JANUARY 17, 2020

COMMENTS ON PROPOSED REVISIONS TO ESSENTIAL REQUIREMENTS OF THE AMERICAN NATIONAL STANDARDS INSTITUTE (ANSI)

INTRODUCTION

I am pleased to provide comments below on proposed revisions to ANSI's Essential Requirements ("ERs") as circulated for public comments on December 9, 2019.[1]

Page and line numbers referenced in the comments hereinbelow refer to the page numbers and line numbers in document ExSC_017_2019 as provided in the ANSI Standards Action notice.

As noted in my comments, many of the proposed revisions appear to go in the right direction, however some revisions appear to not go far enough to resolve the issue(s), and some much-needed definitions are missing from the text. The Annex to the ERs defines multiple terms, including the term "consensus" but does not define the basic terms "balance," "openness," and "standards activity" (or its equivalent term "standards development.") The addition of definitions for these basic terms would promote a better understanding and thus a more uniform adherence of ASDs to the ERs, and safeguard competition in standards development.

In addition, it is hard to understand the rationale for some of the changes that go beyond "clarifications." The lack of explanation for the rationale behind these revisions in the Notice soliciting comments makes it difficult to comment on them.[2]

COMMENTS

1. **Openness (page 1, lines 15-18)**. I support this proposed change of bringing up the text from the footnote into the main text. Openness is one of the core principles of sound standards' development, as recognized by the ERs as well as national and multilateral documents (OMB

[1] ANSI *Standards Action*, Vol. 50, #49 at page 25, dated December 6, 2019 but circulated for comment on December 9, 2019
https://share.ansi.org/Shared%20Documents/Standards%20Action/2019-PDFs/SAV5049.pdf.

[2] For example, the reason for the deletion of categories on page 2, footnote 3, is not provided.

Circular A-119 and the WTO TBT Agreement). Lifting the text up to the main text correctly amplifies its importance.

Too narrow description of "openness"; typo or misplaced word – "interests" (page 1, line 10). On page 1, lines 8-10, the text says a "[t]imely and adequate notice ... shall be provided to all known directly and materially affected **interests**" (emphasis added). The word "interests" is clearly a typo, because "interests" are an abstract concept and therefore cannot be "notified" of anything. I assume the intention was to say "interested parties" rather than "interests."

A much bigger problem is the current text's limited definition of "openness" whereby only "known directly and materially affected interests" are notified.

Circular OMB A-119 as well as the DOJ antitrust division, refer to the terms term "openness to all interested parties"[3] or "open to interested parties."[4] The ER's text of "known directly and materially affected interest[ed parties]" is significantly more limited than that language, and opens the door for exclusion and failure to notify interested parties who may be argued by SDOs to be "not directly and materially interested, but rather just interested."

In order to bring the text of page 1 lines 8-10 in line with the definition and text of OMB Circular A-119, the text needs to be modified as follows:

""[t]imely and adequate notice ... shall be provided to all ~~known directly and materially affected~~ interested~~s~~ parties"

In addition, it would be helpful if the OMB Circular A-119 definition would be added to the Annex to the ERs, as follows:

> "**Openness:** The procedures or processes used are open to interested parties. Such parties are provided meaningful opportunities to participate in standards development on a non-

[3] See Assistant Attorney General for Antitrust, Makan Delrahim, *Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law*, Remarks Delivered at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (December 7, 2018) at 9 https://www.justice.gov/opa/speech/file/1117686/download ("The [ANSI] principles include openness to all interested parties"); DOJ Antitrust Division Business Review Letter to GSMA (November 27, 2019) ("DOJ Letter to GSMA") at 9 note 20 https://www.justice.gov/atr/page/file/1221321/download ("These principles include openness to all interested parties").

[4] Office of Management and Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, at 16 and 18 81 FR 4673 (January 27, 2016), 81 FR 4673 (January 27, 2016) at 16 (OMB Circular A-119") https://www.govinfo.gov/content/pkg/FR-2016-01-27/pdf/2016-01606.pdf. Full text of the Circular is available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf.

discriminatory basis. The procedures or processes for participating in standards development and for developing the standard are transparent".[5]

2. **Definition of Balance (page 1, line 2 and lines 26-29)**

Line 2 explains that the "standards development process should have a balance of interests" and speaks of the "objective of achieving balance." However, the text does not define balance.

Lines 26-29 say the "historic[]…criteria for balance are that a) no single interest category constitutes more than one-third of the membership of a consensus body dealing with safety-related standards or b) no single interest category constitutes a majority of the membership of a consensus body dealing with other than safety-related standards."

While the text in both line 2 and lines 26-29 goes in the right direction, there seems to be a considerable gap and disconnect between the two as currently drafted, for two reasons. First, the text fails to define the term "balance" or "balance of interests" and; second, because the "historic criteria" would not "achiev[e] balance" in all cases. For example, balance would not be achieved in an area in which members of the "producer" category all share the same strong interest because they represent a subset of "producers" (with other producers, who have a different interest, not being included), while members of other categories are indifferent thus having "no interest" in the matter. In such a case, there would be an effective lack of balance even though the "historic criteria for balance" appear to have been satisfied.

Lack of balance is a very significant issue for ASDs, not only as an important element of adherence with the ANSI ERs, but also because it's an important element under OMB Circular A-119 and can raise or increase antitrust liability for ASDs.[6]

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[5] *Id*.

[6] See, *e.g.,* U.S. Statement of interest, *NSS Labs vs. Crowdstrike, Inc.; Symantec Corp., ESET LLC, Anti-Malware Testing Standards Organization Inc. (AMTSO) and DOES 1-50* (N. Dist. Cal., San Jose) (June 26, 2019) https://www.justice.gov/atr/case-document/file/1178246/download (allegation that a standards development organization developed a standard which unreasonably restrained competition in violation of the Sherman Act. The allegations included an imbalance in the membership that developed the standard. The

U.S. statement argued that the SDO and its members should not enjoy an exemption from *per se* antitrust liability under the U.S. Standards Development Organization Advancement Act of 2004 because of that lack of balance).

See also DOJ Letter to GSMA, *supra* note 3, at 9, https://www.justice.gov/atr/page/file/1221321/download ("Standard setters are not allowed to create and leverage unbalanced processes to adopt favorable self-regulation that constitute a competitive advantage for the incumbent participants"; citing to OMB Circular A-119 and the ANSI ERs).

Realizing that ANSI cannot and should not be tasked with evaluating and policing "balance" in every circumstance, there are nonetheless two important additions to the ERs that can help narrow the gap, as follows:

(a) **Defining balance and its scope**. Adding a definition for "balance of interests" is an extremely useful guidance tool. There are a few existing U.S. Government policy documents that provide inspiration in this regard:

OMB Circular A-119: "Balance: The standards development process should be balanced. Specifically, there should be meaningful involvement from a broad range of parties, with no single interest dominating the decision-making,"[7] "a standard that includes patented technology needs to…take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard."[8]

DOJ: Describes balance as an "adequate balance of interests among those involved in the process so that negotiations prior to the adoption of the standard resemble the benefits of competition" and explains the need for "proper safeguards [to be] practiced by the standard setting organization to ensure that the participants represent the market interests as a whole."[9] The Division also stressed the importance of "balanced representations in…decisional bodies" and suggested that in order to "to achieve that balance" SDOs should "include members with diverse interests" in such bodies.[10]

It would be helpful if the OMB A-119 definition of "balance" were added to the Annex of the ERs. In addition, ANSI may want to offer education to its members about the antitrust analysis of "balance" (a proposal I also made during the December 10, 2019 ANSI IPRPC meeting and sent to the NPC in December).

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[7] See OMB Circular A-119, *supra* note 4, at 16 and 18.

[8] *Id*. At 19. *See* also U.S. Patent and Trademark Office, Department of Justice and National Institute of Standards and Technology, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 19, 2019) at 5-6 and footnote 14 ("This application of best practices is consistent with the guidance of OMB Circular A-119, which states that intellectual property rights policies "should …take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard"
See https://www.uspto.gov/sites/default/files/documents/SEP%20policy%20statement%20signed.pdf or https://www.justice.gov/atr/page/file/1228016/download.

[9] DOJ Letter to GSMA, *supra* note 3, at 4, and 10.

[10] Principal Assistant Attorney General for Antitrust Andrew Finch Letter to ANSI VP & General Counsel, Patricia Griffin, and Chair of the ANSI IPR Policy Committee, Amy Marasco (March 7, 2018) https://www.justice.gov/atr/page/file/1043456/download.

(b) **Creating a mechanism for interested parties to review suspected lack of balance**. Similar to the language on page 3, lines 103-105, it would be helpful for added text to say:

"If a developer receives a written request from an interested party, including a consensus body member, to explain how a standards development activity was balanced, the ASD shall respond in writing within 30 days."

3. **Inconsistent standards for advance notification (page 1, line 8; page 2, line 75; and page 2, line 81)**

Ensuring advance notification is crucial for ensuring that due process safeguards are in place to ensure meaningful participation in standards development activities. Thus, the addition of an advance notification text throughout the ERs is a welcome improvement. However, the proposed revisions employ three different formulas for advance notification in different places, as follows:

- "Timely and adequate notice of any action" (page 1, line 8);
- "Reasonable advance notification" (page 2, line 75); and
- "Reasonable timely notification" (page 2, line 81).

It would make more sense to use a uniform standard, and in this case the "timely and adequate notice" language would make the most sense because it provides for the strongest safeguard ensuring openness.

4. **"General Interest" (page 2, lines 41-47).** There is an inconsistency in the text. In lines 41-42 and 45, the text states that "[i]n defining the interest categories…consideration shall be given at least to the following…. c) general interest". In other words, that "general interest" appears to be a mandatory category.

   Then, line 47 speaks of a ""General Interest" category, if one is offered," thus suggesting that it is an optional category.

   It would be useful to clarify which is the correct case (mandatory or optional).

5. **Meaningful opportunity for participation (page 2, lines 76-77).** The addition of the words "and provide a meaningful [opportunity for participation], debate and deliberation" and "in a fair and equitable manner" offer a useful improvement to the text. Meaningful or effective participation is indeed a correct standard, because otherwise a theoretical or nominal opportunity to participate may wrongfully be considered to be sufficient to meet the ER requirements, which it should not.

However, here to, for the same reasons offered earlier on page 2 of these comments, the narrow limitation that would only allow "directly and materially affected persons" is highly problematic and should be corrected to "all interested parties," that lines 76-77 would be consistent with OMB Circular A-119 if it were to read:

"and provide a meaningful opportunity for participation, debate and deliberation by all ~~directly and materially affected~~ interested persons in a fair and equitable manner.

Notably, the proposition that due process safeguards such as openness and balance should "ensure that **all interested parties** have the opportunity to **participate meaningfully** in developing standards at [the SDO]" (emphasis added) has also been supported by the U.S DOJ Antitrust Division in its Letter to GSMA.[11]

Furthermore, the mention of "suitable media" as the announcement channel (lines 75-76) also makes the text more consistent with the broader category of "all interested persons" (or parties) rather only "directly and materially affected" persons. This is because the media (just like the ANSI *Standards Action*) does not broadcast only to "directly and materially effected" persons. Rather, it broadcasts more broadly to all interested parties.

6. **Appeals issued in writing** (page 3, line 116). The addition of the requirement for appeal decisions to be "issued in writing" is a blessed development, for which the rationale is clear. However, the current addition may be insufficient, because even a one-word appeal decision that reads "dismissed" qualifies as a written decision.

   Hence, it would be helpful to have the text be a bit more detailed and say something like: "and issued in writing in a format that includes the reasoning for the decision".

7. **Define "standards activity" / "standards development activity" / "standards development."** The ERs make repeated use of the terms "standards activity," "standards development activity" and "standards development" which appear to be synonymous. However, the ERs but fail to define these terms. It would be useful to add a definition of them to the ER Annex which contains definition of various other terms in its "definitions" section.

   Congress has defined the term "standards development activity" in the Standards Development Organization Advancement Act of 2004 as follows:

   ''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

[11] DOJ Letter to GSMA, *supra* note 3, at 2.

standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization"[12]

It would be useful if the ERs would clarify their alignment with U.S. law as well as provide more guidance to ASDs by referencing this definition in the Annex to the ERs. Such definition would also be consistent with guidance from the U.S. Department of Justice.[13]

CONCLUSION

Many of the proposed revisions appear like improvements to the text of the ERs. However, some of these revisions appear to fall short of resolving the issue(s) they purport to resolve. In addition, adding definitions to a few core principles would greatly improve the ERs.

Thank you for your consideration of these comments.

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[12] The Standards Development Organization Advancement Act of 2004, Pub. L. 108–237, 118 Stat. 661, Sec. 103. Definitions (June 22, 2004) https://uscode.house.gov/statutes/pl/108/237.pdf.

[13] See, *e.g.,* Assistant Attorney General for Antitrust, Makan Delrahim, The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement, Remarks as Prepared for the LeadershIP Conference (April 10, 2018) at 4 (on the need for balanced SDO patent policies) https://www.justice.gov/opa/speech/file/1050956/download.