

To:

Mr. Michael L. White
Acting Director, Office of the Federal Register
Officials at OFR, NARA

Subject: **NARA 12-0002 – Incorporation by Reference**

After having reviewed the documents contained in the docket for NARA 12-0002 up through NARA-12-0002-0110, mostly comprising comments submitted as part of the public comment period, I would like to comment on some recurring themes contained in submissions by interested persons.

A common concern raised against implementing some of the changes suggested in the petition is that the new requirements would create a “one size fits all” system and that such a “one size fits all” policy is wrong for being too rigid in approach. The thing is, we already have a “one size fits all” policy that caters to and mostly benefits the standardization industry and regulators rather than the affected parties. In my view, the suggestions offered by the petitioners only replace the current “one size fits all” system of incorporation by reference with one that can be tailored to individual scenarios, better distributing the benefits among regulators and the regulated alike.

In my current profession as a software developer, I have seen first hand how openness or closedness of technical standards affects the profession. Whenever a standard is open, such as many of the standards that describe web technologies, electrical standards, or technologies constituting the backbone of the Internet, there seems to be an explosion of interest and development in the technical industry that builds on the foundations of the standards. On the other hand, whenever a standard is closed, there doesn't seem to be a similar “explosion of interest” from industry except when a standard is so widespread that enough third-party writings exist on the subject for it to effectively be considered open.

Take, for example, Universal Serial Bus (USB), which most everyone either recognizes by name or instantly upon seeing a USB plug such as:



The USB Implementers Forum (USB-IF) which issues the technical specifications of USB is a non-profit organization that was formed to promote and support the Universal Serial Bus. It places all of its standards online at <http://www.usb.org/developers/docs/>. Anyone may visit that website and download the standards for free for any reason, yet despite this, the USB-IF is easily able to sustain its standards-development activities. It does this through, among other things, product certification programs, licensing of the USB logos and trademarks, sale of test devices, USB-IF memberships, and a form of USB vendor registration program.

The similar openness and accessibility of standards published by the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), Ecma International, The Open Group, OASIS, ...; numerous companies such as Oracle, Google, Microsoft, Intel, Adobe Systems, RSA Security, ...; and contributions to standards development from private individuals and companies also provide hundreds of examples of high-quality standard development processes that are continuing in close partnership between SDO and industry despite the fact that the standards are published “for free” as I have defined the term in my previous letter, NARA-12-0002-0098 (alternatively NARA-12-0002-0086). Oft assumed without a showing of evidence by those in favor of the status quo, the premise that sustained development of high-quality standards is incongruent with free access to standards is not only unconvincing, but obviously wrong.

Other premises routinely asserted by commenters without convincing backing argument include:

1. The current system provides enormous benefits to all involved.

I agree that the current system provides enormous benefits to regulators and SDOs, but I fail to see how IBR benefits affected corporations and persons. An affected person likely does not care that the IBR instance has reduced the overall size of the Federal Register or that an agency was more easily able to regulate him or her; an affected person cares about how he or she is going to satisfy his or her obligations under the new regulation. To require this person to pay hundreds of dollars of licensing fees for the privilege of accessing the regulations that were newly imposed is absurd.

2. Implementing the suggestions of the petition will result in loss of the benefits as well as numerous consequences.

This is the reverse of a fallacious *post hoc ergo propter hoc* argument. The causality between the introduction of the current system of IBR and occurrence of the supposed benefits to business is highly dubious. The reverse, as claimed, is that altering the current system would eliminate the benefits.

The “numerous consequences” appear to be the loss of the supposed benefits and beliefs that quality of standards will diminish and that some SDOs will cease operation for lack of a sustainable business model. But, I have pointed out six non-profit standards-development organizations that are able to continue their high-quality standard development operations without charging for access to their standards, and there are already two SDOs that have submitted comments in support of the petition.

Additionally, I think that there is at least one major benefit to implementing the petitioners' suggestions: more people would actually read the standards. If the standards are free to read by any affected person, then it is more likely that affected persons will read not only the standards that regulate their own activities, but related standards as well. In the current system, affected persons have to pay for access to standards, often safety standards. This leads to the dangerous scenario in which people either do not read the standards or have no idea what is contained in related regulations. We shouldn't pretend as if this is not occurring today. Particularly when it comes to safety regulations, people should be encouraged to read any part of the law that—for whatever reason—is of interest to them.

3. The only way for SDOs to sustain their standards-development activities is to charge for access to standards.

This belief is not true for at least six different standards development organizations.

4. “Reasonably available” should depend on the industry.

This belief is unsupported by 5 U.S.C. §522.

5. Stricter standards for incorporation by reference will prevent agencies from quickly adapting to changes in industry.

I point out how development of standards such as USB is resilient to change. If for some reason there was a push to incorporate a version of the USB standard by reference, I do not think that it would be difficult for an agency to incorporate it.

6. Standards considered for incorporation by reference are already in widespread use.

Please see Public.Resource.Org's conducted audit of standards incorporated by reference (SIBR), NARA-12-0002-0106, in particular Findings 1, 2, 7, and 8. These findings empirically support the opposite claim; namely, that some standards incorporated by reference are *not* in widespread use by industry.

7. Regulators would have to choose standards either by quality or price.

This is a classic fallacy of false choice in that only two options are provided in a deliberate attempt to eliminate the middle ground. The fact that hundreds of high-quality, zero cost (for access) standards exist has been explicitly ignored.

8. Standards incorporated by reference *are* available on SDO websites.

I feel that this is equivocation. “Available” as used in 5 U.S.C. §522 means available for access by affected persons. Some commenters are using “available” in a loaded context, and clearly mean “available for purchase”.

If a standard incorporated by reference costs \$500 and is accompanied by the kind of “onerous shrink wrap license agreements” described by Public.Resource.Org in NARA-12-0002-0106, I do not think that this arrangement satisfies the reasonably-available-for-access requirement of 5 U.S.C. §522.

In the present system, the OFR's regulations do not ask of the Director to consider how much it would cost affected businesses to obtain copies of the materials for their employees. However, the cost to obtain the materials is an important consideration, and should factor into whether the materials are “reasonably available”.

This petition is mainly about the proper interpretation of 5 U.S.C. §522. As such, I strongly recommend to OFR that it depend on legal counsel to interpret 5 U.S.C. §522 and advise of what duties and responsibilities the OFR and its Director have under it.

I am convinced of four things from my reading of the statute:

■ **“Reasonably available” is a dynamic requirement.**

No attempt was made in the wording of 5 U.S.C. §522(a)(1) to limit the set of practices for making materials accessible to only those practices that were considered reasonable at the time of enactment of this law.

■ **An exception to publication in the Federal Register exists, but the OFR is not obligated to make use of the exception.**

The exception is provided, but 5 U.S.C. §522 does not impose conditions under which materials must be incorporated by reference.

One reason why IBR was provided as an exception to publication in the Federal Register is that IBR would decrease the size of the publication. However, as petitioners point out, reducing the print volume of material is no longer an important consideration given that electronic reading rooms can store virtually unlimited volumes of information.

■ **The principal beneficiaries of the action of this law are the regulated, or members of the “class of persons affected”. Interests of the standardization industry are important, but secondary.**

The paragraph that discusses the exception to publication in the Federal Register seems only concerned with the right of an individual to not be subjected to secret regulation.

■ **Agencies are statutorily required to provide copies of materials incorporated by reference upon receipt of a request. Moreover, the agency must make reasonable effort to search for the records in electronic form or format, and is allowed to charge fees “limited to reasonable standard charges for document search, duplication, and review”.**

See 5 U.S.C. §522(a)(1), §522(a)(2)(B), §522(a)(3), §522(a)(4)(A).

Please share these four arguments with legal counsel. I believe that they are consistent with petitioners' recommendations; court decisions such as *Veeck v. Southern Building Code Congress International, Inc.*; Federal laws passed since 1 C.F.R. §51 was last considered; and other commenters' viewpoints.

Sincerely,

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