May 9, 2014

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

Re: Request for Comments on a Proposed Revision of OMB Circular No. A-119
Docket ID: OMB-2014-0001

Dear Mr. Shelanski:

The Society of the Plastics Industry, Inc. (SPI) appreciates the opportunity to provide OMB with its perspective and recommendations on the referenced proposal. Founded in 1937, SPI promotes growth in the $373 billion U.S. plastics industry – the third largest manufacturing industry in the U.S. – and represents nearly 900,000 American workers. SPI delivers advocacy, market research, industry promotion, and the fostering of business relationships and zero waste strategies. SPI's member companies represent the entire plastics industry supply chain, including processors, machinery and equipment manufacturers, mold makers, raw materials suppliers and brand owners.

SPI supports revising OMB Circular A-119 to better achieve its goals of advancing the overall economic, environmental, and social well-being of the people of the United States by bringing technology and industrial innovation to the marketplace and the regulatory arena in the most cost-effective manner. Specifically, SPI believes a ***strong*** preference for the government's use of voluntary consensus standards over non-consensus standards is critical, and that any use of non-consensus standards must be limited to situations where the use of a voluntary consensus standard would be inconsistent with applicable law or otherwise impractical. SPI appreciates the effort made by OMB to better define the term "voluntary consensus standard," but believes OMB has inadvertently developed definitions that would materially and inappropriately dilute the minimum criteria for a voluntary consensus standard. We believe it is essential to re-examine the guidance as to when and how representatives of regulatory agencies may participate in the development of voluntary standards that could be used by the agency as the basis for adoption of

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its mandatory standards. Finally, while there is merit to keeping current with the latest technology, significant concerns would be raised by a policy that presumes government regulatory standards incorporating a consensus standard by reference need to be updated if the consensus standard is updated. We address all of these points in further detail below.

A. Preference for voluntary consensus standards

Section 12(d)(1) and (3) of the National Technology Transfer and Advancement Act (NTTAA) provide as follows:

> (d) UTILIZATION OF CONSENSUS TECHNICAL STANDARDS BY FEDERAL AGENCIES; REPORTS
>
> (1) IN GENERAL- Except as provided in paragraph (3) of this subsection, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.
>
> (3) EXCEPTION- If compliance with paragraph (1) of this subsection is inconsistent with applicable law or otherwise impractical, a Federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies if the head of each such agency or department transmits to the Office of Management and Budget an explanation of the reasons for using such standards. Each year, beginning with fiscal year 1997, the Office of Management and Budget shall transmit to Congress and its committees a report summarizing all explanations received in the preceding year under this paragraph.

We agree with OMB that the quoted language is "intended to maximize the reliance by agencies on voluntary consensus standards and reduce to a minimum agency reliance on standards other than voluntary consensus standards …." The revised language in the first paragraph of Question 6.a ("When must my agency use voluntary consensus standards?") properly reflects the intent of Congress.

We are concerned, however, that the second paragraph of Question 6.a may be read to undermine the first paragraph. The second paragraph reads as follows:

> In addition to consideration of voluntary consensus standards, it is also important to recognize the contributions of standardization activities that take place outside of the voluntary consensus process, particularly in emerging technology areas. Therefore, in instances where there are no suitable voluntary consensus standards, agencies should consider, to the extent consistent with law – as an alternative to

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using a government-unique standard – other voluntary standards that deliver the most generally favorable technical and economic outcomes (such as improved interoperability) and that are widely utilized in the marketplace.

We believe this exception to the normal rule should be limited to areas when speed is needed for a standard to "catch up" to emerging technology and where the adopting agency ensures that the non-consensus standard meets a stringent set of criteria, such as the following, that justify this exception:

- The standards developing organization (SDO) has provided a clear justification for proceeding with development without a full consensus process, including demonstrating a need for an accelerated standard development process due to changes in technology and actual market demand for standard; a compelling national security concern; or a compelling public health reason;
- The SDO considered whether the standard is intended to be used by or will materially impact a broad and diverse group of stakeholders whose technical expertise is needed to fully inform standard development, and if so, secured the participation of such stakeholders; and
- The SDO developed a complete and robust technical standard informed by appropriate scientific and/or technical expertise in the development process.

The success or failure of consensus standards rests partly in the consensus development process itself – by virtue of having achieved consensus agreement – and then is tested by the market itself, where quality, effective standards get used and ineffective standards fail to be used. The consequence of the government picking a non-consensus standard for federal stakeholder use could be to bypass both of these controls. These market impacts are yet another reason why the government should limit its selection of certification systems to recognized consensus standards.

The principles of due process are being challenged and undermined by the emergence of a relatively new category of non-consensus standards that attempts to drive market outcomes. These non-consensus standards have been proliferating from market-based or interest-group driven consortia. While, traditionally, standards are developed to serve a market need, and in many cases are developed after the need emerges, a trend gaining traction over the past decade is for a select group of market or nonmarket entities to form a standards consortium so that they can "lead" or "transform the market." They assert that their purpose is to achieve a socially desirable objective. Without the protection of a consensus process, these consortia could operate much like a private club, setting entrance fees or membership requirements that are exclusionary. And without consensus protection, these consortia can become dominated by an ideology and economic arrangements that support that ideology.

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B. Clarifying the meaning of the term "voluntary consensus standard"

Consistent with section 12(d)(1) of the NTTAA, the use of voluntary consensus standards is preferred because voluntary consensus standards are developed using processes which provide for openness, a balance of representation, due process, appeals, and consensus decision-making.

Given the preferred status of voluntary consensus standards, it is critical to clearly define them so there will be a clear understanding as to what is or is not a voluntary consensus standard.

In the United States, the minimum criteria for a voluntary consensus standard have been established by the American National Standards Institute (ANSI) in the document titled *ANSI Essential Requirements: Due process requirements for American National Standards-2014.* The mandatory minimum due process criteria are:

(1) Openness;
(2) Lack of dominance;
(3) Balance [should be achieved, and must be diligently and continuously sought if not achieved];
(4) Coordination and harmonization;
(5) Notification of standards development;
(6) Consideration of views and objections;
(7) Consensus vote;
(8) Appeals [process]; and
(9) Written procedures.

It appears that OMB attempted to incorporate these essential requirements into the Circular in a simplified format, but in doing so, inadvertently omitted a significant portion of the substance of those requirements. For example, the principles of "balance" and "lack of dominance" are closely related, but not identical. Dominance is prohibited whereas balance is a goal to be diligently sought. If the prohibition on dominance is removed, then balance would have to be an absolute requirement and many standards would no longer be classified as consensus standards.

The absence of any minimum criteria for an appeals process is also a concern. Under the ANSI rules, the standards developing organization must provide an "identifiable, realistic, and readily available mechanism for the impartial handling of procedural appeals regarding any action or inaction. Furthermore, "appeals shall be addressed promptly and a decision made expeditiously." In addition, recognizing that a standards developing organization may not be the sole judge of whether it complied with the applicable due process requirements, a further appeal is available to ANSI.

Finally, we respectfully submit that adoption of the proposed definition of "consensus" would materially change the meaning of that term in a way that conflicts with the policies and goals of Section (d) of NTTAA. It would permit the special preference for consensus standards to be

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applied to standards that do not meet the traditional definition of consensus standards and do not merit that preferred status.

The current Circular defines the term "consensus" as follows:

> (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.
>
> The proposal would substitute the following definition for the term "consensus": 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, open, and transparent processes.

The requirement to advise objectors of the disposition of their objection and the rationale for that determination appears to have been dropped. It appears that the requirement to give consensus body members an opportunity to be persuaded of the validity of a different point of view and change their votes is also missing.

ANSI defines the term "consensus" as follows:

> Consensus: Consensus means substantial agreement has been reached by directly and materially affected interests. This signifies the concurrence of more than a simple majority, but not necessarily unanimity. Consensus requires that all views and objections be considered, and that an effort be made toward their resolution.

The critical phrase "that an effort be made toward their resolution" is explained in Section 2.6 of the *ANSI Essential Requirements*. They require that the standards developer take the following measures to pursue resolution of objections to the language of a standard and the developer must document that they have been taken:

> In connection with an objection articulated during a public comment period, or submitted with a vote, an effort to resolve all expressed objections accompanied by comments related to the proposal under consideration shall be made, and each such objector shall be advised in writing (including electronic communications) of the disposition of the objection and the reasons therefor. If resolution is not achieved, each such objector shall be informed in writing that an appeals process exists within procedures used by the standards developer. In addition, except in the case of Audited Designators, each objection resulting from public review or submitted by a member of the consensus body, and which is not resolved (see definition) must be reported to the ANSI BSR.

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> Each unresolved objection and attempt at resolution, and any substantive change made in a proposed American National Standard shall be reported to the consensus body in order to afford all members of the consensus body an opportunity to respond, reaffirm, or change their vote.

While far more protective of due process than what has been proposed by OMB, the ANSI definition of "consensus" does have material shortcomings. The ANSI process allows the advocates of a particular point of view to create additional interest categories that share a particular perspective and then outvote the interest that is actually covered/regulated by the standard. The national and international standards developers of many of our international trading partners have eliminated that concern by adopting a more appropriate definition of consensus.

The International Standards Organization (ISO) and International Electrotechnical Commission (IEC) define "consensus" as follows:

> "Consensus" is general agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments. Note: Consensus need not imply unanimity.ISO/IEC Guide 2:2004 *Standardization and related activities – General vocabulary*
>
> http://www.iso.org/sites/ConsumersStandards/1_standards.html

The European Committee for Standardization (CEN) defines "consensus" as follows:

> Consensus: General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments (Note: consensus need not imply unanimity). Consensus reflects the voluntary character of standards.
> It makes sure that the standard is wanted by the parties concerned and prepared with the voluntary commitment to their use.
>
> http://boss.cen.eu/reference%20material/Guidancedoc/Pages/Del.aspx

Standards Australia defines "consensus" as follows:

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> *"Consensus*—general agreement on the content of the publication is reached with no sustained opposition by any important interests on the committee."

Standards Council of Canada defines "consensus" as follows:

> 4.5 Consensus
> General agreement, characterized by the absence of sustained opposition to substantial issues by an important part of the concerned interest and by a process seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.
>
> Note 1: Consensus need not imply unanimity.
>
> Note 2: The absence of sustained opposition is not intended to provide a "veto" to any one party.

We urge OMB to reconsider this critical definition and incorporate all of the quoted language from the *ANSI Essential Requirements* as well as the international community's concept of consensus – the absence of sustained opposition to substantial issues by any important part of the concerned interests.

C. Guidance on the participation of representatives of regulatory agencies in the development of voluntary standards

As proposed, Federal regulatory officials from OSHA, EPA, DOT, etc. would be permitted not only to participate as voting representatives of a standards development body, but also to chair the body subject to the caveat that they "**should** [emphasis added] avoid the practice or the appearance of undue influence relating to their activities in standards bodies and activities." At a minimum, we believe the word "should" is inappropriate and must be replaced with the word "must" or equivalent. Looking at the situation from a realistic standpoint, we believe it is clear that Federal regulatory officials should be barred from holding any leadership role in a body developing a standard that could be adopted or relied upon by the agency as the basis for a Federal standard governing activities covered by the voluntary standard. OSHA, for example, has recognized the inherent problems posed by such a situation and does not permit its employees to vote on standards proposal, much less take on a leadership role.

D. The concept of updating standards incorporated by reference in a timely manner to reduce burden

We certainly appreciate OMB's concern for the regulatory burden facing US employers and efforts to reduce it by encouraging adoption of updated standards that provide greater flexibility and eliminate unnecessary burdens. Unfortunately, on an overall basis, our experience has been that updated voluntary consensus standards in the health, safety and environmental arena tend to significantly add to rather than reduce regulatory burdens.

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Furthermore, these updated voluntary consensus standards tend to be more specification-based and less performance-based, with standards addressing combustible dust and chemical hazard communication being two prominent recent examples.

The fact that a voluntary consensus standard incorporated by reference into a Federal regulation has been updated should not affect the ability of the Federal regulatory agency to prioritize its regulatory agenda. It would be inappropriate to direct the agency to amend a regulation within a certain time frame simply because the consensus standard incorporated by reference has been updated.

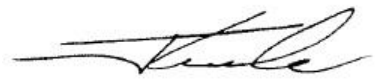
Furthermore, the fact that a consensus standard has been updated does not mean it can be adopted by a Federal agency on an expedited basis. Some standards developers use boilerplate language at the beginning of a revised standard stating that the changes are not intended to be retroactive (apply to existing installations) unless the "authority having jurisdiction" determines that it is necessary to make them retroactive. The decision as to whether to adopt a national consensus standard and make it retroactive to existing facilities often involves complex cost-benefit and technical and economic feasibility analyses that the standards developer avoided with its boilerplate language. In general, the consensus standard would not have been approved without that boilerplate language.

The adoption of a revised voluntary consensus standard does not necessarily represent a material improvement in environmental, health and safety practices. Unfortunately, in some cases, we believe the revisions to an existing standard reflect other free market incentives rather than recognition of a deficiency in existing standards. We do not mean to suggest that these influences dominate, but their existence does suggest the need to avoid adopting policies that will further encourage an outpouring of updated standards.

E. Conclusion

SPI greatly appreciates the opportunity to submit these comments. Please contact me if you have any questions.

Respectfully submitted,



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