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June 1, 2012

Michael White, Acting Director
Office of the Federal Register

Dear Mr. White:

I have been impressed, as I hope you have, by the variety and breadth of the comments you have received in response to petition for rulemaking I and others filed with your office several months ago. In this final comment, I would like to summarize some important propositions that have emerged there:

1) It appears generally agreed that Part 51 needs revision in light of the age of information, which by undercutting the principal rationale for 5 U.S.C. 552(a) -- avoiding unwieldy volume in the Federal Register and the CFR -- casts a different light on what it means for information to be "reasonably available."

2) The requirements of federal rulemaking today give the question of reasonable availability particular importance at the stage of rulemaking proposal, not simply final rule adoption, since commentary is otherwise impeded.

3) The question of SDO financial dependence on the fees charged to make material incorporated by reference available to interested persons is at least contestable, as is suggested, inter alia, by the commentary of David Trebbien. A proposed rule could explore possible variations if it were thought important to protect this interest (which is not an interest underlying Section 552(a), as such). One such variation would be to distinguish between incoporations by reference that make the incorporated material legally binding, and incorporations of material that serves merely to indicate one means, but not the exclusive means, by which the requirements of independently stated regulations might be met. As heard at the NTIS-OMB workshop on OMB A-119 last month, the British Standards Institute has experienced no diffficulty financing its activities on this model.

4) The NTTAA and OMB A-119, on which much reliance is placed in arguing for the appropriateness of fees for access, both appear to assume the BSI model, in which SDO products take the form of technical standards for achieving regulatory compliance, rather than themselves constituting "the law." Many of the problems illustrated by the comments you have received would be eliminated by making this distinction: relevant SDO standards need not be frozen in place by references that do not give them legal force, so that the law appears to require compliance with documents that have been overtaken by time, and perhaps disappeared; the proposition that "the law" is not subject to copyright is not troubled by the use of SDO standards as guidance; as remarked by the Intellectual Property Owners Association, standards from this perspective may even compete as means for best establishing regulatory compliance. When an SDO standard is given the force of law, and fees may be charged to access it, the result is a form of monopoly. "The underlying protections of intellectual property" referenced by ANSI, CEN, CENELEC and others DO apply to standards used as guidance, but as is eloquently shown in several comments, including that of the ABA's Section of Administrative Law and Regulatory Practice, there can be no intellectual property right in public law; when voluntary standards are made legally binding, copyright is precluded.

5) As also appears from the comments, including those of some SDOs, electronic access to standards can be provided in ways that prevent duplication yet satisfy the public's right to know. In a properly structured environment, SDOs and agencies will have the ability to reach sensible agreements about the uses and public availability of SDO standards. The current system, however, provides no such incentive.

6) There are some indications of financial approaches that seem inconsistent with even the NTTAA and A-119 approach. Some SDOs charge a sizeable fee to participate in their standard-setting activities. The fees charged for access to standards, and the restrictions placed on their use, are not regulated -- nor is the possible need for distinguishing between small and large businesses in this regard observed. SDO comments repeatedly offer asssurance that fees are or will be "reasonable," but many comments recount concrete situations of which this could not be said, and no mechanism exists or has been suggested for assuring fees that are "reasonable." OFR will not want to be that regulator, and OMB oversight of such matters as participation fees is their business, not yours. But these difficulties are particularly troubling when the standards are given the force of law -- and that, OFR can attend to.

7) The substantial volume of late-filed comments, together with your insistence that further comments will not be considered after midnight tonight, precludes effective response to much that has been said. It would be wise, of course, to consider whether in the circumstances late filing might represent a strategic effort to preclude response to questionable assertions of fact or logic. More important, however, is that the process not end here -- that you and your staff work now to produce a concrete proposal -- you have at least two suggested texts in hand from which you could work, and with a rule concretely proposed further discussion of these important issues can, as it should, continue.

Respectfully submitted,

Peter L. Strauss