

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 11, 2019

By e-mail psa@ansi.org

Fraunhofer response to ANSI Call for Public Comments – Standards Action dated October 11, 2019

Changes to ANSI Executive Standards Council (ExSC), Board of Standards Review (BSR) and Appeals Board Operating Procedures -

Dear Madam/Sir,

We commend ANSI for its engagement with its membership in the consideration of the draft ANSI ExSC, BSR and Appeals Board Operating Procedures through requesting public comments in response to a notice contained within the 11 October 2019 edition of ANSI Standards Action. Thank you for the opportunity to submit comments in this regard.

The Fraunhofer-Gesellschaft (Fraunhofer)¹ 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.

¹ 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 the **following** comments are of assistance to ANSI during consideration of the draft Operating Procedures for:

- i) Executive Standards Council (ExSC);
- ii) Board of Standards Review (BSR); and
- iii) Appeals Board.

A. General Comments

Fraunhofer provides the following comments, understood to reflect the requirements set out in the Standards Development Organization Advancement Act of 2004 (SDOAA)², universal elements set out in the WTO Agreement on Technical Barriers to Trade (WTO TBT Agreement)³ and the United States Standards Strategy⁴. In its previous comments on the proposed amendments to ANSI governance documents, Fraunhofer has placed emphasis on the guiding principles of openness, balance and lack of dominance enshrined therein – and which were also enshrined in the then ANSI Constitution and By-Laws, Code of Conduct and Essential Requirements, also embodying openness, lack of dominance, balance, consensus, and due process.⁵ It has been said that “*the ANSI Essential Requirements impose an affirmative duty on accredited duty on accredited SDOs to seek participants from diverse interest categories, and that if balance does not exist, the SDO must undertake outreach to achieve that balance. Conversely, dominance by any single interest category must be avoided*”.⁶ It is therefore considered

² The SDOAA enshrines the principles of openness, balance, transparency, consensus, and due process, in particular for the purposes set out in Section 201(5) SDOAA. Annex 3 contains the ‘Code of Good Practice for Preparation, Adoption and Application of Standards’. The TBT Agreement enshrines universally accepted elements relating to standards development: due process, transparency, non-discrimination and openness.

³ For an overview, see https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf.

⁴ https://www.ansi.org/standards_activities/nss/usss), founded upon the principles of being open and inclusive, market driven, sector based, consumer focused and globally relevant.

⁵ This reflects the requirements of OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities.

⁶ Contreras, Jorge L., Understanding ‘Balance’ Requirements for Standards Development Organizations (September 16, 2019). *CPI Antitrust Chronicle*, Sept. 2019, Issue 2. See:

important that these foundational aspects of standardization are reflected in ANSI governing documents, as ANSI is an umbrella organization for all American standardization efforts at a national and international level. The overarching aim is to ensure that the interests of the public have appropriate protection, participation and representation in standardization, conformity assessment and related activities, for the long-term success of ANSI.

Fraunhofer notes that ANSI's call for public comments state that there are some revisions which have been approved by the ExSC to be submitted to the NOC in November 2019, that are not displayed in the draft Operating Procedures (see AC5 and AC6 from the draft ExSC Operating Procedures). It is unclear what revisions are being referenced, and so Fraunhofer's following comments are taken without taking those into account.

B. Substantive Comments

i) Draft ExSC Operating Procedures

1. Section 2 – ExSC Membership and Membership Rights

Duty of Fidelity

Fraunhofer suggests that it be acknowledged that the laws to employment require the ultimate fiduciary relationship and there is a responsibility for ExSC members to act in the best interests of the employing entity (the duty of fidelity).

Balance of Interest

Section 1.3 – Balance, of the current January 2019 ANSI Essential Requirements: Due process requirements for American National Standards state that:

The standards developments 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.

In accordance with the above, and to ensure that an attempt is made to balance the interests of different categories of ExSC members, it is suggested that the below text is reinstated in the ExSC Operating Procedures:

In addition, the ExSC shall be composed of representatives of organizational members, company members, governmental members, members of the Consumer Interest Council, and members-

<https://www.competitionpolicyinternational.com/wp-content/uploads/2019/09/CPI-Contreras.pdf> at page 10.

at-large. An attempt shall be made to have at least two members, with a maximum of six members, in each category. The ExSC shall strive to a balance of representation among categories to the extent possible.

Number of members

Fraunhofer notes that the maximum number of voting membership is indicated as being no greater than 21, however there is no indication of the minimum number of voting members required. Fraunhofer suggests that the minimum number of ExSC members is provided as is provided in the BSR Operating Procedures, as this is important for determining quorum and voting outcomes. Such certainty is included in Section 5 (Nominations and Elections) of the Operating Procedures, where it is stated that a Nominating Committee shall comprise of 'not less than three (3) members [...]'. It appears incongruent that the minimum number of ExSC voting members is not clearly stated.

Example of amendment for a minimum number of ExSC voting members:

The voting membership of the ExSC shall comprise of not less than 9 (nine) voting members. In no case shall the voting membership of the ExSC be greater than 21.

Please note that the reference to 9 (nine) voting members is used as an example; the appropriate minimum number is to be determined, guided by principles of representative membership (balance and lack of dominance).

2. Section 3 – Member Participation

The following text appears in the current ExSC Operating Procedures:

Members are expected to participate actively by fulfilling attendance, voting, correspondence, and other obligations. Members are expected to participate in good faith and in accordance with professional standards, respectful of the rules of the ExSC and the authority given to the Officers of the ExSC as well as to the ExSC Membership, to act on behalf of ANSI.

It is unclear why this has been deleted, as similar language appears in Item 1 of the ANSI Code of Conduct Applicable to Participants:

All persons serving on the Board, Board Committees, Committees of ANSI, Forums, Policy Advisory Groups and any other ANSI committees, subcommittees, task groups or other related bodies (hereafter "Participants") shall act honestly, in good faith and with the highest professional standards.

In support of the guiding principles of openness, balance and lack of dominance, Fraunhofer supports the reinsertion of this text.

Section 5 – Nominations and Elections

With respect, the draft ExSC Operating Procedures are unclear regarding the different pathways for

nominations and recommendations of new ExSC members.

It is suggested that it be clarified whether the election ballot will contain the nominations contained within the report of the Nominating Committee as well as any nominations made by petition. It is also suggested that it be clarified when the ballot will be circulated and the closing date for return as is confirmed in the current ExSC Operating Procedures.

3. Section 7 – Standards advisors

It is noted that there is not a defined term limit for standards advisors and it is not clear whether there is a limit to the number of times that a Standards advisor can be appointed. Fraunhofer suggests that the term of a standards advisor is defined (e.g. 12 or 24 months) and a limit is placed on the number of times a standards advisor can be appointed (e.g. one or two renewals). Alternatively the same term restrictions as ExSC members could be applied to standards advisors so that the term is not indefinite.

4. Section 8 – Other Subcommittees and Task Forces

The process for the establishment of additional subcommittees and task forces is not clear. We note that the current IPRPC Operating Procedures state that chairs of additional committees and task forces will be appointed by the Chair of the IPRPC from members of the IPRPC, any positions or recommendations shall be submitted by the Chair of the subcommittee or Task Force to the IPRPC for final approval which can be accepted, rejected or returned to the Committee or Task Force for further study, give the recommendation to another committee or task any other action deemed in the best interest of the Institute. Fraunhofer suggests that a similar provision is incorporated into the draft ExSC Operating Procedures.

5. Section 11- Meetings

Fraunhofer notes that it is not clear whether a quorum shall be constituted by the presence of a majority of the current voting membership and suggests that this is clarified as it is confirmed in the current ExSC Operating Procedures.

6. Section 13 – Voting

Fraunhofer notes that it is not clear who will establish the time limits which will be established for voting.

7. Section 13 - Voting Period

Fraunhofer notes this section is a repeated number 13 and suggests that this section and those following are renumbered.

8. Section 17 – ExSC hearing of Appeals

Fraunhofer notes there is a comment contained within this section which states: “Revisions approved by the ExSC to be submitted to the NPC in November 2019, not displayed in this document”. As above, Fraunhofer requests whether the proposed revisions will be circulated prior to publication.

9. Section 20 – Accessibility of documentation and decisions

As above, there is a comment contained within the document in relation to this section which states: “Revisions approved by the ExSC to be submitted to the NPC in November 2019, not displayed in this document”. Fraunhofer requests whether the proposed revisions will be circulated prior to publication.

10. Section 23 – Amendments

It is not clear by what vote the Executive Committee can make changes to the ExSC Operating Procedures and whether a simple majority, super majority or unanimous vote is required. Fraunhofer suggests that this is clarified, as well as the minimum number of ExSC voting members and quorum. It would also be helpful if it was made clear whether abstentions are counted in a vote, and for what purpose (if any).

11. Annex A

Fraunhofer notes that Comment A7 states “Proposed deletion to be announced for public comment in 2019”, with the proposed revision circulated in a separate notice for public comment published within the 25 October 2019 edition of Standards Action. For the purpose of consistency and to avoid any confusion amongst those interested in providing comments, Fraunhofer suggests that future proposed revisions relating to the one ANSI document be contained within a single call for comments. This would also enable an assessment with the full context or proposals at hand.

12. Further Comments, Suggestions and Queries

i. Disclosure Policy

On the basis that the current functions of the IPRPC are vested into the ExSC in accordance with the 2020 ANSI By-Laws and that individuals representing commercial entities are ExSC voting members, Fraunhofer suggests that a disclosure policy is incorporated into the ExSC Operating Procedures to ensure that ExSC members are compliant with the below principle from the ANSI Code of Conduct Applicable to Participants:

In order that the points of view and information Participants contribute to the ANSI voluntary consensus standards system can be accurately evaluated by others, Participants should always endeavour to make known their business, commercial, organisational, or other affiliations that might affect their interests or points of view, avoiding real or perceived conflicts of interest wherever possible.

To this end, Fraunhofer suggests that Section 23 of the current ExSC Operating Procedures is reinstated with the following amendments appearing in blue text:

Repeated failure to return ballots or attend meetings shall be considered as a lack of interest. When a member fails to return **two consecutive** ballots before the close of the ballot period, or attend **two consecutive** meetings **during a single three-year term**, the Secretary shall place the matter before the ExSC. The ExSC may request the Chair of the Board of Directors to remove such individual from his or her assignment.

To be added to ExSC OP - Disclosure Policy for ExSC Members Who Have Consulting Relationships with Other IPRPC Voting Members

As a supplement to the ANSI Code of Conduct, each ExSC member shall provide ANSI staff at the beginning of each year (or whenever a consulting or advisory relationship is created), with an answer to the question in subsection “a” and the additional information requested in subsection “b” if appropriate:

- a. During the past three years, have you, either directly or indirectly (for example, through an entity in which you hold a controlling interest), received any compensation, financial or otherwise, in a consultancy or advisory capacity from: 1) any person currently or then serving as a voting member of the ExSC; or 2) such person’s employer; or 3) an entity in which such person holds a controlling interest.
- b. If so, identify to ANSI staff each such source of compensation, the nature of the consulting relationship and any other information you think relevant. For the purpose of this Section, a “consultant” or “advisor” is someone who agrees to provide professional advice or representation in exchange for compensation, financial or otherwise.

Staff will provide the information and data received from ExSC members in response to subsection “b” on the ExSC confidential homepage under “Disclosure Policy” at the beginning of each year.

ii. Two strike rule

As mentioned above, on the basis the functions of the IPRPC are vested in the ExSC, Fraunhofer suggests that a two-strike rule is incorporated into the ExSC Operating Procedures to ensure that voting members comply with the obligations to attend meetings in-person or via teleconference and returns letter ballots on time.

iii. Parliamentary Procedure

In addition to the above, Fraunhofer suggests that the draft ExSC Operating Procedures include a provision on Parliamentary Procedure, as is incorporated in the current ExSC Operating Procedures, or at least a reference and link to the New York corporate-governance principles relating to meetings and voting.

ii) Draft BSR Operating Procedures

1. Foreword

Fraunhofer notes that Comments AC1 states that the Foreword is to be updated and edited for the January 2020 edition however this does not appear to have been done. Fraunhofer requests whether the proposed revisions to the Foreword will be circulated prior to publication.

2. Section 2 – Membership Rights

i) Number of Members

It is noted that the draft BSR Operating Procedures do not contain a requirement for the BSR to be comprised of between 9 and 18 members as is currently contained within the current BSR Operating Procedures. Instead, the draft BSR Operating Procedures state that the BSR “shall strive” for a membership of between nine and eighteen members.

Fraunhofer suggests that this language is removed and that the section is reverted to the current BSR Operating Procedures and include a requirement for a minimum of 9 members and maximum of 18 members.

ii) Term of BSR Members

The draft BSR Operating Procedures do not state when the term of BSR members commences, as is contained within the current BSR Operating Procedures.

Fraunhofer suggests that the following be reinstated in the draft BSR Operating Procedures:

“All membership terms shall commence on January 1”.

3. Section 2.4 - Nomination and Elections

With respect, the draft BSR Operating Procedures are unclear regarding the different pathways for nominations and recommendations of new BSR members.

It is suggested that it be clarified whether the election ballot will contain the nominations contained within the report of the Nominating Committee as well as any nominations made by petition. It is also suggested that it be clarified when the ballot will be circulated, the closing date for return and when the election results will be circulated as is confirmed in the current BSR Operating Procedures.

4. Section 3 – Meetings

Fraunhofer notes that it is not clear whether a quorum shall be constituted by the presence of a majority of the current voting membership and suggests that this is clarified as it confirmed within the current BSR Operating Procedures.

5. Section 7 – Appeal of action on American National Standards

Fraunhofer notes that Comments AC4 states that the revision approved by the ExSC to be submitted to the NPC in November 2019 are not displayed in the document. Fraunhofer requests whether the proposed revisions to the Foreword will be circulated prior to publication.

6. Section 10 – Amendments

It is not clear by what vote the Executive Committee can make changes to the ExSC Operating Procedures and whether a simple majority, super majority or unanimous vote is required. Fraunhofer suggests that this is clarified.

| |
|--|
| iii) Draft Appeals Board Operating Procedures |
|--|

1. Section 1 Authority and scope

Fraunhofer notes that Comment AC1 states that “Additional revisions approved by the ExSC to be submitted to the NPC in November 2019, not displayed in this version”. As above, Fraunhofer requests whether the proposed revisions to the Foreword will be circulated prior to publication.

The draft Operating Procedures have removed a number of ANSI procedures which the Appeals Board will no longer be considered as the basis for appeal by ANSI members. Fraunhofer requests that an explanation be provided for the removal of the below ANSI procedures from the scope of possible appeals:

ANSI-PR-004 Appeals

CAP-PL-301 Accreditation Policy for ANSI Certificate

*Accreditation Program CFP-PL-801 Accreditation Policy for ANSI-
CFP Accreditation Program*

*GHG-PL-701 Accreditation Policy for ANSI Greenhouse Gas Validation / Verification Body
Accreditation Program*

*PCAC-PL-501 Accreditation Policy for Personnel Certification Accreditation
Program PRO-PL-102 Manual of Operations for Accreditation of Product
Certification Programs*

*PRO-PR-106 Identification of Non-Conformities and Implementation of Corrective and
Preventive Actions by Accredited and Applicant CBs*

2. Section 7 – Duties of members

Fraunhofer suggests that it be acknowledged that the laws to employment require the ultimate fiduciary relationship and that there is a responsibility for Appeals Board members to act in the best interests of the employing entity (the duty of fidelity).

3. Section 11 – Appeals process

Fraunhofer notes that comment AC3 states that “Revisions approved by the ExSC to sections 11-16 pending NPC approval in November 2019, not displayed here”. As above, Fraunhofer requests whether the proposed revisions to the Foreword will be circulated prior to publication.

4. Further Comments, Suggestions and Queries

In addition to the above, Fraunhofer suggests that the Appeals Board Operating Procedures include a provision on Parliamentary Procedure, as is incorporated in the current Appeals Board Operating Procedures, or at least a reference and link to the New York corporate-governance principles relating to meetings and voting.

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 Legal Expert Standards, IP and Innovation