

May 31, 2012

To whom it may concern,

I have spent most of my 25-year career either writing regulations for the federal government or complying with federal regulations on behalf of a private company. The thoughts I share regarding the IBR petition are my own. My opinions are informed by these experiences, but they do not necessarily reflect the positions of my current or former employers. This response does not intend to address legal questions, but rather focuses on procedural, administrative, and logistical considerations.

The petition is premised on (or fueled by) two falsehoods. First, the petition confuses the modern, Internet-influenced expectations and perceptions about what should be free and instantaneously available with the economic realities of developing and maintaining intellectual property as represented by the various voluntary consensus standards. Second, the petition considers regulatory requirements in the absence of any context. The view presented is that regulations are like an academic exercise imposed by a demanding professor. Professor Strauss's comments from March 9, 2012, reinforce this idea by describing regulation as something that "principally benefits the agency." It is quite a distorted view of government indeed to think that an agency's actions are intended for its own benefit without regard to any external purpose or benefit associated with the regulation. In contrast, properly understood, every regulation should be considered to be advancing the public good, whether in the direction of environmental protection, food safety, or rules related to baking and securities. Entities meeting regulatory requirements are therefore in turn acting for the public good by complying with applicable rules. Some regulations in fact do not advance the public good, either as a result of erroneous judgment or the passage of time, but evaluating the proper role of IBR in the regulatory process can be properly considered only with this assumption.

A couple points from the petition warrant further attention. The petition states that "Developments in both law and technology...[transform] what it should mean for these standards to be 'reasonably available.'" and also "'Reasonable availability' of mandatory standards in the age of the Internet requires their ready accessibility [sic]..." These statements reflect wishful thinking, ignoring the reality that someone has to pay for developing the voluntary consensus standards. There are generally three candidates for paying the bill: (1) the government agency imposing the regulation, which translates to taxes collected from the general public, (2) the regulated entities, which may or may not be able to pass those costs along to consumers (or others who benefit from their products or services), and (3) the standards organizations themselves. It is generally not sustainable to expect a standards organization to produce standards without being able to recover the associated costs, so the real question is whether the bill should be paid by the regulated parties or the general public. The petition poses the question "Should it be free?" and answers in the affirmative. The more germane question to ask is "Who should pay?" The petition offers no rationale for shifting the cost of compliance to the general public.

The petition also states "Today, binding law cannot be regarded as reasonably available if it cannot be freely be found in or through an agency's electronic library." Taken at face value, this is simply a confession of laziness or entitlement on the part of those who have become accustomed to accessing free information on the Internet. Upon more careful examination, this statement

also betrays a presumption that the content of the regulation itself is unreasonable, not just the process of complying with applicable requirements. If one considers that a regulation must not impose a burden for accessing the information, where does that expectation stop? If the regulated party must perform testing to demonstrate compliance with regulatory requirements, why is the government imposing this requirement not obligated to pay for the testing in addition to paying for the standards that provide the necessary instructions for testing? As stated above, we should start with the understanding that the regulation advances the public good, which leaves the question, again, of whether the regulated entities or the general public (through taxes) should pay for complying with the regulation. It is far from self-evident that the general public should pay for regulatory compliance. Congress has addressed this in some particular circumstances by authorizing agencies to assess fees from regulated entities to cover the cost of overseeing and enforcing regulatory requirements. This establishes the principle statutorily that it is sometimes proper for the costs of compliance to be borne entirely within the regulated community (with costs potentially passed on to consumers of those products or services), rather than being borne by the general public through taxes. This further establishes the somewhat counter-intuitive idea that government oversight of regulatory requirements is a service provided to the regulated community, for which regulated parties may properly be charged. Along those lines, this raises a circularity issue; what do we gain by requiring the government to pay for something when the agency is directed to collect compliance fees from the regulated parties?

There are many examples of unfunded mandates in modern society. These include car insurance and various licensing and certification requirements for teachers, attorneys, doctors and nurses. Governments generally pay for neither the cost of preparing or qualifying for these requirements nor the cost of going through the process to demonstrate compliance. Once a regulation is in place, the regulated party complies to advance the common good, and the cost of accessing voluntary consensus standards can be understood as a cost of doing business, borne by all those with a comparable role.

It is interesting to note that, while the petition acknowledges that standards organizations can rightfully charge for their intellectual property, NARA's request for comment dispenses with that tether to reality, asking simply if materials should be made available for free. Many of the comments received to date offer a less-than-surprising answer to that question – Of course everything should be free. Given the opportunity to answer thoughtfully to the more relevant question of who should bear the burden of funding voluntary consensus standards should lead to a much more informative exchange of ideas.

Those advocating the need for standards development organizations to recover the cost of preparing and publishing standards have their own glaring omission. A CFR reference to a voluntary consensus standard has the potential to dramatically propel increases sales of those standards. Yet, I have never seen an organization decrease the price of a standard in response to some level of revenues or a change in status with federally ensured sales. It is not hard to imagine circumstances in which this goes beyond meeting expenses or even publishing a profitable standard to profiteering.

I don't expect that a single rule would properly reflect this economic dynamic of ensuring adequate revenues for the standards development organization without unfairly burdening the regulated parties.

The following thoughts come to mind regarding the federal role in ensuring reasonable access to published standards:

- The regulating agency should consider the cost of standards and take steps to keep these costs to a minimum, by avoiding IBR where possible, by referencing multiple alternative standards, or by making documents available for reduced cost (or no cost).
- OFR can and should engage with the program office and/or standards organizations at the final rule stage to ensure that reference documents are readily available, including consideration of the cost of the standards. This might involve discussions about pricing or licensing arrangements, or about limited access to reference documents to facilitate public review as part of the rulemaking process. OFR, in its role of ensuring ready availability of documents referenced in the CFR, may be in a better position than that of individual program offices to negotiate the terms of any agreement for easier access to reference materials. They would in any case be an essential resource to the program office based on their closer relationship to the various standards development organizations across the range of federal regulatory issues.
- OFR should not bear responsibility of evaluating content, need, or relevance of referenced documents. The program office understands the content of the rule and the referenced standards. OMB is already reviewing the rule for burden and cost to society. We don't need to add bureaucracy to bureaucracy? It takes the wisdom of Dr. Seuss to know that it doesn't make sense to add another Hawtch-Hawtcher to be another bee-watcher-watcher ["Did I Ever Tell you How Lucky You Are?"]. OFR is simply not well positioned to provide substantive review of reference standards, in part due to staffing limitations and also due to procedural concerns. OFR review happens after signature, which makes it impractical to set up a process for making substantive changes. Creating an earlier review step for OFR would address the procedural concern, but this would be completely unrealistic from a staffing perspective. OFR review of the proposed rule is also inadequate to address the concern about the timing of input for the final rule, because there are many times changes to the rule after the proposal stage that would lead to the problematic dynamic of late review.
- OFR review at the proposal stage may be constructive if it is limited to ensuring the availability of documents for public comment. Public comments are the more appropriate path for engaging questions related to the content of the standards. It would certainly be unnecessary to go through the process to prepare proposed IBR regulatory content in the same way that final rules are reviewed to prepare for publication in the CFR.
- OMB may have a rightful role to review the use of voluntary consensus standards as part of their review of the economic impacts of a proposed or final rule. OMB could prompt agencies to minimize the burden related to reference standards, but substantial deference to the program office would be appropriate. It should also be noted that the costs associated with purchasing standards would generally be expected to be a small part of the overall compliance cost for regulated entities.
- All these things are matters of judgment and are therefore best accomplished through EO or OFR guidance, not by statute or regulation.

I would recommend that OMB direct OFR to take the lead in mediating an appropriate course. In that context, the program office and the standards development organization would be well positioned to consider together how to ensure that referenced documents are reasonably available to the regulated parties and the general public. Some important factors could clearly be taken into account in this regard:

- How many regulated parties would likely need to purchase the standard? Are they generally large corporations, small businesses, importers, consultants, individual citizens, or some mix of those?
- Was the standard developed for the specific purpose of the regulation that references the standard? If so, will there be the possibility of sales outside of the initial regulatory context? If not, will the new CFR reference substantially change the expected sales of the standard?
- Were the staff developing the standard employed by the standards development organization, or were they employed and paid by member companies as part of their normal work responsibilities for the company? Did the standards development organization have any additional direct expenses beyond the administrative steps involved in convening meetings, distributing drafts, and publishing the final product?
- How much federal involvement was there, if any, in developing the standard, either in direct financial support, in-kind contributions, or perhaps staff involvement to develop the standard or provide constructive feedback in review stages.

Depending on how those questions are answered, it may be appropriate for the standards development organization to continue to charge the prevailing rate for the standard. It might also be appropriate to conclude that the standard should be available for a lower cost (or no cost). The reduced cost might also be applied only for qualifying consumers (regulated parties, small businesses, unaffiliated individuals, etc.). The program office in some cases might also want to pay the standards development organization a lump sum for the rights to distribute the standard free of charge as part of implementing the regulation. Documents might also be made more easily available during a comment period following a proposed rule. Over time, there may be any number of additional approaches that would satisfy the competing needs of suppliers and consumers of voluntary consensus standards.

It is important in this context to note that the Administrative Conference of the United States has done an admirable work in developing guidelines for IBR implementation. At the same time, it is apparent that they and OFR and OMB have done a wholly inadequate job of communicating these guidelines. After being directly involved in IBR activities for the last 20 years, I first learned of the existence of the Administrative Conference only in the context of this petition. OFR's Document Drafting Handbook, the primary tool for guiding agencies in preparing regulations, makes no mention of the Administrative Conference guidelines or OMB's Circular A-119. For these administrative policies to have any effect or benefit, they would need to be communicated clearly to those involved in preparing regulations.

Alan Stout  
[astout02@gmail.com](mailto:astout02@gmail.com)  
Ypsilanti, Michigan