



COMPRESSED GAS ASSOCIATION

14501 George Carter Way, Suite 103, Chantilly, VA 20151

(703) 788-2700 ■ Fax: (703) 961-1831 ■ E-mail: cga@cganet.com ■ Web Site: www.cganet.com

March 28, 2012

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 petition received by your office regarding the availability of documents incorporated by reference.

The Compressed Gas Association (CGA), founded in 1913, is dedicated to the development and promotion of safety standards and safe practices in the industrial, medical, and food gases industry. CGA represents over 115 member companies in all facets of the industry: manufacturers, distributors, suppliers, and transporters of gases, cryogenic liquids, and related products and services. Through a committee system, CGA develops technical specifications, safety standards, and training and educational materials, and works with government agencies to formulate responsible regulations and standards and to promote compliance with these regulations and standards.

We believe that the increase in availability of access to the internet over the last decade has augmented public access to materials related to or referenced by regulations. With this access, an expectation has arisen regarding the instant availability of materials and in some cases, the unremunerated provision of properties that are otherwise protected by copyright. Unfortunately, in the case of this petition, there is a failure by the petitioners to recognize the value of the intellectual property contained in these materials to copyright owners. Additionally, there is a lack of understanding of the potential impact to the availability and quality of these standards should organizations be required to make them available online free of charge.

The National Technology Transfer and Advancement Act (NTTAA) and the Office of Management and Budget (OMB) Circular A-119 recognize that the development of codes and regulations in the United States is widely supported through the use of standards produced by the private sector. The material in these standards reduces the costs of goods and services; enhances safety, health, and quality of life, and facilitates innovation, trade, and competitiveness. Private-sector standards developers substantially reduce the burden to the government by providing industry specific, technically sound materials for use in regulation. Many organizations underwrite the considerable costs of technical standards development through the publication and sale of their standards on a reasonable basis.

Section 24 of H.R. 2845, and the expansion of these requirements as proposed in NARA 12-0002, is a departure from the relationship which allows non-profit standards developers to readily provide high-quality standards which are used to support the regulatory activities of the U.S. government. Standards developers will now be forced to choose between nullifying the value of their intellectual property by providing it for free to the general public or limiting the public safety impact of the standard by prohibiting its reference in agency regulations. We hope that our responses, below, to the specific questions posed in the Federal Register further clarify the hazards of these requirements.

- 1) **Does “reasonably available”:**
 - a. **Mean that the material should be available:**
 - i. **For free**
 - ii. **To anyone online?**
 - b. **Create a digital divide by excluding people without Internet access?**

The term “reasonably available” should indicate that the material can be accessed by affected or interested persons within a defined timeframe, either by electronic means or in hard copy format. Many standards developers offer immediate access to electronic publication files and provide an option for users to request hard copy publications, thus eliminating any risk of a digital divide.

The requirement to make this information reasonably available should not impact a standards developers’ ability to protect and maintain the technical and intellectual value of the information produced and does not require the material to be provided free of charge. The implication that this information should be made available free of charge will challenge standards developers’ ability to protect our intellectual property, may diminish the value of their product, and will limit their ability to continue production or maintenance of technical standards.

Further, the Administrative Conference of the United States and the National Science and Technology Council recently indicated that “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.” As the U.S. government has made clear strategic moves to protect other areas of intellectual property subject to devaluation through online sharing in recent years, this recommendation is aligned with other copyright protection efforts.

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

The “class of persons affected” should be defined to be limited to those directly impacted by a regulatory requirement. Those without a stake in the outcome of the requirement or who are interested in the requirements but not directly impacted should not be included.

To develop a correct definition for “class of persons affected” will require an investigation to determine how to best separate those who are directly impacted from those who are interested but not impacted.

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

If agencies require the free availability of material online, they should bear the costs of doing so. Currently, the significant costs to develop technical standards referenced in regulations are borne by the area of industry impacted by those regulations. A change in the process for adoption of regulatory materials which negatively impacts standards developers’ operations may result in these expenses being passed on to taxpayers instead of the stakeholder groups that are actually impacted by the regulation.

In addition to the obvious costs associated with the implementation of computer based technology to meet the requirements of H.R. 2845 Section 24, there are many other costs associated with this requirement which have not been recognized – the potential loss to standards development organizations due to the reduced value of membership; the loss of publication sales due to the availability of free publication content online; and the potential degradation to the value of our standards and publications.

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

The requirements to make material available for free online would cause a significant impact to agencies’ budgets and infrastructure. There would be a need for information technology (IT) support staff, contract management staff to support negotiations with standards developers and reimbursement of costs, and additional administrative staff to handle the processing and inquiries related to the IBR of standards.

If agencies enforce this requirement but do not provide a means for compensation, many standards development organizations may become unable to provide technical resources for regulatory use, as they rely on intellectual property as a primary means for income and as a key benefit for membership. Agencies faced with limited resources would become responsible for subsidizing the significant costs to make material available for free or developing their own technical content, which would require the employment of a technical staff to develop regulatory requirements for specialized areas of industry.

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?

The development of regulatory requirements is out of scope for the OFR. The mission of the OFR is to “inform citizens of their rights and obligations, document the actions of

Federal agencies, and provide a forum for public participation in the democratic process. OFR publications provide access to a wide range of Federal benefits and opportunities for funding and contain comprehensive information about the various activities of the United States Government. In addition, OFR administers the Electoral College for Presidential elections and the Constitutional amendment process.”

Any OFR review of proposed rules for IBR would require the expansion of staff resources to include technical expertise on every segment of industry. This is an inefficient use of federal resources when many standards development organizations use a consensus development platform that allows for the resolution of stakeholder concerns prior to the IBR phase. Standards developers have long supported the relationship between public and private sectors through the development of consensus standards, and have the in-house technical expertise to develop and maintain industry specific standards without further burdening the staff of agencies.

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

The OFR does not have the authority to write or issue regulatory requirements on topics under the jurisdiction of other agencies; instituting a requirement for the free availability of material online interferes with the objectives of other regulatory agencies and is out of scope for the OFR.

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?

The recommendation issued by the Administrative Conference of the United States includes provisions for working with owners of copyrighted material who do not consent to making that material available for free online to promote the availability of the materials through the use of technological solutions, low-cost publication, or other appropriate means, while respecting the copyright owner’s interest in protecting its intellectual property. In order to comply with this revision, H.R. 2845 should be amended to include provisions to allow owners of copyrighted materials to be made available in a means that respects the copyright owner’s interest in protecting intellectual property. Amending the regulation will support the continued availability of materials from U.S. and international standards developers.

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 petition focus on policy issues is more appropriate for the scope of the OMB, which has established policy regarding the use of private sector standards in regulation in

Circular A-119. This policy aims to eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation; provide incentives and opportunities to establish standards that serve national needs; encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and further the policy of reliance upon the private sector to supply Government needs for goods and services.

The requirement to make materials available for free online will jeopardize agencies' ability to continue to use copyrighted standards in rulemaking while remaining in compliance with the goals presented in the OMB Circular.

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

At the time of the proposed rule and final rule stages, the promulgating agency has already invested a significant amount of time and resources to review the proposed material for IBR, assess and resolve stakeholder concerns, and discuss impacts with other agencies. An extended IBR review period during the proposed rule and final rule stages would prevent agencies from enacting regulation in a time efficient manner, thus exposing members of the public to unnecessarily prolonged safety risks.

CGA remains committed to developing and providing reasonable access to high quality, technically sound standards and to work with agencies to provide access to these materials in a variety of means, appropriate to the way in which these standards are adopted and used. In order to sustain these activities, a flexible approach is required to ensure that federal agencies have access to the standards which best meet the needs of the public. This flexibility is consistent with the recommendations made by the Administrative Conference of the United States in 77 FR 2257.

Again, thank you for the opportunity to comment on this issue. If any further information is needed, please contact me at 703-788-2737.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael B. Tiller". The signature is stylized with a large, sweeping initial "M" and "T".

Michael B. Tiller
President and CEO