



Fraunhofer IIS | Am Wolfsmantel 33 | 91058 Erlangen, Germany

**ANSI**  
 25 West 43rd Street, 4th floor  
 New York, NY 10036

Fraunhofer Institute for  
 Integrated Circuits IIS

Management of the Institute  
 Prof. Dr. Albert Heuberger (executive)  
 Dr. Bernhard Grill

Am Wolfsmantel 33  
 91058 Erlangen, Germany

Stefanie Mielert  
 Senior Expert Standards, IP and Innovation  
 Patents and Licensing  
 Phone + 49 9131 776-6121  
 Stefanie.mielert@iis.fraunhofer.de  
 www.iis.fraunhofer.de

Erlangen, November 25, 2019

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

**Fraunhofer response to ANSI Call for Public Comments – Proposed Revision to the ANSI Essential Requirements - Standards Action dated October 25, 2019**

Dear Madam/Sir,

We refer to the proposed revisions to the ANSI Essential Requirements and the request for public comments in a notice contained within the 25 October 2019 edition of ANSI Standards Action. We express our thanks for the opportunity to submit comments in this regard.

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

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

<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.

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

We hope that the **following** comments are of assistance to ANSI during the consideration of the proposed revisions to the ANSI Essential Requirements.

## A. Substantive Comments

### a) 3.2 Commercial terms and conditions

- i) The proposed amendment to the Essential Requirements, a clause is included which provides for an exception to the above prohibition:

*“Except as otherwise permitted by 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”. [emphasis added]*

- ii) Based on the above, it is unclear which exceptions will be permitted, and no reason has been provided to justify the exception. Further information is required to provide an informed view on this proposal, particularly impact on rights of standard implementers to compete with each other by diversifying their commercial terms for standard-compliant products and services.
- iii) If accepted that American National Standards may exceptionally contain commercial terms or conditions, Fraunhofer notes it is unclear whether there will be a retroactive impact upon existing American National Standards. It is also unclear if terms regarding reciprocity cannot be included. Lack of clarity on these bases is a further reason for not including the exception.

### b) 3.2.1 Contractual Requirements

- i) Similar to the above, there is a lack of clarity in purpose and impact regarding the proposed amendment to section 3.2.1 of the Essential Requirements. This clause provides for an exception to the prohibition for any contractual requirements from being included within an American National Standard (ANS):

*“Except as provided below, ANS shall not contain contractual requirements relating to particular products or services, including guarantees, warranties, reworks, indemnities, buybacks, and similar price-related terms and conditions of sale”. [emphasis added]*

### 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:

*“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 as long as the referenced products or services are reasonably available from the referenced sources, the words “or the equivalent” are added to the reference and a note is added to such reference stating expressly that the identify sources are not presented as endorsements”.*

- ii) Fraunhofer is concerned by this language as it can give rise to the appearance of unfairly endorsing particular products, services or companies by only listing “known” sources to the disadvantage of others which are not known. Although there is an attempt to include a disclaimer in the last sentence of this section, it remains unclear how the difference between “known” and “unknown” sources will be determined. The proposed amendments might result in altering the level playing field between manufacturers of products and provider of services which are necessary to comply with the ANS. Making disclosure of sources permissible but not obligatory does not appear to change this possible outcome.
- iii) Fraunhofer therefore suggests that this section is reverted to the following from the current Essential Requirements:

*“The appearance that a standard endorses any particular products, services or companies must be avoided. Therefore, it generally is not acceptable to include manufacturer lists, service provider lists, or similar material in the text of a standard or in an annex (or the equivalent). Where a sole source exists for essential equipment, materials or services necessary to comply with or to determine compliance with the standard, it is permissible to supply the name and address of the source in a footnote or informative annex as long as the words “or the equivalent” are added to the reference. In connection with standards that relate to the determination of whether products or services conform to one or more standards, the process or criteria for determining conformity can be standardized as long as the description of the process or criteria is limited to technical and engineering concerns and does not include what would otherwise be a commercial term”.*

### d) 3.2.3 Conformity Assessment Testing and Training

- i) Fraunhofer notes that the preamble of the World Trade Organisation Technical Barriers to Trade Agreement (WTO TBT Agreement)<sup>2</sup> states that countries should not be prevented from taking measures (including those that are necessary for the protection of human, animal, or plant life or health, or for the protection of the environment) at the level

<sup>2</sup> For an overview, see [https://www.wto.org/english/res\\_e/publications\\_e/tbttotrade\\_e.pdf](https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf).

considered appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or as a disguised restriction on international trade and are otherwise in accordance with the provisions of the WTO TBT Agreement.

- ii) In addition to the above, Article 2.3 of the TBT WTO Agreement states that technical regulations shall not be maintained if the circumstances or objectives can be addressed in a less trade-restrictive manner.
- iii) The proposed revision to allow a generic requirement for third party conformity assessment, testing or training does not appear to be consistent with Article 2.3 of the WTO TBT Agreement given that it does not allow for the re-assessment of any measures if the circumstances or objectives that gave rise to their adoption no longer exist.
- iv) Fraunhofer notes that the introduction of a generic requirement for third-party conformity assessment, testing or training does not include an accreditation requirement e.g. such as national accreditation. Given that the requirement may be imposed for health, safety or environmental protection reasons, Fraunhofer suggests that there is an accreditation requirement for the third party to be accredited, for example a national association.

#### **e) Further Comments, Suggestions and Queries**

In addition to the above, Fraunhofer notes that proposed amendments to commercial terms and other similar items have previously been referred to the ANSI Intellectual Property Rights Committee (IPRPC) for a recommendation as the "IPRPC includes patent and copyright law experts who are familiar with the types of IP issues that arise in standards development".<sup>3</sup> Fraunhofer therefore recommends that the proposed revisions relating to commercial and contractual terms are referred to the IPRPC for consideration and recommendation, in addition to the request for public comments.

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

Yours sincerely



Stefanie Mielert

**Senior Expert Standards, IP and Innovation**

---

<sup>3</sup> Intellectual Property Rights Policy Committee Overview, see:  
[https://www.ansi.org/about\\_ansi/structure\\_management/policy\\_commit\\_councils/intel\\_rights](https://www.ansi.org/about_ansi/structure_management/policy_commit_councils/intel_rights).