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FEATURE STORY

WHAT IS CONGRESS UP TO? WATCH OUT FOR H.R. BILL 1086

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To encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards, and for other purposes." [Purpose, H.R. 1086]

Abstract: *The National Cooperative Research and Production Act (NCRPA) provides an important level of immunity from the economic impact of antitrust sanctions, but it is uncertain which, if any, standard setting activities undertaken by consortia and SDOs are currently entitled to that immunity. A new bill under review in Congress (H.R. Bill 1086) would explicitly extend the protection of the NCRPA to standard setting, but only to SDOs and those few consortia, if any, that operate in a manner functionally equivalent to SDOs. The restrictive approach of H.R. 1086 in its current form represents a retreat from existing law as reflected in OMB Circular A119 and would needlessly deprive those consortia which develop important standards from the protection which H.R. 1086 seeks to extend. This represents an unwise and inappropriate use of government power. [For the complete text of H.R. 1086, please see: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1086ih.txt.pdf]*

Introduction: On March 5, H.R. Bill 1086 was introduced in Congress by James Sensenbrenner, Jr. (R. - Wisc) and 16 other co-sponsors. Its stated purpose, as quoted above, recalls principles such as motherhood, America and apple pie. What could be wrong with a bill like this? Unfortunately, perhaps a great deal.

It is a familiar axiom that "no good deed goes unpunished." Thus it is that Congress should first be applauded for making one of its very rare forays into promoting and facilitating the standard setting process. And there is an actual need for the bill, which is intended to correct a flaw in the law which it seeks to amend. That law -- now called the National Cooperative Research and Production Act (NCRPA) -- was drafted to benefit cooperative efforts that commenced after the bill was passed, leaving then-operating consortia and SDOs ineligible. H.R. Bill 1086 would amend the NCRPA to offer a grace period under which these preexisting organizations could register themselves under the Act.

Unfortunately, the structure of the bill itself is seriously (and perhaps unintentionally) flawed, and could serve to restrict, rather than augment, the speed and range of standard setting. The reason is that, while H.R. Bill provides that it will not "alter or modify the antitrust treatment under existing law" of standard setting, it leaves open which standard setting activities, if any, of entities that do not meet the Bills' definition of a "good" standard setting organization are entitled to protection. Indeed, the inference would seem to be that non-SDO organizations are ineligible for protection.

The current language of the Bill is doubly unfortunate because there is no public interest to be served by adopting so restrictive an approach. Indeed, there is the prospect of harm, as its effect may be to lead those who would set standards to choose venues for their efforts that may be less appropriate and/or rapid in a given case. This is ironic, since the original purpose of the NCRPA was to make America more competitive in world markets by allowing commercial companies to work together cooperatively and on an expedited basis. Indeed, when first enacted, the NCRPA was intended to encourage not broad-based consensus organizations, but close cooperation by major corporations in areas such as semiconductor design.

In order to understand in greater detail why H.R. 1086 may be a step backwards for standard setting, it is necessary to briefly review the evolution of governmental acceptance of so-called "voluntary consensus standards" in its procurement activities.

Agency and Legislative History: For many years, the federal government generated its purchasing requirements without any effort to reference existing standards, using instead what came to be referred to as "government-unique standards." Over time, it became recognized that this practice had a number of negative aspects, including increasing procurement costs, since fewer "off the shelf" products were eligible for purchase, and fewer vendors were likely to compete for a given contract.

Eventually, the Office of Management and Budget (OMB) amended an existing advisory to heads of executive departments and agencies called **OMB Circular A-119**. This October 10, 1993 revision acknowledged that the policy of the federal government, in its procurement and regulatory activities, is to:

(1) Rely on voluntary standards, both domestic and international, whenever feasible and consistent with law and regulation; (2) Participate in voluntary standards bodies when such participation is in the public interest and is compatible with agencies' missions, authorities, priorities, and budget resources;" [additional elements omitted] [See section 6 entitled "Policy"]

However, OMB A-119 did not have the status of law. Subsequently, the **National Technology Transfer and Advancement Act of 1995** (Public Law 104-113 <http://www.nal.usda.gov/ttic/faq/pl104113.htm>) was signed into law on March 7, 1996. In that Act Congress found that: "Bringing technology and industrial innovation to the marketplace is central to the economic, environmental, and social well-being of the people of the United States."

In order to harmonize with and implement the Act, draft amendments to OMB A-119 were prepared. After a public comment period, the current version became effective on February 19, 1998 (<http://www.whitehouse.gov/omb/circulars/a119/a119.html>). This version noted that:

Standards developed by voluntary consensus standards bodies are often appropriate for use in achieving federal policy objectives and in conducting federal activities, including procurement and regulation. The policies of OMB Circular A-119 are intended to: (1) encourage federal agencies to benefit from the expertise of the private sector; (2) promote federal agency participation in such bodies to ensure creation of standards that are useable by federal agencies; and (3) reduce reliance on government-unique standards where an existing voluntary standard would suffice. [Supplementary Information, Part I]

Current Government Practice and Confusion: Combined, OMB A-119 and its administrative history would seem to clearly indicate that consortia and SDOs should enjoy a level playing field in government procurement. For example, OMB A-119, "Policy," Section 6.g. contains the following question and answer:

Does this policy establish a preference between consensus [i.e., SDO developed standards] and non-consensus standards that are developed in the private sector?

This policy does not establish a preference among standards developed in the private sector. Specifically, agencies that promulgate regulations referencing non-consensus

standards developed in the private sector are not required to report on these actions, and agencies that procure products or services based on non-consensus standards are not required to report on such procurements.

And consider the following extract from the explanatory comments which were issued by OMB in explaining the final revisions made in response to suggestions offered during the public comment period:

36. A commentator inquired whether the use of non-voluntary consensus standards meant use of any standards developed outside the voluntary consensus process, or just use of government-unique standards. The intent of the Circular over the years has been to discourage the government's reliance on government-unique standards and to encourage agencies to instead rely on voluntary consensus standards. It has not been the intent of the Circular to create the basis for discrimination among standards developed in the private sector, whether consensus-based or, alternatively, industry-based or company-based. Accordingly, we added language to clarify this point. [Emphasis added; See: <http://www.whitehouse.gov/omb/circulars/a119/a119fr.html#1>]

If all of the above sounds dispositive, it may come as a surprise that the author is aware of instances in which his clients have been told by government agencies that "only SDOs" meet the OMB A-119 standard. And consider the following example, excerpted from the comments recently delivered by George Willingmyre (a standards consultant) to Robert Tracci, Counsel Committee on the Judiciary, and the principal draftsman of H.R. 1086:

Recently the OMB A-119 Circular was cited as a reason for a government sponsored activity not to use the standards from a consortia [sic]. The Geospatial Applications and Interoperability (GAI) Working Group of the Federal Geographic Data Committee (FGDC) is developing a reference model to aid federal geospatial procurements in the applicability of geospatial standards: The Geospatial Interoperability Reference Model (GIRM). In response to the call for comments on the model the FGDC received the following:

"An 'important audience' for this document is identified as 'federal program managers engaged in procurement development and program execution.' However, the GIRM conflicts with federal guidance found in OMB Circular A-119 that directs federal managers to use "voluntary consensus standards" in the execution of their programs, particularly procurements. Throughout the GIRM there are recommendations to use other specifications when there are voluntary consensus standards available for the stated purpose. Given the guidance in Circular A-119, the GIRM has no applicability whatsoever for federal managers in the execution of their programs. It can serve only as a suggestion for what federal agencies might want to work toward as part of their continued participation in the voluntary consensus standards efforts and the applicability statement needs to state that clearly"

What H.R. 1086 Says: Given that Congress rarely speaks to the issue of standard setting, H.R. 1086 could provide a valuable opportunity to reinforce the message of OMB A-119 that non-SDO standards may be adopted in government contracting. And, appropriately enough, H.R. 1086 uses OMB A-119 as a starting point, referring to the principles of "openness, balance, transparency, consensus, and due process" as contained in OMB A-119. However, it then goes on to supply its own definitions for those principles, giving the following as requirements, rather than examples, of the attributes of an appropriate process:

(A) notice to all parties known to be affected by the particular standards development or modification,

- (B) the opportunity to participate in standards development or modification,
- (C) balancing interests so that standards development activities are not dominated by any single group of interested persons,
- (D) readily available access to essential information regarding proposed and final standards,
- (E) the requirement that substantial agreement be reached on all material points after the consideration of all views and objectives, and
- (F) the right to express a position, to have it considered and to appeal an adverse decision

While these principles at first blush may sound innocent enough, consider the following facts and questions:

(A) Notice: What constitutes sufficient notice? Many consortia have very limited financial resources, and are unable to give broad distribution of information, beyond their websites. While publication by a well known SDO with decades of history at its website may constitute appropriate notice, what would be the duty of a small consortium developing a narrow niche standard, with no staff, a budget of a few tens of thousands of dollars, and which receives little notice in the technical press?

(B) Opportunity to Participate: Someone has to pay the bills for standard setting, test suite development, certification and promotion. Some consortia have memberships of fewer than a hundred companies, but budgets in excess of \$1 million. Indeed, some consortia also provide for a public comment period. But the ultimate vote to accept a final specification is limited to those members that have paid for the privilege of doing so. How does one prevent economic "free ridership" if anyone can participate for a nominal, or no cost? If free ridership is possible, who would be willing to pay the higher fees necessary to support the organization? Note also that a standard which is viewed as being proprietary is unlikely to be widely adopted, and hence even a limited field of participants is aware that its work product must meet the needs and approval of a broad commercial audience. As a result, the consortium-based process has its own commercial checks and balances.

(C) Balancing of Interests: Which interests? And how is a consortium to persuade those interests to participate? If a consortium were to set distance learning standards (as some of our clients do), how would they ensure that all interests relevant to the standard were heard, and still finish a standard within budget, and on time? Would the participation of K-12 administrators and teachers be mandatory?

(D) Readily Available Access to Proposed Standards: One valuable right of membership in a consortium is the right to receive advance access to standards in the process of development. Absent this benefit, there is again less incentive for commercial enterprises to fund standards development activities. Indeed, even some organizations that regard themselves as SDOs, or which are accredited by SDOs, operate at times under confidentiality restrictions.

(E) Substantial Agreement on all Material Points: If the alternatives are (i) no standard at all, (ii) an ineffective (but consensus based) standard, or (iii) an effective standard supported by a majority of process members and later adopted almost universally, which is better for the end-user? In fact, the process of standard setting is often quite contentious, and perhaps even beneficially so. Especially where existing instantiations of a new standard are a requirement for submission (in order to enable rapid market implementation of adopted standards) there are likely to be winners as well as losers, and it is unlikely and unrealistic to expect a vendor and its allies to vote in favor of a competitor's submission.

(F) The Right to Voice a Position, Have it Considered, and Appeal a Decision: Consortia follow the first two precepts (with respect to the paid membership), but few, if any, provide for the final -- and arguably superfluous -- appeals step. If the first two steps have been followed in proper fashion, there should be no need for a final appeal. In fact, many consortia provide that a technical committee vote to adopt a standard must be approved by the Board of Directors. Part of the reason is to permit the Board to consider any contentions that the adoption process has been flawed.

What H.R. 1086 Would Mean: The fact of the matter is that the principles espoused by H.R. 1086, if they become the norm by which standard setting is judged, will have numerous deleterious effects, including the following:

- The principles raise more new questions than they answer, which will lead to great confusion as to whether a given organization's filing under the NCRPA could be challenged on grounds of eligibility. Indeed, some SDOs might not meet one or more of the principles!
- Crucially important consortia, such as the W3C, might be ineligible to seek protection under the NCRPA, as amended by H.R. 1086. Given the strategic importance of the World Wide Web, it is vital that an organization such as this, as well as its many members, can conduct its activities with the greatest degree of immunity from both strategic, competitive lawsuits as well as innocent mistakes.- As shown by the experience with the GIRM model submission, government agencies are already confused by their duties as respects standards. Due to the many references to OMB A-119 in H.R. 1086, and the ingrafting of several OMB A-119 definitions into the NCRPA itself, these principles may be seen as an additional indication that only SDO-developed standards may be specified by government agencies.
- The consortium movement was founded for the very purpose of avoiding the constraints of some of these same principles. In short, if strict adherence to these principles had been viewed by commercial enterprises to be tolerable, consortia would never have come into existence.
- The government itself has adopted -- and in many areas (such as GIS standards) -- is increasingly dependent on consortium-developed standards. It would be highly disruptive for the government as well as the commercial community if those organizations were required by their members to either restructure themselves to meet the H.R. 1086 requirements, or disband and reform themselves as working groups under an existing SDO.

Conclusions: In and of itself, agreeing upon best practices for standard setting is a worthwhile endeavor. However, there is danger as well as opportunity in such an exercise. The current effort in Congress is proceeding with very little publicity or input from the industry, and perhaps none to date from the myriad consortia that set standards. If Congress is to be allowed to determine what a "good" standard setting organization is, it should be advised by far more extensive and diverse testimony than it has received to date. Its time for the progress of H.R. Bill 1086 to pause so that interested parties can be made aware of what is intended. More voices must be given the opportunity to advise Congress on the necessity of enacting a broader bill that will truly serve the best interests of government, industry, and end-users alike.

Lucash, Gesmer and Updegrave intends to actively raise its voice in support of its standard setting clients in an effort to broaden the scope of H.R. 1086. If you would like to be involved, or to better understand the issues, please feel free to contact the author at updegrave@lgu.com. We would also encourage you to let your congressional representatives know that you believe that Congress should provide equal protection to all types of effective standard setting organizations -- both consortia and SDOs alike. The bill's co-sponsors may be viewed at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1086ih.txt.pdf

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