



National Electrical Manufacturers Association

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April 30, 2012

The Office of Management and Budget  
725 17<sup>th</sup> Street NW  
Washington, DC 20503

**Re: Request for Information: Federal Participation in the Development and Use of  
Voluntary Consensus Standards and in Conformity Assessment Activities (FR 19357,  
March 30, 2012)**

The National Electrical Manufacturers Association (NEMA) is pleased to have this opportunity to provide comments in response to the Request for Information (RFI) initiated by the Office of Management and Budget (OMB) on "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities."

Attached please find NEMA's responses to many of the issues and questions posed in the Request for Information as published in the *Federal Register* on March 30, 2012. This is an important subject for NEMA and NEMA members, and we appreciate the opportunity to comment. If you have any further questions or require additional information regarding the experiences of NEMA and its member companies with standards development and conformity assessment, please do not hesitate to contact us.

Respectfully,

A handwritten signature in black ink that reads "Kyle Pitsor". The signature is written in a cursive style with a large, looped 'K' and 'P'.

Kyle Pitsor  
Vice President, Government Relations

# NEMA RESPONSE TO REQUEST FOR INFORMATION

## Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

Office of Management and Budget

The National Electrical Manufacturers Association is pleased to have this opportunity to provide comments in response to the *Request for Information on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, initiated by the Office of Management and Budget in the March 30, 2012 Federal Register.

NEMA is the association of electrical and medical imaging equipment manufacturers. Founded in 1926 and headquartered near Washington, DC, its approximately 450 member companies manufacture products used in the generation, transmission and distribution, control and end use of electricity. These products are used in utility, industrial, commercial, institutional and residential applications. The Association's Medical Imaging and Technology Alliance (MITA) group represents manufacturers of cutting-edge medical diagnostic imaging equipment including MRI, CT, x-ray, and ultrasonic products. Worldwide sales of all NEMA-scope products exceed \$120 billion annually.

The following are NEMA replies to several of the questions called out in the Federal Register.

### Conformity Assessment:

1. **What factors should agencies use in evaluating whether to use voluntary non-consensus standards in regulation, procurement solicitations or other non-regulatory uses? OMB also invites comments on the respective roles of voluntary consensus standards vs. voluntary non-consensus standards for agency responsibilities in rulemaking, procurement and other activities. Is there a role for each?**

The vast majority of standards are written without legal regulation or government procurement in mind, and they are developed to solve a particular problem: an economic problem, a technical problem, an environmental problem, a safety problem, or some combination of these. Regulations and procurement specifications are often aimed at solving these same kinds of problems. So the initial question to be posed with respect to a voluntary consensus standard or a non-consensus standard is whether the standard solves or facilitates the solution of the problem that regulation or a procurement specification seeks to address, and, even if it does not fully address the problem, does the standard represent a good first step because it facilitates compliance with the regulation or represents the most efficient means of addressing the procurement problem in the short-run?

The development of regulations and procurement specifications typically occurs in the sunshine of the Administrative Procedure Act's (APA) notice and comment environment where the agency authorized by Congress weighs competing considerations expressed by different stakeholders in light of the problem to be solved and the objectives of the legal and regulatory scheme. Voluntary consensus standards (as recognized by OMB Circular A-119) more closely

mimic the APA process than non-consensus standards development. The competing considerations of many stakeholders in solving a particular problem are likely to have already been debated in the course of the voluntary consensus standards process, and for this reason it is NEMA's view that preference should be given for voluntary consensus standards where they exist. The government should not devote excessive resources to covering old ground that has already solved a particular problem.

Timing, technology lifecycle, number of suppliers of the technology, and availability of consensus standards are considerations in evaluating whether to use voluntary non-consensus standards. However, NEMA believes that OMB should re-iterate the differences between voluntary consensus and non-consensus standards and encourage government agencies to participate in the consensus standards process rather than non-consensus when a choice exists. As an example, Department of Energy (DOE) staff participated in recent development processes for both ASHRAE 90.1 (an American National Standard) and the International Energy Conservation Code (IECC), which are competing energy standards for buildings. There is a view in industry that the federal government exercised undue influence (through the DOE involvement) in the non-consensus IEEC 2009 code proposal process despite industry objections made prior to and during the process. Had clear guidance from OMB to favor consensus standards existed, this might have been prevented.

**2. Should a supplement to OMB Circular A-119 be issued to set out relevant principles on conformity assessment? If so, what issues should be addressed?**

Yes.

Program goals should be clear. Costs to government and stakeholders should be in line with anticipated benefits. Private sector standards should be referenced unless there is specific reason not to do so. Consideration should be given to using existing conformity assessment (CA) programs that have similar purposes (public and private sectors). Avoid recreating the wheel—if something else (government or private) is appropriate, use it. Consider using or referencing international CA schemes. Availability of multiple testing labs, preferably Nationally Recognized Testing Laboratories (NRTL) should be a requirement.

**3. What factors should agencies consider in determining whether to recognize the results of conformity assessment and accreditation activities conducted by private sector bodies in support of regulation?**

Factors to be considered should include: Is the program based on consensus standards? Are there multiple bodies available for testing/certification? Does the private sector program help avoid unnecessary costs? What is the track record of the private sector program?

Conformity assessment represents a resource cost to those who have to comply with regulation or meet the procurement specification. As with any resource input, the cost must be in line with the added value that the regulation or specification is expected to provide, or it risks becoming an entry or mobility barrier in the market. There are multiple means of containing these costs: one means is to ensure that there are many conformity assessment bodies to whom a party can solicit a bid for the conformity assessment services so there is a competitive market for those services; a second means is to accredit producer test labs (an example would be the National

Institute of Standards and Technology National Voluntary Laboratory Accreditation Program) so that competing accredited conformity assessment bodies can be developed internally; a third means is to recognize group conformity assessment programs whereby suppliers of conformant products or services establish programs with suppliers of conformity assessment services.

- 4. Ensuring that agencies consider how to minimize conformity assessment costs and delays for businesses, especially small and medium sized enterprises, subject to statutory and budgetary constraints.**

The government should leverage existing conformity assessment systems to the greatest extent possible, tweaking the system as needed to address specific public policy applications. Our response to the previous questions addresses this issue, as well.

**Access to Referenced Standards:**

Some parties have raised transparency concerns with respect to availability of copyrighted materials in instances where standards are referenced or incorporated in regulation and compliance with such standards is mandatory.

- 5. Is lack of access to standards incorporated by reference in regulation an issue for commenters responding to a request for public comment in rulemaking or for stakeholders that require access to such standards? Provide examples.**

This should not be an issue. First, the standards can always be purchased by contacting the standards developing organization that owns the document and ordering a copy. Second, the standards could be made available on-line in a read-only format, which does not allow the document to be downloaded, printed, or copied. The document could be posted on the standards developing organization's website and a link to it provided to the regulating body. An example where this technique is employed that doesn't involve regulation is when the National Fire Protection Association uses this technique to make its documents available for public review.

NEMA participates in rulemakings at both the federal level and state level and our experience is that the stakeholders have had access to the standards that are proposed to be referenced in the regulation, and the stakeholders are knowledgeable about what the proposed regulation means and what it takes to comply with the proposed regulation. This has not been an issue.

Whether the standards incorporated by reference are NEMA standards, or the standards are sponsored and published by other organizations, they are widely available from the standards development organization or through licensed distributors, such as ANSI, IHS-Global, TechStreet, and others, who actively promote the sale and distribution of the referenced publications.

- 6. What are best practices for providing access to standards incorporated by reference in regulation during rulemaking and during the effective period of the regulation while respecting the copyright associated with the standard?**

In NEMA's experience, referenced standards, incorporated by reference, are readily accessible from one or more sources. NEMA submits that the Internet already facilitates finding these standards from the standards development organization, its publisher or its distributor, but the Notice of Proposed Rulemaking could include a list of websites for the organizations where the referenced standards can be obtained.

The question's reference to "respecting the copyright associated with the standard" really appears to be directed at whether the government should confiscate the standard that may or may not be incorporated by reference. In NEMA's view, this would trigger the Fifth Amendment's taking's clause, and would be more problematic. Furthermore, the suggestion of "some parties" about the availability of copyrighted works appears to be a solution in search of a problem.

It is without dispute that copyright protection subsists in works comprising technical standards publications published by organizational authors. 17 U.S.C. 102(a). The fact that either Congress or an agency chooses to reference that standard in a statute or regulation that "requires citizens to consult or use a copyrighted work in the process of fulfilling their obligations" does not strip the publication of its protected status. *Veck v. Southern Building Code Congress, Int'l.*, 293 F.3d 791, 804 (5<sup>th</sup> Cir. 2002).<sup>1</sup> "The copyrighted works do not 'become law' merely because a statute refers to them. See 1 Goldstein Copyright, §2.49 at n. 45.2 (noting that CCC and Practice Management 'involved compilations of data that had received governmental approval, not content that had been enacted into positive law')." *Id.*<sup>2</sup>

There are significant costs in developing and even revising or updating a standards publication. Costs are incurred by the standards development organization that sponsors the standards development process and typically publishes the document that is approved as a standard, as well as the volunteers who participate in the process. The standards development organization devotes administrative, technical, editorial, and sometimes legal resources, to a given standards development project.

In addition to the time value of these resources, there will likely also be out-of-pocket expenses such as travel or telephone conference call expenses. These expenses can run into the thousands of dollars per year per standard depending on schedule for completing the project. In addition, volunteers who participate in the standards development process, also incur the time value of

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<sup>1</sup> "This case does not involve references to extrinsic standards. Instead, it concerns the wholesale adoption of a model code promoted by its author, SBCCI, precisely for use as legislation. Case law that derives from official incorporation of extrinsic standards is distinguishable in reasoning and result. See *CCC Info. Services v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2nd Cir.1994); and *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir.1997), opinion amended by 133 F.3d 1140 (9th Cir.1998)."

<sup>2</sup> "Equally important," said the court, "the referenced works or standards in *CCC* and *Practice Management* were created by private groups for reasons other than incorporation into law. To the extent incentives are relevant to the existence of copyright protection, the authors in these cases deserve incentives." *Id.* This is unequivocally the case for NEMA standards that have been incorporated by reference into federal or state laws.

their efforts and similar out-of-pocket expenses. In some cases, there are costs related to product testing needed to understand the effect of the proposed standard. There are also marketing and distribution costs. In some cases the standards development organization serves as its own fulfillment center; in other cases, the standards development organization contracts by license to a distributor to sell its standard in exchange for a significant royalty payment.

There are many models for how these costs are recovered. Some standards development organizations rely largely, if not entirely on revenue generated from the sale of the standards publication to recoup their costs; those revenues may also fund other activities of the organization not directly related to standards development. Other standards development organizations rely on membership fees, project fees, registration fees, or some combination thereof, and often in combination with revenue from the sale of standards.

NEMA uses several methods of cost recovery as determined by its members. NEMA is a trade association representing over 50 categories of electrical products, and its members work in "product groups" who have their own budgets financed by membership fees. Standards are developed initially through a technical committee of the relevant product group, although there are cases where two or more product groups might work together because of common issues involving interoperability and safety with respect to their products. NEMA's standards development costs are largely supported by membership or project fees paid by members or participants, and to a lesser extent by royalty revenues earned from standards sales. NEMA distributes the approved standards through licensed distributors who pay a royalty to NEMA based on revenues earned from the sale of standards. NEMA shares that royalty revenue in a stated percentage with its product groups, meaning that a portion of the revenue offsets the product group's standards development budget for the next year (meaning lower membership fees for the members) and a portion of the revenue offsets NEMA's overhead. In some cases, a product group elects to make the standard that originated in its technical committee available for free download as well as available for sale through a licensed distributor. In that case, the product group agrees to give up the revenue sharing formula because it typically causes a decline in sales revenue to the distributor and thus less royalty income to NEMA. The product group's decision to do that typically occurs in cases where the standards that have relatively small sales and revenues will not make a meaningful contribution to offsetting their costs.

The revenues earned on the sale of standards incentivize distributors to market and make widely available the standards published by NEMA. The percentage of royalty revenues received by NEMA lower the cost of standards development activities for the volunteers who participate in the technical committees and incentivize them to continue the work of developing new standards and maintaining existing standards, while at the same time calling on the users of the NEMA standard, who benefit from the work of the technical committee, to absorb a portion of the cost so they are not free-riding on the work of others.

OMB's Policy on this subject, as articulated in Circular A-119, has recognized that agencies must "observe and protect the rights of a copyright holder" when referencing a standard in a

regulation. In its comments on this provision of the Circular A-119, OMB summarized the comments received from the public and its views as follows: "One commentator suggested using stronger language to protect the rights of copyright holders when referenced in a regulation. Others thought the language too strong. We have decided that the language is just right." 63 Fed.Reg. 8546, 8550 (February 19, 1998). OMB struck the appropriate balancing of public and private interests here. Allowing standards development organizations to offset and lower their costs for the development of standards by collecting revenues or royalties from the sale of standards publications is absolutely consistent with the direction provided by Congress in The National Technology Transfer Act of 1995, directing "federal agencies to focus upon increasing their use of [voluntary consensus] standards whenever possible," thus, reducing federal procurement and operating costs." *Id.* at 8546. OMB A-119 represents a best practice.

The agency should ultimately consider what is being referenced in the standard proposed for incorporation by reference. In the case of a standard that describes a test procedure, for example, the entire test procedure likely represents all or a significant or important part of the standard, and referencing the standard allows the government to reduce the cost of reprinting the entire standard in the Federal Register while at the same time observing and protecting the rights of the copyright holder. If, on the other hand, the purpose of the reference is to incorporate a single paragraph in the standard that, for example, recites a definition of something, and that is it, the agency should consider whether using that definition is "fair use." It is NEMA's practice to ask others, even in the case of "fair use," for permission to allow reprinting of the paragraph, and it is invariably granted, and the government should consider doing likewise in the proposed rule as we believe the request is likely to be granted.

**7. What are the best practices for incorporating standards by reference in regulation while respecting the copyright associated with the standard?**

The principles and best practices stated in response to the previous question are equally applicable to this question, the key difference is that the government has formally decided to reference the standard that citizens must "consult or use . . . in the process of fulfilling their obligations." As stated above, this does not vitiate the copyright protection conferred by Title 17 and does not place the standards publication in the public domain.

NEMA also refers OMB to the recommendations of the Administrative Conference of the United States, *Recommendation 2011-5, Incorporation by Reference* (December 8, 2011). ACUS suggested that agencies ask copyright owners to consent to making a copy available for free. The copyright owner may or may not oblige, but it does not hurt to ask, and perhaps other accommodations may be made as suggested by ACUS in paragraph 3(a-c). This inquiry does not contravene OMB A-119 as it observes and respects the rights of the copyright holder.

**Costs Associated with Standardization:**

**8. What resources and other costs are associated with development and maintenance of private sector standards, beyond the cost of purchasing standards?**

The following are some of the resources associated with development and maintenance of private sector standards. It is important to note that both the SDO and the volunteers who participate in the standardization process incur considerable costs for labor, travel and other expenses.

- An organization to establish and facilitate the work of the committee that will develop or revise the standard.
- A committee of interested and knowledgeable individuals to develop or revise the standard and to respond to comments and proposals to improve the standard. The committee would normally be comprised of a chairman, a secretary, and a group of members who are knowledgeable in subject matter covered by the scope of the standard.
- A group to which the standard is balloted and which provides comments and proposals to improve the final document.
- A committee to provide final approval of the standard once it has been balloted and comments addressed.
- One or more individuals to edit the standard.
- A resource to publish the standard, either electronically, in paper copy, or both.
- A resource to market and distribute the standard, either electronically, in paper copy or both.

9. **What costs would be involved if the federal agencies were to develop government-unique standards?**

The resources/costs would be similar to those identified in the response to question 8 except the organization to establish and support the work of the committee that will develop or revise the standard would be the regulatory body. An added cost would be coordination and consultation with the private sector.

**Changing Standards:**

10. **How often do standards-developing bodies review and subsequently update standards?**

The general rule of thumb for updating standards is every five years. However, most standards developing organizations permit standards, particularly those that cover fast-changing technologies, to be revised more frequently. Further, many standards developing organizations permit annual extensions of one year, once the five year limit has been reached, for technologies that are mature such that updating of the standard is not required. Often, extensions can be approved up to a total of 10 years. Finally, many standards developing organizations permit a standard to be reviewed and reaffirmed if no change is required. This has the effect of resetting the clock every five years. Some standards for 'legacy' systems do



not require alteration but are reaffirmed on a regular basis, typically 3-5 years. While costs to acquire reaffirmed standards are not exorbitant, the necessity of acquiring reaffirmed standards is unclear but could be mandated by strict interpretation of the use of "latest revision" unless a reaffirmed standard is recognized as such and not as a new revision.

**11. Do SDO's have mechanisms in place for alerting the relevant agencies and the public about changes/significant changes in the standards?**

Speaking strictly for NEMA, a notice is distributed to all purchasers of the previous edition of a standard when a new revision or edition is published. If an agency had purchased a previous edition of a NEMA standard, that agency would receive the notification of the new edition or revision. NEMA has no mechanism for separately tracking the purchases of its standards by regulators.

**12. In the context of using standards for regulation, should the OMB set out best practices for how to reference/incorporate standards (or the relevant parts) in regulation?**

Yes, to provide some consistency from one agency to the next.

**a. Are there instances where incorporating a standard or part thereof into a regulation is preferable to referencing a standard in regulation (or vice versa)?**

In response to question 6, NEMA gave the example whereby a single paragraph in a standard containing a definition of something is copied for use in a regulation. While not intended to be definitive of all examples of when to borrow a piece of text from a standard, it illustrates that there may be cases where it makes more sense to copy a portion of a standard than to incorporate by reference. As noted in that previous answer, NEMA believes that the best practice is to ask for permission to copy.

Absent the type of circumstance just described, a standard should be referenced in a regulation in order to observe and protect the rights of a copyright holder. Incorporating a standard or portions thereof does not take into account changes that may be made to a standard that is incorporated in the regulation. Because of this and since standards are protected by copyright, only references to standards should be provided. The availability of a standard for free download does not change this. Standards are considered publicly available whether they are free or available for purchase.

**b. Should an OMB supplement to the Circular set out best practices for updating standards referenced in regulation as standards are revised? If so, what updating practices have worked well and which have not?**

Yes.

The standards developing organization generally has its own procedures for revising the standards it owns. Many of these procedures result from accreditation of the various SDO's by the American National Standards Institute (ANSI).

Federal agencies participate implicitly in standardization by incorporating references to consensus standards in rules, regulations, and guidance documents. Keeping these regulations updated to reference the most current editions of the standards, however, poses a significant challenge for some federal agencies. Indeed, while federal adoption of consensus standards streamlines the rulemaking process and represents a cost-effective regulatory mechanism, too often federal agencies cannot keep pace with modifications to the consensus standards, failing to update any regulatory references in a timely manner. In some cases, an agency's process for updating its references to standards is incredibly burdensome. To that end, it may be prudent for OMB to establish best practices for federal agencies to follow to ensure they are able to update their regulations and incorporate the most recent editions of consensus standards in as timely a manner as possible. One way federal agencies could accomplish this, as mentioned in (d) below, is simply to reference "the latest edition" of the standard without directly attributing it to a specific edition by year. However, in cases where a regulation is on a regular review schedule, it may be advantageous to reference a specific edition of a standard, knowing that the reference will be reviewed and updated, if appropriate.

Some standards for 'legacy' systems do not require alteration but are reaffirmed on a regular basis, typically 3-5 years. While costs to acquire reaffirmed standards are not exorbitant, the necessity of acquiring reaffirmed standards is unclear but could be mandated by strict interpretation of the use of "latest revision" unless a reaffirmed standard is recognized as such and not as a new revision.

**13. Is there a role for OMB in providing guidance on how Federal agencies can best manage the need for relevant regulations in the face of changing standards?**

Yes, in terms of overall government policy on how to interface standards and regulations, but the responsible agency should have the final word on how to adapt their regulations to the content of changing standards.

**14. How should agencies determine the cost-effectiveness of issuing updated regulations in response to updated standards?**

NEMA recommends that the agency reference the "latest edition" of the standard, thereby negating the need to update the regulation whenever the standard is revised. This approach is frequently used when standards developers reference the standards of other organizations in one or more of its standards. Again, in cases where a regulation is on a regular review schedule, it may be advantageous to reference a specific edition of a standard, knowing that the reference will be reviewed and updated, if appropriate.

If regulations simply reference the “latest edition” of a standard, mechanisms could be included in the regulatory text to ensure that the issuing agency retains the ability to revise its rule if it is determined the latest revision to the consensus standard does not carry out the purposes of the regulation. This would allow for incorporated standards references to remain current while preserving a federal agency’s regulatory authority. Congress has acknowledged this approach when it mandated the US Consumer Product Safety Commission (CPSC) to adopt an Underwriters Laboratories (UL) product standard for automatic garage door openers and allowed for it to “self-update” in CPSC’s regulations as it was revised by the private SDO, unless it was determined that “such a revision does not carry out the purposes” (Section 203 Public Law 101-608).

Another approach might be to request input from affected organizations regarding initial and ongoing costs of implementation of standards as they relate to the critical factors for performance identified in the regulation.

**Other Issues:**

**15. Do agencies consult sufficiently with private sector standards bodies when considering the update of regulations?**

When considering updates to regulations that reference consensus standards, agencies seldom, if ever, directly consult the SDO (including NEMA) to determine whether the specific standard has been revised. The exception is when an agency publicly “consults” on referenced standards via standard notice and comment. For example, the U.S. Department of Energy (DOE) is required by statute to update its test procedures for energy efficiency performance every seven years. In the process of updating these procedures, DOE solicits public input on any referenced consensus standards, and NEMA typically provides standards options in response to that process.

**16. Should OMB provide guidance to agencies on when it is appropriate to allow the use of more than one standard or more than one conformity assessment procedure to demonstrate conformity with regulatory requirements or solicitation provisions?**

In general, OMB should support a system that encourages broad collaboration of stake holders in creating a single standard and testing protocol that reduces the time and cost of going to market with new products and systems—globally. However, where this is not possible, OMB should permit the use of multiple standards if the situation/marketplace requires more than one. An example is the growing area of standards for and testing of systems such as Smart Grid and high performance buildings.

**17. When an agency is requested by stakeholders to consider allowing the demonstration of conformity to another country’s standard on the use of an alternative conformity assessment procedure as adequate to fulfilling US requirements, should OMB provide guidance to agencies on how to consider such request?**

Yes, OMB guidance to agencies should be to consider this type of request only when there is agreement among all materially affected stakeholder groups. Agencies should always consider the needs of the domestic industry and marketplace. We would not want to see an approach that is contrary to U.S. safety standards, for instance, or that disadvantages a viable technology or an existing installed base of products.

**18. Does the significant role played by consortia today in standards development in some technology areas have any bearing on Federal participation?**

Use of consortia is a viable approach to developing standards in today's rapidly evolving technology environment. Agencies should be encouraged to participate in consortia, in addition to traditional SDO's, as needed, so long as the consortium operates in accordance with World Trade Organization (WTO) requirements. It is important to encourage consortia to be transparent and accessible, and to produce standards that have been broadly and expertly reviewed by relevant stakeholders.