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Office of the Federal Register
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

RE: NARA 12-0002, Incorporation by Reference

Dear Sir or Madame:

Thank you for the opportunity to comment on the recent petition received by your office on the availability of documents incorporated by reference.

As you may know, the Institute was established by the U.S. Congress to work with the public and private sector to advance building science and the design, construction and operations of buildings. Often, the advancement of building science and the improvement of our nation's built environment relies on a combination of government regulations and codes and standards and guidance developed in the private sector (with input from government).

While we agree with the petitioners that access to information has changed significantly since the development of the internet and federal regulations should reflect these changes, the petitioners fail to recognize many key aspects of the codes and standards development process.

As recognized by the National Technology Transfer and Advancement Act (NTTAA) and Office of Management and Budget (OMB) Circular A-119, the development of codes and standards in the United States is an inherently private sector driven activity. The organizations that administer the development of codes and standards have implemented requirements to assure that the resultant documents represent the public interest. These requirements include achievement of consensus, openness and due process. This rigorous process often requires considerable up-front expense that is typically only recouped through the sales of the resultant document.

While the petitioners cite the expansion of the internet as an impetus to change the definition of "reasonably available," by the internet's very existence, access to the referenced documents has grown considerably. The argument to make these documents available for free is predicated on the difference between paper-based documents and electronically-based documents. However, it fails to recognize that the value in the documents does not rest in

the tangible nature of a printed document, but in the actual content. As indicated above, the development of that content comes at considerable expense. Should the ability to recoup that cost change, the private sector-based standards development process would change considerably. Private sector organizations will no longer be able to invest in the development process leaving existing standards to remain stagnant (and thus inhibiting innovation) and shifting future standards development to governments (with government bearing the expense and abandoning the long history of private sector standards development).

Today, the cost of standards development is born by those who are ultimately impacted by the standards (whether through participation in the development process or by purchase of the resultant document). Some standards developers have elected to provide their standards for free for various reasons (to encourage development of a specific market, to spur uptake within an industry, or because of a perceived obligation to a particular community). However, that decision is up to the individual organization due to their ownership of the intellectual property. Shifting the financial and/or process burden to government (either for development or compensating private sector developers) would unfairly obligate all taxpayers to bear the expenses instead of those stakeholders most impacted by the standards.

We are pleased to provide the specific responses to the questions posed in the Federal Register Notice:

1. Does ‘‘reasonably available’’
    a. Mean that the material should be available:
        i. For free and
        ii. To anyone online?

The internet has certainly expanded the public’s access to information. However, it has not changed the underlying protections of intellectual property and the ability for content developers to seek a reasonable return on their investment. The concept of “reasonably available” inherently recognizes that there is some element of reasonableness required in the level of availability—if the intent is to have free access the initial regulation would have termed the concept “freely available.” Most standards development organizations (SDOs) provide information on the availability of standards online as a part of their efforts to publicize the availability of such a standard. SDOs also often provide instant access to standards (either as a PDF or other format) for those wishing to purchase and review the document immediately.

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

This question is probably best suited for social scientists.

2. Does ‘‘class of persons affected’’ need to be defined? If so, how should it be defined?

The concept of "class of persons affected" on its face requires an element of impact or effect on the group considered. A casual observer or member of the public with no significant stake in the outcome, therefore, should not be included in the concept of "class of persons affected." While "class of persons affected" seems straight forward, should a definition be deemed necessary, it should reflect some element of an impact on the person beyond mere curiosity.

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

The development of codes and standards comes at an expense and that expense must be covered by some means. Agencies may elect to provide free access to the public (based on a negotiation with the SDO), but then the agency should be responsible for bearing the cost. In a fiscal environment where agencies are struggling with tight budgets, it appears unwise to add an additional budget item when the current private sector methods are adequate. Shifting the cost burden to agencies would result in the entire burden of the standards development process being born by tax payers while the current system relies on those most impacted by the standards to bear the cost of their development.

4. How would this impact agencies budget and infrastructure, for example?

As indicated above, agency budgets would be significantly impacted. New staff and contracting mechanisms would be required to negotiate with SDOs on appropriate compensation for standards development and dissemination.

5. How would OFR review of proposed rules for 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?

Both in the development of voluntary consensus standards and the federal rulemaking process, stakeholders have adequate opportunity to review pending standards and regulations and provide feedback. As the national body to facilitate standards development, the American National Standards Institute (ANSI) has promulgated strict guidance for the standards development process and weekly publishes notice of upcoming development activities and requests for comments.

Further, the OFR does not maintain expertise in the subjects agencies have identified for rulemaking. If OFR were to circumvent the development of rules and regulations by agencies with the statutory expertise and obligation, OFR would essentially drive the development of rules and regulations, which is not part of its mission.

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

For the many reasons outlined above, OFR should not have the authority to deny IBR approval requests solely on free availability of the referenced document. As indicated in the recent Administrative Conference of the United States Notice and the work of the National Science and Technology Council, "the text of standards and associated documents should be available to all interested parties on a reasonable basis, which may include monetary compensation where appropriate."

OFR does not have the statutory authority to write rules and issue regulations on topics under the jurisdiction of other agencies. By including a "freely available" requirement in the regulations for publication, OFR is essentially driving the content of rules and regulations for which it has no authority.

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?

This question goes to the historic and internal decision making of the Office and we are unable to provide a proper response at this time.

8. Given that the petition raises policy rather than procedural issues, would the OMB be better placed to determine reasonable availability?

Given the focus on policy, OMB would be the more appropriate office to cover these issues and in fact have already covered them through documents like Circular A-119. OMB also is heavily engaged in the regulation development/review process so they currently possess the opportunity to influence the final content and the use of IBR.

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

At the point where a proposed or final rule enters the OFR, considerable time in development and review at the agency level has already occurred. This often includes internal reviews and discussions with related agencies and even public meetings to receive input. If freely available documents that meet the needs of the agency and the resultant regulations are available, they have likely been reviewed as part of the agency's development process and rejected for one reason or another in favor of a private sector standard that may entail a fee for obtaining the document. Also, as identified above, OFR's engagement in this process essentially results in OFR driving the content of the regulation and usurping the authority of the agency with jurisdiction over the subject of the rule.

Thank you for the opportunity to comment on this important issue. Please let me know if there is anything the Institute can do to assist in buildings related issues.

Respectfully submitted,

Henry L. Green, Hon. AIA
President