

**NOVEMBER 11, 2019**

**COMMENTS ON PROPOSED CHANGES TO THE OPERATING PROCEDURES  
OF MULTIPLE AMERICAN NATIONAL STANDARDS INSTITUTE (ANSI) BODIES**

**INTRODUCTION**

I am pleased to provide comments below on the proposed revisions to the:

Operating Procedures of the ANSI Executive Standards Council (ExSC);  
Operating Procedures of the ANSI Board of Standards Review (BSR); and  
Operating Procedures of the ANSI Appeals Board (AB).

The proposed revisions were circulated for public comments on October 11, 2019.<sup>1</sup>

Please note that on February 15, 2019 I also submitted comments on proposed changes to by-laws that will now take effect on 1/1/2020. Where language from these 2020 by-laws changes was now simply transported into the text of Operating Procedures, I incorporate my prior comments by reference.

Section numbers and page numbers in the comments below refer, respectively, to section numbers and page numbers in the redline version provided on the October 11, 2019 notice for public comments. The section numbers in the current Operating Procedures appear in parentheses.

**OPERATING PROCEDURES OF THE ANSI EXECUTIVE STANDARDS COUNCIL (EXSC)**

**1. Section 4, page 38 (Section 1 in the current ExSC Operating Procedures)**

The Proposed Revision
Proposed deletion of the following text:  “In addition, the ExSC shall be composed of representatives of organizational members, company members, governmental members, members of the Consumer Interest Council, and members-at-large. An attempt shall be made to have at least two members, with a maximum of six members, in each category. The ExSC shall strive to a balance of representation among

<sup>1</sup> ANSI Standards Action Vol. 50 #41 (Oct. 11 2019) originally available at <https://share.ansi.org/Shared Documents/Standards Action/2019-PDFs/SAV5041.pdf>, later revised and reposted at <https://share.ansi.org/Shared%20Documents/Standards%20Action/2019-PDFs/SAV5041%20REVISED.pdf>.

categories to the extent possible. However, in no case shall the membership of the ExSC be greater than 21.<sup>¶</sup>

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Members should, to the extent possible, represent the broadest interests of all standards developers and/or users. Next in order of priority, members should represent their assigned interest category (i.e., Organization Member, Company Member, Government Member, Consumer Interest Council, member-at-large) rather than their employer’s specific interests. A member assigned to the member-at-large category may be drawn from another category. No organization shall have a vested right to membership including unexpired vacancy”

**Comment:** The proposal to omit the strive for balance in the membership of the ExSC is misguided, may expose ANSI to antitrust liability, and conflicts with the language and spirit of OMB Circular A-119.

The U.S. Department of Justice Antitrust Division (DOJ) has written to ANSI’s General Counsel in March 2018, with respect to an ANSI ExSC decision, explaining that:

“... it is similarly important for ANSI to have balanced representation in its decisional bodies so that their actions are not susceptible to the outsized influence of one group or another....[T]he Division respectfully suggests that ANSI and the IPRPC include in the Task Group members with diverse interests in the area of standard setting.”<sup>2</sup>

The DOJ has made it clear in its letter that the balance of interest requirement applies to ANSI’s “decisional bodies” and specifically to the ExSC which is referenced in the letter.

The DOJ has reiterated the importance of the “balance of interests” principle and potential ramifications failing to comply with it in at least two other recent statements, including:

- A December 2019 speech in which Assistant Attorney General Makan Delrahim explained that

although principles such as “openness to all interested parties, a balance of interests, a lack of Dominance...and a formalized and impartial appeals process...may not eliminate the opportunity for anticompetitive behavior within a standard-setting organization, they certainly reduce it. ...Where the procedures are written and published, the interests are well balanced, and the losing side can appeal, a standard-setting organization is very likely to have a good record of anything of concern. This benefits both the enforcers and the participants, who certainly have an interest in predictability and that any antitrust concern is resolved quickly and with minimal resources”<sup>3</sup>; and

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<sup>2</sup> See Letter from Principal Deputy Assistant Attorney General for Antitrust, Andrew Finch, to ANSI General Counsel and IPRPC Chair (Mar. 7, 2018), available at <https://www.justice.gov/atr/page/file/1043456/download>.

<sup>3</sup> Assistant Attorney General for Antitrust, Makan Delrahim, *Telegraph Road: Incentivizing Innovation at the Intersection of Patent and Antitrust Law*, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018); available at <https://www.justice.gov/opa/speech/file/1117686/download>.

- A June 2019 statement of interest filed in U.S. District Court where DOJ argued that that the defendant in that matter, the Anti-Malware Testing Standards Organization, Inc. and its members should not enjoy an exemption from *per se* antitrust liability under the U.S. Standard Development Organization Advancement Act because of the alleged lack of balance.<sup>4</sup>

In light of the above, the proposal to delete the strive for balance of interests in the ExSC membership is diametrically opposed to the the interests of ANSI as an organization, as it would significantly increase its potential for incurring antitrust liability. It also runs against the core mission of ANSI that includes

“promoting and facilitating voluntary consensus standards and conformity assessment systems, and safeguarding their integrity”

The U.S. voluntary consensus standards eco-system’s development and integrity would be compromised where the ExSC, which on 1/1/2020 would become one of ANSI’s top decisional bodies, is not bound by a clear balance requirement.

Such imbalance in a semi-governmental body exercising a US gov’t-granted mandate is also inconsistent with OMB Circular A-119, that states that the following attributes define bodies that develop voluntary consensus standards: openness, balance of interests, due process, an appeals process, and consensus.

The proposed new language in section 2 re “shall endeavor to ensure representation of all membership categories” is a far cry from the existing balance of interests language and cannot replace it.

In light of the above, I urge ANSI not to delete the two paragraphs that are proposed for deletion.

## **2. Section 2, page 47**

The Proposed Revision
Proposed addition of the following text:  “Except as otherwise delegated by the Board, members of the ExSC shall be nominated by ExSC voting members and appointed by the Chair of the Board with the approval of the Board. .... Except as may be extended by the Board, each new member appointment shall be for a term of three full years with no person serving more than three full consecutive terms.”

<sup>4</sup> Statement of Interest of the United States, NSS Labs Inc. v. CrowdStrike, Inc. et al, (N. Dist. Of Cal., San Jose Division, June 26, 2019) available at <https://www.justice.gov/atr/case-document/file/1178246/download>.

**Comment:** This proposed new language renders the ExSC, already a closed body to begin with, must more closed than it is now because appointments are generally only made by the existing ExSC members and they can now be extended to 9 (!) years. The opportunity for a non-member of the ExSC to be appointed to the ExSC as well as the turnover of the ExSC thus becomes almost non-existent. The language also does not prevent an ExSC member from serving 9 years on the board, taking a year off, and getting on it again for another 9 years.

This further closing off of the ExSC contradicts the “openness” principle of the WTO TBT agreement as well as the language as OMB Circular A-119.

I therefore urge ANSI not to adopt this proposed new language.

In this regard, please note the following:

#### **A. The proposed revision contravenes ANSI’s obligations under the WTO TBT Agreement**

As a member of the World Trade Organization (WTO), the United States is a signatory to the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement.<sup>5</sup> The TBT Agreement is the principal agreement establishing multilateral rules governing standards-related measures.<sup>6</sup> Annex 3 of the TBT Agreement contains a Code for WTO Members and non-governmental standardizing bodies to follow in preparing, adopting, and applying standards. Central government standardizing bodies must adhere to the Code. WTO Members’ central government standardizing bodies are required to comply with the Code, and WTO Members are required to take reasonable measures to ensure that local government bodies and non-governmental standardizing bodies conform to the Code as well. In the United States, the American National Standards Institute (ANSI) has accepted the Code on behalf of the over 200 standards developing organizations (SDOs) that ANSI has accredited.”<sup>7</sup>

The WTO TBT committee has defined principles and procedures for compliance with the Code in Annex 3 of the TBT Agreement in its “*Decision on Principles for the Development of International Standards, Guides and Recommendations*”<sup>8</sup> (WTO Decision). To comply with the

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<sup>5</sup> See [www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf)

<sup>6</sup> U.S. Trade Representative, “2014 Report on Technical Barriers to Trade,” at 10-11, available at <https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>.

<sup>7</sup> *Id.* at 26.

<sup>8</sup> WTO, “*Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade,*” [G/TBT/1/Rev.13 \(8 March 2017\)](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S007.aspx?SymbolList=%22G%2fTBT%2f1%2fRev.1%22+OR+%22G%2fTBT%2f1%2fRev.1%22&FullTextHash=1&AllTranslationsCompleted=1&MetaCollection=WTO&Id=234947&PageAnchorPosition=234947&SearchPagePageNumber=10&SearchPageCurrentIndex=0&SearchPageViewStatePageIndex=0&SearchPageStartRowIndex=0&returnedPage=FE_S_S006.aspx&IsNotification=False&LeftTabFieldText=&NumberOfHits=5&DreReference=&Query=&Context=&btsType=&IsEnglishSelected=&IsFrenchSelected=&IsSpanishSelected=&IsAllLanguageSelected=&SearchPage=&SourcePage=&Language=&), pp. 54-56, available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S007.aspx?SymbolList=%22G%2fTBT%2f1%2fRev.1%22+OR+%22G%2fTBT%2f1%2fRev.1%22&FullTextHash=1&AllTranslationsCompleted=1&MetaCollection=WTO&Id=234947&PageAnchorPosition=234947&SearchPagePageNumber=10&SearchPageCurrentIndex=0&SearchPageViewStatePageIndex=0&SearchPageStartRowIndex=0&returnedPage=FE\\_S\\_S006.aspx&IsNotification=False&LeftTabFieldText=&NumberOfHits=5&DreReference=&Query=&Context=&btsType=&IsEnglishSelected=&IsFrenchSelected=&IsSpanishSelected=&IsAllLanguageSelected=&SearchPage=&SourcePage=&Language=&](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S007.aspx?SymbolList=%22G%2fTBT%2f1%2fRev.1%22+OR+%22G%2fTBT%2f1%2fRev.1%22&FullTextHash=1&AllTranslationsCompleted=1&MetaCollection=WTO&Id=234947&PageAnchorPosition=234947&SearchPagePageNumber=10&SearchPageCurrentIndex=0&SearchPageViewStatePageIndex=0&SearchPageStartRowIndex=0&returnedPage=FE_S_S006.aspx&IsNotification=False&LeftTabFieldText=&NumberOfHits=5&DreReference=&Query=&Context=&btsType=&IsEnglishSelected=&IsFrenchSelected=&IsSpanishSelected=&IsAllLanguageSelected=&SearchPage=&SourcePage=&Language=&)

WTO Decision, six principles must be adhered to when engaging in international standards development activity: “transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and the development dimension.”<sup>9</sup>

For example, ANSI is therefore bound by the “openness” principle which states in relevant part:

Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness *without discrimination* with respect to the *participation at the policy development level* and at every stage of standards development, ... This is illustrative of the importance of participation in the international standardizing process *accommodating all relevant interests*.<sup>10</sup>

“Openness” with respect to “participation at the policy development level” clearly includes ANSI’s development of policy and procedures which, starting 1/1/2020, would come under the purview of the ExSC.

The ANSI ExSC is already not a body that is open “without discrimination with respect to the participation at the policy development level”. The proposed revisions, however, further distance it from any element of openness.

As the American **National Standards Institute**, which represents the U.S. in various international fora, including the WTO TBT Committee, the proposed revisions are inconsistent with the TBT Agreement principles and thus may compromise the position of U.S. policy makers in these fora. Furthermore, if the proposed revisions were approved, the U.S. Government could be required to investigate ANSI and take action because WTO Members are required to “take such reasonable measures as may be available to them to ensure that ... *non-governmental standardizing bodies within their territories* ... accept and comply with [the Code of Good Practice in Annex 3 to the Agreement].”<sup>11</sup> Moreover, this revision and the conduct it fosters could also be subject to legal challenge by adversely affected interested parties.

In its various policy statements, the DOJ has already shown a keen interest in this area.

### **B. By adopting this revision, ANSI would forfeit otherwise available statutory protections from antitrust liability**

The transition into a more closed and less balanced governance structure is inconsistent with the Standards Development Organization Advancement Act of 2004 (SDOAA or Act).<sup>12</sup> The Act provides “safe-harbor” antitrust protections to any “standards development organization” that

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 55 (emphasis added).

<sup>11</sup> TBT Agreement, Article 4.1.

<sup>12</sup> Pub. L. 108–237, 118 Stat. 661. (June 22, 2004).

engages in “standards development activity” as those terms are defined in the SDOAA.<sup>13</sup> It is important to recognize that under the SDOAA definitions, “standards development activity” expressly includes *any* action with respect to the *patent policies* of the SDO.<sup>14</sup> Today, ANSI may be able to claim that it is itself an SDO under the SDOAA because it “administers and *coordinates* the U.S. voluntary standards,”<sup>15</sup> and because it develops a key industry *standard* — the Essential Requirements, an industry standard adopted by all its accredited SDOs in their own governance and work. Nothing in the SDOAA limits its protection only to SDOs’ developing technical or technology standards.

The law provides further elaboration of the principles Congress found to be set out in OMB Circular A-119, required in the statutory definition of SDO<sup>16</sup>

“Such principles provide for—

- (A) notice to all parties known to be affected by the particular standards development activity,
- (B) the opportunity to participate in standards development or modification,
- (C) balancing interests so that *standards development activities* are not dominated by any single group of interested persons,
- (D) readily available access to essential information regarding proposed and final standards,
- (E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objections, and
- (F) the right to express a position, to have it considered, and to appeal an adverse decision.”

With this proactive further deviation from the requirements of the SDOAA, ANSI would not be entitled to the Act’s safe harbor protections under U.S. antitrust laws. Those include (i) the limited antitrust liability under the Rule-of-Reason scrutiny rather than a *per se* illegality review,<sup>17</sup> and (ii) avoidance of treble damages, which is provided in subparagraphs (1) of 15 U.S.C. § 4303 (a)-(c). By further abandoning openness and balance safeguards and forfeiting its ability

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<sup>13</sup> 15 U.S.C. § 4301(a)(8). (“The term ‘standards development organization’ means a domestic or international organization that plans, develops, establishes, *or coordinates* voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget Circular Number A-119, as revised February 10, 1998. The term ‘standards development organization’ shall not, for purposes of this chapter, include the parties participating in the standards development organization.”) (Emphasis added).

<sup>14</sup> 15 U.S.C. § 4301(a)(7) “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 standard in conformity assessment activities, *including actions relating to the intellectual property policies* of the standards development organization.” (Emphasis added).

<sup>15</sup> ANSI Overview, (August 2016) at 1 [https://share.ansi.org/Shared%20Documents/News%20and%20Publications/Brochures/WhatIsANSI\\_brochure.pdf](https://share.ansi.org/Shared%20Documents/News%20and%20Publications/Brochures/WhatIsANSI_brochure.pdf).

<sup>16</sup> Pub. L. 108–237, title I, § 102(5), 118 Stat. 662. (Emphasis added).

<sup>17</sup> 15 U.S.C. § 4302(2).

to use the SDOAA protections under the Rule of Reason, ANSI may be liable for illegal collusion among members of the ExSC in adopting patent policies that restrain intellectual property inputs into standards development. Such collusion may be found to be *per se* unlawful under the Sherman Act.<sup>18</sup>

Should any U.S. antitrust agency investigate ANSI, its threshold would be much lower for finding liability under a *per se* rule, because the SDOAA protections would not apply<sup>19</sup>

In light of the above, I highly recommend against the adopting the proposed new language in Section 2.

### **OPERATING PROCEDURES OF THE ANSI BSR AND APPEALS BOARD (AD)**

The Operating Procedures of the BSR and AD currently lack a clear language re ‘balance of interests’ requirement. In light of the comments above, I urge ANSI to introduce such language into the Operating Procedures of the BSR and AD, as follows:

#### **3. Page 59, Section 1 (BSR)**

I recommend that the language in the BSR Operating Procedures be identical to the one currently found in the ExSC Op. Procedures, i.e. the following text be added

“In addition, the BSR shall be composed of representatives of organizational members, company members, governmental members, members of the Consumer Interest Council, and members-at-large. An attempt shall be made to have at least two members, with a maximum of six members, in each category. The BSR shall strive to a balance of representation among categories to the extent possible.¶

¶

Members should, to the extent possible, represent the broadest interests of all standards developers and/or users. Next in order of priority, members should represent their assigned interest category (i.e., Organization Member, Company Member, Government Member, Consumer Interest Council, member-at-large) rather than their employer’s specific interests. A member assigned to the member-at-large category may be drawn

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<sup>18</sup> *Golden Bridge Technology, Inc. v. Nokia, Inc.*, 416 F. Supp. 2d 525, 532 (E.D. Tex. 2006) (“The *per se* rule can apply to a standard setting organization...”).

<sup>19</sup> See Assistant Attorney General for Antitrust, Makan Delrahim speech, *supra* note 3.

from another category. No organization shall have a vested right to membership including unexpired vacancy”

**4. Page 68, Section 2 (AD):**

The Appeals Board shall have a membership of not less than nine nor more than eighteen members appointed by the Chair of the Board of ANSI, with the approval of the Board of Directors. Membership in the Institute shall be a prerequisite for participation on the Appeals Board, unless, the Board of Directors specifically permits an exception. The members shall be chosen to broadly reflect the various categories of ANSI membership, ~~to the extent practicable.~~ **An attempt shall be made to have at least two members, with a maximum of six members, in each category.** Its members shall abide by the ANSI Conflict of Interest Policy and Code of Conduct. The resident counsel of ANSI, or in his or her absence, outside ANSI counsel, shall be a non-voting, ex-officio member of the Appeals Board.” [red font text is suggested to be added]

**CONCLUSION**

Thank you for the opportunity to submit comments and for your respectful consideration of them