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Erlangen, January 17, 2020

By e-mail [psa@ansi.org](mailto:psa@ansi.org)

Dear Mesdames and Sirs,

**Fraunhofer response to ANSI Call for Public Comments – Proposed Revision to the ANSI Essential Requirements: Due process Requirements for American National Standards - Standards Action December 6, 2019**

We thank ANSI for the opportunity to provide comment on the proposed revisions to the ANSI Essential Requirements (ANSI ERs), in response to a notice contained within the December 6, 2019 edition of ANSI Standards Action.

The Fraunhofer-Gesellschaft (Fraunhofer)<sup>1</sup> is Germany's and Europe's largest applied research organisation.

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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 26,600 and an annual research budget of €2.6 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.

Fraunhofer USA focuses on industrial innovation in the USA, operating seven Research Centres 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.

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 **attached** comments are of assistance to ANSI.

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

Yours sincerely,



Mr Stefan Geyersberger  
Head of Patents and Licensing

**Encl:**

Fraunhofer response to ANSI Call for Public Comments – Proposed Revision to the ANSI Essential Requirements: Due process Requirements for American National Standards - Standards Action December 6, 2019



## Fraunhofer Response to ANSI Call for Public Comments – Proposed Revision to the ANSI Essential Requirements: Due process Requirements for American National Standards - Standards Action December 6, 2019

### A. General Comments

As expressed by the United States in *NSS Labs v. CrowdStrike*,<sup>1</sup> due process and good governance are upheld, when the principles of openness, balance, consensus, lack of dominance, and right to appeal form an interdependent framework, wherein each individual principle establishes a platform to elevate the other principles. Good governance is only maintained, when there is cohesion among the principles upon which it is built.

Fraunhofer understands that this cohesive framework is reflected at international and national level. Some key instruments relied upon for assessing the proposed amendments to the ANSI ER are the WTO Agreement on Technical Barriers to Trade (WTO TBT Agreement), the Standards Development Organization Advancement Act of 2004 (SDOAA), and the United States Standards Strategy.<sup>2</sup> In its previous comments and submissions, Fraunhofer has placed emphasis on the guiding principles of openness, balance and lack of dominance enshrined therein.

### B. Implementation of ANSI Essential Requirements

The 2017 Executive Standards Council (ExSC) Operating Procedures, 2014 National Policy Committee (NPC) Operating Procedures, and 2015 ANSI Constitution and By-Laws provided that the responsibility for the review of ANSI Essential Requirements was shared – both procedurally and substantively - between the ExSC and the NPC.<sup>3</sup> The 2014 NPC Operating Procedures further provided that the ExSC reported to the NPC when proposing revisions to the ANSI Essential Requirements with final approval provided by the NPC.<sup>4</sup>

The entering into force of the 2020 ExSC Operating Procedures and the 2020 ANSI By-Laws materially alters the process of reviewing and administering the ANSI Essential Requirements, by, most notably, giving the ExSC exclusive responsibility for the said process<sup>5</sup>, thereby removing the NPC/NPAG<sup>6</sup> from the ANSI Essential Requirements revision process. The rationale for removing the valuable role and expertise of the

<sup>1</sup> *NSS Labs v. CrowdStrike*, US District Court for the Northern District of California, San Jose Division, Case No. 5:18-cv-05711-BLF, Document 91, filed on June 26, 2019, United States, Statement of Interest, pp.3-5.

<sup>2</sup> United States Standards Strategy [https://www.ansi.org/standards\\_activities/nss/usss](https://www.ansi.org/standards_activities/nss/usss)

<sup>3</sup> The cover pages of the 2015, 2017, 2018 and 2019 Essential Requirements state the following in relation to proposing changes to the document:

*"[...] To propose changes to this document for consideration and approval by the ANSI Executive Standards Council (ExSC) and the ANSI National Policy Committee (NPC) please submit the specific proposal in strikethrough, underline format with a rationale to [psa@ansi.org](mailto:psa@ansi.org)."*

<sup>4</sup> ANSI Summary Process for the Maintenance of the *ANSI Essential Requirements* and the *ANSI International Procedures*, (October 17, 2014) See page 2. [https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%200Guides,%20and%20Forms/How%20to%20revise%20ANS%20procedures\\_101714.pdf](https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%200Guides,%20and%20Forms/How%20to%20revise%20ANS%20procedures_101714.pdf).

<sup>5</sup> The ANSI 2020 ExSC Operating Procedures state that the ExSC "[...] shall exercise exclusive responsibility for the terms of the ANSI Essential Requirements, subject only to Board ExCo and/or Board approval" [...]. (See Responsibilities and Functions).

<sup>6</sup> As of January 1, 2020, the NPC has been transformed into the National Policy Advisory Group (NPAG). By-laws of the American National Standards Institute, 2020, Article 6.07.

NPC/NPAG regarding the ANSI ER is not known.<sup>7</sup>

The practical effect of this change is that there needs to be continuity of the substantive and procedural review process within ANSI, so that the past wisdom, considerations and corporate knowledge of the NPC is not lost vis-à-vis the ANSI ERs. Having clarity over the status of past NPC decisions and validity of past considerations, moving forward, is also important.

From a governance perspective, Fraunhofer expressed its concern with this change at the time of the revision of the ExSC Operating Procedures.<sup>8</sup> Such a change also places restrictive limits on the operation of the important universal principles of balance, lack of dominance, openness, and consensus. Transferring numerous roles and responsibilities to a single committee within ANSI raises the prospect of a small and not necessarily representative group to carry out quasi-regulatory responsibilities for the entire organisation.<sup>9</sup>

Fraunhofer respectfully proposes that there be a restoration of NPC's role regarding the ANSI ER in the 2020 ANSI By-laws, 2020 ExSC Operating Procedures and 2020 NPAG Operating Procedures.

## C. Substantive Comments

### 1. Section 1.3 – Balance

#### ANSI Proposal

##### 1.3 Balance

The standards development process should have a balance of interests. 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.

Fraunhofer notes the particular attention of the United States, as formulated in *NSS Labs v. Crowdstrike* to the pivotal importance of the principle of balance in safeguarding good governance within an SDO. Therein, the United States stated:

*[...] the 'balance of interests' requirement of the SDOAA is particularly critical as it gives meaning to the statute's other required attributes of openness, due process, an appeals process, and consensus.*<sup>10</sup>

Consistent with ANSI's suggested change to Section 1.5 ANSI ER (see below) and Section 2(7) SDOAA, Fraunhofer encourages replacing 'standards development process' with 'standards development activity'. Also consistent with the SDOA,<sup>11</sup> Fraunhofer respectfully proposes that ANSI clarifies that standards development activity includes 'actions relating to the intellectual property policies of the standards development organization'.

<sup>7</sup> ANSI FAQs on proposed changes to ANSI Constitution and By-Laws, June 5, 2019, See Question 9.

<sup>8</sup> Fraunhofer comments dated November 11, 2019 submitted in response to ANSI Call for Public Comments in response to ANSI Standards Action October 11, 2019 – Changes to ANSI Executive Standards Council (ExSC), Board of Standards Review (BSR) and Appeals Board Operating Procedures.

<sup>9</sup> Justus Baron, Jorge Contreras, Martin Husovec, Pierre Larouche, Nikolaus Thumm (Editor) (2019) Making the rules. The Governance of Standard Development Organizations and their Policies on Intellectual Property Rights. EUR29655EN, Publications Office of the European Union, Luxembourg, ISBN 978-92-76-00023-5, doi:10.2760/48536, JRC115004, See Page 41, [https://publications.jrc.ec.europa.eu/repository/bitstream/JRC115004/sdo\\_governance\\_final\\_electronic\\_version.pdf](https://publications.jrc.ec.europa.eu/repository/bitstream/JRC115004/sdo_governance_final_electronic_version.pdf).

<sup>10</sup> *NSS Labs v. Crowdstrike*, US District Court for the Northern District of California, San Jose Division, Case No. 5:18-cv-05711-BLF, Document 91, filed on June 26, 2019, United States, Statement of Interest, p.3.

<sup>11</sup> Standards Development Organization Advancement Act of 2004 (SDOAA), Section 2 (7).

Fraunhofer also suggests inserting the following language from the OMB Circular A-119, to underscore the link between balance, lack of dominance, and involvement of a broad range of parties, which is meaningful. The OMB Circular A-119 provides: ‘Specifically, there should be meaningful involvement from a broad range of parties, with no single interest dominating the decision-making.’<sup>12</sup> The OECD has long noted the importance that the standards development ‘should represent divergent economic interests’.<sup>13</sup>

Fraunhofer proposes the following amendment and additions:

### 1.3 Balance

The standards development ~~process~~ **activity** should ~~have a balance of interests~~ **be balanced. Specifically, there should be meaningful involvement from a broad range of participants, with no single interest dominating the decision-making.**

**Standards development activity includes actions relating to the intellectual property policies of the standards development organization.**

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.

## 2. Section 2.1 – Openness

### ANSI PROPOSAL

#### 2.1 Openness

Timely and adequate notice of any action to create, revise, reaffirm, or withdraw a standard, and the establishment of a new consensus body shall be provided to all known directly and materially affected interests. Notice should include a clear and meaningful description of the purpose of the proposed activity and shall identify a readily available source for further information. In addition, the member’s name (or if membership is by organization, the name of the organization with a point of contact), affiliation<sup>4</sup> and interest category of each member of the consensus body shall be made available to interested parties upon request.

**The affiliation of a consensus body member refers to the entity that the consensus body member represents (which may or may not be that person’s employer). If the consensus body member is serving in an individual capacity, then the name of the individual, that person’s employer (if employed), sponsor (if other than employer) and interest category shall be made available. Contact information is not required.**

<sup>12</sup> Executive Office of the President, 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, § 2e(ii), as revised January 27, 2016.

<sup>13</sup> OECD Policy Roundtable Standard Setting 2010, at page 11: ‘[A]n SSO should represent divergent economic interests including the public sector and consumers in order to avoid problems such as that presented by South Africa, where an SSO allowed a sub-committee comprised of only the three major incumbents in the market to set the standard for vehicle theft tracking devices. The resulting standard was based on prior performance and effectively blocked entry. If potential new competitors or consumers had been a part of the process, the standard would probably have been based on technological superiority rather than entrenchment. <https://www.oecd.org/daf/competition/47381304.pdf>

As highlighted in its General Comments and encouraged in relation to the section on balance, Fraunhofer respectfully suggests placing the principle of openness in the broader context. The WTO elaborates on the principles governing standards development in Document G/TBT/9, which has been referenced by the Office of Management and Budget during the revision of Circular A-119,<sup>14</sup> and establishes a link between standards development, openness and policy development, non-discrimination, and meaningful opportunities to participate.<sup>15</sup> Having regard to these principles, Fraunhofer proposes the addition at the beginning of 2.1:

## 2.1 Openness

**Openness helps ensure non-discrimination with respect to the participation in policy and standards development activity, as well as meaningful opportunities to participate.**

**In order to ensure openness, t**Timely and adequate notice of any action to create, revise, reaffirm, or withdraw a standard, and the establishment of a new consensus body shall be provided to all known directly and materially affected interests. Notice should include a clear and meaningful description of the purpose of the proposed activity and shall identify a readily available source for further information. In addition, the member's name (or if membership is by organization, the name of the organization with a point of contact), affiliation<sup>4</sup> and interest category of each member of the consensus body shall be made available to interested parties upon request.

**The affiliation of a consensus body member refers to the entity that the consensus body member represents (which may or may not be that person's employer). If the consensus body member is serving in an individual capacity, then the name of the individual, that person's employer (if employed), sponsor (if other than employer) and interest category shall be made available. Contact information is not required.**

## 3. Section 2.2 – Lack of dominance

### ANSI PROPOSAL

#### 2.2 Lack of dominance

Unless it is claimed in writing (including electronic communications) by a directly and materially affected party that a single interest category, individual or organization dominated the standards development process, no test for dominance is required.

Fraunhofer concurs with the text as it is formulated but as current history informs us, it is possible that a dominating interest is represented by a collective of individuals and organizations in the standards development process.<sup>16</sup>

<sup>14</sup> Executive Office of the President, 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, as revised January 27, 2016, §5 (h) and Annex A.

<sup>15</sup> WTO G/TBT/9, Annex 4, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5, and Annex 3 of the Agreement, 13 November 2000, Section C.6.

<sup>16</sup> US Executive Order 13873 of May 15, 2019. "Securing the Information and Communication Technology and Services Supply Chain" <https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/> See also Executive Office of the President of the United States 2019 Special 301 Report, at page 17 [https://ustr.gov/sites/default/files/2019\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf); Executive Office of the President of the United States 2018 Special 301, at pages 16-17.

The need to protect the balance beyond ensuring lack of dominance in an antitrust sense has recently also been underscored by the US Department of Justice (DoJ) Antitrust Division. The DoJ Antitrust Division has expressed concern ‘[...] about situations in which competitors either corrupt the standard setting process so that decisions are not made by a balanced group of IP holders and implementers, or where competitors reach anticompetitive agreements outside of the scope of a legitimate standard setting exercise, with a detrimental effect on competition [...].’<sup>17</sup>

Fraunhofer proposes the following addition to 2.2:

## 2.2 Lack of dominance

Unless it is claimed in writing (including electronic communications) by a directly and materially affected party that a single interest category, individual or organization **or a collective of interest categories, individuals or organizations** dominated the standards development process, no test for dominance is required.

## Section 2.3 - Balance

### ANSI PROPOSAL

#### 2.3 Balance

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.

The interest categories appropriate to the development of consensus in any given standards activity are a function of the nature of the standards being developed. Interest categories shall be discretely defined, cover all materially affected parties and differentiate each category from the other categories. Such definitions shall be available upon request.

**Consensus body members, including consultants<sup>2</sup>, shall normally be classified in accordance with the business or other interests of their employers or the sponsor they represent in connection with the standards development activity. In cases where a consensus body member receives funding from the sponsoring ASD or other entity, that information shall be disclosed, to determine if it will impact the participant's interest classification.**

In defining the interest categories appropriate to a standards activity, consideration shall be given to at least the following:

- a) producer;
- b) user;
- c) general interest.

**A "General Interest" category, if one is offered, should include only those whose business or other interests are not covered by a discretely defined interest category, or those who represent multiple interest categories.**

Where appropriate, additional interest categories should be considered.<sup>3</sup> **However, interest categories shall not be created for the purpose of avoiding balance requirements.**

*(continued overleaf)*

<sup>17</sup> See Assistant Attorney General Department of Justice Antitrust Division Makan Delrahim, “The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement” (April 10, 2018): “[...] standard setting only works - and consumers only reap the benefits of innovating and interoperable products – when both patent holders and patent implementers have the incentives to participate in the process [...].”  
<https://www.justice.gov/opa/speech/file/1050956/download>.

### 2.3 Balance (Continued)

Appropriate, representative user views shall be actively sought and fully considered in standards activities. Whenever possible, user participants shall be those with the requisite technical knowledge, but other users may also participate. User participation should come from both individuals and representatives of organized groups. There are several user categories:

1. User-consumer: Where the standards activity in question deals with a consumer product, such as lawn mowers or aerosol sprays, an appropriate consumer participant's view is considered to be synonymous with that of the individual user – a person using goods and services rather than producing or selling them.
2. User-industrial: Where the standards activity in question deals with an industrial product, such as steel or insulation used in transformers, an appropriate user participant is the industrial user of the product.
3. User-government: Where the standards activity in question is likely to result in a standard that may become the basis for government agency procurement, an appropriate user participant is the representative of that government agency.
4. User-labor: Where the standards activity in question deals with subjects of special interest to the American worker, such as products used in the workplace, an appropriate user participant is a representative of labor.

**<sup>2</sup> For purposes of this section, a "consultant" is someone who agrees to provide professional advice or representation in exchange for compensation, financial or otherwise.**

<sup>3</sup> Further interest categories that may be used to categorize directly and materially affected persons consist of, but are not limited to, the following: a) Consumer; b) Directly affected public; c) Distributor and retailer; d) Industrial/commercial; e) Insurance; f) Labor; g) Manufacturer; ~~h) Professional society; i) Regulatory agency; j) Testing laboratory; k) Trade association.~~

#### i. Meaning of balance

As observed in section C.1 above, the principle of balance in the context of standardisation has been recognised by the United States as pivotal to the upholding of good governance and due process within standards development activity. The DoJ Antitrust Division has encouraged standard setting organisations to adopt balanced patent policies.<sup>18</sup> In *NSS Labs v. Crowdstrike*, the United States considered balance of interests in this case as using the 'cross-section of an industry'<sup>19</sup> and stated that the 'balance of interests' requirement in the SDOAA works to prevent dominance by a subset of the industry.<sup>20</sup>

#### ii. Right to object to lack of balance

In recognizing the importance of ensuring balance in standard development activity, Fraunhofer respectfully proposes the inclusion of a right to object in writing (including electronic communications) to lack of balance. This is suggested at two different levels:

- 1) Within ANSI, by a party directly and materially affected by the non-observance of balance by ANSI and its Board, Committees, advisory groups, or its other bodies and structures. It is proposed that the relevant part of ANSI respond in writing to such written claim, providing reasoning for every material objection within 30 days from the date of receipt of such notice.
- 2) Within an ASD, by a party directly and materially affected by the non-observance of balance, including

<sup>18</sup> Makan Delrahim, Assistant Attorney General – Antitrust Division, "The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement" (April 10, 2018), <https://www.justice.gov/opa/speech/file/1050956/download>.

<sup>19</sup> *NSS Labs v. Crowdstrike*, US District Court for the Northern District of California, San Jose Division, Case No. 5:18-cv-05711-BLF, Document 91, filed on June 26, 2019, United States, Statement of Interest, p.3.

<sup>20</sup> *Ibid.*



a consensus body member. It is proposed that the notification be required to be sent within 30 days from the publication date of a PINS announcement in Standards Action, and that the ASD respond in writing within 30 days from the comment deadline.

### iii. Defining interest categories

Fraunhofer welcomes the addition of the following text:

However, interest categories shall not be created for the purpose of avoiding balance requirements.

### iv. Standard development activity

As noted above, Fraunhofer suggests that ANSI change all references to 'standard setting' in the ANSI ER to 'standard development activity,' as done already by ANSI in ANSI ER Section 2.5.

### v. Further interest categories

Standards activity should allow for full participation and cater for a diverse range of stakeholders in a variety of situations and sectors, with due regard to the international context within which standardization takes place.

#### a. Assuring diversity of interests

As emphasized above in **Section 2.2 – Lack of dominance**, the United States government sees diversification of interest categories as a good measure of ensuring balance in standard development activity. Fraunhofer would consider it counterintuitive to delete categories of further interest groups in Footnote 3 of Section 2.3, in light of the US DoJ Antitrust Division's statements.

In addition, trade associations generally cater to SMEs, which, it is widely recognized, are the engine of any economy.<sup>21</sup> Excluding this vibrant and important group would diminish balance and openness principles and thus impact negatively due process at ANSI.

Fraunhofer respectfully proposes reinstating the two categories, namely i) Professional society; and ; k) Trade association.

#### b. Regulatory agency

Fraunhofer observes that the term "*regulatory agency*" is not as broad as "*government agency*" and proposes that "government agency" be used as replacement of category "i" in footnote 3 of Section 2.3 Balance to that extent.

Relatedly, it is observed that where there is an umbrella organization for standards activities, changes specifically targeted at one sector should not be allowed to affect or impact the numerous other sectors.

Fraunhofer proposes the following addition to ANSI ER 2.3:

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<sup>21</sup> Small Business, "The Engine of the American Dream", *The White House*, August 1, 2017. <https://www.whitehouse.gov/articles/small-businesses-engine-american-dream/>, See Paragraph 5.

### 2.3 Balance

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.

**Within ANSI, it can be claimed in writing (including electronic communications) by a directly and materially affected party that the principle of balance is not observed by ANSI and its Committees. This applies especially to the ExSC and the BSR and all the other committees. ANSI ExSC shall respond in writing, providing reasoning for every material objection within 30 days from the date of receipt of such notice.**

**Within an ASD, if a developer receives a written statement (including electronic communications) as to the lack of balance, from a directly and materially interested party, including a consensus body member, within 30 days from the publication date of a PINS announcement in Standards Action, the ASD shall respond in writing within 30 days from the comment deadline.**

The interest categories appropriate to the development of consensus in any given standards **development** activity are a function of the nature of the standards being developed. Interest categories shall be discretely defined, cover all materially affected parties and differentiate each category from the other categories. Such definitions shall be available upon request.

**Consensus body members, including consultants<sup>2</sup>, shall normally be classified in accordance with the business or other interests of their employers or the sponsor they represent in connection with the standards development activity. In cases where a consensus body member receives funding from the sponsoring ASD or other entity, that information shall be disclosed, to determine if it will impact the participant's interest classification.**

In defining the interest categories appropriate to a standards **development** activity, consideration shall be given to at least the following:

- a) producer;
- b) user;
- c) general interest.

**A "General Interest" category, if one is offered, should include only those whose business or other interests are not covered by a discretely defined interest category, or those who represent multiple interest categories.**

Where appropriate, additional interest categories should be considered.<sup>3</sup> **However, interest categories shall not be created for the purpose of avoiding balance requirements.**

Appropriate, representative user views shall be actively sought and fully considered in standards **development** activities. Whenever possible, user participants shall be those with the requisite technical knowledge, but other users may also participate. User participation should come from both individuals and representatives of organized groups. There are several user categories:

1. User-consumer: Where the standards **development** activity in question deals with a consumer product, such as lawn mowers or aerosol sprays, an appropriate consumer participant's view is considered to be synonymous with that of the individual user – a person using goods and services rather than producing or selling them.
2. User-industrial: Where the standards **development** activity in question deals with an industrial product, such as steel or insulation used in transformers, an appropriate user participant is the industrial user of the product.
3. User-government: Where the standards **development** activity in question is likely to result in a standard that may become the basis for government agency procurement, an appropriate user participant is the representative of that government agency.
4. User-labor: Where the standards **development** activity in question deals with subjects of special interest to the American worker, such as products used in the workplace, an appropriate user participant is a representative of labor.

**<sup>2</sup> For purposes of this section, a "consultant" is someone who agrees to provide professional advice or representation in exchange for compensation, financial or otherwise.**

<sup>3</sup> Further interest categories that may be used to categorize directly and materially affected persons consist of, but are not limited to, the following: a) Consumer; b) Directly affected public; c) Distributor and retailer; d) Industrial/commercial; e) Insurance; f) Labor; g) Manufacturer; **h) Professional society; i) Government** agency; j) Testing laboratory; k) **Trade association.**

#### 4. Section 1.5 – Notification of standards development

##### ANSI PROPOSAL

###### 1.5 Notification of standards development

~~Reasonable advance~~ Notification of standards development activity shall be announced in suitable media as appropriate to demonstrate and provide a meaningful opportunity for participation, debate and deliberation by all directly and materially affected persons in a fair and equitable manner.

Fraunhofer agrees with ANSI's adoption of 'standards development activity', in line with SDOAA. Another useful addition to the ANSI ER is to clarify that standards development activity includes 'actions relating to the intellectual property policies of the standards development organization,' as set out in the SDOAA.<sup>22</sup>

Fraunhofer also agrees with ANSI's clear statement that there it to be meaningful opportunity for participation, debate and deliberation in a fair and equitable manner, which reflects the language used by the DoJ Antitrust Division Business Review Letter to the GSMA.<sup>23</sup> An open question remains whether all stakeholders should be afforded this opportunity.

Separately, Fraunhofer recognises that clear and specific language may contribute to better openness, coherence, and transparency. Therefore, Fraunhofer suggests that ANSI use harmonised language throughout the ANSI ERs and proposes to replace:

Reasonable advance ~~Notification~~  
with

**Timely and adequate notification,**

thus having consistency in language across the sections 2.1., and 1.5. of the ANSI ERs.

Fraunhofer therefore suggests the following changes:

###### 1.5 Notification of standards development

~~Reasonable advance~~ ~~Notification~~ **Timely and adequate notification** of standards development activity shall be announced in suitable media as appropriate to demonstrate and provide a meaningful opportunity for participation, debate and deliberation by all directly and materially affected persons in a fair and equitable manner.

<sup>22</sup> *Ibid.*

<sup>23</sup> Department of Justice, Antitrust Division, Business Review Letter for GSMA, November 27, 2019, p.2. See: <https://www.justice.gov/atr/page/file/1221321/download>.

## 5. Section 2.5 – Notification of standards development and coordination

### 2.5 Notification of standards development and coordination

**Reasonable timely** ~~Notification~~ of standards activity, **including formation of a consensus body or a consensus body meeting**, shall be announced in suitable media as appropriate to demonstrate **and provide a meaningful** ~~the~~ the opportunity for participation by all directly and materially affected persons **in a fair and equitable manner**.

Developers are encouraged to consult any relevant international or regional guides that may impact the proposed standard and shall advise the relevant ANSI-Accredited U.S. TAG(s) if the standard is intended to be submitted for consideration as an ISO, IEC or ISO/IEC JTC-1 standard.

As in Sections 1.3 and 1.5 above, Fraunhofer suggests ANSI adopt 'standards development activity' throughout the ANSI ER, in line with SDOAA. Another useful addition to the ANSI ER is to clarify that standards development activity includes 'actions relating to the intellectual property policies of the standards development organization,' as set out in the SDOAA.<sup>24</sup>

With an express aim of having consistent language throughout the ANSI ERs, Fraunhofer suggests replacing the 'Reasonable timely notification' with the language used in 2.1 and suggested for 1.5, namely 'Timely and adequate notification.' This language appears to better support and be consistent with the aim of meaningful engagement.

### 2.5 Notification of standards development and coordination

~~Reasonable timely~~ ~~Notification~~ **Timely and adequate notification** of standards activity, **including formation of a consensus body or a consensus body meeting**, shall be announced in suitable media as appropriate to demonstrate **and provide a meaningful** ~~the~~ the opportunity for participation by all directly and materially affected persons **in a fair and equitable manner**.

Developers are encouraged to consult any relevant international or regional guides that may impact the proposed standard and shall advise the relevant ANSI-Accredited U.S. TAG(s) if the standard is intended to be submitted for consideration as an ISO, IEC or ISO/IEC JTC-1 standard.

## 6. Section 2.5.1 – Project Initiation Notification

Fraunhofer concurs with the changes in this section.

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<sup>24</sup> *Ibid.*

## 7. Section 2.8 – Appeals

### 2.8 Appeals

The provision for appeals is important for the protection of directly and materially affected interests and of standards developers and is required as a part of due process. This section gives general criteria regarding the right to appeal, to whom appeals are made and what may be appealed.

The right to appeal is a quintessential element guarding good governance in any given structure, where decisions are taken and/or made.

Fraunhofer has previously submitted comments noting its concern for the changes to the appeal process.

Fraunhofer respectfully proposes that ANSI's appeal procedure should express due regard for the guiding principles enshrined in key instruments and documents in particular:

- a) The United States Standards Strategy<sup>25</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>26</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.

Fraunhofer respectfully submits that especially in light of ANSI's recognized quasi-regulatory role,<sup>27</sup> as well as its importance as the representative of the United States in international standardization bodies, including the reference to broadly recognized international and US key instruments.

Fraunhofer suggests the following amendments to ANSI ER 2.8:

<sup>25</sup> [https://www.ansi.org/standards\\_activities/nss/usss](https://www.ansi.org/standards_activities/nss/usss)

<sup>26</sup> For an overview, see [https://www.wto.org/english/res\\_e/publications\\_e/tbttrade\\_e.pdf](https://www.wto.org/english/res_e/publications_e/tbttrade_e.pdf).

<sup>27</sup> Justus Baron, Jorge Contreras, Martin Husovec, Pierre Larouche, Nikolaus Thumm (Editor) (2019) Making the rules. The Governance of Standard Development Organizations and their Policies on Intellectual Property Rights.

EUR29655EN, Publications Office of the European Union, Luxembourg, ISBN 978-92-76-00023-5, doi:10.2760/48536,

JRC115004, See Page 41,

[https://publications.jrc.ec.europa.eu/repository/bitstream/JRC115004/sdo\\_governance\\_final\\_electronic\\_version.pdf](https://publications.jrc.ec.europa.eu/repository/bitstream/JRC115004/sdo_governance_final_electronic_version.pdf).

## 2.8 Appeals

The provision for appeals is ~~essential important~~ for the protection of directly and materially affected interests and of standards developers and is required as a part of due process, **as enshrined in the WTO Agreement on Technical Barriers to Trade, the US Constitution and US law**. This section gives general criteria regarding the right to appeal, to whom appeals are made and what may be appealed.

### 8. Section 2.8.1 – Right to Appeal: Appeals at the standards developer level

#### 2.8.1 Right to Appeal: Appeals at the standards developer level

The written procedures of an ANSI-Accredited Standards Developer (ASD) shall contain an identifiable, realistic, and readily available mechanism for the impartial handling of procedural appeals regarding any action or inaction. Appeals shall be addressed promptly and a decision made expeditiously **and issued in writing**. A standards developer may choose to offer an appeals process to address appeals on other than procedural issues. Procedural appeals include whether a technical issue was afforded due process. Appeals procedures shall provide for participation by all parties concerned without imposing an undue burden on them. Consideration of appeals shall be fair and unbiased and shall fully address the concerns expressed.

Fraunhofer welcomes the inclusion of the obligation to issue the appeals decision in writing. It is respectfully observed that for due process to be upheld, the written appeal decision should provide reasoning for each material point raised in the appeal. The rationale for the duty to provide reasons is 'the intrinsic duty of fairness that decision-makers are said to owe to the subjects of their decisions.'<sup>28</sup>

Furthermore, to expediate the communication with the parties to the appeal, electronic means should be included, when decisions are issued in writing.

It is proposed to include the following language:

#### 2.8.1 Right to Appeal: Appeals at the standards developer level

The written procedures of an ANSI-Accredited Standards Developer (ASD) shall contain an identifiable, realistic, and readily available mechanism for the impartial handling of procedural appeals regarding any action or inaction. Appeals shall be addressed promptly and a decision made expeditiously **and issued in writing, including via electronic means. An appeals decision shall set out reason(s) for decision for each material point raised in the appeal.**

A standards developer may choose to offer an appeals process to address appeals on other than procedural issues. Procedural appeals include whether a technical issue was afforded due process. Appeals procedures shall provide for participation by all parties concerned without imposing an undue burden on them. Consideration of appeals shall be fair and unbiased and shall fully address the concerns expressed.

<sup>28</sup> Hepburn, Jarrod, The Duty to Give Reasons for Administrative Decisions in International Law (February 2012). (2012) 61 ICLQ 641. Available at SSRN: <https://ssrn.com/abstract=2405065>

## 9. Section 2.8.2 – Right to Appeal: Appeals at ANSI

Fraunhofer concurs with the amendments to subsection 2.8.2., however at the same time respectfully queries whether the revised and amended ANSI appeals process under the current set of governance documents is sufficient, as discussed in Section B, as well as Sections C.8 and C.9 above.

### D. Further Comments and Suggestions

In addition to the above, Fraunhofer has further suggestions for the revision of the ANSI ERs:

#### i. Importance of WTO TBT Agreement

Each WTO member is bound to ensure adherence to the WTO Agreement Technical Barriers to Trade (TBT Agreement) throughout its territory, which clearly provides guidance on standards development activity of non-governmental organizations.<sup>29</sup> As a representative of the U.S. Government in the field of standardization, ANSI could take a leadership role in reinforcing the important and universally accepted principles of due process, transparency and openness that are enshrined in the WTO TBT Agreements.

Fraunhofer encourages ANSI to take a leadership role and include in the ANSI ER a recognition of the principles enshrined in the WTO TBT Agreements. Fraunhofer also suggests that ANSI take this opportunity to clarify in its ER clarify that standards development activity includes 'actions relating to the intellectual property policies of the standards development organization,' as set out in the SDOAA.<sup>30</sup>

The following is therefore proposed for the revised version of the ANSI ERs:

#### **1.0 Essential requirements for due process**

**As a representative of the U.S. Government in the field of standardization, ANSI shall have regard to the universally accepted principles of due process, transparency and openness enshrined in the WTO TBT Agreements. Any proposed changes to the ANSI Essential Requirements shall reflect internationally accepted principles in relation to standard development activity.**

These requirements apply to activities related to **the standard development activity and** the development of consensus for approval, revision, reaffirmation, and withdrawal of American National Standards (ANS).

**Standard development activity, as provided by the SDOAA Section 2 (7), includes actions relating to the intellectual property policies of the standards development organization.**

Due process means that any person (organization, company, government agency, individual, etc.) with a direct and material interest has a right to participate by: a) expressing a position and its basis, b) having that position considered, and c) having the right to appeal. Due process allows for equity and fair play. The following constitute the minimum acceptable due process requirements for the development of consensus.

<sup>29</sup> WTO TBT Agreement, Article 3.

<sup>30</sup> Standards Development Organization Advancement Act of 2004 (SDOAA), Section 2 (7).

ii. **Definition of consensus**

Fraunhofer notes that consensus is defined in the Annex 1 to the ANSI ERs and proposes integrating this core principle in the main text of the ER, to emphasise further ANSI's commitment to adhere to the principle of consensus throughout its governance processes.

It is suggested to insert the proposed text as 1.4 and renumber the following in part 1 Essential Requirements for due process:

**1.4 Consensus**

**Consensus means substantial agreement has been reached by directly and materially affected interests. This signifies the concurrence of more than a simple majority, but not necessarily unanimity.**

**Consensus requires that all views and objections be considered, and that an effort be made toward their resolution.**

END OF COMMENTS --