



National Fire Protection Association

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April 30, 2012

The Honorable Cass Sunstein
Administrator, Office of Information and Regulatory Affairs
White House Office of Management and Budget
Washington, DC

RE: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 77 FR 19357 (March 30, 2012)

Dear Mr. Sunstein:

The National Fire Protection Association (NFPA) appreciates this opportunity to offer comments to your March 30, 2012 Request for Information on OMB Circular A-119 (OMB A-119). Since 1896, the NFPA has served as a resource to the public and private sectors alike by developing high quality technical standards to reduce the burden of fire and other hazards in the U.S. and worldwide. The NFPA is highly supportive of the policies in the National Technology Transfer Advancement Act (NTTAA) and OMB A-119. For reasons discussed below, these policies enable the federal government to effectively and efficiently meet regulatory objectives, particularly in the safety arena.

The NFPA has over 70,000 members, representing a range of professions and industrial sectors, from first responders and members of the building community, to manufacturers and insurers. Using an extensive network of technical volunteer experts, the NFPA develops and maintain 300 codes and standards, including NFPA-70, *National Electrical Code*, and NFPA 101, *Life Safety Code*. There are 370 references to NFPA standards in the Code of Federal Regulation. As an American National Standards Institute (ANSI)-accredited standards development organization (SDO), the NFPA adheres to a consensus-based process that is open, transparent, and balanced. NFPA's ANSI-accredited procedures ensure that all stakeholders have a voice in the process and that no one interest group can dominate the standard. By relying on this process, the NTTA and OMB A-119 enable a public-private collaboration that provides governments at all levels with extensive technical expertise at virtually no cost to the taxpayer. Further, the NFPA is a self-sustaining, not-for-profit organization focused solely on improving public safety. It derives the revenue necessary to fund its standards development activities from the sales of its standards publication. Free from reliance on funds from any particular industry, trade association, or government agency, the NFPA maintains independence, ensuring the credibility and quality of NFPA standards.

One additional benefit of private-sector, voluntary consensus SDOs is their ability to respond quickly to new hazards and challenges. The NFPA demonstrated this

responsiveness after the 2010 explosion at the Kleen Energy natural gas power facility in Middletown, Connecticut that killed 12 workers. After an investigation by the U.S. Chemical Safety Board (CSB) revealed the cause of the explosion, the NFPA, responding to the CSB's urgent recommendations, developed and published a standard to address the gas-blow process for newly commissioned power plants, ensuring safer alternatives to the practice that caused the tragedy at Kleen Energy. The NFPA initiated standards development, assembled a standards-drafting "technical committee" and issued the standard within 14 months of the CSB recommendations.

The value of voluntary consensus standards, as illustrated above, and the valuable public-private partnership that federal participation and use of such standards represents, has been summarized in the separate comments submitted by ANSI, which the NFPA adopts and endorses. In addition, the NFPA submits the following responses to several of the standards-related issues on which the Request for Information seeks comment.

Protection of Copyright Associated with Standards

The development and regular updating of timely, high quality technical standards is costly. Though the standards development process of SDO's like the NFPA relies on volunteers to donate their time and expertise, the NFPA provides substantial administrative and technical staff support, research and information services, production and publication services, and supports the meeting costs associated with the literally hundreds of committee meetings that are held annually. As an independent, mission-driven, non-profit organization, NFPA does not receive funding from any trade or business to underwrite these costs. Instead, these costs are borne largely through the publication and sale of standards. These revenues not only sustain the development of those standards which generate significant sales, they are used to fund the development of the many other important standards that have limited sales, but which are critical to safety in many fields. This funding model not only assures the independence and credibility of NFPA's standards development activities, it ensures that the resulting standards can be made available to federal agencies and other governmental jurisdictions across the United States for adoption by reference without cost to taxpayers. The ability to generate the sales revenue that copyright protection affords, moreover, allows SDO's like NFPA to charge no fees for participating in its process, thus keeping barriers to participation low. Recognizing all of these benefits, OMB A-119 has, since its first issuance, rightly required that federal agencies adopting standards "observe and protect the rights of the copyright holder."

The question of reasonable access, in the age of the internet, to standards adopted by reference is an important and timely one. As outlined in the recent staff report issued by the Administrative Conference of the U.S. (ACUS), federal agencies, in cooperation with SDO's, are already developing ways to increase access to copyrighted materials. See Emily Schleicher Bremer, *Incorporation by Reference into Federal Regulations* (ACUS 2011) (the ACUS Report), at pp. 27-30. In providing guidance to federal agencies on the question of reasonable access, the OMB should endorse a flexible approach where

agencies take into account the type of standard at issue, who the users of the standard will be, and other agency and SDO specific factors. Such flexibility is necessary, particularly now, as the evolving uses of internet both facilitate the distribution of valuable content and threaten the incentives for authors to create such content. As the ACUS Report states:

The public-private partnership in standards—which incorporation by reference facilitates—has reaped extraordinary benefits for both government and the private sector. In addressing the important public policy question of how to ensure the reasonable availability of incorporated, copyrighted materials, these benefits must be kept in mind. Any solution must preserve and improve—and not undermine—the valuable public-private partnership in standards.

ACUS Report at p. 27. The recommendations issued by ACUS following this report adopted a flexible approach which should guide OMB in any guidance that it develops for agencies. See Administrative Conference Recommendation 2011-5, Recommendation number 3 (adopted December 8, 2011). This recommendation recognizes that, while free publication of standards incorporated by reference should be encouraged where possible, other approaches should be available in those cases where an SDO's operating environment and revenue needs do not permit such access. Specifically, recommendation 3(b) states that “[where] copyright owners do not consent to free publication of incorporated materials, agencies should work with them and, through the use of technological solutions, low-cost publication, or other appropriate means, promote the availability of the materials while respecting the copyright owner's interest in protecting its intellectual property.”

The path taken by NFPA is consistent with the ACUS recommendations. Beginning in the early 2000's, NFPA began offering free, read-only access to its standards on the NFPA Website, and since 2005, it has offered such access to all of its standards, including, at the request of any adopting agency, many older editions that are still adopted by reference. By linking to the NFPA site, both during rulemaking and during the effective period of the regulation, agencies can provide reasonable access to any interested party at no cost to the agency or the public. This approach, for those SDO's that can provide such access, has significant benefits to both the adopting agency and the SDO. For the SDO's part, it can continue to host its own content, allowing the SDO to provide adequate copy-protection in order to limit indiscriminate downloading that would destroy the market for its standards by making them available, not just to those who must use them to comply with a federal regulation, but to all users. Hosting standards for regulatory use on its own website also allows the SDO to draw visitors to its website. This helps a mission-driven safety organization like NFPA to enhance its public safety outreach. It also allows the NFPA to potentially recoup some of the cost and lost revenues incurred from its free offering by selling copies of standards to those who wish to own their own copy and by offering other ancillary products and services that explain and supplement its standards. As for the adopting agency, SDO-hosted access avoids the need to negotiate licensing agreements with the SDO in order to reproduce a standard on

the agency website, and it spares the agency the time and expense associated with hosting private standards. OMB should encourage and recommend that agencies adopt SDO-hosted free access as the preferred method of providing free access, where SDO's are able to offer it.

Voluntary Consensus Standards & Cost-Benefit Analysis

The codes and standards development and revision process is extensive and resource intensive. The NFPA coordinates over 6,000 volunteers sitting on 300 technical committees. The NFPA process requires codes and standards to be revised, at a minimum, every 5 years, but in many cases, every 3 or 4 years. During the development and revision process, there are at least four different opportunities for the public to propose changes to the code or standard and comment on the work of the technical committees, including a final appeals process. For over 10 years, the NFPA has worked with the several federal agencies to publish announcements in the Federal Register that alert the public to when NFPA codes or standards are entering the revision cycle. On the NFPA website, comments and proposed changes are available for anyone to view, as well as information on how interested parties can offer their proposals and comments to the process. Finally, the NFPA, through its international reputation and credibility, and through its development of standards that are intended as consistent models for national and international use and for both public use and private self-regulation, is able to attract the thousands of volunteer experts that serve on their committees. It is fair to say that the NFPA standards development system, and those of many other SDO's, could not be reproduced by individual federal agencies at any cost.

Using and Updating Standards in Regulation

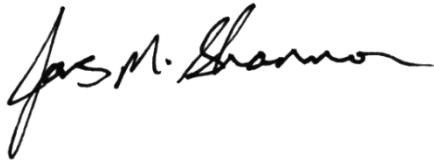
Technology and industry practices are continuously evolving. For this reason, it is imperative that agencies regularly review incorporated standards to ensure they support current practice and innovation within industry. For example, changes to the 2012 version of the NFPA Life Safety reflect the desire of nursing home operators to make their facilities more homelike and comfortable for residents. Open kitchen designs and furniture in the hallway is now permitted with proper fire protection system in place. The 2011 version of the National Electrical Code addresses the safe installation of distributed renewable power generation, such as small wind systems. Moreover, the revision process takes advantage of improvements in safety knowledge and technology. For example, recent revisions to the National Electrical Code now mandate arc-fault interrupters and protected electrical sockets. These improvements can save lives. Regulators should regularly review and update regulations to ensure federal rules reflect significant safety improvement and new industry practice.

The NFPA supports the recommendations made by ACUS in December of 2011 on updating incorporations by reference. These recommendations (six through eleven) offer positive steps towards ensuring regulations keep pace with important developments in the standards they incorporate. In particular, recommendation seven suggests that agencies

“adopt internal procedures to ensure good communication of emerging revisions to those within the agency charged with making policy decisions and writing rules. Agencies should consider participating in standard-setting activities in order to maintain awareness of emerging revisions.” The NFPA welcomes greater agency engagement and encourages participation by agency staff on technical committees. The NFPA also supports the ACUS conclusion that agencies and Congress should explore expedited or streamlined rulemaking authority to allow regulators to make more timely updates to incorporated codes and standards.

Thank you again for this opportunity to provide comments. As one of the nation’s leading standards developers, the NFPA looks forward to further engagement as OMB continues to discuss A-119.

Sincerely,

A handwritten signature in black ink, appearing to read "James M. Shannon". The signature is written in a cursive style with a large, sweeping initial "J".