

Robert J Tennesen
ULC Commissioner
Minneapolis, Mn

October 14, 2020

To: Harvey Perlman, Chair
Jane Bambauer, Reporter
Cc: Committee members, ABA advisors, and Observers
Re: Comments on Oct 16-17 draft.

§ 2 (1) *Compatible data practice* – Who decides?

(4) *Deidentified data* - Is it possible to be reasonably certain that data cannot be linked to a specific individual?

(5) *Incompatible data practice* – Does it really require *consent* to use if for an incompatible practice? What form of consent is required?

(7) *Personal data* – basically name, rank, and serial number. Nothing more. Does this provide any more protection of personal data than is available under common law?

(8) *Pseudonymized data* – is this just an artful way to use personal data for marketing?

(9) *Processing* – adds **prediction** to the previous definition. Why?

(11) *Publicly available information* – what is (C) *observable from a publicly accessible vantagepoint* intended to cover?

(12) *Sensitive data* – (H) why has **biometric** been deleted?

(14) *Targeted content and advertising* and (15) *Targeted decisional treatment* – The distinction is solely that of the controller, processor, or to someone they sold the data to. It seems a fiction to send advertising to a person and claim that it is merely **expressive** of what the advertiser sells and that is not to sell the product because the advertisement to that person **is not differentiated**, whatever that means.

§3. Scope

(a) Why should a controller, a processor, or a purchaser from the controller get a six-month grace period before they must comply?

(2) Is the 50% standard a workable?

(3) Unless a processor has actual knowledge this standard can be met by the processor not asking and the controller not telling.

§4. Controller Responsibilities etc.

- (a) (4) *obtain consent for any processing that would constitute an incompatible data practice under Section 8 - This is meaningless. Under 8 the controller can require consent to incompatible uses as a condition of doing business.* That will be the standard practice. Why bother to have this supposed protection when it is no effect?
- (b) This offers virtually no protection to a person. It is limited to *personal data* name, rank, and serial number.
- (3) Redress for incompatible use is meaningless for the reason stated in the previous paragraph.

§5. Individual Right to Copy etc.

- (a) What is *currently-maintained data* intended to distinguish? It seems like a binary question, either the controller has the data or it doesn't. If that is the case this is unnecessary. If not, what is being withheld?
- (b) (3) This should be rewritten to place the burden on the controller to make the correction unless they have a reason to believe the request is fraudulent.
 - (A) should read unless the controller has reason to believe that the request is fraudulent;
 - (B) Who decides whether a correction *is reasonably likely to affect decisions that will materially affect a legitimate interest of the individual*? If it is the controller's decision the remedy is certainly unenforceable and worthless.
- (4) What constitutes *reasonable effort* to ensure that a processor corrects a record? An email, phone call?
- (c) How can a request to correct personal data be manifestly unreasonable?

§6. Privacy Policy

- (a) (2) *...categories of personal data the controller provides to a data processor or another person...* **This recognizes that personal data can be transferred to third parties, presumably sold for any purpose.** What is the value of a disclosure that says the controller will transfer your personal information to someone unknown?
- (6) add at the end or does not comply.
- (b) Why only "reasonably" available?
- (c) Few AG's have the staff or expertise to review privacy policies.

§7. Compatible Data Practice

- (a) *Consistent with typical expectations or, if inconsistent ...is likely to benefit the individual...* Any controller unable to meet this standard would likely have ceased operations for sheer incompetence.
- (c) This is a meaningless distinction for the reasons stated in §2 (14) above.
- (f) (a) and (b) are not meaningful limitations and this clause cements them.

§8. Incompatible Data Practices.

(a) An incompatible data practice can proceed with the individual's consent so long as not a prohibited data practice. The provisions of (a) – (f) are effectively nullified by (g) which allows a controller to require a waiver of the prohibition on incompatible uses.

§9. Prohibited Data Practice.

Does this add anything to protections presently afforded by common law? It may actually overturn some common law such as protection of private images which under this act is personal data?

(4) This does not prohibit a controller from violating federal law unless it is clear. Why and what federal laws are implicated?

(6) To be prohibited under this provision an individual must first:

One, proved in a prior law suit that the controller violated the consent provision of §8 which is likely impossible to do because it authorizes a controller to require a waiver of prohibitions on incompatible uses.

Second, if by some remote chance the individual could prevail in the first instance the controller would have to commit the same offence again.

Perhaps this could happen but it is highly dubious.

(d) (2) **[Explain how this will apply.]**

§10. Data Privacy and Security Assessments.

This seems to be advisory language and of little effect or utility since data security is reputational requirement that most every controller worries about. Also, states have data security breach laws that already provide incentives to protect data.

§§ 11-13 Voluntary consensus standards

The premise for voluntary consensus standards is Section 12(d) of P.L. 104-113, the "National Technology Transfer and Advancement Act of 1995" Public Law 104-113 passed in 1995.

Revised OMB Circular No. A-119 provides guidance to agencies for implementation. It directs that all federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, *except where inconsistent with law or otherwise impractical.*

Under the section 12 of the Act the secretary of commerce and the National Standards Institute are directed to

(b) (3) *"to compare standards used in scientific investigations, engineering, manufacturing, commerce, industry, and educational institutions with the standards adopted or recognized by the Federal Government and to coordinate the use by Federal agencies of private sector*

standards, emphasizing where possible the use of standards developed by private, consensus organizations.” 15 USC 252 (b) (3)

They are to cooperate with other departments, other governments both in the US and foreign and international organizations and private organizations in establishing standard practices, codes, specifications, and voluntary consensus standards. (10)

They are to coordinate with those organization with the goal of *eliminating unnecessary duplication and complexity* in the development and promulgation of conformity assessment requirements and measures. (13)

The focus of the Act are scientific and technical standards that are or have been developed by both the government and industry organization to obtain the best of both, and to avoid unnecessary costs and speed decision making.

The Circular provides that an agency has the *discretion to decline to use existing voluntary consensus standards* if your agency determines that such standards are inconsistent with applicable law or otherwise impractical. Impractical is defined thus: *"Impractical" includes circumstances in which such use would fail to serve the agency's program needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard.*

An agency may *identify voluntary consensus standards through databases of standards maintained by the National Institute of Standards and Technology (NIST), or by other organizations including voluntary consensus standards bodies, other federal agencies, or standards publishing companies.* It only applies to existing entities.

It also directs that **agencies recognizing voluntary standards must actively participated with the voluntary organization in developing the standards.**

NISI performs a vital function in the adoption and approval of voluntary consensus standards.

...only [ANSI-Accredited Standards Developers](#) (ASDs) can submit standards for approval as American National Standards. An ANSI-Accredited Standards Developer is an organization that has voluntarily submitted its standards development procedures to ANSI for review and accreditation. ASDs' procedures must comply with [ANSI's Essential Requirements](#), including provisions for demonstrating openness, balance, lack of dominance, due process, and consensus. Once accredited, an ASD agrees to comply with ANSI's oversight when submitting individual standards for approval as ANS., including provisions for demonstrating openness, balance, lack of dominance, due process, and consensus. Once accredited, an ASD agrees to comply with ANSI's oversight when submitting individual standards for approval as ANS.

Thousands of individuals and representatives of companies, government agencies, industry, labor, and trade associations, consumer groups, academics, and others voluntarily participate in the development of American National Standards (ANS) through the work of approximately 240

voluntary consensus standards bodies accredited by ANSI. The inclusiveness and integrity of the ANS process encourages participation by the broadest range of subject-matter experts, resulting in high-quality standards that protect the public and foster fair commerce and innovation.

Agencies such as OSHA and the FDA work with NISI in recognizing voluntary national standards and the organization that develop them. Agencies also must determine whether the voluntary standards adequately serve their agency responsibilities and they retain the power to withdraw approval of standards that are no longer adequate or appropriate.

The Child On-Line Protection Act and 16 CFR 312.11 authorize the FTC to recognize “safe harbor programs.” It has recognized some programs but only if they meet the criteria stated in the statute and regulations. The ‘programs’ are published and subject to comment before they are approved. The FTC has explicit power to modify and revoke approval and it has enforcement authority under the rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the [Federal Trade Commission Act \(15 U.S.C. 57a\(a\)\(1\)\(B\)\)](#)

What is necessary to have a valid voluntary consensus standard?

1. A recognized voluntary consensus standards organization must exist.
2. The standards must have been developed pursuant to established protocols including providing for public notice and comment.
3. An agency must have authority over the standards to require change and withdraw approval.
4. There must be an organization that has overall responsibility to enforce the standards.

The provisions of §§ 11-13 do not meet these standards.

First, no voluntary consensus organization exists much less a recognized one.

Second, they do not provide for a unified entity to participate in the development of standards or their implementation or enforcement. Few Attorneys General other than those of the largest states have the staff, expertise, and financial resources to do what NISI does or the FTC regarding COPPA.

Third, rather than authorizing withdrawal of approval it cements them in place through the use of an Interstate Compact which is inappropriate.

The idea that a presently unorganized and unknown voluntary consensus standards body will be able to produce a balance set of standards is at best dubious. Who will manage the process? Who has the time, resources, skill and knowledge to credibly represent the public when the others at the table have an army of skilled experts, propaganda arms, and billions to fight for what they want? A representative or two from a privacy advocacy organization or the Consumer’s Union is not a realistic counterweight to opposing army advocating its self-interest.

§14 Interstate Compact.

Do any states adopt interstate compacts by standards that are not explicit in the compact?
Minnesota has not done so.

§15 Enforcement by the Attorney General

The lopsided battle extends beyond the standards setting. It also extends to an attorney general's responsibility to promulgate rules. First, some AGs do not have rulemaking authority. Second, rulemaking is expensive and requires expertise. Resources are scarce. Third, industry will vigorously oppose every rule that it doesn't like. What resources will an AG have, what resources will consumers have, to represent their views in 50 states? Industry will overwhelm many AGs in rulemaking.

Industry is very adept at initiating *strategic law* suites to bring down regulations and spends millions in pursuit of their objective. Citizen's United is an example. Koch Brothers are well served – at the expense of the public. It will not be a fair fight.

Industry is also very adept at immobilizing congressional action regarding the collection and use of identifiable consumer data. The only reason the ULC is trying to address the problem is because of the inability of congress to act, largely due to industry opposition, not for lack individual legislator's proposals.

It seems that the ULC, and this committee, are being urged to draft a bill that provides virtually no benefit to the public, while giving the industry the power to set the rules and immunize itself from responsibility or liability.

Were this act to be promulgated in its present form industry would likely tell congress that the problem has been solved and to stay out of it. If it were to become an interstate compact it would be cemented in place.

As presently constructed the use of voluntary consensus standards of the bill will not result in any meaningful protection of personal data.

Appendix

15 U.S.C. § 272 - U.S. Code

(a) Establishment of National Institute of Standards and Technology

There is established within the Department of Commerce a science, engineering, technology, and measurement laboratory to be known as the National Institute of Standards and Technology (hereafter in this chapter referred to as the “Institute”). ***

(b) Functions of Secretary and Institute

(3) to compare standards used in scientific investigations, engineering, manufacturing, commerce, industry, and educational institutions with the standards adopted or recognized by the Federal Government and to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations;

(10) to cooperate with other departments and agencies of the Federal Government, with industry, with State and local governments, with the governments of other nations and international organizations, and with private organizations in establishing standard practices, codes, specifications, and voluntary consensus standards;

(13) to coordinate Federal, State, and local technical standards activities and conformity assessment activities, with private sector technical standards activities and conformity assessment activities, with the goal of eliminating unnecessary duplication and complexity in the development and promulgation of conformity assessment requirements and measures.

(c) Implementation activities

In carrying out the functions specified in subsection (b) of this section, the Secretary, acting through the Director 1 may, among other things--

(1) construct physical standards;

(2) test, calibrate, and certify standards and standard measuring apparatus;

(3) study and improve instruments, measurement methods, and industrial process control and quality assurance techniques;

- (8) study and develop fundamental scientific understanding and improved measurement, analysis, synthesis, processing, and fabrication methods for chemical substances and compounds, ferrous and nonferrous metals, and all traditional and advanced materials, including processes of degradation;
- (9) investigate ionizing and nonionizing radiation and radioactive substances, their uses, and ways to protect people, structures, and equipment from their harmful effects;
- (10) determine the atomic and molecular structure of matter, through analysis of spectra and other methods, to provide a basis for predicting chemical and physical structures and reactions and for designing new materials and chemical substances, including biologically active macromolecules;
- (11) perform research on electromagnetic waves, including optical waves, and on properties and performance of electrical, electronic, and electromagnetic devices and systems and their essential materials, develop and maintain related standards, and disseminate standard signals through broadcast and other means;
- (12) develop and test standard interfaces, communication protocols, and data structures for computer and related telecommunications systems;
- (13) study computer systems (as that term is defined in [section 278g-3\(d\)](#) of this title) and their use to control machinery and processes;
- (14) perform research to develop standards and test methods to advance the effective use of computers and related systems and to protect the information stored, processed, and transmitted by such systems and to provide advice in support of policies affecting Federal computer and related telecommunications systems;
- (15) on an ongoing basis, facilitate and support the development of a voluntary, consensus-based, industry-led set of standards, guidelines, best practices, methodologies, procedures, and processes to cost-effectively reduce cyber risks to critical infrastructure (as defined under subsection (e));

OMB CIRCULAR NO. A-119 Revised

February 10, 1998

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
SUBJECT: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

BACKGROUND

1. What Is The Purpose Of This Circular?

This Circular establishes policies to improve the internal management of the Executive Branch. Consistent with Section 12(d) of P.L. 104-113, the "National Technology Transfer and Advancement Act of 1995" (hereinafter "the Act"), this Circular directs agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical. It also provides guidance for agencies participating in voluntary consensus standards bodies and describes procedures for satisfying the reporting requirements in the Act. The policies in this Circular are intended to reduce to a minimum the reliance by agencies on government-unique standards

What Are Voluntary, Consensus Standards?

a. For purposes of this policy, "voluntary consensus standards" are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include 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. For purposes of this Circular, "technical standards that are developed or adopted by voluntary consensus standard bodies" is an equivalent term.

(1) "Voluntary consensus standards bodies" are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, "voluntary, private sector, consensus standards bodies," as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:

(i) Openness.

(ii) Balance of interest.

(iii) Due process.

(vi) 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.

6. What Is The Policy For Federal Use Of Standards?

All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical. ***

a. When must my agency use voluntary consensus standards?

Your agency must use voluntary consensus standards, both domestic and international, in its regulatory and procurement activities in lieu of government-unique standards, unless use of such standards would be inconsistent with applicable law or otherwise impractical. In all cases, your agency has the discretion to decline to use existing voluntary consensus standards if your agency determines that such standards are inconsistent with applicable law or otherwise impractical.

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

f. What considerations should my agency make when it is considering using a standard?

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. If your agency is proposing to incorporate a standard into a proposed or final rulemaking, your agency must comply with the "Principles of Regulation" (enumerated in Section 1(b)) and with the other analytical requirements of Executive Order 12866, "Regulatory Planning and Review."

6. What Is The Policy For Federal Use Of Standards?

i. Should my agency give preference to performance standards?

In using voluntary consensus standards, your agency should give preference to performance standards when such standards may reasonably be used in lieu of prescriptive standards.

1. How may my agency identify voluntary consensus standards?

Your agency may identify voluntary consensus standards through databases of standards

maintained by the National Institute of Standards and Technology (NIST), or by other organizations including voluntary consensus standards bodies, other federal agencies, or standards publishing companies.

7. What Is The Policy For Federal Participation In Voluntary Consensus Standards Bodies?

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.

a. What are the purposes of agency participation?

Agency representatives should participate in voluntary consensus standards activities in order to accomplish the following purposes:

- (1) Eliminate the necessity for development or maintenance of separate Government-unique standards.
- (2) Further such national goals and objectives as increased use of the metric system of measurement; use of environmentally sound and energy efficient materials, products, systems, services, or practices; and improvement of public health and safety.

Memorandum of Understanding between The Occupational Safety and Health Administration and The American National Standards Institute

Whereas the Occupational Safety and Health Administration (OSHA) has the statutory authority to develop, promulgate and enforce occupational safety and health standards; and

Whereas the Occupational Safety and Health Act of 1970 (sections 6(a) and 6(b)(8) recognizes that national consensus standards producing organizations have an important role in the development of occupational safety and health standards; and

Whereas ANSI is recognized as a coordinating and approval agency for voluntary national consensus standards in the United States and is ready to provide assistance and support in occupational safety and health standards, regulations and related issues; and

Whereas, ANSI working through its accredited standards developers has already demonstrated through the performance of various activities an ability to render technical assistance and support to OSHA in carrying out its statutory authority;

It is agreed that:

ANSI will furnish assistance and support and continue to encourage the development of national consensus standards for occupational safety or health issues for the use of OSHA and others. OSHA will continue to cooperate and assist the ANSI Federation in its mission in a manner consistent with OSHA policy. Such technical assistance and support generally include but is not limited to the following program activities;

***;

ANSI will coordinate interpretations and rationale of selected American National Standards for OSHA, as requested, in connection with OSHA standards development and compliance activities;

The purpose of the cooperative effort sought under the Memorandum of Understanding is to bring the technical resources and support of ANSI together for the purpose of assisting OSHA in carrying out its responsibilities. Also, to the extent consistent with its obligations under the Act, and other laws, OSHA will make its technical resources available to ANSI to assist it in meeting its mission. <https://www.osha.gov/laws-regs/mou/1991-05-21>

.....

Recognition and Withdrawal of Voluntary Consensus Standards

Guidance for Industry and Food and Drug Administration Staff

Document issued on September 15, 2020.

The draft of this document was issued on September 14, 2018. This document supersedes “CDRH Standard Operating Procedures for the Identification and Evaluation of Candidate Consensus Standard for Recognition,” issued on September 17, 2007.

The FDA maintains control over the recognition and withdraw of voluntary consensus standards.

<https://www.fda.gov/media/71995/download>

The development of standards may seem like a dry topic, but it also is crucial for any industry that wants to be safe and effective as it matures.

Before the railroad industry implemented gauge standards, cargo traveling between regions would have to be unloaded and moved to different trains when they entered a new area because the distance between rails no longer matched the size of the wheels of the train. From steel, to clothing, to cars, to pharmaceuticals, standards are a vital part of the growth

and development of industries across the globe. This is already true for the burgeoning industry of commercial space.

For many years, the Commercial Spaceflight Federation (CSF) and the Commercial Space Transportation Advisory Committee (COMSTAC) have recognized the importance of developing industry voluntary consensus standards. A particular focus of standards and recommended practices was, and still is, human spaceflight safety.

<https://spacenews.com/why-consensus-on-standards-performance-matters-in-commercial-space/>

American National Standards Institute

While anyone can participate in the ANS process, only [ANSI-Accredited Standards Developers](#) (ASDs) can submit standards for approval as American National Standards. An ANSI-Accredited Standards Developer is an organization that has voluntarily submitted its standards development procedures to ANSI for review and accreditation. ASDs' procedures must comply with [ANSI's Essential Requirements](#), including provisions for demonstrating openness, balance, lack of dominance, due process, and consensus. Once accredited, an ASD agrees to comply with ANSI's oversight when submitting individual standards for approval as ANS., including provisions for demonstrating openness, balance, lack of dominance, due process, and consensus. Once accredited, an ASD agrees to comply with ANSI's oversight when submitting individual standards for approval as ANS.

CONSENSUS BODIES (ANS VOTING GROUPS)

Thousands of individuals and representatives of companies, government agencies, industry, labor, and trade associations, consumer groups, academics, and others voluntarily participate in the development of American National Standards (ANS) through the work of approximately 240 voluntary consensus standards bodies accredited by ANSI. The inclusiveness and integrity of the ANS process encourages participation by the broadest range of subject-matter experts, resulting in high-quality standards that protect the public and foster fair commerce and innovation.

<https://www.ansi.org/american-national-standards/ans-introduction/overview>