

Cotterman Response to Request for Comments on a 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 FR 8207 – Office of Management and Budget

Thank you for the opportunity to respond to the Request for Comments on a Proposed Revision of OMB Circular A-119.

Our company, Material Control, Inc. dba Cotterman Company, is a US manufacturer of industrial and commercial ladders, guardrails and ancillary products. Our products are essentially safety products and we both rely on voluntary consensus standards and actively participate in their development through the American National Standards Institute (ANSI) and ASTM International (ASTM).

We are broadly supportive of the OMB's proposed revision to Circular A-119. The comments below present additional points for consideration, arising from our perspective.

For reference, we have included the ANSI Response to Request for Comments, (Comment ID OMB-2014-0001-0008) which we broadly support. But as the basis for our requests for further consideration, we use this document to indicate important exceptions to their positions. For ease of reference, we have used the page and numbers and headers found in the ANSI response, which in turn refer to the proposed revision document.

1. p. 3, **Definition of "Voluntary Consensus Standards Body":** We disagree that ANSI's *Essential Requirements* meet the modified criteria for "voluntary consensus standards body" and "voluntary consensus standard." ANSI delegates development of compliant procedures to its various subsidiary third-party standards writing bodies. The *Essential Requirements* are general requirements of principle and not prescriptive. Therefore amongst ANSI standards developers, one finds great variation in the procedural mechanisms by which attributes or elements of voluntary consensus standards development are purportedly met, some permitting restrictions on participation by interested and affected parties, definition of consensus as a vote of members, exceeding a majority by some amount, and problematic appeals processes. The onus is therefore on disenfranchised members to appeal, often to the very parties that have either excluded or out-voted the appellant member on substantive or procedural issues. The proposed revision addresses some of these deficiencies and we support these revisions, as proposed. I have suggested remedies for other deficiencies, below.
2. p. 3, **Definition of "Voluntary Consensus Standards Body,"** i) Openness: ANSI is noncompliant with the new requirement that all interested and affected parties be "provided meaningful opportunities to participate at all stages of standards development." Specifically, they assert that permitting such open participation at the draft stage "would be extremely challenging, if not virtually impossible to meet." ANSI takes the position that such parties should only be "provided with a meaningful opportunity to review and comment on the draft." We disagree with ANSI's position regarding the difficulty of providing opportunities for meaningful participation at all stages, including drafting, and the sufficiency of an opportunity to review and comment on the draft. In our experience, we see that ASTM does meet the requirement of the proposed revision of Circular A-119 and this

compliance effectively refutes ANSI's unsupported assertion that compliance is extremely difficult and virtually impossible. We have observed the practice of excluding significantly affected parties from early involvement in ANSI standards writing and forcing those parties to use end-of-process public comment periods as their only means of input. This practice is the antithesis of open and inclusive consensus standards making. Therefore, we support the requirement of the proposed revision to Circular A-119 in this respect.

3. p. 4, **Definition of "Voluntary Consensus Standards Body,"** ii) Balance of Representation: While we agree that there is some ambiguity in the proposed term, "balance of representation," the prior term, "balance of interest," was not defined at all. Therefore, with the included description of the new term, we see ambiguity reduced. However, the word "sector" should be defined for clarity, in our opinion, and, unless the intent is to narrow the field of interested and affected parties participating in the standards development ANSI asks, we request that consensus standards developers be required to engage in due diligent outreach to identify and notify interested and affected parties in order to assure "balance of representation."
4. p. 4, **Definition of "Voluntary Consensus Standards Body,"** iii) Due process: See remarks on "Consensus" and "Appeals," below, and "Openness" and "Balance of representation," above. Due to the increasing reliance on consensus standards by the Federal government in both regulation and procurement, essentially a delegation of legislative and executive authority, we request greater specificity with respect to acceptable minimum requirements for due process, to avoid compromise of the rights of interested and affected parties.
5. p. 5, **Definition of "Voluntary Consensus Standards Body,"** iv) Appeals Process: We believe that additional guidance is needed with respect to the requirements of an equitable and impartial appeals process, particularly with respect to the adjudicatory role of parties with a potentially adverse interest to the appellant, and with respect to the permissible costs to be borne by the appellant.
6. p. 5, **Definition of "Voluntary Consensus Standards Body,"** v) Consensus: We support restoration of the right of voting members to reconsider and change votes, as described by ANSI. However, we request the term "consensus" be defined further beyond the provided definition to indicate more clearly how "general agreement" may be determined. Presently, in some cases, for example, ANSI procedures permit majority vote or vote of some number in excess of majority to constitute indication of consensus. In many cases, minority dissent, whether large in number or intensity, indicates an absence of "general agreement." Therefore we request further guidelines for determination of consensus.
7. p. 7. **Financial Support of SDOs and Standards Development Work,** Budgeting for Participation: I believe that to further encourage federal stakeholder participation, consensus standards developers should be required to make participation available through electronic means, such as telephone conference and web-based meetings and information exchanges, if such means are less costly to participants than in-person meeting. Even if the cost of providing such means are borne by the participants, which would be a reasonable expectation, this requirement would alleviate the budgetary concerns of not only federal government stakeholders but other interested and affected parties whose participation is limited by time or financial budget.

In summary, with the proposed increased reliance on voluntary consensus standards, we believe that it is crucial that the OMB provide guidelines sufficient to ensure uniform application of the five specified requirements of a voluntary consensus standards process across the wide range of bodies engaged in standards development.

Submitted May 12, 2014



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79 FR 8207

Office of Management and Budget

Thank you for the opportunity to comment on the Request for Comments on a Proposed Revision of OMB Circular A-119. The American National Standards Institute (ANSI) – coordinator of the U.S. standards and conformity assessment system – is appreciative of the detailed and thoughtful analysis conducted by OMB in reviewing comments received in response to its March 2012 Request for Information (77 FR 19357) on “whether and how to supplement Circular A-119.”

As one of the biggest users of standards, the U.S. government’s participation in and support of standards development activities are of the utmost importance. The standardization community highly values the expert input that government employees provide and the reliance that agencies demonstrate by adopting voluntary consensus standards and compliance programs. ANSI congratulates the OMB on its efforts and finds that the proposed revision of OMB Circular A-119 continues to be supportive of this public-private partnership.

Given the broad importance of this guidance document, ANSI requested input from its membership on the text of the proposed revision. The input received was taken into account in developing the following comments, which represent a consensus response that has been vetted by ANSI’s governance.

First, it should be noted that ANSI and the standardization community are **broadly supportive** of the OMB’s proposed revision to Circular A-119. The comments presented below attempt to clarify certain issues and raise additional points for consideration; they are organized according to the main categories described by OMB on pages 4-11 of the proposed revision.

Encouraging Agency Use of Standards and Participation in Standards Development

In addition to ANSI’s role as coordinator of the U.S. standards and conformance system, ANSI also accredits the procedures of standards developing organizations¹ (SDOs) and approves their documents as American National Standards (ANS), all according to the requirements, policies, and procedures outlined in our *Essential Requirements*.²

¹ A list of ANSI-accredited standards developers is available at www.ansi.org/asd

² *ANSI Essential Requirements: Due process requirements for American National Standards*, www.ansi.org/essentialrequirements

We are pleased to see that, overall, the proposed revision to OMB Circular A-119 is in general alignment with our *Essential Requirements*, and that the revision creates a distinction between those activities that result in voluntary consensus standards, and those that take place outside of that process.

Consensus versus Non-Consensus

ANSI 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 SDO, a voluntary consensus standard developed by an SDO or consortium, or a voluntary non-consensus standard developed by a consortium.

Especially where societal needs are being addressed – such as the areas of health, safety, and environmental protection – ANSI believes that agencies should rely upon voluntary consensus standards, as these have been developed under an open and balanced process that engages all affected stakeholders.

With that said, OMB correctly notes the value and utility of “contributions of standardization activities that take place outside of the voluntary consensus process, particularly in emerging technology areas.” (p. 10) It is noteworthy, however, that ANS and other voluntary consensus standards are currently in use for emerging technology areas, including nanotechnology, cloud computing, and information and communication technologies. And conversely, there are many consortia-developed standards that are not in “emerging technology areas” that could be considered by federal agencies.

ANSI supports all parts of the U.S. standardization infrastructure:

The global standards landscape is rich with entities, systems, and processes, and both the U.S. government and private sector participate in international standards activities in a variety of ways: through treaty organizations where governments are members; through private, voluntary organizations where the United States is represented by a single “national body” organization; through professional and technical organizations whose membership is on an individual or organizational basis; and through consortia, whose membership is typically technology based.

*United States Standards Strategy*³ (2010), p. 4

ANSI believes that agencies should have wide latitude in deciding when a particular standard – whether it be a voluntary consensus standard or a voluntary non-consensus standard – is best suited for the needs of that agency.

³ www.us-standards-strategy.org

Definition of “Voluntary Consensus Standards Body”

ANSI believes that the Institute’s *Essential Requirements* and any American National Standards approved in accordance with the *Essential Requirements* will continue to meet the modified criteria for “voluntary consensus standards body” and “voluntary consensus standard.” However, some of the new language could be viewed as ambiguous and may therefore be misinterpreted or misapplied if not properly explained.

ANSI offers the following discussion points to better understand how the proposed revision to OMB Circular A-119 may impact ANSI’s *Essential Requirements* relating to voluntary consensus standards. Specifically, as discussed below, the criteria contained in the subparagraphs of paragraph “f. Voluntary consensus standards bodies” (p. 18) differ somewhat from the language previously used to describe these same concepts. The *Essential Requirements* have historically aligned with OMB A-119 and the *National Technology Transfer and Advancement Act* (NTTAA). A clear understanding of the meaning behind the proposed revisions is important to avoid confusion among standards developers and users and to ensure the continued existence of a responsive voluntary consensus standards development system in the United States.

i. Openness

The proposed revision defines openness as follows (p. 18):

The procedures or processes used are open on a non-discriminatory basis to interested parties, and such parties are provided meaningful opportunities to participate at all stages of standards development. The procedures or processes for participating in standards development and for developing the standard are transparent;

This revised language could possibly be read as more stringent than the *ANSI Essential Requirements*, which state: “Participation shall be open to all persons who are directly and materially affected by the activity in question. There shall be no undue financial barriers to participation. Voting membership on the consensus body shall not be conditional upon membership in any organization, nor unreasonably restricted on the basis of technical qualifications or other such requirements.”

If this is the intent, it would be helpful to understand the rationale behind the proposed adoption of new language. ANSI’s requirements provide for full access to participation in the consensus process, but flexibility in the actual authoring of draft standards. This is important as the sources of proposed voluntary consensus standards are varied – the flexibility to allow all types of documents to feed into the consensus process ensures the relevancy of the final standards.

Imposing a requirement that interested parties “are provided meaningful opportunities to participate at all stages of standards development” might be read by some to preclude the processing of some important existing drafts, if the requirement is read to mean that all parties have to be able to participate even in the initial drafting process. Such a requirement would be extremely challenging,

if not virtually impossible to meet. In ANSI's view, what is important is that interested parties are provided with a meaningful opportunity to review and comment on the draft.

Accordingly, we propose the following alternative:

“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.”

ii. Balance of Representation

The proposed new language uses the phrase “balance of representation” where previously, the phrase used was “balance of interest.” The new “balance of representation” language says (p. 19):

The standards development process should have a balance of representation.
The representation appropriate to the development of consensus in any given standards activity is a function of the nature of the standard being developed and the sector.

We understand this proposed new language as consistent with the prior “balance of interest” requirement, i.e., the technical committee must include a balance of materially affected and interested parties relevant to the nature of the standard under development. However, another possible interpretation is that the proposed “balance-of-representation” language applies not to the universe of materially affected and interested parties, but more narrowly to the actual members of the technical committee, regardless of whether all materially affected interests have chosen to participate or outreach by the standards developer to engage them has taken place. This alternative interpretation dilutes the “balance” requirement considerably, so we request clarification on this issue.

We read the introduction of the term “sector” (as used in the quote above) as recognition that the kind of standard at issue should drive the balance of parties who participate on the technical committee. But an alternative reading of the new “sector” language allows for less rigor in outreach and openness. If relevant interests are not represented because they are viewed as “outside the sector” regardless of whether they view themselves as directly and materially affected by a standard, would a standards developer be required to do any outreach to engage them in the process? In other words, is use of the word “sector” intended to narrow the group of materially affected and interested parties? We also request clarification on this interpretation.

iii. Due Process

The proposed language relating to “due process” specifically defines the term to include “adequate notice of meetings, sufficient time to review drafts and prepare views and objections, full access to the views and objections of other participants, and a fair and impartial process for resolving conflicting views.” (p. 19)

From ANSI's perspective, due process means that any person (organization, company, government agency, individual, etc.) with a direct and material interest has a right to participate in the consensus process by: a) expressing a position and its basis, b) having that position considered, and c) having the right to appeal. Due process allows for equity and fair play. The minimum acceptable due process requirements, as they relate to American National Standards, for example, include: openness, lack of dominance, balance, coordination and harmonization, notification of standards development, consideration of views and objections, consensus vote, appeals, written procedures, and compliance with a fair commercial terms and conditions policy and a patent policy.

As we understand the intent of the proposed revision is fairness without micromanagement, we propose an alternative for consideration:

Due process shall include 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.

iv. Appeals Process

ANSI agrees that an appeals process is an important characteristic of a voluntary consensus standards development process. If additional guidance for this requirement is viewed as helpful, we recommend that the requisite procedural appeals process be documented and publicly available.

v. Consensus

Consensus in the proposed draft is now 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." (p. 19)

This revised text states that "consensus may be defined," which is a change from the prior version that states, "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."⁴ (emphasis added)

Further, the revised definition of consensus eliminates reference to the right of voting members to reconsider their votes in light of previously unknown objections or new substantive changes to content. The revised definition also eliminates the right for participants to receive a written disposition in relation to formal objections. Accordingly, the proposed revisions could be viewed as eliminating recognition of the value of these due process safeguards. Clarification of the goal of this revision would be instructive.

⁴ See section 4.a.(1)(v) of the 1998 version of the Circular, currently in effect. www.whitehouse.gov/omb/circulars_a119

Suitability of a Standard

Sections 6.e. (pp. 22-4) and 6.i. (pp. 29-30) address factors used to determine suitability of a standard, or of more than one standard, for agency use. ANSI proposes that agencies also consider the existing use and market acceptance of a standard, including the extent to which the standard is already adopted by state and local jurisdictions. This will help decrease the burden of compliance and will promote efficiency.

OMB Circular A-119's current reference to IPR policies (in current Section 4) has been replaced by a number of new provisions on this topic, including new subsection 6.e. (ii). ANSI seeks guidance on whether this new provision was intended to require that agencies conduct an analysis of the economic effect of SDOs' IPR policies when considering an agency's use of a standard and, if so, what such an analysis would entail.

We also note the following proposed edits, which may help to clarify the points made on pages 22-4:

- 6.e. (iii): Not all factors may be relevant, so we suggest the addition of "as appropriate and applicable"
- 6.e. (iii)(1)(a-i): The list of factors should be examples and not a definitive list. Other factors may be used by an agency. Request insertion of the text "the following examples:" at the end of (1) to convey that the list of factors is not limited to this group.
- 6.e. (iii)(1)(g): Suggest "The extent to which the standard establishes performance versus design criteria, where feasible and applicable;"
- 6.e. (iii)(1)(h): Add "as applicable" to the end of the sentence as not all voluntary consensus standards apply to small or medium entities.

Financial Support of SDOs and Standards Development Work

Where the U.S. government defines a specific need for a voluntary consensus standards activity, an agency or agencies should be supportive of the standards development work to meet that need. This may include financial support of the SDO or SDOs who will undertake the effort, as well as active participation by U.S. government stakeholders as technical experts in the standards development process.

To that end, we note that the proposed revision omits important text that appears in the current version of OMB Circular A-119:

7.c. What forms of support may my agency provide?

The form of agency support may include the following:

- (1) Direct financial support; e.g., grants, memberships, and contracts.
- (2) Administrative support; e.g., travel costs, hosting of meetings, and secretarial functions.
- (3) Technical support; e.g., cooperative testing for standards evaluation and participation of agency personnel in the activities of voluntary consensus standards bodies.

- (4) Joint planning with voluntary consensus standards bodies to promote the identification and development of needed standards.
- (5) Participation of agency personnel.

In particular, the absence of 7.c. (1) from the proposed revision is troubling to many in the standardization community, as some SDOs rely upon grants and contracts from government agencies in order to fund certain standards development activities that are undertaken by agency request, and are often on an accelerated timeline.

Agencies need to know clearly that they are permitted to support SDOs – or certain standards development activities – financially, beyond membership in the SDO or participation in the technical work. Section 6.m., *What if no voluntary consensus standard exists?*, of the proposed revisions could be an appropriate home for this important clarification.

Budgeting for Participation

Active participation by federal government stakeholders is essential to the development of voluntary consensus standards. To that end, ANSI recommends that the revisions to OMB Circular A-119 include a strong reminder to all federal agencies to give adequate priority to the budget needed for participation in standards work.

Further, ANSI members have noted that some federal agency staff indicate that budgets prevent them from traveling to standards development committee meetings, and that most if not all agencies are prevented from accepting travel reimbursement. The revision to OMB Circular A-119 could specifically touch on the issue of travel budgets, exploring the possibility of federal agency staff travel expenses being reimbursed. While we recognize that this is a difficult issue, SDOs have not noted the same obstacles with respect to participation by state and local regulators.

Voting

ANSI members have observed that agency representatives do not always feel compelled to vote on standards, instead behaving more as observers to the standards development process. ANSI suggests a modification to the final sentence of 7.c., *Do agency representatives participate equally with other members?* (p. 38), to read:

Agency representatives have the authority and obligation to vote, in accordance with the procedures of the voluntary standards body, at each stage of the standards development process, unless prohibited from doing so by law or their agencies.

Building Awareness

While this is not covered in the proposed revision, ANSI believes that OMB should consider building greater awareness of OMB Circular A-119 by federal agency staff. An annual distribution of the Circular could help make sure that current employees are familiar with the guidelines. Including the document in training is another option.

Ensuring the Timely Updating of Standards

Standards are updated on a constant basis as revisions are created and/or identified that improve the qualities of the standard or better meet the needs of the marketplace.⁵ However, federal agencies that reference such standards in rules and regulations may not be able, for procedural or other reasons, to make timely updates to rules that accommodate changes in the referenced standards. This may even be the case when the agency's own analysis supports the use of the updated standard for the purpose of the rule.

OMB could consider using the model outlined in section 106 of the *Consumer Product Safety Improvement Act of 2008* (CPSIA) as a guideline by incorporating future changes to a living standard, as they occur. From the CPSIA, sec. 106 (g):

(g) REVISIONS.—If ASTM International (or its successor entity) proposes to revise ASTM F963–07, or a successor standard, it shall notify the Commission of the proposed revision. The Commission shall incorporate the revision or a section of the revision into the consumer product safety rule. The revised standard shall be considered to be a consumer product safety standard issued by the Consumer Product Safety Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the date on which ASTM International notifies the Commission of the revision unless, within 90 days after receiving that notice, the Commission notifies ASTM International that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard. If the Commission so notifies ASTM International with respect to a proposed revision of the standard, the existing standard shall continue to be considered to be a consumer product safety rule without regard to the proposed revision.

While this example is specific to ASTM International and a particular standard, ASTM F963-07, encouraging agencies to include a provision similar to this could be helpful. Such a provision could provide a safeguard for agencies to have the final say in whether or not to update the standard, while allowing for automatic updates if the voluntary standard is updated based on new technology or other information and the agency finds that the updated standard continues to meet the agency's needs and goals.

⁵ For example, approved American National Standards are required to be reviewed at least every five years, but many are updated much more frequently.

OMB could also consider adding a new clause to section 10.c. (p. 47) that would require agencies to include in their reporting to the National Institute of Standards and Technology (NIST) “the number of voluntary consensus standards and other standards used by the agency that were last reviewed and approved ten or more years ago.” Such a requirement would ensure that the issue remains in focus for the agencies and the public alike.

Providing Guidance on Conformity Assessment

ANSI is pleased to see the addition of guidance and principles for conformity assessment – such as those published in the *United States Conformity Assessment Principles*⁶ by ANSI – included in the proposed revisions to OMB Circular A-119. These will be instrumental in promoting agency understanding of conformity assessment, and promoting neutrality in the application of conformity assessment methods.

Following are a few edits that we believe will further clarify this valuable guidance to agencies:

Background, Providing Background on Conformity Assessment, p.7, number 1

Add new 2nd sentence, “Agencies are encouraged to use the global agreements for recognizing competent accreditation such as the multilateral mutual recognition arrangements of the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF), based on internationally recognized conformity assessment standards such as those developed by the Conformity Assessment Committee of the International Organization for Standardization (ISO CASCO).”

8. What is the Policy on Conformity Assessment? p.38, 1st paragraph

Add new 3rd sentence, “NIST should report quarterly regarding those federal, state, and local jurisdictions that have their own conformity assessment requirements, and regarding activities underway to reduce unnecessary duplication.”

8.b. What considerations should my agency make when it is considering the type of conformity assessment procedures(s) to use? p.40

Add to (viii), “It is recommended that for regulated areas, products should be certified by independent third-party conformity assessment bodies through testing, auditing, or a combination of testing and auditing, to provide the required levels of independence and impartiality. Should conformity assessment activities be considered under a first or second party, it is recommended that a formal level of assurance needs to be implemented to ensure proper quality measures are in place and that technical requirements of the standards/guides are being adhered to. NIST should encourage, and assist federal agencies where necessary, to utilize the international standards and/or guides for all conformity assessment activities.

⁶ *United States Conformity Assessment Principles*, www.ansi.org/uscap

In addition, federal agencies should be encouraged to implement reciprocity provisions and consult with the United States Trade Representative when considering all requests for recognition of foreign conformity assessment bodies.”

8.c. What obligations does my agency have when considering whether to recognize a conformity assessment procedure in use of the market of a trading partner? p.43

Add new final sentence, “Trade associations and their captive certification bodies should be excluded from formal roles as independent oversight bodies to strengthen impartiality and defend against conflicts of interest.”

8.d. How does this policy affect my agency’s regulatory authorities and responsibilities? p.44

Add new final sentence, “When considering conformity assessment activities, regulatory authorities should be required to ensure that unique requirements or procedures are not being inserted into statutes or regulations that could be in conflict, or cause inconsistencies, with other recognized national or international conformity assessment standards or program requirements.”

Ensuring Compliance with International Obligations

ANSI is pleased to see greater attention paid to the importance of globally relevant standards in the proposed revision to OMB Circular A-119.

When it comes to international standardization, good practices are measured against the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement Committee Decision⁷, which states that the global relevance of a standard is determined by how it was developed, not where. More specifically, the Decision states that the development of international standards must rely upon a number of principles, including openness, impartiality, consensus, transparency, and coherence, among others.

In other words, the global relevance of a standard cannot and should not be measured by which organization developed it. Ultimately, there are multiple paths to global relevance, and it is the marketplace that decides the utility or applicability of any given standard.

We are pleased to see support for the multiple-path approach so clearly articulated in OMB Circular A-119, both for standards and for conformity assessment. Furthermore, we support the revisions encouraging increased engagement by agencies with the U.S. Trade Representative (USTR) on matters that have trade implications.

⁷ G/TBT/ 1/REV. 10. “Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement”

Clarification: National Standards Can Be International Standards

As a point of clarification, we note that ANSI approves American National Standards (ANS) that are developed by more than 225 ANSI-accredited standards developers. Though the word “national” is in the name, many standards with the ANS designation also qualify as international or globally relevant standards, according to the terms of the WTO TBT agreement.

Enhancing Transparency and Stakeholder Participation

ANSI and the standardization community are pleased to see that, when it comes to federal regulation, “OMB does not believe the public interest would be well-served by requiring standards incorporated by reference to be made available ‘free of charge.’” (p. 10)

In order to continue to support robust, consensus-based standards development, we must protect the standards development ecosystem and not make any decisions or mandates that would impact the ability of SDOs to conduct their work. The preamble to the proposed revision to OMB Circular A-119 articulates these points very clearly on page 10, and we are grateful for the thoughtful consideration that OMB has given to the standardization community’s position. It is clear that OMB understands that there is no one-size-fits-all approach to this challenge. ANSI suggests that these thoughts also be included in the proposed revision to OMB Circular A-119, perhaps in section 6.p. (pp. 34-5).

Reasonable Availability

The Code of Federal Regulations (CFR) states that when a standard is to be incorporated by reference into federal regulation, or “IBR-ed,” a federal agency should determine that the standard is “reasonably available” to those affected by the anticipated regulation. In section 6.p. on page 34, the proposed revisions to OMB Circular A-119 describe several factors that should be considered as part of this determination:

- Whether the standards developer is willing to make read-only access to the standard available for free on its website during the comment period, since access may be necessary during rulemaking to make public participation in the rulemaking process effective
- The need for access to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny
- The cost to regulated and other interested parties to obtain a copy of the material, including the cumulative cost to obtain incorporated materials, and their ability to bear the costs of accessing such materials in a particular context
- Whether the standards developer can provide a freely available, non-technical summary that generally explains the content of the standard in a way that is understandable to a member of the public who lacks relevant technical expertise

On page 35, the proposed revisions go on to state that reasonable availability is context-specific, and that the absence of one or more of these factors alone should not remove a standard from consideration.

This is a significant step in the right direction for the standards community, and ANSI is strongly supportive of this language.

First, it is in alignment with December 2011 recommendations⁸ by the Administrative Conference of the United States (ACUS), which encouraged agencies to “take steps to promote the availability of incorporated materials within the framework of existing law.” That availability is defined as “...on a reasonable basis, which may include monetary compensation where appropriate.”

Second, the revised text is flexible and non-prescriptive. This allows for a number of different reasonable availability scenarios, which will go a long way to accommodating the different needs and business models of the various SDOs whose work is being referenced.⁹

Non-technical Summary

It should be noted that, while many ANSI-accredited SDOs support providing a freely available, non-technical summary, some SDOs have expressed reservations about the notion.

These reservations include concerns that such a summary could not possibly capture the breadth of longer standards and codes, which may be hundreds of pages long and dense with technical content, as well as concerns that a summary could be misapplied or even misunderstood as a “rationale” for the standard, which could raise liability issues.

But because OMB states on page 35 that the absence of one or more of these factors would not remove a standard from consideration, ANSI believes that the summary provision is not onerous overall and could provide significant value for certain SDOs and user groups.

We would like to draw OMB’s attention to ANSI’s weekly publication *Standards Action*¹⁰, which announces the scope of proposed ANS that are available for public comment. In addition to a brief scope, identification of relevant stakeholders and a statement of need for the document are published. ANSI welcomes the opportunity to work with OMB and ANSI-accredited SDOs to determine whether these public scope statements could, in some cases, be a way for SDOs to fulfill the fourth reasonable availability factor related to freely available, non-technical summaries (p. 34).

⁸ www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf

⁹ Many SDOs are already working to make IBR-ed standards reasonably available, whether through the ANSI IBR Portal (ibr.ansi.org) or their own online reading rooms.

¹⁰ www.ansi.org/standardsaction

ICSP Should Engage with Stakeholders More Frequently

Page 11 of the proposed revisions contains the following text:

Some commenters also expressed the view that coordination on standards between agencies and the private sector should be enhanced, and in particular that the Interagency Committee on Standards Policy [ICSP] should engage with stakeholders on a more frequent basis.

ANSI is in agreement that such additional coordination and engagement would be helpful to many, not only with respect to standards but also to conformity assessment activities.¹¹ The Institute's annual World Standards Week¹² series of events – held in Washington, DC – already features a joint meeting of the ICSP and ANSI's Government Member Forum. And ANSI has also previously arranged for both SDOs and industry representatives to participate in meetings of the ICSP to address topics of mutual interest. Should OMB, NIST, and other agencies wish to do so, ANSI could consider hosting an Open Forum or other broadly attended conference – open to the public and free of charge – on this topic as part of World Standards Week.

ANSI also houses a number of standards collaboratives in specific areas of standardization including homeland security, nanotechnology, energy efficiency, and others.¹³ We welcome the opportunity to engage additional stakeholders in these and future activities, with the federal government's support.

Clarification of Terms: Technical Committee, Technical Advisory Group

The phrase "technical committee and technical advisory group" is used throughout the proposed revision to OMB Circular A-119. Is a distinction between these two terms intended? ANSI uses the term "consensus body" to refer to the voting group within the American National Standards process, for example, and Technical Advisory Group (TAG) in reference to U.S. participation in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).

It would be helpful for OMB to consider clarifying whether "technical committee and technical advisory group" is meant to be the equivalent of "consensus body," or if the phrase has a different meaning.

¹¹ ANSI notes the following text from the "Guidance on Federal Conformity Assessment Activities," which describes one of NIST's roles as "work[ing] with agencies through the Interagency Committee on Standards Policy (ICSP) to coordinate Federal, state and local conformity assessment activities with private sector conformity assessment activities."

gsi.nist.gov/global/docs/FR_FedGuidanceCA.pdf

¹² www.ansi.org/wsweek

¹³ A complete list of ANSI panels, collaboratives, and fora for standards coordination can be found at www.ansi.org/panels

Strengthening the Role of Agency Standards Executives

ANSI supports any activity that would strengthen the role of agency standards executives, and that would put qualified individuals into these positions and make it easier for these individuals to be effective. Standards executives are an important link between an agency's technical expertise and the private sector, and the proposed revisions to OMB Circular A-119 seem to empower these standards executives to act with greater authority.

The comment below focuses more on the training of agency personnel, which is germane to the participation of agencies in standards development activities, but is covered in the proposed revisions under the section on qualifications and responsibilities of agency standards executives.

Expressing Personal vs. Agency Viewpoints

It may be helpful to offer further clarification to 15.c. (1) on page 53, which currently states:

“Establishing procedures to ensure that agency representatives who participate in voluntary standards bodies will, to the extent possible, ascertain the views of the agency on matters of paramount interest and will, at a minimum, express views that are not inconsistent or in conflict with established agency views;”

Management and Reporting on the Development and Use of Standards

ANSI is supportive of the more effective guidance included in this proposed revision. The reports prepared by NIST on government participation and use of standards are very helpful to the entire standardization community, and we are supportive of any action that would make the reports more robust and timely, and that would facilitate NIST's efforts to aggregate and analyze this important information.

Conclusion

Standards and conformity assessment activities are inextricably linked to all facets of our national economy and are vital to the continued global competitiveness of U.S. industry and the maintenance of appropriate health, safety, and environmental protection mechanisms. ANSI appreciates this opportunity to share more information about the U.S. standardization system, and welcomes further dialogue on this critical issue.

[submitted May 6, 2014]