



MEMORANDUM

TO: ANSI Accredited Standards Developers

FROM: David Karmol
Vice President, Public Policy and Government Affairs

DATE: September 9, 2004

SUBJECT: UPDATED: Frequently Asked Questions (FAQ) Regarding Public Law 108-237
The Standards Developing Organization Advancement Act of 2004 (HR 1086)

As a follow-up to my memorandum of August 30, 2004, I am writing to inform ANSI-accredited standards developers of an additional document that is required by the U.S. Department of Justice for all filings under HR 1086, The Standards Developing Organizations Advancement Act of 2004. The Act provides a degree of shelter for certain standards developers from the treble damages liability in current antitrust laws.

As noted in my previous correspondence on this topic, since the Act was signed into law by President George W. Bush on June 22, 2004, a number of ANSI-accredited standards development bodies have contacted the Institute with questions about the law and its implementation. A summary of the most "Frequently Asked Questions" and their answers was developed and circulated on to ANSI-accredited standards developers for information and review. The attached document supersedes the FAQ file that was circulated on August 30, 2004. This paper is intended to provide background information and general guidance on this recently enacted legislation. As appropriate, excerpts from the law itself are cited.

NOTE: The following questions and answers are not intended as legal advice and should not be viewed as such. This document shall not be viewed as an alternative to seeking legal counsel regarding the individual circumstances of each organization's operations, standards-setting activities, and overall antitrust exposure. These comments are also not intended to provide a definitive answer as to whether filing under the provisions of HR 1086 is appropriate, necessary or prudent for any particular organization.

Should you have any additional questions, please e-mail them to me directly at dkarmol@ansi.org.

**Frequently Asked Questions (FAQ) Regarding Public Law 108-237
The Standards Developing Organization Advancement Act of 2004 (HR 1086)**

REVISED – September 9, 2004

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Q1 What does HR 1086 do for Standards Developers?

A1 HR 1086, *The Standards Developing Organization Advancement Act of 2004* (PL 108-237) provides qualified standards developers with an opportunity to file for, and obtain, a limited exclusion from antitrust liability for treble damages. This protection is identical to the protection which has been available to joint venturers under the National Cooperative Research and Production Act since 1993, which also remains available to those utilizing a consortium, or other informal process to develop standards.

[To view a .pdf version of HR 1086](#)

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ237.108.pdf

Q2 Are all standards developers eligible to file under the Act?

A2 Section 103 of HR 1086 defines a standards development organization (SDO) that is eligible to file under Section 107 of the Act.

An SDO is defined under the Act as an “. . . organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, and consensus in a manner consistent with the Office of Management and Budget Circular A-119....”

This definition includes all ANSI-accredited standards developers.

Q3 What needs to be done to take advantage of the law?

A3 Section 107 of HR 1086 requires a qualified organization that wishes to invoke the limitation on liability to file, with the Department of Justice and with the FTC simultaneously, a “written notification disclosing (A) the name and principal place of business of the standards developing organization, and (B) documents showing the nature and scope of such activity.”

The Department of Justice also requires submission of a draft notice, formatted as shown in the Annex to this FAQ or as shown in the online example (www.usdoj.gov/atr/public/guidelines/ncrpa/204123e.htm), for publication in the *Federal Register*.

Q4 Will ANSI file one form covering all of its Accredited Standards Developers?

A4 No. There is no provision in the law for an organization to file on behalf of another entity. ANSI may not file on behalf of its accredited standards developers. Under the terms of the law, a standards developer seeking the protection of the law must file for itself.

Q5 When must a filing be made?

A5 Section 107 of HR 1086 indicates that an SDO that wishes to file, and obtain the law's protection, must do so:

- within 90 days of commencing a standards development activity, or
- to cover existing standards activity, within 90 days of the passage of the Act. As the Act was approved on June 22 2004, the 90-day deadline is September 20, 2004.

An SDO is not required to make a filing under the act.

Q6 Does the Act extend any protection to the companies or individuals participating in a standards development activity?

A6 No. The Act protects only the standards developing organization. According to Section 108 of HR 1086, the entities involved in the standards-setting activity are in the same position relative to the antitrust laws as before the passage of the Act.

Q7 Does the law negatively affect existing standards setting organizations, such as consortia and forums, which have previously filed for protection under NCRPA?

A7 No. Section 108 of the law explicitly states that it does not alter antitrust treatment under existing law, for standards developers within the scope of the act, or for organizations NOT within the scope of the Act.

Q8 What is required by the filing requirement for "documents showing the nature and scope of such activity"?

A8 The Department of Justice has not given direct guidance on this issue.

There is little downside or risk to a standards developer that chooses to file a general statement of its standards activities. There is also general agreement that broad statements of scope* will likely be in the best interests of the SDO applicants, the Department of Justice, and other affected parties.

While it is possible that the Department of Justice may ask a standards development body for more detail, it is likely that the Department will be better served by a broad description than a narrow description. Some groups have suggested that they will file a document that contains a broad statement of the scope of their standards activities, along with an appendix, listing all current published and in-process standards, for illustrative purposes.

*NOTE: A broad statement of scope might be similar to the scoping statement(s) filed with ANSI when an organization applies for ANSI accreditation as a standards developer.

To download a .pdf file containing all scope statements for ANSI-accredited standards developers, please visit www.ansi.org/standards/domestic and follow the left-hand sidebar links for “ANSI-Accredited Standards Developers.”

Q9 Has the Department of Justice issued any guidelines?

A9 Yes, a number of points relating to instructions for filing the appropriate documents, including where and when to file, and what is required in the filing, were identified in a June 24, 2004, press release posted to the Department’s website (http://www.usdoj.gov/opa/pr/2004/June/04_at_443.htm). This press release is specific to the SDO Advancement Act of 2004.

An excerpt is shown below:

SDOs must file a proper notification with the Department and the Federal Trade Commission (FTC) to obtain the liability limiting protections provided by the Act. Proper notifications should:

- (1) be filed not later than 90 days after the date of the enactment of the Act, or 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating voluntary consensus standards;
- (2) disclose the name of the SDO and its principal place of business;
- (3) provide documents showing the nature and scope of the standards development activity;
- (4) contain two copies of all documents submitted to the Department and one copy of all documents submitted to the FTC;
- (5) be delivered to the Department and the FTC at the following addresses:

U.S. Department of Justice Antitrust Division Premerger Notification Unit 950 Pennsylvania Avenue, N.W. Room 3335 Washington, DC 20530 FEDEX Zip Code: 20004	Federal Trade Commission Bureau of Competition Office of Policy and Coordination 600 Pennsylvania Ave., NW, Room 392 Washington, DC 20580
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The DoJ also maintains information on the filing of notifications under the National Cooperative Research and Production Act of 1993 (“NCRPA”). This information and related links can be found on the DoJ website (<http://www.usdoj.gov/atr/public/guidelines/ncrpa.htm>).

Any additional information or guidance will be provided to ANSI members and ANSI-accredited standards developers as it becomes available.

September 9, 2004

U.S. Department of Justice
Antitrust Division

NOTICE PURSUANT TO THE NATIONAL COOPERATIVE RESEARCH
AND PRODUCTION ACT OF 1993 - **[NAME OF STANDARDS DEVELOPMENT
ORGANIZATION]**

Notice is hereby given that, on **[date notification is received and stamped in Premerger Notification Unit]**, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 et seq. (“the Act”), **[name of standards development organization (“abbreviation of name”)]** has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the name and principal place of business of the standards development organization is: **[name of standards development organization, city, and either the two letter U.S. Postal Service abbreviation for the state or, if a foreign-located organization, the name of the country in all capital letters]**. The nature and scope of **[abbreviation of name]**'s standards development activities are: **[provide a description, in general terms, of the organization's standards development activities]**.

Dorothy B. Fountain
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Antitrust Division