GAMA 12-39

June 1st 2012

Attn: Amy Bunk
Office of the Federal Register (NF)
The National Archives and Records Administration
8601 Adelphi Road
College Park, Maryland

Dear Ms. Bunk:

The General Aviation Manufacturers Association (GAMA) appreciates the opportunity to provide perspective on the issue of assuring materials that are incorporated by reference (IBR) by the Federal Register remain "reasonably available". GAMA is an international trade association representing over 75 of the world's leading manufacturers of general aviation airplanes and rotorcraft, engines, avionics, components and related services. GAMA's members also operate repair stations, fixed based operations, pilot and maintenance training facilities and they manage fleets of aircraft.

Summary

GAMA member companies are directly impacted by the statutes and regulations which have been and will be posted in the Federal Register as civil aerospace is a heavily regulated industry by the Federal Aviation Administration (FAA) as well as other agencies such as EPA, FCC, OSHA, etc. The aerospace industry's long partnership with government agencies responsible for the regulations and airworthiness standards which support the safety certification, acceptance and compliance of aviation products is one of the key reasons for the high level of aviation safety in the U.S. Part of the success of this partnership is the ability for Federal Agencies to draw upon the rich technical pool of data found in voluntary consensus standards (as directed by the National Technology Transfer and Advancement Act, Public Law 104-113) and on company proprietary intellectual property (when the applicable rules relate to products from a specific company). Ensuring strong, responsive and flexible standards systems to support this process, as well as the ability to direct the affected class of persons to appropriate company unique IP, is critical to the success of aerospace products and programs.

GAMA believes it is critically important to understand how the IBR materials play a key role in assuring regulations and policies remain modern, nimble and permit federal agencies to keep pace with the needs of society. The importance of the selection of the term "reasonably available" is key in shaping today's regulatory environment as that term provides for balance between the desire to reference materials with high intellectual value but not in a case where proposed regulated parties would be unable to obtain these documents. Obtaining these documents in a reasonable fashion involves assuring regulated parties are not precluded from access to the information and that the fees associated with such access are equitable. Clearly the term "reasonably available" includes a sense of balance between unavailable and freely available and therefore does not mean freely available. The Office of the Federal Register, through the history of IBR, has further clarified the meaning of the term "reasonably available".

It would cause harm to a great number of regulated entities if the Office of the Federal Register were to change its longstanding interpretation of the term "reasonably available" as for nearly two decades the National Technology Transfer and Advancement Act (NTAA, Public Law 104-113) has encouraged a move towards IBR standards to assure requirements remain current and modern. A change that would put at risk the ability to keep requirements current through the IBR process would be extremely detrimental and would pose a far greater cost to regulated parties than the cost of obtaining IBR material under the current interpretation of "reasonably available".

Looking forward, GAMA believes it is very important for the Office of the Federal Register to reaffirm the longstanding interpretation of "reasonably available" with respect to IBR'd materials as long-term budget projections make it unlikely that the federal government will be able to increase regulatory resources and reliance on public standards through IBR will be increasingly important.

General Comments

Consensus Standards

The current standards development process in the United States ensures that standards are developed by technical experts and stakeholders most familiar with the issues, in an open environment that does not favor any one stakeholder over another, whether industry, government or the public. The process ensures that standards improve public safety while at the same time minimizing the public's share of the development costs. Any revision of 1 CFR Part 51 should ensure that these important criteria are not compromised.

Participants in standards development activities expend significant time and resources, often over a period of years, to create and publish standards that are then available to interested parties on a global basis. Consequently, standards are not created for "free"—and "free" availability is not only impractical but does not reflect the true and significant costs incurred in developing, vetting, refining, producing and distributing voluntary consensus standards. Someone or some entity must be responsible for and bear these costs, and, in the case of free enterprise, be able to protect and benefit from its intellectual property and recoup some amount of revenue to defray a portion of the development costs. Otherwise, standards will not be drafted and published.

IBR of Manufacturer's Service Documents and Intellectual Property

In addition to IBR of consensus standards, aerospace companies, working with the FAA, have permitted company proprietary documentation and intellectual property to be referenced by FAA Airworthiness Directives and FAA approved manufacturer's service information such as Service Bulletins (SB).

14 CFR Part 39 provides a legal framework for FAA's system of Airworthiness Directives (AD) which are rules that apply to aircraft, aircraft engines, propellers, and appliances to address an unsafe condition that is likely to exist in the type design. The FAA approved type design represents the FAA's determination that a company's proprietary design for an aviation products complies with the applicable regulatory airworthiness standards prescribed in 14 CFR and is in a condition for safe operation. An AD specifies inspections that must be carried out, conditions and limitations that must be complied with, and/or any actions that must be taken to resolve a potential unsafe condition in an aviation product type design.

Section 39.27 states that in some cases an AD incorporates by reference a manufacturer's service document. This is a unique relationship between a manufacturer who is the holder of an FAA design approval and the

FAA. FAA regulations require that manufacturers develop instructions for continued airworthiness (ICA) which includes documents such as maintenance manuals, structural repair manuals, maintenance instructions, airworthiness limitations, wiring diagrams, etc. specific to a particular make/model aircraft, engine, propeller or article. The IBR of a manufacturer’s SB allows all the necessary information to address the unsafe condition, including the requirements and related instructions for continued airworthiness to be contained/referenced in a single document and in a format which facilitates ease of use and understanding for those who are required to comply with them. FAA policy Notice N8110.114 *Placing Service Information into the Federal Docket Management Systems* ensures compliance with 1 CFR Part 51 IBR requirements. It explains when FAA shall place service information (e.g., service bulletins, etc.) specified in an FAA AD into the electronic online Federal Docket Management System (FDMS) and that written consent from the manufacturer must be provided to FAA before doing so.

The FAA policy also specifically recognizes that manufacturer service information referenced in an AD action, but not IBR’d, such as when referenced in a note or provided as an informational reference in the text, does not constitute a regulatory requirement.

<u>Reference to Support Documents Is **Not IBR**</u>
In addition to the incorporation of standards by reference into the CFR, aerospace companies, working with the Federal Aviation Administration, permit company documents and other intellectual property to be referenced within FAA ADs and IBR manufacturer service information (i.e. SB). This includes information such as Instructions for Continued Airworthiness (ICA), Aircraft Flight Manuals (AFM), proprietary engineering data and drawings, etc. However, these documents are provided as additional informational reference and do not constitute a regulatory requirement and, therefore, cannot be considered IBR. This additional information is often advisory material on one means, but not the only means of showing compliance with the requirement. Broad-brushed changes to IBR rules could unintentionally violate the IP and proprietary data rights of these organizations and enable parties to obtain access to proprietary information which are not themselves IBR, but referenced within an AD or IBR SB as additional information.

IP and proprietary information provides a company with actual or potential economic value, in part because the information is not generally known by the public. Any public release or broad licensing of such proprietary information would significantly impact the IP owner’s competitive advantage, even if such proprietary information is licensed under reasonable and nondiscriminatory terms. In other words, proprietary information is valuable because it is a secret, and once the secret becomes generally known, the value of the information decreases substantially. Accordingly, company proprietary information is often times not approved for release outside of a company under any circumstances (except as required by existing laws or regulations).

This unique relationship between regulated manufacturer design approval holders and the FAA could be significantly impacted by any changes to applicable IBR rules. For example, impacted OEMs may determine it is necessary to remove proprietary information that is not approved to be broadly licensed or disseminated prior to inclusion of that information in the rulemaking process – even if such information would otherwise add value to SB and AD users. In effect, the SB which is IBR would have to be made a standalone document, containing only the requirements and minimum mandatory instructions specific and particular to addressing the unsafe condition and not all the instructions and guidance which would facilitate understanding and compliance by those that must comply. This could limit the effective operations of the civil aerospace industry because the instructions would have to be adhered to exactly unless the FAA approves an alternative means

of compliance (AMOC) for even minor alterations in the instructions, which may otherwise be embodied in the documentation that would have been incorporated by reference in the SB or AD.

GAMA strongly disagrees with the petitioner's recommendation to change part 51.7 and 51.9 to include publications "…that informs the public how the regulation referring to it might be complied with…" as IBR. As stated previously and in FAA policy Notice N8110.114, these documents are provided as an informational reference in the text and do not constitute a regulatory requirement and therefore, are not IBR'd. In a contradictory submittal to the docket, the petitioner states that issues regarding reference to consensus standards in regulations would not be an issue if they were provided as informational text as an acceptable method of compliance because this does not constitute a regulatory requirement and therefore is not IBR.

IBR Must be Consistent with Other U.S. Laws

As IBR'd information must be reasonably available, there are types of information which should not be incorporated by reference such as information protected by U.S. export controls regimes and proprietary information (as discussed above). Placing export-controlled information in the public domain could be the net result of this proposed rule change. In this regard, there can be no law or regulation that permits "incorporation by reference" of any information that is subject to the Export Administration Regulations (EAR) or controlled by the International Traffic in Arms Regulations (ITAR). Only the Commerce Department and the State Department, respectively, pursuant to the underlying statutory authorities of the Arms Export Control Act for the ITAR and the Export Administration Act, effected through IEEPA, have the authority to place their respectively controlled information in the public domain.

Thus, if the OFR rules in 1 CFR Part 51 are revised, the regulations must include language to the effect that: "Nothing herein requires or authorizes the release to the public either directly or through incorporation by reference of any information subject to the export control restrictions as promulgated by the U.S. Department of State or the U.S. Department of Commerce."

Response to Specific Questions

1. **Does "reasonably available"**
    a. **Mean that the material should be available:**
        i. **For free and**
        ii. **To anyone online?**
    b. **Create a digital divide by excluding people without internet access?**

"Reasonably available" does not mean that material should be available for free nor does it imply unlimited online access.

One cannot rationally argue the term "reasonably available" is a strict term meaning for free and online. The term clearly intends to assure that regulated parties can have access to regulatory requirements and in this sense reasonably available becomes clearer. First, the benefit of well-developed IBR documents, such as consensus standards, provide far greater benefit to regulated parties by assuring requirements remain modern and up to date but maintaining this intellectual property does not come without cost. Reasonably available with respect to cost can be determined by understanding the benefit of the IBR'd materials to the regulated parties balanced against the distribution costs. In this way, regulated parties

bear the cost and benefits of the IBR’d documents rather than dispersing the cost across society or negating the benefits of well-developed materials that should be IBR’d. Second access to the materials to the proposed regulated parties must be assured but the manner in which that information must be provided has always varied and must continue to vary; requiring online access would not be appropriate for all IBR materials as regulated parties are not always the public at large.

2. Does “class of persons affected” need to be defined? If so, how should it be defined?

The aerospace industry does not believe that this term needs to be defined. Each agency needs the flexibility to determine the class of persons affected in light of the specific rule making and the particular standards under consideration for reference,as long as those parties impacted have access to the materials or standards on a reasonable basis. This term is easily understood on a case by case basis as each rulemaking will have different scope with respect to the class of persons affected.

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

For standards incorporated by reference, the aerospace industry would strongly argue against forcing federal agencies that incorporate standards to bear the costs of making them available to the public for free. The public/private partnership the aerospace industry has with the government regarding standards is based on the premise that whenever possible, federal agencies should not develop their own standards but instead adopt standards developed by the private-led voluntary consensus standards organizations. The federal agencies which work with the aerospace industry are already facing huge budgetary cuts. If the IBR rules were changed to require the agencies to subsidize the cost of standards setting, then government budgets would have to be substantially increased which would pose untenable costs on the nation’s taxpayers and the national debt.

Moreover, while the government has strong reasons to want high quality technical standards to help ensure the safety and reliability of products used by and for the public, the agencies lack the breadth and depth of technical expertise and resources which are needed to produce the standards used by them today. The industry and the standards developing organizations welcome and rely on the participation and input from federal agencies in development of standards, but by engaging with the broadest possible stakeholder input from around the world on SDO committees, the government is assured of the most technically reliable standards to meet its needs. Sharing the development costs among users from the entire global aerospace industry and supply chain helps ensure that those who benefit from the standards help bear the burden for their development, maintenance and distribution. To ask the far smaller number of entities, including government agencies, which sit on the technical committees to bear all those costs up front, would have the effect of forcing most of them out of the development process. Standards organizations which fund the process through the sale of standards are able to keep the financial barrier to participation low for small and medium sized enterprises, government agencies, academia and consumer interest groups. This ensures the broadest, most robust input into the standards and protects against just a few entities being able to have a disproportionate amount of influence on the resulting standards.

Requiring agencies to bear the cost of making IBR materials available for free online would have several unintended consequences. First and most importantly such a dramatic shift in how IBR documents are invoked would providing a chilling effect on an agency’s willingness to IBR materials despite the tremendous benefit they can provide to regulated entities by assuring requirements remain contemporary

and keep pace with technology and state of the art methods of compliance. Such a swing would be counter to the National Technology Transfer and Advancement Act (NTAA, Public Law 104-113) effectively neutering the intent of the public law.

4. How would this impact agencies budget and infrastructure, for example?

While some agencies may opt to commit budget if they were required to carry the cost of IBR materials but in fact all the cost would be borne by society as a result of less or poorly developed IBR'd materials. And for company unique intellectual property incorporated by reference, the aerospace industry again would argue against forcing the federal agencies that incorporate this material to bear the costs of making them available to the public for free. The process, costs, and time required to negotiate appropriate compensation in each unique case would be too labor and cost intensive to be achievable.

5. How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of IBR approval request at final rule stage of rulemaking?

Stakeholders and affected parties have adequate opportunity during the development of voluntary consensus standards and during the federal rulemaking process to review pending standards and regulations and provide comments and input. OFR does not maintain expertise in the technical domains, industry sectors, and the subjects dealt with by the individual federal agencies during rulemaking. It would not be value-added to have OFR supplant the role and responsibilities of agencies for the development of rules and regulations and would be a change to OFR's responsibilities far beyond the scope of their mission.

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

Clearly "reasonably available" does not mean for free and online and therefore it would be completely inappropriate and such a direction would have far costlier impact for the OFR to deny IBR simply for this reason. The charge in OMB Circular A-119 that federal agencies respect the copyrights of IP holders, the acknowledgement in the Federal Register Document Drafting Handbook that copies of materials may be made available for purchase, and even recommendations from the Administrative Conference of the United States (ACUS) from December 2011 which supports earlier recommendations made by the National Science and Technology Council's Subcommittee on Standards state that appropriate compensation is due the applicable standards organization or IP holder. (http://www.acus.gov/we-content/uploads/downloads/2011/12/Recommendation-2011-5-Incorporation-by-Reference.pdf).

7. The Administrative Conference of the United States recently issued a Recommendation on IBR. 77FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?

As noted above, ACUS has issued recommendations related to information incorporated by reference into federal rulemaking. The aerospace industry believes that updating OFR guidance on IBR based on the recommendations could be very helpful. OFR should also look to a white paper developed by the American National Standards Institute on the copyright implications of incorporating voluntary consensus standards in regulations for additional information to include in any updated guidance material. Why Voluntary

Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected," http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20 Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf

8. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonably availability?

As noted above, the Office of Management and Budget has already addressed the policy of IBR with regards to standards in OMB Circular A-119. Any changes to policy or additional policy issues with regards to standards or other materials incorporated by reference should be addressed by OMB as the appropriate office to set policy related to recognition and protection of intellectual property rights.

9. How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?

One of the greatest benefits of the IBR tool is assuring that the most current and intelligent standards can be implemented by federal agencies in an expeditious manner. Slowing this adoption would have a detrimental effect far greater than the cost of acquiring typical IBR materials.

Rulemaking is a lengthy and complex process, with many aspects unique to the industries and Federal Agencies involved. Any extension to the process would add a level of complication which could have the negative unintended consequence of making standards organization, companies, or other IP holders less willing to allow their information to be incorporated by reference. This is contrary to the policy established by OMB in Circular A-119 which directs Federal Agencies to work with standards setting organizations and adopt and use voluntary consensus standards. This could also undermine the relationship between industry and Federal Agencies where specific practices for incorporating IP into rulemaking by reference have been adopted.

Conclusion

We welcome the opportunity to continue to work with all stakeholders involved in the discussion surrounding the incorporation of standards and other materials, and to search for ways to improve the proven processes while avoiding any unintended negative consequences as our industry continues to meet our nation's civil and defense priorities. Any additional guidance developed by OFR should respect the needs of the different industries and agencies served, should uphold and honor the copyrights of standards developing organizations and and other intellectual property of IP owners, and should be examined carefully to ensure that they do not have any unintended negative consequences.

We appreciate the opportunity to provide these comments and we look forward to being a part of the ongoing dialogue between OFR, the various Federal Agencies, and other key stakeholders from industry and the standardization community.

Respectfully,

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GAMA - GAMA is an international trade association representing over 75 of the world's leading manufacturers of general aviation airplanes and rotorcraft, engines, avionics, components and related services. GAMA's members also operate repair stations, fixed based operations, pilot and maintenance training facilities and they manage fleets of aircraft. GAMA fosters and advances the welfare, safety, and interests of general aviation by working with governments and the industry to promote a better understanding of the important role general aviation plays worldwide in economic growth and development. GAMA is headquartered in Washington, DC, with a European office in Brussels, Belgium. For additional information, visit GAMA's website at www.GAMA.aero.