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Plymouth, April 15, 2019

**By email: [psa@ansi.org](mailto:psa@ansi.org)**

**Fraunhofer response to call for comments in respect of proposed amendments to ANSI Appeal Procedures**

Dear Ladies and Gentlemen:

We commend ANSI for its engagement with its membership as well as members of the public in the consideration of proposed amendments to the ANSI Appeals Procedures. We express our thanks for the opportunity to submit comments in this regard.

The Fraunhofer-Gesellschaft (Fraunhofer)<sup>1</sup> is Germany's and Europe's largest industrial research organisation and has been actively contributing to international dialogue on the relevance of good governance in standardisation and the importance of intellectual property law in the context of high-technology strategies and innovation ecosystems.

Fraunhofer USA focuses on industrial innovation in the USA, operating seven Research Centers of Excellence with Universities such as Boston and Michigan State. It also has strong relationships with US Departments and Agencies, for example, the US Department of Energy, NASA and DARPA, and agencies of economic development in several States.

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<sup>1</sup> Fraunhofer undertakes applied research of direct utility to private and public enterprise and of wide benefit to society. With a workforce of over 26,500 and an annual research budget of €2,2 billion, the Fraunhofer-Gesellschaft is Europe's largest organization for industrial research, and currently operates a total of 72 institutes and research units. Fraunhofer's research focuses on the needs of people in the areas of healthcare, security, communication, mobility, energy and the environment. Fraunhofer's international sites and its representative offices act as a bridge to the regions of greatest importance to scientific progress and economic development. See also <https://www.fraunhofer.org/> for specific details of Fraunhofer's activities in the United States.

The aim of Fraunhofer when undertaking applied research with its cooperation partners is to increase the competitiveness and relevance of local industry, thereby assisting in job creation. This includes undertaking activities as a developer and holder of all types of intellectual property, including standard essential patents and other forms of intellectual property which have the potential for global adoption. From these activities, Fraunhofer has participated in many licensing programs developed to implement world-class, global technology solutions to ultimately serve societal benefit and advancement.

We hope that the **following** comments are of assistance to ANSI during the consideration of the proposed amendments to the ANSI Appeals Procedures.

## **A. Substantive Comments**

### **1. Proposed amendments to Authority and Scope**

It is proposed to amend the ANSI Appeals Board Operating Procedures (ABOP) so that standing to apply for an appeal is brought by:

‘directly and materially affected persons that have exhausted all other appeals available to them through ANSI and who believe they have been, or will be, adversely affected by a decision of ANSI, whether in the form of action or inaction, in the implementation of the following ANSI procedures:

[...]’.

It is unclear why the test for standing to apply for an appeal has been amended.

The proposed amendment appears to change the application of a test for standing to apply, to a test as to whether the applicant *prima facie* demonstrated that it has been, or will be, adversely affected by a decision of ANSI.

We query whether this is the intended consequence of the proposed amendment, and whether it would be more appropriate to qualify ‘belief’ so that the applicant must demonstrate that it holds a reasonable and honest belief. Standing to apply for an appeal would then be brought by

‘directly and materially affected persons that have exhausted all other appeals available to them through ANSI and who hold an honest and reasonable belief they have been, or will be, adversely affected by a decision of ANSI, whether in the form of action or inaction, in the implementation of the following ANSI procedures:

[...]’.

## **2. Proposed amendments in relation to procedures for Appeal, Response and Request to Stay**

It is proposed that the ANSI ABOP, the ANSI Board of Standards Review Operating Procedures (BSROP) and the ANSI Executive Standards Council Operating Procedures (ExSCOP)<sup>2</sup> be amended to include letters of support as part of an appeal, as well as the response to the appeal.

Fraunhofer considers that the proposed amendments add clarity and could assist in facilitating an open, transparent and representative appeals process in line with the ANSI Essential Requirements by giving all directly and materially affected persons who are not parties to the appeal an opportunity to take part in the appeal *ab initio*. This could be important in relation to section 11.2 of the ABOP, as it may avail all directly and materially interested persons of the opportunity to facilitate the determination by the Appeals Board as to whether a *prima facie* case has been established by an appellant. Indeed, the ANSI Essential Requirements highlight the importance of ‘an identifiable, realistic, and readily available appeals mechanism for the impartial handling of procedural appeals regarding any action or inaction’.

Fraunhofer considers that clarity is also provided through the proposal to add procedural guidance in the ABOP, BSROP and ExSCOP<sup>3</sup> in relation to requests to stay decisions, as well as in relation to the proposal on relevant evidence to be included in the appeal to the Appeals Board and appeal statement format.<sup>4</sup>

## **3. Proposed amendments in relation to identification of the Respondent**

Fraunhofer respectfully expresses reservations regarding the proposed amendment of the ABOP, the BSROP and the ExSCOP<sup>5</sup> to remove the definition of the respondent as ‘the party who must respond to the appeal’. Clear identification of the respondent who has standing to participate in an appeal is considered a fundamentally important element of any hearing. This appears to be supported by other sections of the appeal process, notably where a broader class of persons who may be directly and materially affected are afforded the opportunity to submit letters of support.

Relatedly, and in line with the ANSI Essential Requirements for due process particularly openness, balance and transparency, Fraunhofer suggests that ANSI could use current communication channels (e.g. through Standards Action) to notify all directly and materially interested parties of any actions/decisions taken by ANSI as well as appeals and responses to appeals. It is considered important that all directly and materially interested persons be notified of the appeal so that they are able to effectively participate in the process.

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<sup>2</sup> Sections 11.1, 11.3, 11.4 of the ABOP, sections 7.2 and 7.3 of the BSROP and sections 17.2 and 17.3 of the ExSCOP.

<sup>3</sup> Proposed sections 11.2 of the ABOP, 7.2 of the BSROP and 17.3 of the ExSCOP.

<sup>4</sup> Proposed amendments to sections 11.1 and 11.3 of the ABOP, 7.2 and 7.3 of the BSROP and sections 17.2 and 17.3 of the ExSCOP.

<sup>5</sup> Section 11.3 of the ABOP, section 7.3 of the BSROP and section 17.3 of the ExSCOP.

The second proposed amendment to the section dealing with 'Response' highlights that there is no compulsion on a respondent to respond to an appeal. It is suggested that clarity be added to this section, in terms of what a 'no response' means for the appellant. For example, is the appeal automatically held to be in favour of the applicant?

#### **4. Proposed amendments in relation to accessibility of documentation and decisions**

It is proposed to amend the ABOP, the BSROP and the ExSCOP<sup>6</sup> to limit access only to a copy of the appeal decision and to remove the option for any directly and materially affected person to access a copy of the entire record on appeal.

Fraunhofer considers that this amendment could go against the ANSI Essential Requirements on openness and transparency. There is no rationale provided for removing the option to access a copy of the record on appeal. It is respectfully noted that due process should not only be followed, but also seen to be followed, for all directly and materially affected parties.

#### **5. Proposed amendment to section 17.1 of the ExSCOP in relation to the Right to Appeal**

It is proposed to amend section 17.1 of the ExSCOP by adding the following paragraph:

Other complaints or concerns of a directly and materially interested party who has been or will be adversely affected by any other kinds of actions or inactions of the ExSC should be brought to the attention of the ExSC secretary. The ExSC Executive Committee or the full ExSC (as determined by the Chair or Executive Committee) will address such concerns in a manner that it deems fair and reasonable, consistent with the ANSI By-Laws and these operating procedures

It is not clear what distinction ANSI seeks to make between actions or inactions of the ExSC for which a right of appeal is available and 'any other kinds of actions or inactions of the ExSC' that seemingly fall outside of the normal appeal procedure. Further it is not clear what nature of actions or inactions of the ExSC is contemplated by this amendment. The proposed addition introduces inconsistency within section 17.1 of the ExSCOP by creating what seems to be a second category of actions or inactions of the ExSC for which a different procedure, other than the appeal procedure, is applicable.

If the intention is to create, in relation to actions or inactions of the ExSC, an avenue by which directly and materially affected persons can lodge complaints and concerns with the ExSC outside of the normal appeals procedure, then it may be more appropriate to introduce a separate provision that deals with general complaints to the ExSC and clear processes and procedures (including addressing standing (*locus standii*)).

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<sup>6</sup> Section 15 of the ABOP, section 7.7 of the BSROP and section 20 of the ExSCOP.

## B. Conclusion

Any amendments to ANSI's rules of procedure should be pursued with due regard being given to the guiding principles enshrined in key instruments and documents in particular:

- a) The United States Standards Strategy<sup>7</sup>, founded upon the principles of being open and inclusive, market driven, sector based, consumer focussed and globally relevant.
- b) The Standards Development Organisation Advancement Act of 2004 (SDOAA) , which enshrines the principles of openness, balance, transparency, consensus, and due process. As set out in Section 102(5) SDOAA, US Congress finds that *'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.'*
- c) The WTO Agreement on Technical Barriers to Trade (TBT Agreement)<sup>8</sup>, Annex 3, containing the 'Code of Good Practice for the Preparation, Adoption and Application of Standards'. The TBT Agreement enshrines universally accepted elements relating to standards development: due process, transparency, non-discrimination and openness.
- d) ANSI's current Constitution and By-Laws, and Essential Requirements, which embody openness, lack of dominance, balance, consensus, and due process. One of the key purposes of ANSI that is outlined in the current Constitution and By-Laws is to assure that the interests of the public have appropriate protection, participation and representation in standardization, conformity assessment and related activities. It is also noted that these governing documents adhere to good governance, relying on expert advice and decision making to enable long-term and strategically sound outcomes for ANSI to fulfil its mandate.

Whereas some of the proposed amendments to the ANSI appeals procedures are in line with the guiding principles, it is humbly requested that ANSI exercise caution before adopting any amendments that are inconsistent with these principles. Keeping all interested parties adequately informed, including facilitating access to all relevant information, is considered essential in maintaining the safeguarded due process,

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<sup>7</sup> [https://www.ansi.org/standards\\_activities/nss/usss](https://www.ansi.org/standards_activities/nss/usss)

<sup>8</sup> For an overview, see [https://www.wto.org/english/res\\_e/publications\\_e/tbttotrade\\_e.pdf](https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf).

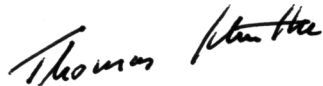
openness and transparency. Any amendments that could interfere with the opportunity for all interested parties to effectively participate in ANSI should in this regard be reconsidered.

Fraunhofer is supportive of any effort that reflects inclusiveness, openness, representative and transparent. This includes any initiative to ensure that interested parties are notified of actions and decisions of the Program Oversight Committees, as well as other ANSI bodies - including any appeal proceedings that may arise in relation to these actions and decisions.

We would be happy to respond to any questions regarding the above comments and remain in dialogue with ANSI on these issues which are important to sustainable innovation and globally competitive American Industry.

Yours sincerely,

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Schuelke". The signature is written in a cursive style with a large, stylized initial 'T'.

Prof. Dr. Thomas Schuelke  
President, Fraunhofer USA, Inc.