fine for corporations from $10 million to $100 million, the statutory maximum fine for individuals from $350,000 to $1 million, and the maximum term of imprisonment from 3 to 10 years.

Prior to ACPERA, the government was increasingly relying on the so-called "alternative fine" provision of 18 U.S.C. § 3571(d) when seeking to impose substantial fines for violations of the antitrust laws, especially in the case of international cartels. Section 3571(d) authorizes fines of up to twice the gross gain (derived by all conspirators) or loss (suffered by all victims) resulting from the violation. Using § 3571(d), since 1997, the government had obtained five agreed-to fines in excess of $100 million. However, the government's reliance on § 3571(d) is not without potential problems for prosecutors, including whether the government could in any given case sustain its burden (which may be beyond a reasonable doubt) of proving at a sentencing hearing the actual amount of the gross gain or gross loss. Moreover, § 3571(d) by its terms does not apply where it would "unduly complicate or prolong the sentencing process." It remains to be seen whether the increased statutory maximums will reduce the government's reliance on the alternative fines provision of § 3571(d). The government will certainly now be on solid ground when seeking fines of up to $100 million, and it will have interesting decisions to make in cases where application of § 3571(d) and the Sentencing Guidelines would yield fines exceeding, but not substantially exceeding, $100 million, especially if the defendant appears willing to litigate the fine.

ACPERA also contains a substantial incentive for corporations to take advantage of the Department of Justice's highly successful corporate leniency program. Under the leniency program, the first member of a price-fixing or other illegal conspiracy who reports the illegal cartel and cooperates with the government (and meets certain other conditions) is granted amnesty from criminal prosecution. ACPERA provides an additional benefit to qualifying cooperators: it limits their damages in follow-on civil litigation to the "actual damages sustained" by the private plaintiff (*i.e.*, single damages, rather than treble damages ordinarily imposed under the antitrust laws). In order to take

advantage of this "de-trebling" provision, however, the cooperator, in addition to cooperating with the government, must assist the private claimant(s) (including a class of claimants) by, among other things, providing accounts of facts, producing documents and providing testimony. This de-trebling provision is subject to a five-year sunset provision.

Finally, ACPERA also amends that Antitrust Procedures Act of 1974 (know as the Tunney Act). The Tunney Act requires judicial review of antitrust consent decrees to determine whether they are in the public interest. The amendments are designed to increase the level of judicial scrutiny of consent decrees, requiring (rather than permitting) evaluating courts to consider a variety of factors, including competitive impacts, provisions for enforcement and modification, duration of relief, alternative remedies, and impact upon competition in the relevant market(s) and upon the public in general.

THE STANDARD DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2004

SDOAA, also part of H.R. 1086, seeks to reduce the antitrust exposure of qualifying standards development organizations ("SDOs") through amendments to the National Cooperative Research and Production Act of 1993. Among other things, SDOAA legislatively mandates a rule of reason analysis for all activities of qualifying SDOs, except for price fixing and market allocation, which remain subject to per se condemnation.[1] To be eligible for SDOAA's protections, SDOs must file disclosures of their activities with the government. The Department of Justice and the Federal Trade Commission announced on June 25, 2004 the implementing procedures for registering an SDO with the agencies. The implementing procedures require, among other things, that notifications be filed no later than 90 days after the date of the enactment of SDOAA or the commencement of standard development activities and include documents showing the nature and scope of the SDO's activities.

SDOAA also de-trebles damages and eliminates joint and several liability for qualifying SDOs. The Act does not, however, modify the liability under the antitrust laws of any person not a full-time employee of a qualifying SDO who violates the antitrust laws by participating in standard development activity deemed illegal.

Although these amendments are not particularly controversial, they are complex and can be difficult to navigate. Moreover, failing to timely and effectively invoke the benefits of the changes can have serious consequences, including continued exposure to treble damages under circumstances where the law may now limit potential exposure to actual damages. Potentially affected corporations and individuals should seek knowledgeable counsel to ensure that they can effectively take advantage of these important changes in the law.

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[1] The Act further excepts from mandatory rule of reason treatment exchanges of competitive information not reasonably required for standard setting.