



Acoustical Society of America

OFFICE OF THE
STANDARDS SECRETARIAT

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Re: 1 CFR Part 51 [NARA 12-0002] Incorporation by Reference

Dear Madam or Sir:

The Acoustical Society of America (ASA) would like to submit these comments in response to this notice of proposed rulemaking published in the Federal Register on February 27, 2012. The Acoustical Society of America is an ANSI-Accredited Standards Developing Organization (SDO) and currently maintains over 110 American National Standards. Approximately 5% of these are incorporated by reference (IBR), while another 5% are otherwise recognized by regulatory agencies.

The ASA is a not-for-profit scientific society formed in 1929 to increase and diffuse the knowledge of acoustics and promote its practical application. Soon after its inception the ASA became involved in the development of standards on acoustics and vibration and has continued this activity for over 80 years. The ASA has about 7,000 members spanning 13 different technical areas within acoustics. ASA is best known for its flagship journal, the *Journal of the Acoustical Society of America*.

The notice of proposed rulemaking asks nine specific questions which are shown below with our responses following.

- 1) Does “reasonably available”:
 - a. Mean that the material should be available:
 - i. For free

There is a common misconception that because we are living in the Internet age we should have immediate access to all information free of cost. Many sources of information are not free, for example books, musical scores, etc. We note that the government itself charges for access to government-developed information maintained by the National Technical Information Service and The National Technical Reports Library. In the area of standards, there are costs associated with the development, preparation, maintenance and distribution of information.

The OFR also needs to consider that there are instances where there may be multiple entities with copyright claims to a single standard such as nationally adopted international standards which might further complicate any requirement that the standard be made available for free.

We think that the proposed rulemaking is in conflict with the existing Federal rule on using consensus standards. Since the Federal Government now requires, or strongly supports, the use of consensus standards in Federal Regulations, it is important that the standards development bodies are capable of doing that. Revenue from sales of their copyrighted standards is a major source of the SDO funding. Therefore, if the proposed rulemaking for giving away standards at no cost is implemented, some of the SDOs will not be able to survive.

The ASA would be happy to make our standards available online at no cost to the end-user if the government is willing to cover the lost revenue. Otherwise, this is an unfunded mandate that simply shifts the burden onto the SDO.

ii. To anyone online?

The ASA along with virtually every other SDO currently makes its standards available on line, meaning that they are already reasonably available to anyone with a need to see them. Some SDOs are industry-sponsored and are able to give their standards away for free. Many SDOs, like ASA, are scientific or professional societies that develop more fundamental standards and have to charge a fee.

Except in the case where a law refers to a long-outdated version of a standard, it should not be difficult to purchase any standard online. (For example, OSHA currently incorporates ANSI S3.6-1969 by reference. This obsolete standard has been revised and replaced many times since 1969, most recently in 2010. To our knowledge no resellers currently sell the 1969 edition through their online stores. However, it is readily available for purchase from our office in either PDF or print format.)

b. Create a digital divide by excluding people without Internet access?

We (like most SDOs and standards resellers) are happy to sell standards in print upon request. In the case of the ASA, the cost is the same regardless of the medium. The cost of standards simply is not driven by the printed page.

2) Does "class of persons affected" need to be defined? If so, how should it be defined?

In regard to some regulations, the "class of persons affected" may be so broad that there is no specific class. In regard to other regulations the "class of persons affected" may be very narrow and easy to define.

3) Should agencies bear the cost of making the material available for free online?

Yes. As we understand the current procedure, the standards to be IBR are purchased by the adopting Agency and placed on file for public review in the NARA office and in the Agency office as well. If the Office of the Federal Register should revise its rules to require standards to be made more broadly available and for free to the users, the Agency should bear the cost. We expect that the cost in terms of lost revenue could range in the thousands of dollars per standard per year. Expecting the SDO to absorb the loss of revenue is the ultimate in an unfunded mandate.

4) How would this impact agencies' budgets and infrastructure, for example?

The answer to this question would have to be provided by the Agencies themselves. We assume that absorbing this cost might affect cash-strapped Agencies but not as much as the cost of developing their own standards.

5) How would the Office of the Federal Register (OFR) review of proposed rules for incorporation by reference (IBR) impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final rule stage of the rulemaking?

No comment.

6) Should OFR have the authority to deny IBR approval requests if the material is not available online for free?

No. Is there any other instance where the government requires NGOs to give away their products for free without compensating the owner? The OFR should allow for standards that have been purchased from the SDO or authorized reseller to be placed in a repository for inspection at the docket office of the respective agency that is using the standard.

7) The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?

No comment.

8) Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability?

The OMB should not be given this authority. The incorporation of the standards and the determination of reasonable availability should be done by the agency that is creating the rule. The OMB does not have subject matter experts capable of understanding the breadth of material and topics associated with the regulations being produced in the federal government. Their expertise is focused on determining whether or not the regulation will have a financial impact on businesses, individuals and institutions.

9) How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?

With the process that is in place, the agencies already must pass through numerous levels of approval within the agency and then they must be approved by OMB and by the Government Printing Office and the OFR. Just the process of getting through an Agency approval is already onerous. An extended IBR review period will delay the rule development at the proposal and final stages by at least 3 months if not more.

Thank you for providing this opportunity to comment. We would be pleased to provide any additional information you might need.

Sincerely,



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