May 12, 2014

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
U.S. Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Submitted Electronically

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

Dear Mr. Administrator:

Intel Corporation appreciates the opportunity to provide inputs to the Federal Register notice submitted by the Office of Management and Budget (OMB) regarding its proposal to revise OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities."

Intel is a world leader in computing innovation. The company designs and builds the essential technologies that serve as the foundation for the world's computing devices and equipment. Standards are critically important to U.S. and global industry, and especially in the ICT sector, the emphasis on global standards is vital to spur innovation and economic growth and to enable interoperability. For these reasons, Intel invests heavily in standards development efforts around the world.

Under the US standardization system, industry and government have an especially important partnership -- standards bodies are industry-led and government is an important participant together with other stakeholders to develop voluntary standards which meet global market and national interest needs. Circular A-119 has worked well because of its flexibility in allowing industry and government to quickly respond to changes in the market and adapt to new and innovative technical and business solutions. Intel believes the proposed revision to Circular A-119 improves upon this sound approach. Moreover, the additional clarity and content in the proposed revision will be helpful to other governments who are struggling to determine how much to intervene in standard development activities led by the private sector.

Intel would like to specifically highlight the following elements of the proposed revision of A-119 that we believe are important and helpful:

- The proposed revision establishes clear preferences for using relevant international standards, which complies with U.S. obligations under international trade agreements[1] and reflects how global industry is structured. The ICT industry develops products and services via global supply chains and delivers them to satisfy global markets. Unique, country-specific standards present significant obstacles to the ICT industry, especially where interoperability is important. We believe the imperative for global standards will grow as ICT technologies are incorporated in other sectors. In specific areas where governments regulate to protect health, safety and the environment, global standards have the potential to help harmonize technical regulations around the world. Intel fully supports the increased emphasis on international standards in the proposed revision.

- The proposed revision provides new guidance on conformity assessment procedures, in particular by providing guidance on which type of conformity assessment should be used and on noting the importance of conducting a risk analysis prior to implementing any conformity assessment requirement. Intel supports this additional guidance and believes it will help achieve more consistent use of conformity assessment best practices across federal agencies.

- The proposed revision more clearly describes how standards may be incorporated by reference in regulation. It is important to recognize that some standards bodies have business models that rely on the sale of standards, and those models should be respected. The proposed revision facilitates public access to standards referenced in proposed regulation while respecting standards body business models. In addition, it has been shown that many standards referenced in regulations are out of date. The new guidance on how to update standards incorporated by reference in regulation is likely to improve the relevance of standards that have been made mandatory through reference in regulation.

- Participation by U.S. government representatives in the voluntary standards process is an essential component of the public-private partnership envisioned by the NTTAA. The additional guidance in the revised circular on involvement in discussions, registering of opinions and serving in leadership positions will help strengthen this partnership.

Intel has the following additional recommendations for the revision of Circular A-119:

In the definitions section, Intel recommends modifications to improve clarity and to align the criteria with common practices in voluntary consensus standards organizations

- 3(d) "Voluntary standard" may be more clear if changed to "Voluntary Standard or Voluntary Specification" to encompass the range of standards and other deliverables

[1] WTO Agreement on Technical Barriers to Trade, Preamble, Article 2.6 and Annex 3 (Code of Good Practice, Substantive Provisions F & G).

that meet the definition in 3(d) but may not meet all the principles described in 3(f). Because “consensus” is one of the attributes called out in 3(f), it is not necessary to include it in the title, and the distinction may not be correct since many voluntary specifications are also developed using consensus processes. Corresponding changes should be made in other definitions: 3(e) would become “Voluntary Standard”, 3(f) would become “Voluntary Standards Bodies”. Any deliverables from organizations that do not meet all the attributes of 3(f) would be called “Voluntary Specifications”, which could be a new defined term. Later in the document, the term “Voluntary non-consensus standards” should be replaced by “Voluntary Specifications”.

- 3(i) Openness: We support the definition of “openness” which refers to the openness of the body for participation on a non-discriminatory basis to all interested parties (both domestic and foreign), as well as, transparency of the body’s procedures and processes. However, the words “all stages” in the phrase “such parties are provided meaningful opportunities to participate at <u>all stages</u> of standards development” is unnecessarily limiting when considering the standards development processes of various voluntary consensus bodies. These bodies typically specify participation levels for the stages of standards development which correspond to different categories of participation that may be identified at an organization level or working group/project level – there is still openness and non-discrimination, as parties voluntarily choose their level of participation based on their respective interests in the standards development process. Additionally, standards bodies may also have processes to receive contributions from external technical working groups or other standards bodies when considering new areas for standards development (to meet objectives such as: timely development to meet market needs, minimize duplication/ market-fragmentation etc.) - in these cases, the external working groups or other standards bodies work would focus on the final technical and approval stages. Therefore, it is recommended to replace the phrase with “such parties are provided meaningful opportunities to participate in the standards development process”.

- 3(iii) Due Process: We support the key concepts defined for “due process”, however, it is recommended that the definition be improved to consider the standards development process of various voluntary consensus bodies. Specifically, to make distinctions between recommended publicly available information (for example – policies and procedures, scope of standards projects) and information which may be made available to participants engaged directly in the standards development process.

- 3(v) Consensus: We support the definition for “consensus”, with the additional recommendation to remove the word “open” from the second sentence since “openness” is already specifically defined as a separate term.

Process recommendation for use of voluntary non-consensus standards (policy section 6a):

It is recommended that reporting requirements for the use of other standards (ie. other than voluntary consensus standards) be formalized to include: public notification from the federal agency regarding the intention to use other standards, rationale and evaluation process and a 60-day review public comment period (prior to final decision by the agency). Such a policy for use of other standards would also set a helpful example for foreign governments.

The Need to Promote to Other WTO Members the Robust U.S. Measures That Protect Confidential Information Required to Show Conformity

Foreign governments are developing an increasing number of overbroad conformity assessment procedures and other regulatory schemes that require the unnecessary submission of confidential information or trade secrets as a condition of market access. As recognized by USTR in its 2011 TBT report, in the food industry there are increasingly intrusive demands from a number of governments for compositional information about flavor imports and related products. As another example in the ICT industry, various sources have pointed out concerns with China’s requirements for source code disclosure as part of its conformity process for certain information security products[2]. And several years ago, the Indian Ministry of Communications and Information Technology published new rules on security clearance for telecom equipment that required source code to be deposited in escrow accounts; this requirement was removed due to international pressure[3]. The more sensitive information that is required to be submitted to governmental authorities, the greater the risk that some of it will leak to a submitter’s competitors and thus undermine innovation and investment. This risk is compounded by the reality that many governments have inadequate safeguards to protect such information.

We recognize that in certain circumstances some proprietary product information needs to be provided to governments, including ours, for legitimate health, safety, security and other reasons. In such cases, however, U.S. agencies have very detailed procedures to protect confidential business information (*see, e.g.,* 40 CFR Part 2). Most other governments, in

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[2] See squiresanders bulletin on compulsory certification of information security products/; USITO Written Comments to the U.S. Government Interagency Trade Policy Staff Committee In Response to Federal Register Notice Regarding China’s Compliance with its Accession Commitments to the World Trade Organization (WTO) (September 24, 2014).

[3] (See http://madb.europa.eu/madb/barriers_details.htm?barrier_id=115396&version=1).

contrast, lack such detailed procedures. As noted below, the requirements in the WTO TBT Agreement to minimize requests for unnecessary information, and to protect any required confidential information, are worded in general terms only. As such, they do not alone provide sufficient guidance or deterrence to prevent disclosures (unintentional or otherwise) of confidential information submitted to foreign agencies in response to their requests to show conformance to an increasing number of emerging technical regulations and standards.

Ideally, the revised circular would summarize in a crisp manner the multitude of procedures that U.S. agencies have to safeguard any confidential information submitted to them. This written summary could then be used as a model of best practices for other governments to emulate on how to effectively protect confidential information. The use of the Circular in this manner would be consistent with Executive Order 13609 ("Promoting International Regulatory Cooperation"), which in part "encourages the development of Federal strategies to promote good regulatory practices internationally…." (Circular A-119, p. 3). With those purposes in mind, we suggest that the following edits be made to section 8.b(ix) (proposed new language in red):

> As required by the WTO TBT Agreement, the need to ensure that information requirements for conformity assessment are limited to what is necessary to assess conformity and determine fees. The TBT Agreement also requires each WTO member to ensure that the confidentiality of information about products originating in the territories of other Members, and supplied in connection with conformity assessment procedures, is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected.
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> Pursuant to these TBT requirements, U.S. agencies must (i) have the burden to justify confidential information requests as necessary to show conformity; and (ii) take protective measures so that any confidential or proprietary information that suppliers submit to an agency is not communicated, whether intentionally or inadvertently, to any person or organization not having legal right to such information. United States agencies have, in fact, implemented robust measures to protect confidential information submitted to them (*see, e.g.,* 40 CFR Section 2, applicable to the federal Environmental Protection Agency). These measures are enforceable against the officials that administer them (*e.g.*, Section 2.211). Among various requirements, the measures expressly prevent disclosure-- even to other government agencies unless carefully justified (*e.g.*, Section 2.209(c)), and establish specific procedures that require the submitter to identify the confidentiality of information submitted so that it can be validated and segregated from non-confidential information (*e.g.*, Sections 2.203 and 2.208). In conjunction with Executive Order 13609 ("Promoting International Regulatory Cooperation"), U.S. agencies should share the measures they have implemented to protect confidential information with foreign officials who are responsible for conformity assessments in counterpart agencies.

Clarifications on sections that address the inclusion of patented technologies in standards and the IPR policies used by standards bodies to ensure Fair, Reasonable and Non-Discriminatory access to any Standards Essential Patents

As noted on pages 5-6 of the proposed revisions to Circular A-119, "OMB is interested in receiving comments from the public regarding whether it should consider *providing more specific guidance* for agencies with respect to intellectual property rights (IPR)-related considerations with regard to standards" (emphasis added). Specifically, with regard to the use of a standard by a federal agency, OMB is interested in "what factors, if any, should an agency consider regarding the interests of intellectual property holders whose intellectual property is incorporated in the standard and the interests of parties seeking to implement that standard?"

In recent years, several federal agencies and courts have provided direct guidance on (i) the meaning of certain aspects of FRAND; (ii) the types of licensing practices by holders of FRAND encumbered standard essential patents ("SEPs") that can undermine the benefits of standard setting; and (iii) the steps that Standards-Setting Organizations ("SSOs") can take to help address those issues and other aspects of FRAND. OMB should ensure that other federal agencies are made aware of such guidance, which has been developed since the last revision to Circular A-119. As an example, to avoid patent hold-up, both the USTR and the Court of Appeals for the Federal Circuit have provided explicit guidance that injunctive relief or its equivalent should not be available for FRAND-committed SEPs except in very limited circumstances.[4] Additionally, several recent Federal District Court decisions have addressed how best to calculate "reasonable" royalties in the context of FRAND-committed SEPs.[5] Finally, some DOJ and FTC officials have indicated that SSOs should take steps to ensure access to SEPs for all implementers, to prevent patent hold-up, and to balance the interests of *both* patent owners and standards-implementers.[6]

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[4] Letter from Ambassador Michael Froman, USTR, to ITC Chairman Irving Williamson (August 3, 2013) (*available at* http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF);
Apple, Inc. v. Motorola, Inc., Nos. 2012-1548, 2012-1549 (Fed. Cir. 25 Apr. 2014) (*available at* http://www.cafc.uscourts.gov/images/stories/opinions-orders/12-1548.Opinion.4-23-2014.1.PDF). "Patent hold-up" occurs when, after a patented technology has been standardized, a SEP holder that has made a FRAND commitment uses injunctive relief or threatens its use to extract unreasonable royalties from potential licensees.

[5] *Microsoft Corp. v. Motorola, Inc*., 2013 WL 2111217 (W.D. Wash. 2013); *In re Innovatio IP Ventures, LLC Patent Litig*., 2013 WL 5593609 9 (N.D. Ill. 2013), *available at* http://scholar.google.com/scholar_case?case=16686656429682855701&q=%E2%80%A2%09In+re+Innovatio+IP+Ventures,+LLC+Patent+Litig&hl=en&as_sdt=6,33); *Realtek Semiconductor Corp. v. LSI Corp*., 946 F.Supp.2d 998(N.D. Cal. 2013), *available at* http://scholar.google.com/scholar_case?case=10159752723719911807&q=946+F.Supp.2d+998&hl=en&as_sdt=6,33; *Apple, Inc. v. Motorola, Inc*., 869 F. Supp. 2d 901 (N.D. Ill. 2012) (*available at* http://scholar.google.com/scholar_case?case=5628920475413786680&q=869+F.+Supp.+2d+901+&hl=en&as_sdt=6,33) *, rev'd in part*, Nos. 2012-1548, 2012-1549 (Fed. Cir. 25 Apr. 2014) (*available at* http://www.cafc.uscourts.gov/images/stories/opinions-orders/12-1548.Opinion.4-23-2014.1.PDF) (the appellate decision addressed the injunction issue but not the level of a FRAND-compliant royalty).

[6] *E.g.,* Renata Hesse, "Six 'Small' Proposals for SSOs Before Lunch," Remarks as Prepared for the ITU-T Patent Roundtable, Geneva, Switzerland (October 10, 2012) (*available at* http://www.justice.gov/atr/public/speeches/speech-hesse.html); Kai-Uwe Kuhn, Fiona Scott Morton, & Howard Shelanski, "Standard Setting Organizations Can Help Solve the

Intel sees tremendous value in this balanced approach to the licensing of FRAND-committed SEPs. A balanced approach fully respects intellectual property rights by appropriately rewarding innovators for their patented innovations while also preventing SEP owners from behaving in anticompetitive ways that can undermine the key benefits of standard-setting. In furtherance of this balanced approach, and in light of the guidance provided by government agencies and courts, Intel believes the evaluations and considerations described in Circular A-119 should take into account the following principles:

- A commitment to license SEPs on FRAND terms is a commitment to license every user or implementer of the relevant standard, and such license may not be conditioned on licensing patents that are not essential for that standard;
- Injunctions and other exclusionary remedies should not be available on FRAND committed patents except in limited circumstances;
- A FRAND royalty should reflect a number of factors including a royalty based on the smallest unit that practices the standard, the technical value of the patented technology compared to alternatives available during the standard-setting process, and the overall royalty that could reasonably be charged for all patents essential to the standard; and
- FRAND commitments follow the transfer of a patent to subsequent owners.

Based on these principles, we suggest the following edits be made to the text on pages 22, 24 and 30 of the proposed revision to Circular A-119:

In response to 6(e)(ii), (Page 22):

Revise the second paragraph as follows (proposed new language in red):

This evaluation should include consideration of the economic effect of the intellectual property rights (IPR) policies of the voluntary consensus standards bodies, or of a specific standard or specification, on standards implementers, such as the extent to which any and all entities practicing the standards are able to 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 (e.g., the use of injunctions to extract unreasonable royalties or the refusal to license all implementers); impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety. If an

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Standard Essential Patent Licensing Problem," CPI Antitrust Chronicle, March 2013 (*available at* https://www.competitionpolicyinternational.com/assets/Free/ScottMortonetalMar-13Special.pdf)

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)) of Executive Order 12866, "Regulatory Planning and Review"), the analytical requirements of other relevant executive orders, and other documents described in section 1 of the Circular.

In response to 6(e)(iii)(3), (Page 24):

Revise the paragraph as follows (proposed new language in red):

(3) The extent to which the body when preparing the standard reflected the attributes of voluntary consensus standards bodies set out in section 3f of the Circular. The policies of standards developing bodies regarding the development and implementation of the standard should be easily accessible. Further, the rules for determining participation, balance of representation, opportunity for review and comment, and consensus, as well as the rules for ensuring availability of a license for the SEPs applicable to a particular standard, should be clear and unambiguous;

In response to 6(j), (Page 30):

Revise the guidance as follows (proposed new language in red):

j. What should my agency consider with regard to intellectual property and the development of standards?

Many standards developing bodies have policies which require participating IPR holders to commit to license any patented technology incorporated into a standard on reasonable and non-discriminatory, or "RAND," terms. Some policies may go into detail to address different aspects of RAND, such as the availability of licenses to all implementers, what constitutes reasonable compensation to patent holders, and the limited circumstances under which a RAND-committed patent may be used to sue for injunctive or similar relief, among others. Such policies should be easily accessible and the rules governing the licensing of IPR should be clear and unambiguous. Before selecting a standard for its use, and as part of its participation in developing voluntary consensus standards, an agency should consider how a particular SSO patent policy balances the interests of both the IPR holders and those seeking to implement the standard. As an example, a balanced approach may include the following basic principles:

- A commitment to license standard essential patents on FRAND terms means a commitment to license every user or implementer of the relevant standard, and such license may not be conditioned on licensing patents that are not essential for that standard;
- Injunctions and other exclusionary remedies should not be available on FRAND committed standard essential patents except in limited circumstances;

- A FRAND royalty should reflect a number of factors including a royalty based on the smallest unit that practices the standard, the technical value of the patented technology compared to alternatives available during the standard-setting process, and the overall royalty that could reasonably be charged for all patents essential to the standard; and
- FRAND commitments follow the transfer of a standard essential patent to subsequent owners

Clarification on reasonable availability guidance

On page 34, section P, the guidance on "Reasonable Availability" should be focused on standards used for regulatory context only (as covered in the OMB A-119). It is not necessary to impose such a requirement on standards not referenced in regulation and such a requirement may have unintended consequences.

We recommend to make the following text change (removes the "non-regulatory context" phrase):

> p. How should my agency determine whether a voluntary standard is "reasonably available" in a regulatory context?

In addition, also on page 34 section P, the factor for "Free access to the standard during the comment period" should not be more stringent than the WTO Agreement on Technical Barriers to Trade (reference Annex 3: Code of Good Practice, Substantive Provisions, Article M), which recognizes the option for non-discriminatory fees to access draft standards. For alignment with the WTO TBT Agreement, we recommend a change to the text (proposed new language in red):

> Whether the standards developer is willing to make read-only access to the standard available, for free or at a reasonable cost on its website during the comment period, since access may be necessary during rulemaking to make public participation in the rulemaking process effective

On page 35, section P, we propose additional guidance after the sentence: "The absence of one or more of these factors alone should not be used as a basis for an agency decision not to use the standard." A recommended additional sentence would align with other guidance in OMB A-119 that encourages collaboration of agencies with standards organizations:

> "Agencies should also consider direct consultation with the relevant standards developer on options for access to standards or necessary information during the rulemaking decision making process".

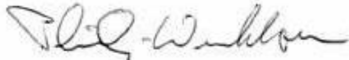
Conclusion

Intel supports this revision of OMB Circular A-119 and notes the improvements including clear preferences for using international standards, new guidance on conformity assessment procedures, clarity for how standards may be referenced in regulations and encouragement for participation by government representatives in the development of voluntary standards.

Intel recommends some further changes to the draft revision including: modifications to the definitions section to improve clarity and to align with voluntary standards practices, elaboration of safeguards for protecting confidential information that may be required to show conformity, clarifications on sections that address the inclusion of patented technologies in standards and clarification on reasonable availability guidance.

Intel very much appreciates the opportunity to provide these comments.

Sincerely,



Philip Wennblom
Director of Standards
Intel Corporation
Email: philip.c.wennblom@intel.com