



Fraunhofer response to ANSI Call for Public Comments – Third round of proposed revisions to the ANSI Essential Requirements: Section 3.2 Commercial terms and conditions - Standards Action dated June 19, 2020

A. General Comments

The 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), OMB Circular A-119 and the United States Standards Strategy. In its previous comments and submissions, Fraunhofer has placed emphasis on the guiding principles enshrined therein.¹

B. Substantive Comments

a) 3.2 Commercial terms and conditions

- i) In response to Fraunhofer’s comments suggesting clarification of exceptions allowed by the Essential Requirements, the ExSC provided the example of patented technology mentioned in section 3.1 of the Essential Requirements. To ensure clarity within the document, Fraunhofer suggests this example is included in the Essential Requirements by inserting the below underlined text:

“Except as otherwise permitted by sections 3.1 and 3.2 of these Essential Requirements, ANS shall not include terms or conditions that are primarily contractual or commercial in nature, as opposed to technical, engineering or scientific in nature”.

- ii) It remains unclear whether there will be a retroactive impact upon existing American National Standards when the revised Essential Requirements are implemented. Fraunhofer suggests ANSI indicate whether the revisions are applicable from a certain date or are applicable retroactively.

b) 3.2.1 Contractual Requirements

- i) Similar to the above, Fraunhofer suggests insertion of the below text for clarification:

“Except as permitted by sections 3.1 and 3.2 of these Essential Requirements, provided below, ANS shall not contain contractual requirements relating to particular products or services, guarantees, warranties, reworks, indemnities, buybacks, price-related terms and other conditions of sale or use.

In relation to the prohibition placed on an ANS so that it cannot include terms or condition that are primarily contractual or commercial in nature, we suggest that the text expressly state that this prohibition exists vis-

¹ Alexander Okuliar, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, Ensuring the Proper Application of Antitrust Law to Standards Development, Remarks as Prepared for Delivery Before the Intellectual Property Rights Policy Advisory Group of the American National Standards Institute, 28 May 2020: <https://www.justice.gov/opa/speech/file/1281926/download>.

à-vis the development of a standard or technical, scientific or engineering specifications, in contrast to what a contributor to a standard may disclose regarding the use of its intellectual property. Without this context, the scope of the prohibition, and to whom it is directed, appears ambiguous.

c) 3.2.2 Endorsements of Products or Services

i) Fraunhofer notes that the updated draft section 3.2.2, second paragraph, reads as follows:

“However, for informational purposes, where known sources exist for products or services necessary to comply with the ANS, it is permissible, but not obligatory, to identify the name and address of the sources in a footnote, an appendix, or reference to a website. The referenced products or services shall be reasonably available from the referenced sources, the words “or the equivalent” shall be added to the reference and the reference shall also expressly state that identification of products or services is not an endorsement of those products or services or their supplied.”

ii) Fraunhofer is concerned by this language as the current Essential Requirements state it is permissible to identify the name and address of only a sole source which exists for essential equipment, materials or services necessary to comply with or to determine compliance with the standard. In contrast, the proposed amendment seeks to allow multiple sources to be identified. Although a disclaimer is included in the last sentence of this section, it is not likely to affect the appearance of endorsing multiple sources while there no an obligation to list all sources.

iii) Fraunhofer suggests this section be amended so that a source may be identified only where a sole source exists to comply with or determine compliance with the standard.

d) 3.2.3 Conformity Assessment Testing and Training

i) As mentioned above, Fraunhofer is concerned by the appearance of endorsing multiple sources when there is no requirement for all sources to be identified.

ii) Fraunhofer suggests this section is amended so that a source may be identified only where a sole source exists to comply with or determine compliance with the standard.

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.

END OF COMMENTS --