

DRAFT

Patrick Gallagher, Director National Institute of Standards and Technology,
Co-Chair, National Science and Technology Council's Sub-Committee on Technology
(Via electronic mail to SOS_RFI@nist.gov)

Re: Standardization feedback for Sub-Committee on Standards; Comments from
SAP AG

Dear Dr. Gallagher:

SAP AG (SAP) would like to thank NIST for this opportunity to provide input on the many issues in standards development. SAP, based in Walldorf, Germany, is the world's largest business software company with more than 53,000 employees in more than 50 countries worldwide, including approximately 13,000 in the United States.

Interoperability has become essential for the software industry and for SAP products. For this reason SAP is active in dozens of standard setting organizations (SSOs). These SSOs have successfully produced hundreds of standards over the years to promote interoperability. Based on our extensive experience in SSOs, we believe that maintaining flexibility within and among various SSO policies is paramount for the continued success in standards development. By allowing various SSOs to form their own policies, SSOs can develop policies that best suit interests of stakeholders, which is essential in creation of successful standards. As such, SAP respectfully opposes any government institution from imposing mandatory SSO policies.

Federal Agency Involvement

SAP believes that new or expanded oversight by government agencies is not needed and thus, feels that government mandated SSO policies are not warranted at this time.

Standards development is not a new business and has operated successfully with the various regulatory offices already in place (*e.g.*, the Department of Justice, Federal Trade Commission). If an SSO violates any rules or laws, these agencies, along with the existing court system, can adjudicate to correct the SSO's behavior. As such, additional or expansion of oversight is not necessary in regulating SSOs.

Notwithstanding SAP's position here, we understand that as consumers of software, federal agencies have an interest in standards development and implementation. From this perspective, federal agencies should engage SSOs and provide input into the relevant standards development initiatives. However, this input should be on equal footing with private interests and not overshadow other SSO member input and participation.

In this vein, SAP recommends caution when federal agencies "regulate" by way of mandating standards. When this occurs, the federal government runs the risk of impinging on free market choice by effectively giving non-government customers less or no choice. To the extent a federal agency mandates a standard, the selection of that

standard should be based on the technical merits of that standard and not the policies and procedures of the SSO that developed it. If not, federal government selection of standards based on SSO policy will have a chilling effect on the variety of different SSO policies we see today, and thus continued success of SSOs.

Despite SAP's opposition to additional government oversight in SSO policy, one area where federal oversight would be helpful to the standards community is a central, publicly accessible database that tracks the involvement of various federal agencies in the many SSOs. This database would be a gateway for the public and other federal agencies to learn where the government has standards-based interests. Such a database would also allow for efficient coordination of ideas in the standards setting process.

Favorable SSO Policies

Although SAP believes NIST should be circumspect in any effort to require a specific policy for all SSOs, we recognize that certain guidelines can be helpful. For example, recommending that SSOs make their proceedings and publications available to the public and having membership open to all who are interested are best practices. Any interested member, including the federal government, should be allowed to attend meetings and vote on proposed standards (assuming such a member has voting rights in that SSO). SSO policies should also permit other parties, such as non-member contributors and implementers, to attend SSO activities.

Along these lines, we also encourage publication of the policies and procedures of each SSO. This would foster awareness of membership requirements of an SSO, greater participation in the development of standards, more effective implementation of standards, or simply greater opportunity to observe SSO activities.

SAP recommends policies that are internationally neutral. Establishing protectionist policies will be counterproductive to effective standards development. Foreclosing participation based solely on an entity's pedigree threatens to deny the United States access to collaboration and innovation that may be vital to its growth and security. Likewise, such protectionism could invite retaliation against domestic firms, undermining the benefits of the global trading platform that the United States worked so tirelessly to establish.

Intellectual Property Policy

Flexibility is important, and for this reason the federal government should not mandate a particular Intellectual Property (IP) policy in the SSO context. If, however, an IP policy is to be mandated for standards adopted by the federal government, licensing commitments that are based on reasonable and non-discriminatory (RAND) terms should be encouraged. When independent parties successfully negotiate an IP license, it can be presumed that concepts of commercial reasonableness specific to the circumstances ultimately will guide the process. They then negotiate what is acceptable to them in a free market system. That is, neither party is constrained nor coerced to offer or accept

terms that it finds unduly unreasonable. Maintaining flexibility in an IP policy including RAND terms is a key to successful licensing, and thus to the success of standards.

Ex ante licensing terms are not preferred and should not be endorsed by NIST. The basics of standards development suggest this position. Given the large number and wide range of participants involved in standards creation and resultant product commercialization reflecting a wide range of opinions and business needs, it is impractical and unreasonable for this many parties to agree to a single set of licensing terms before a standard is developed. Endorsement of any specific term including *ex ante* licensing terms would be impractical and deter some from participating in an SSO, which would hinder development of successful standards.

In addition, *ex ante* licensing terms create opportunities for collusion. In the free market, a group can force an IP policy in an SSO to include *ex ante* licensing terms that are unacceptable to IP holding participants. Since the IP holding participants are unable to attempt to seek licensing terms that they find reasonable (*for example*, obtaining reasonable compensation for the property they own), they currently have the option of walking away from that SSO and looking for another SSO with an IP policy they find more agreeable. If, however, a federal agency mandates *ex ante* licensing terms in all SSOs, IP holding companies will either have to accept unfavorable terms (*i.e.*, anti-free market behavior) or not participate in any SSO activity. Neither situation is optimal.

Allowing SSOs to adopt RAND policies permits flexibility at an appropriate level in the particular circumstances. An SSO can adopt RAND and any member who wishes to offer a unilateral license or covenant on a voluntary *ex ante* basis may do so within the bounds of a RAND commitment. Flexibility is thus given to the SSO to pass down to the members and implementers.

Conclusion

SAP believes maintaining flexibility for each SSO to develop its own policies is the best way to foster free market behavior in the standards development process. This is supported by the rich and successful history of standards development. In particular, allowing for RAND as opposed to *ex ante* licensing terms is one of most important elements in maintaining flexibility as licensing terms play a key role in SSO policies

SAP appreciates this opportunity to provide NIST our perspective on issues in the standards development process.