

Jim Tozzi

June 1, 2012

SUBMITTED ELECTRONICALLY

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

Re: Announcement of a Petition for Rulemaking and Request for Comments, 77 Fed. Reg. 11414 (Feb. 27, 2012)

Dear Sir or Madam:

I am pleased to submit these comments to the National Archives and Records Administration (NARA) regarding the Announcement of a Petition for Rulemaking and Request for Comments regarding the Office of the Federal Register's (OFR) regulations on incorporation by reference (IBR).

OFR should not amend its regulations to define "reasonably available" or to require Agencies to provide standards that are incorporated by reference to the public free of charge. Pursuant to the recommendation by the Administrative Conference of the United States (ACUS), agencies should work with the standards making bodies to make voluntary consensus standards that are incorporated by reference more available to the public. I offer the following comments in furtherance of the ACUS recommendation.

I. VOLUNTARY CONSENSUS STANDARDS INCORPORATED BY REFERENCE SAVE TAXPAYERS MONEY

Voluntary consensus standards save the U.S. Government a significant amount of taxpayer money by eliminating the cost to the Government of developing its own unique standards. Accordingly, agencies rely on the existing expertise and resources of the private sector to implement highly technical standards, instead of allocating resources to develop the technical proficiency required to create its own unique standards. Voluntary consensus standards further save taxpayer dollars by substantially reducing the volume of the CFR. The ACUS report found, "Agency personnel interviewed unanimously reported that, without the work of private standard-

Vienna, Virginia

development organizations, agencies would not have the time, resources, or technical expertise to fulfill their regulatory missions.”

Recognizing the cost savings available by incorporating standards by reference, the government has a policy strongly favoring agency use of voluntary consensus standards. This policy is integrated in the National Technology Transfer and Advancement Act of 1995 (NTTAA) and the Office of Management and Budget (OMB) Circular A-119. In fact, NTTAA requires agencies to use standards developed by standard setting organizations, unless doing so is inconsistent with applicable law or otherwise impracticable.”

Requiring agencies to provide standards incorporated by reference available to the public free of charge would either require agencies to violate the copyright protections of the standards development organizations (SDOs) or require agencies to license the standards at an enormous cost. Both of the options are untenable and would undermine the great benefit of incorporating by reference voluntary consensus standards.

II. VOLUNTARY CONSENSUS STANDARDS ARE PREFERRED BY THE REGULATED STAKEHOLDERS

The regulated community also prefers the use of voluntary consensus standards over the use of agency unique standards. Appreciating this, OMB Circular A-119 established as one of its goals to encourage the use of voluntary consensus standards in order to decrease “the burden of complying with agency regulations.” Private standards are able to reduce the regulatory burden on regulated parties, because the standards are often consistent with industry best practices. Accordingly, much of the regulated community is already compliant with voluntary consensus standards that are incorporated by reference, and often have a familiarity with the practices underlying the standards before they are incorporated into a regulation.

Voluntary consensus standards also provide more opportunities for the regulated community to be involved in the process for developing regulatory standards. SDOs have increasingly adopted more democratic and voluntary, consensus based procedures. Thus, the use of voluntary consensus standards also serve the interests of the regulated community.

III. THE PARAMETERS OF “REASONABLY AVAILABLE”

The OFR federal register notice specifically inquired what the definition is for “reasonably available” under 1 CFR part 51. “Reasonably available” clearly does not mean free, because otherwise the language would instead been drafted as “freely available.” Further, in order to provide standards incorporate by reference free to the entire public agencies would need to either violate the copyright protections of the SDOs or to acquire licenses to the standards at great costs. As discussed above, neither of these options are tenable.

While agencies are not required to provide standards incorporated by reference free to the public, agencies must continue to work with SDOs to ensure that the standards are accessible to interested parties. The following are suggestions, most of which are articulated by the ACUS recommendation, would contribute to making voluntary consensus standards incorporated by reference more accessible to interested parties.

Agencies should request the consent of the SDOs to publish standards incorporated by reference on the agencies' websites with or without conditions for restricted use. If the SDOs consent to free publication, then the agency avoids any copyright issues.

If SDOs do not consent to the agencies' publication, then agencies should coordinate with the SDOs to ensure that the standards are available during key points of the rulemaking process. For example, it is likely more important that the standard is available during the public comment period. Many SDOs are willing to work with the agencies to make the standards available in a read only format or making the standard available for a temporary period during the public comment period. Further, it may be important for the regulated community, especially in the cases of public safety standards, to have access to the incorporated standard immediately after the final rule is promulgated in order to comply with the standard. Accordingly, the SDO may make the standard available for short period in a read only format immediately after the rule or it may collaborate with relevant trade associations to ensure that the regulated community has access to the standard.

In addition, agencies can ensure the public and regulated community have access to standards incorporated by reference by maintaining hard copies in agency reading rooms and libraries throughout the country. Finally, agencies should consider the parties that would need access to the standard and their ability to bear the cost. It should be a factor if the party will be able to bear the cost, and if not, then the agency should develop a process for low cost licensing for certain parties.

SDOs benefit by having their standards incorporated by reference. Therefore, SDOs have an interest in cooperating with agencies to ensure that standards are reasonably available. Moreover, using technological advancements, SDOs have significantly increased the availability of voluntary consensus standards to the public and have demonstrated a commitment to continue to work with agencies to achieve this aim.

IV. SPECIFIC RESPONSES TO THE QUESTIONS POSED BY OFR IN THE FEDERAL REGISTER NOTICE

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

As discussed in Section IV above, “reasonably available” does not mean available for free. Requiring agencies to provide the voluntary consensus standards incorporated by reference to the public free of charge would entail a disruption of copyright protections afforded to the SDOs or would come at a prohibitive expense to agencies to license.

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

“Class of persons affected” does not need to be defined. Voluntary consensus standards incorporated by reference cover a wide variety of standards. Accordingly, the “class of persons affected” for each standard will vary widely and the agency should be afforded the flexibility to respond according to each specific situation.

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

Agencies should not be required to bear the cost of making the material available for free online. In coordinating with SDOs, agencies may be able too provide the material available for free online.

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

Agencies are better situated to describe how making material incorporated by reference available for free online will affect their budgets. However, it is clear that such a requirement would be extremely expensive for agencies. Agencies would need to pay for licenses for the entire public from the SDOs, which given current budget constraints is not likely possible. In situations where the agencies could not afford the license for the standard, the agency would revert to developing government unique standards. Developing government unique standards would require the agency to hire many subject matter experts and develop expertise it lacks. This would require significant resources and run counter to OMB Circular A-119.

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 requests if the material is not available online for free?*

OFR substantive review of proposed rules for IBR would come at a substantial delay and cost to the agencies. Further, it would create a disincentive for agencies to use voluntary consensus standards.

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

For the reasons stated above, OFR should not have the authority to review IBR approval requests and standards incorporated by reference should not by mandate be available by agencies for free.

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*

Yes.

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?*

OMB is capable of discharging this responsibility but for a variety of reasons it is best that this function remain in the OFR.

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

An extended IBR review period would diminish many of the benefits associated with the use of voluntary consensus standards that are incorporated by reference.

For the foregoing reasons, I recommend that OFR remain firmly committed to its current regulations on Incorporation by Reference and that any updates reflect the ACUS recommendation and oppose the adoption of the aforementioned petition.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is stylized with a large, sweeping initial "J" and "T".

Jim Tozzi