



U.S. Department of Justice

Antitrust Division

*Office of the Principal Deputy
Assistant Attorney General*

Washington, D.C. 20530

October 11, 2018

Patricia Griffin, Vice President and General Counsel
Amy Marasco, Chair, IPRPC
American National Standards Institute
25 West 43 Street, 4th Floor
New York, NY 10036

VIA EMAIL

Dear Ms. Griffin and Ms. Marasco,

I write regarding the proposed “Sample Patent Letter of Assurance Form” currently under consideration by the IPRPC as directed by the ANSI Executive Standards Council Summary Decision released on February 23, 2018.

The Division takes no position regarding whether ANSI should issue a model LOA. As I noted in my letter of March 7, 2018, however, should ANSI determine through a transparent and consensus-driven process to adopt a model LOA, and should ASDs adopt the model without adaptation, the “check the box” options on the form could, depending on the options that are included and how they are worded, materially affect the rights of the patent holders who choose from among the available options, as well as the rights of implementers who wish to license technology subject to the available options. As Assistant Attorney General Delrahim has explained, and as we know you appreciate, standard setting only works – and consumers only reap the benefits of innovative and interoperable products – when both patent holders and patent implementers have the incentives to participate in the process. To that end, “we want standard setting bodies to be industry-led, and we encourage them to experiment, to compete with one another, and to be creative.”¹

In the interest of ensuring that the standard setting process remains industry-led, we encourage ANSI to communicate to ASDs that (i) any model form ANSI adopts does not foreclose individual ASDs from adopting their own LOA forms, or from choosing not to use any LOA form at all; and (ii) that ASDs remain free to implement their own consensus-driven IP policies and LOA policies regarding customization, reciprocity,

¹ Remarks of Assistant Attorney General Makan Delrahim at the Leadership Conference on IP, Antitrust and Innovation Policy (April 10, 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-leadership-conference>.

essential patent disclosure, and other such provisions as their members may deem appropriate as long as they are consistent with ANSI's Essential Requirements.

To that end, if ANSI adopts a basic model form, the Division believes it would promote transparency for ANSI to identify for ASDs that there are additional LOA features that ASDs may decide to include, consistent with their own patent policies. For example:

- ANSI should note that reciprocity is a common feature of many patent policies and form LOAs that ASDs and their members may wish to consider.
- ANSI should note that whether to require patent lists for either positive or negative assurances is a policy choice that ASDs and their members may wish to make.
- ANSI should also note that there are various acceptable methods for allowing patent holders to disclose additional information about the terms they are willing to offer.

This approach would encourage ASDs and their members to discuss and adopt an LOA form best suited to their particular goals, and would highlight ANSI's articulated commitment to accommodating a variety of forms of assurance.

Sincerely,



Andrew C. Finch