

Response of Andrew Updegrove to Request for Comments

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

79 FR 8207
Office of Management and Budget

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 whether and how to supplement OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (Circular).

I am a partner in the Boston law firm of Gesmer Updegrove LLP. Over the last 25 years, I have represented more than 100 non-profit membership organizations that develop and/or promote standards. While some of these standard setting organizations (SSOs) have been approved by the American National Standards Institute (ANSI) as accredited standards development organizations (SDOs), the great majority have been formed to attract participation by relevant stakeholders on a global basis. Most commonly, such organizations are referred to as "consortia."

Comment Focus: The Potential Negative Impact on Consortia of the Proposed Changes

The Importance of Consortia to the National Interest. Consortia play a vital role in the information and communications technology (ICT) industries, an area in which the U.S. provides global leadership. This role, and the significant advantages to the national interest that consortia provide, are described in the first five pages of my submission in connection with the 2012 round of comments requested in connection with the current review of the Circular (a copy of that submission is appended as Exhibit A for convenience of reference).

Indeed, while ANSI serves as the U.S. accrediting body for SSOs, it also recognizes that the participation of a broader range of SSO models is essential to the national interest. On page 2 of its own response in the current comment cycle, it offers this advice:

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.

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 should be considered by federal agencies.

The focus of this Comment will be on the negative impact that several of the proposed changes to the Circular could have on consortia directly, and on the national interest, indirectly. The author assumes that these impacts are unintended, but wishes to draw attention to the fact that, unless certain proposed language is modified, the serious consequences described below can be expected to follow.

Preference Language and VCSB Definition Issues

In the Circular’s current form, no preference is given for one type of private sector standard over another (e.g., to one developed by an SDO as compared to one created by another standards setting organization, such as a consortium). However, the revisions that have now been proposed would establish an explicit preference favoring standards developed by standards organizations (referred to in the Circular as “voluntary consensus standards bodies” (VCSBs)) that meet criteria stated in the amended language. Standards developed by VCSBs are referred to in the amended text as “voluntary consensus standards” (VCSs).

Importantly, the criteria included in the definition of a VCSB include several attributes that are not fully supported in the procedures that have typically been adopted by consortia. The attributes are openness, balance of representation, due process, and appeals process, and consensus, and all of these criteria are problematic for consortia to a varying degree, as follows:

Openness: Unlike SDOs, most of which derive a substantial, and sometimes the majority, of their funding from the sale of their standards,

consortia virtually universally make their standards publicly available at no charge, providing a clear benefit to all non-members, and especially so when a consortium standard is referenced into law. However, in order to fund their operations, virtually all consortia charge a membership fee as a precondition to participating in the standards development process.

The proposed changes therefore raise the question of whether charging a participation fee would be consistent with the VCSB definition, and if so, how high that fee could be. If the answer is that the ability to participate must be made available for free, or at nominal cost, then providing transparent access at "all stages" of standards development would seriously undercut the value of consortium membership, and therefore severely undermine their financial viability of consortia.

And finally, it is axiomatic in both the business as well as the academic literature that there is no consensus on a single definition of "openness."

Balance: This definition is more problematic, although the wording does include recognition of the fact that balance is situation-specific. However, were the agencies to use the accreditation guidelines developed by ANSI as a benchmark for determining which standards organizations should be eligible to offer standards for recognition as "American National Standards," the burden to consortia of achieving balance would be great. For example, Section 1.3 of the ANSI *Essential Requirements: Due process requirements* (which incorporates the balance concept) for American National Standards reads as follows:

The standards development process should have a balance of interests. Participants from diverse interest categories shall be sought with the objective of achieving balance. If a consensus body lacks balance in accordance with the historical criteria for balance, and no specific alternative formulation of balance was approved by the ANSI Executive Standards Council, outreach to achieve balance shall be undertaken.

A later Section (2.3) goes on to state:

Historically the criteria for balance are that a) no single interest category constitutes more than one-third of the membership of a consensus body dealing with safety-related standards or b) no single interest category constitutes a majority of the membership of a consensus body dealing with other than safety-related standards.

The interest categories appropriate to the development of consensus in any given standards activity are a function of the nature of the standards being developed. Interest categories shall be discretely defined, cover all materially

affected parties and differentiate each category from the other categories. Such definitions shall be available upon request. In defining the interest categories appropriate to a standards activity, consideration shall be given to at least the following:

- a) producer;
- b) user;
- c) general interest.

Where appropriate, additional interest categories should be considered.

Appropriate, representative user views shall be actively sought and fully considered in standards activities. Whenever possible, user participants shall be those with the requisite technical knowledge, but other users may also participate. User participation should come from both individuals and representatives of organized groups.

There are several user categories:

1. User-consumer: Where the standards activity in question deals with a consumer product, such as lawn mowers or aerosol sprays, an appropriate consumer participant's view is considered to be synonymous with that of the individual user – a person using goods and services rather than producing or selling them.
2. User-industrial: Where the standards activity in question deals with an industrial product, such as steel or insulation used in transformers, an appropriate user participant is the industrial user of the product.
3. User-government: Where the standards activity in question is likely to result in a standard that may become the basis for government agency procurement, an appropriate user participant is the representative of that government agency.
4. User-labor: Where the standards activity in question deals with subjects of special interest to the American worker, such as products used in the workplace, an appropriate user participant is a representative of labor.

A footnote adds the following:

2 Further interest categories that may be used to categorize directly and materially affected persons consist of, but are not limited to, the following: a) Consumer; b) Directly affected

public; c) Distributor and retailer; d) Industrial/commercial; e) Insurance; f) Labor; g) Manufacturer; h) Professional society; I) Regulatory agency; j) Testing laboratory; k) Trade association.

While such criteria may make good sense in the context of safety and health standards, non-technical representation in consortia working groups would have little point, and indeed, it would be virtually impossible to interest non-technical people in participating at all, with or without the need to pay a membership fee. And, in fact, ANSI takes such factors into account in assessing SDOs in the ICT space. Since an Agency could be expected to take ANSI accreditation as a seal of approval under the preference, even a consortium with similar balance in fact might be assumed to be deficient.

Due Process and Appeals Process: Some of the elements of the Due Process attribute are also problematic. For example, the definition includes the following text: "...full access to the views and objections of other participants, and a fair and impartial process for resolving conflicting views; ..."

To the good, the definition is high level rather than detailed and prescriptive. But it is also demanding, especially when read in the context of traditional industry practices. For example, would the right of a member to participate in live discussions (email, conference call and face to face) be deemed to be "full access," and would engaging in debate in the course of a meeting be considered to meet the "resolving conflicting views" requirement, noting that in each case, those not in attendance would have access only to meeting minutes? In a traditional standards process, all objections are required to be stated in writing, and then each must be resolved (i.e., accepted or the reasons for rejection given) in writing before a standard can be approved – a very time consuming process.

The requirement of including an appeals process is clear enough, but by definition appeals processes require time – weeks to months – to accommodate. Adding such a module to consortia work flows that do not already include such a formal process (and the author believes that few do) would very meaningfully add to process times that are already longer than most would wish.

Consensus: The final requirement, consensus, while simple in concept is at once both vague and suggestive of near-unanimity – something that is rarely required in consortia. Specifically, it is unclear how high a majority of concurrence is needed to establish "consensus," but the words "not necessarily unanimity" are also used. And how much bureaucracy is needed to satisfy the requirement to address comments and objections in a "fair, impartial, open and transparent" process? In this context, transparency once again implies written dispositions of comments and objections rather than real-time discussion. Again, if the ANSI guidelines are adopted as a

benchmark, then substantial changes would be needed to the processes of most consortia.

Market Realities

It is important to note that one reason that consortia came into existence in the early 1980s was in response to the (then) very slow pace at which standards were developed by SDOs, in part due to requirements that all objections be documented and then resolved in writing. Unlike many traditional industry sectors, the life cycles of technologies and technology-based products and services can be extremely short. It is no surprise, then, that the great majority of information technology, and to a lesser extent communications technology, standards came to be developed in consortia rather than SDOs (although it should be noted that SDO standards development in the ICT area is now much more speedy than previously).

It is also important to note the fact that many hundreds of consortia have been created and now exist that do not include the specific VCSB process elements described in the VCSB definition, although these same organizations have taken great care to develop and operate under rules of process that they believe well address almost all of the same needs enumerated in the Circular – they simply do so in a more streamlined, real-time fashion.

Finally, it is vital to acknowledge that almost all consortia have global memberships, which greatly facilitates the rapid uptake of ICT standards, and lessens the likelihood of unnecessary, overlapping standards. Current consortium rules have evolved over a 35 year period, and are regarded by these global memberships as being well-suited to the development of technically useful standards while maintaining appropriate levels of transparency, openness, due process and consensus.

In order for a consortium to reliably fit within the proposed VCSB definition, the typical consortium would need to make significant changes to its process. This would consume significant management and member time, add onerous administrative overhead, and lengthen standards development cycles. Given that there would be no demand for these changes from non-U.S. members, it is hardly to be assumed that many consortia are likely to attempt to make such an effort, or that many will be able to persuade their global memberships that there is a sufficient reason to do so.

Lack of Consensus on the Need for a Preference

In an effort to determine the incentive and goals for adding a VCSB preference to the Circular, the author charged an associate with reviewing all of the comments filed in the previous comment round. What he found was quite significant. In many cases, commenters did not touch on the issue at

all, while in others they touched on process values in selective, rather than blanket fashion (i.e., they did not voice a clear preference for either SDO or consortium standards or processes). While this made deriving a definitive analysis impossible, this Comment is accompanied by a table showing a good faith, annotated analysis of all of the comments that touched on the VCSB and VCS issues.

As will be seen, there is nothing approaching a strong movement calling for adding a preference at all. Indeed, some of the commenters that argued to the contrary were even SDOS, and in that regard, it is worth noting that not all SDOs progress 100% of their own standards through an accredited process.

Inconsistent Policy Directions

Due to the absence of a rationale in the proposed revisions for converting to a preference, and the lack of a groundswell in the private sector demanding a preference, it is not obvious what problem OMB is addressing by proposing that a preference be established. Indeed, the attachment of WTO Technical Barriers to Trade Act language which does not map closely to the VCSB definition would seem to argue to the contrary.

Similarly, establishing a preference would seem to undermine the current efforts of the U.S. Trade Representative in the ongoing TTIP negotiations with Europe, given that one area of disagreement involves the preference to be given to SDO standards over consortium standards. The EU is arguing for preference to be given to the former, while the U.S. is (rightly) stressing the importance of the latter.

Issues for the Federal Agencies

Because few consortia are likely to change their rules in order to conform to Circular definitions, the only results to be expected are, at best, that Agency staff will find it more complicated and burdensome to determine which standards they can use in procurement and when referencing standards into law. At worst, the proposed language may constrain Agency staff to conclude in a given case that they must use a less satisfactory and less widely adopted standard than might otherwise have been the case.

Exception Language: The author appreciates that those who drafted the proposed amendments to the Circular sought to address the fact that applying the preference will not always be appropriate. For example, the response to question 6.a states:

In addition to consideration of voluntary consensus standards, it is also important to recognize the contributions of standardization activities that take place outside of the voluntary consensus process, particularly in emerging technology areas. Therefore, in instances **where there are**

no suitable voluntary consensus standards, agencies should consider, to the extent consistent with law – as an alternative to using a government-unique standard – other voluntary standards that deliver the most generally favorable technical and economic outcomes (such as improved interoperability) and that are widely utilized in the marketplace. *[emphasis added]*

However, often there will be multiple standards that arguably could address an identified need. While in some cases one standard will have clearly become dominant (making an Agency's task easier), where a technology is new and standards are just beginning to be introduced, no standard may have as yet become dominant. On the other hand, one standard may come from a consortium that is the recognized leader in that area, while the other may have been developed by an SDO that has marginal involvement in that area and/or a poor track record of success in seeing its standards become pervasive in the area in question.

What should an agency do in such a case? The proposed, amended language goes on to state as follows:

When the use of existing voluntary consensus standards would be inconsistent with applicable law ***or otherwise impractical***, agencies have the discretion under section 12(d) of the NTTAA to use a government-unique standard or other voluntary standard. *[emphasis added]*

The 6.a response defines "impractical" as follows:

(ii) "Impractical" includes circumstances in which such use would fail to serve the agency's program needs; be infeasible; be inadequate, ineffectual, inefficient, or inconsistent with agency mission or the goals of using voluntary consensus standards; be inconsistent with a provision of law; or impose more burdens, or be less useful, than the use of another standard.

The language quoted at first blush would seem to address the author's concerns. However, in less black and white examples, that conclusion quickly fades. Would the emphasized language be sufficient in the above example dealing with early, concurrent development of standards, especially when it is recalled that the language in answer 6.b. states that agencies should take into account a VCS that is still in the process of development, and consider its use when available? That language would seem to suggest a strong bias towards choosing a VCS over a non-VCS.

Given such statements, an Agency might well not feel that it has the freedom to select what may be the likely dominant standard over the "preferred" alternative, especially given that it must justify its decisions in its annual

written report to Congress, via NIST, to use the non-VCS alternative. Nor is this the only example that can be imagined. In the area of security standards, there are many standards that can overlap to provide pervasive security. An agency might feel that it must require vendors to use only some standards (e.g., ISO standards) relating to pervasive security without additionally requiring compliance with others (such as the PCI Security Council DSS standard).

Multiplicity of "Apples to Oranges" Requirements: The proposed response to question 6.e raises a different issue: whether the criteria that an agency "should" take into account in "considering whether to use a VCS" are so numerous and varied that the concept of requiring preferential use of VCSs is practicable at all. 6.e reads in part as follows:

e. When deciding to use a standard, what are some of the things my agency should consider?

(ii) 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, including laws and regulations relating to antitrust, national security, small business, product safety, environment, metrication, technology development, international trade, intellectual property and copyright, privacy and security, and conflicts of interest.

This evaluation should include consideration of the economic effect of the intellectual property rights (IPR) policies of the voluntary consensus standards bodies on standards implementers, such as the extent to which entities practicing the standards may obtain licenses to patented technology incorporated into the standard on a non-discriminatory and reasonable royalty or royalty-free basis. This evaluation should also include consideration of whether such IPR policies bind subsequent transfers of patented technology incorporated into the standard.

An agency should also recognize the improper use of standards can suppress free and fair competition; impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety. If an agency is proposing to use a standard in a proposed or final rulemaking, the agency must comply with the "Principles of Regulation" (enumerated in section 1(b))

The answer goes on for several more pages, introducing additional criteria (see Exhibit B for the complete text of the

answer). Remarkably, in the context of the clear statement that VCSs are to be preferred over “other types of standards,” only one of the many criteria included refers to, “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.” For this reason, it is difficult to tell which text is authoritative – the explicit statement that VCSs are to be preferred, or the very lengthy list of criteria to be considered, of which VCS status is only one?

Given this bewildering array of criteria, it would hardly be surprising if over-worked Agency personnel would simply take the easy way out, and reflexively use a VCS over a non-VCS every time, since the preference, at least, requires only a binary analysis. This is even more likely if the staff person is told by third parties (whether through honest mistake or deliberate intent to mislead) that this is the required course of action (as several of the author’s consortium clients recounted to him at the time of the last amendment of OMB A-119 in 1998).

While OMB is to be congratulated on its awareness of the issues discussed in this Comment and thanked for going to the effort of addressing them (e.g., by acknowledging the importance of consortium standards “in emerging technology” areas), it is the author’s belief that the result falls short of the goal of providing the Agencies with the type of clear guidance that would enable them to easily and efficiently decide to use a consortium standard where it is in the national interest to do so.

Summary

The issue for current purposes is not that the values represented by the enumerated attributes in the VCSB definition are not admirable (they are), but that the practices of consortia, which typically relate to ICT rather than health and safety, have evolved over more than three decades and have been found to reliably create standards that have provided significant value to society, and become predominant in many industry verticals. Just as it is widely acknowledged that no “one size fits all” approach is appropriate for the intellectual property rights policies of SSOs in different settings, prescribing too specific and narrow a set of process rules is similarly counterproductive.

It would be difficult to imagine that the substantial non-US memberships of the hundreds of extant consortia would be willing to take the time to substantially revise their processes, undercut their revenue models, and saddle themselves with the resulting steps that such changes would require, simply to satisfy the requirements of the Circular. Moreover, given that many value judgments would need to be made even if a consortium were to wish to attempt compliance, there would be no way for it to conclusively demonstrate that it had made the grade without becoming accredited by ANSI (assuming the final Circular language and the ANSI Essential

Requirements are brought into alignment, which seems reasonable to assume).

This is something that few consortia could be expected to do, absent additional reasons for taking on the substantial time and effort needed to achieve that status over and above remodeling their processes to conform to Circular requirements. Moreover, doing so would also exacerbate the chronic concern of consortia not to appear to be too “U.S.-centric,” an impression that can seriously undermine a consortium’s effort to attract a global membership and achieve global uptake of its standards. At the same time, absent accreditation, the Agencies will be left with the burden of determining whether a consortium had, or had not, made the grade.

While it is true that the amendments would permit Agencies to use non-VCSs where a VCS is not available, and also recognize that in certain “emerging technology” areas this might often be the case, the author believes that overall the language explaining when this might be permissible is vague and will inevitably lead to confusion over whether and when consortium-developed standards may be acceptable for government procurement use and for referencing into law.

Recommendations

Given these concerns, the author believes that it would be preferable for OMB to leave the Circular unchanged on the subject of a preference. In the event that this preference is retained, then the author believes that it is essential that the final criteria to be used by Agency staff in evaluating consortium-developed standards should be significantly clarified. At minimum, where a consortium-developed standard has become significantly more widely adopted than a VCS, or (in the case of a new standard) where the consortium in question has previously released many standards that have become widely adopted, that fact alone should justify use by an agency.

The author therefore recommends the following resolution alternatives, in order of desirability:

1. Delete the proposed preference entirely, except in the case of health and safety standards.
2. If deletion does not occur, revert to less specific language in the VCSB definition and add language stating that the manner in which these requirements may be satisfied will vary depending on a variety of factors, including market sector, type of standard (e.g., health or safety vs. purely technical), rapidity of technological change, prevailing industry practice, reputation of the developing organization, and other relevant factors.
3. At minimum, state that an agency has substantial latitude in deciding when a non-VCS will best serve the needs of the Agency (in procurement) or serve the public interest (in the case of referencing into law).

In addition, the author urges that the Circular should be amended to state that consortia should receive equal priority in government funding of activities and in participation by Agency personnel, and that the Agencies should also report to Congress, via NIST, as to adoption of consortium-originated standards as well as VCSs. Were this to have always been the case, it is likely that OMB would have been less inclined to propose the preference at all, because of its augmented awareness of the importance of consortium standards.

I thank you for the opportunity to provide these comments, and look forward to the further dialogue that will occur on these important issues.

EXHIBIT A

Response of Andrew Updegrove to Request for Comments

Federal Participation in the Development and Use of Voluntary Consensus
Standards and in Conformity Assessment Activities
Office of Management and Budget

April 30, 2012

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

I am a partner in the Boston law firm of Gesmer Updegrove LLP. Over the last 24 years, I have represented more than 100 non-profit membership organizations that develop and/or promote standards. While some of these standard setting organizations (SSOs) have been accredited by the American National Standards Institute (ANSI), the great majority have been formed to attract participation by relevant stakeholders on a global basis. Most commonly, such organizations are referred to as "consortia."

Focus: The Role of Consortia

The primary focus of this response will be on consortia. My remarks will address the degree to which the standards output and supporting activities of these voluntary, consensus-based organizations has become essential to the existence and further advancement of information and communications technology (ICT) since the Circular was promulgated in 1998, and the ways in which guidance under the Circular should be updated in order to maximize the benefits anticipated by Congress when it enacted the Technology Transfer and Advancement Act of 1995 (NTTAA).

My central premise will be that it is essential that the vital role played by consortia in the ICT sector be recognized and that, to the extent that any additional guidance or supplemental advice is provided by OMB, that such guidance and advice should serve to encourage rather than hamper uptake of consortium-developed standards, and to require the participation by Federal government personnel in consortium developmental and other activities to the same extent as in those of traditional SSOs.

Background

In almost all cases, the standards that consortia have been formed to develop, promote, and/or otherwise support serve the ICT industries. Over the last thirty years, nearly 1,000 of these organizations have been created, and together the tens of thousands of standards they have developed address the needs of virtually every niche of ICT.¹ Indeed, for most of that period the information technology industry has looked preferentially to consortia for new standards, utilizing either already existing consortia or launching new ones to meet their needs. To a lesser, but still very significant extent, this has been true in the communications technology sector as well.

One reason that industry has looked so heavily to consortia, as compared to traditional standards organizations, is that new ones can be set up so easily and quickly (it is rare that a week goes by without at least one standards-focused consortium being announced, and often several are launched). While each new consortium is likely to be similar in many ways to those already in existence, its purpose will usually be unique, and its focus will typically be precisely defined. By forming a new organization rather than taking a new project to an existing SSO, the founders can deploy 100% of their resources towards rapidly achieving whatever standards-related goal they have joined forces to achieve.

In almost every case, the new organization will be charged not only with developing a new standard, or suite of related standards, as quickly as possible, but the founders will underwrite whatever additional activities are needed to achieve their goals. Those activities typically include many of the following activities: collaboration on joint marketing and education activities; sponsoring research; registering distinctive trademarks and launching certification testing programs; holding meetings and speaking at tradeshows and other venues; and coordinating with other consortia and traditional SSOs to increase synergies of results and lower the likelihood of needless duplication of efforts.

Once launched, the great majority of consortia follow one of a few tracks:

- Where they are very narrowly focused (i.e. on a single standard, or a few closely related standards), they will eventually go out of existence when the need for further extensions to their standard(s) has passed. At that time, the standards and other intellectual property of the consortium will usually be transitioned to another consortium or traditional SSO.
- Where they are more broadly focused (e.g., on an area of technology or type of product, service or application), they will continue to launch new working groups for as long as the need for activity in that area sustains.

¹ What I believe to be the most complete list of ICT SSOs (both traditional and consortia) in existence may be found at a Web site I maintain, called ConsortiumInfo.org. That list can be found here: <http://www.consortiuminfo.org/links/index.php#categories>

- Where they become widely recognized for their value, they often become recognized as institutions to be sustained over the long term, taking their place among the globally recognized sources of excellence and leadership in standards development.

There are many examples of consortia that demonstrate each of these life cycles.

Consortia also vary widely in the rules relating to intellectual property rights (IPR) they adopt. In many areas (e.g., consumer electronics and telephony), the commitments that members are expected to make are similar to those required in traditional SSOs: i.e., each participant must agree that if a standard it helps develop will infringe a patent claim owned by it (a "Necessary Claim"), it will either agree to license that claim on reasonable and non-discriminatory (RAND) terms to everyone that wishes to implement the standard, or it will disclose the Necessary Claim, and the portion of the standard that would need to be modified to avoid infringement.

But in other areas of endeavor (e.g., Internet and Web standards), consortia often adopt stricter rules, requiring those that participate in developing a standard to forego the right to charge a royalty or other compensation for the right to practice a Necessary Claim.

This ability to set the particular IPR rules that a group of founders believe to be best suited to achieving the goal at hand provides another reason for forming new consortia, since it avoids the need to agree to the type of "lowest common denominator" IPR Policy that an organization with scores of active working groups might otherwise find it necessary to maintain.

Consortia differ in other important respects, including rights of participation. The great majority of consortia exhibit levels of "openness" that are equal to, and which sometimes exceed, those of traditional SSOs. A small percentage, however, operate in a more restricted fashion. These organizations (often referred to as "Special Interest Groups," or SIGS) are particularly common in technical areas characterized by "patent thickets," and offer a way for those companies with the heaviest concentrations of technology in the subject area to negotiate what amounts to a mutual cross license arrangement that allows third party implementations without the need to negotiate licenses with multiple patent owners.

Some of these very narrowly focused collaborations operate on a "by invitation only" basis, although those participants that own patents underlying the resulting standard still commit to license their Necessary Claims on RAND terms to anyone desiring to implement the resulting standard.

These and other differences among consortia illustrate the benefits of this extremely flexible and organic approach to standards development. In large part, it is this ability to tailor structure, process, IPR policies and work plans

that helps explain why this approach to standards development has proven to be so popular in the extremely competitive, fast moving, and patent-thick arena of ICT.

National Interest

Ensuring that the Federal agencies give equal priority to both utilizing and helping develop consortium-developed standards is essential for a number of reasons central to the national interest.

First and foremost, ICT standards “want” to be global standards. Not only is the benefit of universally implemented standards demonstrable given the portability of electronic devices and the global sharing of data and services, but the Agreement on Technical Barriers to Trade² to which members of the World Trade Organization are signatory prohibits those nations from unjustifiably mandating compliance with local standards in preference to equivalent global standards in order to set up barriers to free trade. Where a common standard is used everywhere, trade can follow as well.

This default to global standards means that the Federal agencies will have little real option but to specify implementation of a given consortium standard in procurement once the global marketplace has decided to implement it. To do otherwise would raise costs of procurement, deprive the Federal purchaser of the benefits of the ongoing innovation in the marketplace that develops around a global standard, and, in many cases, make it difficult and burdensome to communicate and interact with the world beyond the agency’s own network. This would be a particularly inappropriate situation where interaction with the American public is involved.

There is an important, indirect reason for the Federal agencies and regulators to support consortium standards as well. The formation of standards consortia has been almost exclusively led by U.S. multinational corporations. While most consortia actively recruit foreign as well as domestic corporations and other types of stakeholders (e.g., U.S. and foreign universities, non-profits and national, state and local governmental bodies, depending on the technical focus and business goals of the consortium), only a small number of consortia have been formed by foreign interests.

Because standards are so effective at enabling new technologies, products and services, being able to set a standards agenda can provide great advantages to those vendors that define the scope of a new SSO and then direct its strategy. This is because those vendors then enjoy a “first mover” advantage in the marketplace, and also because the standards that they choose to create will typically build upon technology they have already developed (and frequently patented).

² Also sometimes referred to as the [Uruguay Round Agreement](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm), available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

Similarly, matters of great national policy importance are heavily dependent on consortium-developed standards for achievement. To give but a few examples, the SmartGrid, electronic health records, cybersecurity, first responder capabilities, privacy, open government, and cloud computing all rely extensively on consortium developed standards, often to a greater extent than those produced by traditional SSOs.

Definition of “Voluntary Consensus Standards Bodies”

As noted above, consortia differ widely in the composition of their membership, the rules they adopt (procedural, with respect to IPR, and otherwise), and the degree of respect that their output earns in the marketplace. Over the years, “best practices” for consortia formation, governance and technical process have continued to evolve, reflecting market needs and perceptions, including with respect to values such as transparency, accessibility to relevant stakeholders, due process and consensus.

In order to be successful, a consortium must be able to attract sufficient participation by relevant stakeholders to create valuable standards, and sufficient uptake of its standards by non-members as well as members. These results are unlikely to be achieved unless the consortium has met market expectations of fairness, openness, accessibility, and transparency.

However, the Circular includes a specific set of criteria for defining what are referred to as “voluntary consensus standards bodies,” some of which are general, while others are quite specific. The attributes defining such an SSO are stated to be as follows:

- (i) Openness.
- (ii) Balance of interest.
- (iii) Due process.
- (iv) An Appeals Process.
- (v) Consensus, which is defined as general agreement, but not necessarily unanimity and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.

While this definition sets out a very suitable set of attributes for creating standards worthy of Agency consideration, it does not describe the only appropriate regime under which standards can be developed that are

responsive to the needs, and which fairly reflect the input, of interested stakeholders. Attributes (iv) and (v), for example, are both specific as well as absent in a wide variety of very well respected consortia that have pursued different rules and processes in pursuit of similar goals.³

Because the Circular defines “voluntary, consensus standards” as standards “developed or adopted by voluntary consensus standards bodies,” other sections of the Circular are restrictively impacted as well.

Does this matter? It is true that the introduction to the Circular states that:

[t]hese policies do not create the bases for discrimination in agency procurement or regulatory activities among standards developed in the private sector, whether or not they are developed by voluntary consensus standards bodies.⁴

On the other hand, Circular Item 7 states that:

Agencies must consult with voluntary consensus standards bodies, both domestic and international, and must participate with such bodies in the development of voluntary consensus standards when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budget resources.

Similarly, Item 9.a. only requires reporting with respect to voluntary, consensus body standards. In these cases (at least), the Circular does discriminate between those SSOs that meet the somewhat arbitrary and restrictive Circular definition of a voluntary, consensus standards body and those that do not.

Unfortunately, it is difficult to tell whether these are the only cases where such discrimination is intended. For example, there are numerous examples of statements mandating use of voluntary consensus standards, without mentioning that consortium standards represent equally acceptable

³ For example, in many consortia the Board of Directors or a lower level committee will review whether a given working group process has worked appropriately from a due process point of view before recommending a draft standard for adoption, and take appropriate action if this is found not to be the case. But would this practice satisfy the definition as an “appeals process?” Similarly, while traditional SSOs require “no” votes to include reasons for a negative vote, with each such reason then being addressed, in writing, and reported back to the committee, most ICT consortia view these extra steps as being more burdensome than beneficial, and in any event unacceptably time consuming. Instead, opinions are expressed – often vigorously – in advance, after which an up or down vote is taken. The result is no less democratic, and helps serve the goal of rapid deployment of standards in a fast-moving, competitive environment.

⁴ Circular, Item 1. certain other references are consistent. For example, Item 6.g. repeats the same dictum, and acknowledges that other standards can be referenced in regulations and used in procurement, although these actions need not be reported.

alternatives.⁵ Does this mean that in any given instance non-voluntary, consensus body standards were consciously excluded from the statement, or simply that a “shorthand” reference was used? And how is the reader supposed to be able to tell what the intention is in a given case, given that it is clear (from other statements, e.g., in Items 9.1 and 6.g) that in some cases only the narrow definition is intended?

Not surprisingly, this writer is aware of situations in which private sector representatives favoring a standard developed by a traditional SSO have misrepresented to Federal personnel that, in fact, only standards developed by such an organization should be used in procurement, rather than a rival standard developed by a consortium.

The inclusion of this very specific, somewhat arbitrary definition of a voluntary, consensus body standard has had unfortunate effects outside the Act and the Circular as well. For example, when the National Cooperative Research and Production Act was amended in 2004⁶ to provide specific protection for SSOs, Congress opted to restrict this extended protection to SSOs that meet the Circular’s definition of a voluntary, consensus standards body.

In doing so, Congress likely excluded the vast majority of the consortia that have created untold thousands of the standards upon which our modern, ITC-based economy is based, and which have proven to be a boon to the competitiveness of U.S. industry, simply because their own internal rules did not conform to the specific requirements relating to appeals and consensus that the Circular chose to approve.

It is strongly to be recommended that if the Circular is amended, that the language quoted above should be modified to indicate that attributes such as those enumerated are typical of, but do not exclusively define, a “voluntary, consensus standards body.” Similarly, it should be made clear that participation by government representatives, and reporting under the Act, should extend to consortia and consortium-developed standards as well.

Otherwise, the Circular will serve to discourage and penalize SSOs from adopting those rule sets that are most appropriate to modern realities, will undercut Congress’s purpose in adopting the NTTAA, and will deprive

⁵ See, for example, Items 6 (“All federal All federal agencies must use voluntary consensus standards in lieu of government-unique standards...”) and 6.1.: (“Your agency must use voluntary consensus standards, ...”).

⁶ The National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, amended the National Cooperative Research Act of 1984, Pub L. No. 98-462, renamed it the National Cooperative Research and Production Act of 1993, and extended its provisions to joint ventures for production. The Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, extended the provisions of the NCRPA to standards development organizations.

Congress of important information regarding Agency involvement in national and international standards development activities and uptake of non-government unique standards.

Criteria for Referencing

As noted earlier, some consortia are more open than others. In its current form, the Circular notes criteria that some of these consortia (e.g., those that have adopted "by invitation only" rules of participation) would not meet. As currently written, the Circular rightly permits standards developed by such organizations to be utilized by the Federal agencies where appropriate. It is important that this flexibility be maintained in the area of ICT standards for the reasons given above – there may simply be no practical alternative where the marketplace has already chosen to uniformly implement a standard developed by such an organization.

However, there are other areas in which giving preference to standards developed by SSOs (consortia or traditional standards organizations) that meet certain minimum process and other standards may be appropriate, in order to achieve policy goals, as compared to simply serving the technology-neutral demands of government procurement. In Item 6.f., the Circular specifically acknowledges that Federal agencies not only may, but should, take into account additional criteria in making standards-related decisions, stating in part:

When considering using a standard, your agency should take full account of the effect of using the standard on the economy, and of applicable federal laws and policies, including laws and regulations relating to antitrust, national security, small business, product safety, environment, metrication, technology development, and conflicts of interest. Your agency should also recognize that use of standards, if improperly conducted, can suppress free and fair competition; impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety....

An important and timely example of an area in which such additional criteria should be taken into account involves the use of standards essential to the interaction between governments and citizens, and to the exercise by citizens of their constitutional rights.

The American experience of the last two centuries has demonstrated the need for constant vigilance in order to ensure that the unfettered exercise of constitutional rights remains available to all citizens. These rights include those of assembly, freedom of speech, voting, access to public representatives, and more. But today, each of these rights is increasingly exercised on the Internet rather than in person. Indeed, for budgetary and

other reasons, national, state and local government bodies are pushing more and more of their interactions out of courthouses and onto the Web.

Unless all citizens have the same access to Government-provided services, venues of expression, and information, they will be just as effectively disenfranchised as if they were barred from entering a courthouse. But unless governmental decision makers ensure that these services are accessible by all, regardless of their disabilities and the technology they can afford, citizens, and particularly those who are poor or disabled, will be so disenfranchised.

For this reason, I have previously proposed the recognition of what I call "Civil ICT Rights."⁷ I introduced the role that standards play in guaranteeing Civil ICT Rights as follows:

Much as a constitution or bill of rights establishes and balances the basic rights of an individual in civil society, standards codify the points where proprietary technologies touch each other, and where the passage of information is negotiated.

In this way, standards can protect — or not — the rights of the individual to fully participate in the highly technical environment into which the world is now evolving. Among other rights, standards can guarantee:

1. That any citizen can use any product or service, proprietary or open, that she desires when interacting with her government.
2. That any citizen can use any product or service when interacting with any other citizen, and to exercise every civil right.
3. That any entrepreneur can have equal access to marketplace opportunities at the technical, standards-mediated level, independent of the market power of existing incumbents.
4. That any person, advantaged or disadvantaged, and anywhere in the world, can have equal access to the Internet and the Web in the most available and inexpensive method possible.
5. That any owner of data can have the freedom to create, store, and move that data anywhere, any time, throughout

⁷ Updegrave, Andrew, "[A Proposal to Recognize "Civil ICT Rights."](http://www.consortiuminfo.org/bulletins/feb08.php#feature) Consortium Standards Bulletin, Vol VII, No. 2, February – March 2008, at: <http://www.consortiuminfo.org/bulletins/feb08.php#feature>

her lifetime, without risk of capture, abandonment or loss due to dependence upon a single vendor.

Since I wrote that article, the number of public-facing government initiatives launched on-line has dramatically increased. But while much progress has been made at the Federal level to ensure that on-line services will be both secure as well as user-friendly, only limited attention has been paid to whether every citizen can access those services, regardless of what technology they can afford, what technology they are capable of using, and whether or not government technology decisions arbitrarily limit the choices that every citizen, regardless of income or ability, can make when selecting ICT goods and services.

For these reasons, I would suggest that decisions relating to standards that are integral to government-citizen interaction – what one might reasonably refer to as “Civil ICT Standards” - be made in a different manner. I identified those standards as follows:

Standards in this class today comprise only a small, but vitally significant percentage of all standards. But they demand special attention in their selection and protection in their use, because their impact is both fundamental and far reaching. And, since some standards (like document formats) are intended for very long term use, it is more than usually important to select them carefully.

A number of existing Civil ICT Standards can already be readily identified. By way of example, they include those that enable universal global access in native character sets (the Unicode) and the basic standards upon which the Internet and the Web are based. In the future, Civil ICT Standards will include those that relate to health records, privacy, security, electronic voting, federated identity, and much more. Over time, they will become both more numerous as well as more important.

In the case of standards such as these, setting a higher bar in terms of process (e.g., guaranteeing broad stakeholder access, ensuring transparency to non-participants, preventing lock-in to a single technology platform, and avoiding unnecessarily high costs of acquisition) would be important. Moreover, in a limited number of cases, employing the “soft” power of public procurement could also provide opportunities and incentives to bring new competition into areas of the marketplace that have become dominated by a single vendor or service provider, providing lower costs, more competition, and richer consumer choices.

Summary

It is welcome and appropriate that comments have been solicited relating to whether and how any new guidance should be given under the Circular should refer to consortia. Since the date of the Circular's promulgation, the role of consortia, and the standards they develop, has continued to expand rapidly in the area of ICT (indeed, they are beginning to be found in other areas, such as pharmaceuticals, as well). In particular, the importance of ICT, and in particular the Internet and the Web, to both the public and private sectors has increased by orders of magnitude.

At the same time, the importance of U.S. ICT producers and service providers to the economy and to the nation's competitiveness in international trade continues to grow apace. The predominant role played by U.S. companies in forming consortia has played no small role in ensuring the continuation of this trend.

For these reasons, it is essential that Federal purchasers and regulators remain agnostic as to the source of ICT standards in the great majority of cases, and that Federal agency personnel give equal priority to participating in and supporting consortia. Congress should also receive timely information with respect to Federal involvement in the development and implementation of consortium standards.

At the same time, a distinction should be drawn between those standards whose origins have no relevancy to the exercise of Civil ICT Rights and those that do. In the latter case, I would suggest that any additional guidance should at minimum recognize the appropriateness of considering whether the selection of a given Civil ICT Standards would serve, neglect, or even prejudice, the exercise of an important Constitutional right.

I thank you for the opportunity to provide these comments, and look forward to the further dialogue that will be hosted on these important issues.

RESPONSES TO OMB REQUEST FOR INFORMATION

RE: FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES

RESPONSES THAT RECOMMENDED THE EXCLUSIVE OR PREFERENTIAL USE OF STANDARDS FROM SDO'S USING A CONSENSUS-BASED PROCESS:

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
Masco Corporation	Company	No	Standards development should be done <u>only</u> under the auspices of an ANSI accredited organization. See Sample Quote1	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0021
Association for the Advancement of Medical Instrumentation	Professional Association	Yes - ANSI Accredited	Govt. should have a preference for VCSDO's and a minimum requirement on the use of non-consensus standards See Sample Quote2	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0015
Alliance for Telecommunication Industry Solutions	SDO	Yes - ANSI Accredited	Keep requirement that govt agencies use standards developed only by SDO's that have a consensus procedure. See Sample Quote 3	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0031
Association of Home Appliance Manufacturers	Professional Association	Yes - ANSI Accredited	Maintain directive in its present form - comment implies that this means that standards developed by VCSDO's is required.	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0020

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
ANSI	SDO	Yes	Consensus is integral to standards development process.	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0024
Siemens	Company	No	Govt should continue to use standards developed by bodies that use consensus and a key principle. See sample quote 4	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0005
American Nuclear Society	Professional Association	Yes - ANSI Accredited	Standards developed by VCSDO's should be given highest priority and more weight than those developed by bodies without consensus principles. Agencies should be required to verify and document when standards from bodies without consensus principles are used. See sample quote 5	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0012
National Association of Convenience Stores	Professional Association	No	Govt should not rely on standards developed by non-consensus based standard setting bodies (like PCI). See sample quote 6	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0034
American Society for Testing and Materials International	CDO	Yes - ANSI Certified	Wide ranging comment in support of accredited VCSDO's (but no mention of non-consensus SDO's)	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0022
Society of Automotive Engineers International	Professional Association	Yes - ANSI Accredited	Would require consensus for SDO's, because otherwise, the standards might not meet WTO's Technical Barriers to Trade	
Alliance for Telecommunications Industry Solutions	Professional Association	Yes - ANSI Accredited	Supports continued focus on standards developed through a consensus process. Modification of OMB not necessary	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0031

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
American Chemistry Council	Professional Association	Yes - ANSI Accredited	Support amendment to OMB to establish a preference for consensus standards, except in limited circumstances. Conform definition of consensus to ANSI's definition. Provide clarity on when consensus standards should or must be preferred in govt regulatory activity. Any non-consensus standard must meet stringent criteria. See sample quote 7	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0071
Air-Conditioning Heating and Refrigeration Institute	Professional Association	Yes - ANSI Accredited	Strongly believes in the importance of consensus in standards development process. See Sample Quote 8	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0007
Intertek Testing Services NA	Company		Supports consensus based standards (but letter is really about conformity assessments)	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0028
Scott Rafferty	Individual		Comment is mostly about standards updating, but is against the use of non-consensus based standards, including by consortia. See Sample Quote 9	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0049
American Coatings Association	Professional Association	No	Requests supplemental guidance to encourage consensus-based standards and discourage use of standards that fail to satisfy consensus criteria. Also believe consensus requirements should conform to ANSI requirements. See Sample Quote 10	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0061
National Fire Protection Association	Professional Association	Yes - ANSI Accredited	Advocates for its own process that is consensus-based.	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0038

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
Petroleum Convenience Alliance for Technology Standards	SDO	Yes - Not ANSI Accredited	Would have government work with only VCSDOs. Warn that non-consensus based standard setting bodies are susceptible to market power influences. See Sample Quote 11	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0043
Information Technology industry Council	Professional Association	Yes - ANSI Accredited (I believe through International Committee for Information Technology Standards)	Strong preference for the use of consensus standards over non-consensus standards, including those developed by consortia. See Sample Quote 12	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0041

RESPONSES THAT RECOMMENDED THE INCLUSION OF NON-CONSENSUS BASED SDO'S :

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
Institute of Makers of Explosives	Professional Association	Yes (non-consensus) - Not ANSI Accredited	Believes certain specialized industries are well-served by non-consensus SDOs and other factors should be used to evaluate SDOs. See Sample Quote 13	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0051

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
World Wide Web Consortium	Consortium	Yes - Not ANSI Accredited	Described its own standards development procedure	http://www.regulations.gov/documentDetail;D=OMB-2012-0003-0040
American Society of Mechanical Engineers	Professional Association	Yes- ANSI Accredited	Continue to use Para 6(f) of the Circular with respect to both consensus and non-consensus standards, in conjunction with other considerations (state of acceptance, openness/inclusiveness, diversity, responsiveness, harmonization with global markets). See Sample Quote 14	http://www.regulations.gov/documentDetail;D=OMB-2012-0003-0010
Underwriters Laboratories Inc.	SDO and Product Tester	Yes- ANSI Accredited	Call for more transparency - issue public call for rulemaking efforts. Do not restrict to consensus based SDO standards. Use disclosed criteria in selecting a standards developer. See Sample quote 15	http://www.regulations.gov/documentDetail;D=OMB-2012-0003-0027
National Electrical Manufacturers Association	Professional Association	Yes- ANSI Accredited	Criteria used to determine qualification of standard should be whether the standard solves or facilitates the problem that the reg seeks to redress. Preference should be given to voluntary consensus standards	http://www.regulations.gov/documentDetail;D=OMB-2012-0003-0017
Intel	Company	No	Does not believe circular needs to change. Believes govt. should "focus" on attributes of voluntary consensus standards but lists other factors to be considered when evaluating standards activity. See Sample Quote 16	http://www.regulations.gov/documentDetail;D=OMB-2012-0003-0044
Aerospace Industries Association/ Strategic Standardization Forum for Aerospace	Professional Association	Yes - Not ANSI Accredited	Support circular's guidance on consideration of consensus and non-consensus standards and believes other criteria should be considered. See Sample Quote 17	http://www.regulations.gov/documentDetail;D=OMB-2012-0003-0019

Responder's Name	Type of Organization	SDO?	Comment Summary	Link
Internet Architecture Board/Internet Engineering Task Force	Professional Association	Yes - Not ANSI Accredited	IETF is concerned that it does not meet the condition of "balance" under the requirements of a VCSDO under the circular. They recommend that this requirement be eliminated or that the definition be returned to an earlier version of the Circular, which had a broader and more inclusive character.	http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0013

OTHER COMMENT OF NOTE

Cisco - The Company Cisco, in an expansive comment, suggested that the federal government specify what would qualify as a "voluntary consensus standard" and proposed that the requirements consist of (1) genuine openness, which will generally draw a sufficient cross-section of stake holders and (2) due process - fundamental fairness in how contributions are sought and considered - which will result in consensus around standards that enable broad interoperability. Whether this means that the other criteria (balance, appeals process and consensus) should not be considered or not emphasized is unclear from the comment. <http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0025>

Sample Quotes (opposed to Non-consensus Standards):

1. MASCO Corporation. Any Consensus Standards Development must be done under the auspices of an Accredited Standards Development organization which has been accredited by the American National Standards Institute (ANSI) and which is using ANSI's full due process system as part of the American National Standards process, resulting in an American National Standard. ANSI is the organization which represents the United States with in the International Standards community. ANSI has established processes which Standards Developers may use to ensure true balanced representation of stakeholder groups whose participation is very important to the development of sound standards, and works to prevent undue influence by groups who might otherwise work to create an unbalanced voting block.
2. Association for the Advancement of Medical Instrumentation. As a signatory to the Technological Barriers to Trade Agreement, AAMI believes that to support competitiveness of U.S. industry, the preference should be for voluntary consensus standards, and a minimum requirement for use of other types of standards should be that (a) there are no suitable standards developed by a voluntary consensus standards organization, and (b) the alternative standards developer meets the criteria for openness, due process, etc. set out in that agreement.
3. Alliance for Telecommunication Industry Solutions. ATIS supports the continued focus of Circular A-119 on standards developed through a consensus process, which has the other attributes identified in Circular A-119 of openness, balance, and due process. Modification, based on ATIS' experience, is not necessary even when sophisticated technical solutions require prompt attention and resolution. Indeed, elimination of Circular A-119's requirement for consensus processes would, in ATIS' opinion, risk the quality and nature of standardization, especially when standards are used by Federal or other government agencies. The risk posed by non-consensus procedures would be a qualitative lessening of the technical merit of the standard or other Deliverable because of the diminished opportunity for parties of interest to contribute to the development of such works, and could result in output that favors one interest over those of others. Where the standard or other Deliverable is used by Federal or other agencies, such risks should be particularly avoided.
4. Siemens. The World Trade Organization (WTO) has identified consensus as one of the key principles which it requires when identifying appropriate voluntary standards. These principles, which are listed in the WTO

Technical Barriers to Trade Agreement, emphasize the need for a process which is open, balanced and consensus-based for the development of standards.

5. American Nuclear Society. The NRC uses non-consensus standards, reports, and other documents generated by national organizations such as the Electric Power Research Institute, the Institute for Nuclear Power Operations, the Boiling Water Reactor/Pressurized Water Reactor Owner's Groups, and the Nuclear Energy Institute as part of stakeholder inputs relative to new or modified regulatory requirements. While ANS is fully supportive of the work done by these organizations, and of the Federal use of such information, ANS strongly recommends that the OMB upgrade A-119 to stress that the consideration of national and international Voluntary Consensus Standards (VCSs) be given the highest priority and be given more weight in supporting regulatory activities where other non-consensus documents are available on a particular technical subject area. ANS believes that such a distinction is required to realize the policy objectives of Public Law 104-113. Precedence accorded to VCSs is justified by the broader representation of industry users in development and approval of consensus standards and in the rigorous certification process imposed by ANSI. This consensus process provides a more objective stance in the generation of standards.
6. National Association of Convenience Stores. Standard-setting processes that are not based upon consensus run the risk of being susceptible to market power influences. If consensus is not the basis for developing and finalizing a standard, a consortium of powerful market participants could develop to impose their proprietary preferences on the process. This would undermine the legitimacy of the standard, potentially disadvantage less-powerful market participants and result in a standard that is inequitable and not as effective as it otherwise might have been. Indeed, such a scenario has already played out in the marketplace.

The lack of a federally recognized standard for ensuring the data security of consumers using electronic forms of payment (including debit and credit cards) has resulted in the development of a proprietary standard setting body, the Payment Card Industry (PCI) Security Standards Council (SSC). The PCI SSC has developed a series of requirements for securing payment data and cardholder identity which have not resulted in an effective, secure system. PCI SCC decisions are made by a panel of five stakeholders who represent one element of the financial services supply chain - the card brands. These requirements have been developed without meaningful input from other stakeholders within the financial transaction system, shift the burdens of compliance and liability of risk to other parties in the system, and have not resulted in the most secure system possible. Consequently, consumers, merchants and banking institutions are subject to an elevated risk of fraud.

7. American Chemistry Council. At a minimum, the definition of “consensus” should be changed to conform to ANSI’s definition: “substantial agreement among directly and materially affected interest categories.” Additional guidance would be needed, however, to address with specificity what this means in application.

We also suggest that additional clarification be made to discourage references to “consensus” standards that do not satisfy consensus-based standards development criteria even though they were developed by an accredited consensus SDO. This is a consistent source of confusion for the public and users of standards – the distinction between the standards body and the finished work product, the standard. We recognize that the NTTAA definition of “voluntary consensus standards” itself derives from the development process (“standards developed or adopted by voluntary consensus standards bodies, both domestic and international); we encourage OMB to determine whether it has the flexibility to further illuminate that definition in a way that would be both accurate and less confusing to the stakeholder community.

8. Air-Conditioning Heating and Refrigeration Institute . HRI strongly believes in the importance of consensus in the standards development process. AHRI is an ANSI-accredited standards developer that complies with ANSI’s Essential Requirements which cite consensus as one of the cardinal principles for the development of American National Standards (ANS). As an ANSI-accredited standards developer, AHRI conducts its work in a manner that is open to public scrutiny and that provides every stakeholder with an opportunity to be heard, without dominance by any party. Consensus is also a critical component of international standards development as articulated in the principles of the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement. A particular voluntary standardization process should also embody transparency, access and availability, coherence, and timeliness
9. Scott Rafferty. Consortia have emerged in high technology fields to respond to the perceived slowness of consensus bodies in maintaining standards that require very frequent revision. This model has many variations, is frequently international, and may operate independently of the ANSI/ISO process. It may provide for participation by both the promoters and adopters of technology. Rapidly moving markets may require flexibility, but the Center for Regulatory Effectiveness has written a white paper identifying some drawbacks of non-consensus standards, which includes many of those developed by “consortia.” There are often alternatives to consortium standards. X12 has contributed many of the Health IT standards so far incorporated into regulations. It operates on consensus principles and belongs to ANSI, but provides for guidance and interpretive documents to address issues that arise between standards revisions. At least one consortium consisting of some of the largest members

of X12 has emerged, but has not yet contributed a standard. In general, government should be cautious about substantial participation in consortia that are exclusive of some competitors.

10. American Coatings Association. The ANSI Essential Requirements provide a comprehensive set of consensus and due process requirements for consensus-based standards – including openness, balance, consensus, and appeals – and carefully detail benchmarks for each of these individual criteria. When compared to the ANSI Essential Requirements, Circular A-119 is less detailed and may not provide adequate guidance to federal agencies. Although A-119 draws on the principles of openness, balance of interest, due process, and an appeals process for voluntary consensus standards, it lacks definitions of these concepts and does not include a clear mandate to ensure referenced standards meet these criteria. The Circular A-119 would be well served by adopting ANSI’s definitions, especially that of “consensus” itself. We encourage OMB to incorporate ANSI’s definition of consensus and its due process procedures into Circular A-119.

ACA also requests supplemental guidance in Circular A-119 to encourage references to consensus-based standards and discourage the use standards that fail to satisfy the consensus-based standards development criteria outlined in A-119 Section 4. We believe there should be a preference for consensus standards over non-consensus standards in Circular A-119 based on the language in the National Technology Transfer and Advancement Act of 1995 (National Technology Transfer Act), Public Law 104-113. The National Technology Transfer Act directs all federal government agencies to use standards and conformity assessment solutions developed or adopted by voluntary consensus standards bodies, where feasible, instead of developing government-unique standards and regulations. There is no mention of promoting the use of non-consensus standards over government-unique standards in the statutory language. Consistent with this reading, OMB should amend Circular A-119 to provide clear guidance to federal agencies that the preference for private, voluntary consensus-based standards does not also extend to non-consensus standards.

11. Petroleum Convenience Alliance for Technology Standards. While we understand OMB’s suggestion that it might be “important to recognize the contributions of standardization activities that take place outside of the voluntary consensus process, in particular certain activities in emerging technology areas,” PCATS is concerned that this statement could lead to official reliance on non-consensus based standard setting bodies.

Standard-setting processes that are not based upon broad industry consensus run the risk of being susceptible to market power influences. If consensus is not the basis for developing and finalizing a standard, a consortium

of powerful market participants could develop to impose their proprietary preferences on the process; creating potential impairment to economics and innovation of using such standards.

As an example, the lack of a federally recognized standard for ensuring the data security of electronic forms of payment (including debit and credit cards) has resulted in the development of a proprietary standard setting body, the Payment Card Industry (PCI) Security Standards Council (SSC). The PCI SSC has developed a series of requirements for securing payment data and cardholder identity which have not resulted in an effective, secure system. PCI SCC

12. ITI supports voluntary consensus standards, as defined in the Circular, referenced in regulatory rulemaking, procurement, and other activities. Voluntary consensus ICT standards are developed in many venues. They are created through collaborative efforts that have a global reach, are voluntary and are widely adopted by the marketplace across national borders. These standards are developed not only by ISO, IEC and ITU, but also by consortia groups and other standards setting organizations (SSOs).

On the other hand, regulatory reference of non-consensus standards can potentially result in substantial costs or inefficiencies being imposed upon both the sector and the economy as a whole, leading to higher costs, higher prices, misallocation of resources, a lack of product innovation and poor service quality. U.S. government must be very cautious not to lend itself to distortions of the market and create uneven playing fields. Note also that ITI has observed the problems that can result when a country establishes mandatory technical requirements, by law or by regulation, by referencing a standard that is not globally accepted.

Sample Quotes (not opposed to Non-consensus Standards):

13. As noted above, IME SLPs are developed and maintained by professional engineers and technical experts with intimate and extensive knowledge of the manufacture, transportation, storage, use and disposal of commercial explosives products. Use of a voluntary consensus standard-setting process with its associated public participation component would not add value to the SLP standards and could potentially detract from the quality of the publications and slow the process of development and revision. These standards are appropriately developed and maintained by experts in the field. Accordingly, we recommend that OMB continue to recognize the value of voluntary non-consensus standards and encourage their incorporation by reference (“IBR”) into federal regulations where appropriate.

14. American Society of Mechanical Engineers . Agencies should continue to use Para. 6(f) of the Circular with respect to both consensus and nonconsensus standards. Other considerations may include: the state of acceptance within industry as a best practice; the openness/inclusiveness of the underlying standards development process (including the agency’s ability to participate); the diversity of stakeholders impacted by the standard (class of persons affected/regulated entities); the responsiveness of the standard to advancements in technology and evolving industry needs; the need for harmonization with global markets; and appropriate compliance with principles established by the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement.
15. Underwriters Laboratory. UL believes that the government should not restrict itself to using and referencing only consensus standards, but instead look to the ultimate objective to drive the selection of a standard or standards. This is not uncommon to how accredited SDOs like UL approach standards development. UL uses its technical expertise and knowledge of the market to develop standards that meet a variety of needs. In practice, consensus standards often result in effective minimum requirements, agreed upon by industry, standards development organizations, regulators, consumer advocates, and other interested stakeholder groups. In safety, security, and health-related scenarios, a consensus standard creates a level playing field, which provides a clear set of expectations for new and current suppliers.

Consensus standards sometimes lag behind market developments. For industries with short development cycles or for rapidly emerging technologies, SDOs may employ different development techniques (such as UL’s Outlines of Investigation, OOI) to offer industry and other stakeholders a platform to document preliminary requirements that act in the short term, as a baseline. In such circumstances, UL, for example, can choose to proceed with an OOI that is grounded in science, drives technical consistency in approach to innovative products, and serves as a record of requirements applied during early stages of innovative product deployment in the market. Many industries view this approach to standards development as an important way to facilitate market acceptance of new products. Because of the OOI approach, new technologies can achieve critical mass in the market or mature to the point where consensus can be achieved.

While the result is valuable, pursuing consensus standards can be an arduous, expensive and ultimately uncertain endeavor for standards developers and all those participating in the process. Competitors in a particular industry, offering products of varying levels of performance, are inherently unlikely to agree. When a wide range of stakeholders with other interests are added to the mix, a technical standards panel can often become quite contentious. When members of a standards panel have strongly held and diametrically opposed views, it can

require significant time and resources to work through the consensus process and complete a standard. In some cases, it has taken three to five years to reach consensus. In some extreme cases, reaching consensus can take decades to achieve, if at all.

16. Intel. Intel recognizes that OMB A-119 specifies the use of voluntary, private sector, standards over development of unique government standards, with focus on attributes of voluntary consensus standards. When evaluating any standards activities, it is recommended for agencies to take the following factors into consideration:

inclusion of “provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties”

maturity, quality and performance of the technical specifications

market adoption of the standards (domestic and global)

in certain activities, such as emerging technology areas, public consultations with the private-sector may be beneficial

17. Aerospace Industries Association/ Strategic Standardization Forum for Aerospace. We support the Circular’s guidance regarding consideration of standards as it applies to any voluntary standard -- consensus or non-consensus. Given the critical safety aspects of our industry, as well as the global nature of our business, we advocate that consideration of standards should be based on suitability to meet performance, safety, and quality as well as national and international regulation and certification needs appropriate to the product and the intended use of the standard. Additional guidance on selection of standards developed in accordance with the principles established by the World Trade Organization (WTO) Technical Barriers to Trade, would be helpful.

18. Internet Architecture Board/Internet Engineering Task Force. We believe there is no reason to incorporate an express “balance” requirement in the definition of “voluntary consensus standards bodies”. This requirement, to the extent that it is meaningful, is largely duplicative of the “openness” and “due process” prongs of the definition. The term “balance” is not mentioned in the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. Law 104-113 (1996)), which prompted the 1998 revisions of Circular A-119. In the statement of Sen. Rockefeller in support of the passage of the NTTAA (104 Cong. Rec. S1078, S1080, Feb. 7,

1996), he explicitly mentions the IETF as one of two specific examples of "legitimate consensus standards organization provid[ing an] open process in which all parties and experts have ample opportunity to participate in developing the consensus." The legislative history of the NTTAA thus clearly indicates that the IETF's procedures should qualify it as a voluntary consensus standards body, notwithstanding the absence of formal "balance" procedures.

Finally, no such "balance" requirement existed in any version of Circular A-119 prior to 1998. In all such prior versions of the Circular (45 Fed. Reg. 4326 (1980), 47 Fed. Reg. 49,496 (1982), 58 Fed. Reg. 57,643 (1993)), the definition of "voluntary standards bodies" encompassed "nongovernmental bodies which are broadly based, multi-member, domestic and multinational organizations including, for example, non-profit organizations, industry associations, and professional technical societies which develop, establish, or coordinate voluntary standards." We believe that this definition better reflects the true character of "voluntary consensus standards bodies" in the United States, and clearly includes groups such as IETF.