NEUTRAL GOVERNMENT SOFTWARE PROCUREMENT POLICIES CREATE SIGNIFICANT OPPORTUNITIES IN INNOVATION, LOCAL ECONOMIC GROWTH, AND JOBS

◈ ***Preferential Procurement Policies Are Bad Public Policy and May Be Illegal:*** Procurement policies establishing preferences for particular types of software, technology standards, business models, or licensing models are bad public policy because they: (1) arbitrarily force product uniformity and vendor lock-in; (2) discourage R&D investment; and (3) limit choice and can prevent governments from securing the best technical solution available. Preferential policies are particularly imprudent given the convergence of technologies and business models in an increasingly heterogeneous IT eco-system that allows agencies to ***choose and combine*** the best proprietary software and best open source software (OSS) products to forge an ideal solution. Preferential policies may also be *per se* illegal. As court decisions in [Brazil](#), [Belgium](#), and elsewhere demonstrate, preferences in software procurement policies contravene well-established principles of equal protection and non-discrimination set out in federal and state laws, constitutional provisions, and major EU Directives. Because such legal principles are at the center of societies worldwide, these decisions should give serious pause to any government considering the adoption of direct or indirect procurement preferences.

◈ ***Benefits of Neutral Procurement Policies:*** The better public policy approach, and the one that is most consistent with the constitutions and laws of jurisdictions across the globe, is for policy makers to develop policies that do not advantage or disadvantage business or licensing models (*neutral* procurement policies) and that allow governmental agencies to ***choose*** the best software and business models in a given situation based on reasonable, objective criteria, such as the following: (1) the overall cost of procuring the software and its administration over the life of the product; (2) interoperability; (3) reliability; (4) vendor support; (5) ease of use; (6) security; and (7) availability of warranties and indemnities for intellectual property (IP) claims. Such neutral policies, in turn, drive substantial benefits for consumers, governments, and local economies. In particular:

- ♦ Such policies encourage companies of all types -- both OSS and proprietary software -- to vigorously compete for the government's purchase decision, which, in turn, fosters greater innovation, increased customer choice, lower costs, and enhanced interoperability. This approach also results in a vibrant IT ecosystem with many different business models competing to best meet customer needs.

- ♦ Neutral policies promoting choice also allow companies to protect the IP of their innovations without fear that in doing so they will be disadvantaged in a procurement process that penalizes IP-based solutions (as is often the case where OSS is mandated or preferred). Such respect for IP will, for example, encourage small businesses to identify and build upon core competencies of local economies, which, in turn, will attract investment capital to help them compete in areas where their expertise is often the greatest.

- ♦ Finally, neutral procurement policies have a broader positive social impact, especially in developing countries, across a broad range of "quality-of-life" areas. The benefits of robust competition, recurrent innovation, and greater choice in the marketplace, as well as the resulting economic growth and local investment, include better health care and the availability of pharmaceuticals, higher-wage jobs, and better and more responsive government services, such as improved education and infrastructure.

◈ ***In short, software choice, <u>not</u> software preference, is the best policy.*** Attached is a representative list of countries and leading institutions that have rejected preferences in software and IT procurement decisions and embraced a neutral policy based on choice and objective criteria.

GOVERNMENTS AND LEADING INSTITUTIONS SUPPORTING NEUTRALITY AND CHOICE IN PROCUREMENT DECISIONS

(Underlined text is a hyperlink to the referenced document)

◈ **Asia-Pacific Economic Cooperation (APEC):** *Technology Choice Spurs the Cycle of Innovation*

The APEC countries, including, among others, Australia, Canada, Chile, China, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Thailand, the United States, and Viet Nam, have collectively recognized the importance of having a technology neutral procurement policy; and, in November 2006, adopted the APEC Technology Choice Principles, under which each of the members agreed to "promote technology neutral policies and regulations… that will allow flexibility in the choice of technologies in order to ensure competition, maximize benefits for governments, businesses, and consumers, and bridge the development gap."

◈ **European Union:** *Treat Economic Operators Equally and Non-Discriminatorily*

The EU Directive on Public Procurement Law establishes the principle that "[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way." Derived from this principle, Article 23 of the directive says that "technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition."

◈ **United Nations:** *Choice in Standards Should be Maintained by Member Nations*

A United Nations report focused on e-government in Asia concluded that supporting the core principles of standards choice and technology neutrality will improve results and drive interoperability. The report also specifically warned of the dangers of narrow government mandates. "[T]he rigid insistence of using any particular standard may constrain a government from using old standards that respond to all previous needs as well as to new ones. Mandating a particular technology will not only prevent government from using the latest and the best but also consign it to using older and perhaps outmoded standards."

◈ **Argentina:** *City of Buenos Aires Establishes Information Systems Agency, Supports Principle of Tech Neutrality*

As initially drafted, the bill that created Buenos Aires' Information Systems Agency included preferences for open source software and open standards, and even mandated that the city itself own any source code that operated in its IT systems. After hearing from local businesses and associations, the city reaffirmed its commitment to e-government and its new technology agency, but it removed preferences for OSS and incorporated the principle of technology neutrality.

◈ **Belgium:** *Court Rules that OSS Preferences Contravene Non-Discrimination Rules of the European Community*

After the Assembly of the French-speaking community of Brussels adopted a proposal mandating the exclusive use of open source software, the Belgian Supreme Administrative Court issued an opinion finding the proposal illegal. "The technical prescriptions… have to be necessarily determined on a case-by-case basis, according to each market, by the contracting authority itself… and not by legislative act or an implementing decree."

◈ **Brazil:** *Brazilian Supreme Court Bars Enforcement of OSS Law*

Upholding the principles of equal treatment and non-discrimination, the Brazilian Supreme Court ruled unanimously to bar enforcement of a Rio Grande do Sul state law giving preferential treatment to open source software. The Court determined that IT procurement decisions must be made on a case-by-case basis and before-the-fact preferences were not legal.

◈ **Brazil:** *State of Sergipe Revokes OSS Preference Decree, Reaffirms Technology Neutrality*

In March 2006, the State of Sergipe enacted an OSS procurement preference for executive branch purchases. After learning more about the issue, the Governor signed a decree revoking this policy and establishing a more technologically neutral approach to software procurement. The new procurement policy calls for bids to be evaluated on real-world criteria such as cost effectiveness and the availability of support and training.

◈ **Brazil: *Court Overturns OSS Preference Legislation in Rio de Janeiro***

In spite of the Mayor Cesar Maia's opposition, the Rio de Janeiro City Council passed OSS procurement preference legislation in December 2005. In May 2007, the Special Panel of the Court of Appeals of the State of Rio de Janeiro unanimously ruled that the law was unconstitutional.

◈ **Canada: *Canadian Government Adopts Balanced Approach to Software Procurement***

Canada's IT procurement policy (the [Federated Architecture Program](#)) seeks to ensure that "policies and guidelines do not bias one software business model over another." To this end, the Canadian Government will "review and monitor federal procurement practices to ensure a level playing field." Specifically, Canada's OSS [position](#) requires agencies and departments to base all software decisions on both their business needs and several key factors, including: (1) reduction in integration complexity, (2) security/privacy, (3) proven standards/technologies, and (4) total cost of ownership.

◈ **Chile: *National Procurement Agency Codifies Technology Neutrality as a Key Purchasing Criterion***

ChileCompra, the Chilean national procurement agency, has established technology neutrality as a key criterion for government purchases of technology products and services, and requires that each competing bid for government contracts be analyzed on its own merits. ChileCompra's technology procurement [directive](#) governs more than 600 public entities of the Chilean government and expands prior executive branch guidance on technology neutrality. The directive followed passage of an official statement in the Chilean Camera de Diputados (lower house) requesting that President Michelle Bachelet apply the principle of technology neutrality to all IT acquisitions made by the executive branch of government.

◈ **Denmark: *Federal, Regional, and Local Governments Establish Balanced Policy Supporting Choice Among Open Standards***

Three levels of government in Denmark—the Danish Government (federal), Danish Regions, and Local Government Denmark—established a balanced policy supporting choice among open standards for software in the public sector. The agreement allows use of seven sets of open standards for new IT solutions, including choice between Open XML and ODF for document formats.

◈ **Germany: *Resolution Upholds Competition in Open Standards, Supports Intellectual Property Provisions***

The German Parliament passed a [Resolution](#) that supports competition among open standards, allows for choice among multiple open document format standards in government, and supports the protection of intellectual property rights in standards, as established by international standards organizations. Federal ministries are now developing plans to comply with the Resolution.

◈ **Italy: *Government and Private Organizations Reject Document Format Preferences***

Several regional governments in Italy have examined open document formats, but proposed ODF preferences have been rejected. In addition, several organizations have also rejected ODF preferences, and the National Trade Association issued a public statement in support of file format neutrality.

◈ **Ireland: *Open Source "Too Costly" For Irish E-Government Initiative***

E-government in Ireland will be built using open standards technology, which may not be open source software such as Linux, said Ireland's then-Minister of State, Mary Hanafin, in a [speech](#) before the Irish Software Association's 16th annual conference. The government determined that using only open source software could, in the long run, be more expensive, she said, adding that "[t]he long-term costs associated with open source may outweigh the short-term benefit."

◈ **Japan: *National IT Policy Supports Choice Among Open International Standards***

In 2007, Japan issued new Guidelines for IT, which established that government contracting decisions should consider compliance with open international standards as one criterion among others. The agency drafting the rules publicly stated that the guidelines did not favor one standard over another.

◈ **Malaysia:** *Cabinet Adopts Neutral Technology Platform Policy*

In November 2006, Malaysia's Minister of Science, Technology, and Innovation, Datuk Seri Dr Jamaludin Jarjis, [announced] that the Malaysian government had decided to reverse course on its OSS preference policy established in 2004, and that procurement policies henceforth would be based on merit. In explaining the government's elimination of OSS preferences, the Minister noted that "[t]here has been a lot of negative reaction towards open source [from the IT market] and that's why [choosing] the technology platform should be neutral … It's about choice. Let the market decide."

◈ **Malaysia:** *Standards Body Upholds Choice in Document Formats*

Datuk Dr. Mohamad Ariffin Aton, Chief Executive of Sirim, the Malaysian standards body, says that Malaysia will not mandate the use of any document standard in government. He says that mandating a standard would constitute an illicit non-tariff barrier against software using other standards and would therefore violate Malaysia's commitments to free trade under the World Trade Organization. "Ultimately, it is up to the general public and users in both the public and private sectors to decide which format they want to use," he said.

◈ **New Zealand:** *A Neutral Position Should Be Maintained When Assessing Software Procurement*

Under New Zealand's [policy] on software procurement, "'Value for money' and 'fitness for purpose' principles should continue to underlie any software procurement decisions," as well as issues of functionality, interoperability, and security. The State Services Commission published a [guide] to legal issues that arise from using OSS, reiterating that "[a]gencies should base their [procurement] decisions on the overall merits of the software concerned."

◈ **Peru:** *Neutrality in Technology Procurement Required for Central Government*

Before acquiring software, governmental agencies must produce a public report comparing the value of alternatives and identifying the software that best meets their needs. Peru's law (which marked a dramatic reversal of Peru's prior attempts to enact a procurement policy that would have established an express preference for OSS over proprietary software) requires that procuring entities apply the principles of technology neutrality, transparency, efficiency, and austerity when making acquisitions.

◈ **Poland:** *National Computerization Program Requires Technology Neutrality and Prohibits Preferences*

Poland's National Computerization Program (NCP), which is the regulatory framework implementing the country's IT ACT, establishes technology neutrality as a central tenet. The NCP specifically establishes neutrality to ensure equal treatment of different IT solutions by government administrators and to prevent discrimination against any vendors.

◈ **Slovenia:** *Treat Open Source and Proprietary Software Equally*

Under Slovenia's [policy], the Government "will treat open-source and proprietary software solutions equally … [and] selection of the solution will be based on the financial and functional efficiency of an individual solution."

◈ **Spain:** *Electronic Access Law Affirms Accessibility, Standards Choice, and Technology Neutrality*

The Spanish Parliament enacted legislation establishing neutral principles concerning the use of IT in government. The Electronic Access to Public Services law affirms that information should be accessible to people with disabilities, that neutrality and market-based decisions should guide the use of technologies, that open and de facto standards can be used by the Spanish Public Administration, and that no citizen shall be discriminated against due to his or her technological choices.

◈ **Sweden:** *Government Rejects ODF Preference*

Sweden conducted an official inquiry into standardizing certain aspects of the government's IT operations. The report resulting from the inquiry considered but ultimately rejected instituting a preference for ODF file formats.

◈ **Switzerland:** *E-Government Technical Guidelines Support Choice, Use of Both Open XML and ODF File Formats*

Switzerland updated its technical guidelines for the implementation of e-government applications and recommends the use of both ODF and Open XML for document creation, management, and storage. Both open file formats were approved by Switzerland's eCH expert committee.

◈ **United Kingdom:** *UK Government Committed to Neutrality in Public Procurement of Software*

The UK Government's policy concerning the use of OSS concludes that "UK Governments will consider OSS solutions alongside proprietary ones in IT procurements. Contracts will be awarded on a value for money basis."

◈ **United States:** *U.S. OMB Reaffirms Policy of Software Neutrality*

U.S. Office of Management and Budget memorandum reminds agencies that the policies and procedures covering acquisition of software to support agency operations are intentionally technology and vendor neutral and, to the maximum extent practicable, implementation should be similarly neutral.

♦ **Florida:** *State Officials Conclude that Interoperability Should Guide Technology Procurement Decisions*

After examining arguments concerning technology procurement policies, the Florida Senate Committee on Governmental Operations said that the "most important issue for agencies choosing technology is not whether that system is proprietary or open source but whether that system is interoperable." The Florida House Committee on Audit and Performance concurred and asserted that it was premature to adopt any specific document standard.

♦ **Massachusetts:** *Supports Open Document Formats without Vendor or Commercial Bias*

In its Enterprise Technical Reference Model (ETRM), a guidance document for public sector IT, the Information Technology Division of the Commonwealth of Massachusetts included both ODF and Open XML as approved standards. This policy was established after Massachusetts initially considered mandating the use of ODF exclusive to all other formats except Adobe's Portable Document Format (PDF). Massachusetts has stated that it aims to make information accessible and reusable using XML-based technologies without vendor bias.

♦ **Minnesota:** *State Rejects Immediate ODF Mandate and Instead Studies Document Format Issue*

State legislators considered enacting an ODF mandate but instead recognized that the issue needed greater consideration. An official study is now being conducted. After learning more about ODF and other file formats, one original sponsor of the ODF-mandate bill acknowledged that legislators may not have enough expertise to choose a technical standard. "We're public policy experts. [Picking technical standards] is not our job."

♦ **Oregon:** *Legislation Mandating ODF in Government Fails Over Cost Concerns*

Legislation calling for state government use of ODF in Oregon was rejected after the Secretary of State raised concerns about the high costs of converting state offices to applications that support the format.

♦ **Texas:** *State Legislators Reject Migration to ODF*

Texas legislators rejected proposed legislation that would have mandated the exclusive use of ODF for electronic government documents in the state. An official Financial Impact Report calculated the cost of implementing the mandate in the hundreds of millions of dollars. According to published reports, some Texas legislators also questioned the credibility of ODF advocates.

♦ **Other State Governments in the U.S.:** *Committed to a "Best Value" Approach to Software Procurement*

Various other U.S. state governments, including California and New York, have issued procurement policies requiring that IT solutions be selected based on "best value" for the money. For example, California's policy clarifies that "a preference for open source solutions… does *not* reflect state policy" and that "[t]he goal of an information technology procurement is simply to get the 'best value' for the State." New York's policy makes plain that "'Best Value' is the basis for awarding *all* service and

technology contracts to the offerer which optimizes quality, cost and efficiency." Policy makers in California and Connecticut have also rejected proposals to mandate the use of specific open document formats.

◈ **Venezuela: *Neutrality Supported by Public Procurement Law***

A Venezuelan public procurement law asserts the principle of technological neutrality in electronic purchasing and applies to federal, state, and local governments.   The law establishes the principles of transparency, efficiency, equality, and competition in the selection of providers of goods and services and also provides that the processes for electronic bidding and procurement shall be technologically neutral.

◈ **International Chamber of Commerce: *Opposes Software Procurement Preferences and Mandates***

The ICC Commission on E-Business, IT and Telecoms issued a policy statement that said, in part: "ICC opposes government procurement preferences and mandates that favor one form of software development or licensing over others." The statement advocated that governments, like all potential and existing customers, should choose software on a technology-neutral and vendor-neutral basis, examining the merits of the technology. This provides the best range of user choice in selecting technology for their specific needs.   "As a general rule, governments should not discriminate against or ban the procurement of software based on its licensing or development model. Such preferential policies prevent public authorities from effectively weighing all relevant factors in their procurement decisions."

◈ **Harvard Berkman Center for Internet and Society: *Endorses Tech Neutrality, Industry Leadership on Interop***

In a 2007 report, this prestigious Harvard group determined that interoperability is achieved in multiple ways and that private sector leadership, rather than government intervention, is the best method for promoting interoperability and innovation. In a 2005 report, Berkman similarly concluded that "[t]echnology and brand neutrality in procurement specifications… reduces the possibility of vendor or technology lock-in by emphasizing choices and procurement decisions based upon what works best. It will also reduce costs, increase competition and help smaller vendors to compete. Use metrics that focus on performance characteristics, business needs and contributions that help open the ICT ecosystem.''