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Public Works for a Better Government

July 16, 2014

Honorable Elizabeth Warren
United States Senate
317 Hart SOB
Washington, D.C. 20510

Honorable Ed Markey
United States Senate
218 Russell SOB
Washington, D.C. 20510

Dear Senator Warren and Senator Markey:

I am writing to you about H.R. 4195, the **Federal Register Modernization Act**, a bill that unanimously passed in the House on July 14, 2014 and will be considered by the Senate. The bill makes a number of clerical amendments to Title 44 of the U.S. Code, such as changing the word "print" to "publish." I am supportive of those minor changes, but I think we are missing a great opportunity, one at the very heart of the mission of the Office of the Federal Register.

The Federal Register was a creation of some prominent Massachusetts residents, which is why I am writing to you today. The Federal Register was created during the heyday of the New Deal, when new regulations were being created but were published so randomly and unsystematically that citizens had no way of knowing the laws they should obey.

This all came to a head in 1934 when the "hot oil" cases reached the Supreme Court and the Department of Justice discovered that the regulation they were suing to enforce had never been published. Justice Brandeis called upon his friend Felix Frankfurter at Harvard Law School and they drafted a young professor named Erwin Griswold who wrote a seminal article in the Harvard Law Review that resulted soon thereafter in the passage of the Federal Register Act.¹

In his article, Professor Griswold invoked the words of Jeremy Bentham, who said "We hear of tyrants, and those cruel ones; but whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."²

¹ Harold C. Relyea, **The Federal Register: Origins, Formulation, Realization, and Heritage**, Prepared remarks delivered at the National Archives and Records Administration for the 75th Anniversary of the Federal Register, September 15, 2010, Washington, D.C.

² Erwin N. Griswold, "**Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation**," Harvard University Law Review, vol. 48, Dec. 1934, p 204.

Massachusetts, since the early days of the colony, has always stood for the principle that citizens must know their rights and their duties if we are to be, as John Adams put it, “an empire of laws, not of men.” In 1641, the citizens of Massachusetts insisted that their rights be written down and promulgated for all to know in the Massachusetts Body of Liberties, a document that had a dramatic impact on the promulgation of the law in the other colonies and then in the United States.³

In our modern era, regulations govern our daily lives. For our federal government, those regulations are published in the Federal Register and then codified in the Code of Federal Regulations. These Official Journals of Government are how citizens know what they must do.

In our modern era, many of the most important regulations are public safety codes which govern the safety of railroads, automobiles, factories, ships and boats, the transport of hazardous materials, testing for the safety of water, and other aspects of our increasingly technical society. In our Code of Federal Regulations, most of these public safety standards are incorporated by reference, a mechanism originally conceived to save space in the printed documents. [5 U.S.C. 552\(a\)](#) and [1 CFR 51](#).

Incorporation by reference allows agencies to use public safety codes developed by nonprofit standards development organizations. The use of standards such as those developed by the National Fire Protection Agency are a way of making sure federal regulations use the highest quality safety standards possible. Indeed, the standards development organizations are eager to see their materials incorporated by reference and lobby aggressively and compete with each other to make sure their codes become the law. In doing so, they are able to exploit an enviable position as the creators of an important portion of U.S. law, using that to sell ancillary products such as training, handbooks, memberships and to receive substantial aid in the form of grants and donated labor from government officials at all level.⁴

The problem is that some of these standards development organizations have exploited this position to try and prohibit others from making copies of the law. Imagine, if you will, a government agency such as the EPA promulgating a regulation but prohibiting individuals from making copies of these documents! The principle that the law has no copyright and is free for all to read and speak is one that has deep roots in American law, going back to the unanimous decision in *Wheaton v. Peters*, [33 U.S. \(8 Pet.\) 591](#) (1834), a decision that has been repeatedly reaffirmed by our courts.

When key parts of the Code of Federal Regulations are unavailable, we cannot enforce the law. I remember, Senator Markey, when you were chairing the House Committee on Natural Resources and took the lead in investigating the BP oil spill. Your staff director wanted to read one of the key mandatory safety documents, but was told by the American Petroleum Institute that this was only possible if she paid \$1,000 for a copy. Making the law available only to those with means sufficient to afford such prices is a

³ [The Massachusetts Body of Liberties](#) as adopted as law by the General Court of the Commonwealth of Massachusetts Bay, December 1641.

⁴ Carl Malamud, [Edicts of Government](#), Testimony before the House Judiciary Committee, U.S. House of Representatives, January 14, 2014.

poll tax on access to justice, it denies equal protection and due process to those not armed with a corporate credit card.

You and your fellow members of Congress were so outraged that you amended the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 to include Section 24, which states:

"The Secretary may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site." **Public Law 112-90.**

I would urge you to consider a similar amendment to the Federal Register Modernization Act to make it clear that the law belongs to the people and that nobody can prevent us from freely reading and speaking the laws of our country.⁵ It's the American way, a principle that Massachusetts has always been in the vanguard to establish and preserve. I hope you will follow in the footsteps of Nathaniel Ward, Louis Brandeis, Erwin Griswold, and reaffirm the principle that we are an empire of laws.

Best regards,



Carl Malamud
Public.Resource.Org

cc: Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives

⁵ During my testimony before the House Judiciary Committee, Congressman Darrell Issa, the sponsor of the Federal Register Modernization Act, **spoke strongly in favor of the principle** that laws incorporated by reference should be available, as did members on both sides of the aisle. I am cc'ing him on this letter as I believe he might be receptive to the suggestion should you choose to introduce such an amendment in the Senate.