



**U.S. Department of Justice Antitrust Division Comments  
on the U.S. Standards Strategy  
September 8, 2020**

The Antitrust Division of the U.S. Department of Justice welcomes the opportunity to comment on the competition aspects of the U.S. Standards Strategy (“the Strategy”). We recognize that industry-wide standards are an integral component of the infrastructure of today’s economy. By ensuring the interoperability of a wide range of related products, standards “make products less costly for firms to produce and more valuable to consumers.”<sup>1</sup> They also help fuel dynamic competition by ensuring market-wide acceptance of the most innovative new technologies.<sup>2</sup> Many products, especially those that rely on advanced technologies and patented inventions, are standardized. As the Strategy observes, “[s]tandards are essential to a sound national economy and secure critical infrastructure, and to the facilitation of global commerce.” Strategy at 1. Standards will continue to be central as emerging technologies that enable the Internet of Things continue to develop.

Standards development, however, is not without antitrust risk, and the Antitrust Division has a strong interest in ensuring that the standard-setting process remains procompetitive.<sup>3</sup> The Supreme Court has recognized that “private standards can have significant procompetitive advantages,” when standards development organizations promulgate them “through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988). We are pleased that the Strategy is based on “globally accepted principles for standards development”—including transparency, openness, impartiality, consensus, performance based, balance, and due process. Strategy at 3-4. These principles are critical to ensuring the benefits of standardization and to mitigating the likelihood of competitive harm.

There are areas of the Strategy that could benefit from further discussion and recognition of these principles, particularly given the importance of the transition to 5G over the next several years and the evolving global landscape, in which certain players are increasingly attempting to bias standards development processes in their favor. For example, it is critical that innovators who voluntarily contribute their intellectual property are appropriately compensated for their innovation should they seek a royalty. The guarantee of market-driven financial rewards is a powerful incentive for inventors to develop new technologies—and for maintaining an innovative environment over time. Indeed, maintaining balance in the standards selection process is critical to preventing any number of special interests from subverting the process to

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<sup>1</sup> See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, 33 (2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

<sup>2</sup> See Makan Delrahim, Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice, “Don’t Stop Thinking About Tomorrow”: Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property. Remarks Before the Organisation for Economic Co-operation and Development, 4 (June 6, 2019) (discussing the benefits of standard setting), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-co> [hereinafter Delrahim, “Don’t Stop Thinking About Tomorrow”].

<sup>3</sup> See generally Delrahim, “Don’t Stop Thinking About Tomorrow” at 5-11 (discussing the U.S. government’s approach to analyzing antitrust issues that may arise in standards development).

further their own ends, thereby undermining the procompetitive value of standards. Consequently, we offer the following comments.

### **Protection of Intellectual Property**

The Strategy indicates that the “[l]aws and policies that protect patents, trademarks, and other intellectual property are not universally or rigorously applied” globally, and “[t]he standardization process must respect [intellectual property] rights . . . while ensuring implementers and users have access to the intellectual property rights (IPR) incorporate into standards.” Strategy at 2. The Strategy further states that “*Government* should advance and respect policies at home and abroad that ensure the continued ownership and control of the copyrights and trademarks of standards developers, and the protection of intellectual property contributed in the standards development process.” Strategy at 9.

The Antitrust Division agrees that intellectual property rights must be respected and protected. In addition, the Strategy should take the opportunity here to recognize that in the United States commitments to license or otherwise contribute intellectual property to standards are voluntary. This means that intellectual property holders decide whether to contribute their technology to a standard and whether they will agree to the terms of the SDO’s licensing policy, which may include a requirement to license on fair, reasonable and non-discriminatory terms (FRAND) or royalty free. The Strategy should seek to promote voluntary commitments and licensing policies that balance the interests of both intellectual property holders and implementers. Intellectual property disclosures to SSOs and licensing commitments are designed to promote access to the technology needed to implement standards and to encourage participants to include their best technology in a standard by allowing for appropriate compensation. As recognized in OMB Circular A-119, intellectual property rights policies “should . . . take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard.”<sup>4</sup>

To that end, the U.S. Standards Strategy should further recognize that respecting intellectual property rights includes ensuring that licensing commitments are voluntary, intellectual rights policies are balanced, and that intellectual property holders are appropriately compensated for their contributions if they choose to license and seek a royalty.

### **“Accepted Principles”**

The Strategy indicates that “[g]overnment agencies at the federal, state, and local levels are encouraged to rely on voluntary consensus standards that have been developed in accordance with accepted principles.” Strategy at 3. The Strategy does not articulate what those principles are until further down the page. It would be helpful here to cite OMB Circular A-119, which defines the foundational principles for the federal government’s participation in standards development and use of industry-led standards, which include openness, balance, due process, an

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<sup>4</sup> See Office of Mgmt. and Budget, Exec. Office of the President, Revision of OMB Circular A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” 81 Fed. Reg. 4673 (Jan. 27, 2016), <https://www.nist.gov/document/reviseocirculara-119asof01-22-2016pdf>.

appeals process, and consensus. *See also* page 5 (discussing the A-119). These principles also have been incorporated by Congress into the Standards Development Organization Advancement Act (SDOAA). *See* 15 U.S.C. § 4301(a)(8).

### **Definition of Standardization or Standards “Activities”**

In several places, the Strategy uses the term standardization “activities” without defining what such activities include. For example, the definition of transparency on page 3 says information about “standardization activities” should be accessible to interested parties. *See* Strategy at 3, 4. It would be helpful to explain whether such activities include both standards development and policy development by the SDO. The SDOAA defines such activities as “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.” *See* 15 U.S.C. § 4301(a)(7).

As previously articulated by the Department, principles of openness and balance of interests should extend to intellectual property policy development. If an SSO’s intellectual property rights policy is too restrictive for one side or the other, it also risks deterring participation in procompetitive standard setting. The Department has urged ANSI to have balanced representation in its decisional bodies that are charged with implementing and revising ANSI’s Patent Policy, so that diverse interests are represented, and so that their decisions do not shift bargaining leverage in favor of one set of economic interests, including the interests of either implementers or patent holders. Moreover, the Department in the past also has encouraged ANSI to promote flexibility among standards development organizations to experiment and compete with one another on their policies.<sup>5</sup>

### **Openness**

The Strategy says that participation in standards development should be open to “all affected interests” but does not define “affected interests.” Strategy at 3. In the Department’s view, greater participation from industry stakeholders is likely to lead to better technical solutions. Therefore, it would be helpful to articulate what interests are “affected” by standardization and who should be included in the process.

### **Standards Development Organization Advancement Act**

The Strategy states that “[a]dherence to [principles like balance, etc.] can also mitigate antitrust liability . . . [under] the [SDOAA].” *Id.* at 3 n.4. The SDOAA provides (1) rule of reason treatment for “a standards development organization while engaged in a standards development activity” and (2) limited recovery in antitrust suits based on “standards development activity engaged in by a standards development organization.”

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<sup>5</sup> Alexander Okuliar, Deputy Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice, Remarks at the Intellectual Property Rights Advisory Group Meeting (May 28, 2020), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-alexander-okuliar-delivers-remarks-intellectual>.

See 15 U.S.C. §§ 4302(2), 4303(a). It may be more precise if the Strategy explained the SDOAA in greater detail. The ability of an SDO to claim the SDOAA's protections will depend, of course, on whether it engaged in qualifying "standards development activity" and whether any such activities were conducted in accord with the procedures required under the Act. Also note that the Act excludes "any agreement or conspiracy that would set or restrain prices of any good or service" from the definition of "standards development activity" subject to the rule of reason. 15 U.S.C. § 4301(c)(3).

### **Barriers to Trade and Balanced, Unbiased Standards Selection Bodies and Processes**

The Strategy recognizes that "facilitation of global trade requires that more attention be given to preventing standards and their application from becoming market access barriers, and to addressing barriers that do arise." Strategy at 7. Toward this end, it also recognizes the importance of truly global standards achieved through balanced processes that focus on technological merits. For instance, it notes the "global acceptance of relevant voluntary consensus standards developed through a variety of processes . . . regardless of the domicile of the standards developers." Strategy at 4.

The Antitrust Division agrees that global standards function best when they are used as tools for fostering competition and consumer benefits, and not when they are imposed to create barriers to market entry or to deny adequate and effective protection for intellectual property rights. The Division also recognizes that ensuring standards development organizations and processes remain balanced and unbiased is critical to achieving the procompetitive outcomes that both benefit consumers and encourage innovation. Balanced processes compel firms to compete aggressively for inclusion into a standard, and ensure that technologies are selected for inclusion based on their relative merits.

If the standards development process is stacked in favor of specialized interests, whether private or state interests, however, the process is more likely to deviate from a merits-based approach. For example, biasing global standards development processes in favor of one nation's interests may undermine the very principles that the Strategy recognizes are critical to promoting competitive outcomes.<sup>6</sup> ANSI, the Division, and many others have worked diligently for many years to foster an international standards development environment conducive to both competition and innovation. To prevent these efforts from being undermined, the Antitrust Division recommends the Strategy further emphasize the importance of maintaining balanced

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<sup>6</sup> See Emily de La Bruyere & Nathan Picasric, *China Standards 2035: Beijing's Platform and Geopolitics 'Standardization Work in 2020'*, Horizon Advisory, China Standards Series, at 11 (Apr. 2020) ("Beijing's standardization plan is not just about China. The China Standards outline is explicit about its intentions to proliferate standards internationally – and to do so by integrating with, and co-opting, global standard-setting bodies."); Arjun Kharpal, *Power is 'up for grabs': Behind China's plan to shape the future of next-generation tech*, CNBC (Apr. 26, 2020), <https://www.cnbc.com/2020/04/27/china-standards-2035-explained.html> ("China is set to release an ambitious 15-year blueprint that will lay out its plans to set the global standards for the next-generation of technologies."); Emily de La Bruyere & Nathan Picasric, *China's next plan to dominate international tech standards*, TechCrunch (Apr. 11, 2020), <https://techcrunch.com/2020/04/11/chinas-next-plan-to-dominate-international-tech-standards/> ("Beijing is about to launch China Standards 2035, an industrial plan to write international rules.").

standards developments processes and outcomes, and consider warning of the very real consumer harms of allowing specialized interests to influence these decisions.

## **Conclusion**

The Antitrust Division appreciates the opportunity to comment on this draft Strategy. Engaging with ANSI on the drafting of this document furthers the Division's interest in promoting competition and innovation in the area of standards development.