24 Jewett Drive

Cincinnati, Ohio 45215

513 708-5601

May 18, 2012

Office of the Federal Register

NARA 12-0002, 1 CFR Part 51

Fedreg.legal@nara.gov

Dear Colleagues:

First, thank you for extending the period for accepting public comments, as my open heart surgery has held back most of my activity in the last few weeks, but this is an issue on which I have strong feelings and have some background that may be useful to your deliberations.

I have been involved with consumer safety and medical device standards development in past decades and have some experience that is relevant. The purpose of the standards development organization (SDO) is to serve its members' needs, and federal agencies' incorporation by reference (IBR) of its standards is regarded as a great boon to the organizational credibility. The SDO receives its funding from members and receives its prestige from wide adoption of the standards, especially IBR by federal entities and in appropriate cases, ISO and ANSI adoptions for international trade. I do not speak for the National Safety Council but as general editor of its Accident Prevention Manual 13th & 14th editions, I have observed the relative weight given to federal rules that use IBR, and other SDO products. The "cachet" of IBR is a significant boost to the SDO's purpose. The SDO then sells more shelf copies of its standards, generally as a byproduct of this credibility enhancement. So please don't give unwarranted credence to economic assertions that a free access norm greatly harms the SDO. Based on my decades of experience, I urge the OFR to adopt the petition's requirement for an IBR prerequisite for public access to free (at least read-only digital) copies of the SDO's standard. The residual value to the SDO of the agency's credibility through IBR far outweighs claims by some SDOs that IBR would reduce their income. Overall, the benefits outweigh marginal costs.

I am chairman of a regional library board and a longtime elected official in Ohio. I am familiar with the public administration of standardized compliance activities and with the enforcement of code violations in our mayor's court proceedings. This very practical experience teaches that public interest in having access to (at least read-only digital copies of) the SDO-developed standards is very high, in many circumstances in which federal or state IBR calls on the public for compliance.

The comments by Prof. Strauss and colleagues aptly cover the constitutional issues so I will not repeat them. Here 800 miles away from Washington, I can attest that the public wants to have access to the details of rules with which the public must comply. Here is where the "rubber meets the road" for the concepts of access to IBR standards and here, the public really needs to know and the public wants to know. It is not an answer for my reference library staff to say to a lower income patron, "Go buy the NFPA standard" or "Go on the building code entity website and pay for a copy so you can satisfy the HUD standard". It is not an answer for the mayor's court defendant to be told, "You should have paid for a copy of the [SDO] standard." The public interest in access is high; the marginal negative impact on the SDO is small; and any SDO that if offended can petition to remove its standard from the Code of Federal Regulations – but none will actually do so.

I also support the free public access prerequisite because since 1976 my textbook on the Freedom of Information Act, West's ***Federal Information Disclosure***, has been used by American judges, practitioners, and the drafters of FOIA laws in Japan, the UK, Latvia and other nations. Teaching, lecturing, studying and counseling in FOIA has shown me that the public needs to know the boundaries within which their actions are to be constrained by government. If OSHA can penalize for violation of Standard 1234, then the regulated persons have a long-standing APA and FOIA expectation that 1234 will be accessible to the persons who must comply. Particular FOIA-requested technical documents may have cost millions to generate but the agency spent those millions of tax dollars for public purposes; FOIA releases the agency document for free without recoupment of the cost to generate it. If the agency saves money by using the work of outside SDOs, it is acting rationally, but the free public access to the IBR flows from that same concept. It makes sense for the OFR, part of NARA, to honor the public's right to free access to knowledge, the concept of free public knowledge which is essential to NARA's mission.

Therefore I urge the OFR to define "reasonably available" as a prerequisite to IBR to mean free access, even if read-only digital web access. I also support the more detailed responses of the American Bar Association Section of Administrative Law & Regulatory Practice as to the specific numbered issues raised in the OFR request

for comments. The Strauss petition and the ABA AdminLaw comments are appropriate bases for the OFR to act and I urge their adoption.

My sincere thanks for your consideration.

James T. O'Reilly