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**Via First Class and Electronic Mail**

June 1, 2012

**Re: Incorporation by Reference (77 Fed. Reg. 11,414, Feb. 27, 2012).**

Dear Acting Director Mosley:

API appreciates the opportunity to comment on the Office of the Federal Register's ("OFR") request for comments on a petition from individual academics led by Columbia Law School (the "Columbia Petition") to substantively amend the regulation governing the Federal Register at 1 CFR Part 51.<sup>1</sup> Specifically, API would like to take this opportunity to point out that; (1) it does not appear that the director of the OFR is authorized to amend the regulations at 1 CFR Part 51, (2) if the authorized agencies undertake a change to 1 CFR Part 51, they should follow the procedure outlined by law for this rulemaking to ensure they are considering the impacts of any changes to other agencies and the public, and (3) the changes contemplated by the petition are likely to impose significant burdens on the federal agencies and the regulated public, with little or no actual corresponding benefit.

API is a nationwide, non-profit, trade association that represents over 500 member companies that are engaged in all aspects of the petroleum and natural gas industry, including exploration, production, refining, transportation, and distribution of petroleum products. API's member companies engage in exploration, production, refining, transportation, and construction projects that routinely trigger federal regulatory and permitting regimes that incorporate industry standards by reference. API itself publishes more than 600 industry standards applicable to all aspects of the oil and natural gas industry, 94 of which are incorporated by reference more than 350 times by six federal agencies' regulations.

**I. The Office of the Federal Register does not appear to be authorized by law to amend the regulation found at 1 CFR Part 51.**

At the outset, API is extremely concerned that the OFR is seeking comment on amendment of a regulation that the Federal Register lacks the statutory authority to amend. Further, it does not appear

<sup>1</sup> *Incorporation by Reference* (77 Fed. Reg. 11,414, Feb. 27, 2012).

that the OFR has consulted with the federal agencies that actually do have statutory regulatory authority over 1 CFR Part 51.

In 1935, Congress created the Administrative Conference of the Federal Register (“ACFR”), and empowered it to “prescribe, with the approval of the President, regulations for carrying out [Title 44, chapter 15 of the U.S. Code].”<sup>2</sup> Chapter 15 also included the requirement to publish in the Federal Register all “documents or classes of documents that may be required so to be published by Act of Congress.”<sup>3</sup> This includes the requirement referenced in the Columbia Petition and found in Administrative Procedure Act requiring matters affecting the rights of regulated parties to be published in the Federal Register.<sup>4</sup>

Therefore, though the Administrative Procedure Act requires that each individual incorporation by reference receive the approval of the director of the OFR prior to its publication in the Federal Register, only the ACFR is authorized by law to amend the regulations governing the decision by the director of the OFR to incorporate documents by reference found at 1 CFR Part 51. By law, the ACFR itself consists of the Archivist of the United States, a designee of the Attorney General, and the Public Printer.<sup>5</sup> The director of the OFR is only authorized to act as the secretary for the ACFR, not to propose changes to the regulation without consultation with the named members of the ACFR.

API is concerned that the members of the ACFR and the President’s Executive Order designees, including the Attorney General, were not listed in the contact information in the OFR’s request for comments on the Columbia Petition. Also, since the OFR received the petition on February 13, 2012, and the acting director of the OFR approved the published notice five business days later, on February 21, it does not appear that the OFR consulted with the ACFR or the federal agencies likely to be impacted by the changes proposed in the Columbia Petition before publishing its notice of petition and request for comments.<sup>6</sup>

In order to amend 1 CFR Part 51, the ACFR members must jointly consider the Columbia Petition and jointly propose regulatory action or not.

## **II. If the Administrative Committee of the Federal Register (ACFR) decides to pursue an amendment of the regulations contained in 1 CFR Part 51, it must follow proper administrative procedure and fully consider the impacts of its actions.**

If the ACFR does later decide to pursue the regulatory changes contemplated in the Columbia Petition, it must comply fully with every applicable law designed to ensure that federal agencies make fully informed decisions. Specifically, prior to amending 1 CFR Part 51, the ACFR must complete: (1) a cost benefit analysis, including the costs the action would impose on other federal agencies in implementing the action, (2) an analysis of other available regulatory alternatives,<sup>7</sup> (3) a regulatory

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<sup>2</sup> 49 Stat. 501 (July 26, 1935), as amended at 44 U.S.C. §1506.

<sup>3</sup> 44 U.S.C. §1505. The statutory grant of regulatory authority to the ACFR was originally adopted in 1935, preceding the Administrative Procedure Act requirement for agencies to publish their final rules in the Federal Register. 5 U.S.C. §552(a)

<sup>4</sup> 5 U.S.C. §552(a).

<sup>5</sup> 5 U.S.C. §1506. The statute provided for ultimate approval of regulations by the President, but President Eisenhower later delegated his ultimate approval authority over the ACFR’s regulatory actions to the Archivist and the Attorney General, acting jointly. E.O. 10530, 19 FR 2709 (May 12, 1954).

<sup>6</sup> Publication in the Federal Register normally requires the document to be submitted several days prior to its actual publication.

<sup>7</sup> Executive Order 12,866, at 6(a)(3), 58 FR 51735 (Sep. 30, 1993) (as amended by E.O. 13,258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13,422, 72 FR 2703 (Jan. 18, 2007)).

flexibility analysis of the effects of the delays the changes could impose on permitting, as required by the Regulatory Flexibility Act,<sup>8</sup> (4) independent Executive Order 12866 review by OIRA, including an interagency consultation with the agencies who would need to make substantive changes to their regulatory programs, (5) public notice and comment rulemaking,<sup>9</sup> and (6) a final interagency review. These steps are not mere procedural hurdles; they are basic legal requirements to make sure agencies take the time to consider all the impacts of their proposed actions.

Also, prior to proposing any changes to the CFR, API recommends that ACFR provide at least another sixty days for the regulated public to review the Columbia Petition and provide the agency meaningful input. As President Clinton recognized in his 1993 Executive Order instructions to federal agencies, agencies should provide at least sixty days of open comment period to ensure a meaningful opportunity for participation.<sup>10</sup> Even if the February 27 Federal Register notice was only intended to serve as a preliminary notice, additional time is necessary for the broad array of industries that could be affected by the issues raised in the Columbia Petition to fully consider and provide meaningful comments to the agencies.

API recommends that the ACFR use the additional public input provided to inform it as to the proper response to the Columbia Petition. If the decision is then made to proceed with amending the regulation, API recommends that the ACFR first consider the impacts of any proposed changes and consult with affected federal agencies and the regulated public on ways to reduce regulatory uncertainty and delay with respect to issues raised below.

### **III. Adoption of petitioners' suggested changes to 1 CFR Part 51 could result in significant economic impacts to regulated industries, introducing serious federal permitting delays, in exchange for speculative benefits to regulated entities that do not appear likely to materialize.**

From a substantive standpoint, API believes that adoption of petitioners' suggested changes to 1 CFR Part 51 could impose significant economic costs on regulated industries through serious federal permitting delays, with no corresponding benefit to regulated parties. Whether the director of the OFR retains discretion to approve or reject an individual incorporation by reference of a document that is not available for free, regulatory agencies and regulated industries could be impacted.

The Columbia Petition contemplates changes to the regulation to require agencies to certify that a publication is available online, for free, in order to meet the requirements for publication in the Federal Register. However, some independent standards organizations may not wish to provide their copyrighted works to the public without charge. In the event that a private standards development organization declined to make its standards available online for free, and 1 CFR Part 51 has been amended to remove the director of the OFR's discretion, requiring him to reject such an incorporation by reference, the rejection of the incorporation by reference would force the regulatory agency to either refrain from rulemaking or expend agency time and resources to duplicate already existing private resources. In the alternative, if the OFR retains discretion to choose to include a standard which is not provided without charge, the director of the OFR could be exposed to litigation alleging the director improperly approved an incorporation by reference, opening an avenue of collateral attack for those unhappy with the substance of the final rule. Considering these alternatives, the changes

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<sup>8</sup> Importantly, the initial regulatory flexibility analysis also includes, "an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule." 5 U.S.C. §603(b).

<sup>9</sup> 5 U.S.C. §553.

<sup>10</sup> E.O. 12,866, at 6(a).

urged by the Columbia Petition could have a direct bearing on almost every regulatory permitting program in this country, placing the OFR in the position of approving or rejecting politically contentious permitting regulations that affect almost every industry. Whether the ACFR approved changes to 1 CFR Part 51 or not, any new policy on incorporation by reference could at the least impose unnecessary delays in regulation. In short, the changes advocated in the Columbia Petition are far reaching and deserve serious scrutiny, and prior to imposing new regulatory requirements, the ACFR must adequately and appropriately consider all pertinent regulatory benefits and impacts.

Nor does it appear that these impacts would be offset by some additional benefit to the regulated public. In the oil and natural gas industry, since the API standards development process is open to any interested party, most of the regulated companies are actually involved in drafting API's publications. Currently, most of these companies already have the standards on hand during their operations. Making these standards available online would not provide an actual benefit to these regulated companies or allow them to more knowledgeably comment on the standards' incorporation by reference.

API recommends that the ACFR fully consider the practical effects that the recommended changes to 1 CFR Part 51 could have on the federal agencies, the regulated public, and standards setting organizations.

#### **IV. Conclusion.**

In conclusion, API does not believe that the OFR has statutory authority to proceed with any revisions to the regulations found at 1 CFR Part 51. If the ACFR does elect to pursue a rulemaking, API urges the ACFR to follow all procedural requirements for rulemaking, including the consideration of the serious potential impacts the recommended changes could have on other federal agencies, the regulated public, and standards setting organizations.

Sincerely,



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Director, Standards

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