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May 31, 2012

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

Re: *Incorporation by Reference, 1 CFR Part 51 (NARA 12–0002)*

To the Office of the Federal Register, National Archives and Records Administration:

The Telecommunications Industry Association (TIA) hereby submits input to the Office of the Federal Register, National Archives and Records Administration (OFR) in response to its announcement of a petition for rulemaking and request for comments.[1]

I. INTRODUCTION

TIA represents a large number of information and communications technology (ICT) companies and organizations in standards, government affairs, and market intelligence**.** A major function of TIA is the writing and maintenance of voluntary industry standards and specifications, as well as the formulation of technical positions for presentation on behalf of the United States in certain international standards fora. TIA is accredited by American National Standards Institute (ANSI) to develop voluntary industry standards for a wide variety of telecommunications products and sponsors more than 70 standards formulating committees. These committees are made up of over 1,000 volunteer participants, including representatives from manufacturers of telecommunications equipment, service providers and end-users, including local, state and federal government entities.

The member companies and other stakeholders participating in the efforts of these committees and sub-groups have produced more than 3,000 standards and technical papers that are used by companies, consultants and governments to produce interoperable products around the world, a number of which are incorporated by reference (IBR) into the Code of Federal Regulations (CFR). TIA is and has been a standards development organization (SDO) since its inception in 1988, and is one of the largest SDOs accredited by ANSI. TIA's standards development activities have both a national and global reach and impact. TIA is one of the founding partners and also serves as Secretariat for 3GPP2 (a consortium of five SDOs in the U.S., Japan, Korea, and China with more than 65 member companies) which is engaged in

[1] *Announcement of a petition for rulemaking and request for comments*, Office of the Federal Register, National Archives and Records Administration, 77 Fed. Reg. 11414 (February 27, 2012) (Petition).

drafting future-oriented wireless communications standards.[2] TIA also is active in the formulation of United States positions on technical and policy issues, administering four International Secretariats and 16 U.S. Technical Advisory Groups (TAGs) to international technical standards committees at the International Electrotechnical Commission (IEC).

TIA's standards committees create consensus-based voluntary standards for numerous facets of the ICT industry, for use by both private sector interests and government, which fall within the purview of the Petition.[3] Among other areas, TIA's standards committees develop protocols and interface standards relating to current U.S. Government technology priorities such as Smart Grid,[4] health care ICT,[5] and emergency communications infrastructure[6] in such areas as fiber optics, public and private interworking, telecommunications cable infrastructure, wireless and mobile communications, multimedia and voice over internet protocol (VoIP) access, as well as vehicular telematics.

TIA's association members and others come to TIA to develop standards that promote efficiency and interoperability, enhancing industry collaboration to solve market-driven demands and customer needs. This enables access to new technologies and markets, helps diffuse innovative solutions across the industry while maintaining respect for intellectual property rights and supporting incentives for companies to further invest in related R&D. TIA's process also creates opportunities for further competition among differentiated implementations and products, which provides stimulus for more innovation and choice for customers and users.

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2 *See* 3GPP2, About 3GPP2, *available at* http://www.3gpp2.org/Public_html/Misc/AboutHome.cfm (last visited May 26, 2011).

3 TIA publishes an annual report that includes the latest actions taken by each respective TIA engineering committee toward the development of standards for the advancement of global communications. *See* TIA, Standards & Technology Annual Report (September 2010), *available at* http://tiaonline.org/standards/about/documents/StarReport_09-10.pdf.

4 TIA's TR-50 (Smart Device Communications) is responsible for the development and maintenance of access agnostic interface standards for the monitoring and bi-directional communication of events and information between smart devices and other devices, applications or networks. *See* http://tr50.tiaonline.org.

5 TIA's TR-49 (Healthcare ICT) is responsible for development and maintenance of standards for the healthcare ICT applications which involve medical devices, network infrastructure, applications, and operations support. *See* http://tr49.tiaonline.org.

6 Engineering Committee TR-8 formulates and maintains standards for private radio communications systems and equipment for both voice and data applications. TR-8 addresses all technical matters for systems and services, including definitions, interoperability, compatibility, and compliance requirements. The types of systems addressed by these standards include business and industrial dispatch applications, as well as public safety (such as police, ambulance and firefighting) applications. *See* http://tr8.tiaonline.org. (is this paragraph font different?)

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II. RESPONSES TO OFR QUESTIONS

1. ***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?***

Initially, TIA notes that it does not believe that the OFR should entertain the request in the Petition to define what is "reasonably available" pursuant to 5 U.S.C. 552(a)(1), as it is not required to. While the Petition is certainly correct that many leaps in technology have altered the means by which citizens obtain access to Federal regulations,[7] it ignores the fact that alterations to the means of access are merely that. New methods of viewing the same materials do not alter existing characteristics of standards which are IBR. These include intellectual property rights (IPR) concerns, which are currently addressed through the development of policies and through use of digital rights management for electronic formats. The fact that less of the Federal Register is printed does not change the inclusion of the following language in the same law cited by Petitioners, which TIA believes indicates Congress' intent for the availability of standards IBR in the CFR to be allowed to shift mediums to the electronic format:

> "For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means."[8]

In the Petition, it is argued that the rationale behind IBR has, due to developments in law and technology, been "undermined" because standards no longer are available "only in printed form;" as a result, OFR is urged to substantially alter the entire landscape of IBR and disrupt the success which has resulted. [9] TIA urges the OFR to consult the December 2011-adopted recommendations of the United States Administrative Conference (USAC),[10] which states that:

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7 *See* Petition at 11415.

8 5 U.S.C. 552(a)(2)(E).

9 Petition at 11415.

10 The Administrative Conference of the United States is an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures. Its membership is composed of innovative federal officials and experts with diverse views and backgrounds from both the private sector and academia. TIA believes that the OFR should regard the USAC recommendations as the Executive's position on IBR.

> "The practice [of IBR] is first and foremost intended to—and in fact does—substantially reduce the size of the CFR. But it also furthers important, substantive regulatory policies, enabling agencies to draw on the expertise and resources of private sector standard developers to serve the public interest. *Incorporation by reference allows agencies to give effect to a strong federal policy, embodied in the National Technology Transfer and Advancement Act of 1995 and OMB Circular A-119, in favor of agency use of voluntary consensus standards. This federal policy benefits the public, private industry, and standard developers* [emphasis added]."[11]

The term "reasonably available" does not necessarily mean that the information must be available "for free" nor does it necessarily mean that must be "available to anyone online." To implement such a broad definition would not be in line with any language in the statutes cited by the Petitioners, or in the existing regulations. For each IBR, the Director of the Federal Register is entitled to make a case-by-case determination of whether the referenced material is "reasonably available."[12] TIA believes that these decisions, which are reserved for the Director, to allow for the IBR of copyrighted material have been appropriate and are due deference.[13]

TIA holds the position that the text of standards should be made available to any party on a reasonable basis. We emphasize that, consistent with U.S. copyright law,[14] the contents of a standard are the intellectual property of the developing organization, entitling that developing organization to associated rights which cannot be removed without just compensation. Therefore, when a standard is incorporated into some other creation, intellectual property rights attached to it should be viewed no differently than the intellectual property rights of other aspects of the creation. To block these rights from all standards which are IBR would put a Federal agency on the "slippery slope" of picking classes of rights holders that should and should not enjoy copyright protections.

Furthermore, TIA believes that IBR, as it is currently implemented, is consistent with the National Technology Transfer and Advancement Act of 1995[15] as well as OMB Circular A-119, which states, in response to the question "how should my agency reference voluntary consensus standards?":

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[11] *Adoption of Recommendations*, Administrative Conference of the United States, 77 Fed. Reg. 2257 (Jan. 14, 2012) (citations omitted) (USAC Recommendations).

[12] *See* 5 U.S.C. 552(a)(2)(E).

[13] The *Chevron* standard applies when an agency (in this case, the OFR is the secretariat for the Administrative Committee of the Federal Register, a component of the National Archives and Records Administration, an independent Federal agency) is interpreting a statute it has been charged with administering through some order imbued with the force of law. The standard of review under *Chevron* consists of two steps: first, the reviewing court must ask whether, after "employing traditional tools of statutory construction," it is evident that "Congress has directly spoken to the precise question at issue." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 843 n.9 (1984). Then, if the statute is found to be "ambiguous," the court will uphold the agency's interpretation as long as it is "based on a permissible construction of the statute." *Id.* at 843.

[14] *See* 17 U.S.C. *et al.*

[15] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 (1996).

> "Your agency should reference voluntary consensus standards, along with sources of availability, in appropriate publications, regulatory orders, and related internal documents. In regulations, the reference must include the date of issuance. For all other uses, your agency must determine the most appropriate form of reference, which may exclude the date of issuance as long as users are elsewhere directed to the latest issue. *If a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations* [emphasis added]."[16]

We also agree with the National Science and Technology Council's acknowledgment that "the text of standards and associated documents should be available to all interested parties on a reasonable basis, which may include monetary compensation where appropriate."[17] Further, we concur with the recommendations recently adopted by the United States Administrative Conference, which include the following:

> "If copyright owners do not consent to free publication of incorporated materials, agencies should work with them and, through the use of technological solutions, low-cost publication, or other appropriate means, promote the availability of the materials *while respecting the copyright owner's interest in protecting its intellectual property* [emphasis added]."[18]

The effect of the OFR following the Petitioners' recommendations must not be understated. Under the current standardization system in the United States, market-driven open standards can help promote competition and innovation, and such standards are developed or ratified through a voluntary, open and consensus-based process**.** To consent to the request of the Petition would seriously jeopardize this ecosystem of trust through which companies and governmental entities can convene to create standards for industry-wide use.[19] The nominal fees charged by SDOs for electronic versions of some standards are used to support the continued activity of those standards organizations. To remove the ability to collect and protect these nominal fees for protected standards referenced – even those potentially referenced without the knowledge or consent of the SDO – would severely curtail the development of further standards to the detriment of the Federal government and all other stakeholders. Such an undertaking by the OFR would additionally result in the ceasing of standard development in some areas, which runs wholly counter to the NTTAA and OMB Circular A-119, along with the Administration's current policy on standards. Furthermore, the USAC has concluded that "[e]fforts to increase transparency of

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[16] Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (1998).

[17] *See* Subcommittee on Standards, Nat'l Sci. & Tech. Council, Exec. Office of the President, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* at 11 (Oct. 10, 2011).

[18] USAC Recommendations at 2258.

[19] We note that the information and communications technology (ICT) sector, which TIA is one of two ANSI-accredited SDOs for in North America, is widely considered to be one of the most successful sectors in standardization.

incorporated materials may conflict with copyright law and with federal policies recognizing the significant value of the public-private partnership in standards."[20]

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

TIA does not believe that this term should be defined. The "class of persons affected" should be allowed a fluid, case-by-case status, which may change under the Director's discretion depending on the circumstances of the IBR, without being overly-broad. The categories of standards referenced in the CFR are extremely diverse, making this definition in the CFR impossible without leaving out some appropriate parties and unnecessarily including others. We defer to the experience of the Director to make this decision on a case-by-case basis, as currently allowed.[21]

With this stated, TIA contends that Petitioners misconstrue 1 C.F.R. § 51.1(c)(1)'s meaning of the phrase "...the Federal Government and the members of the class affected," by stating that while "respect for standards organizations' copyrights may influence the Director's determination that incorporated material is 'reasonably available,' this language invokes that interest only indirectly."[22] TIA has itself experienced – and believes to be the case in a significant amount of IBR occurrences – the impact and relevance of standards which are IBR, and strongly urges the OFR to regard SDOs as a "class affected" when appropriate.

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

As stated above, TIA does not believe that all standards referenced in the CFR should be required to be made freely available online. TIA believes that the current system, where agencies work with SDOs on a case-by-case basis to ensure that the standards referenced in the CFR are reasonably available, is the most reasonable and efficient path forward.

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

Currently, the Federal government is a significant contributor to the development of voluntary, consensus-based standards across nearly every sector of the economy.[23] Many of these standards are

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20 USAC Recommendations at 2258.

21 *See infra* note 7.

22 *See* Petition at 11415.

23 For example, Federal participation occurs on such TIA engineering committees as TR-8 (Mobile and Personal Private Radio Standards), and TR-45 (Mobile and Personal Communications Systems Standards).

relied upon by Federal agencies to ensure that entities follow the regulations in such forms as safe harbors or compliance assessment.[24]

If the Petition is obliged, a great number of voluntary, consensus-based standard development organizations will either (1) be forced to grossly increase membership dues on participants, resulting in much lower participation from member companies and governmental organizations, decreasing and degrading the development of standards; or (2) be forced to completely cease activities due to a lack of resources, depriving those reliant on standards – including the Federal government – of their use. Federal agencies that previously were able to rely upon standards as safe harbors or for compliance assessment will have to dedicate increased resources to create and manage governance structures currently not in place. In the end, the consumer is the loser in this scenario, as the cost of governance will increase which will no doubt be passed onto industry and ultimately the consumer. We urge OFR to appreciate the impact the Petition would have on the operation of the Federal government alone, much less the economy at large.

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 request at the final rule stage of the rulemaking?***

TIA believes that such an undertaking by OFR would have noticeably negative effects on the rulemaking process. TIA believes that, generally, the current regulatory process in the United States is overly onerous and sluggish, resulting in reduced investment and innovation. We note that even the Administration has acknowledged these characteristics of the current regulatory regime through such means as the issuance of Executive Orders requiring agencies to improve the existing regulatory process (and urging independent agencies like the National Archives and Records Administration to follow suit),[25] and the OFR should strive to reduce and streamline – not add to – the burdensomeness of the regulatory process.

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[24] For example, Section 107(a)(2) of CALEA contains a safe harbor provision, stating that "[a] telecommunications carrier shall be found to be in compliance with the assistance capability requirements under section 103, and a manufacturer of telecommunications transmission or switching equipment or a provider of telecommunications support services shall be found to be in compliance with section 106 if the carrier, manufacturer, or support service provider is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission under subsection (b), to meet the requirements of section 103." 47 U.S.C. § 1006(a)(2). Subcommittee TR-45.2 of TIA, along with Committee T1 of the Alliance for Telecommunications Industry Solutions, developed interim standard J-STD-025 to serve as a "safe harbor" for wireline, cellular, and broadband PCS carriers and manufacturers under section 107(a) of CALEA. The standard defines services and features required by wireline, cellular, and broadband PCS carriers to support lawfully authorized electronic surveillance, and specifies interfaces necessary to deliver intercepted communications and call-identifying information to a law enforcement agency. *See* TIA, Communications Assistance for Law Enforcement Act (CALEA), *available at* http://www.tiaonline.org/policy/public-safety/calea (last visited March 19, 2012).

[25] *See, e.g.*, Executive Order 13563 -- Improving Regulation and Regulatory Review, January 18, 2011, (http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order) ("[The regulatory system] must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends").

The current system for IBR is successfully functioning, allowing the Federal government to incorporate consensus-based industry standards into the CFR. We urge the OFR to adhere to avoid adding increased steps to the regulatory process, particularly for regulations which it has not subject matter expertise over.

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

For the reasons discussed above TIA opposes that OFR should have the authority to deny IBR approval requests if the material is not available online 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?***

TIA supports the OFR updating its guidance on IBR instead of amending our regulations. Such an action would be consistent with the precedent and Administration policies cited above.

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?***

As TIA has noted above, particularly in response to Question 1, the Petition should be wholly rejected by OFR. In TIA's view, no further action is necessary on the part of OFR after that.

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

See response to Question 5.

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III. CONCLUSION

For the foregoing reasons, TIA urges the OFR to adopt the recommendations above. We urge OFR to contact us with any questions or concerns you may have with our positions as it considers this proposal.

Respectfully submitted,

Telecommunications Industry Association

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