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To: Office of Management and Budget

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

On behalf of Intel Corporation, we respectfully submit the attached comments in response to the request for comments.

This report is being filed electronically.

Sincerely,

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Response to Request for Comments

FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (OFFICE OF MANAGEMENT AND BUDGET)

COMMENTS OF INTEL CORPORATION

I. Introduction

Intel Corporation appreciates the opportunity to provide inputs to the Federal Register notice submitted by the Office of Management and Budget (OMB) regarding OMB Circular A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.”

Intel is a world leader in computing innovation. The company designs and builds the essential technologies that serve as the foundation for the world’s computing devices and equipment. Standards are critically important to U.S. and global industry and especially in the ICT sector, the emphasis on global standards is vital to spur innovation and economic growth and to enable interoperability. For these reasons, Intel invests heavily in standards development efforts around the world.

The ICT industry develops products and services via global supply chains and delivers them to satisfy global markets. Unique, country-specific standards present significant obstacles to the ICT industry, especially where interoperability is important. We believe the imperative for global standards will grow as ICT technologies are incorporated in other sectors. In specific areas where governments regulate to protect health, safety and the environment, global standards have the potential to help harmonize technical regulations around the world.

Under the US standardization system, industry and government have an especially important partnership -- standards bodies are industry-led and government is an important participant together with other stakeholders to develop voluntary standards which meet global market and national interest needs. Intel believes the fundamental approach for use of voluntary standards as defined in the National Technology Transfer and Advancement Act and OMB Circular A-119 is sound and effective and not in need of revision or change. A-119 works well because of its flexibility in allowing industry and government to quickly respond to changes in the market and the availability to adapt to use new and innovative technical and business solutions.

However, Intel also feels that all stakeholders could benefit from a supplement highlighting best practices and providing additional guidance where appropriate. For example, various governments in emerging markets are

enacting with increasing frequency certification programs that require companies to disclose highly proprietary information to show conformance with their national technical regulations. The type of information required to be submitted to those authorities, which typically lack adequate procedures to protect it, includes source code, product content, and design information – all highly proprietary “know how” that often is unnecessary to show conformity.

From these background perspectives, Intel respectfully offers the following comments in response to the notice with emphasis on:

- Support for use of voluntary, private sector, standards over development of unique government standards
- Support for additional guidance on conformity assessment in a supplement. Everyone benefits when conformity assessment is set to an appropriate minimum justified by the determined risks. This process should include (i) placing the burden on the agency requiring the submission of confidential business information to justify that it is necessary for conformity purposes; and (ii) ensuring effective procedures are in place to safeguard any confidential information that is in fact submitted.
- Recommended best practices on protection of copyrights and referencing of standards for inclusion in a supplement.

II. Standardization Activities

Intel recognizes that OMB A-119 specifies the use of voluntary, private sector, standards over development of unique government standards, with focus on attributes of voluntary consensus standards. When evaluating any standards activities, it is recommended for agencies to take the following factors into consideration:

- inclusion of “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”
- maturity, quality and performance of the technical specifications
- market adoption of the standards (domestic and global)
- in certain activities, such as emerging technology areas, public consultations with the private-sector may be beneficial

III. Conformity Assessments

Intel believes a supplement to OMB Circular A-119 to address a number of critical conformity assessment issues would be helpful. Such a supplement would serve to highlight the importance of conformance and compliance practices, and would encourage federal agency participation in and recognition of the process. Furthermore, such a supplement could include appropriate definitions¹ and well-defined roles for all stakeholders, entities such as first party private-sector and third-party conformity assessment bodies, mitigating some of the confusion that has occurred surrounding recent legislation.

A. Tailoring Assessment Requirements to the Risk Being Regulated

It would be extremely valuable if such supplement offers guidance for conformity assessment procedures that are not stricter than is legitimately necessary, based on a reliable and authoritative risk assessment. Intel believes very low risk areas are unlikely to need regulating (unless new information becomes available). Low risk areas should only be subjected to “light” conformity assessment intervention. A supplement can help guide U.S. government agencies understand how to employ 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 assessments 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; noting impact to trade. The risk assessment should take into account:

- risk assessments already conducted by international bodies
- available scientific evidence or technical information
- the intended end uses

Government agencies should solicit input from industry and the public at large. They should make publicly available the relevant documentation regarding the risk assessment procedures implemented, 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 proposed risk assessment process prior to its finalization to ensure the likelihood and consequences of a risk is

¹ Of note, ANSI has published the United States Conformity Assessment Principles, a document articulating the principles for U.S. conformity assessment activities that will allow consumers, buyers, sellers, regulators, and other interested parties to have confidence in the processes of providing conformity assessment, while avoiding the creation of unnecessary barriers to trade. See <http://www.ansi.org/uscap>.

indeed significant, and again, the suitability of the conformity assessment procedures are not more strict than is legitimate.

Intel 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, Intel proposes that US government agencies (including OMB and NIST) broaden its view of private sector conformity assessment beyond third-party testing and third-party certification. A supplement 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.

Everyone benefits when conformity assessment is set to an appropriate minimum justified by the determined risks. If certification is necessary, an OMB supplement should encourage a competitive market in conformity assessment to assure choice and competitive prices from certifiers, while at the same time ensuring that all accredited certifiers are providing credible, reliable certifications. Such supplemental guidance would help achieve Circular A-119's goal of "eliminating unnecessary duplication and complexity in the development and promulgation of conformity assessment requirements and measures." (Circular No. A-119, Revised, Par. 9.)

Intel supports OMB providing guidance for those instances where it may be appropriate to use more than one standard or conformance procedure. The U.S. standardization system embraces the "multiple path approach," where multiple standards or conformance systems may achieve global relevance and applicability. If more than one standard or conformity assessment solution could satisfy the need, then these should be considered, so long as they are in compliance with the principles of the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement.

The main guidance for regulatory agencies on compliance should be derived from the WTO TBT Agreement (Section 5), and related guidance documents. An OMB supplement on conformity assessment could provide explicit guidance wherever possible to ensure maximum compliance by federal agencies. The current lack of explicit, clear guidance can lead to inadvertent divergence from reasonable and practical conformity assessment practices.

B. Limiting the Submission of Confidential Information to that Which is Essential to Show Conformity

Foreign governments in emerging markets are developing an increasing number of overbroad certification systems that require the unnecessary disclosure of trade secrets as a condition of market access. Because these same governments typically have inadequate safeguards to protect such information, there is a real risk that the

required sensitive information will leak to competitors. As a result, some U.S. companies have foregone sales opportunities in several of the biggest markets, including China and India, rather than risk losing valuable trade secrets as a result of the conformity assessment process.

The WTO TBT Agreement has several safeguards that are helpful, but they are too general to effectively address the magnitude of the problem. For example, a WTO member is required to “ensure that . . . information requirements are limited to what is necessary to assess conformity“ (TBT Art. 5.2.3). However, there is no TBT guidance on how that is supposed to happen in practice. Indeed, although a WTO member has to notify other parties “of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objectives and rationale” (TBT Art. 5.6.2.), it is unclear whether this notification requirement also applies to the type(s) of information required to show conformity.

As a result of these deficiencies, industry is working to enhance those safeguards in newer trade agreements such as the Trans-Pacific Partnership Agreement currently under negotiation. We recognize that in certain circumstances some proprietary product information needs to be provided to governments, including ours, for legitimate health, safety, security and other reasons. Unlike most foreign governments however, many U.S. agencies have detailed procedures to protect confidential business information they receive (*see, e.g.*, 40 CFR Part 2), which are enforceable against the officials that administer them (*e.g., id.* Section 2.211). These procedures also establish the criteria and obligations of an IP rights holder in order to assert that certain information is in fact a trade secret subject to confidential treatment (*see e.g., id.* Section 2.208).

It would be very helpful to have a supplement to Circular A-119 that summarizes, from relevant regulatory frameworks, the common procedures used by U.S. agencies to (i) minimize the amount of confidential information submitted to that which is necessary to show conformity, and (ii) protect that information from intentional or inadvertent disclosure by U.S. officials. This supplemental guidance could then be used as a model of best practices for other governments to emulate, and a concise foundation for future U.S. trade agreements to build on so our government can require other parties to develop the principles embedded in such procedures.

IV. Protection Of Copyright Associated With Standards And Referencing of Standards

Intel recommends that the best practice for incorporating voluntary standards by reference into regulation begins with the controlling agency understanding the scope of the standard and the policies of the standards organization and if needed, establish a relationship with the organization to better coordinate their respective activities. The standards organization is responsible for the continuing development and publication of the standard regardless of whether it is referenced in a regulation. The controlling agency is responsible for its regulation documents, including any decision to incorporate a standard by reference.

An OMB supplement could advise the controlling agency to consider the technical merit of the standard and whether the policies of the standards organization provide reasonable assurances that any interested party can:

- Access the text of the standard on a reasonable basis (with no unreasonable restrictions or conditions placed on such party); and
- Obtain licenses to essential intellectual property rights (e.g., patents or patent claims) on at least reasonable and non-discriminatory (RAND) terms to make, use and sell the party's products implementing the standard.

The OMB Supplement could further advise controlling agencies to work with the standards organization to address concerns. Each party should maintain its own area of responsibility. The standards organization owns the development and publication of the standard and the controlling agency owns their regulation documents. As a word of caution: please note that the controlling agency should not dictate terms, attempt to alter the business model of the standards organization, or attempt to alter the content or intent of the standard as provided by the standards organization. The regulation document should only direct selection of options specified in the standard when: appropriate; necessary for reasonable implementation in the public interest; and where the standard explicitly allows for a selection from alternative options (e.g., selection of a 60 hertz frequency for compatibility in the U.S. power system). In the event that the agency and the standards organization cannot address agency concerns, the agency should simply not reference the standard. Where needed for clarity, the incorporation of any copyrighted material in a regulation (e.g., reproduction of tables, diagrams, or other excerpts of standards) requires first obtaining permission from the copyright owner. Such material may not be included or reproduced without such permission.

V. Conclusions

Intel believes the fundamental approach for use of voluntary standards in OMB Circular A-119 is sound and effective. Intel supports consideration of a supplement to the Circular that would include guidance in several important areas: tailoring assessment requirements to the risk being regulated, limiting the submission of confidential information to that which is essential, and describing best practices for incorporating voluntary standards by reference.

Intel appreciates the opportunity to provide these comments to the OMB and is available to respond to any questions about our comments.