April 30, 2012

Mr. Cass Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

RE: **Comments submitted by the Business Software Alliance on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities**

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Mr. Sunstein,

The Business Software Alliance (BSA) [1] appreciates the opportunity to respond to the Office of Management and Budget (OMB) request for information on "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities." [2]

BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Our members include businesses that function in a business-to-consumer environment as well as the business-to-business and business-to-government environments.

Technology standards are a cornerstone of software and hardware development that play a key role in fostering a healthy and competitive IT ecosystem. With growing demand for interconnectivity, interoperability and sharing among hardware, software and IT services, the role of standards has only increased in importance. This is particularly true in the public sector, due to the need for better communication with citizens as well as among government agencies (intra- and inter-governmental).

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[1] The Business Software Alliance (www.bsa.org) is the leading global advocate for the software industry. It is an association of nearly 100 world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward. BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Intel, Intuit, McAfee, Microsoft, Minitab, Progress Software, Quest Software, Rosetta Stone, Siemens PLM, Sybase, Symantec, and The MathWorks.

[2] 77 Fed. Reg. 19,357 (March 30, 2012).

I.   General observations: Standards Promote Interoperability and Benefit Consumers

The purpose of technology standards is to promote interoperability, efficiency, increased functionality, productivity, and economic growth. Interoperable software, hardware, and services spur innovation and competition, which lead to increased consumer choice, the creation of new markets, enhanced communication, and technological progress. In order to reap these benefits, however, it is important to properly understand the nature and use of standards.

Technology standards are typically documented in written specifications that enable developers of software, hardware, and services to make and distribute products or components that work with one another within a given context. This interoperability can take the form of information exchange (e.g., protocols or file formats), task performance (e.g., APIs) and other functions that allow systems and people to collaborate effectively. In addition to facilitating broader communication across platforms and devices, this interoperability also enables suppliers to develop their own implementations of a standard, which consumers can then choose among. All entities are not required to implement the standard in exactly the same way; technology standards make possible flexible implementations that best fit the task at hand while retaining interoperability. Standards thus create predictability, interoperability, and competition between implementations without imposing homogeneity.

Voluntary Standards Fuel Innovation

Voluntary processes have proven to be the most effective means of fueling innovation through standards. Indeed, most of the widely adopted technology standards in existence today have been developed through voluntary, supplier-led efforts. The marketplace – responding to consumer demands – is best situated to determining the appropriate timing for the development and promotion of a standard. Over the years, suppliers have been able to respond quickly to industry and consumer needs by developing standards that most effectively address interoperability issues and embrace the direction of the marketplace.

On the other hand, government-mandated standards in the technology industry can often result in a number of unintended consequences. These consequences may include:

i.   unnecessarily freezing the development of new technologies and failing to reap fully the benefits of such quickly evolving technologies;
ii.   inadvertently disadvantaging certain market competitors;
iii. hindering market acceptance and penetration; and,
iv.   precluding a multi-faceted competitive environment.

The method of development of a standard is not ultimately the critical factor that determines its acceptance. A successful standard is one that solves the problem for which it is intended. Typically, the development of such standards is achieved through a natural and dynamic process that is voluntary and responsive to market demands.

Characteristics of "Open" Standards

Among technology standards, there is particular interest in "open standards" as a potential means of achieving widespread interoperability. While there is no universally accepted definition of that term, all open standards have the following common characteristics, which BSA member companies also recognize:

1) Open standards are published without restriction (e.g., potential implementers are not restricted from accessing the standard) in electronic or tangible form, and in sufficient detail to enable a complete understanding of the standard's scope and purpose;

2) The specifications for open standards are publicly available without cost or for a reasonable fee for adoption and implementation by any interested party;

3) Any patent rights necessary to implement open standards are made available by those developing the specification to all implementers on reasonable and non-discriminatory (RAND) terms (either with or without payment of a reasonable royalty or fee); and

4) Open standards are regularly developed, maintained, approved, or ratified by consensus, in a market-driven standards-setting organization that is open to all interested and qualified participants. Open standards are also developed by consensus in the marketplace.

Further, in many standards bodies, multiple and independent implementations of a standard are required as evidence that the specification is complete.

Within this context, governments can play an important role in advancing open standards. Government policies that support the implementation or adoption of open standards, where open standards exist and are broadly supported by industry, will improve interoperability and benefit governments and consumers on the whole. On the other hand, governments should avoid policies that inadvertently discourage the development and adoption of broad-based standards, either by mandating standards themselves (e.g., freezes innovation) or mandating those that have not achieved broad industry support, or by reducing the economic incentives to participate.

II.   Response to Inquiry Questions

Protection of Copyright Associated with Standards: What are the best practices for incorporating standards by reference in regulation while respecting the copyright associated with the standard?

BSA members have developed an overarching series of guiding principles for all government acquisitions of technology that also are relevant here.

1. Competition Spurs Market Innovation: Government's acquisition of a technology product or service should be impartial and based on open and inclusive competition, which will spur innovation in the market, foster integrity and business ethics in public transactions, and guard against conflicts of interest. To ensure full and fair competition for its business, the government should:

   a. Provide an opportunity for interested vendors of technology products and services to participate without government preference for any particular business, licensing, or development models or predetermining the technological solution;

   b. Ensure that government decision makers conduct market research and procurement planning sufficient to understand and be aware of the range of potential choices before initiating the acquisition process;

   c. Require the government to use competitively awarded procurement contracts consistent with the public interest, statutory requirements, and applicable procurement regulations, when it acquires technology products and services to fulfill its mission, including for its acquisitions that are without up-front acquisition and licensing fees, and for its use of open source software, private web sites, on-line services, social media, platforms, and other technologies; and

   d. Protect public confidence in the integrity of Government selection by avoiding no-bid/sole-source arrangements, except where properly justified.

2. Transparency Fosters Public Trust: To protect the taxpayers' interests the Government should:

   a. Require fair disclosure by vendors of any fees, charges, conditions, or benefits at the outset of a transaction;

   b. Require assessment of the full life cycle or total ownership costs of a technology or a system, including time and resources to test,

deploy, integrate, update, migrate and maintain technology or a service beyond the initial acquisition costs;

c. Require that all acquisitions of products and services by the government occur through the same processes, including those where there is no initial cost or acquisition fee; and

d. Avoid arrangements that create the appearance, if not the reality, of improper influence in the Government endorsement of a specific type of technology, including preferences for methods of development or licensing of software or technology, business model, a process or vendor, and no-bid/sole source acquisitions of technology and services.

3. <u>Technology Neutral Procurement Criteria Promote Choice</u>: Government shall use technology-neutral guidelines and criteria in selecting and utilizing technology products and services to meet the government's requirements. These criteria and guidelines should:

a. Establish clear functional specifications based on functionality and performance, service to citizens, interoperability, reliability, security, and cost effectiveness over the life of the technology, adaptability to future technologies, economic development, and other appropriate factors.

b. Rely on criteria that achieve interoperability in a simple, efficient manner while leaving maximum opportunity for companies to expand and develop new technologies. Where "open" standards are relied upon, such standards shall have the following characteristics:

i. Developed and maintained through an open, voluntary, consensus-based process that is open to all participants;

ii. Specifications are publicly available for a reasonable fee or without cost for adoption and implementation by any interested party;

iii. Any patent rights necessary to implement the standard are available to all implementers on reasonable and non-discriminatory (RAND) commercial licensing terms, either with or without payment of a reasonable royalty or fee; and

iv. The functional specifications are sufficiently detailed to enable a complete understanding of the standard's scope and purpose and to enable competing implementations by multiple vendors.

c. Promote innovation by considering all potential solutions (commercial, open source, or any combination thereof) without favoring particular solutions or vendors.

d. Respect intellectual property rights and should not:

    i. Discriminate on the basis of whether or not the vendor asserts intellectual property rights;

    ii. Require a vendor to convey more rights in intellectual property than (i) are offered commercially or (ii) the Government actually needs.

e. Develop criteria in consultation with industry and appropriate Federal agencies.

III.   Conclusion

While standards in general play a key role in enabling interoperability, which type of standard is appropriate and successful ultimately depends on many unique factors (e.g., the specific technology, market, and timing involved). Voluntary, supplier-led standards efforts are typically the most effective at addressing interoperability issues and securing widespread adoption. Government agencies also have a role to play, but they are most effective when facilitating voluntary processes rather than imposing rigid mandates.

It is also important to recognize that standards development organizations (SDOs) have differing funding models. Some charge dues, some charge for participation in certain standards activities, and some charge for the standards specification itself. So long as the charge for the specification is reasonable and the same for all purchasers of the specification at a particular time, this is a commonly accepted international practice. BSA also would note that charging for a specification is common outside the IT space. For example, the International Code Council publishes, *inter alia*, building and construction codes. Adherence to the codes is required under myriad U.S. state and local laws.
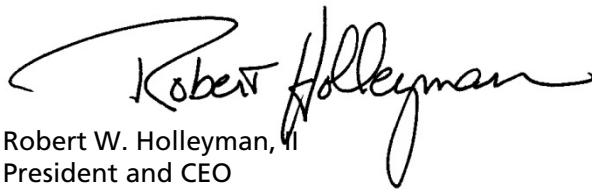
BSA believes that a mature, balanced understanding of the purpose and practice of standards – including the important role of open standards – is essential for a healthy marketplace and technology industry. In turn, a healthy IT ecosystem based on voluntary standards has proven best able to help customers achieve their desired goals of interoperability, flexibility, and accessibility.

Finally, BSA and all leading technology innovators recognize the importance of interoperability and strongly support efforts to enhance interoperability. Yet, as ICT and software are ubiquitous, any related policies are likely to have an impact far beyond U.S. borders. China, for example has sought to use standards policies to create market access barriers for U.S. and other international

innovators. The United States has long urged China to adopt international standards rather than its own indigenous standards and to play a full role in international standards bodies. Any changes to federal policy in Circular A-119 must not compromise the United States' ability to maintain its robust defense of U.S. IPR holders or call into question U.S. support for the use of international standards in trade or government procurement.

BSA welcomes the opportunity to provide additional information regarding this inquiry, and we look forward to a continuing dialogue with federal officials on this important issue. Thank you for your consideration.

Sincerely,

Robert W. Holleyman, II
President and CEO