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Hon. Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Re: Request for Information 2012-7602, 77 FR 19357

Dear Administrator Sunstein,

In response to your request for information, and coming workshop, I am writing to suggest that you strongly distinguish between the use of privately developed standards as guidance how the requirements of separately stated regulatory obligations might be met, and the use of such standards *as themselves law*. As you know, I and others have submitted a petition for rulemaking to the Office of the Federal Register underscoring the need to revise its regulations on incorporation by reference to accommodate the Internet age and the inappropriateness of acting in a manner that in effect permits the copyrighting of law. If, however, standards are incorporated (or more simply referred to) in regulations in a manner that does not give the standards themselves the force of law, this problem does not arise – the copyrighting of a method for compliance with independent legal obligations presents no similar difficulty.

Many but not all of the commentary from standards development organizations and their supporters filed in response to our rulemaking petition is written as if any change from the current regime would destroy the financial support necessary for their important work. Their work *is* important, but this concern is misplaced. The National Technology Transfer Act and the OMB Guidance you are now reconsidering appear to have been written on the understanding that privately developed standards would be used as means for assuring regulatory compliance, and would not in and of themselves be regulatory requirements – would not in and of themselves constitute law .

The British Standards Institution is the English equivalent of ANSI; it has a portfolio of some 27,000 industrial standards which it licenses, just as American SDOs

do, to support its continuing development of standards. It must be reasonably successful; Public.Resource.Org reports that its chief executive officer earned \$1,029,161 in 2010; this is about three times what the British Prime Minister is paid, just as the CEOs of some important American SDOs earn multiples of the American President's salary.

What ought to be reassuring about this situation is that the British Standards Institution states that the 27,000 standards it offers for sale on its website are "designed for voluntary use and do not impose any regulations."¹ Its promotional literature, too, stresses this characterization. While "many industry bodies and trade associations require products (e.g. motorcycle helmets) to conform to a British Standard or a European Directive before they can be offered for sale in the UK or EU," this appears to be a matter of private governance not public law.²

A similar use of standards in American practice is readily imagined, and would not undercut SDOs current ability to sustain standards development through the fees they charge for access to their standards. One needs only imagine a regulation taking this form:

(c) Caution signs. (1) Caution signs (see Figure G-2) shall be used only to warn against potential hazards or to caution against unsafe practices.

(2) Caution signs shall have yellow as the predominating color; black upper panel and borders; yellow lettering of "caution" on the black panel; and the lower yellow panel for additional sign wording. Black lettering shall be used for additional wording.

(3) Standard color of the background shall be opaque glossy yellow; and the panel, opaque glossy black with opaque glossy yellow letters. Any letters used against the yellow background shall be opaque glossy black.

(4) Colors meeting the contemporary ANSI "Safety Color Code" standards for opaque glossy yellow and opaque glossy black provide an assured means for compliance with this regulation.

Unlike the wording of a current OSHA regulation,³ such a regulation would not render

¹ <http://www.bsigroup.com/en/Standards-and-Publications/About-standards/How-are-standards-used/> (last visited 4/5/2012).

² Ibid.

³ **29 CFR 1926.200(c) Caution signs.** (1) Caution signs (see Figure G-2) shall be used only to warn against potential hazards or to caution against unsafe practices.

(2) Caution signs shall have yellow as the predominating color; black upper panel and borders; yellow lettering of "caution" on the black panel; and the lower yellow panel for additional sign wording. Black

compliance with the ANSI standard mandatory (i.e., itself an element of legal obligation), and thus would not fall within the proposition that public law is not subject to copyright. Just as in England, where standards are voluntary, the financial basis for SDO production would be assured.

Nothing in the petition that we have filed would require OFR or agencies to revisit regulations which may already have been approved for publication in the Federal Register while incorporating SDO standards *as law*. The SDOs are already at risk that, to the extent their standards have been made into legal obligations by the manner in which they have been incorporated into regulations, their copyright cannot be protected. *Veck v. Southern Building Code Int'l*, 293 F.3d 791 (CA 5 en banc 2002).

Treating private standards as means for regulatory compliance, not itself law, would also have distinct advantages for agencies and the regulated. When standards are converted into law, as in the footnoted OSHA regulation, that standard remains “the law,” even though it may well have been further developed by the responsible SDO. American National Standard Z53.1-1967, adopted 45 years ago, is now Z535 SET. American National Standard Z53.1-1967, the law, is no longer “readily available,” on any understanding of those words. To change its regulation, OSHA would have to go to the trouble and expense of fresh rulemaking. But if standards are merely identified as means for compliance with a requirement of law that is independently stated, it should be possible, as above, to create a formulation that permits reference to the standard in place at the relevant time. So long as the law’s requirement does not change, new rulemaking would not be required. Any agency caring to (as perhaps it should) could maintain among the guidance instruments in its electronic reading room a concordance of contemporary standards that it had determined would permit compliance with its regulations – a great boon to the regulated community. And, since the identified standards would not in themselves be legal requirements, SDO copyrights of them would not be threatened by the proposition that law is not subject to copyright.

The financial well-being of the SDOs could thus be assured while public access to the law would also be protected.

Respectfully submitted,

lettering shall be used for additional wording.

(3) Standard color of the background shall be yellow; and the panel, black with yellow letters. Any letters used against the yellow background shall be black. The colors shall be those of opaque glossy samples as specified in Table 1 of American National Standard Z53.1-1967