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STANDARDS & CERTIFICATION

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To: Michael L. White, Acting Director, Office of the Federal Register, National Archives and Records Administration

Subject: NARA 12-0002 Incorporation by Reference—Petition for Rulemaking (77 Fed. Reg. 11414, Feb. 27, 2012)

The American Society of Mechanical Engineers (ASME) submits this response to the request from the Office of the Federal Register (OFR) for comments on the OFR regulations governing the practice of “incorporation by reference” (IBR). 77 Fed. Reg. 11414 (Feb. 27, 2012). The request for comments followed a petition from law professors and others seeking amendment of those regulations (Petition). Like the Petition, ASME’s submission focuses on published standards¹ that are incorporated by reference into federal regulations.

Founded in 1880, ASME is a not-for-profit scientific, educational and technical organization for mechanical engineers, with over 125,000 individual members worldwide. It has no corporate members. ASME serves several important functions, one of which is the development and maintenance of over 500 voluntary consensus standards associated with the art, science and practice of mechanical engineering. These include standards for complex machinery such as boilers, pressure vessels, elevators, and escalators and items as ubiquitous as nuts, bolts, and plumbing fixtures.

Sufficiency of the Existing IBR Regulations at 1 C.F.R. pt. 51.

The OFR regulations at 1 C.F.R. pt. 51 remain sound and should not be amended. What it means for incorporated material to be “reasonably available” can vary based on many circumstances, including the field of regulation and the type of entities regulated. The promulgating agency, rather than OFR, is better suited to evaluate “reasonable availability” in context, based on its experience and involvement in the pertinent field. The existing, flexible OFR regulations accommodate these variations by sanctioning incorporating references as long as the agency clearly states “where and how copies may be examined and readily obtained with maximum convenience[.]” 1 C.F.R. § 51.9(b)(4).

The cost of copies must be distinguished from access and the availability of standards. There is substantial expense involved in developing voluntary consensus standards. The expectation that publishers will recoup that expense by selling copies is consistent with a strong federal policy toward standards. That policy mandates that federal agencies adopt voluntary

¹ For purposes of these comments, “standards” refers to both “standards” and “codes.”

consensus standards where possible and, in doing so, that they “observe and protect the rights of the copyright holder and any similar obligations.” Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, 63 Fed. Reg. 8545, 8554-55 (Feb. 19, 1998), available at <http://www.whitehouse.gov/omb/circulars/a119/a119.html> (*OMB Circular A-119*). This policy reflects a choice about how to cover the expense of achieving consistent, sound rules for industry and public safety. In policy and practice, the federal government has determined that cost should be borne principally by those who must comply with the standards’ technical requirements—i.e., businesses in the regulated industries. And it is precisely those technical businesses, rather than individuals, who are the intended users of ASME’s consensus standards.

While the Internet may ease the distribution of standards, it does not undo the substantial costs of developing their technical content. All authority and past experience indicate that reasonable availability can encompass a reasonable charge for copies. The sale of copyrighted standards to recoup development costs “poses no realistic threat to public access.” *Practice Mgmt. Info. Corp. v. Amer. Med. Ass’n*, 121 F.3d 516, 518, amended on other grounds, 133 F.3d 1140 (9th Cir. 1998). Therefore, OFR should not amend its regulations to address an unfounded concern about “access,” a concern inaccurately conflated with the question of reasonable cost.

The Petition proposes that the government should bear the licensing costs so that any member of the public can have access at no charge. For the technical businesses affected, however, the price of standards is a small fraction of their total costs of doing business. Those businesses are better suited than the taxpayer to bear the financial burdens of standards development. Recouping costs in this manner is also an effective means of ensuring the integrity of the standards by reducing the potential for conflicts of interest and domination by a single group of stakeholders in the development process.

The legal and policy framework supporting a flexible approach to IBR has evolved over decades of experience in balancing the strengths and needs of both the public and private sectors. This flexible approach acknowledges the importance of funding standards development through their publication and sale. As explained in response to OFR’s specific questions below, no changed circumstance justifies amending or restricting the existing interpretation of “reasonable availability” to alter this healthy existing balance.

Background.

Consensus standards.

Technical standards arose in the wake of the Industrial Revolution, out of the need to keep ordinary people safe around the powerful new technologies of that era and subsequent industrial advancements. For example, ASME developed the Boiler and Pressure Vessel Code in the early twentieth century after a series of boiler explosions killed and injured numerous people across the country and resulted in substantial financial and property losses. Standards have also come to promote commerce and reduce costs to producers and consumers by ensuring quality, reliability, and compatibility across industries and geographical areas. Lastly, standards significantly reduce the burdens of governments by providing practical, rigorous and industry-accepted means of meeting regulations.

In the United States, private, not-for-profit organizations like ASME have long developed the majority of standards relied on by industry and government. ASME produces its standards on a “voluntary consensus” basis—an open, balanced, and deliberative process carried out by committees comprising diverse expert areas and interest groups.² Maintenance of ASME’s standards is an ongoing process, requiring the continuous consideration of new and advanced technologies and commercial practices as they emerge. The resulting standards are followed widely, in part because of the valuable contributions of the many experts who work to maintain them; the transparent, thorough procedures observed in creating them; and the responsiveness in adapting to new information and technologies. Today, they enjoy credit for reducing the costs of goods and services; enhancing safety, health, and quality of life; and facilitating innovation, trade, and competitiveness.

Consensus standards are published documents distributed to any interested parties. Nothing about them is confidential or even internal to any organization or body.³ By contrast, a defining attribute of voluntary consensus standards, as acknowledged in federal policy, is the “[o]penness” of the process by which they are developed. *OMB Circular A-119*.

Government use and adoption of consensus standards.

Over the past century, federal, state, and local governments have increasingly relied on the expertise embodied in published standards for very specialized kinds of rulemaking: technical matters outside the usual ken of government bodies. Instead of creating unique technical standards, government bodies have incorporated into their statutes and regulations numerous standards created in the private sector for independent commercial and public safety reasons. For instance, federal agencies have incorporated ASME’s published standards by reference in the *Federal Register* over 500 times.⁴

By referring to voluntary consensus standards as one means of satisfying safety objectives, the federal government as well as individual states and local jurisdictions have ensured that their laws and regulations reflect deep and broad expertise, gathered in an open and transparent process, free of the influence of narrow interests (through lobbying or otherwise). They have saved the cost of having to develop, update, and maintain their own, unique standards, with the inefficiencies of duplicative and potentially inconsistent efforts. And they have endorsed consensus standards as the most effective way to achieve uniform practices in design, construction, and inspection that protect the American public and promote commerce across jurisdictions—often throughout the entire nation, and sometimes even internationally.

² See Am. Nat’l. Standards Inst., *ANSI Essential Requirements: Due Process Requirements for American National Standards* (Jan. 2012), <http://www.ansi.org/essentialrequirements>; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994), available at [http://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm#Annex 1](http://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm#Annex%201); World Trade Org. Comm. on Tech. Barriers to Trade, *Principles for the Development of International Standards*, G/TBT/1/Rev.8 (May 23, 2002), available at <http://docsonline.wto.org/DDFDocuments/t/G/TBT/1R8.doc>.

³ The Petition’s references to standards incorporated into federal regulation as “secret law” are inaccurate in this context.

⁴ Nat’l Inst. of Standards and Tech., Regulatory SIBR (P-SIBR) Statistics (Standards Incorporated by Reference (SIBR) Database), http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total_regulatory_sibr (last visited Mar. 12, 2012).

When incorporating consensus standards into regulation, governments can either affirmatively require the specific conduct described in the standard or indicate that following the standard is one means of achieving regulatory compliance. While those determinations are made by government alone, ASME advocates that its standards be used in the latter sense.

Strong federal policy favoring regulatory adoption of consensus standards.

Federal statute specifically mandates the use of voluntary consensus standards in regulatory matters. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 783, codified at 15 U.S.C. § 272 (NTTA). This strong policy means that “[a]ll federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical.” *OMB Circular A-119*.

In establishing this policy, Congress noted that the “unique consensus-based voluntary system has served us well for over a century and has contributed significantly to United States competitiveness, health, public welfare and safety.” H.R. Rep. No. 104-390, at 24 (1996), *reprinted in* 1996 U.S.C.C.A.N. 493, 510. According to the Office of Management and Budget (OMB), the policy eliminates the federal government’s cost in producing its own standards, as well as reducing the public’s cost of compliance. *OMB Circular A-119*.

Publication and availability of ASME standards.

ASME publishes its standards for reference and use by any interested person or organization in a wide variety of channels and formats. For example, ASME provides information about all its standards on its Internet website at www.asme.org, employs the services of numerous resellers, and offers an annual catalog of its publications. Its standards may be obtained in print or electronic format by visiting ASME’s website (or that of a reseller), calling a toll-free number, sending a fax or e-mail, or submitting a written request. Recognizing that some of its standards are voluminous and that many users do not need them in their entirety, ASME offers copies of separate, specialized volumes for sale individually.

In publishing its standards, ASME maintains copyright protection and charges a reasonable price for copies. Despite the extensive voluntary participation of experts, ASME relies on revenue from publication and sale to recoup development expenses, underwrite updates and new standards (including many safety related standards that have little or no revenue potential), and cover distribution costs.

Specific Questions Posed by OFR.

[Question 1.a.i] Does “reasonably available” mean
that the material should be available for free?

The term “reasonably available,” as it appears in 5 U.S.C. § 552(a)(1), cannot be interpreted to mandate availability without cost. One reason is a plain interpretation of the language; the statute does not say “free.” Instead, it says “reasonable,” which means “fair, proper, or moderate under the circumstances.” *Black’s Law Dictionary* 1049 (abridged 8th ed. 2005). This is a flexible rule; no sound reading can assume every set of circumstances dictates a cost of zero. It would be

inconsistent with the statute to issue a regulation that interpreted “reasonable” to require “free” availability in all cases.

This conclusion is buttressed by the fact that “reasonably available” has always been understood, in rule and in practice, to encompass reasonable costs for copies. From the first time IBR was introduced into legislation, before ultimately being passed and codified at 5 U.S.C. § 552(a)(1), the expectation was that the relevant materials would be available through commercial channels; the 1964 Senate Report considered that material “publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc.” would be “readily available to interested members of the public.” S. Rep. No. 88-1219, at 4-5 (1964). Those commercial publishers almost certainly charged fees to their customers.

Likewise, today’s strong federal policy endorsing the adoption of consensus standards acknowledges “the rights of the copyright holder” as an important component of the regulatory system. *OMB Circular A-119*. The President’s National Science and Technology Council recently reiterated the same understanding, recommending that federal agencies work cooperatively with standard-development organizations (SDOs) to ensure availability of adopted standards “to all interested parties on a reasonable basis, which may include monetary compensation where appropriate.” Nat’l. Sci. & Tech. Council, Exec. Office of the President, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* 11 (Oct. 10, 2011), available at http://standards.gov/upload/Federal_Engagement_in_Standards_Activities_October12_final.pdf (2011 NSTC Report). This statement reflects the consistent, sustained expectation in government and industry that publishers will charge “reasonable” and “appropriate” costs for copies of consensus standards.

The foundation of that expectation is that not-for-profit SDOs like ASME incur considerable cost in developing, maintaining, and disseminating consensus standards and must recoup that cost through the publication and sale of copies on a reasonable basis. Without those revenues, ASME would no longer be able to sustain its neutral, efficient, and highly credible standards programs. And without those programs, federal state, and local agencies would not be able to rely on the private-sector expertise and experience embodied in voluntary consensus standards, as they are directed to do under federal policy. *OMB Circular A-119*. Governments would be forced to underwrite the development costs and would risk the emergence of conflicting standards in different jurisdictions, resulting in greater compliance costs for businesses, consumers, and ultimately the general public.

Nothing has changed the reasoning behind that policy since OFR last revised its IBR regulations in 1982. According to the Petition, the Internet and other electronic tools have decreased the distribution costs of voluminous material like consensus standards. That may be the case in some circumstances. But the “information age” has not changed the fundamental economics of coordinating and producing a consensus standard. What is at stake is not printing costs or the number of pages in the *Federal Register*. It is the private-sector expertise embodied in consensus standards and the federal government’s ability to fortify its regulations with that expertise in the interests of commerce, health, public welfare, and public safety.

At bottom, someone has to pay for the development and maintenance of standards. Federal and state governments could have chosen to bear those costs directly by developing their own

standards for boilers, pressure vessels, concrete structures, as well as numerous other items such as elevators and escalators. Although governments may have an adequate incentive to produce those standards—namely, the obligation to ensure the safety of their constituents—they would be unable to deploy the same extensive resources as SDOs. SDOs whose standards are widely followed are able to spread the costs among users throughout the world; individual jurisdictions may not be able to share costs so efficiently. Nor would individual jurisdictions be able to collect the breadth of expert input achieved by the private, not-for-profit SDOs. Moreover, standards developed by political bodies or special-interest groups would be more likely subject to the domineering influence of certain interested parties, through lobbying or otherwise.

For these and many other reasons, the federal government decided not to develop its own standards. Instead, it has settled on a policy strongly endorsing—and mandating—the adoption of published, copyrighted standards from the private sector. NTTA; *OMB Circular A-119*. That policy, consistent with the IBR statute, fully anticipates that adopted standards will be supported by revenues from their publication and sale.⁵ OFR regulations governing the publication of the *Federal Register* are not the right vehicle for rewriting federal standards policy in this respect.

[Questions 3 and 4]: Should agencies pay to make incorporated material available for free? If not, who should cover the costs?

The federal agencies that incorporate standards should not bear the costs of making them available to the public for free. The first purpose cited in support of the federal policy endorsing voluntary consensus standards is to “eliminate the cost to the Government of developing its own standards[.]” *OMB Circular A-119*. Changing the IBR rule to thwart that purpose—and impose the cost on the nation’s taxpayers—would be misguided.

Instead, the cost should be borne principally by the entities whose business activity most closely relates to the standards and who therefore have the greatest need to refer to them. ASME’s standards are intended for and used by manufacturers and contractors, not by lay individuals. Those businesses routinely purchase relevant standards, independent of their incorporation by a particular jurisdiction, whether as part of voluntary industry activity or due to prior incorporation in other jurisdictions. Interested businesses use standards in many different projects and in the manufacture of thousands of the same item. For them, the cost of purchasing a code or standard is simply a recognized, accepted, and tax-deductible cost of doing business (and just one of many costs of complying with law). The cost of purchasing standards is not exorbitant to those businesses (and is negligible when compared to the cost of goods sold). By contrast, the cost to the government could be enormous if it were to try to supplant all revenue from licensing and sale in order to make standards free to the public. And the costs associated with developing standards fluctuate depending on economic trends and technological advancements—both of which can be unpredictable. A market-driven approach is better suited to accommodating those fluctuations.

⁵ By contrast, any policy or rule that purported to vitiate or expropriate the copyright in adopted standards would be contrary to the plain requirements of the Copyright Act. 17 U.S.C. § 201(e) (providing, with qualifications not relevant here, that “no action of any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright . . . shall be given effect under this title”). Such a policy or rule would also “raise very substantial problems under the Takings Clause of the Constitution.” *CCC Info. Serv., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994).

In sum, the current model fairly places the cost of consensus standards on those who must comply with them and efficiently distributes those costs across all affected industries and all jurisdictions where they are adopted.

[Questions 5, 6, and 9] Should OFR review and decide whether material is “reasonably available”? And how would an amended OFR review process affect federal rulemaking?

These three questions, taken together, ask whether OFR should conduct a substantive review of whether IBR material is made “reasonably available” and how that review could affect federal rulemaking. OFR should not upset the current, well-functioning process by amending 1 C.F.R. pt. 51 to impose such a review.

The current regulation specifies what a promulgating agency must include in its rule before OFR will approve an IBR request. The agency must make “an official showing that the publication [to be incorporated] is in fact available by stating where and how copies may be examined and readily obtained with maximum convenience to the user.” 1 C.F.R. § 51.9(b)(4); *see also* Office of Fed. Register, *Federal Register Document Drafting Handbook* 6-5 (revised Jan. 2011), *available at* <http://www.archives.gov/federal-register/write/handbook/ddh.pdf> (*Federal Register Document Drafting Handbook*). The rule closely tracks Congress’s basic expectation in passing the IBR statute that each “reference would indicate where and how the material may be obtained[.]” H. Rep. 89-1497, at 7 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2424.⁶ It ensures that the material is published so that agencies are not relying on internal or confidential information. *See* S. Rep. No. 88-1219, at 5 (1964). And it is flexible by permitting different terms of availability in different circumstances, as required by the standard of “reasonableness” found in the IBR statute.

What the current regulation does not do is impose on OFR the obligation to second-guess the regulatory agency’s judgment regarding availability. In that way, the current rule is consistent with OFR’s mission and responsibility. OFR specifies and enforces the relevant “format and editorial requirements” for *Federal Register* publications. *Federal Register Document Drafting Handbook* at iii. In this case, OFR reviews the IBR language to ensure it is adequate in form and content. But OFR does not evaluate substantive, factual issues raised by the content of rules. Those questions are addressed by the promulgating agency, by OMB review, and by the public through the notice-and-comment process. Instituting a substantive review of “reasonable availability” by OFR would require it to police the circumstances of works published across all fields of federal regulation—in other words, to know the business of the entire federal government. That is not OFR’s intended role, nor does OFR have the resources to undertake it. It would represent an unprecedented imposition of substantive review at the publication stage, and it could disrupt and delay the federal rulemaking process.

The better rule—the one currently in force—is to charge promulgating agencies with the task of assessing whether materials are reasonably available, based on the circumstances specific to the pertinent field of regulation. The notice-and-comment process required in federal rulemaking can help inform the agency’s determination, as interested parties can raise objections if they

⁶ It is also consistent with all past versions of OFR’s regulation on IBR, which have specified that “reasonable availability” is shown by a statement of clear instructions for obtaining copies. *See* 1 C.F.R. § 51 (1972), *reprinted at* 37 Fed. Reg. 214 (Nov. 4, 1972); 1 CFR 20.12 (1967), *reprinted at* 32 Fed. Reg. 105 (June 1, 1967).

perceive unreasonable barriers to obtaining copies. As it relates to codes and standards, this flexible approach is consistent with the recent recommendations of the President's National Science and Technology Council, which said that agencies should consider the manner in which adopted standards are made available and work cooperatively with SDOs to ensure reasonable availability consistent with the needs of the public and the SDO. *2011 NSTC Report 11*.

Because the changes proposed by the Petition (or other similar changes to charge OFR with substantive review) would put OFR in the untenable position of supervising federal standards policy, those changes should not be made.

[Question 2] Does “class of persons affected” need
to be defined? If so, how should it be defined?

The “class of persons affected” is one of many circumstances to evaluate in considering whether incorporated material is reasonably available. Because the IBR statute opts for the flexible standard of “reasonableness” that will vary based on context, OFR should not amend its regulations to define more specifically the characteristics of the relevant class.⁷ Like other circumstances of availability, it is better left to the determination of the promulgating agency.

The relevant terms of availability may include the cost of copies, including the reasonableness of the price charged. The reasonableness of the price may vary, depending on the regulated activity, the size and sophistication of the regulated parties, and their financial means. In the case of ASME's consensus standards, the vast majority of those who seek copies are businesses participating in technical, industrial fields who, as discussed above, purchase those copies as a modest business expense. The promulgating agencies know best what regulated parties are affected by consensus standards and are mostly likely to need to use them. OFR should not amend its appropriately flexible regulation in an attempt to address a speculative concern of this sort.

[Questions 1.a.I, 1.b] Does “reasonably available” mean that
the material should be available to anyone online? And does
a policy favoring online access create a digital divide?

As noted above, reasonable availability varies based on the circumstances. While the flexible standard set out in the IBR statute cannot be interpreted to mandate online availability in all cases, the Internet and other electronic tools do create valuable new channels for the distribution of consensus standards and other incorporated materials. Federal agencies and SDOs should collaborate to ensure that consensus standards are available through the channels that best serve the interests of federal standards policy, including the SDOs' need to recoup the costs of development and maintenance. *2011 NSTC Report 11*.

Where online access is pursued, it need not be offered to the exclusion of other means of distribution in a way that might create a “digital divide.” ASME remains committed to offering its consensus standards through a variety of channels, including both print and electronic formats.

⁷ In any event, “class of persons affected” cannot correctly be interpreted as “the public at large”; Congress would have said the latter if it had intended that meaning.

[Question 7] Should OFR update its guidance on
“reasonable availability” rather than amend its regulations?

OFR need not update its guidance on reasonable availability to address the questions raised by the Petition. Those questions relate principally to federal standards policy, not to editorial requirements for the *Federal Register*. OFR is not the expert body charged with issuing guidance on consensus standards for the entire federal government. There are other federal bodies with functions corresponding to that task; they may include the Office of Management and Budget, the National Science and Technology Council, the Office of Science and Technology Policy, the National Institute of Standards and Technology, and the Administrative Conference of the United States.

Respectfully submitted,



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