ANSI Board Response to Member Comments on Proposed By-Laws Changes

The ANSI Board of Directors ("Board") thanks the 16 ANSI members who submitted comments relating to the proposed changes to the By-Laws. Some of these comments were substantive in nature and others were editorial. All of them were thoughtful and helpful. The Board greatly appreciates the time and effort put forth by each of these commenters.

This document, prepared by the Governance Advisory Task Group ("GATG") and approved by the Board at its June 5, 2019 meeting, summarizes the substantive comments received and provides ANSI's response, explaining why changes were made (or not made) and providing relevant history and commentary where appropriate. Proposed editorial changes (and a change regarding the By-Laws’ continued use of the term "balance," discussed below) are incorporated into the attached red-lined draft.

The substantive comments relate to a number of topics, including: (1) ANSI's legal status; (2) ANSI decision makers; (3) the ANSI Essential Requirements; (4) the proposed new organizational structure; (5) the history and purpose of the ANSI Patent Policy; (6) the composition and expertise of the Executive Standards Council ("ExSC"); (7) the composition of the Intellectual Property Rights Policy Committee ("IPRPC") and future Intellectual Property Rights Policy Advisory Group ("IPRPAG"); (8) the relationship of the By-Laws to the OMB Circular A-119, the World Trade Organization ("WTO") Code of Good Practice, the Standards Developing Organization Advancement Act ("SDOAA") and the United States Standards Strategy ("USSS"); (9) the operations of Policy Advisory Groups; (10) the Code of Conduct; (11) conformity assessment; (12) Robert’s Rules of Order; (13) balance; (14) quorum requirements; (15) conflict of interest; and (16) the GATG itself. Each of these issues, and the comments relating to them, are addressed below.¹

1. ANSI's Legal Status

Some commenters ask questions about the source of ANSI's authority and what limitations may curtail that authority. Some of these commenters mischaracterize ANSI either as a "quasi-governmental" body or otherwise the product of delegated authority from a government agency. For example, several commenters state that ANSI derives its authority from a Memorandum of Agreement ANSI entered with the National Institute of Standards ("NIST"), dated December 7, 2000, last updated on April 29, 2019. These comments are not accurate.

ANSI was created to serve as a neutral body to coordinate the voluntary consensus standards system and approve standards as American National Standards ("ANS"). The original sponsors of ANSI were: (a) five of the then-leading Standards Developing Organizations ("SDOs"), the American Society of Mechanical Engineers ("ASME"), the American Society of Civil Engineers ("ASCE"), the Institute of Electrical and Electronics Engineers ("IEEE"), the American Institute of Mining, Metallurgical and Petroleum Engineers ("AIME") and the American Society of Testing

¹ Every comment received by the GATG was considered, although not every comment is addressed in this response.
and Materials (now "ASTM International"); and (b) three agencies of the federal government, the Department of War, the Department of Navy (now combined as the Department of Defense) and the Department of Commerce.

ANSI was organized as, and continues to be, a New York, not-for-profit corporation exempt from federal taxation under Internal Revenue Code ("IRC") 501(c)(3). Membership and participation in ANSI is and always has been entirely voluntary. No legislation or federal agency empowers ANSI to perform the role that it does, including NIST. ANSI is not a “quasi-governmental” body and enjoys none of the privileges and immunities of government. No government agency has delegated any of its authority to ANSI.

Today, ANSI has more than 1,400 members who are placed into five primary member categories: organizations, companies, government agencies, academic institutions and consumers. ANSI does not exist to serve any particular membership category or any particular industry group within a membership category.

2. ANSI Decision Makers

Some commenters in effect suggest that ANSI should delegate certain policy-related decisions to individuals who are not fiduciaries of ANSI. Doing so, however, would expose ANSI to increased risk under the laws that apply to ANSI.

Under both New York law and the IRC, ANSI may not act for the benefit of the private commercial interests of its members. Instead, ANSI must act in furtherance of its charitable, scientific and educational purposes. Prudence and principles of good corporate governance also counsel that decisions made on ANSI’s behalf should be made by disinterested persons owing fiduciary duties to ANSI. This requirement is different than one that would apply to a trade association, for example, that exists for the very purpose of benefiting a particular industry or business generally.

A number of Supreme Court decisions hold that not-for-profits such as ANSI will be held accountable for decisions made on their behalf by volunteers and members. These decisions make clear that it is the not-for-profit’s responsibility to ensure that decision making does not fall into the control of commercially-interested parties. In Hydrolevel v. ASME, 456 U.S. 556 (1982), for example, an SDO was sued for conspiring to restrain trade. The case stemmed from a letter written by an SDO committee member disapproving of the plaintiff-company’s product. The Supreme Court held the SDO liable for antitrust violations committed by the commercially-interested individuals that it placed in positions of apparent authority. Under Hydrolevel, not-for-profit organizations like ANSI can be subject to antitrust and tort liability for the wrongdoing of their volunteers even if ANSI does not benefit from the wrongdoing.

In Allied Tube v. Indian Head, 486 U.S. 492 (1988), a group of individuals proposed an amendment to the National Electrical Code that would allow installers to use PVC conduit in addition to steel tubing. The steel tubing industry thought the amendment would cost them business, so they recruited more than 200 employees to join the sponsoring SDO and those new members voted down the amendment. The PVC conduit manufacturers sued the steel tube manufacturers and won a $3.8 million verdict for restraint of trade. The case reaffirmed the principle that the writing of
codes and standards is subject to antitrust laws even though the codes and standards may ultimately be adopted by government agencies.

Accordingly, ANSI should seek to ensure that persons making decisions for ANSI are fiduciaries and that they make key decisions in ANSI's best interests and not for their own or their employers' financial or commercial interests.

3. **The ANSI Essential Requirements**

Some commenters raise questions about ANSI's relationship with the SDOs it accredits and at least one commenter mistakenly characterizes ANSI itself as a "standards developer" by claiming that the Essential Requirements is a "standard."

ANSI's certificate of incorporation states that one of its "purposes" is to "provide a systematic means by which organizations concerned with standardization work may cooperate in establishing American [National] Standards … but not to formulate standards." (Emphasis added.) ANSI's By-Laws echo this prohibition, stating that "ANSI itself shall neither develop standards nor conduct certification programs." ANSI is required to adhere to these core principles.

The Essential Requirements governs the processes by which ANSI accredits SDOs and approves standards as American National Standards ("ANS"). The Essential Requirements is not itself a standard, but a document established solely by ANSI that sets forth when a standard may become an ANS and what an organization must do to be accredited by ANSI. Over 240 organizations are accredited by ANSI and over 11,000 standards are approved as ANS. While ANSI always solicits input on the Essential Requirements from interested parties, the final decision as to what to include in the Essential Requirements is made within ANSI's governance committees.

Once accredited, an SDO may call itself an ANSI-Accredited Standards Developer ("ASD") and once approved, a standard may be called an ANS, entitling the sponsoring SDO to utilize the ANS certification mark, a kind of trademark indicating that the standard has been approved as an American National Standard in accordance with ANSI's Essential Requirements. ANSI cannot require an SDO to seek ANSI accreditation under the Essential Requirements and ANSI cannot require an ASD, once accredited, to submit its standards for approval as ANS. SDOs come to ANSI seeking a service – ANSI's accreditation – and its coveted certification mark. In doing so they subject their ANS development process to ANSI's neutral oversight and due process-based requirements, including public review requirements, appeals and audits.

4. **Proposed New Organizational Structure**

Some commenters question why ANSI is proposing changes to its current organizational structure, in particular why current Policy Committees are being re-designated Policy Advisory Groups and why the ExSC and Board of Standards Review ("BSR") are now to report directly to the ANSI Board Executive Committee. Some of these commenters mistakenly argue that certain responsibilities previously held by Policy Committees, such as the IPRPC, have been "shifted" to other Committees of ANSI, such as the ExSC. These commenters suggest that the proposed By-Laws changes may cause ANSI to lose valued input from its current Policy Committee members.
in the form of decreased participation of experts and that key decisions may be placed in the hands of groups that do not possess relevant expertise.

The change of name from "Policy Committees" to "Policy Advisory Groups" or “PAGs” is designed to emphasize that committees that do not make decisions on behalf of ANSI are advisory in nature and their members do not owe fiduciary duties to ANSI. By contrast, ANS decision-making committees must be composed of individuals who owe ANSI a fiduciary duty and are free from conflicts of interest. The four decision-making Committees of ANSI that do require their members to have such fiduciary responsibilities are the ExSC, BSR, ANSI ISO Council ("AIC") and the USNC Council. Other fiduciary decision makers are members of the Board itself, the Board Executive Committee (and other Board Committees), and the ANSI Appeals Board.

In the new organizational structure, the ExSC and BSR will once again report directly to the Executive Committee (as they did prior to the By-Laws changes that were adopted in 2002), instead of to the National Policy Committee. This change ensures that ANSI committees with members owing fiduciary duties report to other ANSI committees owing fiduciary duties. The AIC and USNC Council already report directly to the Executive Committee so the By-Laws changes do not alter the current reporting lines for these committees. Despite being elevated on the organizational chart to their pre-2002 place at ANSI, the responsibilities of the ExSC and BSR remain fundamentally unchanged. Detail is added to the descriptions of the responsibilities of these committees, including the role the ExSC has historically played and will continue to play regarding the ANSI Patent Policy. This is discussed further in the next section.

In the new organizational structure, the ExSC and BSR chairs will also sit on the Board and Executive Committee ex officio just like the chairs of the other Committees of ANSI (the AIC and USNC Council) and just like the chairs of the PAGs and Forums. Contrary to some of the comments received, this does not present a conflict of interest for these chairs as any "vote" on issues relating to the committees they manage can take place following the recusal of the affected chair if a conflict exists. Moreover, inclusion of these two additional perspectives on the Board and Executive Committee enhances, rather than diminishes, the voices of the members of the ExSC and BSR and ensures that the Board and Executive Committee stay abreast of the important work of these Committees.

Even though the existing Policy Committees will be renamed PAGs, their responsibilities likewise remain largely unchanged. They will continue to be a source of expertise in their respective areas – national policy, international policy and IPR policy. Therefore, there should be no decrease in

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2 One commenter questions why the By-Laws do not provide even greater detail regarding the ExSC's oversight of Audited Designator and ANSI-Accredited U.S. TAGs to ISO. The ExSC Operating Procedures provide such detail and will continue to do so. These Operating Procedures will be updated to ensure consistency with the amended By-Laws.

3 One commenter mistakenly maintains that placing PAG chairs on the Board and Executive Committee ex officio is inconsistent with the "derogation" of those PAGs to advisory groups. But the Policy Committee chairs currently sit on the Board and Executive Committee ex officio, as will their PAG successors. This demonstrates the important role these groups will continue to play at ANSI. Another commenter questioned why the term limits for the chairs of certain committees differ from the term limits for the members of those same committees. This is not new. The
participation or any degradation of policy analysis by relevant experts as such analysis will continue to be handled in the first instance by the group at ANSI with specialized expertise. We hope that members will continue to utilize the PAGs to share their expertise and as a vehicle to communicate important information back to interested ANSI members.

5. The History and Purpose of the ANSI Patent Policy

A group of company members from the IPRPC raises concerns that the By-Laws changes improperly place control over the ANSI Patent Policy in the ExSC. In their view, the IPRPC should have control over that policy and has had such control since at least 2005 when the IPRPC was first designated an ANSI Policy Committee. Many of the arguments put forward by these commenters are not new – they were advanced and rejected in prior ExSC and Appeals Board appeals and in a letter discussing the relevant history issued by ANSI's General Counsel in August 2018.

The Patent Policy is currently set forth in Section 3.1 of the Essential Requirements and has been included in some form in the Essential Requirements or its predecessor documents continuously for more than 50 years. Throughout this time, the ExSC has continuously been charged by the ANSI Board of Directors with the responsibility for "developing and maintaining the criteria and procedures for the development and coordination of American National Standards" as set forth in the Essential Requirements.

Although provisions relating to patents embedded in standards can be found in ANSI's governance documents since as early as 1932, the Patent Policy, in its current form, was conceived and drafted by ANSI's legal counsel in 1974 to safeguard the legal and reputational interests of ANSI in situations where an ANS includes an essential patent claim, also known as a standard essential patent or “SEP.” The attorney for ANSI supervising this effort, George D. Reycraft, was formerly a senior official in the Antitrust Division of the Department of Justice.

The Patent Policy was, and still is, a risk management tool – it was specifically designed to limit and/or eliminate the legal and reputational risks incurred by ANSI (such as patent infringement, antitrust, business tort and others) that otherwise might arise from the act of including a SEP in an ANS. The three prongs of the current ANSI Patent Policy were approved by ANSI's Board in 1974. There was no IPRPC at that time. These core provisions of the Patent Policy remain essentially unchanged today.

The Patent Policy was not controversial when first developed and it was very well received by patent holders and implementers alike. The Policy was adopted by many standards developers –

shorter time periods for chairs reflects a desire to review chair performance more frequently than members, given the relative greater importance of the chair role.

4 First, an ANS may include a SEP only where "technical reasons" justify doing so. Second, the SEP holder must provide an assurance that it either does not hold a patent required to implement the standard or that it will license applicants seeking to implement the standard under "reasonable terms and conditions that are demonstrably free of any unfair discrimination." Third, there must be a series of disclosures/disclaimers made by the ASD concerning the existence, scope and validity of patent rights.
domestically, regionally and internationally. To the extent there has been controversy about the language in the Patent Policy more recently, it has resulted not from actions taken by ANSI, but rather from actions pursued by regulators and private litigants/courts who have referenced language in the policy in order to confirm/imply legal rights and obligations as between patent holders and implementers – a process that has not involved ANSI and where ANSI's views have neither been solicited nor offered.

The Patent Policy has stood the test of time and served ANSI well. ANSI has never incurred any liability to any party (SEP holders, implementers, or anyone else) by reason of the inclusion of a SEP in an ANS. From at least 1975, the ExSC was responsible for the development of the procedures that govern the ANS process and those procedures included the ANSI Patent Policy.

The claim that the IPRPC assumed responsibility for the Patent Policy in 2005 is refuted by language contained in the current By-Laws and relevant history. As explained in the August letter to the IPRPC from ANSI's General Counsel, the section of the current By-Laws addressing the IPRPC does not mention the Patent Policy at all and the delegation of authority that is set forth there specifically carves out "responsibilities otherwise delegated by the Board to another body," such as the responsibilities for the Patent Policy delegated to the ExSC. To the extent the prior By-Laws are ambiguous on this or any other point, these new revisions provide any needed clarifications.\(^5\)

6. **Composition and Expertise of the ExSC**

IPRPC commenters also raise concerns about the composition of the ExSC and the expertise of the ExSC to make decisions relating to the Patent Policy. These commenters mistakenly suggest that the ExSC is a "closed" group, with "opaque" nominating procedures, in which company members, particularly patent holders, are underrepresented. They also mistakenly suggest that the ExSC is not competent to address patent-related issues which, they argue, require the expertise of patent attorneys, like those who sit on the IPRPC.

Membership in the ExSC is open to any ANSI member who is willing to serve as a fiduciary to ANSI, to act in furtherance of ANSI's mission (not the commercial interests of his/her employer) and to commit the extensive time required to perform the job properly (an estimated equivalent of roughly one full working month). The Operating Procedures of the ExSC state that "an attempt shall be made to have at least two members, with a maximum of six members," from each membership category of ANSI. At present, there are four company member representatives (two of whom also sit on the IPRPC).

Historically, opportunities have always been available for company members to become ExSC members. Since at least 1965, no company member has been turned down for membership in the ExSC.\(^6\) However, company members have not been as willing or able to make the required time

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\(^5\) Currently, some IPRPC members are involved in ongoing litigation against other IPRPC members on matters involving SEPs. The group remains very divided and there is strong disagreement from time to time about how to interpret and implement the Patent Policy. The inability of the IPRPC to reach anything close to an agreement on many matters underscores the need to clarify its advisory role and its relationship to the ExSC.

\(^6\) Exclusive of one applicant who was a consultant.
commitment as organizational and government members. None of the patent-holder commenters has applied for a position on the ExSC. That said, if they were to apply for ExSC membership, the rigorous conflict of interest policies used by the ExSC would likely preclude patent holders from adjudicating most (if not all) Patent Policy issues.

Unlike the members in the IPRPC, who are heavily concentrated in the telecom/IT industries, the members of the ExSC reflect a wide variety of industry interests and experiences including: air quality, appliances, boilers, building codes, consumers, electronics, energy, environmental protection, fire protection, food quality, government (commerce, environmental protection, food & drug administration), infrastructure, life safety, manufacturing, medical devices, petroleum, petrochemicals, plumbing, safety equipment, safety & security procedures, technology, utilities, testing, water products & quality.

These ExSC members are experienced engineers and other professionals (including attorneys) who work within the standards community. They have deep knowledge of standards and the ANSI Essential Requirements. Many have dealt with intellectual property issues in their own organizations, as well as through various appeals at ANSI.

The ExSC can, and often does, solicit input on Patent Policy issues from the IPRPC and ANSI's legal counsel. The ExSC has administered the Patent Policy successfully for decades. Recently, the ExSC was commended for "its efforts to draft a thoughtful decision [in a matter pertaining to patent statements of assurance required by the ANSI Patent Policy] that leaves to patent holders and implementers the ability to determine what licensing terms are appropriate in particular standards, subject to the terms of the relevant ASD's patent policy."7

7. Composition of the IPRPC and Future IPRPAG

Many of the same IPRPC commenters who challenge the ExSC's authority and capabilities also urge that the Patent Policy should be controlled by the IPRPC because of the alleged greater experience that committee collectively holds on matters pertaining to SEPs. These commenters also worry that, under the proposed changes, ANSI will treat the Intellectual Property Rights Policy Advisory Group ("IPRPAG") with less significance and stature than other patent groups receive in various international standards developing bodies.

These commenters do not acknowledge or address the important legal and prudential reasons why decision-making for ANSI cannot be turned over to a group such as the IPRPC, where so many members work for companies with significant financial interests in the matters that need to be addressed. Many of the persons serving on the IPRPC are employed by ANSI member companies that have a direct financial interest in what the ANSI Patent Policy says and how it is interpreted.

7 See Letter from Andrew Finch, dated March 7, 2018. Certain patent holder commenters speculate that the proposed By-Laws changes could invite interest from the Antitrust Division of the Department of Justice. However, ANSI has already briefed the Department of Justice on the By-Laws changes and explained why they do not raise any competition issues. The Department of Justice is a valued member of ANSI, and if it were to offer any comments on the By-Laws, ANSI would consider them carefully.
That is true whether they are patent holders, implementers or both. And the financial interests can be, and often are, very substantial. It follows that many members of the IPRPC may be disabled from acting as fiduciaries to ANSI on Patent Policy related issues by reason of conflict of interests. This is not meant to diminish the role of company members, but instead to make sure that ANSI honors well-settled principles of corporate governance/conflict of interest.

As noted above, neither New York law nor the IRC permit a not-for-profit like ANSI to implement policies intended to further the private financial interests of members or to allow those members to make decisions for ANSI where they have a financial interest in the outcome. That sort of delegation could jeopardize ANSI's not-for-profit status and present serious liability concerns. In addition, as noted, applicable antitrust decisions from the Supreme Court, including most especially the Hydrolevel and Indian Head cases, hold that not-for-profits such as ANSI will be held accountable for decisions made on their behalf by volunteers and members and that it is the not-for-profit's responsibility to ensure that decision-making does not fall into the control of commercially-interested parties.

Importantly, under the By-Laws changes, the IPRPAG will continue to function as a key ANSI group to which the ExSC and other committees will turn for IPR-related guidance and advice. In this regard, it will continue to function in an advisory capacity as do IPR groups in the other, international organizations mentioned by the commenters. These other IPR groups all have advisory roles, not decision-making roles. Thus, to the extent relevant, the actions of these international organizations support treating the ANSI IPR group as an advisory group.

8. Relationship of the ANSI By-Laws to the OMB Circular A-119, WTO TBT Agreement, SDOAA and USSS

Several commenters mistakenly raise concerns that the By-Laws revisions may not align with the OMB Circular A-119, the WTO TBT Agreement, the SDOAA, and the USSS.

These documents, however, do not relate to the corporate governance of an organization – they all concern standards development activities. As detailed above, ANSI is not a standards developer but, rather, accredits other bodies that develop standards. Moreover, the proposed By-Laws changes do not address standards development practices, except to indicate which body within ANSI is responsible for which subjects (e.g., the ExSC to accredit standards developers) and which other bodies exercise supervisory authority (e.g., the Board Executive Committee to supervise the ExSC). The commenters do not identify any provision in the existing or proposed By-Laws that conflicts with any provision contained in the referenced sources.

9. How the New PAGs will Operate

One commenter asked whether the extra fee paid by voting members of the IPRPC will continue to be charged to voting members of the IPRPAG. The extra fee associated with the IPRPC is based on the higher staff hours required to administer that committee, relative to other committees of ANSI, something that is likely to continue after the transition to the IPRPAG. Once the IPRPAG is in place, however, ANSI’s Finance Committee will examine this issue and determine whether the extra IPRPC fee continues to be warranted.
Several commenters raise questions about how the new PAGs will operate. As noted above, the Policy Committees, now PAGs, will continue to play a valuable role at ANSI. The changes are intended to make clear the advisory nature of the PAGs and that their members are not fiduciaries and not subject to conflict of interest requirements. With the exception of the Conformity Assessment Policy Committee (“CAPC”) (which will be removed because of the ANAB acquisition, see FAQ document, attached, at number 12), the PAG Chairs will continue to provide key input on policy matters and sit on the Executive Committee and Board in an ex officio capacity.

Thus, the NPAG will continue to provide advice on national standards policy, the IPAG will continue to provide advice on international standards policy and, as noted, the IPRPAG will continue to provide advice regarding the incorporation of essential patents or other proprietary intellectual property in national, regional or international standards. These PAGS will continue to respond to requests for input from other Committees of ANSI, such as the ExSC, and will continue to meet and discuss matters relevant to their areas of expertise.

10. The Code of Conduct

A number of commenters observe that the Code of Conduct, which has already been approved by the ANSI Board and is currently in force at ANSI, does not contain a description of the procedural steps to be followed in the event a potential violation occurs. It is ANSI's intent to develop such procedures in a separate document that will be independently approved when finalized.

In addition, some commenters request that the Code of Conduct include language on intellectual property rights, proposing to add language that refers to the protection of intellectual property to Item 10 of the Code of Conduct. But Item 10 already states that Participants "should obey all applicable laws and ANSI policies," and there is no need to preference one set of laws over others. Finally, one commenter questions what is meant by "key" staff or employees to whom the Conflict of Interest Policy, fiduciary duties and the Code of Conduct apply and asks about the General Counsel's role as Corporate Secretary. Under the IRC a key employee is an employee with a decision-making role in the business of ANSI. At ANSI, these key employees are the President, the Senior Vice Presidents (including the General Counsel) and the Vice Presidents. In addition, all employees at ANSI (including these "key" employees) are subject to codes and rules of conduct both required by law and contained in ANSI's Human Resources Manual. With respect to the role of ANSI's General Counsel in particular, that position is required to serve as ANSI's Corporate Secretary to ensure that Board members have proper legal advice and resources for discharging their fiduciary duties and that the Board's actions during a meeting reflect the proper exercise of those fiduciary duties.  

9 The Conflict of Interest Statement that accompanies the Conflict of Interest Policy similarly defines "key" persons.

10 Relatedly, another commenter asked why, under Section 3.20, the Compensation Committee will establish and approve compensation only for the ANSI President and not for other members of ANSI’s senior staff. That Section has been revised to conform to current practice where the President of ANSI sets compensation for staff. The Compensation Committee will continue, however, to establish and approve policies concerning employee compensation and benefits, like pension plans and the like, via the third subsection of Section 3.20.
11. Conformity Assessment

There were a number of thoughtful comments about conformity assessment issues. Some commenters expressed concerns about eliminating the CAPC at this time. They suggest that ANSI's acquisition of ANAB (which led ANSI to consolidate all of its accreditation programs for conformity assessment bodies and related personnel into ANAB) does not alone justify removing CAPC as an ANSI policy group because CAPC addresses a broader number of conformity-assessment-related issues than just oversight of ANSI's (now ANAB's) accreditation programs.

CAPC and the National Policy Committee (NPC), proposed to become the new NPAG, merged their meetings and discussions approximately five years ago. That consolidation was met with much approval as there is overlap of NPC/CAPC members and those members share interests in both national standards-related issues and national conformity-assessment-related issues. Thus, the proposed allocation of CAPC responsibilities between the proposed new NPAG and IPAG builds on the current, successful consolidation of CAPC activities with other committees at ANSI.

Moreover, as noted in the FAQ document, ANSI separately will undertake an examination of what kind of forum or other body might be created at ANSI to address broader conformity-assessment matters (other than accreditation programs) exclusively. The joint CAPC/NPC meeting that took place on May 15, 2019, included discussion of what additional forum or other body might be supported by a wider audience to address these more expansive conformity assessment matters. Ideas were exchanged and further discussion is contemplated at the next joint meeting during World Standards Week.

One commenter asked how the International Conformity Assessment Committee (“ICAC”), currently a subcommittee of CAPC, would be overseen by the ExSC under the new proposed changes. The ICAC is not intended to be a subcommittee of the ExSC as it was a subcommittee of CAPC. Instead, it is intended that it will be treated as a Technical Advisory Group (“TAG”) that will be accredited by the ExSC under the ANSI International Procedures (www.ansi.org/internationalprocedures), just like other TAGs.

12. Robert’s Rules of Order

Several commenters inquired why the reference to Robert’s Rules of Order is being removed from the By-Laws. Robert’s Rules of Order was first included in the By-Laws more than 70 years ago. At that time, Robert’s Rules of Order were simpler, better understood and more widely used by organizations like ANSI. Today, New York corporate-governance principles relating to meetings and voting are much better developed and understood. Moreover, ANSI has now written detailed Operating Procedures for its various committees and groups that address voting and various other procedures. In general, these procedures have been sufficient to address procedural questions when they arise. Thus, there is less need to resort to Robert’s Rules of Order which have regrettably become less understood and less often used with the passage of time.

13. Balance

A number of commenters inquired about the use of the term “balance” in the current By-Laws. These commenters note that “balance” is not a defined term and is susceptible to multiple potential
meanings, which may promote confusion instead of clarity. One commenter asks that "safeguards" be considered for ensuring that balance be maintained not only across membership categories, but within them.

In the By-Laws, the term is intended to mean a "diversity of interests" and "lack of dominance" and has historically been used flexibly and aspirationally. In seeking to achieve balance in a governance context, ANSI has never limited its consideration to membership categories because these categories focus more on the legal form of the member organization rather than the actual sectors or interests represented. Likewise, there has never been a strict formulaic or numeric approach to “balance.” As used in the By-Laws, "balance" conveys that ANSI strives to maximize diversity of interests and to avoid dominance by a single interest, person, or group.

The point about potential confusion raised by these commenters is well taken because the By-Laws' use of the word "balance" differs from the use of that same term in the Essential Requirements and the aspirational goals of "diversity of interests" are independently expressed in the By-Laws, making the use of the word "balance" superfluous. Therefore, as suggested by NIST and others, the proposed new By-Laws removes the word "balance" thereby eliminating it as a source of possible confusion but includes the word “broad” as a modifier to the word “diversity” as used in the ANSI By-Laws.

Regarding the suggestion that ANSI develop "safeguards" to ensure that balance be maintained at ANSI within membership categories, ANSI will continue to open its membership doors widely to any individual or entity impacted by standardization and encourage as large and as diverse a group as possible to join. ANSI would not and should not pass over applicants because of a perception that ANSI already has "too many" in a particular sector or interest category. Doing so would require ANSI to make highly-subjective decisions. However, ANSI always strives to achieve a diversity of interests on its Board, Board Committees and Committees of ANSI.

14. Quorum Requirements

Although the By-Laws revisions did not change in any way the quorum requirements for member and Board meetings, several commenters nevertheless questioned whether these quorum requirements remain consistent with current law. They do.

Regarding member meetings, By-Laws Section 2.06 Quorum says: “The presence in person or by proxy of at least one-tenth of the Members of the Institute entitled to vote shall constitute a quorum for the transaction of business at all meetings of Members.” Under New York's Not For Profit Law, Section 608(b), the By-Laws may provide for the lesser of 100 or one-tenth of the total number of votes entitled to be cast. As noted, the current membership at ANSI is approximately 1400 members and one tenth of that is 140 which is higher than the minimum of 100. For many membership organizations, the quorum requirement for meetings is relatively low because it can be difficult to gather members.

Regarding Board meetings, By-Laws Section 3.11 Quorum says: “The presence of two-fifths of the members of the Board of Directors shall constitute a quorum at any meeting of the Board.” Under New York's Not for Profit Law, Section 707, a quorum on a Board of more than 15 members
"shall be at least five members plus one additional member for every ten members (or fraction thereof)." The ANSI Board is comprised of 49 so ANSI's quorum requirement of 20 is two times the minimum amount.\footnote{Relatedly, some commenters voiced concerns that not all ANSI meetings are open to all ANSI members and others are open to all members, but subject to space limitations. Under Section 2.09, meetings of the ANSI Board, Board Committees and Committees of ANSI have been historically limited to the members of those committees as the work they do is quite often confidential in nature (although the committee chair can and often does allow observers to attend with permission). Members (except for Basic members) may attend Forum and PAG meetings in person or remotely, provided there are no space or technology limitations.}

15. **Conflict of Interest**

Several commenters suggest that the conflict of interest policy be more robust and include: (i) additional procedures for making known a situation in which a member believes that another member has a potential conflict that should be examined; (ii) a provision addressing a familial relationship between certain individuals serving in ANSI leadership positions; and (iii) a definition of "conflict of interest" that includes non-financial relationships. The Conflict of Interest Policy, including the definition for conflicts of interest, is modeled after the conflict of interest policy form provided by the IRS for 501(c)(3) organizations, like ANSI, and is therefore generally accepted as a good choice for a 501(c)(3). When ANSI seeks input from Board members each year, it provides a Conflict of Interest Disclosure Form, prepared by ANSI's not-for-profit counsel, that expands on the kinds of relationships unique to ANSI that should be disclosed.

16. **The GATG**

Some commenters asked for more details about the membership on the GATG and how that group undertook its mission. As discussed in the FAQ document, the GATG's broad review of the By-Laws started in August and was conducted by a group of 10 ANSI members – the chairs of all existing ANSI Policy Committees (the IPC, IPRPC, NPC and CAPC), the chairs/past chairs of Program Oversight Committees (the BSR, ExSC, AIC and USNC Council) and other knowledgeable current and former Board members (including 4 members of the IPRPC). The GATG was chaired by Art Cote, a former Board chair (now retired). Each individual who was asked to serve did so willingly.

As noted in the FAQ document, the GATG went through the By-Laws line by line and asked many questions, which ranged from the appropriate size of the Board to the sufficiency of the indemnification provisions. The GATG generated many revised drafts over a three-month period, including organizational charts, tables and red-lines. Ultimately, in late October 2018, the GATG reached consensus on a final draft. The Executive Committee (19 members) unanimously approved the final draft in November with some minor changes. The Board (49 members) reviewed it in December and asked staff to distribute it to ANSI's 1,400 members and specifically to ask for comments.
Since then 16 comments were received. All of these comments were again reviewed by the GATG, which proposed certain additional revisions to the By-Laws reflected in the attached red-lined document and drafted this Response document for review and approval by the ANSI Board Executive Committee and the ANSI Board. Both the Executive Committee at its Meeting on March 27, 2019 and the Board at its meeting on June 5, 2019, have reviewed the comments received and this Response to those Comments. The Board resolved at its June meeting that the By-Laws in the form attached hereto be implemented as of January 1, 2020.

Conclusion

The Board thanks the 16 ANSI members who submitted comments relating to the proposed changes to the By-Laws. Every one of the comments received was considered by the GATG. Many of these comments resulted in additional changes to the By-Laws that are reflected in the updated, final attached By-Laws document.

Attachments

ANSI By-Laws 2020