



AMERICAN TRUCKING ASSOCIATIONS

950 N. Glebe Road ★ Suite 210 ★ Arlington, VA ★ 22203-4181
www.truckline.com



Dave Oslecki
Senior Vice President
Policy and Regulatory Affairs

June 1, 2012

Office of the Federal Register
National Archives and Records Administration
8601 Adelphi Road
College Park, MD

Re: *Federal Register* Request for Comments on Petition to revise 1 CFR Part 51
February 27, 2012
Docket No. NARA-12-0002

Gentlemen:

The American Trucking Associations (ATA), located at 950 N. Glebe Road, Arlington, VA 22203, is pleased to submit the following comments in response to the above-referenced Federal Register Announcement of a Petition for rulemaking and request for comments. ATA is the national association representing, through its affiliated conferences and 50 state associations, approximately 35,000 motor carriers of all types and sizes. As a leader in an industry dominated by small businesses we have a high interest in the question of incorporation by reference (IBR) of non-government standards into U.S. regulations.

The trucking industry is essential to the U.S. economy. Every day, \$1.5 billion in trade crosses the U.S.-Canada border, with more than 60% of U.S.-Canada trade carried on trucks, making the industry a significant contributor to the economies of both countries. Within the U.S., the trucking industry hauled 9.2 billion tons of freight in 2011, representing 67 percent of total domestic tonnage shipped. According to the Federal Motor Carrier Safety Administration (FMCSA) 2012-2016 Strategic Plan, as of the end of 2011, currently there are approximately 500,000 active interstate motor carriers registered with the U.S. Department of Transportation. The vast majority of these carriers are small, with 97 percent operating fewer than 20 trucks and 90 percent operating six trucks or less.

Motor carriers are regulated by numerous government agencies. Among them are:

U.S. Department of Transportation
U.S. Department of Homeland Security
U.S. Department of Agriculture

Good stuff.



Background

The Administrative Conference of the United States (ACUS) is an independent federal agency that works to improve the administrative process, using consensus-driven applied research, to provide nonpartisan expert advice and recommendations for improvement of federal agency procedures. Its membership is composed of federal officials and experts from both the private sector and academia.

ACUS produced recommendations on incorporation by reference of private standards that are published either for profit or not for profit into federal regulations. The Office of the Federal Register (OFR) only requires that any materials referenced in a regulation be “reasonably available” to the public. The issue of cost was not addressed by the agency.

A group of legal scholars associated with ACUS petitioned the Office of the Federal Register in order to have the term “reasonably available” defined. In turn, OFR published this petition in the February 27, 2012 *Federal Register*, asking for comments.

The term “incorporation by reference” has a great deal of value to federal government agencies because it reduces time and effort needed for rulemaking. However, for other organizations and the public, which needs and expects a transparent rulemaking process, the idea is not generally acceptable.

The February 27, 2012, *Federal Register* notice asked for comments on the following issues:

1. What is “reasonably available”?
2. Does “class of person” need to be defined ? How?
3. Should agencies bear the cost of making the material available for free online?
4. How would this impact agencies budget and infrastructure?
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.
6. Should OFR have the authority to deny IBR approval requests if the material is not available online for free?
7. The Administrative Conference of the U.S. recently issued a Recommendation on IBR- 77 FR 22578 (January 17, 2012). In light of this recommendation should we update our guidance on this topic instead of amending our regulations?

8. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed at both the proposed rule and the final rule stages to impact

ATA comments on these issues below.

Discussion

1. What is “reasonably available”?

ATA supports a definition of the term “reasonably available” to mean both “free” and “available to everyone on the Internet.” Purchasing technical reference materials can be cost-prohibitive for small businesses, medium-sized businesses, and individuals. It creates in essence a “secret government” by making the regulatory process non-transparent for the very entities that need the information the most.

President Obama’s Executive Order dated January 18, 2011 (Executive Order 13563 - Improving Regulation and Regulatory Review) backs up the need for availability and transparency. It says:

“Sec. 2 Public participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote the open exchange each agency . . . shall endeavor to provide the public with an opportunity to participate in the regulatory process... [E]ach agency shall afford the public a meaningful opportunity to comment . . .” To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.”

In order to promote meaningful public participation in the regulatory process, complete transparency is needed. Standards promulgated by non-government entities that are used to formulate federal regulations need to be readily available for reference by the public at all times.

2. Does “class of person:” need to be defined? How?

ATA believes that while it may seem to be in some way advantageous to create a hierarchy – small businesses, medium-sized businesses, individuals, and large businesses – to “qualify” for

free reference materials, we fear that this differentiation may encourage the formation of a complicated secondary bureaucracy.

President Obama speaks to the essentiality of small businesses in the U.S. in his January 18, 2011, *Memorandum for the heads of executive departments and agencies*:

“Small businesses play an essential role in the American economy... More than half of all Americans working in the private sector either are employed by a small business or own one.” The RFA emphasizes the importance of recognizing “differences in the scale and resources of regulated entities:” . . . the RFA also encourages public participation in and transparency about the rulemaking process.”

These statements indicate that the Obama Administration supports participation in the rulemaking process by small businesses and individuals with limited resources.

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

ATA supports the idea of federal agencies bearing the cost of materials incorporated by reference into regulations and making it available at no cost online. This would most likely involve the federal government entering into licensing agreements to publicly use materials created by non-government standards-setting organizations. The reference materials in regulations need to be available for as long as the regulation remains in effect, not simply for the comment period(s).

4. How would this impact agencies budget and infrastructure?

The financial impact on agencies would be dependent upon the type of licensing arrangement(s) the federal government reaches with each of the standards-setting bodies. Each agency would be responsible for budgeting appropriately to cover the financial impact of such licensing agreements.

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.

The key issue is for agency rulemaking actions to be consistent with OMB and OFR rules and guidance. In ATA’s view, both OMB and OFR will need to review IBR impacts, and whether agencies are complying with the IBR-related rules. Since OMB reviews rules and regulations that are “economically significant”, i.e. regulations that impose an annual impact on the economy of \$100 million or more, OMB should be the first line of defense concerning IBR impacts on such rules. For rules that do not meet the ‘economically significant’ threshold and,

therefore OMB has little or no policy and cost oversight role, the OFR should be the lead organization for reviewing IBR impacts.

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

Yes. It is imperative that both OMB and OFR have such authority. In order to comply with rules, the constituency affected must have all of the relevant information to comply. The federal government cannot expect compliance when any portion of the rule is not publicly available at no-cost. This is a significant issue for regulated industries, and OFR should recognize it as such.

7. The Administrative Conference of the U.S. recently issued a Recommendation on IBR- 77 FR 22578 (January 17, 2012). In light of this recommendation should we update our guidance on this topic instead of amending our regulations?

ATA believes that 1 CFR Part 51 needs to be completely reviewed and revised to align it better with today's common business practices that use the electronic exchange of information. Bulletin A-119 should then be revised to mirror the changes made in the regulations. A simple update in guidance would not suffice since the changes being considered are significant and will change the way OFR and, perhaps OMB, will do its job in the future.


8. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed at both the proposed rule and the final rule stages to impact agencies?

As stated above in our response to questions 5 and 6, both OFR and OMB should have a role in reviewing agency compliance with IBR-related rules, depending upon the nature and significance of the agency regulation being review.

Conclusion

ATA appreciates the opportunity to comment on this important regulatory issue. We hope to work with the Office of the Federal Register and other agencies to clarify the issues presented and develop a transparent, fair and cost-effective process for producing federal regulations.

Sincerely,



David J. Osiecki

Sr. VP, Policy & Regulatory Affairs