

**CEN and CENELEC response to request for comments on incorporation by reference
1 CFR Part 51 [NARA 12-0002]**

Thank you for the opportunity to comment on the petition submitted by Prof Peter Strauss et al. to the Office of the Federal Register, regarding the availability of material incorporated by reference in the code of Federal Regulations.

The European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) respectfully submits the following comments and replies to the questions asked by the OFR in the Federal Register notice.

CEN and CENELEC are two of the three officially recognized European Standards Organisations. CEN and CENELEC coordinate, develop and maintain European standardization activities in all sectors except for telecommunication. The drafting of standards is done by experts and the support services provided by the members of CEN and CENELEC. Although the experts voluntarily sacrifice their resources for the development of standards, the significant management costs for example for accommodating meetings, for distributing documents, for maintaining records or for other administrative, technical and support services are covered by the sale of the copyrighted standards. This system has ensured that standardization activities are independent from any specific funding source and that the system remains market-driven and self-sustaining.

Through the Vienna and Dresden Agreements, CEN and CENELEC cultivate close links with ISO and IEC, in order to ensure that international standards remain market relevant for European players while not duplicating efforts in the national, regional and international levels of standardization. For this reason a certain proportion of European Standards (ENs) are identical to international standards.

Some IBR could contain voluntary international standards, which in some cases are identical to those of Europe and are sold and distributed by the different National Standardization Bodies.

In view of the above, our comments to the questions from the Federal Register Vol. 77, No. 38, pp 11414, supporting the position of ANSI (American National Standards Institute) are as follows:

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?

A: CEN and CENELEC are convinced that the text of standards and relating documents should be reasonably available to all interested parties. However, CEN and CENELEC believe that reasonable availability does not equal to free and online

availability. In order to ensure the protection of copyright and fair compensation, these documents should continue to be available on a timely basis and readily accessible for a reasonable price for those who want to view them.

We would especially like to support the ANSI reply to this consultation in their view that "The internet has certainly expanded the public's access to information. However, it has not changed the underlying protections of intellectual property, nor has it changed the need and the ability of standards developers to cover the significant costs of creating the documents that are used to further public policy goals in law and rulemaking."

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

A: CEN and CENELEC believe that all citizens can be affected by standards, therefore the term "class of persons affected" need not be defined, as these can change on a case-by-case basis.

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

A: CEN and CENELEC consider the current practice of providing the material by the NSBs a good practice to ensure that copyright is protected and that there is no distortion in the incentives and affiliation of these organizations. Maintaining budgetary independence is one of the main elements in ensuring market relevance and competitiveness.

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

A: We fully support ANSI's position that "[...] agency budgets would be significantly impacted by undertaking the responsibility to provide all referenced standards for free online. In addition, new staff and contracting mechanisms would be required to negotiate with SDOs on appropriate compensation for standards development and dissemination. A separate but equally significant issue would be the real or perceived undue influence by a single stakeholder – the U.S. government – in the consensus-based standards development process."

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?

A: We support ANSI's position.

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

A: CEN and CENELEC are convinced that the decision of IBR approval of a voluntary standard needs to be based solely on its technical relevance to the legislation and additionally because of it ensuring health, safety and quality for consumers.

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?

A: We do not have a position.

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?

A: We support ANSI's position.

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

A: We support ANSI's position.

Thank you again for the opportunity to provide our comments.