



National Fire Protection Association

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Mr. Michael White
Acting Director, Office of the Federal Register
The National Archives and Records Administration
800 North Capitol Street NW
Suite 700
Washington, DC 20001

June 1, 2012

Dear Mr. White:

Thank you for this opportunity to comment on the Office of the Federal Register's procedures for **Incorporation by Reference** (NARA 12-0002). The National Fire Protection Association (NFPA) is a voluntary consensus standards development organization (SDO) whose primary mission is to reduce the burden of fire and other life safety hazards on Americans and citizens around the world. For over 100 years, the NFPA has brought together private and public sector stakeholders to develop codes and standards to improve both public and worker safety. By relying on the principles of openness, transparency, balance, and due process, the NFPA has coordinated the development of over 300 robust, credible technical standards that are widely adopted around the world.

The NFPA recently responded to a request for information from the Office of Management and Budget (OMB) on **Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities** (OMB-2012-0003). That response outlines some of the benefits to society of maintaining a private-sector standards development system. These benefits include an open process trusted by stakeholders, extensive technical expertise provided to the government at virtually no cost to the taxpayer, the capacity to stay abreast of—and be responsive to—developments in industry, and the ability to respond quickly as new problems arise. A more thorough explanation of these benefits is available in the OMB Docket 2012-003, document ID number: 0038.

Copyright protection enables the United States system of private-sector standards development to thrive. The development of quality standards requires substantial resources. The NFPA coordinates thousands of volunteers and provides them with meeting space, logistical and administrative support, as well as access to technical staff assistance, research, and analysis. In addition to the staffing and other costs of assembling, editing and preparing the standards for

publication, NFPA staff must process, organize, and publish the thousands of technical comments submitted by interested members of the public throughout the code or standard revision cycle. Particularly for non-profit, mission driven organizations like the NFPA, the revenue derived from the sale of NFPA codes and standards allows the organization to provide these services while maintaining its independence, free from reliance on funds from either industry or government. It also allows the NFPA the resources to develop and make available many important safety standards which do not generate self-sustaining revenues but which serve the NFPA's safety mission. Federal agencies choose to use standards developed by independent, mission driven organizations like the NFPA in order to meet the health, safety and environmental needs of the Nation's citizens. OFR procedures for determining "reasonable availability" should continue to promote rather than impede that use.

"Reasonable availability" has never been understood to require cost-free availability. The question of reasonable access to standards adopted by reference is, of course, an important and timely one in the age of the internet. But the goal of public access must be assessed and weighed against the equally important federal goals of encouraging the robust and effective development of private-sector standards for federal government adoption and use. Indeed, both Congressional enactment and federal executive branch policy contemplate such a balancing.

Congress sought to promote transparency in prescribing that material referenced in the Federal Register be ". . . reasonably available to the class of persons affected thereby . . ." 5 U.S.C. 552(a). Congress, however, did not require cost-free access; nor did it designate the public at large as the class to whom access should be reasonably available. Congress, moreover, has identified other important governmental and public needs that weigh heavily against a reading of "reasonable availability" to require cost-free access to anyone. Specifically, Congress, in the National Technology Transfer and Advancement Act of 1995 (P.L. 104-113) (NTTAA) mandated that the federal government rely on the private-sector led standards development process. The NTTAA served to codify already well established executive branch policy set forth in OMB Circular A-119. See OMB Circular A-119, as revised, 63 Fed. Reg. 8545 (Feb. 19, 1998). As stated in OMB Circular A-119, federal agencies must adopt private-sector standards in lieu of government standards wherever possible. This is because private sector standards "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" and "encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards." OMB Circular A-119, 2, 63 Fed. Reg. 8545, 8555. In order to ensure diverse and effective development and funding mechanisms for private sector standards, the OMB Circular directs that agencies, in adopting standards, "must observe and respect the rights of the copyright holder." OMB Circular A-119, 6(j), 63 Fed. Reg. 8545, 8555.

The goal of government reliance on privately developed standards, first articulated in the OMB Circular under President Reagan and mandated by Congress in the NTTAA, retains vitality today. That goal has been most recently reaffirmed under the present administration. See *Federal Engagement in Standards Activity to Address National Priorities: Background and Recommendations*, Subcommittee on Standards, National Science and Technology Council (October 2011), p. 11 (recognizing that reasonable availability of standards "may include monetary compensation where appropriate"). It has been further reaffirmed in recommendations

issued by the Administrative Conference of the United States (ACUS). See Administrative Conference Recommendation 2011-5, Recommendation number 3 (adopted December 8, 2011), 77 Fed. Reg. 2257 (January 17, 2012) (Recommending flexible approach to “reasonable availability.”). As outlined in the recent staff report issued by ACUS, federal agencies, in cooperation with standards development organizations, are already developing ways to increase access to copyrighted materials. See Emily Schleicher Bremer, *Incorporation by Reference into Federal Regulations* (ACUS 2011), <http://www.acus.gov/wp-content/uploads/downloads/2011/11/Incorporation-by-Reference-Report.pdf>, at 27-30 (the ACUS Report).

OFR’s current approach to its function, by which it generally confirms that material incorporated by reference has been published and that copies have been deposited with OFR, remains today the correct way to effectuate the “reasonable availability” requirement. In fact, the internet has greatly increased the availability of published material, and makes locating and purchasing such material simple and in most cases, instantaneous. To that extent, the advent of the internet makes the conclusion that publication of referenced materials generally provides “reasonable access” even more valid today than in a pre-internet era where even published materials could be difficult to locate and obtain. The OFR’s current approach, moreover, gives federal agencies the flexibility to adopt and use standards based on agency needs and agency knowledge of how materials incorporated by reference are used and by whom. Such flexibility is necessary, particularly now, as the evolution of the internet evolves to both facilitate the distribution of content and to threaten the incentives of authors to create quality content. As the ACUS Report states:

The public-private partnership in standards—which incorporation by reference facilitates—has reaped extraordinary benefits for both government and the private sector. In addressing the important public policy question of how to ensure the reasonable availability of incorporated, copyrighted materials, these benefits must be kept in mind. Any solution must preserve and improve—and not undermine—the valuable public-private partnership in standards.

ACUS Report at p. 27.

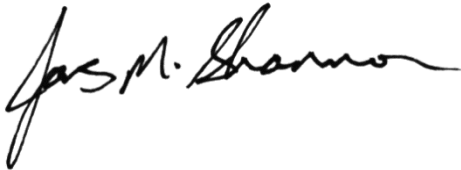
Any approach by OFR which would limit agency flexibility in using and relying on copyright-protected standards would force federal agencies, in some cases, to forgo use of the best available standard or, in other cases, to negotiate and pay licensing fees for standards that the agency can, under current policy, adopt by reference without a license or taxpayer cost. Imposing a one-size-fits-all solution, moreover, would stifle the experimentation currently underway in agencies that, in partnership with standards developers, are finding a variety of ways to increase access to standards. See ACUS Report at 27-30, and Recommendation Number 3. (“[Where] 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.”) Thus, while some standards development organizations, including the NFPA, have been able to offer free read-only access to standards on the organizations’ websites, other approaches should be

available to federal agencies in those cases where an SDO's operating environment and revenue needs do not permit such access.

In sum, the NFPA urges that the OFR's current understanding of its role in determining reasonable access for purposes of inclusion of referenced material in the Federal Register fulfills Congress' intent to promote transparency by ensuring that government referenced works can be identified and consulted. It fulfills that intent while preserving and promoting the long tradition of United States private-sector led standards development that Congress has deemed necessary for an efficient and effective government. In addition, the NFPA recommends that the OFR not further define "class of persons affected" and instead rely on the judgments of the adopting agencies, which are in the best position to know the types of stakeholders most likely to seek access to a particular standard and the best means to accommodate their needs. The NFPA agrees, moreover, that to the extent general guidance is needed to assist agencies in formulating those judgments, such guidance would involve policy considerations more appropriate to the Office of Management and Budget than to the OFR.

Thank you again for this opportunity to comment. Any follow up questions can be directed to Greg Cade, NFPA Director of Government Affairs, 202-898-0222.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Shannon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jim Shannon
President
National Fire Protection Association