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Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Dear Sir or Madam:

On behalf of the Internet Architecture Board (IAB) and the Internet Engineering Task Force (IETF), we thank the Office of Management and Budget (OMB) for the opportunity to comment on OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" pursuant to the Request for Comments contained in 77 Federal Register 19,357 (March 20, 2012) (RFC).

Please do not hesitate to contact the undersigned if you require any additional information or if you wish to discuss these points in greater detail.

Sincerely yours,

Jorge L. Contreras, IETF Legal Counsel
Russ Housley, IETF Chair
Bernard Aboba, IAB Chair

About the IETF and the IAB

The Internet Engineering Task Force (IETF) is a large open international community of network designers, operators, vendors, researchers and other interested parties concerned with the evolution of the Internet architecture and the smooth operation of the Internet. IETF standards are published as "RFCs", which are available free of charge to the public via the Internet.

The IETF is completely open to newcomers, and has no membership fee or other membership requirements. Participants serve as individuals, not as representatives of any company, agency, or other organization. The work of IETF is divided into "areas," each of which is further divided into working groups (WGs). During IETF meetings (currently 5-day meetings held three times a year), working groups meet to resolve open issues and review proposed solutions to work items. Much of the standards development work of the IETF is conducted on various mailing lists, such as the working group mailing lists; all such lists are completely free and open to the public.

The IETF has been the leading source of Internet standards since its establishment in 1986. IETF standards start as "Internet Drafts," (i.e., a draft specification), are published as RFCs and become Internet Standards after a period of development and review by the IETF community, conducted both at open IETF meetings and on open mailing lists.

The Internet Architecture Board (IAB) is chartered both as a committee of the IETF and as an advisory body of the Internet Society. IAB responsibilities include Internet architecture oversight, IETF standards process oversight and appeals, and external liaison activities.

Comments of the IETF and IAB on Circular A-119

A. Standardization Activities.

The current version of Circular A-119 defines “voluntary consensus standards bodies” with reference to several requirements that are discussed below. IETF, the quintessential voluntary consensus standards body, may, under some interpretations of these requirements, fail to qualify as a “voluntary consensus standards body”. OMB notes in the RFC that “A-119 does not establish a preference between consensus and non-consensus standards developed in the private sector” (77 Fed. Reg. 19,359). While this may be the case, classification as a “voluntary consensus standards body” under the terms of Circular A-119 is important. For example, the Standards Development Organization Advancement Act of 2004 (Pub. Law 108-237) expressly applies only to organizations that possess the attributes described in Circular A-119 (Section 103(1)(8)). In the NIST Framework and Roadmap for Smart Grid Interoperability Standards, Release 2.0, the National Institute of Standards and Technology (NIST) expressly adopts the definition of “voluntary consensus standards bodies” used in Circular A-119 (p.61). The list goes on. Thus, even though OMB may not itself differentiate between private sector standards organizations that do and do not qualify as “voluntary consensus standards bodies”, other federal agencies and Congress use the requirements of Circular A-119 as the de facto determination of whether a standards body is operating in a desirable manner.

1. Standardization Activities – Definition - Balance.

Section 4.a(1) of Circular A-119 defines “voluntary consensus standards bodies” as organizations characterized by (i) openness, (ii) balance of interest, (iii) due process, (iv) an appeals process, and (v) consensus. While these terms are intentionally left undefined in the Circular (63 Fed. Reg. 8548, Item 28), we believe there is little doubt that, by any measure, IETF satisfies the requirements for openness, due process, an appeals process and consensus. We also believe that IETF deliberations are “balanced” and follow procedures to ensure that deliberations are not dominated by any particular company or interest group. This conclusion is supported by numerous federal governmental agencies, who regularly use IETF standards and point to them as examples of voluntary consensus standards. These include the Department of Justice, Department of Defense, Department of Commerce, Department of Homeland Security and Department of Treasury (see NIST Reports on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment, 1998-2011). Moreover, the IETF’s open and democratic procedures have been widely-documented in the academic literature (see, e.g., A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 Harv. L. Rev. 749 (2003)).

Nevertheless, certain interpretations of the term “balance” in the standards-setting context could be used to argue that IETF does not, in fact, meet the Circular’s requirement of “balance”. For example, Section 1.3 of the American National Standards Institute (ANSI) Essential Requirements establishes balance requirements for ANSI-accredited standards developers. To achieve “balance”, the ANSI Essential Requirements dictate that “[p]articipants from diverse interest categories shall be sought with the objective of achieving balance”. Section 2.3 provides that “[i]nterest categories shall be discretely defined, cover all materially affected parties and differentiate each category from the other categories”.

Interest categories suggested by ANSI include producers, users, general interest, consumers, the public, distributors and retailers, industrial/commercial, insurance, labor, manufacturers, professional societies, regulatory agencies, testing laboratories and trade associations. While IETF makes every attempt to ensure that standards-related discussions are fair, open and balanced, we do not actively seek out participants for IETF deliberations, nor do we determine, request or track the different interest categories in which participants may fall. Thus, one could argue that IETF fails to meet the “balance” requirement of Circular A-119 under an ANSI-based interpretation (and, given the absence of any independent definition of “balance” in Circular A-119, looking to extrinsic sources such as ANSI could very well be justified).

We believe there is no reason to incorporate an express “balance” requirement in the definition of “voluntary consensus standards bodies”. This requirement, to the extent that it is meaningful, is largely duplicative of the “openness” and “due process” prongs of the definition. The term “balance” is not mentioned in the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. Law 104-113 (1996)), which prompted the 1998 revisions of Circular A-119. In the statement of Sen. Rockefeller in support of the passage of the NTTAA (104 Cong. Rec. S1078, S1080, Feb. 7, 1996), he explicitly mentions the IETF as one of two specific examples of “legitimate consensus standards organization provid[ing] an open process in which all parties and experts have ample opportunity to participate in developing the consensus.” The legislative history of the NTTAA thus clearly indicates that the IETF’s procedures should qualify it as a voluntary consensus standards body, notwithstanding the absence of formal “balance” procedures.

Finally, no such “balance” requirement existed in any version of Circular A-119 prior to 1998. In all such prior versions of the Circular (45 Fed. Reg. 4326 (1980), 47 Fed. Reg. 49,496 (1982), 58 Fed. Reg. 57,643 (1993)), the definition of “voluntary standards bodies” encompassed “nongovernmental bodies which are broadly based, multi-member, domestic and multinational organizations including, for example, non-profit organizations, industry associations, and professional technical societies which develop, establish, or coordinate voluntary standards.” We believe that this definition better reflects the true character of “voluntary consensus standards bodies” in the United States, and clearly includes groups such as IETF.

Recommendation 1: The “balance” requirement of Circular A-119 should either be (a) eliminated or (b) amended to clarify that affirmative recruitment/solicitation/tracking of different interest groups is not required, so long as participation is open and other procedural measures exist to prevent undue influence by single companies or interest groups. In the alternative, we would support a return to the definition of “voluntary standards bodies” contained in prior versions of Circular A-119.

2. Standardization Activities – Definition – Intellectual Property.

Section 4.a of Circular A-119 states that voluntary consensus standards must “include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties”. IETF does not impose a patent licensing requirement on its participants. Instead, under BCP 79 (the IETF policy governing patents in IETF standards) all IETF participants must specifically disclose all patents and patent applications “reasonably and personally known” to them as soon as an IETF document that would necessarily be infringed by them is published. Once such disclosures are made, working groups

can elect to work-around potentially blocking patent positions (and this has happened many times). Moreover, participants can voluntarily disclose licensing terms when they disclose patents and patent applications. This happens frequently, as has been documented by one of us (Contreras) in an independent study funded by the National Institute for Standards and Technology (NIST) (Jorge L. Contreras, An Empirical Study of the Effects of Ex Ante Licensing Disclosure Policies on the Development of Voluntary Technical Standards (GCR 11-934, June 27, 2011)). The study found that between 2007 and 2010, inclusive, 76% of IETF patent disclosures included information regarding licensing of the disclosed patents. Moreover, 59% of all IETF patent disclosures during this period either committed to royalty-free licensing or broad non-assertion of patents.

Thus, while IETF does not formally adhere to a mandatory licensing requirement as specified in Circular A-119, the effect of IETF's strong disclosure policy, together with its longstanding cultural ethos of openness, has been to provide the market with a broad range of critical Internet standards on a royalty-free basis.

Recommendation 2: The intellectual property licensing requirement of Circular A-119 should be supplemented to include SDOs that have strong disclosure requirements and/or which, based on past practice, produce a large number of standards that are made available on a royalty-free basis.

B. Copyright.

The RFC requests feedback regarding copyright in technical standards documents and the issue of incorporation by reference. IETF's policy is very simple. All IETF Documents are made freely available to the public via the Internet and may be freely reproduced, translated and distributed without charge (see IETF Trust Legal Provisions Relating to IETF Documents, Effective Dec. 28, 2009). Modifications and derivative works of IETF RFCs are permitted only with permission. IETF Documents may be incorporated into other documents in full without charge. In no case has IETF ever charged for the use, copying or modification of IETF Documents. We feel that this approach has served the Internet community well and has resulted in the widespread adoption and use of IETF standards. We fully support efforts to ensure the widespread and free use and distribution of standards published by other groups, as well.