UNDERSTANDING "BALANCE" REQUIREMENTS FOR STANDARDS-DEVELOPMENT ORGANIZATIONS

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I. INTRODUCTION

In 2015, the Institute of Electrical and Electronic Engineers Standards Association ("IEEE-SA") amended its patent policy.[2] The amendments were approved by the association's Standards Board, Board of Governors, and Board of Directors,[3] and the procedure for adopting them was the subject of a favorable Business Review Letter from the U.S. Department of Justice Antitrust Division ("DOJ").[4] Nevertheless, a number of IEEE-SA members opposed the amendments, arguing, among other things, that they were unduly biased against the interests of companies that derive significant revenue from the licensing of patents[5] (what I have previously termed "Patent-Centric" firms[6]). Both before and after adoption of the amendments, opponents argued, among other things, that their interests were not adequately represented on the "*ad hoc* committee" that initially drafted the amendments considered by the voting bodies noted above.[7] As such, they claimed that IEEE-SA, in adopting these amendments, "failed to achieve the balancing of interests" that its own rules require for the development of technical standards.[8]

NSS Labs, Inc. offers testing services for cybersecurity products and is a member of the Anti-Malware Testing Standards Organization, Inc. ("AMTSO"), an SDO that develops cybersecurity software standards. In 2018, NSS sued AMTSO and several of its members, alleging that they violated Section 1 of the Sherman Act by (1) colluding to develop standards that disadvantaged certain testing vendors and then (2) refusing to deal with vendors who did not comply with those standards.[9] NSS argued

2 Institute of Electrical and Electronics Engineers [IEEE], IEEE-SA Standards Board Bylaws, § 6.1 (Mar. 2015).

3 Michael A. Lindsay & Konstantinos Karachalios, *Updating a Patent Policy: The IEEE Experience*, CPI Antitrust Chron. (Mar. 2015), at 4.

4 Business Review Letter from Hon. Renata B. Hesse, Acting Assistant Attorney General, U.S. Department of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney, L.L.P. (Feb. 2, 2015).

5 See, e.g. J. Gregory Sidak, *Testing for Bias to Suppress Royalties for Standard-Essential Patents*, 1 Criterion J. Innovation 301 (2016).

6 Jorge L. Contreras, *Technical Standards and Ex Ante Disclosure: Results and Analysis of an Empirical Study*, 53 Jurimetrics J. 163, (2013)

7 See Sidak, *supra* note 5, at 314-16.

8 *Id.* at 315. The IEEE controversy highlights an important distinction between SDO rules and procedures for the development of technical standards versus those for the creation and amendment of SDO policy (e.g. relating to patents). One recent study finds that many SDOs have significantly different procedures for these two functions. Justus Baron, Jorge Contreras, Martin Husovec & Pierre Larouche, *Making the Rules: The Governance of Standard Development Organizations and their Policies on Intellectual Property Rights*, JRC Science for Policy Report, EUR 29655 EN, at 989-1112 (Nikolaus Thumm, ed., Mar. 2019) [hereinafter JRC Report]. Because the body of literature and case law regarding standardization addresses balance requirements primarily in the context of standards-development (rather than SDO policy development), this article focuses on the former. Nevertheless, useful analogies can be drawn to discussions of SDO policy development.

9 *NSS Labs, Inc. v. Crowdstrike, Inc.*, Case No. 3:18-cv-05711, Complaint (N.D. Cal., filed Sept. 18, 2018) [hereinafter NSS Complaint].

that the SDO and its members were liable both on a *per se* basis (e.g. for a group boycott) and under the rule of reason. AMTSO (through one of its principal members Symantec) filed a motion to dismiss, among other things, with respect to NSS's claims of *per se* liability.[10] AMTSO/Symantec argued that under the Standards Development Organization Advancement Act of 2004 ("SDOAA"),[11] an SDO is not subject to *per se* liability under the Sherman Act while engaged in "standards development activity."[12]

But in June 2019, the DOJ intervened in the case, arguing that the court should not dismiss NSS's *per se* liability claims, as a question of fact exists regarding AMTSO's qualification as an SDO under the SDOAA.[13] Specifically, the DOJ notes that the SDOAA defines an SDO 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, an appeals process, and consensus…"[14] Yet, as alleged in NSS's Complaint, "AMTSO's membership consists principally of cybersecurity companies [with] only a small number of companies who provide testing services…"[15] Accordingly, the DOJ reasons that AMTSO may not be in compliance with the balance requirement of the SDOAA, and if not, AMTSO would not qualify as an SDO entitled to the SDOAA's shield against *per se* liability.

The recent emergence of SDO balance issues in the IEEE and NSS cases, coupled with the DOJ's separate indication that it intends to increase its scrutiny of collective behavior within SDOs (particularly if they disadvantage Patent-Centric firms),[16] warrants a renewed look at the history and interpretation of SDO balance requirements.[17] This article reviews the history of such balance requirements and offers suggestions regarding their interpretation and intent.

II. BALANCE AND QUOTAS

Non-governmental SDOs have operated in the United States and Europe for more than a century, serving as neutral fora for the collaborative development of technical interoperability standards and protocols. In order to achieve broad acceptance and legitimacy of their standards, SDOs have long sought some degree of balance among their members, typically welcoming active participation by product manufacturers, product users, and unaffiliated experts.[18] SDO stakeholders have broadly identified "balance of interest" as a desirable feature of SDOs.[19]

While in many cases such balance was achieved informally by working group chairs and other SDO leaders, some SDOs such ASTM International adopted formal policies requiring that technical committees have minimum levels of representation from defined stakeholder cat-

10 *NSS Labs, Inc. v. Crowdstrike, Inc.*, Case No. 3:18-cv-05711, Defendant Symantec Corporation's Motion to Dismiss (N.D. Cal., filed Nov. 26, 2018).

11 Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301-4306.

12 15 U.S.C. § 4302 ("In any action under the antitrust laws … the conduct of … a standards development organization while engaged in a standards development activity, shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets").

13 *NSS Labs, Inc. v. Crowdstrike, Inc.*, Case No. 3:18-cv-05711, Statement of Interest of the United States (N.D. Cal., filed Jun. 26, 2019). The DOJ does not otherwise appear to be a party to the *NSS* case, nor does the case appear to arise from a DOJ investigation or enforcement action. Thus, the author assumes that the DOJ submitted its Statement of Interest in this case in its "advocacy role." See Makan Delrahim, Assistant Attorney Gen. Antitrust Div., U.S. Dep't Justice, *The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement*, Keynote Address at LeadershIP Conference on IP, Antitrust, and Innovation Policy 7–8 (Apr. 10, 2018), https://www.justice.gov/opa/speech/file/1050956/download (explaining that as an "advocate," as opposed to an "enforcer," the DOJ will "clarify what conditions are ideal" for competition, while "at the opposite end of the spectrum, what conduct might attract enforcement scrutiny."). *See also* Jorge L. Contreras, *Taking it to the Limit: Shifting U.S. Antitrust Policy Toward Standards Development*, 103 Minn. L. Rev. Headnotes 66, 77 (Fall 2018) (discussing DOJ enforcement versus advocacy roles).

14 *Id.* at 2.

15 NSS Complaint, *supra* note 9, at 13.

16 See, e.g. Makan Delrahim, Assistant Attorney Gen. Antitrust Div., U.S. Dep't Justice, *Take it to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law*, Address Before the USC Gould School of Law (Nov. 10, 2017); *see also* Contreras, *supra* note 13 (analyzing shift in DOJ policy toward SDOs).

17 The focus of this article is on U.S. law and policy. However, it is worth noting that similar balance requirements for SDOs exist in both international agreements and European Union law. For a summary of these non-U.S. requirements, see JRC Report, *supra* note 8, at 43-46, 119-21.

18 JoAnne Yates & Craig N. Murphy, Engineering Rules: Global Standard Setting Since 1880 9, 194 (2019).

19 See JRC Report, *supra* note 8, at 119 (89 percent of surveyed stakeholders believed that "SDOs should ensure balance among different types of stakeholders when considering a significant new policy or policy change").

egories (e.g. producer, user, and consumer).[20] Other SDOs required that in order for standards documents to be approved, a minimum number of votes from each of several designated stakeholder categories must be attained.[21] I refer to these numerical category balancing requirements as "quotas."

In observing the practical operation of the mandatory quota requirement at ASTM, Professor Robert Hamilton noted that while formal voting committees at ASTM do, indeed, hew to these quota requirements, much of the detailed standards-development work at ASTM is conducted by smaller expert working groups that largely represent the industrial sector.[22] Quota requirements present challenges both in defining useful stakeholder categories and ensuring that selected representatives of those categories actually represent the interests of other members of the category.[23] What's more, when categories include stakeholders who are diffuse or lack sufficient expertise or financial resources to engage substantively in SDO deliberations, it is often difficult to secure their meaningful participation in SDO activities.[24] Finally, quotas themselves may unfairly skew SDO decision making when the representatives of very small stakeholder groups are given the same voting privileges as representatives of much larger or more technically or economically significant groups. As such, it is not clear that mandatory quota requirements actually achieve their goals, or that such goals are even attainable in a practical sense.[25]

II. THE CODIFICATION OF BALANCE REQUIREMENTS UNDER OMB CIRCULAR A-119

During the negotiation of the Tokyo round of the General Agreement on Tariffs and Trade ("GATT") in the 1970s, officials in the Ford Administration, who were pressing to include a Standards Code in the GATT Agreement, decided that it would be expedient to have a formalized U.S. standardization policy that could be used as a model in international negotiations.[26] Accordingly, in 1976 the administration's Office of Management and Budget ("OMB") proposed a draft policy which was debated for the next four years.[27] The finalized policy was released as OMB Circular A-119 in January 1980.[28]

For purposes of the 1980 Circular, "voluntary standards bodies" were defined as "nongovernmental bodies which are broadly based, multi-member, domestic, and multinational organizations including, for example, non-profit organizations, industry associations, and professional technical societies which develop, establish, or coordinate voluntary standards." [29] Federal agencies were encouraged to participate in voluntary standards bodies.[30] Standards bodies in which federal agencies participated, however, were required to comply with certain minimum "due process" criteria.[31] These included, among other things, what appears to be an early "balance" requirement:

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20 ASTM Intl., *Regulations Governing ASTM Technical Committees*, § 3.1.1 (2018) (defining "balance" as occurring "when the combined number of voting user, consumer, and general interest members equals or exceeds the number of voting producer members"); *id.* at § 3.2.1 (requiring that "Balance must be achieved before any standards are brought before a classified subcommittee or main committee for ballot"). See also Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1352-55 (1978) (observations of ASTM's mandatory balance rules in practice).

21 See JRC Report, *supra* note 8, at 121 (discussing balance in voting requirements at DVB Project and ETSI).

22 Hamilton, *supra* note 20, at 1355 ("One is left with the overall impression of extensive industrial participation in and domination of the process").

23 *Id.*

24 See JRC Report, *supra* note 8, at 121, 169-70 (reporting difficulty that some SDOs have experienced in convincing certain stakeholder groups, particularly consumers, to invest time and effort in SDO deliberations).

25 *Id.* at 1354-55 (given the impossibility or impracticability of applying mandatory balance rules to working groups, the putative balance protection at ASTM may, in fact, be illusory).

26 Yates & Murphy, *supra* note 18, at 194-95.

27 See, e.g. Hamilton, *supra* note 20; Admin. Conf. U.S., *Recommendation 78-4: Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, Recommendations and Reports 1978, 13 (1978). According to Professor Emily Bremer, the initial OMB Circular was the culmination of a long interagency effort to codify the procurement practices of individual federal agencies.

28 Off. Mgt. Budget, Federal Participation in the Development and Use of Voluntary Standards; Final Issuance, 45 Fed. Reg. 4326 (1980) [hereinafter OMB Circular A-119 (1980)].

29 *Id.* § 4.e.

30 *Id.* § 6.b.

31 *Id.* § 6.c. *See also* Hamilton, *supra* note 20, at 1346 (applying the term "due process" broadly to a set of procedural protections).

> Inviting representatives of a broadly-based group of persons likely to have an interest in the subject including, for example, consumers; small business concerns; manufacturers; labor; suppliers; distributors; industrial, institutional and other users; environmental and conservation groups; and State and local procurement and code officials.[32]

It is notable that this requirement places an emphasis on making the SDO open to all interested stakeholder groups, rather than enforcing any particular mix or numerical quota of representatives from different stakeholder categories. This approach is consistent with that of leading commentators of the period, who were of the view that "a good consensus process must allow review and approval by a balanced group in which no single interest is given disproportionate weight."[33]

In 1981, the President's Task Force on Regulatory Relief reviewed OMB Circular A-119 to determine whether it imposed unnecessary burdens on the public or private sectors. Following this review, a draft revision of the Circular was published in the Federal Register on April 20, 1982.[34] After a 60-day public comment period, during which 120 comments were received, a final revision was published on October 26, 1982.[35]

The 1982 revision made a number of substantive changes to the Circular. Most importantly, it expanded the scope of the Circular from federal procurement activity to both federal procurement and regulatory activity. In addition, it eliminated the specified "due process" requirements for federal participation in voluntary standards organizations. In response to public comments objecting to this removal, OMB responded that "the imposition of the mandatory procedures included in the previous editions of the Circular is inappropriate, burdensome and costly and … peripheral to the fundamental aims of the Circular."[36] The DOJ supported the elimination of the "rigid" 1980 due process requirements, but urged federal participants in standards-setting organizations to foster transparency and "open standards proceedings" to "mitigate the substantial anticompetitive potential inherent in private standards groups."[37]

The U.S. Federal Trade Commission ("FTC") also appeared to approve of an approach to standards development based on openness, while at the same time casting doubt on the effectiveness of formal "classification schemes" intended to mandate balance (e.g. the quota requirements imposed by ASTM).[38] Echoing some of the concerns expressed in the 1970s,[39] the FTC noted that quota schemes are seldom imposed on the working groups that actually formulate technical standards documents, the classification of individuals into particular categories is often imperfect, and there are ample other ways to skew the standardization process even when such balance requirements are present.[40]

32 OMB Circular A-119 (1980), *supra* note 28, § 6.c.

33 Hamilton, *supra* note 20, at 1346.

34 47 Fed. Reg. 16,919 (1982).

35 47 Fed. Reg. 49,496 (1982).

36 *Id.*

37 Letter dated June 22, 1982 from Ronald G. Carr, Acting Asst. Atty. Gen., Antitrust Div., U.S. Dept. of Justice, to Donald E. Sowle, Admin. for Federal Procurement Policy, OMB (reproduced at 47 Fed. Reg. 49,496).

38 Fed. Trade Comm'n, *Standards and Certification – Final Staff Report* 159 (1983) ("for several reasons, classification schemes do not always achieve their intended effect.") [hereinafter FTC 1983 Report].

39 See *supra*, note 22, and accompanying text.

40 FTC 1983 Report, *supra* note 38, at 159-64.

IV. THE LASTING IMPACT OF *ALLIED TUBE*

Around the time that the 1982 Circular was published, a case that drew significant attention to the principle of balance within SDOs began to work its way through the court system. The SDO in question was the National Fire Protection Association ("NFPA"), a large organization formed in 1896 to develop standards for fire safety equipment and systems. At the time, NFPA had approximately 30,000 members drawn from state and local governments, educational institutions, professional associations, manufacturers and users of fire-fighting equipment, and fire insurance companies.[41] In addition to fire codes, NFPA is also responsible for the National Electrical Code (the "NEC" or "Code"), which establishes requirements for the design and installation of electrical wiring systems, many of which are adopted into local building codes and regulations.[42] The facts of the controversy that ensued at NFPA, which are reproduced in detail below for illustrative purposes, are as follows:[43]

> Among the electrical products covered by the Code is electrical conduit, the hollow tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, [Indian Head, Inc. (IHI)] began to offer plastic conduit made of polyvinyl chloride…
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> [IHI] initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or rejected by a simple majority of the members present. Alarmed that, if approved, [IHI's] product might pose a competitive threat to steel conduit, [Allied Tube], the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude [IHI's] product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.
>
> Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to vote against the proposal. [Allied Tube] alone recruited 155 persons -- including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. [Allied Tube] and the other steel interests also paid over $100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposal to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in opposition, the proposal was rejected and returned to committee by a vote of 394 to 390.[44]

Shortly after this vote, IHI brought suit against Allied Tube and other steel conduit manufacturers alleging that they had violated Section 1 of the Sherman Act by unreasonably restraining trade in the electrical conduit market. After a jury trial, a verdict was entered against Allied Tube and its co-defendants.[45] But the verdict was nullified by the district court *n.o.v.* under the *Noerr-Pennington* doctrine,[46] and it was this issue that was eventually appealed to the Supreme Court in 1988 (IHI won on this point as well – the jury verdict against Allied Tube was reinstated).[47]

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41 Hamilton, *supra* note 20, at 1340 ("Manufacturers constitute about six and one-half percent and insurance companies eleven percent of NFPA's membership").

42 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988)

43 The facts underlying the famous *Allied Tube* case are but one of several controversies involving NFPA and its procedures during the 1980s. See FTC 1983 Report, *supra* note 38, at 162-63 (citing additional complaints that NFPA's "procedural rules governing standards development were exploited to thwart participation").

44 *Allied Tube*, 486 U.S. at 496-97.

45 *Id.* at 498.

46 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

47 *Allied Tube*, 486 U.S. at 509-10 ("we hold that, at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.").

But it is not the *Noerr* issue for which the *Allied Tube* case is remembered today. Rather, it is the Court's dicta approving the jury's finding of antitrust liability against Allied Tube and the other steel conduit manufacturers. Specifically, the Court recognizes that the "hope of procompetitive benefits [from standard-setting] depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition."[48] It goes on to observe that "[w]hat [SDO members] may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the [standard-setting] process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition."[49] Thus, the Court recognized that an SDO member's attempt to stack the deck to defeat a particular proposal or to gain some other economic advantage in standard-setting could be enough to result in a violation of the Sherman Act. It is not enforced or quota-based "balance" in standard-setting that the Court encourages, but an avoidance of deliberate imbalance.

In 1992, four years after the *Allied Tube* decision, OMB issued a new request for comments regarding Circular A-119. Several commenters suggested that the definitions in Circular A-119 were "ambiguous" and recommended changing them to reflect either the Court's approach in *Allied Tube* or the definitions in the GATT Standards Code. OMB declined to change the definitions in the Circular, noting that they "are not being misinterpreted and have served their purpose well."[50] A final revised version of the Circular was issued on October 26, 1993 with no change to the balance requirement.[51]

V. THE NTTAA AND THE 1998 REVISIONS TO OMB CIRCULAR A-119

In 1996, President Clinton signed the National Technology Transfer and Advancement Act of 1995 ("NTTAA").[52] Among other things, the NTTAA embodied in statutory language the OMB Circular A-119 requirement that federal agencies "use technical standards that are developed or adopted by voluntary consensus standards bodies."[53] Because the term "voluntary consensus standards body" was not expressly defined in the NTTAA, it was generally understood to refer to the definition contained in the Circular.

The enactment of the NTTAA led to another review of the Circular, and on December 27, 1996 OMB released a new draft version for public comment.[54] Public hearings were held on February 10, 1997 and comments were received from over 50 sources. OMB published the final revisions to the Circular on February 19, 1998.[55]

The 1998 revisions of the Circular constitute a complete overhaul of the structure and language of the Circular, converting it to a "plain English" question-and-answer format. It substantially altered the definition of "voluntary consensus standards body" from prior versions of the Circular. The new definition reads as follows:

> A voluntary consensus standards body is defined by the following attributes:
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> (i) Openness.
> (ii) Balance of interest.
> (iii) Due process.
> (iv) An appeals process.
> (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties …"[56]

48 *Id.* at 509.

49 *Id.* at 511.

50 58 Fed. Reg. 57,643 (1993).

51 *Id.*

52 Pub. L. 104-113 (1996).

53 *Id.* at § 12(d)(1).

54 61 Fed. Reg. 68,312 (1996)

55 63 Fed. Reg. 8,546 (1998).

56 63 Fed. Reg. 8,554, § 4.a(1).

This definition differs significantly from the definition of "voluntary standards body" contained in each prior version of Circular A-119. Whereas earlier definitions simply referred to organizations that "develop, establish, or coordinate voluntary standards," the 1998 definition imposes a new set of criteria defining such bodies, including openness, balance of interest, and due process. It is possible that the Supreme Court's decision in *Allied Tube* influenced OMB in developing this new set of criteria for SDOs, particularly a formal requirement of "balance" (which would conceivably prevent the type of deck-stacking attempted by Allied and its co-conspirators). But other than "consensus" none of the new terms (including "balance of interest") was defined.[57]

VI. THE STANDARDS DEVELOPMENT ORGANIZATION ADVANCEMENT ACT OF 2004

In the late 1990s and early 2000s, the standardization world witnessed a wave of litigation involving allegations of patent deception and ambush by Rambus, Inc.[58] Among other things, Rambus was subject to an investigation and action by the Federal Trade Commission, which accused it of violations of both the Sherman Act and the FTC Act. These antitrust actions caused SDOs around the world to revisit their intellectual property policies and to consider their potential liability in such disputes.[59] One of the outgrowths of this heightened awareness was the enactment in 2004 of the Standards Development Organization Advancement Act ("SDOAA"),[60] which was intended to offer SDOs protection against certain types of antitrust liability that could arise from the actions of their members.

Rather than craft a new legislative framework for this protection, Congress simply added SDOs to the types of entities already protected under the existing National Cooperative Research and Production Act of 1993 ("NCRPA"),[61] which itself was an outgrowth of the earlier National Cooperative Research Act of 1984 ("NCRA").[62] When enacted the NCRA was intended to encourage innovation and promote trade by facilitating the participation of U.S. industries in R&D joint ventures.[63] To achieve this goal, the NCRA offered two principal antitrust protections to qualifying "joint research and development ventures" – an immunity from treble damages under the antitrust laws[64] and a requirement that the conduct of joint R&D by such entities be evaluated under the antitrust rule of reason and not be subject to *per se* liability.[65] In 1993, given pressures on U.S. manufacturing industries, the protections of the NCRA were extended to joint production ventures.[66]

Under the NCRA, the "joint research and development ventures" protected under the Act are defined as "two or more persons" engaged in one of a variety of enumerated technical cooperation activities, and which did not engage in any of a list of prohibited anticompetitive activities.[67] This definitional structure was preserved in the NCRPA.[68] Under the SDOAA, "standards development organizations" are added to the types of entities protected by the Act. It defines "standards development organization" as "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."[69] Like the 1998 circular, the SDO balance requirement under the SDOAA is not defined.

57 Several commenters in 1997 requested that OMB clarify these definitions, but OMB declined to do so. 63 Fed. Reg. 8,548, Item 28.

58 See generally Renata B. Hesse & Frances Marshall, *U.S. Antitrust Aspects of FRAND Disputes* in The Cambridge Handbook Of Technical Standardization Law: Competition, Antitrust, And Patents 263, 272-74 (Jorge L. Contreras ed., 2018).

59 See JRC Report, *supra* note 8, at 140.

60 Standards Development Organization Advancement Act of 2004, Pub. L. 108–237 (2004), 15 U.S.C. §§ 4301-4306.

61 National Cooperative Production Amendments of 1993, Pub. L. 103–42 (Jun. 10, 1993), 15 U.S.C. §§ 4301 et seq.

62 Pub. L. 98-462 (Oct. 11, 1984), 15 U.S.C. §§ 4301 et seq.

63 *Id.*

64 *Id.* § 4.

65 *Id.* § 3.

66 NCRPA, *supra* note 61.

67 NCRA, *supra* note 62, § 2(6).

68 NCRPA, *supra* note 61.

69 *Id.* § 103(1)(8). Interestingly, the SDOAA (both at the time of its enactment and today) expressly incorporates the 1998 version of OMB Circular A-119 into its definition of "standards development organization." Thus, it is not clear that definitions from subsequent versions of the Circular (e.g. the 2016 version, discussed below) are actually incorporated into the SDOAA.

However, the preamble to the SDOAA elaborates on the due process requirements of OMB Circular A-119, noting in particular that the "balance" requirement provides for "balancing interests so that standards development activities are not dominated by any single group of interested persons."[70] This "non-domination" balance requirement, which must be read into the text of the SDOAA, is distinctly not a quota requirement. That is, the SDOAA does not mandate that SDOs ensure that all or every conceivable interest group be represented in SDO decision making, but only that SDO deliberations are not "dominated" by any single group. This requirement of non-domination echoes the cautionary language of the Supreme Court in *Allied Tube*, which warned against "stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition."[71]

VII. THE 2016 REVISION OF OMB CIRCULAR A-119

In 2012, OMB again invited public commentary on Circular A-119.[72] After releasing a draft revision in 2014, OMB published the final revised version of Circular A-119 in January 2016.[73] It includes the following provision:

> 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.[74]

The 2016 version of the Circular encourages "meaningful involvement" not from all affected stakeholder groups, but from "a broad range" of parties. This requirement avoids formal quota language, as it does not specify that decision making bodies should be composed of particular proportions of different stakeholder groups. Rather, the balance to be attained appears more flexible.

In addition, the Circular echoes the "non-domination" language of the 2004 SDOAA. It prohibits any "single interest from dominating the decision-making." And, like the SDOAA and the 1998 Circular, this requirement harkens back to the Supreme Court's message in *Allied Tube* – when a group of economically-interested parties tilts the playing field to their own advantage, antitrust liability may arise. This does not mean, however, that an SDO must take affirmative steps to include particular groups, in particular proportions, within its decision-making processes.

VIII. BALANCE AND THE ANSI ESSENTIAL REQUIREMENTS

In considering SDO balance requirements, it is also informative to review the "due process" requirements established by the American National Standards Institute ("ANSI"), which serves as the accreditation body for developers of American National Standards. While ANSI accredits more than 200 individual SDOs, not all U.S.-based SDOs are ANSI-accredited (notable omissions including IETF and W3C), and virtually no foreign-based SDOs are accredited. Nevertheless, ANSI's "Due Process Requirements for American National Standards," better known as the *ANSI Essential Requirements*, are widely cited, and contain balance requirements that are useful to contrast with those of Circular A-119 and the SDOAA.[75]

At a high level, the ANSI Essential Requirements echo the "due process" requirements of OMB Circular A-119. Thus, they provide that a developer of American National Standards must operate according to principles of openness, lack of dominance, balance, consensus, and appeals.[76] In terms of balance, however, ANSI has adopted a semi-structured approach falling somewhere between the rigid quota requirements of ASTM and the unstructured requirement of Circular A-119 and the SDOAA.

70 *Id.* § 102(5)(C).

71 *Allied Tube*, 486 U.S. at 511,

72 77 Fed. Reg. 19,357 (2012).

73 81 Fed. Reg. 4,673 (2016), referencing Office of Management and Budget, OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Jan. 22, 2016.

74 *Id.* § 2(e)(ii).

75 The ANSI Essential Requirements were first adopted in 2003, but draw from a variety of earlier policy documents. For example, ANSI's 1974 procedures manual includes the following requirement relating to balance: "A reasonable balance of membership among organizations, companies, and public interest shall be maintained." Am. Natl. Standards Inst., *Procedures Manual for Management and Coordination of American National Standards* § 1.4.2 (Dec. 5, 1974). The author is grateful to Emily Bremer for drawing my attention to this document.

76 Am. Natl. Standards Inst., *ANSI Essential Requirements: Due Process Requirements for American National Standards* 4 (2019).

Section 1.3 of the Essential Requirements, which establishes at the outset that "[t]he standards development process should have a balance of interests," imposes the following affirmative requirements on accredited SDOs:

> Participants from diverse interest categories shall be sought with the objective of achieving balance. If a consensus body lacks balance in accordance with the historical criteria for balance, and no specific alternative formulation of balance was approved by the ANSI Executive Standards Council, outreach to achieve balance shall be undertaken.

The "historical criteria" referred to above are set out in Section 2.3 which provides:

> Historically the 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.

In defining an "interest category," ANSI notes that such categories may vary from case to case, being "a function of the nature of the standards being developed." Though not strictly required, three interest categories are suggested: producer, user,[77] and general interest. However, the door is left open "where appropriate" for the consideration of additional interest categories including consumer; directly affected public; distributor and retailer; industrial/commercial; insurance; labor; manufacturer; professional society; regulatory agency; testing laboratory; and trade association.[78]

In addition, ANSI includes a separate non-domination requirement in Section 1.2 of the Essential Requirements:

> The standards development process shall not be dominated by any single interest category, individual or organization. Dominance means a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints.

Putting these pieces together, the ANSI Essential Requirements impose an affirmative duty on accredited SDOs to seek participants from diverse interest categories, and that if balance does not exist, the SDO must undertake outreach to achieve that balance. Conversely, dominance by any single interest category must be avoided. These requirements, while falling short of formal quotas, go further, and impose more stringent affirmative requirements on SDOs than OMB Circular A-119 or the SDOAA.

IX. PRACTICAL BALANCE

Despite the potential benefit of qualifying as a "voluntary consensus standards body" under OMB Circular A-119 and the SDOAA, some SDOs have steadfastly refused to adopt *any* formal balance requirement in their rules and policies. The most notable of these holdouts is the Internet Engineering Task Force ("IETF"), which emphasizes its openness to all interested parties,[79] but which does not impose any formal requirements of balance on its deliberations.[80] The IETF explained in its 2012 comments to OMB its belief that a balance requirement "is largely duplicative of the "openness" and "due process" prongs of the definition [of voluntary consensus standards body]."[81] It further noted that IETF is widely acknowledged by both federal agencies and academic commentators to be an exceptionally open and democratic body.[82] As such, IETF contends that it achieves a high degree of balance through the mechanism of openness – what may be termed "practical balance." This approach, while not achieving the degree of numerical balancing that could be achieved under a quota system, has resulted in a long-standing, effective, and widely-admired standardization process.

77 Four different sub-categories of "user" are defined based on the type of standard being produced: consumer, industrial, government and labor.

78 Interestingly, despite several recent disputes involving allegations that Patent-Centric SDO members have been oppressed by Product-Centric members at ANSI-accredited SDOs, ANSI's non-exhaustive list of potential interest categories does not include Patent-Centric firms (at least as of its most recent iteration in 2019). Another omitted category, which was noted in the FTC 1983 Report, *supra* note 38, at 158, is foreign manufacturers.

79 See Letter dated Apr. 29, 2012 from Jorge L. Contreras, Russ Housley and Bernard Aboba to Office of Information and Regulatory Affairs, Office of Management and Budget, at 2 [hereinafter IETF Letter] ("The IETF is completely open to newcomers, and has no membership fee or other membership requirements.")

80 IETF has, by choice, never sought accreditation by ANSI.

81 IETF Letter, *supra* note 79, at 4.

82 *Id.*

Moreover, even without formal balance requirements, some SDOs have taken positive steps to encourage participation by diverse stakeholder groups including consumers and civil society.[83] IETF, through its parent organization the Internet Society, regularly funds the participation in IETF standardization activities of individuals from developing countries.[84]

X. A HIERARCHY OF BALANCE MECHANISMS

From the above discussion emerges a four-tier hierarchy among SDO balance mechanisms. First, the intentional unbalancing of SDO deliberations through tactics such as those alleged in *Allied Tube* – packing the room with unqualified individuals, paying for individuals to attend SDO meetings solely for the purpose of voting, and otherwise corrupting the legitimate deliberative process – smacks of the worst abuses of labor racketeering and should clearly be sanctionable under the antitrust laws. This is a baseline requirement for all SDOs.[85] Facilitating an abusive imbalance in SDO decision making processes is prohibited to all.

Beyond this baseline, however, degrees of stakeholder balance reflect the preferences of different SDOs. Both OMB Circular A-119 and the SDOAA prohibit domination of SDO deliberative processes by a single interest group. Certainly, some degree of single-group domination might give rise to antitrust liability. But not all instances of single-group domination are anticompetitive. SDOs that wish to take advantage of the liability safe harbors under the SDOAA or that wish to have their standards accepted by federal agencies in their procurement or regulatory functions must avoid such domination. But failing to do so, by itself, is not actionable under the antitrust laws.

And beyond the non-domination requirements imposed under the SDOAA and Circular A-119 are even more stringent balance requirements that can voluntarily be adopted by SDOs. Two approaches of increasing stringency include those adopted by ANSI, which imposes on its accredited SDOs an affirmative obligation to ensure some degree of balance among an unspecified mix of stakeholder groups, and by ASTM, which imposes a strict numerical quota requirement on its deliberative bodies. Again, these third and fourth-level balance requirements are not required by law; rather, they are policy design preferences expressed by SDOs.[86] In the case of ANSI, only SDOs that elect to seek ANSI accreditation must comply, and in the case of ASTM, such requirements are imposed purely by choice of the SDO's governing body as representative of its membership.

The hierarchy of balance mechanisms is summarized in Table 1 below.

Table 1

Hierarchy of SDO Balance Requirements

Tier	Nature of Balance Requirement	Source	Applies to
1	No abusive imbalance	Allied Tube	All SDOs
2	Non-domination	SDOAA, OMB Circular A-119	SDOs wishing to take advantage of statutory benefits under SDOAA and OMB Circular A-119
3	Obligation to seek balance	ANSI Essential Requirements	SDOs that wish to be accredited by ANSI
4	Numerical quotas	ASTM	SDOs that desire minimum representation by identified stakeholder categories

83 See JRC Report, *supra* note 8, at 120.

84 See Jorge L. Contreras, *National Disparities and Standards-Essential Patents: Considerations for India* in Complications And Quandaries In The Ict Sector: Standard Essential Patents And Competition Issues (Ashish Bharadwaj, Vishwas H. Deviah & Indranath Gupta, eds., Springer: 2017).

85 I borrow this terminology from the JRC Report, *supra* note 8, at 139-40 (discussing "baseline" IPR policy terms that are largely dictated by legal and administrative requirements).

86 Using the terminology of the JRC Report, these would be "baseline-plus" policies. See JRC Report, *supra* note 8, at 145-46.

XI. CONCLUSION

At some level, balance in SDO decision making is an expected and important aspect of collaborative standardization. But beyond a baseline prohibition on abusive attempts to skew the process per Allied Tube, the imposition of balance requirements on SDOs is not legally mandated. SDOs may select, based on their different policy preferences, risk aversion, and stakeholder composition, what degree of balance they wish to enforce. In some SDOs, such as IETF, the SDO may desire to impose no such balance requirements, relying instead on openness and transparency to ensure a fair and legitimate process. SDOs that wish their standards to be adopted by federal agencies must comply with the non-domination balance requirements of OMB Circular A-119, and those that wish to benefit from the liability protections of the SDOAA must do the same. Those that wish to be accredited by ANSI, must adhere to the affirmative balancing obligations set forth in its Essential Requirements, and others, such as ASTM, may wish to impose strict numerical quotas on participation by different interest groups. The resulting diversity in SDO policy outcomes is a sign not of disagreement, but of a healthy organizational ecosystem in which policy experimentation and preference signaling are robust.[87]

In assessing the balance requirements of SDO policies, it is important to remember that an SDO's failure to abide by the more stringent balance requirements described in Tiers 2-4 above should not be confused with a violation of the law. Antitrust liability should be imposed only when the relatively high threshold for liability established by cases such as *Allied Tube* has been established. In all other cases, differences in SDO balance requirements should be viewed as expressing the policy preferences of SDOs and their members. This approach is consistent with both the regulatory history of SDO balance requirements in the U.S. as well as the Supreme Court's leading precedent in this area and, as such, itself exemplifies a balanced approach to the legal regulation of SDOs.

87 See JRC Report, *supra* note 8, at 79-80, 158-60 (describing experimental approach among SDOs in the development of IPR policies and resulting policy diversity).

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