



**THE  
NATIONAL  
BOARD**

OF BOILER AND  
PRESSURE VESSEL  
INSPECTORS

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June 1, 2012

Michael L. White  
Acting Director  
Office of the Federal Register (NF)  
The National Archives and Records Administration  
8601 Adelphi Road  
College Park, Maryland 20740-6001

Re: Incorporation by Reference

Dear Mr. White:

These are comments on issues 1, 2, 3, 4, 5 and 6 raised by the Petition for amendment of 1 CFR Part 51, "Incorporation by Reference," set out under the Proposed Rules section of the FEDERAL REGISTER of February 27, 2012.

The undersigned, the National Board of Boiler and Pressure Vessel Inspectors ("National Board"), is a nonprofit standards developing organization ("SDO") whose purpose is to promote public safety through the uniform administration and enforcement of boiler and pressure vessel laws, rules and regulations, including the development of uniform standards for acceptance of boilers, pressure vessels, parts and appurtenances, a uniform construction code, a uniform inspection code and uniform standards for inspectors who are to enforce the requirements of these codes.

The National Board's membership consists solely of the chief boiler inspector or other government official charged with inspection of boilers and pressure vessels of a state or large city of the United States or a province or territory of Canada. The chief boiler inspector is the official who, in the interest of public safety, is in charge of enforcement of compliance with the technical standards set for the manufacture, repair, operation and safety inspections of boilers and pressure vessels in the particular state, municipality or province. In addition to its members, the National Board's Board of Trustees has an Advisory Committee made up of representatives of boiler and pressure vessel manufacturers, the welding industry, insurers of boilers and pressure vessels that also perform boiler inspections, boiler repair companies, organized labor, and boiler and pressure vessel users.

One of the primary purposes of the National Board is development, review and revisions of a uniform boiler inspection code and other relevant technical standards related to the use of boilers in public buildings in the United States and elsewhere. The National Board relies upon the input of representatives of the class of persons affected by these technical standards, which include the chief boiler inspectors of the various states, municipalities and provinces and representatives of the boiler and pressure vessel manufacturers, insurance and inspection companies, repair companies, boiler and pressure vessel users and the welding industry.

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The expense of development of the inspection code and standards includes much more than just printing costs. It includes the expense of facilitating the ongoing contributions of the affected class of persons to the development, review and updating of the inspection code and related technical standards and the cost of paid staff and other expenses to put all of this in a format available at a reasonable cost. All government and industry participants volunteer their time in the development of the code and technical standards. The moneys received from the sale of copies of the inspection code contribute to partially cover the costs incurred by the National Board in providing the opportunities to bring together the affected government officials with representatives of the affected private sector in developing and updating the inspection code and technical standards. The National Board through its paid staff also provides a uniform system of training of boiler inspectors and other educational forums for the affected government agencies and private sector representatives and employees. The National Board is not aware of any member of the affected class of government and private persons that would not find the code and standards to be "reasonably available" under the current price structure.

The affected states, municipalities and federal agencies rely upon the National Board, through its efficiently designed standards development system, to facilitate the development of, and keep current, a uniform code and set of technical standards and the ongoing harmonization of the code and standards that can be used from state to state and by appropriate federal agencies.

Existing policy regarding the use of private sector standards in regulation has been established by the Office of Management and Budget (OMB) Circular A-119, which is a partial codification of the provisions contained within the "National Technology Transfer and Advancement Act" (P.L. 104-113). This policy aims to:

- eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation;
- provide incentives and opportunities to establish standards that serve national needs;
- encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and
- further the policy of reliance upon the private sector to supply Government needs for goods and services.

Recognizing the importance of copyright as a funding mechanism for the development of standards, the OMB Circular directs federal agencies to observe and protect the SDO's copyrights, and agencies have done so successfully for decades. The Petition's proposed amendment will jeopardize the ability of federal agencies to fulfill the important goals served by the OMB Circular. Further, if SDOs are unable, due to the financial impact of the Petition, to continue to develop and update their standards, it may result in:

- duplicative and potentially conflicting regulations and industry practices;
- reduced responsiveness, resulting in gaps and barriers to technology commercialization; and
- reduced stakeholder diversity in standards development.

SDOs have and will remain committed to providing wide and reasonable availability of their standards to the affected class of persons, and to working with federal agencies to provide both pre- and post- adoption access to standards through a variety of means, appropriate to the many circumstances in which standards are adopted and used. But, in order to sustain funding for the development of private sector standards and to allow federal agencies to choose those standards that best meet the needs of public safety, a flexible approach is required. Such an approach has worked well and has been fundamental to achieving and sustaining the important public-private standards partnership that has served the United States so well.

Federal government use of private sector standards was the subject of a recent review within the federal government, which resulted in recommendations endorsing a flexible approach, where the manner in which standards are made available is one among many factors that an agency should consider and where agencies work cooperatively with SDOs to ensure reasonable availability of adopted standards consistent with the needs of the SDO. See the October 2011 memorandum entitled, "Federal Engagement in Standards Activities to Address National Priorities," by the National Science and Technology Council's Technology Subcommittee on Standards.

Requiring an agency to only reference standards that can be made available for free represents a significant deviation from the long-standing public-private partnership that has proven so effective in providing high quality private sector standards for government use.

The Petition to Amend relies totally on the false assumption that a one-size “cure” will fit all situations involving SDOs. Should the Petition be granted, that false premise is likely to lead to unintended adverse consequences. Those unintended consequences include:

- A likely increase in costs to federal agencies and for each state and municipality that currently relies on the well developed process of standards development and current updating developed through the National Board and other similarly situated SDOs.
- A likely sacrifice of public safety for the purpose of implementing a theoretical public “benefit” of free or significantly reduced fees for access to technical standards that are readily available to the class of affected public-private persons in the boiler industry and in other industries of other similarly situated SDOs.
- It ignores the serious contributions of time and expertise made by public-private members of the class of affected persons in developing, reviewing and updating the technical standards through the National Board and other similarly situated SDOs.
- It ignores or impugns the value of the intellectual property rights of the National Board and every other similarly situated SDO.
- It may hobble an efficient, smoothly operating system of technical standards development through the National Board and other similarly situated SDOs.
- It could result in future duplication of efforts by various states and federal agencies in attempts to create, review and update technical standards, or, could result in future technical standards either not being implemented, reviewed and updated because of the cost or the standards begin to vary from jurisdiction to jurisdiction.
- It may force, alternatively, the National Board and other similarly situated SDOs to increase the cost of purchasing the codes and technical standards by the affected public-private class of persons to offset the financial losses from the implementation of the Petition’s requested amendments.

It would remove the current responsibility of the federal agencies that have the particular technical or industry expertise to assure that the standards have been developed by the appropriate SDOs, and the accessibility to the particular affected public-private class of persons and would put that responsibility on the OFR, which could not have the necessary expertise in each and every technical and industry area.

Michael L. White

June 1, 2012

Page 5

- It may reduce or eliminate certain future U.S. standards being adopted internationally, which would hinder U.S. companies who have relied upon U.S. developed international standards from competing in the global market.

Therefore, the National Board urges you to deny the Petition and not amend the regulations as requested.

Sincerely,

The National Board of Boiler and  
Pressure Vessel Inspectors

By: 

David A. Douin, Executive Director

cc: Hon. Susan Collins, Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate

Hon. Patrick D. Gallagher, Director  
National Institute of Science and Technology

Hon. John P. Holdren, Director  
Office of Science and Technology Policy

Hon. Joseph Lieberman, Chair  
Committee on Homeland Security and Governmental Affairs  
United States Senate

Ms. Maria Pallante  
Register of Copyrights  
Library of Congress

Hon. Cass Sunstein, Director  
Office of Information and Regulatory Analysis

Hon. Stephen Van Roekel  
Federal Chief Information Officer

Hon. Paul Verkuil, Chair  
Administrative Conference of the United States