

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

RE: NARA 12-0002

ASC X12 is an ANSI accredited Standards Development Organization (SDO) responsible for the development and maintenance of EDI and CICA Standards, Technical Reports, XML schemas and other products which drive effective business processes globally. The diverse membership of ASC X12 includes technologists and business process experts, encompassing health care, insurance, transportation, finance, government, supply chain and other industries. ASC X12 submits the following comments related to the 1 CRF Part 51, NARA 12-0002, Incorporation by Reference notice.

While ASC X12 appreciates the concerns of the petitioners, it is important to note that there are significant expenses involved in creating the items which may be incorporated by reference at a later point. For the most part, the developing organizations are SDOs, associations, industry groups or other non-profit entities, not commercial organizations. As such, these groups rely on sales of their copyrighted materials to sustain the standards development activities.

Specifically pertaining to the issues enumerated in the Notice, ASC X12 submits the following detailed responses:

1.a.i Does “reasonably available” mean that the material should be available for free?

No, “reasonably available” means that everyone has access to the material, not that it be provided free to every individual, entity or organization in the United States. OFR must not create a requirement that would violate U.S. copyright law. In fact, OMB requires agencies to “observe and protect the rights of the copyright holder...”.¹ In addition, NIST Special Publication 1108 states “In making the selections of

¹ Section 6j OMB A-119

[standards] listed in this section, NIST attempted to ensure that documents were consistent with the guiding principles, including that they be open and accessible. This does not mean that all of the standards and specifications are available for free, or that access can be gained to them without joining an organization (including those organizations requiring a fee). It does mean that they will be made available on fair, reasonable, and nondiscriminatory terms and conditions, which may include monetary compensation.”²

- 1.a.ii Does “reasonably available” mean that the material should be available to anyone online?

No, considering the many diverse types of IBR materials, it is likely that some of those materials are not produced in an online format. Furthermore, it is likely that some of those materials are not produced in a downloadable format.

- 1.b Does “reasonably available” create a digital divide by excluding people without internet access?

No, providing information exclusively on the internet would not create a digital divide, since there are a number of public sites offering internet access today, for example public libraries. Such public access provides most, if not all, people with the ability to use the internet for reference purposes. However, we also note that some IBR materials may be best utilized in a non-digital format and accommodation should be made for those situations.

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

It is likely that the definition of “class of persons” varies by situation and cannot adequately be defined in a “one size fits all” definition. We suggest that agencies be given the authority over such terms based on the situation.

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

If a government requirement mandates free online access of IBR materials, then the developers of the IBR material should be fully compensated for the IBR material, including the cost of providing the information online and the opportunity cost of providing information which would otherwise be sold to produce revenue for the developing organization. The developer of the IBR should be made whole, based on the full commercial value of the material.

² Page 46 [Emphasis added.]

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

It seems reasonable to assume that a requirement for an agency to compensate external developers of IBR material would do one of two things.

- A. Decrease the number of instances in which the government seeks to name materials produced by an established external expert, even if such material is developed via consensus of industry experts.**
 - B. Increase the budgets and expand the infrastructures of agencies that include IBR materials.**
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 stage of the rulemaking?

It seems reasonable to assume that a requirement for an OFR review of proposed rules for IBR would have both a negative timing impact and a negative impact on the inclusion of valuable external work products.

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

No. The related agency should have the discretion to determine whether other factors satisfy the “reasonably available” requirement.

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?

We fully support this recommendation, specifically endorsing the practice of IBR as part of strong federal policy developed using the expertise and resources of private sector standards developers. This recommendation recognizes that IBR allows agencies to make use of voluntary consensus standards to serve the public interest. However, we cannot provide a recommendation on whether updating the guidance or amending the regulation is preferable.

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?

We do not offer an opinion on the proper place for this determination.

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

Extending the review period at both stages would be detrimental in many, if not all, situations because it would elongate the timeframes for publishing the final rules.

As an ANSI accredited SDO with a number of work products included as IBR in Rules, we welcome the opportunity to provide additional information about our development process, or our published offerings.

We encourage OFR to review the American National Standards (ANSI) [white paper](#), “Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected” for additional input on this subject.

<http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf>

ASC X12 appreciates the opportunity to comment on this matter. Please contact me if you have questions or require further clarification

Sincerely,

/s/

Cathy Sheppard
Chair, ASC X12
X12.chair@disa.org