Response of Professors Jorge L. Contreras, Michael A. Carrier and Daryl Lim
to
Office of Management and Budget
Request for Comments
(79 Fed. Reg. 8207)

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

May 12, 2014

Thank you for the opportunity to comment on the *Federal Register* notice submitted by the Office of Management and Budget (OMB) regarding proposed revisions to OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (Circular).

The undersigned are professors of law at accredited institutions of higher education in the United States. Our areas of expertise include administrative law, intellectual property law, antitrust law and private regulation. Collectively, we have written numerous books, book chapters and scholarly articles on issues pertaining to technical standardization and standards-setting, both within the United States and internationally.

First, we commend OMB for its proposed revisions to the Circular. As OMB has recognized, the landscape of regulation, standards and conformity assessment has changed considerably since the last revision of the Circular in 1998 (63 Fed. Reg. 8546). We appreciate the effort that OMB has undertaken to analyze the Circular in light of current considerations and to take into account feedback provided by the public. Below are specific responses and comments relating to specific provisions of the proposed revised Circular:

3.f Definition of "Voluntary consensus standards bodies"

Section 3(f) of the revised Circular offers a substantially expanded definition of "voluntary consensus standards bodies" over that contained in Section 4(a)(1) of the 1998 version of the Circular. In particular, the revised Circular defines the terms "openness", "balance of representation", and "due process", which were intentionally left undefined in the 1998 version.[1] We believe that the definition of these key terms constitutes a significant improvement to the Circular. The Circular establishes a clear Federal preference for voluntary consensus standards (VCS), making it critical to have a clear standard for determining which bodies create VCS.

[1] See OMB Response No. 28, 63 Fed. Reg. 8548 (1998) (acknowledging public comments requesting further clarification of these definitions, but declining to offer further specificity ("the definition provided at this time is sufficient")).

While the new definitions of "openness", "balance of representation", and "due process" are distinct improvements over the 1998 Circular's complete lack of definition, we note that the revised definitions still fall short of the "due process" requirements established in Section 6.c of the 1980 version of the Circular (45 Fed. Reg. 4327-28). Specifically, the 1980 Circular enumerated eleven specific "due process" requirements for VCS bodies, including the following (emphasis added):

> (1) That public notice of meetings and other standards activities is provided in an appropriate and timely fashion and to invite broadly-based representation, through media which are designed to reach those persons reasonably expected to have an interest in the subject. Interested persons may include, for example, *consumers; small business concerns; manufacturers: labor; suppliers; distributors; industrial, institutional and other users, environmental and conservation, groups and State and local procurement and code officials*.
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> (3) That meetings are open and that participation in standards activities is available to interested persons. *Unreasonable restrictions on membership in standards-developing groups by means of professional or technical qualifications, trade requirements, unreasonable fees, or other such restrictions must be avoided*.
>
> (7) That appropriate records, sufficient to review and understand what transpired, are maintained of formal discussions, decisions, standards drafts, technical or other rationale for critical requirements of standards, complaints/appeals and their resolution, meeting minutes and balloting results; and that such records are retained in accordance with published procedures and are *readily accessible to all interested persons* on a timely and reasonable basis.

While we do not suggest that the entirety of the 1980 due process requirements be incorporated into the current revision of the Circular, on the basis of the above we suggest the following:

1) That the definition of "balance" make specific reference to the desirability of participation by consumers; small business concerns; manufacturers; labor; suppliers; distributors; industrial, institutional and other users, environmental and conservation, groups and State and local procurement and code officials,

2) That the definition of "openness" prohibit unreasonable restrictions on membership, including unreasonable fees, and

3) That the definition of "openness" require that electronic records of all formal discussions, decisions, standards drafts, technical or other rationale for critical

requirements of standards, complaints/appeals and their resolution, meeting minutes and balloting results be maintained and made publicly available.

6.a Agency Use of Voluntary Consensus Standards (VCS)

With a suitably expanded definition of VCS bodies under Section 3.f (discussed above), we support a firm requirement in Section 6.a that federal agencies use VCS unless doing so would be inconsistent with law or infeasible (i.e., because no suitable VCS exists).[2]

While the proposed Circular does impose a relatively firm commitment to use VCS, it gives agencies the option to use non-VCS if using VCS would be "impractical". The definition of "impractical", however, is quite broad (Section 6.a.ii), and includes any instance in which the agency deems use of a VCS to be "inefficient" or "less useful" than a non-VCS private standard. We recommend tightening the definition of "impractical" to cover only situations in which use of a VCS is highly undesirable due to significant cost, safety or timing issues.

We understand that the standards "ecosystem" includes many different private sector fora in which standards are developed, and that many useful standards are developed within non-VCS bodies. However, with the expanded definition of VCS, we feel that standards developed within groups that do not meet the new and more lenient criteria for openness, balance, due process, etc. should be used only when a VCS is unavailable.

If OMB does not tighten the definition of "impractical" as suggested, then we fear a situation in which private sector groups, wishing to avoid the openness, balance and due process requirements of VCS bodies, can disregard these requirements and act as non-VCS bodies with few, if any, real consequences.

6.e.ii Intellectual Property Licensing

Section 6.e.ii of the revised Circular instructs federal agencies to "take full account" of the economic effect of intellectual property rights policies on standards implementers. We strongly support this requirement. However, we feel that additional clarification may be useful for agencies. That is, the factors that an agency should consider could be spelled out in greater detail in order to assist agencies that are not accustomed to analyzing intellectual property policies of standards organizations. In particular, rather than merely mentioning factors such as the availability of "reasonable and nondiscriminatory" (RAND) or "royalty-free" licensing, and the binding of subsequent transfers, OMB may wish to suggest to agencies that RAND and royalty-free licensing policies, as well as policies that bind transferees, are highly desirable, and that agencies should avoid standards that are not subject to such policies unless absolutely necessary (see discussion of "impracticality" above).

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[2] This requirement is repeated in Sections 6.f.ii, 6.f.iii and 6.m of the revised Circular. Any changes to the proposed language should be applied consistently in all of these sections.

In addition, agencies should consider the binding nature of commitments made by participants in a standard-setting organization, and should favor standards in which RAND and royalty-free commitments are made expressly binding on participants and transferees, as opposed to being mere expressions of then-current intent.

Finally, agencies should be informed that they may wish to give higher priority to standards that are available on a royalty-free or nominal-fee basis when the technologies that are under consideration have a strong national security, energy security, national health, environmental or healthcare impact. Likewise, agencies could be encouraged to analyze the history of intellectual property enforcement and litigation that has characterized certain standards or standards bodies when considering whether such standards should be adopted for federal requirements.

6.e.iii.1.i Enforceability of standards?

Section 6.e.iii.1.i of the revised Circular recommends that agencies consider, among other factors, the "enforceability" of a standard under consideration. The meaning of "enforceability" in this context is unclear. The use of voluntary consensus standards is, by definition, voluntary (see Section 3.d). In almost all cases, there is no requirement that standards be utilized either by members of the standards body or third parties. Accordingly, there is typically no enforcement mechanism associated with the use of voluntary standards. It would be helpful for OMB to clarify what it is suggesting that agencies consider in this paragraph.

6.e.iii.5 and 6.p Reasonable Availability

Sections 6.e.iii.5 and 6.p of the revised Circular address the public availability of standards that are incorporated by reference into law or regulation (the so-called "IBR" issue). Other commenters have addressed the IBR issue in great detail (*see, e.g.,* comments submitted by American Bar Association Section of Administrative Law), and we are largely supportive of these comments. We would only point out the following additional considerations:

First, the legal requirement for reasonable availability of standards applies only when standards are incorporated into law or regulation. Reasonable availability is not required when a standard is utilized in, for example, a public procurement project, a government research activity, or non-mandatory governmental best practices, recommendations and the like. This distinction should be made clear in the revised Circular.

Second, when a standard is adopted into law or regulation, reasonable availability should not merely be a factor to be considered by the adopting agency, but a requirement.

6.*l* Intellectual Property Protection

In Section 6.*l* of the revised Circular, OMB requires that agencies "must observe and *protect* the rights of the copyright holder" when using a standard. While we concur in the agencies' need to observe legally-enforceable copyrights, we do not understand how or why an agency would be required to "protect" a private party's rights. Protection implies some affirmative duty of enforcement, which would be wholly inappropriate for an agency to assume. We would ask OMB to clarify or eliminate this requirement to "protect".

Furthermore, the same sentence requires agencies to "meet any other similar obligations, such as those relating to *patented technology* that must be used to comply with the standard." It is unclear to us what, if any, legal requirements would be imposed on an agency by virtue of its adoption or use of a standard covering patented technology. Simply referencing a patent or a patented technology in a written document does not constitute patent infringement in the United States, nor does it generate any royalty obligation under the Patent Act. Thus, we would ask OMB either to clarify or eliminate this requirement regarding patented technology.

10. Reporting

Section 10 of the revised Circular, in line with the requirements of National Technology Transfer and Advancement Act of 1995 and the current Circular, requires agencies to report to NIST their determinations to use government-unique standards in lieu of VCS. We believe that this reporting requirement should be expanded given the revised Circular's new distinction between VCS and non-VCS to require that agencies report both decisions to use government-unique standards *and* to use non-VCS standards in lieu of VCS. Such an expanded reporting requirement would enable OMB, NIST and the public to determine whether agencies are giving due deference to VCS, and whether and to what degree non-VCS bodies are able to influence governmental use and adoption of standards. This information will be relevant to OMB as it reviews agency implementation of the revised Circular, and may offer suggestions regarding whether the revised Circular's definitions of VCS and the like are useful in practice.

We thank OMB for the opportunity to offer these comments and hope that they may be useful as it finalizes the revised Circular.

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