

May 12, 2014

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

Submitted Electronically

**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 once again provide comments regarding proposed revisions to Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" published on February 11, 2014 ([Federal Register](#) 2014-02891). 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 reiterate some general observations and recommendations regarding the U.S. standardization policy.

**ICT Industry Perspective on Standardization Policy**

As we stated in previous comments, 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 increased productivity, capability and competitiveness. The current process is actually a dynamic system that evolved 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

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.

ITI encourages the U.S. government to continue 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. 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.

### **U.S. Government Participation in Standardization Activities**

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. In the rare cases where an additional government role is justified, e.g., when there is a compelling public interest (e.g., health, safety and the environment), 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.

### **Proposed Revisions to Circular A-119**

ITI believes that a number of the proposed changes will help clarify and strengthen guidance to Federal agencies. In particular, ITI appreciates and supports the following elements:

- Clear preferences for using relevant international standards, in order to fully comply with U.S. obligations under international trade agreements. This policy also sets a positive example for other countries that may implement national standards policies similar to those established by the Circular.
- Guidance on how to update standards incorporated by reference. These steps are likely to improve the relevance of standards that have been made mandatory through reference in regulation.
- Guidance for U.S. government representatives' participation in the development of voluntary standards. Active participation by government representatives (including involvement in discussions and technical debates, registering of opinions and serving in leadership positions) is fundamental to making the public-private partnership embodied in the Circular effective.
- Conformity assessment guidelines and in particular guidance on which type of conformity assessment procedure to use. These guidelines should help achieve more consistent use of conformity assessment procedures across federal agencies.
- Revisions to the Circular that ensure agencies provide Standards Executives with sufficient authority and that provide a clear description of the important role that the Interagency Committee on Standards Policy (ICSP) plays including its interaction with federal agencies. These requirements will help achieve more consistent implementation of the Circular across federal agencies with greater transparency.

ITI has additional recommendations to further clarify and improve the text, which we address in the next section.

### **Recommendations for Further Clarification and Improvement of Proposed Revisions**

The following comments respond to the specific proposed revisions to the Circular as contained in the February 11 draft.

## *DEFINITIONS*

### *3. What is a standard?*

With regard to the attributes of standards development process of “voluntary consensus standards bodies”, as outlined in 3(f), ITI offers the following comments:

- Overall comment: Some of the terms used in connection with the definition of these attributes are somewhat ambiguous and would benefit from greater clarity. For example, many well-recognized standards developing organizations allow directly and materially affected parties to communicate their interest in participating in the work of the relevant technical committee or other identified technical group process that will work to produce the final standard. Based on this, the standards developing organization identifies these “participants” as part of the technical group that must follow the standards developing organization’s procedures to arrive at a consensus outcome.
  - A number of these standards developing organizations also provide for a more limited form of “participation” – for example, by providing drafts of the standard to the public or other stakeholder groups for their comments. This permits others to “participate”, but this level of participation is different from being part of the core technical group organized by the standards developing organization.
  - As a result, when the draft Circular refers to “participants”, it is not clear whether this term refers to the first group of people described above (which we think would be appropriate), or whether it also includes others who participate through a public comment or other more limited process pursuant to which the standards developing organization seeks broader feedback.

Specific comments on the attributes of the “voluntary consensus standards bodies” attributes:

- We believe that the term “openness” would be better defined as:
  - “Openness: The procedures or processes used are open on a non-discriminatory basis to all persons who are directly and materially affected by the activity in question, and such parties are provided meaningful opportunities to participate in the standards development process. The procedures or processes for participating in standards development and for developing the standard are transparent.”
  - Rationale: The OMB proposed definition speaks to providing any directly and materially affected party the opportunity to participate “at all stages of the

standards development process”. As noted above, we are not sure what is meant by “participant”. In addition, we are not sure what is meant by “at all stages of the standards development process”. For example, many well-recognized standards developing bodies permit draft text (and even a draft of the standard) to be developed by one or a few stakeholders outside the full consensus process. In this case, the draft is then provided to the technical group organized by the standards developing organization. That group then undertakes a detailed review (and often revision) to the proposed text following the full due process-based procedures of the standards developing organization to finalize and approve the standard.

- We also believe that “due process” would be better defined as:
  - “Due process shall include documented and publically available policies and procedures, adequate notice of meetings and standards development, sufficient time to review drafts and prepare views and objections, and a fair and impartial process for resolving differing views.”
  - Rationale: As noted above, it is not clear what is meant by the term “participant” and what it would mean to provide “full access to the views and objections of other participants”. For example, must the standards development organization provide public commenters (or even the public generally) with access to all of the technical group’s participants’ comments on all drafts of the standard? This may be rather burdensome and could raise other possible concerns.

- We believe that “consensus” would be better defined as:

“Consensus, which may be defined as general agreement, but not necessarily unanimity. During the development of consensus, comments and objections are considered using fair, impartial, and transparent processes.”

- Rationale: With regard to the definition of “consensus”, we are not sure that we understand the use of the term “open” in connection with this phrase: “During the development of consensus, comments and objections are considered using fair, impartial, open, and transparent processes.” We agree that these processes should be fair, impartial and transparent. But if the term “open” suggests that such processes must be open to the public, then we are concerned that this may be very burdensome and raise other possible concerns. Since “openness” is defined above, it is not necessary here.

## *POLICY*

### *6. What is the Policy for Federal Use of Standards?*

#### *a. When must my agency use voluntary consensus standards?*

This subsection contains guidance on how to proceed when there are no “suitable voluntary consensus standards” fit for purpose, or when “the use of existing voluntary consensus standards would be inconsistent with applicable law or otherwise impractical.” It goes on to outline steps agencies should take when it “elects to use or develop a government-unique standard or other voluntary non-consensus standard in lieu of using a voluntary consensus standard.” For clarity, we recommend using the term “specification” instead of “non-consensus voluntary standard.” A “Voluntary Specification” is a deliverable produced as the result of a collective activity, but it was not developed using processes that include all the attributes or elements identified in subsection 3(f) (“What is a Standard?”).

This subsection also cites the requirement contained in section 12(d) of the NTTAA that an agency submit a report to OMB describing the reason(s) for electing to use other than an existing voluntary consensus standard. We strongly recommend that the reporting requirement be expanded. When a Federal agency intends to use other than voluntary consensus standards, the agency should be required to publish via the Federal Register notification regarding its intent. The notification should include:

- contact information for the government office and representative(s) responsible for the review and determination;
- a minimum 60-day public review and comment period; and
- specific information regarding what process was followed to evaluate the availability of suitable voluntary consensus standards.

These additional steps would enable interested parties to review the decision and to possibly identify either existing voluntary consensus standards or those under development that could meet the agency’s needs and thereby sustain the preference for such standards.

#### *e. When deciding to use a standard, what are some of the things my agency should consider?*

Bullet (ii) addresses the consideration of intellectual property rights (IPR) when an agency determines whether to use a standard. We also note that the topic is addressed in subsection 6(j). In order to avoid confusion, we recommend that the texts be merged under 6(j) and revised to read as follows:

Many standards developing bodies have policies which require participating IPR holders to commit to license any patented technology incorporated into a standard on reasonable and non-discriminatory terms. Such policies often take into account the interests of both the IPR holders and those seeking to implement the standard. Such policies should be easily accessible and the rules governing the disclosure and licensing of IPR should be clear and unambiguous.

When considering using a voluntary standard, an agency should, to the extent permitted by law, take account of the effect of using the standard on the economy, and of applicable Federal laws and policies, including laws and regulations relating to antitrust, national security, small business, product safety, environment, metrication, technology development, international trade, intellectual property and copyright, privacy and security, and conflicts of interest.

The evaluation should include consideration of the extent to which entities implementing the standards may obtain licenses to patented technology incorporated into the standard on a non-discriminatory and reasonable royalty or royalty-free basis. This evaluation should also include consideration of whether the relevant IPR policy binds subsequent transferees of patented technology incorporated into the standard.

Bullet (iii)(5) should be revised in order to make it clear that use of the referenced criteria should be confined to incorporation of standards by reference in a regulation, and should otherwise remain silent on standards used in a non-regulatory context. To achieve this, we recommend adding the phrase “For standards incorporated by reference in a regulation.” The revised bullet (5) would read as follows:

(5) For standards incorporated by reference in a regulation, whether the standard is “reasonably available.” See section 6p of the Circular for additional information.

*p. How should my agency determine whether a voluntary standard is “reasonably available” in a regulatory context?*

ITI believes that this subsection should be revised in order to place stronger emphasis that the list of criteria is not presented as a check list, but rather, as guidance for making such determinations. Accordingly, we strongly recommend incorporating text from the second paragraph into the leading paragraph, and reordering the bullets, as follows:

“In determining whether a standard is “reasonably available” to regulators and other interested parties, agencies should take into account the following factors (not listed in priority), given that reasonable availability is context-specific. The following is not meant to be a checklist. The

absence of one or more of these factors alone shall not be used as a basis for an agency decision not to use the standard. This section shall also be applied in a manner consistent with: U.S. international obligations to use relevant international standards (see section 6g of the Circular); the “Principles of Regulation” (enumerated in Section 1(b) of Executive Order 12866); and the need to “protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation” (see section 1 of Executive Order 13563). In all cases, the Federal Government should respect the business models of the various SDOs whether they charge for their standards or provide them free of charge.

- i. The need for access to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny;
- ii. The cost to interested parties to obtain the reference technical material, including the cumulative cost to obtain referenced and incorporated materials;
- iii. The standards developer can provide a technical summary that generally explains the content of the standard in a way that is understandable to the public who may lack relevant technical expertise; and
- iv. The standards developer is willing to make read-only access to the standard available on its website during the comment period, since technical reference access may be necessary during rulemaking to make public participation in the rulemaking process possible or effective.

### **Conclusion**

U.S. government reliance on voluntary consensus standards is fundamental to the standardization approach used in the United States. The 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.

We applaud the effort to provide clearer, more concise guidance to Federal agencies on standardization policy. ITI would welcome the opportunity to provide additional information or to respond to any questions that you may have. If you have further questions, please contact Ken Salaets at [ksalaets@itic.org](mailto:ksalaets@itic.org). Thank you for your consideration.