May 31, 2012

RESPONSE TO FEDERAL REGISTER REQUEST FOR COMMENTS

"Incorporation by Reference"

1 CFR Part 51 [NARA 12-0002]
National Archives and Records Administration,
Office of the Federal Register

The Aerospace Industries Association (AIA) appreciates the opportunity to comment on the petition submitted by Professor Peter Strauss *et al.* to the Office of the Federal Register (OFR), regarding the availability of material incorporated by reference (IBR) in the Code of Federal Regulations (CFR).

The aerospace manufacturing industry's long partnership with government agencies (both civil and military) for the rules and regulations which support the certification, acceptance and compliance of aerospace products is a key contributing factor to U.S. aerospace dominance. Part of the success of this partnership is the ability for Federal Agencies to draw upon the rich technical pool of data found in voluntary consensus standards and in company proprietary intellectual property (when the applicable rules relate to products from a specific company). Ensuring strong, responsive and flexible standards systems to support this process, as well as the ability to direct the affected class of persons to appropriate company unique IP, is critical to the success of aerospace products and programs.

Why Does IBR Matter to the Aerospace Manufacturing Community?

When the documents being incorporated by reference are voluntary consensus standards, the aerospace industry has a strong vested interest in the continued success of the processes in place. Those systems provide for a robust public/private partnership for setting the standards which ensure safe, reliable, quality aerospace products are built on business models which guarantee the best technical data in the most timely and cost effective manner. The government and regulatory agencies involved in aerospace have long come to rely on the private sector-lead standards process to provide the technical standards needed to meet the regulatory, certification and customer requirement for aerospace products.

The standards systems the aerospace industry has been working with for decades and our standards-based relationship with Federal Agencies has been well served by the

government's policy under OMB Circular A-119. Under the Circular, government agencies are charged to "observe and protect" the rights of copyright holders when incorporating by reference into law voluntary consensus standards. The U.S. aerospace industry strongly supports this rule as it's been proven to result in both the government and the industry benefitting from the efficiencies of the voluntary consensus standards development process and its supporting business models. A reversal of this ruling, without the benefit of comparable means of supporting the existing standards development processes would have a severe impact on the aerospace industry's access to timely, cost effective standards and could jeopardize the industry's safety and economic viability.

In addition to the incorporation of standards by reference into the CFR, aerospace companies, working with the Federal Aviation Administration, have permitted company proprietary documentation and intellectual property to be referenced by FAA Service Bulletins and Airworthiness Directives in the CFR. This is a unique relationship between one industry and one Federal Agency. Again, changes to how materials are incorporated by reference without reasonable compensation for company intellectual property could limit the effective operations of the civil aerospace industry.

Responses to Questions from the Federal Register Notice

1. *Does "reasonably available" mean that the material should be available for free and to anyone online?*

The aerospace industry believes that the text of standards or other materials should be reasonably available to all interested parties. However, "reasonable" does not mean "free". Existing statutes clearly state "reasonable", not "free", to allow different intellectual property holders -- including standards developing organizations (SDOs) and the sectors they serve -- to determine what constitutes "reasonable" in terms of fair, proper and moderate compensation under the circumstances.

The federal policy endorsing the adoption of consensus standards (OMB Circular A-119) acknowledges the rights of the copyright holder and the federal agencies which interact with the aerospace industry have been operating successfully for decades with the expectation that standards developers will charge "reasonable" costs for copies of their standards. With the existing federal policies, the government acknowledges that standards developing organizations incur considerable cost in developing, maintaining, and disseminating consensus standards and must recoup that cost in some manner. Most do so by selling copies of those standards at a reasonable price.

The Federal Register Document Drafting Handbook, January 2011 Revision, instructs that drafters of rules must "Identify the standard and/or material to be incorporated, by title, date, edition, author, publisher, and identification number of the publication." IBR material must also "Contain statements of availability stating... Where copies can be

purchased from the publisher." The OFR recognizes that certain materials are intellectual property for which the IP holder is due appropriate compensation.

The internet has definitely expanded the options for access to standards and other materials and has given companies and the standards organizations a powerful tool for distribution of their intellectual property. But while electronic tools may have reduced the costs of printing and distributing paper copies of materials incorporated by reference, the costs inherent in the intellectual property still remain. There are significant costs in developing and maintaining the technical information which may be incorporated by reference. For standards developing organizations, the costs of employing the people, processes and computing tools necessary to facilitate the consensus standards process are significant. And if the material being referenced is the intellectual property of an individual company, the rights to this information represent a significant investment on the part of the company and compensation for access is fundamental to their businesses.

2. Does "class of persons affected" need to be defined?

The aerospace manufacturing industry does not believe that this term needs to be defined.

3. and 4. Should agencies bear the cost of making the material available for free online? If so, how would this impact the agencies budget and infrastructure?

For standards incorporated by reference, the aerospace industry would strongly argue against forcing federal agencies that incorporate standards to bear the costs of making them available to the public for free. The public/private partnership the aerospace industry has with the government regarding standards is based on the premise that whenever possible, federal agencies should not develop their own standards but instead adopt standards developed by the private-led voluntary consensus standards organizations. The federal agencies which work with the aerospace industry are already facing huge budgetary cuts. If the IBR rules were changed to require the agencies to subsidize the cost of standards setting, then government budgets would have to be substantially increased which would pose untenable costs on the nation's taxpayers and the national debt.

Moreover, while the government demands the highest quality technical standards to help ensure the safety and reliability of products used by and for the public, it lacks the breadth and depth of technical expertise and resources needed to produce those standards. The industry and the standards developing organizations welcome and rely on the participation and input from federal agencies in development of standards, but by engaging with the broadest possible stakeholder input from around the world on SDO committees, the government is assured of the most technically reliable standards to meet its needs. Sharing the development costs among users from the entire global aerospace industry and supply chain helps ensure that those who benefit from the standards help bear the burden for their development, maintenance and distribution.

To ask the far smaller number of entities, including government agencies, which sit on the technical committees to bear all those costs up front, would have the effect of forcing most of them out of the development process. Standards organizations which fund the process through the sale of standards are able to keep the financial barrier to participation low for small and medium sized enterprises, government agencies, academia and consumer interest groups. This ensures the broadest, most robust input into the standards and protects against just a few entities being able to have a disproportionate amount of influence on the resulting standards.

To ask the Federal Agencies to pick up the costs for the standards processes lost by forcing the standards to be made available for free is equally untenable. This would place the need for timely standards development at the mercy of governmental budget cycles and as such would be a far less dependable source of support for the standards process than what exists today. The current business models are market-driven and very responsive to new and changing technologies and standards needs. It would unfairly burden the taxpayers to start to pay for the standards process and place the timely development of needed standards dependent on governmental budgeting processes.

Additionally, while many aerospace standards are developed by organizations domiciled in the U.S. and are incorporated via reference into U.S. rulemaking, they are used by and supported by the entire global industry. To force the standards organizations to give the standards away for free would mean that other nations would have free access to this technical data without having to pay their fair share to support the process.

So while the aerospace industry encourages the standards organizations to continue to look for ways to address the issues of accessibility and affordability, we would request that OFR continue to respect the copyrights of standards organizations and refrain from changes that would have a negative impact on the rich diversity of participants in the standards setting process or on the system's ability to respond quickly to the need for new standards. Many of the key SDOs supporting the aerospace industry have been operating for over a century. Our industry and our partner government agencies obviously find value commensurate with the cost to have continued to support them all this time.

And for company unique intellectual property incorporated by reference, the aerospace industry again would argue against forcing the federal agencies that incorporate this material to bear the costs of making them available to the public for free. The process, costs, and time required to negotiate appropriate compensation in each unique case would be prohibitive.

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 stage of the rulemaking?

Stakeholders and affected parties currently have adequate opportunity to comment during the development of voluntary consensus standards and during the federal rulemaking process. The OFR does not have the industry-specific technical expertise needed to review proposed rules for IBR impact.

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

OFR should not have the authority to deny IBR approval requests based only on the free availability of the referenced material on-line. As was noted above, "reasonably available" does not mean "free". The charge in OMB Circular A-119 that federal agencies respect the copyrights of IP holders; the acknowledgement in the Federal Register Document Drafting Handbook that copies of materials may be made available for purchase; and the December 2011 recommendations from the Administrative Conference of the United States (ACUS) supporting earlier recommendations made by the National Science and Technology Council's Subcommittee on Standards all state that appropriate compensation is due the applicable standards organization or IP holder.[1]

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?

As noted above, ACUS has issued recommendations related to information incorporated by reference into federal rulemaking. The aerospace industry believes that updating OFR guidance on IBR based on the recommendations could be very helpful. OFR should also look to a white paper developed by the American National Standards Institute on the copyright implications of incorporating voluntary consensus standards in regulations for additional information to include in any updated guidance material.[2]

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 noted above, the Office of Management and Budget has already addressed the policy of IBR with regards to standards in OMB Circular A-119. Any changes to policy

[1] http://www.acus.gov/we-content/uploads/downloads/2011/12/Recommendation-2011-5-Incorporation-by-Reference.pdf

[2] "Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected," http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf

or additional policy issues with regard to standards or other materials incorporated by reference should be addressed by OMB as the appropriate office to set policy related to recognition and protection of intellectual property rights.

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

Rulemaking is a lengthy and complex process, with many aspects unique to the industries and Federal Agencies involved. Extending the process would add a level of complication which could have the unintended consequence of making SDOs, companies, or other IP holders less willing to allow their information to be incorporated by reference. This is contrary to the policy established by OMB in Circular A-119 which directs Federal Agencies to work with standards setting organizations and adopt and use voluntary consensus standards. This could also undermine the relationship between industry and Federal Agencies where specific practices for incorporating IP into rulemaking by reference have been adopted.

10. Additional Comments

Placing export-controlled information in the public domain could be the net result of this proposed rule change. In this regard, there can be no law or regulation that permits "incorporation by reference" of any information that is subject to the Export Administration Regulations (EAR) or controlled by the International Traffic in Arms Regulations (ITAR). The Department of Commerce and the Department of State are the only U.S. government agencies, respectively, pursuant to the underlying statutory authorities of the Arms Export Control Act for the ITAR and the Export Administration Act, effected through IEEPA, that have the authority to place their respectively controlled information in the public domain.

Thus, if the OFR rules in 1 CFR Part 51 are revised, the regulations must include language to the effect that: "Nothing herein requires or authorizes the release to the public either directly or through incorporation by reference of any information subject to the export control restrictions as promulgated by the U.S. Department of State or the U.S. Department of Commerce."

Conclusion

Our nation's economy and national security rest on the strength of the aerospace industry and its products, which in turn owes its strength to the robustness and flexibility of the rules and regulations which support the certification, acceptance and compliance of aerospace products. The ability to collaborate with government agencies to identify and include the standards and other unique materials necessary to support this vital industry is integral to the continued success of U.S. aerospace superiority. AIA and its members have been well served by the existing CFR practices for incorporating materials into rulemaking and by our long-term partnerships with those Federal Agencies with whom we work closely.

Additionally, the aerospace industry and the government together have benefited greatly from public-private partnership for the use of standards set forth in OMB Circular A-119.

We welcome the opportunity to continue working with all stakeholders involved in the discussion surrounding the incorporation of standards and other materials, and to search for ways to improve the proven processes while avoiding unintended consequences as our industry continues to meet our nation's civil and defense priorities. Additional guidance developed by OFR should respect the needs of the different industries and agencies served, and uphold and honor the copyrights of standards developing organizations and other IP holders.

We appreciate the opportunity to provide these comments and we look forward to being a part of the ongoing dialogue between OFR, the various Federal Agencies, and other key stakeholders from industry and the standardization community.

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