WORKING DRAFT
7/20/00

MARKET-DRIVEN CONSORTIA

IMPLICATIONS FOR THE FCC'S CABLE ACCESS PROCEEDING

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MARKET DRIVEN CONSORTIA
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I. Introduction

The commercial and economic importance of having an agreed upon set of consensus standards is recognized by both government and industry. The National Technology Transfer and Advancement Act formalizes US government support for the development and use of voluntary consensus standards. The private sector's support for consensus standards is evidenced by industry's extensive participation in voluntary consensus standards organizations, as well as by their use of the standards.

The American National Standards Institute (ANSI) is a private, non-profit membership organization which administers and coordinates the private voluntary standards system in the US. ANSI has a Memorandum of Understanding (MOU) with the National Institute of Standards and Technology (NIST, a US government agency) designed to strengthen the voluntary consensus standards system. Under the MOU, ANSI has a number of responsibilities including accrediting Standards Developing Organizations (SDOs) to develop and publish American National Standards; and approving proposed consensus standards as American National Standards[1]. It should be noted that ANSI has been administering the voluntary standards system in the US long before the MOU with NIST and that nothing in the signed agreement undermines ANSI's status and authority as an independent private organization.

Although consensus standards in the US may be developed through different mechanisms, the most common development process is through ANSI-accredited SDOs. The ANSI accreditation, as delineated in ANSI's *Procedures for the Development and Coordination of American National Standards*, indicates that the internal procedures of SDOs must provide for openness, due process (including an appeals process), a balance of interests, and development of consensus. The ANSI accreditation also signifies that the SDO cooperates with ANSI in standards planning and coordination activities and meets the other requirements for accreditation specified by ANSI.

The American National Standards designation for proposed standards, as distinct from accreditation for the organization developing the standard, verifies that consensus was achieved by stakeholders directly and materially affected by the standard and with other

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[1] Memorandum of Understanding between The American National Standards Institute and the National Institute of Standards and Technology, Sec. 3.3.

NIST/ANSI requirements.[2]

Although there are benefits to developing standards through a consensus process, there are, in some instances, potentially serious drawbacks to this process, particularly in terms of the lengthiness of the process. Consensus standards can take years to develop or revise. In the fast-developing technology arena, such delays may render the consensus standards process as ineffective and unresponsive to industry needs.

As a result of the need by technology-based industries for a timely standards development process, an alternative has developed: market-driven consortia (MDCs). These consortia are associations of organizations which develop technical standards without necessarily adhering to ANSI requirements for openness and consensus. Thus, the consortia are not recognized by ANSI although the non-consensus development groups may include ANSI members and ANSI-accredited SDOs.

Even though a standard is not developed through a consensus process, ANSI procedures may still allow for certification of the standard as an American National Standard, provided that ANSI puts the proposed standard through an open consensus process.

This paper will discuss the development of MDCs using, as an initial example, the Strategic Alliance organized by the Society of Automotive Engineering (SAE). The SAE is an ANSI recognized SDO.

This paper will also examine key issues pertaining to the development of non-consensus standards by consortia, including:

The future of consensus and non-consensus processes.

Developing both consensus and non-consensus standards - potential problems and trade-offs.

ANSI review procedures for non-consensus developed standards.

Antitrust implications for consortia.

Potential revisions to OMB Circular A-119 - Federal Participation in the Development of Voluntary Consensus Standards and in Conformity Assessment Activities.

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[2] ANSI, "Procedures for the Development and Coordination of American National Standards," April 1998, p. iv.

The paper will conclude by examining an additional instance of a standard-setting consortia in light of the issues discussion.

II. Consortia: The SAE Strategic Alliance Example

The Society of Automotive Engineering is an ANSI-recognized Standards Development Organization. The SAE has almost 80,000 members in over 90 countries. Members include engineers, business executives and other interested parties. Despite using the term "automotive", the SAE develops and publicizes technical information for much of the transportation industry ranging from agricultural equipment to aerospace. The SAE has developed an extensive array of ground vehicle and aerospace consensus standards.

As part of its work, the Society has developed the SAE Strategic Alliance (SSA). The SSA is a "partnership" of dozens of major US and foreign corporations in the transportation industry ranging from equipment manufacturers and parts suppliers to airlines and freight companies.

The SSA has several functions, including providing an entry point for organizations to participate in the Technical Standards development process. These Technical Standards are domestic and international (ISO) standards developed through a consensus process. In addition to Technical Standards activities, the SSA also offers their partners the opportunity to participate in "Market Driven Consortia". These consortia are initiated by SSA Partners to meet specific needs. A key aspect of these consortia is that they do not need to follow an open consensus process. Thus, although any consortia-developed standards may not necessarily gain the ANSI imprimatur, the SSA partners have increased flexibility in consortia operations.

Insight into the impetus behind the development of consortia and non-consensus methodologies can be gained from a report prepared by the SAE's Information to Knowledge Task Force. The Task Force was convened by the SAE Board of Directors to clarify issues related to transforming the SAE from an information providing society to a knowledge providing society. The Task Force defined a "knowledge providing society" as:

> *A society that productively provides the user with real-time, interactive tools and technology to adapt information and knowledge for user's specific needs: speeds delivery of knowledge to the practitioner's desktop and <u>establishes proactive, noncompetitive best practices (not consensus</u>*

standards) to guide future development of the industry[1]. [emphasis added]

[1] SAE, Executive Summary of the March 5, 1999 Board of Directors Meeting, Information to Knowledge Task Force Report.

The Task Force members unanimously agreed that SAE needed to implement a "[p]aradigm shift to the knowledge end of the spectrum."[1] Thus, it can be seen that the SAE is concluding that non-consensus "best practices" provided in "real-time" will play an increasing and beneficial role in guiding the development of the transportation industry.

III. The Future of Consensus and Non-Consensus Processes

The SAE is working on both consensus and non-consensus activities. The issue arises as to what widespread development of non-consensus standards by SDOs means for the future of the consensus standards system. This issue extends beyond the SAE and includes the current and/or future activities of other ANSI accredited SDOs.

It would initially appear that, since non-consensus standards are market driven, MDC activities would continue to expand to the extent of market demand for this type of standard-setting activity. However, there are three issues which could alter the current course:

1. Antitrust issues (which will be discussed in Section VI);

2. Changes in government policy toward acceptance of non-consensus standards (which will be discussed in Section VII); and

3. Non-consensus standards not proving as useful as consensus standards (which will be discussed in Section III.B).

Standards developed through an open, consensus process have a long history of producing useful results. It is because of the success of consensus standards that the consensus process has been embraced by industry and government. The MDC process lacks this track record. Although there may be some benefits to use of a non-consensus process, the associated limits on stakeholder participation and the need to find common ground may result in standards which have limited utility.

Given the limited experience with MDCs, participants may not be aware of whether or not the non-consensus process is producing standards which may not fully meet their needs. Ultimately, only experience will determine whether a non-consensus process can reliably produce useful standards that meet the goals of consortia participants.

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[1] Ibid.

Overall, there are four basic possibilities as to the future of consensus and non-consensus standards:

1. Non-consensus practices supplant the voluntary consensus standard system.

2. Non-consensus practices and consensus standards develop independently along parallel tracks with each system having their own niche.

3. Non-consensus practices merge into an expanded voluntary standard system which encompasses standards developed through consensus, non-consensus or hybrid methodologies.

4. Non-consensus practices will largely disappear due to sub-satisfactory performance, antitrust concerns, or other factors.

The rest of this document will explore the issues which may determine the future of consensus and non-consensus standards.

IV. Developing Both Consensus and Non-Consensus Standards - Potential Problems, Benefits, and Trade-Offs

In that the SAE is utilizing both consensus and non-consensus standards development methodologies, it is reasonable to assume that each methodology is perceived as offering certain benefits. However, questions arise regarding an ANSI-accredited organization developing both consensus and non-consensus standards:

Whether there are any problems which may occur specifically related to an SDO engaging in both consensus and non-consensus practices; and

What are the benefits from offering stakeholders, at least in certain instances, a non-consensus standards development methodology.

A. Potential Problems with Non-Consensus Processes

In terms of potential problems from SAE (or other ANSI-accredited SDO) having a foot in both camps, consensus and non-consensus, there appear to be two main potential problems:

Non-consensus practices could undermine the voluntary consensus standards system which is a significant portion of the organization's mission; and/or

There could be a lack of clarity as to the status (consensus/non-consensus) of any

given activity.

It should be noted that the above are potential problems which may be specific to the same organization producing both consensus and non-consensus standards, rather than any potential problems which may result from using a non-consensus process.

1. Potential of Non-Consensus Practices to Undermine Consensus Standards

As was discussed above, the development of non-consensus consortia is being driven by market demands. Thus, even if non-consensus practices were to: 1) survive any legal challenges; 2) prove their long term value; and 3) supplant consensus standards (an outcome which is far from certain even if the first two conditions were met), this development should be viewed as an outcome which enhances overall economic efficiency rather than a "problem" to be solved. Of course, a radical change in the standards system could create localized negative externalities within the standards community - including within SDOs sponsoring non-consensus standards development activities.

2. Potential for Confusion among Consensus and Non-Consensus Standards Activities

One potential problem which could occur from ANSI-accredited SDOs engaging in both consensus and non-consensus processes is confusion. There are three types of parties for whom there is the potential for confusion as to the consensus status of an activity:

Participants. Although this is a theoretical possibility, presumably participants in a given process would know the ground rules under which they are operating.

Stakeholders/members of the interested public. These persons may have a need to know whether or not a given activity is an open consensus process since this would determine whether or not they could meaningfully participate in the process.

Users of the end-product of the development activity. Here too, it should be simple to determine if the technical document is a consensus standard since American National Standards and ISO standards are clearly labeled as such by their numeric designator. However, as will be discussed below, ANSI procedures allow technical documents which have not been developed through an consensus process to be put through a consensus

process after development. Thus, it is possible that a potential end-user may not be aware of whether or not a given document is intended for eventual consensus status which could impact the ultimate acceptability and utility of the document.

One mechanism for ensuring clarity to all interested parties, is for organizations which engage in both consensus and non-consensus projects to clearly label all projects as to their consensus status. Thus, each project could be labeled, in documents for both internal use and for external communications (web sites, press releases, media articles) as to their consensus status. Options for labeling could include:

Consensus development process;

Non-consensus; and

Non-consensus intended for consensus approval.

Thus, although confusion could result from ANSI-accredited SDOs engaging in both consensus and non-consensus projects, it is a potential problem which could be avoided with relative ease.

B. Potential Benefits from MDCs

Although, as described above, there may be potential disadvantages to using a non-consensus process, consideration should also be given to the benefits of the MDC process. It is important to note that development of MDCs by highly respected SDOs, such as SAE, reflects that the consensus process was not always meeting the needs of industry. The study commissioned by SAE's Board of Directors confirmed that the organization needed to speed the delivery of knowledge to the practitioner and that this knowledge delivery would increasingly be accomplished through "noncompetitive best practices" rather than consensus standards.

Probably the most important benefit of MDC processes is speed. Specifically, by not needing to obtain consensus among all relevant stakeholder and limiting or eliminating due process and appeals, the timetable for developing the technical document may be significantly accelerated. Two of the most obvious potential benefits from speeding up the development process are that reduced development time means:

Reduced development costs; and

Bringing new processes and products on-line more quickly, thus allowing for a

more agile response to highly competitive and rapidly evolving market conditions.

The consensus standard development process originated during a time when technology progressed at a slower pace. Moore's Law offers an example of how the consensus process may not always be appropriate in high technology industries.
Gordon Moore, one of the inventors of the microchip, stated in 1965 that the number of transistors in microchips would double about every 18 months. So far, this law has held true. Thus, a consensus standards process in an industry utilizing microchips, could be debating a technology which was literally generations out of date. Although this example is specific to microchips, the basic principle about the speed of technological advancement holds true in many industries.

It is clear that, at least in some instances, technology-dependent industries need to be able to develop standards is "real time." Failure to develop timely standards could result in the standardization process being moot.

An additional potential benefit to some MDC processes is, that by excluding some stakeholders, it may be possible to avoid some compromises, unrelated to competitive issues, which may be undesirable in the view of the organizing party. Such compromises could, in certain instances, reduce the quality and utility of the standard in order to achieve a "lowest common denominator."

One of the key potential benefits to non-consensus process is that MDCs, unlike consensus processes, are able to exclude potential participants based on expertise or lack thereof. Thus, the MDC process can be limited to only those stakeholders who are able to substantively contribute to resolving specific issues; an attribute which may have a multitude of benefits.

C. Trade-Offs

MDCs, as was discussed above, offer both potential advantages and disadvantages. In addition to examining pluses and minuses of MDC processes, it may also be useful to discuss the specific trade-offs that are made in opting for a non-consensus process.

The advantages of the consensus process which may not be available to MDCs having a nationally or internationally recognized standard which reflects the needs of virtually all materially affected stakeholders. Other advantages of the consensus process which may not be available to MDCs include ANSI's coordination which ensures that a given standard is does not duplicate or conflict with other standards as well as ANSI requirements that the standard is maintained on a regular basis.

There are two additional potentially significant advantages with regard to the consensus

standards process that me be lost to MDCs. As is the case with many was learned

Participation in SDOs is open to all directly and materially affected stakeholders; and

Government participation in the standard development process.

1. Participation in SDOs is Open to All Directly and Materially Affected Stakeholders

A key aspect of the open consensus standards process is, of course, openness. Openness is defined by ANSI as meaning that participation in the standard setting process is open "[t]o all persons who are directly and materially affected by the activity in question" without undue financial barriers or conditions such as membership in a given organization or unreasonable restrictions based on technical qualifications[2].

Openness is closely linked to two additional ANSI requirements: balance; and consensus. Balance means that a standards development process should not be dominated by any single interest categories. ANSI defines three basic categories of interest groups: 1) producer; 2) user; and 3) general interest. The user category is further divided into sub-categories including: user-consumer; user-industrial; and user-government; and user-labor. Thus, the definition of balance provides specificity to the definition of openness.

Both openness and balance are essential the concept of consensus since these two criteria determine among whom consensus must be reached. Thus, agreement reached among a group which includes only members of a given organization or industry would not be considered as consensus for standards purposes. Similarly, agreement reached among a group which is dominated by a given interest and includes only token representation from other interests, would also not be considered as consensus for standards purposes. It should be noted that ANSI also requires that participants in standards development activities adhere to due process requirements and offer an appeals process to participants who have substantive and/or procedural complaints.

Openness, and with it the principles balance and consensus, is potentially the greatest strength of the consensus standards system. As was noted earlier, use of non-consensus consortia may speed development of standards. However, MDC limitations on both intellectual contributions (participation) and acceptance by

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[2] ANSI Procedures, p. 1.

materially affected stakeholders may result in a final work product which, compared to a consensus standard, is:

Of lower quality; and

Useful to fewer stakeholders.

A calculated trade-off between speed and quality can only be made if the MDC participants are aware of the contributions that would have been made by excluded groups. In that the use of non-consensus consortia has a limited history, there are not yet likely to be any research examining the speed-quality trade-off. Therefore, it may be difficult to for participants to accurately weigh the pluses and minuses of each type of process.

An additional issue which may have the potential to reduce or negate the value of non-consensus standards is if the MDC participants reach either a pre-determined goal or exclude certain potential options for competitive reasons. Should this gaming-the-system situation ever occur, not only could the work product be sub-optimal, but also serious antitrust issues may be raised.

2. <u>Government Participation in the Standard Development Process</u>

When considering potential trade-offs that may occur from using a non-consensus standards development process, one specific ANSI sub-category of interested user is of particular importance: user-government. Under the Technology Transfer and Advancement Act and OMB Circular A-119, federal officials are strongly encouraged to consult with voluntary consensus standards bodies and participate in such bodies whenever such actions are in the public interest and practical. The OMB Circular delineates the conditions and restrictions associated with federal participation in the development of consensus standards.

In addition to the OMB Circular which supports federal participation in consensus standards bodies, NIST is responsible for encouraging and coordinating the participation of state and local government officials in relevant standards proceedings.

Thus, if a non-consensus process is used, the consortia may have to forgo having government officials to contribute their time, skills and expertise to the project. Of course, it is possible that there may circumstances in which the lack of government involvement is not viewed as a detriment.

Not surprisingly, there are benefits and drawbacks to both consensus and non-consensus

processes. The net balance of the pluses and minuses will depend on the specific project as well as any relevant legal considerations.

V. ANSI Review Procedures for Standards

As was noted earlier, it is possible for standards developed through a non-consensus process to attain ANSI recognition as an American National Standard. ANSI's *Procedures* specifies three possible methods for determining the existence of consensus on a proposed standard. These methods of consensus development are:

Accredited organization method;

Accredited standards committee method; and

Accredited canvass method.

A. Accredited Organization Method

The accredited organization method of consensus is the mechanism most commonly used by organizations which have, among their activities, an interest in developing standards. This method of standards development requires that the organization develop operating procedures which meet the requirements specified by ANSI for consensus, i.e. that the organization develops standards though an open consensus process and meets the other requirements specified in Sec. 2.2 of *Procedures for the Development and Coordination of American National Standards*.

B. Accredited Standards Committee Method

An Accredited Standards Committee (ASC) is a forum which has been created by stakeholders for the purpose of developing consensus standards in a given subject area and submitting the standards to ANSI for approval. The committee method is often used instead of the organization method when the subject issue would affect a diverse array of stakeholders. Thus, where the accredited organization method concerns standards may be primarily relevant to a given industrial sector, the committee method is used to develop consensus standards which are relevant across industries. For example, Accredited Standards Committee X9 (ASC X9) develops financial industry standards relating to issues such as check processing and fund transfers. Although administered by the American Bankers Association, the committee includes such diverse interests as computer companies, accounting and consulting firms, telecommunications service

providers, and paper manufacturers.

C. Accredited Canvass Method

The accredited canvass method provides a process by which consensus may be obtained on documents which were not developed through a consensus process. Under this methodology, relevant stakeholders are surveyed (canvassed) to determine consensus. The canvass is conducted by an accredited sponsor. ANSI has specified a detailed procedures for the canvass methodology in Annex B of the *Procedures*. The key elements of the canvas method of consensus include:

Developing a canvass list which includes all known stakeholders who would be directly and materially affected by the standards such as corporations, individuals, government agencies, and standards developers.

ANSI review of the canvass list.

Conducting the canvass in accordance with ANSI procedures.

Attempting to resolve the various views and any objections expressed during the canvass ballot process. Any substantive changes made to the proposed standard as well as any unresolved objections are provided to all parties canvassed for an additional round of comments.

Providing the results of the process along with documentation to ANSI.

The canvass process potentially allows a non-consensus consortia-developed standard to achieve ANSI-certified consensus status. Thus, there is an ANSI process which may bridge the gap between consensus and non-consensus development processes. Therefore, it may be possible, in some instances, for stakeholders to gain benefits from both the MDC and consensus processes.

VI. Antitrust Issues for MDCs

A. Antitrust Background

As was discussed in the Introduction, MDCs are groups of industry associations or companies which develop standards-like technical documents without adhering to ANSI requirements for consensus. The decision of MDCs to not adhere to ANSI procedures. raises some potentially significant legal issues:

The ANSI procedures entail several elements that can delay, often by years, the

time required to develop a standard: (i) requirements that all relevant stakeholders be included in the process; (ii) multiple opportunities for appeal to ensure that entities who feel they would be harmed by the proposal can raise any concerns, including the antitrust impacts of a proposed standard; and (iii) consensus requirements.

These ANSI requirements are designed to protect the parties participating in the standard-development process from antitrust liability.

> The stakeholder inclusion and appellate opportunity requirements mitigate against any claim by a prospective plaintiff that the standard-setting group acted in collusion to harm its ability to compete, because the aggrieved party has a significant opportunity to participate in the process and to raise any problems before the standard is established. Moreover, if a dissenting party objects to a proposed standard on antitrust grounds, the ANSI process ensures that those problems are addressed and resolved, so that any harm to competition (and consequent antitrust liability) can be avoided at the outset.
>
> The consensus requirement ensures that the standard is acceptable to all or most affected groups, thus eliminating potential antitrust plaintiffs.

ANSI is careful to point out that complying with its elaborate procedures does not guarantee, in any absolute sense, that no antitrust liability will arise. (Marasco at 2 ("due process in and of itself is not and can never be a complete defense to an antitrust claim. However, the value of an open system and due process-based procedures derives from the fact that they are designed in large measure to cause antitrust-related issues to surface as early in the process as possible").)[3]

The primary purposes of the MDC mechanism are: (i) to avoid the consensus requirement; and/or (ii) to speed up the process so as to allow industry to begin using new standards.

B. Antitrust Considerations

From the above, it is clear that market driven consortia are a category of standard-setting body (the other category being ANSI-approved bodies). No Federal cases have addressed "market driven consortia" per se. However, numerous cases have addressed the antitrust implications of standard-setting bodies generally.

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[3] The fact that acting under the umbrage of a recognized consensus standard setting body does ***not*** necessarily or absolutely guarantee participants from antitrust liability is borne out by the Allied Tube case (discussed below).

The key case is Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931 (1988), which held that the activities of private standard-setting bodies are subject to the antitrust laws. In Allied Tube, the National Fire Protection Association was voting on a proposal to revise its electrical wiring code so as to approve the use of plastic conduits. Steel conduit manufacturers "packed" the Association's annual meeting with manufacturers and agents who joined the Association solely for the purpose of voting down the plastic conduit revision. When the proposal was defeated, the plastic conduit manufacturer sued the steel conduit manufacturers for violations of the antitrust laws.

The U.S. Supreme Court upheld the Second Circuit's decision that, while an attempt to round up supporters to dominate a *governmental* decision-making body or process is protected by the constitutional right to petition the government, this right does not apply to an attempt to influence a *private* organization. Therefore, general antitrust principles were applicable to determine whether the steel conduit manufacturers had engaged in unlawful concerted action to thwart competition.

Allied Tube established the following key principles:

> First, "*Noerr* immunity" does not apply to the activities of private standard setting bodies when those activities are directed at private markets. Under the *Noerr-Pennington* doctrine, "[c]oncerted efforts to restrain or monopolize trade by petitioning officials are protected from antitrust liability." 486 U.S. at 499. According to the Court, immunity does not apply in the private standard-setting body context, because such bodies are not government entities, even though government entities may routinely adopt the standards established by such bodies. Id. at 501 ("[w]hatever de facto authority the Association enjoys, no official authority has been conferred on it by any government"). In other words, when companies or associations act in concert to influence the decision of a private standard-setting body, they are not petitioning the government.
>
> Second, because Noerr immunity does not apply, normal antitrust scrutiny does apply. Id. at 500.
>
> Third, in applying normal antitrust analysis, the following considerations apply:
>
> > "Agreement on a product standard is...implicitly an agreement not to manufacture, distribute, or purchase certain types of products." (Id. at 500.) (The Court recognized a distinction between "the exercise of the power of persuasion" and "the exercise of market power." The use of standard-setting by such market participants as consumers, distributors and manufacturers not to approve a product "is in part an implicit agreement not to tread in that type of" product. (Id. at 507.))

"When...private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition...those private standards can have procompetitive advantages." Id. at 501.

"It is the potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations." (Id.; see also International Test & Balance, Inc. v. Associated Air & Balance Council, 14 F. Supp. 2d 1033, 1046 (N.D. Ill. 1998) ("[i]t has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations"); I. Scher, 2 Antitrust Advisor ¶ 11.50, p. 11-65 (4th ed. 1999 revision) (benefits of standards include enhancing safety, safeguarding against product failure, and providing product uniformity to enable a market to function).)

Potential anticompetitive ramifications of standard-setting include: (i) depriving customers of a desired product; (ii) elimination of quality competition; (iii) exclusion of rival producers; and (iv) facilitation of oligopolistic pricing by easing rivals' ability to monitor each others' prices. Allied Tube, 486 U.S. at 501 n.5 (quoting 7 P. Areeda, Antitrust Law ¶ 1503, p. 373 (1986).)

"[B]ecause private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits,...the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication." Id. at 506-07.

"[T]he hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards." Id. at 509; see also id. at 511 (a participant in the standard-setting process may not bias the process itself without exposing itself to possible antitrust liability).

Allied Tube involved a standard that was purportedly necessitated by safety concerns. The extent to which the Allied Tube reasoning would apply to a

> standard-setting process motivated primarily by economic, as opposed to safety, considerations (*e.g.*, a standard aimed at enhancing the ability to sell a product in foreign markets) is unclear. Arguably, where the standard is not necessitated by safety concerns, the potential for antitrust liability may be greater.

Other authorities suggest that the following actions by a standard-setting organization (or a dominating company or companies within the organization) could serve as predicates for antitrust liability:

> Barring a competitor from obtaining approval of its products in a discriminatory manner. (In re Circuit Breaker Litig., 984 F. Supp. 1267, 1278 (C.D. Cal. 1997).)
>
> Drafting or implementing a standard in a manner that "goes beyond what is necessary to achieve the purpose of the standard." (I. Scher, 2 Antitrust Advisor, supra, ¶ 11.50, p. 11-66.)
>
> Failing to comply with the organization's own process in making a decision to certify or not certify a product. (Id.; see also International Test & Balance, Inc., supra, 14 F. Supp. 2d at 1045 (suggesting that subversion of the standard-setting body's procedure is a possible basis for antitrust liability).)
>
> A 1971 advisory opinion of the Federal Trade Commission suggests that private standards may be unlawful if they: (i) are devices for fixing prices; (ii) have the effect of boycotting or excluding competitors; (iii) have the effect of withholding or controlling production; or (iv) limit the kinds, quantities, sizes, styles, or qualities of products. (See I. Scher, 2 Antitrust Advisor, supra, ¶ 11.50, p. 11-66 (citing F.T.C. Advisory Op. No. 457, 78 F.T.C. 1628 (1971)).)
>
> Anticompetitive problems arise when a standard: (i) restricts entry into an industry; (ii) inhibits innovation; or (iii) limits the ability of any industry members to compete. (Id.)

As applied to the MDC context, Allied Tubing suggests that the potential for antitrust liability is not dependent upon whether the organization that sets the standards is or is not ANSI-accredited. Rather, a court would look to the unique facts and circumstances of each standard-setting proceeding, and consider the following questions:

> Did the participants in the standard-setting process have an economic incentive to stifle competition?
>
> Did the participants bias the process in any way to prevent the views of competing economic interests from being fully and fairly considered?
>
> Were all arguments for and against the standard, and any alternatives, fully considered in terms of safety, technical requirements and competitive impacts?

Did dissenting parties have an opportunity to appeal both procedural and substantive determinations of the standard-setting body?

What is the goal of the standard? Does the final standard exceed what is necessary to achieve that goal?

Was a new or revised standard necessary due to safety, technological or economic concerns?

Does the new or revised standard enhance or stifle competition?

Does the consortia uniformly apply an objective, written procedure in making its decisions?

In sum, if the MDC mechanism is utilized to *expedite* an inclusive, consensus-based process aimed at achieving a *procompetitive* result, then the MDC standard should not result in antitrust liability. If, on the other hand, the standard-setting process was used as a subterfuge for excluding competing products from the market, then antitrust liability could result.

VII. Should OMB Circular A-119 - Federal Participation in the Development of Voluntary Consensus Standards and in Conformity Assessment Activities - Be Revised?

OMB Circular A-119 includes two key standards-related functions:

Directing federal agencies to use voluntary consensus standards in lieu of government-unique standards to the extent practicable; and

Providing guidance to federal agencies on participation in voluntary consensus standards bodies.

The question is whether, in light of the issues discussed in this paper, is there a need to revise the Circular?

A. Why OMB's Definitions of "Consensus" and "Consensus Standards Body" are Important to SDOs and MDCs

As was discussed in Section I, ANSI has a signed agreement with NIST which specifies responsibilites by each party. The agreement to strenghen the consensus standards system in between ANSI and NIST since: 1) ANSI has historically been responsible for administering and coordinating the US system of private consensus standards; and 2)

NIST is responsible for coordinating federal activites with regard to voluntary standards and to ensure adaquate representation by US interests in all relevant international standards organizations. NIST receives its authority regarding standards issues through: the National Technology Transfer and Advancement Act of 1995 (PL 104-113); the Trade Agreements Act of 1979 (PL 96-39); and OMB Circular A-119.

The Act requires NIST to develop, and provide to Congress, a plan for implementing the Act. As part of its Implementation Plan, NIST directs that OMB, in consultation with NIST, "[r]evise OMB Circular A-119 to implement the Technology Transfer Act." Thus, OMB is defining both "consensus" and "consensus standards body" is response to a Congressional mandate.

Since: 1) Circular A-119 defines the terms "consensus", "consensus standards body" and related principles (openness, due process, etc.) for the whole federal government, including NIST; and 2) NIST has an agreement with ANSI recognizing ANSI's responsibilities to develop and publish American National Standards in accordance with these principles, it is reasonable to presume that these principles specified in the MOU, including "consensus", are defined by the OMB Circular.

Thus, it is incumbent upon ANSI-accredited SDOs, discussed in the MOU under ANSI responsibilities, to adhere to the relevant definitions contained in the OMB Circular even though the Circular never explicitly mentions ANSI or American National Standards.

The OMB definitions of consensus and consensus standards body are also of relevance to MDCs since, in light of the antitrust discussion in the previous section, these organization may want to selectively adopt elements of the consensus process.

It is also important to note that the Circular provides a definition of "non-consensus standards." Non-consensus standards are defined as standards which are developed in the private sector but not through a "full consensus process."

B. How OMB's Definition of Consensus Compares With ANSI

OMB Circular A-119 states that a voluntary consensus body is defined by the following attributes[4]:

Openness;

Balance of interest;

Due process;

An appeals process; and

Consensus.

These requirements are compatible with ANSI's requirements for due process, openness, balance, and an appeals process as well as consensus. The primary difference between OMB's definition and ANSI requirements, for the first four categories, is that ANSI provides greater definitional detail. For example, whereas the Circular simply specifies "balance of interests", ANSI's *Procedures* provide a description of what balance means. Specifically, ANSI requires that no interest category dominate the proceedings and provides a definition of dominance. Furthermore, ANSI specifies the interest categories to be included in the standards development process.

The potentially significant difference between OMB and ANSI is on the definition of "consensus." OMB employs what appears to be a somewhat looser definition of consensus. OMB defines consensus as "general agreement, but not necessarily unanimity," By contrast, ANSI describes consensus as "substantial agreement among directly and materially affected interest categories." ANSI goes on to describe substantial agreement as meaning more than a simple majority but less than consensus. Both ANSI and OMB require that all views/comments be fairly considered and that there be a process for attempting to resolve objections.

Although certainly not in contradiction to the OMB Circular, ANSI's *Procedures* provide somewhat greater detail. However, both ANSI and OMB definitions of consensus provide a significant grey area between more than a majority and less than unanimity.

OMB's somewhat skeletal definition of consensus and consensus standards body raises the possibility of OMB revising the Circular to tighten the definitions. Such a revision could potentially include adding at least some of ANSI's explanation of openness,

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[4] OMB Circular A-119 - Federal Participation in the Development of Voluntary Consensus Standards and in Conformity Assessment Activities, Sec. 4(a)(1).

balance, due process, and appeals to Circular A-119. Similarly, it may be possible for OMB, ANSI and other interested parties to collaborate on enhancing the clarity of the Circular's definition of "consensus."

One of the advantages of an enhanced definition of consensus is that disputes over what constitutes consensus may be reduced. Reduced dispute may make the consensus standards process more attractive to current and prospective standards developers. Furthermore, an enhanced definition of consensus may allow for organizations to make a more informed decision between a consensus and non-consensus standards development process.

C. OMB Recognition of Non-Consensus Standards

Since the Circular specifically address voluntary "consensus" standards, it would initially appear that the document would have relatively limited relevance to MDC non-consensus standards. However, the OMB Circular explicitly states that there is no federal preference between consensus and non-consensus standards that are developed in the private sector.[5] Therefore, MDC non-consensus standards are accorded equal treatment to consensus standards in matters of regulation and procurement by the Circular.

Under the OMB Circular, it appears that a standard produced by an SAE-organized consortia, or any privately developed standard, would have equal weight with a consensus American National Standard in both regulation and procurement activities.

There are three potentially significant issues raised by the OMB Circular providing equal preference to consensus and non-consensus standards:

Determining the intent of the Circular regarding non-consensus standards;

Appropriateness of possibly using non-consensus standards in regulatory proceedings; and

Congressional intent expressed in the National Technology Transfer and Advancement Act (PL 104-113).

1. <u>Determining the Intent of the Circular Regarding Non-Consensus Standards</u>

OMB Circular A-119 requires federal agencies to use voluntary consensus

[5] OMB Circular A-119 - Federal Participation in the Development of Voluntary Consensus Standards and in Conformity Assessment Activities, Sec. 6(g).

standards instead of government-unique standards wherever legal and practical. Section 6 of the Circular states:

> *All federal agencies 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 law or otherwise impractical.*

However, as was noted above, Section 6(g) states, "This policy does not establish a preference among standards developed in the private sector." The paragraph goes on to state, "For example, this policy allows agencies to select a non-consensus standard developed in the private sector...regardless of whether the underlying standards are developed by voluntary consensus bodies or not."

If the Circular's preference is simply for private sector standards over government-unique standards, as Section 6(g) indicates, it is not clear why the rest of the Circular, including the introductory paragraph of Section 6 and much of the rest of the Circular, explicitly refers to "voluntary consensus standards." After all, the Circular could refer simply to private sector standards without repeatedly and explicitly referencing "consensus" standards. Furthermore, since the Circular distinguishes between consensus and non-consensus standards (in Section 4(a)), it is clear that the Circular is not simply using voluntary consensus standard as a generic term for all private sector standards.

The result of the Circular's wording in different sections is to leave the intent ambiguous with regard to non-consensus standards. It is worth noting that Section 6(h) states the Circular's policy that there is no preference between domestic and international voluntary consensus standards. How foreign/ international non-consensus standards would fit into this policy is not addressed.

The overall conclusion is that OMB Circular A-119 allows for potentially contradictory interpretations depending on which sections are examined. Thus, an argument can be made that the Circular should be revised to clarify OMB's intent with regard to federal use of consensus and non-consensus standards.

2. Appropriateness of Using Non-Consensus Standards in Regulatory Proceedings

As was discussed above, the OMB Circular states that there is no federal preference between consensus and non-consensus standards in regulatory proceedings. However, using private sector standards in regulatory proceedings

means that the private process used to develop the standard substitutes for part of the agency regulatory proceedings. When voluntary consensus standards are employed, using a private standard development process should not be a problem since the consensus process is open to participation by all stakeholders. However, there are no public participation requirements for non-consensus standards. Therefore, if a government agency uses a non-consensus standard, stakeholders may be denied an opportunity to participate in the development of a key element of a federal regulation.

An additional issue regarding the use of non-consensus standards in rulemakings is that consensus procedures may provide important safeguards against anticompetitive behavior. Thus, use of non-consensus standards in a federal rulemaking may raise serious due process issues which may have legal implications.

3. Congressional Intent Expressed in the National Technology Transfer and Advancement Act (PL 104-113)

Section 12(d)(1) of the Technology Transfer Act states, "[a]ll Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus bodies..." The Act does not discuss or reference non-consensus standards. The NIST Plan for implementing the Technology Transfer Act also does not ascribe any role to or discuss non-consensus standards.

Given that the Technology Transfer Act: 1) states that federal agencies are to use consensus standards; and 2) does not discuss non-consensus standards, it is not clear how Section 6(g) of OMB Circular A-119 comports with the Technology Transfer Act.

Overall, Section 6(g) of Circular A-119 raises potentially significant questions regarding both other sections of the Circular as well as Congressional intent expressed through the Technology Transfer Act. Thus, it may be beneficial for OMB to revise Circular A-119 to clarify the potential roles of non-consensus standards in federal regulatory and procurement decisions.

VIII. Market Driven Consortia: The CableLabs Example

Cable Television Laboratories (CableLabs) is an association of cable television operators in North and South America. CableLabs conducts research and develops technical specifications for the cable television industry. The MDC's work includes standards for

interoperability between interconnected cable systems and also between cable systems and other types of networks such as telephone systems and the internet. CableLabs is not an ANSI-recognized SDO. It should be noted that there is an ANSI-accredited SDO for the cable television industry, the Society for Cable Telephony Engineers (SCTE). CableLabs does, on some occasions, have SCTE put CableLabs standards through a consensus process.

A. CableLabs Development of an MDC Non-Consensus Standard for Cable Modems

CableLabs developed the standard for cable modems, the Data Over Cable System Interface Specification (DOCSIS), through a non-consensus process. The DOCSIS standard was not submitted to SCTE or ANSI for review. However, the cable modem standard was submitted to the International Telecommunication Union (ITU). The ITU is an international consensus standards organization. As was noted above, under OMB Circular A-119, international consensus standards are given equal weight with domestic consensus standards.

1. A Potential New Mechanism for MDC Standards to Achieve Consensus Status

The DOCSIS example is significant since it outlines a potential mechanism, in addition to the three processes described in *Procedures* by which an MDC-developed non-consensus standard may be able to achieve consensus status following development - approval by an international consensus standards organization. The question arises as to whether there is any reason for ANSI's *Procedures* and/or Circular A-119 to be revised to accommodate or otherwise manage this possible pathway to consensus status.

2. Potential Competitive Issues Regarding MDC Standards

One interesting aspect of the DOCSIS standard is that Ameritech had alleged, in a draft paper posted on the ANSI website[1], that CableLabs employs anticompetitive practices. The draft paper states that an Ameritech unit (Ameritech New Media) has been denied membership in CableLabs and, thus, the ability to participate in the development of the DOCSIS and other CATV infrastructure standards. Furthermore, Ameritech has alleged that their exclusion from the standard development process is anticompetitive. Specifically, the draft paper states, "CableLabs has a policy of screening out prospective members based on their line

[1] "A Case for Open Standards Development in the CATV Industry" [Draft], Ameritech, December 9, 1999.

of business and perceived competitive threat to incumbent members. ... The incumbent operators have designed architecture and interfaces...that are biased toward an incumbent (single) provider...The ability of the user to obtain competitive equipment and services from other than the incumbent provider is restricted."[2] Thus, Ameritech is raising the possibility that, in this instance, the MDC process is being for the purpose of achieving anticompetitive goals.

Ameritech has also alleged that they have been excluded for anti-competitive reasons from the CableLabs' development of specifications for Packet Cable technology which provides for the ability to interconnect multimedia between cable television systems, the internet and other public and private networks.

B. *The FCC's New Role in Determining Cable Television-Internet Interconnection Policy*

CableLabs role in developing standards to permit interconnection between cable television systems and the internet may be of heightened significance in light of a recent decision by the Ninth Circuit Court of Appeals. The decision in AT&T v City of Portland gave to the FCC the policy decision on whether cable television operators which offer internet access should be required to open their systems to competing internet service providers.

As a result of the court decision, the FCC is initiating a proceeding on "Cable Access." The purpose of the proceeding is to determine whether the FCC should require open access, not set standards for such requirements. However, Chairman Kennard, in a June 30, 2000 press release, stated that his goal is to achieve an open cable platform and the question is whether that goal would be reached through regulation or market forces.

Although the FCC Cable Access proceeding is to determine policy, the standards for interconnecting cable systems with other networks may play a significant role in how the FCC's policy is implemented.

Any allegations regarding potentially anticompetitive behavior by CableLabs may take on added significance as a result of the FCC proceeding given the FCC's reliance on CableLabs for cable infrastructure standards development work on other issues. Specifically, the FCC, in CS Docket 97-80, designated CableLabs' Open Cable project as having primary responsibility for setting standards for set-top boxes for digital cable systems. It is important to note that the FCC set up a monitoring process for the project. The FCC requested that the National Cable Television Association (NCTA) monitor

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[2] Ibid., p. 2.

CableLabs progress, based on a series of milestones, and provide semi-annual reports to the Commission in developing the standards for digital set-top boxes.

The FCC 97-89 proceeding is interesting in that it presents an novel model for federal use of standards developed by MDCs; monitoring and reporting on the MDC's work by a third party. There is not any discussion of this policy option in OMB Circular A-119.

When evaluating the FCC decision to use an MDC to develop the digital navigation (set-top box) standard, it is important to consider that one of the Commission's key goals in the proceeding meshed with one of the advantages of MDCs discussed in the Introduction, rapid development of the standard.

Overall, the following conclusions may be drawn from considering: Ameritech's allegations regarding CableLabs; the FCC's use of CableLabs for standards development; and the FCC Cable Access proceeding:

> MDCs are playing an important role in developing standards for the cable television industry;
>
> Allegations have been raised that the MDC standards development process for the cable television industry is anticompetitive;
>
> Federal agencies may be developing policy towards the use of MDC standards on an *ad hoc* basis; and
>
> The FCC Cable Access proceedings may provide an opportunity to explore whether federal and/or ANSI policy adaptations are needed to account for the growing role of MDC standards.

IX. Conclusions

> Market Driven Consortia (MDC) is a generic term for standards development organizations which do not use an open consensus process.
>
> Use of a non-consensus process may speed development of standards but the non-consensus process may also have drawbacks.
>
> Consensus standard development organizations, such as the Society for Automotive Engineering, are developing both consensus and non-consensus standards.

Standards developed through a non-consensus process may still attain consensus status provided that the standard is put through an ANSI-approved consensus-seeking process.

Use of an open consensus process may help prevent the circumstances which could give rise to antitrust concerns in a standard setting process.

In either a consensus or non-consensus process, antitrust concerns may be raised if the process is used for anti-competitive purposes.

OMB Circular A-119, which sets federal policy for use of consensus standards, requires agencies to use consensus standards and to participate in consensus standards bodies whenever practical. The Circular also defines the terms consensus and consensus standards body.

OMB Circular A-119 states that there is no federal preference between consensus and privately-developed non-consensus standards.

There is some ambiguity in the OMB Circular's definition of consensus and in policy regarding non-consensus standards. This ambiguity may indicate a benefit to revising the Circular to enhance clarity.

One MDC, CableLabs, is developing non-consensus standards for the cable television industry.

Allegations have been made that CableLabs operates in an anticompetitive manner to exclude potential competitors and restrict consumer choice.

CableLabs may be able to obtain consensus status for their standards by submitting them for approval to either an ANSI-accredited SDO or to an international consensus organization.

The FCC has requested that CableLabs develop a digital set-top box standards for the cable television industry. The FCC is using a third-party monitoring and reporting system to track progress.

The FCC has initiated a new Cable Access proceeding. Implementing the results of the proceeding may be significantly dependent on cable interconnection standards.

Federal agencies may be developing policy towards the use of MDC standards on an *ad hoc* basis.

The FCC Cable Access proceedings may provide an opportunity to explore whether federal (OMB Circular A-119) and/or ANSI policy adaptations are needed to account for the growing role of MDC standards.

X. Next Steps

The Center for Regulatory Effectiveness is creating an exploratory committee to determine whether an ANSI Accredited Standards Committee (ASC) or an MDC should be established for the purpose of developing standards for interconnecting cable televisions systems with the internet and other networks. Stakeholders interested in participating in the exploratory committee should contact the CRE.