

# Congress Poised to Bolster Criminal Antitrust Penalties: An Update on H.R. 1086

## Melanie Sabo

For years, federal prosecutors, judges and academics have questioned whether the criminal penalties for violating the antitrust laws are too lenient. In the wake of several high profile enforcement actions and the Enron, WorldCom and Adelphia fraudulent accounting scandals, Congress is poised to swing the pendulum in the opposite direction with H.R. 1086 (previously considered as S. 1797), which passed the Senate on April 2, 2004. H.R. 1086 amends the Sherman Act<sup>1</sup> to raise the maximum sentence for criminal antitrust violations to \$1 million and ten years imprisonment for individuals, and a \$100 million fine for corporations.

Although the Antitrust Division has had great success in obtaining corporate fines well above \$10 million in recent years through use of the alternative maximum fine provisions of 18 U.S.C. § 3571(d),<sup>2</sup> Congress seems intent on aligning the penalties for antitrust violators with the increased penalties now available for securities fraud violations as a result of Sarbanes-Oxley. Price fixing, bid rigging, and market allocation may well cause customers to pay more for goods or services, but it is debatable whether the impact of such conduct is at all comparable to that of the fraudulent accounting schemes uncovered in recent years.

Whether one views the new maximum penalties as proportional or not, the passage of H.R. 1086 appears likely. On June 10, 2003, the House passed what is now Title I of the bill—the Standards Development Organization Advancement Act of 2003, introduced by Representative Sensenbrenner, Chair of the House Judiciary Committee. This title would amend the National Cooperative Research and Production Act<sup>3</sup> to provide that specified standards-setting activities of a “standards development organization” would be subject to rule of reason treatment in any action under federal or state antitrust laws.<sup>4</sup> Title I also would limit recovery to single damages when the nature and scope of the standards-setting organization’s activities have been disclosed in advance to federal antitrust enforcement agencies.

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*Melanie Sabo is a partner in the antitrust and trade regulation group at Preston, Gates & Ellis LLP, and Vice Chair of the Legislation Committee of the ABA Section of Antitrust Law.*

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<sup>1</sup> 15 U.S.C. §§ 1–3.

<sup>2</sup> 18 U.S.C. § 3571(d) provides that the government can set as an alternative to the statutory maximum fine an amount that is twice the gain or twice the loss from the conduct. The principal reason for the Antitrust Division’s success in this area is that corporate defendants usually enter into a negotiated plea agreement rather than challenge the Division at trial and, if necessary, at a contested sentencing hearing. Plea agreements may include non-prosecution provisions involving other product areas or for corporate executives, resolution of U.S. travel status for individuals who are not U.S. citizens, or other benefits that outweigh the cost of agreeing to a fine much higher than the Sherman Act statutory maximum. Since 1996, the Division has obtained fines in excess of the statutory maximum \$10 million in more than 30 cases, obtaining a fine as high as \$500 million from a defendant of the vitamins cartel.

<sup>3</sup> 15 U.S.C. §§ 4301–4305.

<sup>4</sup> For further discussion of Title I of the bill, see ABA SECTION OF ANTITRUST LAW, REPORT AND RECOMMENDATION ON H.R. 1086, STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT (Nov. 2003), available at <http://www.abanet.org/antitrust/comments/ncrpa.pdf>.

After referral to the Senate Judiciary Committee, the bill was reported out with an amendment in the nature of a substitute that incorporated S. 1797—the Antitrust Criminal Penalty Enhancement and Reform Act of 2003, now Title II of H.R. 1086. In addition to the increased fines and jail terms discussed above, Title II also contains a provision to reduce civil liability for corporations that participate in the Antitrust Division’s corporate leniency program,<sup>5</sup> and provides for slight modifications to the Tunney Act.<sup>6</sup>

The modest Tunney Act amendment is dramatically different from the bill as introduced, which drew criticism from both the private antitrust bar and reportedly the Antitrust Division.<sup>7</sup> In response to the perception that federal judges were simply “rubber-stamping” any proposed consent decrees put before them by the Antitrust Division, the amendment would have required federal judges to make an “independent” determination that the proposed settlement is in the public interest following a judicial finding that there is a “reasonable belief, based on substantial evidence and reasoned analysis, to support the United States’ conclusion that the consent judgment is in the public interest.” That language has been removed. The findings still state that the purpose of the amendment is to “effectuate the original Congressional intent in enacting the Tunney Act” and that it misconstrues the original intent to limit review to whether a “consent judgment would make a ‘mockery of the judicial function,’”<sup>8</sup> but the revised language simply requires that judges “shall” consider certain identified factors when reviewing a decree submitted by the parties. Those factors are largely unchanged from the current language, and are routinely addressed by the Antitrust Division in their motion papers when seeking entry of a decree.<sup>9</sup> The bill specifically states that the reviewing court is not required to conduct an evidentiary hearing, nor required to permit anyone to intervene.<sup>10</sup> As a practical matter, the change is unlikely to affect or alter the current procedures.<sup>11</sup>

As of this writing, H.R. 1086 awaits floor consideration at the House of Representatives. The cartel penalty and the Tunney Act provisions have not been the subject of hearings or substantial debate in Congress, and no hearings are anticipated at this juncture. It appears likely that a Conference between House and Senate will be unnecessary. There are a number of measures lined up ahead of the bill, but the House could take it up in the in next several weeks. The Bush Administration has taken no formal position on the bill at this time. ●

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<sup>5</sup> Under H.R. 1086, participants in the leniency program would be liable only for single damages and only with respect to the sales of their own goods or services. De-trebling would be available only to corporations found by a court to have provided a “full account” of relevant facts and otherwise “provided satisfactory cooperation” to private plaintiffs. The de-trebling provisions would sunset after five years. Proposed H.R. 1086, §§ 211–214.

<sup>6</sup> The Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §§ 16(b)–(h).

<sup>7</sup> For the Section’s comments, see COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW ON H.R. 1086: INCREASED CRIMINAL PENALTIES, LENIENCY DETREBLING AND THE TUNNEY ACT AMENDMENT (Jan. 2004), available at <http://www.abanet.org/antitrust/comments/increasedcriminalpenalties.pdf>.

<sup>8</sup> Proposed H.R. 1086, § 221(a).

<sup>9</sup> The only new factors identified are (i) whether the terms of the decree are ambiguous; and (ii) the impact of the decree on competition in the relevant market or markets. See Proposed H.R. 1086 at §221(b)(2).

<sup>10</sup> *Id.*

<sup>11</sup> One modification of the Tunney Act that the Antitrust Division may have supported allows alternatives to publishing all comments received and the Division’s responses to those comments in the *Federal Register*. Use of an alternative method must be based upon a finding that the publication expense in the *Federal Register* exceeds the public interest benefits to be gained. See Proposed H.R. 1086 at 221(b)(1). The Antitrust Division received thousands of comments in response to the consent decree filed in the *Microsoft* case, and this provision may be intended to address similar situations.