

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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202/463-5310

March 7, 2011

Dr. Patrick Gallagher
Under Secretary of Commerce for Standards and Technology
Director, National Institute of Standards and Technology
100 Bureau Drive, Stop 1000
Gaithersburg, MD 20899-1000

RE: FR Doc. 2010-30864
Effectiveness of Federal Agency Participation in Standardization in Select Technology
Sectors for National Science and Technology Council Subcommittee on Standardization

Dear Director Gallagher:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is aware that the federal government has been for some time undertaking a comprehensive assessment of the U.S. standard setting process. We are pleased that you have extended this dialogue to now include public participation through this request for information.

In inquiring as to the appropriate role of government in standard setting, the interface standards can have with intellectual property (IP), competition matters, and finally the challenge of understanding standardization in a global trade and U.S. competitiveness context, the request for information accurately captures the current complexity of policy development with regard to standards. In short, the Chamber strongly believes that the current U.S. approach to standards, with its hallmarks of being private sector driven, voluntary in nature, and consensus-based, has served the interests (of regulators, businesses, and consumers alike).

Given the challenges American businesses face internationally and the important role standards have always played in bringing about convergence, the Chamber firmly believes that the U.S. approach to standards and the flexibility it brings is a competitive advantage to the United States, not a handicap.

As a result of this consultation, the Subcommittee on Standards is likely to accrue many specific comments; however, the Chamber has chosen to make the following general comments in strong support of the current private sector, voluntary, consensus-based standard setting system. Our strength, being the largest broad-based business group with international reach, gives us the understanding needed to directly support the comprehensive nature of the current interagency exercise.

Private Sector Driven

The critically important, but limited, role for government in standard setting has served not only the interest of industry and consumers alike, but also the interests of the U.S. government. A mandate for government to develop government-unique standards has been in most instances correctly rejected as a result of the National Technology Transfer and Advancement Act of 1995 and the Office of Management and Budget Circular A-119, which while encouraging agencies to be active in standard setting, also appropriately directs them to utilize private-sector standards when using standards as a basis for regulation or other government purposes.

In a collaborative, private sector driven approach government involvement is both welcome and essential. In addition, where government has taken an active role in a standard setting exercise, its presence as a stakeholder is routinely respected to ensure its needs and concerns are addressed.

There are many instances where government has identified a need for a standard, but no sufficient standard currently exists. One of the strengths of the U.S. standard setting system is that government, through its involvement and inclusion in standard setting, can present the need for a new standard to a standard setting body. The resulting standard not only meets the need of regulators or other government agencies, but as a result of the collaboration with the private sector a high-quality, better understood, more easily deployable standard often emerges.

Similarly, conformity assessment (when supplier's declarations of conformity is not desirable) carried out by third-party, private sector organizations is a well established and proven approach to market surveillance. When there is a need for further formal assurance of the competence of conformity assessment bodies, accreditation by internationally recognized accreditation bodies should be the preferred means of assurance.

A stronger government hand in standard setting, however, could quickly become problematic should the government increasingly put itself in the position of setting standards. While standards that are both designed and mandated by government may have the advantage of being developed quickly, such a rigid approach also leads to an overall poor quality of standards as well as any number of unintended consequences, including potential foreclosure of innovation, for example, in the ICT sector.

A top-down approach to standardization can frustrate normal marketplace outcomes, resulting in possible trade barriers, fewer competitive outcomes and choices for users, and decreased incentives to invest in further innovation in impacted technology sectors. The U.S. government has worked hard internationally to counter such an overly strong foreign government influence over standard setting processes and outcomes.

The current approach to U.S. standard setting provides agencies the necessary policy tools needed; however, it requires agency engagement to take advantage of those tools. Inter-agency involvement is important to ensure that high-quality standards are developed to address agency needs. The Chamber recommends that agencies make participation in standard setting a greater priority and dedicate the necessary resources to ensure adequate participation.

Leadership and involvement in private sector developed standards should be central to all agencies' standards-related strategies. The adoption and adherence of standards, developed in collaboration with the relevant agencies, helps to manage the government's need for standards and creates an environment where standards users enjoy a high degree of confidence in the standards.

Voluntary & Consensus Based

The voluntary and consensus-based nature of the U.S. standard setting system is key on several levels as it relates to government involvement in standard setting. An increasing concern by some in government is the intersection among standards policy, intellectual property policy, and competition policy. These complicated issues are not only of interest to U.S. government officials, but also countries that represent our largest trading partners. As a result, it is important that the U.S. government approach these issues in a consistent manner and remains mindful that our approach at home is material to our ability to advocate on behalf of U.S. competitiveness and IP abroad. However, the voluntary and consensus based approach of the U.S. system largely and adequately addresses the very infrequent IP and competition related concerns that arise.

The Chamber believes that getting the balance right with regard to the interface among standards, IP, and competition is critical. Owners of intellectual property need to be afforded the appropriate accompanying rights. Further, governments have a duty to protect and respect those rights and not undermine them at a later date both to maintain the rule of law as well as to incentivize future innovation. Finally, markets need competition in order to enhance consumer welfare, promote efficiencies, and generate economic growth.

Thousands of standards are developed each year without competition concerns or IP-related legal problems. Further, the private-sector led standards setting organizations are in the best position to define and evolve IPR policies that meet the needs of the market. IPR policy varies across sectors – there is no single right answer. While some concerns have been raised, thousands of standards are developed each year without substantial IPR problems. In brief, the private-sector led system is working.

It is not surprising that problems in standard setting are statistically rare because standard setting organizations (SSOs) in general employ good processes adapted to fit particular circumstances and varying from one another in part because of legitimate differences of opinion about what is best, which are resolved by market experience according to industry needs.

SSOs typically have broad memberships and thus pro-competitive incentives to find the optimal balance between the interests of IP holders, who need to be able to seek RAND licensing terms for use of their innovations; manufacturers, who need access to technology; and customers, whose patronage is needed by both IP holders and manufacturers. SSOs have developed practices that have been tested over time and continue to be refined based on how best to achieve the proper balance among the different stakeholder groups.

Such important governance practices include the need for transparent processes, the inclusion of all interested stakeholders, and the clear recognition that those stakeholders each are

motivated by their own self-interest. Governance principles for standard-setting bodies also require that they be unbiased, offer an unrestricted approach, remain open to the adoption of more than one standard, and remain grounded in a voluntary compliance framework.

Typically in a SSO's IPR policy, there is a requirement for good faith disclosure with regard to any underlying intellectual property rights that are essential to the use of a potential standard and a related licensing commitment statement. In addition, a number of standard-setting bodies have policies that are "participation-based," where all participants agree in advance that they will license IPR that is technically essential to practice the final standard that is adopted on RAND terms (with or without compensation). These approaches are working and there have been few problems.

The Chamber is aware of two narrow situations where government intervention may make sense. First, government clearly has a duty to enforce competition laws in to ensure no collusion occurs among SSO members that could undermine established SSO decision-making procedures. Such a clear competition violation is exceedingly rare as standards bodies and their participants are mindful of the fact that price coordination and other similar competition law violations are subject to aggressive enforcement. In addition, most standard-setting bodies have rules that (a) do not mandate that IP holders must disclose specific licensing terms and (b) prohibit group discussion of specific IP-related licensing terms in order to avoid any buyer cartel or group boycott issues.

Second, to the degree there is outright fraud in the standard-setting process by one of the IP holders, recourse may be sought through various means including but not limited to exercise of legal rights through litigation and/or action by an appropriate government agency. While the SSO may be an effective self-regulator, some standard organizations are not well equipped to deal with fraud.

With any such additional intervention, the government is highly likely to overly influence to the point of determining the outcome reached in the chosen standard and the terms by which it can be used. Such an influence, at best, is unlikely to produce a measurably better outcome than that which a standards body would have decided independently. At worst, government influence could produce an outcome inconsistent with the needs of an evolving and competitive global market.

Even with a rigorous, transparent, thorough, stakeholder-engaged process, occasionally standards fail in the market. In an evolving innovative environment, some failures are inevitable and may be a sign of a healthy and vibrant economy trying new approaches and seeking new efficiencies. The market itself, in most cases, given a short period of time would further evolve and an alternative standard would emerge.

In addition, regulators and other U.S. government officials are rarely well-situated to second-guess licensing terms pertaining to standards involving intellectual property rights (whether in-bound, out-bound, or cross-licensing obligations) that are the result of arms-length bilateral negotiations. Therefore, while some stakeholders may not be entirely pleased with the final negotiated licensing terms painstakingly negotiated, government officials are not likely to

be any better informed to determine the appropriate valuation, market price, or other IP licensing terms.

Most implementers entering into a license with a holder of essential patent claims want to negotiate a customized bilateral agreement that covers more than just those essential claims. The holders of the IP that support the standard have incentives in many cases to license and to do so on commercially viable terms in order to maximize the number of implementers taking licenses and therefore the IP holder's anticipated royalty proceeds.

Finally, as government is encouraged to take an active, but limited role in the standard setting it is important for participants in the standardization process to believe that there is an even-handed and unbiased approach on the part of government. The Chamber has members who have developed business models based on either a royalty-generating or a royalty free approach to IP in standards, and some members use both depending on circumstances. In a competitive market, different business models should compete, and consumers should decide what is preferred. Therefore, governments should remain unbiased and neutral in their approach to different business models.

Standards and International Trade and U.S. Competitiveness

The Chamber urges the U.S. government to continue to support the current U.S. standard setting approach not only because it has served the United States well, but in large measure out of concern for the state of standards development and standards-related policy around the world. U.S. business increasingly finds divergence in standards approaches around the world that lead to barriers to trade and undermine U.S. competitiveness.

Standards development around the world is typically more government-driven with strict limits for private stakeholder participation, particularly with regard to foreign private stakeholders. In some countries, for some industries, standardization is drafted and mandated entirely by government. In these cases, standards have become tools for protectionism.

As a result some policy makers have suggested a "join them" mentality which would require a greater government involvement and control in standards setting. The U.S. should reject an approach because it would undermine the private sector driven, voluntary, and consensus approach to standards development. A "join them" mentality would eliminate standards competition, and leave behind the enormous benefits a voluntary and consensus-based approach achieves. Instead, the government participation in SSOs should be leverage so that in international circles, the U.S. government can demonstrate stronger leadership and better support for the U.S. standard setting approach.

The U.S. government should continue its efforts to aggressively address individual trade barriers as they arise in international markets – both through advocacy and through trade barrier enforcement. These efforts not only help companies affected by specific barriers, but also send a message about the importance of fair and open trade and the U.S. commitment to ensuring that U.S. trading partners fully implement any relevant trade agreements.

To advance the diverse interests of U.S. stakeholders, the U.S. government should continue to seek full implementation of the WTO Technical Barriers to Trade (TBT) Agreement and annexes as well as decisions taken in the WTO TBT Committee.

Further, the Chamber is pleased that the U.S./Korea Free Trade Agreement prohibits the two parties from restricting foreign participation in their domestic standard setting activities, and favoring domestic over foreign entities in such participation. We hope the same type of commitments will be included in the Trans-Pacific Partnership Agreement currently under negotiation.

Finally, the Chamber also considers it a positive development that, as part of the 21st Joint Commission on Commerce and Trade (JCCT), the Chinese government agreed to ensure that processes for developing standards in China will be open and transparent with regard to products and technologies related to smart grid, and foreign stakeholders will have an opportunity to participate. China is welcoming opportunities to collaborate with NIST in developing smart grid standards, which provides a good opportunity for the U.S. government to demonstrate the nature and limits of its involvement in U.S. standard setting activities.

Cybersecurity

The Chamber believes cybersecurity is a global issue important to governments and businesses. The U.S. government should pursue the development and enhancement of cybersecurity standards through engaging global standards bodies and foreign governments.

Businesses have been involved in developing internationally accepted cybersecurity standards, best practices, and international assurance programs for several years. Cybersecurity standards are routinely written and updated through open and transparent standards-development processes and organizations, such as the International Organization for Standardization (ISO), and processes. These efforts are global by design and scope and include active engagement by people from business enterprises and governments who are typically developers, consumers, and evaluators of information technology products.

Business and government entities voluntarily adopt international standards, practices, and assurance programs that best match their unique needs, operational plans, and cultural or regulatory environments. International standards-development processes are widely embraced by experienced practitioners who value the openness and credibility that these standards processes afford participants from multiple countries. Effective policies for improving U.S. and global cybersecurity products and practices must leverage the existing international standards-setting bodies.

National governments should resist the urge to “put a thumb on the scale” in favor of a particular country-specific standards. Among the upsides of an international approach to standards setting, international practices and requirements have the benefit of a global peer-review process. Further, the interoperability of security practices and technologies across multiple countries allows for an organization’s limited resources to be more efficiently directed toward cybersecurity rather than encumbered by myriad national standards and mandates.

This is not to say that U.S.-specific standards that are voluntary and consensus based (e.g., American National Standards via American National Standards Institute-accredited SSOs) are inappropriate. Indeed, U.S.-specific standards may be appropriate to either address specific domestic needs, or alternatively, because the United States may be the technology-leader in that space. In either case, the domestically driven standards must reflect and acknowledge the global environment and should be developed to leverage, harmonize, or drive the existing international standards.

The Chamber encourages the Administration to consider taking three actions:

- The U.S. government, through entities such as the Department of Commerce and the National Institute of Standards and Technology (NIST), should take the lead in promoting the adoption of international cybersecurity standards and best practices developed by industry-led and/or public-private standards-development bodies.
- The federal government should collaborate with the private sector to implement, improve, and expand the Common Criteria for Information Technology Security Evaluation, generally known as Common Criteria, which is the primary international standard (ISO 15408) for computer product assurance security certification. This international standard is recognized under a multilateral agreement (Common Criteria Recognition Arrangement) by more than 20 countries. Common Criteria is preferred by many in industry to a hodgepodge of country-specific standards, rules, and required actions that could unintentionally balkanize cyberspace and security.
- NIST should continue to build its capacity to engage in international standards-setting efforts that are industry led. NIST may find it useful to leverage its resources by participating first at the national level, and then through that participation becoming a much more effective representative of the voluntary, industry-driven position at the international level.

In sum, the Chamber encourages policymakers in the United States to recognize the ubiquitous nature of cyberspace, which recognizes no borders. Efforts to enhance cybersecurity should be rooted in internationally accepted standards, best practices, and international assurance programs. The U.S. government, in partnership with the private sector, should push against the initiatives of foreign governments that would mandate cybersecurity standards and requirements that are not compatible with international practices. International standards, the *Cyberspace Policy Review* concludes, are critical to the security and vitality of our digital infrastructure.^[1]

Conclusion

The Chamber applauds the Subcommittee for including public consultation with stakeholders in its effort to take a comprehensive examination of the U.S. standard setting

^[1] The White House, *Cyberspace Policy Review*, May 2009, available at www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf.

process and the role government plays. The current private-sector driven, voluntary, consensus approach which provides for an appropriate level of government involvement has served our country well and will continue to do so.

The built-in flexibility and collaborative nature of the U.S. standard setting process allows us to most effectively address increasing concerns abroad as other countries take a more aggressive government-dominated approach. It also encourages innovation, rewards it appropriately, and deploys standards in the market efficiently.

While there are always opportunities for improvement, at its core the U.S. standards approach is unquestionably the best in the world. Therefore any recommendations offered as a result of this notice should only be considered if they further strengthen and are in-line with the private sector driven, voluntary in nature, consensus approach, and are adopted after further careful, extensive public consultation.

The Chamber looks forward to working with you and the Subcommittee on standards policy to ensure standards are optimally produced and that the U.S. is equipped to compete around the world.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Josten". The signature is fluid and cursive, with a large initial "R" and "B".

R. Bruce Josten