



April 26, 2012

Cass Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C.

Re: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

Dear Mr. Sunstein:

The Air-Conditioning, Heating and Refrigeration Institute (AHRI) appreciates the opportunity to comment on the March 30, 2012 *Federal Register* notice published by the Office of Management and Budget (OMB) regarding whether and how to supplement OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities." AHRI's responses to specific questions raised by OMB in its *Federal Register* notice are provided below.

AHRI is the trade association representing manufacturers of heating, cooling, water heating, and commercial refrigeration equipment. More than 300 members strong, AHRI is an internationally recognized advocate for the industry. AHRI develops standards for, and certifies the performance of, many of the products manufactured by our members. In North America, the annual output of manufacturers of heating, air conditioning, ventilation and commercial refrigeration (HVACR) equipment is worth more than \$20 billion. In the United States alone, our members employ approximately 130,000 people, and support some 800,000 dealers, contractors, and technicians.

AHRI has been a world leader in certification programs for air conditioning, heating, water heating, and refrigeration products for over 75 years. AHRI certification programs verify the performance (including energy efficiency) of a variety of products including residential and commercial heating, refrigeration, water heating, and air conditioning equipment covered under the Energy Policy and Conservation Act (EPCA). AHRI's programs are open to AHRI and non-AHRI members. In 2011 alone, AHRI tested over 2,900 units, covering 37 product categories at a cost of \$10 million to the industry.

The *National Technology Transfer and Advancement Act of 1995* (NTTAA), Public Law 104-113 directs all Federal government agencies to use for regulatory, procurement, and other agency activities, wherever feasible, standards and conformity assessment solutions developed or adopted by voluntary consensus standards bodies in lieu of developing government-unique standards or regulations.

Below AHRI is pleased to answer the very good questions posed by OBM. However, AHRI wishes to point out that in answering those questions, it puts forward the notion that with respect to the relationship of the government to both private sector voluntary standards and conformity assessment programs, now is the time to develop new approaches within the context of OMB Circular A-119. These approaches should increase government/private sector cooperation and promotion abroad of U.S. private sector voluntary standards. They should also promote more vigorously the role of private sector conformity assessment programs to allow governmental agencies to meet their mandates without unnecessary and costly duplication.

OMB Question: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities - Agency Implementation of Circular A-119 in Rulemakings: Are Federal agencies generally following the guidance set out in the Circular and providing an adequate explanation of how they considered standards and conformity assessment-related issues in the preambles to rulemakings?

AHRI wishes to bring to the attention of OMB some issues concerning a U.S. Department of Energy (DOE) rulemaking: “Energy Conservation Program - Certification, Compliance and Enforcement for Consumer Products and Commercial and Industrial Equipment (Docket No. EERE-2010-BT-CE-0014/RIN 1904-AC23).”

This DOE rulemaking has raised several issues regarding the recognition and role of voluntary independent certification programs (VICP). AHRI has pointed out that VICPs provide a valuable service to manufacturers and consumers. In the case of the programs that AHRI sponsors, this service has been provided decades before Federal or state product efficiency standards were established. Those manufacturers that participate in VICPs incur costs and agree to accept any enforcement actions that may result from the periodic testing of their models.

AHRI has commented that it does not believe that a mandatory verification program is necessary when voluntary industry certification programs (VICPs) already exist. The HVACR industry has policed itself through VICPs administered by AHRI for over 75 years. These programs have worked very well without government oversight. Therefore, there is absolutely no need to regulate programs that have a proven track record of success.

However, in the event that DOE decides to mandate periodic verification testing, AHRI has urged DOE to rely to the maximum extent possible on VICPs such as the programs that AHRI administers. We feel that in no case should DOE require manufacturers who participate in a VICP to perform additional verification testing. This would be totally unjustified, unnecessary, and would destroy any reason for a manufacturer to continue the additional cost of participation in a VICP.

AHRI has alerted DOE that the Environmental Protection Agency (EPA) has certification and testing requirements for products that are submitted as qualifying for Energy Star designation. To the extent that those EPA regulations apply to DOE covered products and equipment, those regulations do duplicate, overlap and possibly conflict with DOE's regulations.

As an example, the DOE certification requirements establish that the rating for a new model has been properly determined. If that rating is high enough to meet Energy Star criteria, the DOE certification requirements are still valid. Yet, EPA has imposed additional testing requirements.

OMB Question: Standardization Activities. OMB A-119 does not establish a preference between consensus and non-consensus standards developed in the private sector. What factors should agencies use in evaluating whether to use voluntary non-consensus standards in regulation, procurement solicitations, or other non-regulatory uses? OMB also invites comments on the respective roles of voluntary consensus standards vs. voluntary non-consensus standards for agency responsibilities in rulemaking, procurement, and other activities.

AHRI strongly believes in the importance of consensus in the standards development process. AHRI is an ANSI-accredited standards developer that complies with ANSI's *Essential Requirements* which cite consensus as one of the cardinal principles for the development of American National Standards (ANS). As an ANSI-accredited standards developer, AHRI conducts its work in a manner that is open to public scrutiny and that provides every stakeholder with an opportunity to be heard, without dominance by any party. Consensus is also a critical component of international standards development as articulated in the principles of the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement. A particular voluntary standardization process should also embody transparency, access and availability, coherence, and timeliness.

OMB Question: Conformity Assessment. Circular A-119 directs the Secretary of Commerce to issue guidance to Federal agencies on conformity assessment. NIST issued such guidance in 2000 and plans to update the guidance. In conjunction with NIST's efforts to update its conformity assessment guidance, should a supplement to Circular A-119 be issued to set out relevant principles on conformity assessment? If so, what issues should be addressed in such a supplement?

Yes, a supplement to OMB Circular A-119 to address conformity assessment issues is needed. Agencies should be encouraged to utilize private sector conformity assessment programs and avoid duplicative requirements. Agencies should evaluate whether their objectives necessitate creating government-unique conformity assessment schemes, which may be expensive to develop and maintain, may impose additional costs on the private sector, and may not be recognized beyond national boundaries.

AHRI believes that OMB Circular A-119 needs to be supplemented to address cases such as the one we cited earlier and describe further here. AHRI understands that the Department of Energy is developing a proposal to create a verification program for covered HVAC products.

This is contrary to Congress's stated intent in 42 U.S.C. §6295 (o)(6)(G); 42 U.S.C. §6296 (d); and 42 U.S.C. §6316 (e)(5) where Congress encourages the Department of Energy to use nationally recognized certification programs. In addition, Executive Orders 13563 and 12866 were meant to address and reduce redundant and burdensome government regulations that could stymie private sector job growth and innovation. AHRI does not understand why DOE would craft a regulation that results in a duplicative certification process that will compete against long standing private sector VCIPs that are nationally recognized and respected.

OMB Question: What factors should agencies use in selecting the appropriate conformity assessment procedure, including product/sector specific issues and the level of risk of non-fulfillment of legitimate regulatory, procurement, or other mission-related objectives?

The main factor should be preference for private sector accredited conformity assessment programs that are based on voluntary consensus standards.

OMB Question: What factors should agencies consider in determining whether to recognize the results of conformity assessment and accreditation activities conducted by private sector bodies in support of regulation?

The following are some factors that federal agencies should consider in recognizing private sector body conformity assessment bodies and programs. Such bodies should incorporate transparency and impartiality and be open to all parties on an equal basis. Accreditation bodies and certification bodies should have well-established, well-documented systems in place to assure that their clients are competent and compliant with standards.

OMB Question: How to ensure that agencies consider how to minimize conformity assessment costs and delays for businesses, especially small and medium sized enterprises, subject to statutory and budgetary constraints and the ability of agencies to fulfill their legitimate regulatory, procurement, or other mission-related objectives.

AHRI reiterates here that agencies should utilize private sector conformity assessment programs to avoid duplicate verifications. Agencies should always evaluate whether their objectives necessitate creating government-unique conformity assessment schemes that impose additional costs on the private sector.

OMB Question: Protection of Copyright Associated with Standards: Is lack of access to standards incorporated by reference (IBR) in regulation an issue for commenters responding to a request for public comment in rulemaking or for stakeholders that require access to such standards?

The text of standards and associated documents that have been incorporated by reference should be available to all interested parties on a reasonable basis, which may include appropriate compensation as determined by the standard developing organization (SDO) copyright holder. This approach is already working in the marketplace. Some SDOs make certain standards available online on a read-only basis. And many SDOs make standards available at discounts or without charge to consumers, policymakers, and small businesses. Agencies should continue on the path that has already proven successful – working with the individual SDOs whose standards are incorporated by reference in order to determine the best mechanism for making those documents reasonably available.

OMB Questions: What are the best practices for providing access to standards incorporated by reference in regulation during rulemaking and during the effective period of the regulation while respecting the copyright associated with the standard? What are the best practices for incorporating standards by reference in regulation while respecting the copyright associated with the standard?

All should have the right to access standards referenced into law and be able to review such work by means as described above. The responsible government agency should collaborate with the SDOs to ensure that the public does have reasonable access to the referenced documents.

Some suggested best practices on the copyright implications of incorporation by reference of voluntary consensus standards in regulation can be found in an ANSI February 2011 white paper on the subject which we understand ANSI is providing to OMB.

OMB Question: Voluntary Consensus Standards and Cost-Benefit Analysis: What resources and other costs are involved in the development and revision of voluntary standards?

SDOs incur significant expenses in the development and revision of voluntary standards. From the time a new project is commenced until the final balloting and adoption of a standard, the drafting process draws heavily on an SDO's administrative, technical, and support services. Tens of thousands of staff employed by SDOs across the nation provide direct support for the technical development activities of the volunteers.

Standards sales allow non-profit SDOs to recoup basic administrative costs while passing on to implementers all of the benefits of the voluntary and inclusive process of standards development, including openness, balance, opportunities to participate, and protection from undue influence.

OMB Questions: How often do standards-developing bodies review and subsequently update standards? If standards are already incorporated by reference in regulations, do such bodies have mechanisms in place for alerting the relevant agencies and the public, especially in regard to the significance of the changes in the standards?

Voluntary consensus standards are driven by marketplace needs, and SDOs are motivated to keep their documents up to date. ANSI requires its accredited SDO's to review and reaffirm or revise all standards at least as frequently as every five years. AHRI is an ANSI-accredited SDO.

ANSI has promulgated strict guidance for the standards development process and publishes *Standards Action*, an online publication with weekly notices of upcoming development activities and requests for comments. Stakeholders with concerns about a standard's content are always encouraged to reach out to the SDO responsible for that standard and to get involved in its development and/or maintenance.

OMB Questions: Using and Updating Standards in Regulation. Should OMB set out best practices on how to reference/incorporate standards (or the relevant parts) in regulation? If so, what are the best means for doing so? Are the best means of reference/incorporation context-specific? Are there instances where incorporating a standard or part thereof into a regulation is preferable to referencing a standard in regulation (or vice versa)?

Standards are updated on a constant basis as revisions are created and/or identified that improve the qualities of the standard or better meet the needs of the marketplace. However, in many cases Federal agencies that reference such standards in rules and regulations have not

been able, for procedural or other reasons, to make timely updates to rules that accommodate changes in the referenced standards.

Best practices for updating standards referenced in regulation would be helpful. Often an agency must follow a laborious rulemaking process to recognize a revision of an accepted standard. We understand that ANSI is recommending to OMB an alternative approach – namely, the adoption of a rule of construction that would give an agency 90 days after the promulgation of a revision of a referenced standard to update the Code of Federal Regulations (CFR). If the agency does not do so within the 90-day period, it will be presumed that the revision of the standard would be accepted as the new standard. An agency could create a due diligence requirement that such a revision has to be noticed in the *Federal Register* for 30, 60, or 90 days. If no significant opposition has been heard, the revision becomes the new standard. We understand that a number of agencies have successfully used this approach. There are instances where incorporating a standard or part thereof into a regulation is preferable to referencing a standard in regulation.

OMB Question: Other Developments. Have there been any developments internationally—including but not limited to U.S. regulatory cooperation initiatives—since the publication of Circular A-119 that OMB should take into account in developing a possible supplement to the Circular?

The prior level of participation of the public sector in promoting U.S. standards abroad has led to successes in numerous industries. Yet AHRI observes that the level of U.S. government participation has been inconsistent over time, creating a scenario where industry's global success has fallen short of expectations.

One such example involves the participation and subsequent non-participation of DOE and the National Institute of Standards and Technology (NIST) in some of the ISO Technical Committee (TC) 86, *Refrigeration and Air-conditioning*, subcommittee deliberations. NIST staff was able to partner with and assist industry to champion the utilization of AHRI and DOE's testing procedure for central air conditioner standards during the initial undertaking by ISO. This effort was advantageous to U.S. competitiveness because it allowed the current testing standards to be the same on the international scale. Unfortunately, the U.S. government has not been represented during the recent ISO Working Group meetings and U.S. interests have suffered from a lack of official U.S. expertise to back up industry preferences. Consequently, an ISO Working Group is currently moving toward a Japanese-backed testing procedure. In general, in the HVACR (heating, ventilation, air-conditioning and refrigeration) sector, U.S. global influence has waned as U.S. government participation has declined.

The role of U.S. standards in promoting U.S. competitiveness can be and perhaps is being compromised by two things: the competitive nature of the global standards landscape and the nature of the current public/private sector relationship in the United States' standards system.

The global standards landscape is characterized by sharp competition among national or regional standards development processes. The drive to dominate or heavily influence the content of internationally used standards stems from the drive to increase global economic influence and exports. Although ISO has approximately 190 members, the global standards scene in the HVACR sector is dominated by three converging and often conflicting standards

regions – Asia, Europe, and North America. Each seeks to optimize its access to global markets while at the same time lowering costs. This results in a scenario where companies export to areas where local standards favor whatever unique technology that exporter has. This leads to a global market in which standards can be used to create technical barriers to trade. What must be realized is that success in promoting the use of standards globally is often more a function of the relative economic power of the promoter than of the standard's technical superiority.

The advantage that Asia and Europe have in this competition is that their respective standards development systems are top-down, state influenced, and partially state financed. Standards development is part of a general economic policy with government bodies, such as the Ministry of Economy, Trade and Industry (METI) in Japan, heavily involved in determining both industrial and business priorities, and the requisite changes in international standards needed to accomplish that.

In this competition, the U.S. is working from a disadvantage – its own standards system. There is no question that the U.S. standards system is a proper reflection of the Federal nature of government and the traditional division of responsibilities between the public and private sectors. And, short of a revolutionary usurpation of the private sector's role by government, the system will not and need not change significantly – domestically. What must change, however, is the relationship of the public/private sector relationship in standards regarding the competitiveness of U.S. products abroad.

A new model of cooperation regarding foreign economic policy needs to be developed. This means a public/private entity that systematically integrates governmental incentives to industries with a standards strategy to make needed changes in both domestic and international standards, or to write new standards.

It means developing a financial model with U.S. standards developers who sell their standards that allows the U.S. to give free copies of the standards to trade partners. These or other steps are needed to overcome the inherent weakness of the U.S. standards system – an arms-length relationship between standards developers and the U.S. government borne out of respect for a proper public/private relationship and a fear of “too much government” in our standards system. This new model needs to recognize the needs for closer SDO/government cooperation and the development by the U.S. government of a sharper, clearer foreign economic policy that promotes the value of U.S. developed standards in improving U.S. competitiveness.

U.S. standards developers can (and do) produce world class standards, but absent an increased and coordinated role with government, they won't succeed in harmonizing their standards globally versus those of their competitors.

Concluding Remarks:

OMB Circular A-119 should clearly state that federal agencies coordinate conformity assessment activities with those of the private sector to reduce unnecessary duplication. This will help ensure more productive use of the increasingly limited federal resources available to conduct conformity assessment activities.

A supplement setting out relevant principles on conformity assessment is needed to address case such as the one we describe above. Nationally recognized and respected private sector VICPs should be relied upon by DOE to verify compliance with Federal energy efficiency standards. Such principles for VICPs might include: accreditation by a third party to well-recognized standards, transparency, open access by all impacted manufacturers, and access to test data by the participants, government, and the public.

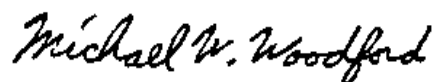
Recent results of DOE verification testing of efficiency ratings of residential tankless and storage water heaters conducted for the ENERGY STAR® program show that not a single test result required further action to verify the rating. The results of these tests support the belief that participants' products in nationally recognized and respected voluntary certification programs are being properly rated and should not be the focus of enhanced Federal scrutiny.

VICPs provide private sector verifications conducted in a manner that eliminates the need for a taxpayer-funded verification program.

By collaborating with private sector partners and relying on private sector voluntary consensus standards and conformity assessment programs, Federal agencies can work faster and smarter to meet and exceed their directives and mandates.

We thank you for this opportunity to provide these comments. If you have any questions regarding this submission, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael W. Woodford". The signature is written in a cursive, slightly slanted style.

Michael Woodford
AHRI Vice President for Standards