I file these further comments in order to make several important points and observations:

1) The concern of standards development organizations that rulemaking in response to our petition would deprive their copyrights of value and eliminate an income stream essential for their important work is considerably overstated.

A) Access during the comment period of notice and comment rulemaking, whose importance is clearly recognized in the ACUS recommendations, can be limited through computer technology to persons actually commenting in the rulemaking, on a read-only basis, and under a license agreement that precludes other use. The impact of such access on SDO organizations' proper copyright interests.should be extremely limited. Should an SDO faced with an agency's wish to incorporate its standard by reference in a notice of proposed rulemaking wish to insist on a license payment for that use, the agency faced with the demand for payment will have a proper bargaining incentive, and the level of any resulting payment should be low.

B) When SDO standards are used in agency *guidance* materials, citizens and companies are not *required* to comply with those standards. They are required to comply *only* with the regulations to which the guidance pertains. Consequently, they can freely make the judgment whether acquiring a license to that guidance is the most efficient means for them to be sure of compliance with the regulation. This will assure SDO organizations compensation for their work, while creating a market incentive for them to keep their prices reasonable in relation to the alternatives that persons who might want this guidance will have to assure their compliance with the regulation. It is useful to add, here, that this is the use of SDO standards foreseen by the National Technology Transfer Act and the OMB guidance OIRA Administrator Katzen developed to guide agencies in implementing that act. SDO standards were to be supportive of compliance, and not the law itself. That law would be free.

C) It is only when agencies choose to make compliance with SDO standards *obligatory*, and not just one named means of assuring compliance with regulations that independently state their requirements, that free access to the standards is required by the principle recognized in the *Veeck* case, that law is not subject to copyright. SDOs and agencies alike can avoid this outcome by observing the difference between a regulation that states that the regulated must comply with ANSI Standard XYZ (e.g., "Caution signs must be painted in glossy black lettering on a glossy yellow background as specified in ANSI Standard XYZ."), and a regulation that states a requirement ("Caution signs must be painted in glossy black lettering on a glossy yellow background.") that can be met by compliance with an ANSI standard, which might be mentioned either in the regulation itself ("for example, as specified in ANSI Standard XYZ") or in accompanying guidance documents.

Only if agencies choose to make compliance with an SDO standard *obligatory* would it be the agency's responsibility to pay any compensation that copyright law might require to the SDO. For guidance usage, matters could remain as they are. Guidance is not law, and its use is optional (if very often highly efficient for the regulated and agency alike).

2) Giving agencies and SDOs incentives to use standards as guidance about regulatory compliance, rather than as the law itself, could have beneficial impacts:

A) Burdens on the Office of Federal Register could be considerably reduced. Since there is no requirement that guidance documents be published in the Federal Register, standards incorporated in guidance would not require OFR approval.

B) Agencies would be able to escape the current need to engage in fresh rulemaking if they wish to make a reference to SDO standards that have been revised. A formula in the regulation such as "Compliance with this regulation may be shown by compliance with the relevant contemporary standards on the matter maintained by the American National Standards Institute, as reflected in agency guidance" is not an incorporation by reference in the 552(a)(1) sense, since it does not create a legal obligation or standard. It would not require change in the regulation as the ANSI standard matured over the years.

3) The SDO development process is not a proper substitute for notice and comment rulemaking.

SDO's frequently and commendably use careful consensus-building and science-validated procedures in the development of their standards. However, this development – necessarily occurring before any rulemaking that might incorporate its results has been proposed – may not occur on the basis of notice-and-comment activities involving the public at large, or with the kinds of outreach typical of agency rulemaking. Consequently, it cannot properly substitute for notice-and-comment rulemaking, and it is particularly important that citizens have full access to any standards that may be proposed to be incorporated, as well as supporting studies, during the relevant agency comment period.

As important, the NTTA and OMB Circular A-119 giving guidance on the use of standards envision that their use will be for resolving *technical* issues – what kind of steel is appropriate for a given use, what are the necessary qualities of a weld in particular circumstances, etc. But some agencies appear to have taken the use of standards incorporated by reference to a wider range of circumstances. I understand, for example, that an agency charged to develop regulations to assure public education about pipeline hazards and responsive measures to them, fulfilled this obligation by incorporating by reference an American Petroleum Institute standard on this issue – hardly a technical issue, and not the product of the kinds of science-validated consensus-building procedures that are typical of the creation of technical standards. It is doubtful the OFR would wish to police such misuses of IBR; but if API and the agency understand that using incorportion by reference to, in effect, transfer law-making to private bodies that act in advance of wide public notice and comment will result in significant costs to the agency for license acquisition or, in the alternative, the loss of royalty revenue to API, the resulting incentives should do a good deal to suppress them.

Peter Strauss
Columbia Law School