



June 1, 2021

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### Petition to Initiate Rulemaking

The Information Technology Industry Council (ITI) is petitioning your agency to initiate a Federal Acquisition Rulemaking (FAR) to modify Part 23.704 to replace the current requirement that federal agencies purchase EPEAT® registered products and replace it with a requirement that federal agencies purchase products that conform to requirements that have been identified as voluntary consensus standards, as defined by OMB Circular A-119 to the EPA Guidelines for the Assessment of Environmental Performance Standards and Ecolabels for Federal Procurement and third-party ecolabels. Our members are global leaders in all facets of ICT innovation, from hardware to services and software, and have long been leaders in sustainability. Many exceed environmental design and energy efficiency requirements and lead the way in product stewardship efforts. As a result, the Dow Jones Sustainability Index, the Financial Times Sustainability Index, and the Global 100 have consistently recognized ITI member companies for their significant environmental and sustainability achievements.

ITI member companies have supported environmentally preferable purchasing, the policy intent of Executive Orders 13423 and 13514, and the EPEAT® program since its inception. Today, our products comprise over 80% of the EPEAT®-registered products. We also support the inclusion of imaging equipment (IEEE 1680.2), televisions (IEEE 1680.3) and an updated computer standard (IEEE 1680.1) reference in the Federal Acquisition Regulation (FAR) provided that the modifications we propose below are adopted. We wish

to reiterate, however, a number of concerns previously outlined in our comments to FAR Case 2010-001 and FAR Case 2013-016, and to further note that we believe the FAR should be used to make additional revisions to FAR Parts noted below in order to provide full access to the Federal government market for electronic products.

### **The FAR delegates Inherently Government Functions**

The FAR's reference to the privately-held EPEAT® program is an improper delegation of an inherently governmental function, as it effectively delegates the Government's purchasing decisions to the Green Electronics Council (GEC). EPEAT® is a registered trademark that GEC owns, and the FAR currently requires executive agencies to acquire EPEAT®-registered products. In order to qualify as an EPEAT®-registered product, the product's manufacturer must complete two steps: (1) register with EPEAT®; and (2) select a Conformity Assurance Body (CAB) to verify that the product is compliant with the requisite technical standard. GEC controls both steps. Specifically, the first step requires the manufacturer to (a) enter into a legal agreement with GEC (an agreement that GEC authors and the Government has not vetted); (b) meet any conditions established by the GEC contained therein; and, (c) pay an annual fee that GEC establishes. The second step mandates that the manufacturer pay a separate fee to a GEC-approved and GEC-trained CAB. CABs are charged with verifying that the manufacturer's product(s) conforms to the criteria of the standard for that product. EPEAT Inc., originally served as the sole product verifier during the first six years the EPEAT® program was operational, despite GEC's lack of accreditation or demonstration of technical knowledge to perform such functions. As of May 2012, GEC has approved six bodies, including its own still-unaccredited CAB, to serve as CABs.

If the manufacturer does not complete both steps, which go far beyond demonstrating conformance to the underlying technical standards, the manufacturer's products are not registered on the EPEAT® registry. Consequently, agencies required to commit at least 95% of their electronics acquisition funding to sustainable products will not consider acquiring the product, and the product will not receive a preference in Government purchasing. As such, by referencing "EPEAT®" in the final rule rather than an ecolabel or voluntary consensus standard, manufacturers can only sell to the Government by directly engaging with, and meeting the private qualifications established by, GEC. The practical outcome is that a manufacturers' products are deemed ineligible for purposes of Federal IT acquisitions unless the manufacturer agrees to meet the conditions that a third-party private entity sets in the absence of any federal review or approval. Stated otherwise – GEC serves as the sole gatekeeper, without any government oversight, for deciding which products qualify as EPEAT®-registered and, thus, effectively determines "which supplies or services are to be acquired by the government" – a function that OFPP Policy Letter 11-01 recognizes as inherently governmental.

We strongly support the referencing of ANSI-accredited voluntary consensus standards in the FAR to establish a neutral conformance metric for the demonstration of sustainable

electronic products. We remain strongly opposed to a regulatory requirement for manufacturers to subscribe to a specific privately-held program as a condition of doing business with the Government. This requirement delegates an inherently governmental function to a private entity and limits not only industry's ability to pursue other options for determining conformance with green procurement preferences, but also precludes other organizations from providing similar or better and more cost-effective services than GEC.

### **No FAR Precedent Exists for a Registry requirement**

Industry shares the Government's desire to avoid creating a need for additional training that the acquisition workforce must attend, or additional skills that such workforce must acquire, in order to determine compliance with the appropriate FAR clauses governing sustainable electronics acquisitions. ITI's recommendation to make EPEAT® registration one option for compliance would not ignore this concern, but rather, would treat the EPEAT® Criteria the same as other standards cited in the FAR. Specifically, ITI has conducted a thorough review of other FAR citations and references to voluntary consensus standards, and we are not able to identify the requirement for use of such a registry in any other instance. Instead, contracting officers accept the certifications of conformity or other conformance measures that duly accredited CABs issue to manufacturers as evidence of compliance with a particular standard. Thus, we believe removing the EPEAT® registry requirement would not disable the ability of the acquisition workforce to properly identify qualified products, but rather, would conform to the Government's existing practices with respect to voluntary consensus standards.

### **The FAR is currently inconsistent with the National Technology Transfer Act (NTTA)**

The NTTA requires the Agencies adopt voluntary consensus standards (VCS) wherever possible. The FAR violates this statute by failing to adopt voluntary consensus standards and instead mandates the purchasing of products identified on a privately held entity's registry. Further, GEC is proposing to move away from voluntary consensus standards to instead use a criteria-based approach to qualifying products. In fact, the EPA made the following comment to the GEC proposal:

“Products that meet EPEAT Criteria are identified in the public facing website called the EPEAT Registry”. Historically the program has been based on Voluntary Consensus Standards (VCS) (rather than criteria), and we believe there is value in retaining this approach while adding a weighted voting approach. This approach is supportive of (1) U.S. Federal agency cooperation with the EPEAT program, and (2) demonstrating that EPEAT is an international system.

1) OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities defines

VCS as a type of standard developed using a process that includes attributes or elements such as: Openness, Balance, Due Process, Appeals Process, and Consensus. Many standards bodies use the American National Standards (ANS) designation as a tool to demonstrate that their standards are VCS. Federal law and policy direct Federal agencies to use VCS in lieu of government-unique standards. There are inherent safeguards built into VCS processes which do not necessarily exist in other standards and criteria development processes, including:

- Protection against anti-trust issues within the standards development process;
- Assurances that the standards development process is accessible to all interested parties;
- Assurances that the viewpoints of all interested parties will be given consideration and treated fairly;
- Alignment of standard development processes with legal requirements for government agencies to avoid unnecessary obstacles to the foreign commerce of the United States in standards development.

2) Continued use of VCS would also support consideration of the EPEAT as an international system. In 2000, the World Trade Organization (WTO) Committee on Technical Barriers to Trade adopted a decision setting out principles that standards bodies should follow when developing international standards. The principles set out in this decision closely reflect the OMB A-119 definition of VCS.”

As the GEC moves EPEAT Criteria away from VCSs, the US Government has no power to meaningfully or substantively oversee GEC and the EPEAT® program. Specifically (and per the EPEAT® website), an independent fiduciary Board of Directors oversees and has legal authority over EPEAT® and, thus, over GEC. Instead, the Government, along with impacted manufacturers, merely serves on the EPEAT Advisory Council, which has no authority or ability to change the EPEAT® program. Consequently, there is no Government oversight of the EPEAT® program. The language the USG used in the FAR has in effect given GEC complete control over how it chooses to manage EPEAT.

## **Recommendation**

Because of the aforementioned concerns, we are petitioning the USG initiate a rulemaking to amend the FAR to remove the reference to the EPEAT® program in subparts 39.101, 23.704, 23.705 and, instead, instruct the EPA to create a list of acceptable labels and voluntary consensus standards based on review by its assessment guidelines. Likewise, where subparts 7.103, 11.002(v), 23.000(d), and 23.103 reference EPEAT® as an example of an environmentally preferable product, we recommend referencing only environmentally preferable attributes or standards that are otherwise deemed appropriate to serve as the basis of Government purchasing requirements, rather than specifying a single, privately held program. We believe this approach will maintain the environment and sustainability leadership the US Government has shown in purchasing green products,

while ensuring good governance. ITI has respectfully provided suggested potential text for CFR 23.704 and 23.705 in Attachment A.

As an interim measure, we request that OMB:

1) Issue guidance upon which contractors and vendors can rely stating that, for purposes of compliance with FAR 23.705, the government will accept an EPEAT-registered product or a third party certification of conformance to IEEE 1680.1 for Personal Computers and Displays, IEEE 1680.2 for Televisions, IEEE 1680.3 for Imaging Equipment, UL 110 for Mobile Devices and NSF 426 for servers. FAR 23.705 already equates EPEAT® with IEEE 1680, and clearly states that reliance upon certification of conformance with IEEE 1680 is a threshold criterion for eligibility on the EPEAT® registry. Such a clarification will resolve the issue of the government improperly delegating an inherently governmental function, while preserving the EPEAT® registry as one option for compliance.

2) Issue further guidance clarifying that FAR 23.705's reliance upon IEEE 1680 as the underlying metric for inclusion in the EPEAT® registry precludes use of other standards to add new product categories for compliance with FAR 23.704. As new product categories are promulgated for inclusion and coverage in IEEE 1680, then those categories would be eligible for addition to FAR 23.704 coverage.

Respectfully Submitted,



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The Information Technology Industry Council (ITI) is the premier advocacy and policy organization for the world's leading innovation companies. ITI navigates the constantly changing relationships between policymakers, companies, and non-governmental organizations to promote creative policy solutions that advance the development and deployment of technology and the spread of digitization around the world.

ITI membership includes access to our advocacy focused on two core pillars – policy and public affairs. ITI membership includes full access to ITI's public sector work, which focuses on improved government procurement policies and practices, and ITI's environment and sustainability work, which advances sector priorities in environment, energy, and supply chain sustainability.