

May 31, 2012

Mr. Michael L. White  
Acting Executive Director  
Office of the Federal Register  
Suite 700  
800 North Capitol Street, NW  
Washington, DC 20001

Reference: FR Docket NARA 12-0002, 1 CFR Part 51, Incorporation by Reference, “Announcement of a petition for rulemaking and request for comments”

Dear Mr. White:

SAE International (SAE) appreciates the opportunity to comment on the above-referenced notice, which appeared in the *Federal Register* on February 27, 2012. Founded over 105 years ago, SAE is an international standards development organization (SDO) that produces globally-recognized and globally-adopted, consensus-based standards for use in the aerospace, automotive and commercial vehicle industries. SAE follows the requirements of the World Trade Organization (WTO) with regard to Technical Barriers to Trade (TBT), and ensures an open and transparent standards development process. SAE membership is not required for participation on any of SAE’s standards development committees, which is open to all interested parties throughout the world. SAE also is a member of the American National Standards Institute (ANSI).

#### **General Comments on Issue:**

The current standards development process in the United States ensures that standards are developed by technical experts and stakeholders most familiar with the issues, in an open environment that does not favor any one stakeholder over another, whether industry, government or the public. The process ensures that standards improve public safety while at the same time minimizing the public’s share of the development costs. Any revision of 1 CFR Part 51 should ensure that these important criteria are not compromised.

#### **Responses to Specific Issues Listed in the Request:**

*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” does not mean that material should be available for free nor does it imply unlimited online access.

Participants in standards development activities expend significant time and resources, often over a period of years, to create and publish standards that are then available to interested parties on a global basis. Consequently, standards are not created for “free”—and “free” availability is not only impractical but does not reflect the true and significant costs incurred in developing, vetting, refining, producing and distributing voluntary consensus standards. Someone or some entity must be responsible for and bear these costs, and, in the case of free enterprise, be able to protect and benefit from its intellectual property and recoup some amount of revenue to defray a portion of the development costs. Otherwise, standards will not be drafted and published.

The U.S. standards system is the envy of the world—it increases the health and safety of the public by engaging an unrestricted pool of technical experts while, at the same time, minimizing the cost to government agencies and the public. SDOs, such as SAE, provide neutral forums where these stakeholders set aside competitive interests, combine knowledge, and seek to develop

standards of value to the public. SAE, in turn, integrates the collective wisdom of these experts in the form of standards and takes great strides to ensure their integrity, broad distribution and historical maintenance. Unilateral alteration of the meaning of “reasonably available” will compromise the integrity of the process, lead to higher costs of government and potentially reduce the public’s health and safety.

Just because information can be quickly and easily distributed electronically via the Internet does not necessarily mean that all online information must be free. Information is not inherently free. The information sector constitutes a major slice of the U.S. economy. Information that is currently provided for “free” on the Internet is often paid for by other means, such as by advertising revenue, or due to a conscience choice of the provider. The Internet is just the latest method of delivery, just like the “next day” delivery systems developed decades ago.

While the Internet does eliminate the need to print documents, one should not conclude that the cost of standards is thereby reduced to zero. In fact, only a negligible fraction of the total cost lies in the actual printing. The bulk of standard development costs is in the consensus process itself (technical experts’ and SDO staff’s time and expenses, facilitation of committees), integration, testing, review and validation of standards (often including significant R&D investments), and finally, publishing (design, layout and maintenance).

The presumption that SDOs, such as SAE, know in advance that their documents will be referenced in regulations is simply not true in the vast majority of the cases. A large majority of the standards published by SAE are not done with prior knowledge that they will be incorporated by reference. A requirement that certain standards be provided for “free” to the public would, in essence, create an “eminent domain” taking of the intellectual property embodied in those standards that are incorporated into government regulations.

The “one size fits all” approach that the “free” provision would require is not necessary, nor wise. SAE believes that SDOs (or other organizations developing referenced material) and federal agencies should be allowed to negotiate how the incorporated materials can be best made available to the interested public using methods that would satisfy both parties.

SAE standards are available to any party at a reasonable cost. SAE has received only a minimal number of comments relating to a perceived lack of access to SAE standards. SAE has a demonstrated practice of working with parties that have expressed hardship related to access to standards to meet their needs, while at the same time preserving intellectual property rights afforded by U.S. law. SAE also provides access to its standards to federal agencies for their internal use on a case-by-case basis.

Businesses consider the cost of accessing standards as a component of the cost of doing business. The cost of access is negligible compared to the total cost a business incurs in complying with a regulation. SAE always has made special arrangements with organizations or individual members of the public that feel disadvantaged with having to purchase documents during rulemaking comment at the normal price. SAE has had very few requests for these provisions or complaints from anyone due to being required to purchase a document(s). One could question, based on our experience, the cost/benefit of the continued discussion on this issue.

Concerning the issue of whether “reasonably available” creates a digital divide; SAE does not believe that it does. How many “interested parties” will not have access to the Internet? Does “Internet access” require an interested party to have access in his or her own home? Is Internet access provided by a local library sufficient? Regardless, if an individual does not have access to the Internet; the options that always have been available would remain so if the current wording is maintained.

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

It would be beneficial in some ways to create a definition. When defined, the “class of persons affected” should include the organizations that develop documents that end up being incorporated by reference into regulations by Federal agencies.

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

While SAE does not believe that free online access to referenced material should be required, we believe if developed material is placed online as a requirement by an agency, the costs to produce, maintain and recover investments made by the SDO should be borne by the agency or a designated federal entity. However, SAE believes that such an arrangement would not be beneficial to the public in general when compared to the current method of referenced document/standards cost recovery.

*How would this (last issue) impact agencies budget and infrastructure, for example?*

Agencies would and should be the ones to comment in detail on this particular issue. However, it can be readily assumed that an agency budget would be adversely affected by the need to fund the cost of placing referenced material online. In addition, if an agency would need to hire technical consultants to provide the expertise normally embedded in a standards development committee, the question of openness and transparency required by the World Trade Organization could come into question.

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

Given that SAE does not feel “reasonably available” should be defined as “free online,” we also would not agree that OFR should be able to deny IBR approval if the material is not free online.

*The Administrative Conference of the United States recently issued a Recommendation on IBR. In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?*

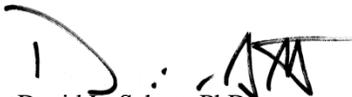
SAE believes the OFR should consider updating their guidance in lieu of amending their regulations. Requiring a rigid definition of “reasonably available” would not benefit the general public and would inhibit the flexibility required of a diverse, varied set of agencies.

*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 given the task to determine if regulations have positive cost/benefit attributes. The cost of documents incorporated by reference to the regulated parties has and should continue to be the responsibility of the OMB. SAE would question the time and cost that would be incurred if OMB also would have the responsibility of determining “reasonable availability.”

SAE hopes our comments are of value to your mission and request. If you have questions or require any item submitted to be clarified, please do not hesitate to contact us.

Sincerely,



David L. Schutt, PhD  
Chief Executive Officer