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OF THE
UNITED STATES OF AMERICA

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Office of the Federal Register
800 North Capitol Street NW
Suite 700
Washington, DC 20001

Re: NARA 12-0002

To whom it may concern:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is deeply committed to promoting and advancing better regulatory practices among U.S. regulators, as well as the increased efficiency that comes from stakeholder cooperation and engagement. Incorporation by reference is a long-standing federal policy that achieves these goals by allowing U.S. regulators to leverage a voluntary, private sector-led, consensus-based standards development process to save time and resources. This process allows agencies to balance the interests of those holding copyrights of the standards incorporated by reference with the public policy advantages of referencing and incorporating those same standards into public law and rulemaking. The current system of incorporation by reference is one that embodies better regulatory practices and maximizes benefits to consumers, regulators, and business alike.

The Chamber also strongly supports the current U.S. approach to standard setting — a system undergirded by a private-sector, consensus based, and voluntary process. The U.S. system works bottom-up, meaning businesses, consumers, and regulators alike work together across multiple sectors to both formulate standards and determine the type of standards that are needed. The U.S. approach also allows businesses and regulators the opportunity to participate in the creation of the standards they will later incorporate or enforce, providing for a continuous feedback loop that seamlessly and efficiently makes needed adjustments. Stakeholders in every sector decide the standards that are most appropriate for their needs and rapidly adapt those standards as needs change with technology, avoiding unnecessary inertia that stifles innovation.

The "vibrancy and effectiveness of the U.S. standards system" was recently confirmed by the Administration as a key to global competitiveness and growth as well as a means to maximize agency resources effectively.[1] The petition to revise regulations at 1 CFR 51 endangers these benefits. The suggested regulatory changes are unneeded, overly prescriptive,

[1] "Principles for Federal Engagement in Standards Activities to Address National Priorities" (M-12-08) memo issued by the Office of Management and Budget, U.S. Trade Representative, and Office of Science and Technology Policy. Issued January 17, 2012.

and in direct opposition to longstanding United States law[2] and policy.[3] Petitioners' reliance on *Veeck v. S. Bldg. Code Cong. Int'l.*[4] in support of their proposal is unconvincing, as that holding was expressly limited to its facts which involved a model code created specifically for the purpose of becoming the law. In contrast, the proposal here would apply to standards set by anyone for anyone, or any other work any agency may see fit to incorporate by reference.

The Administrative Conference of the United States (ACUS) recently examined and adopted an Incorporation by Reference (IBR) Recommendation.[5] A group of academics, practitioners, high-level government officials, and technical experts agreed on a set of best practices in the IBR Recommendation, specifically voting against the very suggestions raised in this petition.[6] In fact, the petition overlooks numerous negative consequences that will result from the suggested amendments.

First, the suggested amendments result in a one-size-fits-all approach that doesn't provide the needed flexibility for regulators and copyright owners to choose the best method of making material reasonably available to the interested public for each situation. For example, specific methods and fees to make material "reasonably available" are often different for the IT sector than the medical devices sector. If regulators are unable to simply choose the best standard to suit their specific needs for each regulation, they will be losing a valuable resource. The ACUS IBR Recommendations provide a suitable set of guidance for agencies to weigh when determining whether a prospective standard is in fact reasonably available.

While standards can be developed using a variety of formats and methods, someone must still bear the cost for developing the standards. Standards development organizations (SDOs) currently fund their development efforts through a variety of methods, including charging for access to standards. These business models often allow for anyone to participate in the standards development process. In turn, thousands of experts in thousands of specific sectors, from private consumers, to multi-national companies, to small and medium enterprises, are able to dedicate their time and talents to the standards development process. Regulatory agencies are then able to leverage this expertise and greatly save valuable time, monetary, and personnel resources to choose pre-vetted standards that are often already in wide use. This in turn provides certainty and saves money for businesses, which are often either involved with the formation of the standard or already in compliance, and also provides consumers with the benefits of standards already proven to be effective. For these reasons, the United States has one of the most inclusive and participatory standards development systems in the world.

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[2] See generally National Technology and Transfer and Advancement Act of 1995.

[3] Office of Management and Budget Circular A-119 of 1998, containing guidance on standards development and espousing principles affirmed and clarified in a recent National Science and Technology Council Subcommittee report "Federal Engagement in Standards Activities to Address National Priorities" (available at http://standards.gov/upload/Federal_Engagement_in_Standards_Activities_October12_final.pdf).

[4] 293 F.3d 791 (5th Cir. 2002).

[5] The final ACUS IBR Recommendation and other comments can be found at http://www.acus.gov/research/the-conference-current-projects/incorporation-by-reference/.

[6] See http://acus.granicus.com/MediaPlayer.php?view_id=2&clip_id=14 for the Webcast recording the debate at the ACUS Plenary on December 8, 2011. The petitioner raised similar concerns at the Plenary and many members of the Committee, as well as senior Federal officials spoke against the suggested changes and in support of the final IBR Recommendation.

In addition to the loss of the benefits mentioned above, if regulators are restricted to only using standards that meet a narrow, rigid definition of "reasonably available," the regulators may then be forced to develop their own standards, which leads to additional problems. Regulators often do not have the practical experience, nor can they afford to hire or train such experts to formulate their own standards. Moreover, due to their inherently bureaucratic structure and function, regulators simply do not have the flexibility to reach creative solutions for new problems or even to promptly identify emerging technologies and participate in a standards development process in rapidly developing fields. Often, by the time an agency chooses to regulate a sector, relevant standards are in place for over a year or more. The proposed changes might also result in regulators unable to use "relevant international standards," endangering United States compliance under the WTO TBT Agreement.[7]

Our above points should be extrapolated broadly to all the questions in the Federal Register petition, and specific answers to those questions are below:

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

"Reasonably available" should not mean that the material is available for free. Requiring that standards be available for free disregards existing copyright protections and also restricts regulators from being able to choose the most reliable standard that best achieves their regulatory goals. Whether "reasonably available" should mean the material is available to anyone online should be decided on a case-by-case basis.

While the Chamber respects the need for transparency, in practice we think it highly unlikely a "digital divide" will be created by only making material available online.

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

The Chamber does not believe "class of persons affected" needs to be defined in the context of this request.

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

Agencies should not *mandatorily* be required to bear the cost of making materials available for free online. Foremost, we reiterate that "reasonably available" should not be construed to mean free or even be defined narrowly or exhaustively in guidance or regulation. However, in some situations, an agency and SDO can be allowed to *choose* to make a standard available for free (online or by other means) if they reach an agreement to do such and both find such access beneficial. This decision must be freely made, through a process by which the

[7] World Trade Organization Agreement on Technical Barriers to Trade Article 2.4.

agency and SDO mutually decide how to address the cost (as well as the method) of making material reasonably available. This provides regulators and SDOs the option to choose the solution that works best for the particular situation and allows for different solutions to different situations in different sectors.

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

If regulators are unable to select the best standards because those standards are not available for free or in whatever narrow manner prescribed by the suggested changes, the regulators can easily lose access to invaluable expertise. It would be difficult to factor in the cost of an agency needing to hire numerous subject matter experts, adding specialized training for current employees, responding to the inevitable amount of extra comments that will result from creating a new standard instead of using a pre-vetted consensus standard, as well as unknown additional cost burdens associated with wasted time or the lost ability to quickly and proactively adapt to changing technology. In today's economic climate agencies need every incentive and method to save costs and increase efficiency.

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 rulemaking?**

Delays stemming from this examination will be costly. As indicated in parts 2 and 3 of the IBR Recommendations there are already issues with keeping incorporated standards up-to-date as businesses typically move quicker than the agencies.

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

For the reasons stated throughout these comments, OFR should not have the authority to deny IBR approval requests if material is not available online for free. OFR should be faced with a high burden when claiming that material is not "reasonably available."

7. **The Administrative Conference of the United States recently issued 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 believe guidance on this topic should only be updated if the updates affirm that "reasonably available" does not mean for free and that any such updates provide a non-exhaustive list of examples that might satisfy making materials "reasonably available." It is essential that any updates follow the ACUS Recommendation, and allow for appropriate standard copyright protection.

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 Chamber does not believe a proposed rulemaking on this topic is necessary, therefore the ACUS IBR Recommendation can provide suitable guidance on this topic. However, if a need to define "reasonable availability" is found, the far reaching policy ramifications of this issue certainly indicate the Office of Management and Budget is better suited to answer questions. Sudden and unnecessary changes to agencies' incorporation by reference practices will cause negative consequences across virtually every U.S. agency. Moreover, since the suggested amendments will result in changes to the *substance* of regulations, the Office of Information and Regulatory Affairs should answer any questions related to defining "reasonable availability."

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

An extended IBR period causes unneeded uncertainty and can serve to stifle innovation. Agencies often turn to pre-developed, widely accepted standards to rapidly meet urgent needs. An extended IBR period would remove this benefit.

Conclusion

In conclusion, the Chamber is strongly opposed to the petition, as the request will ultimately bring about net consequences to consumers, regulators, and business. We should encourage our regulators to incorporate standards based on quality not price. The Chamber thanks you for your consideration of our comments.