



April 30, 2012

The Honorable Cass R. Sunstein  
Administrator  
Office of Information and Regulatory Affairs  
U.S. Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

**Ref: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.**

Dear Mr. Administrator:

The Information Technology Industry Council, ITI, appreciates the opportunity to provide comments in response to the Office of Management and Budget's ("OMB") Request for Information regarding the referenced subject, published on March 30, 2012, in the Federal Register (77 FR 19357). We welcome this initiative to exam whether and how to supplement Circular A-119.

ITI is a leading voice, advocate and thought leader for the U.S. information and communications technology (ICT) industry. Our members are global leaders in innovation from all sectors of the digital economy – hardware, software, services and the Internet – and are strong advocates of a global, harmonized, consensus-based ICT standardization system that is market-driven and private sector-led. Before addressing some of the specific questions outlined in the Notice, ITI would like to share some general observations and recommendations regarding U.S. standardization policy.

**I. ICT Perspective on Standardization Policy**

ITI believes the decentralized, voluntary, market-driven standardization system that has brought us to this point is one which can carry us into a globally connected future with equal or increased productivity, capability and competitiveness. The current process is actually a dynamic system that evolves in response to the needs of industry and other stakeholders. The U.S. ICT industry

has experienced continuous growth in productivity and innovation over the past four decades and the beneficial impact of ICT on virtually all sectors of the U.S. economy and every aspect of society has been even greater. This growth could not have been achieved without the voluntary collaboration of private industry stakeholders in partnership with government in the development of globally relevant ICT standards.

The basic principles forming the U.S. Standards Strategy remain sound, relevant and essential to both U.S. competitiveness and global cooperation. These principles include:

- Market-led
- Sector-specific
- Voluntary, consensus-based, performance-based
- Balanced, flexible IPR policies
- Government as consumer, partner and participant

**Public/Private Partnership:** ITI values the public/private partnership that exists today with regard to ICT standardization. This balance, as reflected in the National Technology Transfer and Advancement Act, Pub. L. 104-113 (1995) (“NTTAA”), and OMB Circular A-119 has been effective in supporting a dynamic and diverse ICT standards ecosystem that has benefitted industry and supported U.S. global competitiveness. We encourage the U.S. government to continue its support for the framework and principles currently articulated in the NTTAA and OMB Circular A-119.

**Diversity of ICT Standards and Standardization:** ITI encourages the U.S. government to embrace a variety of ICT standards and standards-setting processes, and avoid policy decisions that might discourage a broad diversity of approaches to ICT standardization. This diversity provides for choice, competition and flexibility that further enable the ICT sector to respond to a rapidly changing marketplace with new, innovative solutions.

**IPR in Standards:** There also is tremendous diversity with regard to standards bodies’ policies addressing the inclusion of patented technology in ICT standards. This diversity is healthy and should be encouraged, and any articulation of preferred approaches should be avoided.

**Global Standards:** ITI members must be able to compete in global markets and address global supply chains. We encourage the U.S. government to advocate practices for governments worldwide that rely on consensus-based, market-led, voluntary global standards and avoid promulgating and mandating conflicting country-specific standards.

**Use of Standards in Technology Regulations:** Given the dynamic nature of innovation and ICT standards development, governments should be cautious about mandating adherence to any particular standard without demonstrating sufficient need and without support from the impacted industry and relevant stakeholders. Mandated standards can divert normal marketplace outcomes and stifle innovation. If it is necessary to mandate adherence to an ICT standard, the government should look to standards that have been widely implemented in the marketplace as they have some level of demonstrated effectiveness and acceptance.

**U.S. Government Support and Advocacy:** The U.S. government has been a strong advocate of the current ICT standardization ecosystem and many of the points articulated herein. ITI values this ongoing support and appreciates the U.S. government's related international advocacy.

**U.S. Government Participation in Standardization:** As reflected in the NTTAA and OMB Circular A-119, the U.S. government is a very important stakeholder in the standards community. U.S. government technical experts should be adequately resourced so that they can participate in standards-setting activities and contribute their views and expertise.

**U.S. Government Role:** ITI notes that there may be some cases where an additional government role is justified, when there is a compelling public interest (*e.g.*, health, safety and the environment) and markets have failed. Such situations are rare. In such limited circumstances, it may be appropriate for the U.S. government to facilitate an appropriate process and outcome that leads to the successful integration of standards. When these situations arise, the U.S. government should use a process that:

- Includes all stakeholder interests
- Articulates agreed-upon use cases
- Seeks to leverage well-established and broadly implemented standards, and
- Does not mandate conformance to such standards.

## **II. Response to Notice Questions**

### **Voluntary Consensus Standards vs. Voluntary Non-Consensus Standards**

*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?*

**Minimal use of standards in technical regulations**

Governments create technical regulations by mandating technical requirements. This may include procedures for testing, conformity assessment, and ongoing compliance. These requirements may embrace globally recognized procedures or they may be unique to a country or region. Technical regulations can limit manufacturing flexibility, inhibit innovation, delay time to market, and distort product design. They can limit market choice and slow consumer price reductions. They can force companies to spend resources complying with procedural requirements that satisfy no real world need and add no value to products. They can obscure legitimate regulatory requirements and widen the gap to enabling technology.

While governments may reference standards as the basis for technical regulations, this is only appropriate under certain, limited circumstances. ITI's view is that the objectives for technical regulations should be to ensure safe and legal products. Technical regulations should never be more trade-restrictive than necessary and governments should consider alternatives whenever possible. If technical regulations are necessary, governments should fairly consider the costs and time to-market delays associated with implementation and enforcement. ITI supports a simple "design once – test once – single conformity assessment" global system rather than closed regulations with redundant procedures, market delays, and unwarranted costs.

**Strong preference of the use of voluntary, consensus standards over voluntary, non-consensus standards**

ITI supports voluntary consensus standards, as defined in the Circular, referenced in regulatory rulemaking, procurement, and other activities. Voluntary consensus ICT standards are developed in many venues. They are created through collaborative efforts that have a global reach, are voluntary and are widely adopted by the marketplace across national borders. These standards are developed not only by ISO, IEC and ITU, but also by consortia groups and other standards setting organizations (SSOs).

On the other hand, regulatory reference of non-consensus standards can potentially result in substantial costs or inefficiencies being imposed upon both the sector and the economy as a whole, leading to higher costs, higher prices, misallocation of resources, a lack of product innovation and poor service quality. U.S. government must be very cautious not to lend itself to distortions of the market and create uneven playing fields. Note also that ITI has observed the problems that can result when a country establishes mandatory technical requirements, by law or by regulation, by referencing a standard that is not globally accepted. We appreciate the U.S.

government's efforts to address these problems through international and bilateral trade resolution channels.

With voluntary consensus standards intended for use in regulations, it is critical for industry to focus on the content of the standard, its development process and the breadth of its adoption. More specifically, industry supports reference to those standards that meet the tests of real usage (*e.g.*, responsive to the real-world, performance-based, technically sound). Additionally, standards considered for use in regulations should be developed through a process that is both open and global. Ultimately, industry seeks to provide market and customer value through a technologically neutral, level-playing field when standards are referenced in regulations.

### **Conformity Assessment**

*Factors agencies should 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.*

ITI believes very low risk areas may not need to be regulated. Also, low risk areas may not need any conformity assessment intervention.

A supplement guide can help U.S. government agencies to employ its risk analysis. We believe any risk analysis should include identifying the range of options available for managing identified risks, assessing those options, and the preparation and implementation of plans to effectively manage that risk.

Information gathered for risk assessment must be reliable and authoritative. To minimize subjective biases, the assessment should be based on information gathered from past records; relevant experience; industry practice and experience; regulatory practices and surveillance systems abroad; economic impact to small and medium-sized enterprises, as well as to trade; engineering or other models; and specialist and expert judgments. The risk assessment should take into account:

- Risk assessments already conducted by international bodies;
- Available scientific evidence or technical information;
- Related processing technology;
- The intended end uses.

Government agencies should solicit input from industry and the public. They should make publicly available the relevant documentation regarding its risk assessment procedures, as well as the factors considered in carrying out the assessment, and establishing protection levels (*e.g.*, the responsibilities, schedules, the expected outcome, budgeting, and performance measures).

And they should permit public comments in the risk assessment process prior to conclusion to ensure the likelihood and consequences of a risk is indeed significant, and the suitability of the conformity assessment procedures are not more strict than is legitimate.

***Factors agencies should consider in determining whether to recognize the results of conformity assessment and accreditation activities conducted by private sector bodies in support of regulation***

Additional guidance to Circular A-119 could be beneficial. ITI encourages the U.S. government agencies to recognize the results of conformity assessment and accreditation activities conducted by the private sector bodies. Examples of good private sector initiatives include the accreditation of laboratories under the ILAC agreement, and the mutual acceptance of test results among the members of the IECEE. That said, ITI cautions the United States to broaden its view of private sector conformity assessment beyond third-party testing and third-party certification. Additional guidance to Circular A-119 should also support the recognition of Supplier's Declaration of Conformity, performed by first-party private sector bodies, in accordance to international standards, ISO/IEC 17050.

***Non-regulatory uses of standards (including vendor conformity for purposes of response to procurement solicitations); and***

***Ensuring 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.***

ITI supports guidance to consider in minimizing conformity assessment costs and delays for small and medium sized enterprises *and* for multinationals. Everyone benefits when conformity assessment is set to the minimum justified by the determined risks.

**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)?***

ITI supports OMB setting out best practices on how to reference/incorporate standards in regulations. In general, ITI believes government agencies should reference standards in whole,

specified by title, version control number, and date. Government agencies should not add requirements devised by the agency, or seek to mix requirements from two or more standards.

***Should an OMB supplement to the Circular set out best practices for updating standards referenced in regulation as standards are revised? If so, what updating practices have worked well and which ones have not?***

ITI supports OMB setting out best practices for updating standards referenced in regulation as standards are revised. ITI members have found numerous problems when a government agency does not allow sufficient transition period to a changed reference standard. During the transition, the agencies should allow manufacturers to choose between using the old version of the standard or the new one. The agencies should also consider “grand-fathering” where products in the marketplace before the end of the transition period are exempted. A knife-edge transition does not work. If the changes in the requirements are significant, a year or more may be required. ITI members have also experienced problems when agencies have not given sufficient lead time of when the transition starts.

***Should OMB provide guidance to agencies on when it is appropriate to allow the use of more than one standard or more than one conformity assessment procedure to demonstrate conformity with regulatory requirements or solicitation provisions?***

Yes. ITI supports OMB providing guidance on when it is appropriate to allow the use of more than one conformity assessment procedure. For example, manufacturers benefit when they are allowed to choose between the use of third-party test labs or the manufacturer’s test lab, or between third-party certification and Supplier’s Declaration of Conformity.

***Where an agency is requested by stakeholders to consider allowing the demonstration of conformity to another country's standard or the use of an alternate conformity assessment procedure as adequate to fulfilling U.S. requirements, should OMB provide guidance to agencies on how to consider such requests?***

Yes. ITI supports OMB providing such guidance. For example, if the U.S. regulation references global standard, which is also referenced by another country’s regulation, then the U.S. authority should deem the conformity assessment procedure performed for that other country as adequate in satisfying the U.S. requirements.

### **III. Conclusion**

U.S. government reliance on voluntary consensus standards and the principle of Supplier’s Declaration of Conformity are important aspects of the standardization approach in the U.S. The

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continued strength of the U.S. standardization system depends upon the ongoing effective cooperation of government and industry, which has been supported by the principles set forth in OMB Circular A-119.

ITI would welcome the opportunity to provide additional information or to respond to any questions that you may have. Thank you for your consideration.

Sincerely,

Ken J. Salaets

Director

Cc: Jeff Weiss  
Associate Administrator