

108TH CONGRESS  
1ST SESSION

# S. 1799

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.

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## IN THE SENATE OF THE UNITED STATES

OCTOBER 30, 2003

Mr. LEAHY (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

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.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Standards Develop-  
5       ment Organization Advancement Act of 2003”.

1 **SEC. 2. FINDINGS.**

2 The Congress finds the following:

3 (1) In 1993, the Congress amended and re-  
4 named the National Cooperative Research Act of  
5 1984 (now known as the National Cooperative Re-  
6 search and Production Act of 1993 (15 U.S.C. 4301  
7 et seq.)) by enacting the National Cooperative Pro-  
8 duction Amendments of 1993 (Public Law 103–42)  
9 to encourage the use of collaborative, procompetitive  
10 activity in the form of research and production joint  
11 ventures that provide adequate disclosure to the  
12 antitrust enforcement agencies about the nature and  
13 scope of the activity involved.

14 (2) Subsequently, in 1995, the Congress in en-  
15 acting the National Technology Transfer and Ad-  
16 vancement Act of 1995 (15 U.S.C. 272 note) recog-  
17 nized the importance of technical standards devel-  
18 oped by voluntary consensus standards bodies to our  
19 national economy by requiring the use of such stand-  
20 ards to the extent practicable by Federal agencies  
21 and by encouraging Federal agency representatives  
22 to participate in ongoing standards development ac-  
23 tivities. The Office of Management and Budget on  
24 February 18, 1998, revised Circular A–119 to re-  
25 flect these changes made in law.

1           (3) Following enactment of the National Tech-  
2           nology Transfer and Advancement Act of 1995,  
3           technical standards developed or adopted by vol-  
4           untary consensus standards bodies have replaced  
5           thousands of unique Government standards and  
6           specifications allowing the national economy to oper-  
7           ate in a more unified fashion.

8           (4) Having the same technical standards used  
9           by Federal agencies and by the private sector per-  
10          mits the Government to avoid the cost of developing  
11          duplicative Government standards and to more read-  
12          ily use products and components designed for the  
13          commercial marketplace, thereby enhancing quality  
14          and safety and reducing costs.

15          (5) Technical standards are written by hun-  
16          dreds of nonprofit voluntary consensus standards  
17          bodies in a nonexclusionary fashion, using thousands  
18          of volunteers from the private and public sectors,  
19          and are developed under the standards development  
20          principles set out in Circular Number A-119, as re-  
21          vised February 18, 1998, of the Office of Manage-  
22          ment and Budget, including principles that require  
23          openness, balance, transparency, consensus, and due  
24          process. Such principles provide for—

1 (A) notice to all parties known to be af-  
2 fected by the particular standards development  
3 activity,

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

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

9 (D) readily available access to essential in-  
10 formation regarding proposed and final stand-  
11 ards,

12 (E) the requirement that substantial  
13 agreement be reached on all material points  
14 after the consideration of all views and objec-  
15 tions, and

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

18 (6) There are tens of thousands of voluntary  
19 consensus standards available for government use.  
20 Most of these standards are kept current through in-  
21 terim amendments and interpretations, issuance of  
22 addenda, and periodic reaffirmation, revision, or  
23 reissuance every 3 to 5 years.

1           (7) Standards developed by government entities  
2           generally are not subject to challenge under the anti-  
3           trust laws.

4           (8) Private developers of the technical stand-  
5           ards that are used as Government standards are  
6           often not similarly protected, leaving such developers  
7           vulnerable to being named as codefendants in law-  
8           suits even though the likelihood of their being held  
9           liable is remote in most cases, and they generally  
10          have limited resources to defend themselves in such  
11          lawsuits.

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

16          (10) As was the case with respect to research  
17          and production joint ventures before the passage of  
18          the National Cooperative Research and Production  
19          Act of 1993, if relief from the threat of liability  
20          under the antitrust laws is not granted to voluntary  
21          consensus standards bodies, both regarding the de-  
22          velopment of new standards and efforts to keep ex-  
23          isting standards current, such bodies could be forced  
24          to cut back on standards development activities at

1 great financial cost both to the Government and to  
2 the national economy.

3 **SEC. 3. DEFINITIONS.**

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

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

8 “(7) The term ‘standards development activity’  
9 means any action taken by a standards development  
10 organization for the purpose of developing, promul-  
11 gating, revising, amending, reissuing, interpreting,  
12 or otherwise maintaining a voluntary consensus  
13 standard, or using such standard in conformity as-  
14 sessment activities, including actions relating to the  
15 intellectual property policies of the standards devel-  
16 opment organization.

17 “(8) The term ‘standards development organi-  
18 zation’ means a domestic or international organiza-  
19 tion that plans, develops, establishes, or coordinates  
20 voluntary consensus standards using procedures that  
21 incorporate the attributes of openness, balance of in-  
22 terests, due process, an appeals process, and con-  
23 sensus in a manner consistent with the Office of  
24 Management and Budget Circular Number A-119,  
25 as revised February 10, 1998.

1           “(9) The term ‘technical standard’ has the  
2           meaning given such term in section 12(d)(4) of the  
3           National Technology Transfer and Advancement Act  
4           of 1995.

5           “(10) The term ‘voluntary consensus standard’  
6           has the meaning given such term in Office of Man-  
7           agement and Budget Circular Number A-119, as re-  
8           vised February 10, 1998.”; and

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

10          “(c) The term ‘standards development activity’ ex-  
11          cludes the following activities:

12               “(1) Exchanging information among competi-  
13               tors relating to cost, sales, profitability, prices, mar-  
14               keting, or distribution of any product, process, or  
15               service that is not reasonably required for the pur-  
16               pose of developing or promulgating a voluntary con-  
17               sensus standard, or using such standard in con-  
18               formity assessment activities.

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

22               “(3) Entering into any agreement or conspiracy  
23               that would set or restrain prices of any good or serv-  
24               ice.”.

1 **SEC. 4. RULE OF REASON STANDARD.**

2 Section 3 of the National Cooperative Research and  
3 Production Act of 1993 (15 U.S.C. 4302) is amended by  
4 striking “of any person in making or performing a con-  
5 tract to carry out a joint venture shall” and inserting the  
6 following: “of—

7 “(1) any person in making or performing a con-  
8 tract to carry out a joint venture, or

9 “(2) a standards development organization  
10 while engaged in a standards development activity,  
11 shall”.

12 **SEC. 5. LIMITATION ON RECOVERY.**

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

15 (1) in subsections (a)(1), (b)(1), and (c)(1) by  
16 inserting “, for a standards development activity en-  
17 gaged in by a standards development organization  
18 against which such claim is made” after “joint ven-  
19 ture”, and

20 (2) in subsection (e)—

21 (A) by inserting “, or of a standards devel-  
22 opment activity engaged in by a standards de-  
23 velopment organization” before the period at  
24 the end, and

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



1           (3) by inserting after subsection (d) the fol-  
 2       lowing:

3       “(e) Subsections (a), (b), and (c) shall not be con-  
 4       strued to modify the liability under the antitrust laws of  
 5       any person (other than a standards development organiza-  
 6       tion) who—

7           “(1) directly (or through an employee or agent)  
 8       participates in a standards development activity with  
 9       respect to which a violation of any of the antitrust  
 10      laws is found,

11          “(2) is not a fulltime employee of the standards  
 12      development organization that engaged in such ac-  
 13      tivity, and

14          “(3) is, or is an employee or agent of a person  
 15      who is, engaged in a line of commerce that is likely  
 16      to benefit directly from the operation of the stand-  
 17      ards development activity with respect to which such  
 18      violation is found.”.

19   **SEC. 6. ATTORNEY FEES.**

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

22          (1) in subsection (a) by inserting “, or of a  
 23      standards development activity engaged in by a  
 24      standards development organization” after “joint  
 25      venture”, and

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

2 “(c) Subsections (a) and (b) shall not apply with re-  
3 spect to any person who—

4 “(1) directly participates in a standards devel-  
5 opment activity with respect to which a violation of  
6 any of the antitrust laws is found,

7 “(2) is not a fulltime employee of a standards  
8 development organization that engaged in such ac-  
9 tivity, and

10 “(3) is, or is an employee or agent of a person  
11 who is, engaged in a line of commerce that is likely  
12 to benefit directly from the operation of the stand-  
13 ards development activity with respect to which such  
14 violation is found.”.

15 **SEC. 7. DISCLOSURE OF STANDARDS DEVELOPMENT AC-**  
16 **TIVITY.**

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

19 (1) in subsection (a)—

20 (A) by redesignating paragraphs (1), (2),  
21 and (3) as subparagraphs (A), (B), and (C), re-  
22 spectively,

23 (B) by inserting “(1)” after “(a)”, and

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

1       “(2) A standards development organization may, not  
2 later than 90 days after commencing a standards develop-  
3 ment activity engaged in for the purpose of developing or  
4 promulgating a voluntary consensus standards or not later  
5 than 90 days after the date of the enactment of the Stand-  
6 ards Development Organization Advancement Act of  
7 2003, whichever is later, file simultaneously with the At-  
8 torney General and the Commission, a written notification  
9 disclosing—

10           “(A) the name and principal place of business  
11 of the standards development organization, and

12           “(B) documents showing the nature and scope  
13 of such activity.

14 Any standards development organization may file addi-  
15 tional disclosure notifications pursuant to this section as  
16 are appropriate to extend the protections of section 4 to  
17 standards development activities that are not covered by  
18 the initial filing or that have changed significantly since  
19 the initial filing.”,

20           (2) in subsection (b)—

21           (A) in the 1st sentence by inserting “, or  
22 a notice with respect to such standards develop-  
23 ment activity that identifies the standards de-  
24 velopment organization engaged in such activity

1           and that describes such activity in general  
2           terms” before the period at the end, and

3                 (B) in the last sentence by inserting “or  
4           available to such organization, as the case may  
5           be” before the period,

6                 (3) in subsection (d)(2) by inserting “, or the  
7           standards development activity,” after “venture”,

8                 (4) in subsection (e)—

9                         (A) by striking “person who” and inserting  
10           “person or standards development organization  
11           that”, and

12                        (B) by inserting “or any standards devel-  
13           opment organization” after “person” the last  
14           place it appears, and

15                 (5) in subsection (g)(1) by inserting “or stand-  
16           ards development organization” after “person”.

17 **SEC. 8. RULE OF CONSTRUCTION.**

18           Nothing in this Act shall be construed to alter or  
19           modify the antitrust treatment under existing law of—

20                 (1) parties participating in standards develop-  
21           ment activity of standards development organiza-  
22           tions within the scope of this Act, or

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

