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May 12, 2014

Office of Management and Budget

Regarding: U.S. Green Building Council Comments on Federal Participation in  
the Development and Use of Voluntary Consensus Standards and in  
Conformity Assessment Activities, Docket No. OMB-2014-0001

On behalf of the U.S. Green Building Council (USGBC), our more than 12,000 member companies and organizations, and our 76 local chapters, we are pleased to offer comments on the Office of Management and Budget (OMB) proposed update to the existing Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (Circular A-119 or Circular).

USGBC's success in advancing leadership in energy conservation and efficiency through building design, construction, and operations is reflected in the widespread national and international use of our flagship rating system, Leadership in Energy and Environmental Design (LEED®). In developing LEED, USGBC employs processes that ensure the highest levels of openness, inclusion, and transparency. USGBC's commitment to these processes, among other things, has allowed for the acceptance of the LEED rating system by governments and private sector participants throughout the world. We are proud that the Federal Government relies upon LEED to meet energy efficiency mandates in Federal buildings and leased spaces.<sup>1</sup>

Circular A-119 promotes governmental use of voluntary consensus standards, enabling stakeholder expertise to shape the standards while conserving Federal resources and reducing potential compliance burdens. USGBC's consensus development of the LEED rating system exemplifies how voluntary consensus standards achieve the policy goals of Circular A-119 in practice. For example, relying upon the LEED rating system rather than going through the arduous process of creating and administering Federal-specific green building standards saves U.S. Government employees' time and financial resources. This use of a consistent standard by the Federal Government and private industry enables the market to respond by allocating resources to product development and innovation. USGBC's consensus-developed LEED rating system also serves a number of national needs, such as improving energy efficiency. In addition to assisting Federal agencies'

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<sup>1</sup>See Letter from Dan Tangherlini, GSA Administrator, to Honorable Ernest Moniz, Secretary of Energy (Oct. 25, 2013), accessed at [http://www.gsa.gov/portal/mediaId/180467/fileName/GSA\\_Green\\_Building\\_Certification\\_Systems\\_Review\\_Letter\\_to\\_Sec\\_Energy.action](http://www.gsa.gov/portal/mediaId/180467/fileName/GSA_Green_Building_Certification_Systems_Review_Letter_to_Sec_Energy.action).

compliance with the mandates for green buildings,<sup>2</sup> LEED encourages long-term economic growth for U.S. enterprises. For example, in domestic projects, LEED's regional materials credit encourages use of locally harvested and manufactured products. U.S. manufacturers also benefit from LEED's credits for certain advanced materials that lead to specification of U.S. products in national and international markets with LEED-certified buildings.

Our LEED rating system is guiding projects in 150 countries (some of which are U.S. Department of State and Department of Defense projects) and encompasses innovative thinking in building designs, technologies, materials, and methods. It has bolstered the construction sector and created new industries that have converged into a half-trillion-dollar green building industry in the U.S. alone.<sup>3</sup> Since its establishment in 2000, LEED has become the most successful voluntary, consensus-based private-market-driven green building program in the country, with more than 20,000 commercial and institutional projects that have achieved LEED certification with another 36,000 projects under way. In addition, there are more than 50,000 residential units currently certified and more than 80,000 units registered and in the process of seeking certification.

The attached document includes USGBC's official comments on the proposed changes. If you have any questions, please do not hesitate to contact Elizabeth Beardsley, USGBC Senior Environmental Policy Counsel at [EBeardsley@usgbc.org](mailto:EBeardsley@usgbc.org) or by telephone at 202-595-3989.

Sincerely,

A handwritten signature in black ink, appearing to read 'Susan E. Dorn', with a long horizontal flourish extending to the right.

Susan E. Dorn  
General Counsel, U.S. Green Building Council

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<sup>2</sup> Section 543(a)(1) of the National Energy Conservation Policy Act (NECPA), as amended by section 431 of the Energy Independence and Security Act of 2007 (EISA 2007), adopts the energy intensity reduction goals of Executive Order 13423.

<sup>3</sup> Booz Allen Hamilton, Green Jobs Study, available at <http://www.usgbc.org/Docs/Archive/General/Docs6435.pdf>.

Comments of the U.S. Green Building Council on  
Federal Participation in the Development and Use of Voluntary Consensus Standards  
and in Conformity Assessment Activities, Docket No. OMB-2014-0001

USGBC is pleased that OMB has taken the opportunity to revise and update OMB Circular A-119. The proposed revisions add clarity and underscore the importance of the interoperability and transferability of standards used by the Federal Government in the global community. With a few small modifications to better address the need to foster and cultivate both emerging technology and important health or environmental policy objectives, USGBC believes that the proposed revised OMB Circular A-119 is well-crafted to meet the essential and fundamental strategic objectives for Federal engagement in standards.

**Encouraging Agency Use of Standards and Participation in Standards Development**

USGBC supports the proposed changes to Circular A-119 that provide more detailed guidance regarding participation by Federal representatives in the standards development process. USGBC also supports encouraging better internal and interagency coordination regarding development, utilization, and updating standards. If successfully implemented, the updates to Circular A-119 would reduce Federal expenditures of time and resources in creating duplicative, unnecessary Federal standards.

**Ensuring Compliance with International Obligations**

USGBC supports the efforts to comply with international obligations and recommends that Circular A-119 continue to support the use of multiple standard development processes. The Federal Government's interests and obligations are best served by standard and consortia used across international boundaries. For instance, LEED is now used in 150 countries and is an example of a system that is working to comply with both domestic and international standards-making criteria.

Specifically, we support OMB's proposed approach that Federal agencies consult with the U.S. Trade Representative, among other steps, in keeping with legal obligations and the Circular's overall case-by-case approach to agency use of standards. By retaining (1) a factors-based approach to determining whether voluntary standards are consensus standards and (2) agency discretion to use voluntary standards other than consensus standards, where indicated, Circular A-119 will facilitate the broadest range of standards for agency consideration, inherently optimizing harmonization opportunities and reducing costs associated with differing national standards and facilitate international trade. The factors-based approach to identifying voluntary standards as consensus standards is also consistent with World Trade Organization Technical Barriers to Trade (WTO TBT) guidelines and the existing U.S. Department of Commerce and the American National Standards Institute (ANSI) U.S. Standards Strategy (USSS), each of which supports or recognizes the need for multiple standards development processes.

### **Use of Multiple Standards**

USGBC supports the proposed changes to Circular A-119 that would expressly address Federal agencies' option to reference more than one standard in order to satisfy the requirements of respective programs or regulations. For example, the General Services Administration (GSA) recommends agencies use either of two green building certification systems, including LEED, to assess their buildings' performance. In another context, program objectives may create a need for agencies to specify both minimum standards and leadership (also known as "stretch") standards, with the two used in a complementary setting. Such baseline functions and leadership initiatives can provide for consistent improvement while working to simultaneously raise both the minimum levels of achievement and the ceiling. For example, the Environmental Protection Agency (EPA) proposed draft guidelines for environmental performance standards and ecolabels that envision the use of both baseline and advanced leadership criteria in its recognition of standards. To add clarity, OMB should consider including an explicit statement that an agency's use of a voluntary compliance standard does not preclude use of another standard where the agency finds the standards suitable for its program needs.

### **Voluntary Consensus Standards**

USGBC is an ANSI Standards Developer and develops LEED using a consensus-based process that derives critical input from tens of thousands of stakeholders from across all sectors and facets of the building industry.<sup>4</sup> We support OMB's use of and preference for voluntary consensus standards, such as LEED.

With respect to a Federal agency's determination of whether a standard is a voluntary consensus standard, we agree with OMB's emphasis on a case-by-case determination, based upon listed factors. In the context of the Circular and its ultimate preference for voluntary consensus standards over government-unique standards, it is particularly important that OMB avoid imposing a one-size-fits-all method for developing consensus standards, which could have the unintended consequence of reducing the availability of such standards to federal agencies. In this vein, we support the changes to the definition of voluntary consensus standard body that emphasize agency discretion and avoid overly prescriptive language with respect to defining consensus. We believe that due process should encourage and require public comment and other mechanisms to ensure all interested parties have meaningful opportunity to participate. Additionally, we understand the proposed additional language clarifying the "due process" attribute to apply to formal drafts of standards, so as to permit smaller-scale workgroups or

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<sup>4</sup> The Pacific Northwest National Laboratory found the development process utilized by LEED to meet the government's definition of a consensus-based process pursuant to the Energy Independence and Security Act of 2007. See Green Building Certification System Review (PNNL-2096) (March 2012) (prepared for the General Services Administration).

subcommittees of a consensus body the flexibility to work with less rigid requirements. Finally, USGBC notes that the proposed Circular's approach appears to be infused with an implicit overarching reasonableness assessment in the proposed process for voluntary consensus standards development. We believe that, for clarity, such an implicit expectation should be more clearly articulated as guidance.

Although ANSI's standards development process is widely used, it is not the only route to demonstrate a consensus process. Some commenters are likely to ask OMB to impose the consensus standards body attributes as a pass-fail test, such as to mandate the ANSI process.<sup>5</sup> However, in light of the National Technology Transfer Advancement Act of 1995 (NTTAA)<sup>6</sup> and the success of OMB's longstanding approach, the revised Circular should continue to specifically allow multiple processes for developing standards and case-by-case evaluations of the attributes of a consensus standards body. As OMB explained in 1998 in response to comments suggesting the use of ANSI as the means of identifying voluntary consensus standards bodies, "[s]ince the purpose of the Circular is to provide general principles, rather than make determinations about specific organizations or guides, these determinations will be made by agencies in their implementation of the Act."<sup>7</sup>

While OMB may wish to add language acknowledging that the ANSI process is one way to satisfy the Circular's definition of a voluntary consensus standard process, were OMB to specify ANSI as a threshold requirement, it could undermine the primary aim of the Circular and negatively impact the current and future use of voluntary consensus standards by Federal agencies. For example, International Code Council (ICC) develops consensus standards used by Federal agencies including the Occupational Safety and Health Administration and the Department of Energy, but ICC does not use ANSI's specific process.<sup>8</sup> Furthermore, if OMB were to adopt ANSI's process as the sole means of developing a consensus standard, it could stymie or complicate Federal agencies' use of standards consistent with international obligations, as multiple consensus processes are in use globally. We urge OMB to retain its longstanding approach that Federal agencies tasked with implementing their policy objectives and activities are best positioned to determine whether a particular standard — once deemed suitable for the

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<sup>5</sup>ANSI does not take the position that its process is the only consensus process. In its comments on the proposed Circular revisions, ANSI states that it "supports the multiple-path approach to standardization, meaning that there are multiple paths to global relevance, and that it is the marketplace that decides the utility or applicability of any given standard — be it an American National Standard developed by an ANSI-accredited [standards developing organization (SDO)], a voluntary consensus standard developed by an SDO or consortium, or a voluntary non-consensus standard developed by a consortium." See document OMB-2014-0001-0008 at 2, available at [www.regulations.gov](http://www.regulations.gov).

<sup>6</sup> Pub.L. 104-113, as amended, codified at 15 U.S.C. § 3701, *et seq.*

<sup>7</sup> 63 Fed. Reg. 8546, 8548 (Feb. 19, 1998).

<sup>8</sup> See ICC, "Federal Use of ICC Codes," available at [http://www.iccsafe.org/gr/Documents/FederalUse\\_ICC\\_Codes.pdf](http://www.iccsafe.org/gr/Documents/FederalUse_ICC_Codes.pdf); ICC, "ICC Code Development Process," available at [http://www.iccsafe.org/cs/PMG/Documents/Code\\_Dev.pdf](http://www.iccsafe.org/cs/PMG/Documents/Code_Dev.pdf).

policy objective — has been developed by a process with the attributes to be a voluntary consensus standard in accordance with the NTTAA and the Circular, and not impose a single route to consensus.

### **Clarify Intent of Circular Revision with Respect to Voluntary Consensus Standards in Use**

Federal agencies tasked with implementing the revised Circular would benefit from a clear statement with respect to voluntary consensus standards already in use. We suggest OMB consider adding a statement that the revisions are not intended to require immediate review of or decrease the current body of standards deemed voluntary consensus standards. For example, many Federal agencies and departments actively use several private sector-developed standards, such as LEED, that have gone through rigorous consensus processes found to satisfy the current version of Circular A-119. Agencies may be unclear as to whether further review of such voluntary consensus standards is required, which could lead to inefficient use of resources.

### **Preference for Voluntary Standards over Government Unique Standards**

The revisions to Circular A-119 include important language regarding Federal agencies' use of voluntary standards other than consensus standards.<sup>9</sup> OMB provides agencies with useful guidance on when voluntary standards other than consensus standards may be appropriate, as we discuss further below. In other locations in the Circular, however, language suggests a more restrictive view of Federal agencies' use of voluntary standards other than consensus standards.<sup>10</sup> We suggest OMB include in the final revised Circular language giving effect to the hierarchy of policy objectives: avoid government-unique standards, and second, use consensus standards over other standards when consensus standards are consistent with law and not impractical. We also suggest, as set out in Attachment A, item 1, attached to our comments, corresponding changes to Section 6(e) of the Circular's instructions to agencies on what to consider when deciding to use a standard. The suggested changes would assist agencies in using standards by first focusing on identifying standards that are suitable, followed by evaluation of whether standards are consensus or other standards.

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<sup>9</sup> See, e.g., guidance found in section 6 of the Circular ("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."; "An agency should consider the use of voluntary standards on a case-by-case basis."; and "When considering using a voluntary standard, an agency should, to the extent permitted by law, take full account of the effect of using the standard on the economy, and of applicable Federal laws and policies...").

<sup>10</sup> Circular, p. 2, paragraph 3 provides, "The policies in the Circular are 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, including reliance on government-unique standards."

### **Voluntary Standards Other Than Consensus Standards**

We support OMB's longstanding and continued recognition of both voluntary consensus standards and other standards developed by non-governmental entities. Although LEED is a consensus standard, USGBC concurs with the Federal Government's use of all tools and strategies, such as other types of standards, in support of important Federal policies such as the pursuit of sustainable design, construction, and operation of buildings. We agree with OMB's continued guidance to Federal agencies to, when appropriate, rely upon voluntary standards other than consensus standards, as is found, for example, in section 6(a) of the proposed Circular.

In particular, we note that while implementing a preference for voluntary consensus standards, OMB retains its interpretation of circumstances under which federal agencies should consider other voluntary standards. We agree with OMB's retention of this interpretation. Federal agencies' legal obligations and policy objectives must be first and foremost in their use of standards. For example, where health, safety, or environmental protection is at issue, Federal agencies are frequently directed by statute or executive order to play a leadership role. While many leadership standards, such as LEED, are consensus standards, in the arena of these leadership standards, agencies may not find a suitable consensus standard. For example, the Department of Health and Human Services uses voluntary standards other than consensus standards.<sup>11</sup> Additionally, there are promising new industry efforts, such as those in the chemical industry, to develop products with less toxicity and greater sustainability; these efforts may lead to new voluntary standards in the future, which are not likely to be consensus-based (at least at their onset), but may be needed to serve a valuable role in Federal program activity. Thus, where Federal agencies are playing a leadership role, their continued ability to use leadership standards is important to support desired Federal outcomes in areas such as human health, environmental sustainability, and technology development.

We also observe that other respected standards-setting bodies have noted the important role of standards generated without a consensus process. To that end, USGBC recommends careful consideration of the proposal made by Underwriters Laboratories Inc. (UL) in its 2012 comments to use both voluntary consensus standards and other standards, and in particular UL's suggestion that the Circular focus on the preferred outcome to facilitate the selection of a standard or standards as opposed to a default preference. UL noted that while it often uses a consensus process<sup>12</sup>, "[o]ther times, such as when standards are needed to address a disruptive technology *or to demonstrate environmental leadership as opposed to minimum requirements*, reaching consensus could reduce the likelihood of a meaningful solution that provides valued order and

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<sup>11</sup> See, e.g., Department of Health and Human Services Report to OMB FY2012, item 4 (identifying that the agency began to use 90 non-consensus standards in that year), available at <https://standards.gov/NTTAA/agency/index.cfm?fuseaction=agencyReports.agencyReport>.

<sup>12</sup> Specifically, UL uses the ANSI process.

clarity to the marketplace and for regulators.”<sup>13</sup> UL went on to add that “[a]s a market transformation tool, standards that are generated without consensus may help markets push toward desired outcomes either by setting requirements higher than those that are developed through a consensus process or by more efficiently raising the requirements. Nimbleness and rigor are the heart of leadership programs and standards.”<sup>14</sup> The concept of encouraging “outcomes” in choosing a standard could be more broadly articulated in the draft revisions. To that end, we therefore propose expanding the relevant language in section 6(a) and provide suggested language in Attachment A, item 2.

### **Conclusion**

USGBC supports — philosophically and practically — Federal agencies’ use of voluntary consensus standards. Our LEED rating system is a prime example of how such standards can accelerate agencies’ progress toward their goals, while saving Federal and private resources alike. We believe OMB’s proposed changes are largely helpful to agencies; however, we request consideration of our comments and suggestions both to provide clarity and to ensure agencies retain optimum flexibility to use voluntary standards in accordance with law.

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<sup>13</sup>Letter, Columbus R. Gangemi Jr., Senior Vice President, Underwriters Laboratories Inc. (UL) to Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (April 31, 2012) (emphasis added).

<sup>14</sup> *Id.*



Attachment A  
Suggested Language for Revision of Circular A-119  
(Revisions Indicated in **Bold**)

1. Page 23, Section 6(e)(iii):

(iii) In evaluating whether to use a standard, an agency should also consider the following factors:

(1) The apparent suitability of the standard for agency use, taking into consideration factors including:

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(2) The nature of the agency's statutory mandate and the consistency of the provisions of the standard with that mandate;

**[MOVE existing paragraphs (3) and (4) to new (4)(i)-(ii) with no changes]**

**(3) Whether the standard is “reasonably available.” See section 6p of the Circular for additional information;**

**(4) After consideration of the factors in (1) – (3), if an agency finds a standard or standards to be potentially suitable, consistent with law, and reasonably available, then the agency should consider the following factors to determine the extent to which the standard(s) is a consensus standard:**

**(i)** The extent to which the body when preparing the standard reflected the attributes of voluntary consensus standards bodies set out in section 3f of the Circular. The policies of standards developing bodies should be easily accessible. Further, the rules for determining, e.g., participation, balance of representation, opportunity for review and comment, and consensus, should be clear and unambiguous;

**(ii)** Any barriers to membership and participation in the standards development process, given that fee structures, modes of participation, and other factors can impact the ability of SMEs, public interest groups, and the general public to participate in technical committee and technical advisory group work.

2. Page 20, Section 6(a), paragraph 2:

....particularly in emerging technology areas **or when trying to accomplish important health, safety, or environmental policy objectives.** Therefore, in instances where there are no suitable voluntary consensus standards, ..... other voluntary standards that deliver the most generally favorable technical, **environmental, health, safety,** and economic outcomes....”