Comments of Cisco Systems, Inc.

in response to Office of Management and Budget Request for Comments Regarding Proposed Revision of OMB Circular No. A-119: ***Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities***

(79 Fed. Reg. 8207)

Submitted May 12, 2014

Cisco Systems, Inc. ("Cisco") appreciates this opportunity to share its views in response to the Request for Comments on a Proposed Revision to OMB Circular No. A-119. Cisco strongly supports the Office of Management and Budget's effort to update Circular No. A-119 to reflect changes in the standards development process in the 16 years since the Circular was last revised.

1. Cisco and Standards Development

Cisco is active in a wide range of standards development organizations ("SDOs"), from large, formal SDOs like the Institute for Electrical and Electronics Engineering Standards Association ("IEEE-SA") to numerous informal special interests groups, fora, and consortia, formed by industry participants to create technical specifications in a focused area, sometimes with the goal of subsequent standardization by a formal SDO.

The range of Cisco's involvement in standardization spans the range of networking technologies underlying Cisco's businesses, including Ethernet, Wi-Fi, Internet Protocol (IP), software defined networks, and cloud computing; standards for the provision of video, voice, and broadband over cable television and telephone networks; and wireless air interface standards such as UMTS and LTE. On any given day dozens of Cisco engineers are actively

engaged in standards development, including attending meetings, creating technical contributions, and directing the work of SDOs as board members, working group chairs, or technical editors.

Cisco also actively patents its innovations, including innovations that Cisco contributes for inclusion in standards. The IEEE Spectrum's 2012 Patent Power Scorecard ranked Cisco's patent pipeline as the second best in the category of "Communications/Internet Equipment."[1] Cisco innovations in the areas of routing, MPLS, and quality of service have been critical to the development of the internet and the ability of data networks to carry voice and video. Cisco has also played a leading role in the development of multiple generations of the DOCSIS standard that is used to transmit data over cable networks, the standard most households in the United States that receive broadband use to access the Internet.

Cisco also regularly implements standards in our products. We are industry leaders in Ethernet switching products which implement the IEEE-SA's 802.1 and 802.3 family of local area networking standards. We are also the leading developer of enterprise wireless local area networking products that implement IEEE-SA's 802.11 family of wireless LAN standards. And we are a leading innovator in routers, which implement a large number of standards created by the Internet Engineering Task Force ("IETF"), the International Telecommunications Union Telecommunication Standardization Sector ("ITU-T"), and other SDOs. We also implement IETF and IEEE-SA standards in our internet telephony products, ITU-T voice and video compression standards in our videoconferencing products, and CableLabs standards in cable set-top boxes and routers, to name just a few examples. Indeed, many Cisco products implement dozens of different standards created by dozens of standards development organizations.

2. Definition of Voluntary Consensus Standards

[1] http://spectrum.ieee.org/static/interactive-patent-power-2013#anchor_ciequ

The definition of "Voluntary Consensus Standard" in both the existing circular and the proposed revision list specific criteria that a developer of a standard must adhere to if the standards it creates are to come within the definition. OMB is to be commended for adding explanatory text concerning several of the criteria that are not defined in the current Circular.

Nevertheless, we have a few suggested changes. With respect to the explanatory text regarding "Openness", Cisco suggests that the current reference to "all stages" be modified to read "all significant stages" or "all material stages". We are concerned that the "all stages" text may be mis-understood as a requirement that, for example, participants at a particular SDO that do not participate in a particular working group and are thus unable to participate in working-level discussions (but are able to vote to approve or reject the resulting standard) may contend that the resulting standard is outside the voluntary consensus standard definition. We also suggest that the definition of "Openness" be expanded to refer not just to the standards development process itself but also to governance functions, for example the selection of SDO leadership and the creation of policy documents such as the IPR policy. Making this change would communicate to standards development organizations outside the US that excluding participants from the process of creating organizational rules can raise serious concerns with the openness of the standards development process.

3. Voluntary Consensus Standards versus Voluntary Non-Consensus Standards

The proposed revision appropriately recognizes the increasing importance of standards created outside the formal standards development process, including by Special Interest Groups and Consortia that satisfy some, but not all, of the criteria included in the definition of Voluntary Consensus Standard.[2] The proposed revision appropriately states a preference for federal implementation of standards created by SDOs that adhere to all of the requirements identified in the definition of Voluntary Consensus Standards. However, additional guidance may be needed, in particular given the increasing importance of Voluntary Non-Consensus Standards

[2] Some prominent examples include the Bluetooth SIG, the SD Association, the Broadband Forum, and the Universal Serial Bus Implementers Forum.

in the sphere of computing and communications. In particular, the Circular should state whether the absence of any specific criterion included in the definition of Voluntary Consensus Standards disqualifies a Voluntary Non-Consensus Standard from federal implementation.

4. Consideration of Intellectual Property Rights Issues by Federal Implementers

In light of the disputes regarding the interplay between intellectual property rights, in particular patents, and standards, we commend OMB for addressing the issue at all. Cisco knows from its own experience as an implementer of standards and a frequent target of patent assertions that ambiguous IPR policies lead to opportunistic behavior by owners of standards essential patents. The costs that behavior imposes are frequently borne by implementers of standards like Cisco, and by purchasers of products that comply with standards. The latter group includes federal agencies. At a time of scarce resources, agencies deciding what standards to use should focus on whether the use of particular standards may expose them to supply interruptions or excessive pricing.

We note with approval the reference in Section 6(e) of the proposed revision to the Circular to agency consideration "of the economic effect of the intellectual property rights policies of the voluntary consensus standards bodies on standards implementers." We note that consideration of IPR issues may also be appropriate when an agency is deciding whether to implement a voluntary non-consensus standard, and suggest that the revised Circular note this point. As experienced participants in the development of both voluntary consensus and voluntary non-consensus standards, we can say that the latter often have more fully elaborated IPR policies than the former, which may reflect the shared perspectives of their memberships. Thus, the preference stated in the proposed revision for "clear and unambiguous" IPR policies (Section 6(j)) will, at present, sometimes favor the adoption of voluntary non-consensus standards. Hopefully the developers of voluntary consensus standards will respond to OMB's preference for "clear and unambiguous" IPR policies by accelerating efforts to clarify their existing IPR policies, as some are in the process of doing.

We strongly support the reference in Section 6(e)(ii) to the question of whether IPR policies bind subsequent transferees. We have been involved in too many disputes with owners of patents claimed to be essential to implement standards ("SEPs") who acquired patents, directly or indirectly from the initial participants in standardization. We note, however, that the presence of specific language in an IPR policy that binds transferees may do little to prevent opportunistic behavior by transferees. Unfortunately, the lack of consensus regarding what licensing terms are consistent with RAND gives transferees, typically patent assertion entities that do not themselves implement the standard for which they claim to own one or more SEPs, scope to seek licensing terms that are not constrained by the defensive considerations that implementers of standards face.

To limit the ability of acquirers of SEPs to seek super-competitive licensing terms from suppliers to federal agencies (who will inevitably seek to pass through those costs to their federal agency customers), OMB may wish to go beyond referring to IPR policy terms that bind transferees to the RAND commitments given by their predecessors in interest. Specifically, with respect to standards involving information technology in particular, OMB may wish to follow the lead of the National Academy of Sciences, which recommended in its comprehensive 2013 report on standards development and IPR issues that SDOs include in their IPR policies guidance regarding the meaning of RAND, including

> "guidance regarding royalty demands that could be a disproportionate share of product value when many patents are necessary to comply with the standard and the relevant product includes multiple technologies."[3]

To curb another source of opportunistic behavior in standards development, OMB may also want to follow another recommendation of the National Academy of Sciences in its 2013 report, regarding the inclusion in IPR policies of statements regarding the limited circumstances when

[3] National Academy of Sciences, *Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communication Technology* (2013) at pp. 5-6 (available at http://www.nap.edu/catalog.php?record_id=18510).

injunctive relief is appropriate to owners of SEPs that have voluntarily committed to license on RAND or FRAND terms.[4]

The inclusion of IPR considerations in the revised Circular may prompt questions from federal agencies making implementation decisions regarding how to evaluate IPR policies. OMB may wish to anticipate those questions by preparing a short publication concerning IPR-related issues. Cisco would be pleased to assist OMB in the preparation of such a publication, and we are confident that other IT industry companies would join us. As an interim solution, OMB may wish to create a list of references that agency personnel can consult. The National Academy of Sciences study, in particular the recommendations contained at the start of the report, would be a valuable source to include in such a list.

5. Federal Agency Participation in SDO Policy Functions

Section 7 of the proposed revision to the Circular addresses the important issue of federal agency participation in the development of standards. We note with approval the reference to the potential for agency participation to be "an important contribution to ensuring balance of representation." We recommend that OMB make clear that this principle extends beyond agency participation in the development of standards themselves, and extends as well to agency participation in the development of SDO policies, including IPR policies, when that participation will help to represent consumer interests. Unfortunately, the current discussion of IPR policies at many standards development organizations is dominated by companies with significant licensing businesses and large technology companies that implement standards. The views of smaller companies that do not license SEPs are typically absent. Likewise, the interests of consumers or products that use standards are often not represented. Recently the federal antitrust enforcement agencies have begun to participate in the IPR development fora of leading IT-industry SDOs and in the ANSI IPR Policy Committee. Cisco views this as a favorable development, and suggests that OMB revise the first paragraph of Section 7 to recognize the

[4] *Id.* at p. 9 (Recommendation 6:1).

value of agency participation in SDO policy functions when that participation will help represent the interests of otherwise under-represented stakeholders.

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Cisco commends OMB for undertaking the revision of Circular A-119. As the very limited nature of our comments should make clear, Cisco applauds both the effort to update the Circular to respond to the evolution in standards development since 1998, and the specific revisions OMB proposes to make. We appreciate the opportunity to comment. We hope our comments are helpful to OMB, and would be happy to discuss them with OMB staff involved in the revision effort.