



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
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Legal & Regulatory Group

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Via regulations.gov
Office of the Federal Register (OFR)
800 North Capitol Street NW, Suite 700,
Washington, DC 20001

Office of Information and Regulatory Affairs (OIRA)
Office of Management and Budget
New Executive Office Building
725 17th Street, NW
Washington, D.C. 20503

Re: Incorporation by Reference; 1 CFR Part 51; Docket
No. NARA 12-0002 and Federal Participation in the
Development and Use of Voluntary Consensus Standards
and Conformity Assessment Activities.

Dear Sir or Madam:

The National Automobile Dealers Association (NADA) represents more than 16,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ upwards of 1,000,000 people nationwide yet the majority are small businesses as defined by the Small Business Administration.

Earlier this year, the OFR asked for comment on the issue of the incorporation into federal regulations consensus standards set by non-federal entities. 77 Fed. Reg. 11414, *et seq.* (February 7, 2012). Subsequently, OIRA asked for comment on federal participation in the development and use of voluntary consensus standards and in conformity assessment activities. 77 Fed. Reg. 19357 (March 30, 2012). In response to these two requests, NADA offers the following comments and suggestions.

I. The OFR Notice

The OFR notice results from a petition filed by several administrative law experts associated with the Administrative Conference of the United States (ACUS) asking for a definition of the term “reasonably available” as used in conjunction with the incorporation by reference of “consensus” standards in federal regulations. The petition flows from several ACUS recommendations on incorporation by reference, including one urging that “consensus” standard materials be “reasonably available” to regulated entities and other interested parties. *Administrative Conference Recommendation 2011-5, Incorporation by Reference*, p. 5.

NADA conditionally supports the incorporation by reference of non-governmental “consensus” standards consistent with the National Technology Transfer Advancement Act’s (NTTAA) intent that federal agencies leverage such standards in lieu of developing their own. Incorporations by reference can serve to husband limited government resources and to take advantage of well-respected non-governmental expertise and processes. Effectively, the NTTAA requires federal agencies to “use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities,” except when an agency determines that such use “is inconsistent with applicable law or otherwise impractical.” 77 Fed. Reg. 19357 at 58. Importantly, OIRA’s OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* provides agencies with guidance on the development and use of such standards.

The Administrative Procedures Act and numerous individual agency rules and policies dictate that federal rulemakings entail a requisite level of due process. 5 USC Subchapter II. Thus, to the extent an agency proposes a regulation incorporating and relying on a “consensus” standard, three important considerations should be taken into account. First, the agency should assure itself that the standard development process allows potentially regulated and other interested persons an adequate opportunity to participate in or provide input into the process. This is particularly important where small businesses are involved that may lack the time or resources to participate directly, but whose input could be provided through participation by a trade association or otherwise.

Second, during pre-proposal and proposed rulemaking stages, the agency should make a draft or “draft final” version of the non-governmental standard generally and “reasonably” available for review and comment. Potentially regulated entities and other interested parties simply will not receive adequate notice and opportunity for comment if they don’t get a chance to look at a “draft” version of the standard at issue. Even if the standard is “final,” it needs to be modifiable to accommodate legitimate comments or concerns. Alternatively, the agency could incorporate it with conditions.

Third, once an incorporating rule goes final, the non-governmental standard must be made “reasonably” (physically and financially) available. Generally, “reasonably” should mean available for download from the rulemaking docket. If a final rule is “reasonably available” if downloadable from the Federal Register, then a “consensus” standard likewise should be considered “reasonably available” if downloadable for free from a rulemaking docket.

Standards development organizations (SDOs) and the experts who participate with them incur costs, whether or not a standard is eventually incorporated into a federal regulation. NADA suggests three cost recovery strategies for standards destined for incorporation into federal regulations. First, SDOs should look to off-set the cost of such standards against general revenues. This could involve the establishment of a “regulatory standards account” funded by allocations from subscriptions or one time charges for non-regulatory standards. Second, agencies should budget to reimburse the development costs associated with these standards and for the costs of distribution. Typically, such costs will be less than what an agency would have

incurred had it developed a standard itself. Third, agencies should be flexible when addressing cost recovery issues, since historical practices and the nature and scope of the parties involved may lead to a variety of outcomes on how to make incorporated standards “reasonably available.” To the extent an agency determines that “reasonably available” could mean something other than “free for download,” it should specifically solicit comment on that issue.

II. The OIRA Notice

The OIRA notice requests information focused on existing the OMB Circular *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (Circular A-119) mentioned above. Circular A-119, first issued in 1998, serves as agency guidance on the adoption or incorporation by reference of non-governmental consensus standards. 63 Fed. Reg. 8546, *et seq.* (February 19, 1998). As discussed at length above, the Federal Register may not publish regulations incorporating such standards unless they are “reasonably available” to regulated entities and other interested persons. 5 U.S.C. 552 (a)(1).

Again, NADA conditionally agrees that the incorporation of non-governmental “consensus” standards can save the government both time and resources, can improve the quality of federal regulations, and can result in overall benefits to potentially regulated persons. However, such benefits directly depend on the degree to which regulated parties and other interested persons have access to the processes by which such standards are developed and to the standards themselves; before, during, and after the related rulemaking proceedings.

A. Participation: Rarely are dealership employees able to break away from their day-to-day responsibilities to directly participate in a non-governmental standard development process. Dealerships generally are too small to commit to the staff resources necessary for the travel, meetings, and conference calls typically involved. Fortunately, NADA and related state and local dealer associations can and sometimes do participate on their members’ behalf. Circular A-119 should stress that for standards expected to be incorporated by reference, agencies should oversee and ensure that the standards development process allows for adequate participation.

B. Consensus: Since “consensus” does not always mean “consensus”, as defined OMB Circular A-119, NADA has chosen to put that word in quotes throughout this document. Even assuming the physical ability of dealers or their trade associations to participate, SDOs for a variety of reasons may be unable or unwilling to adequately take dealer interests into account, let alone reach “consensus.” Circular A-119 should stress the need for and importance of agency oversight of the application of “consensus” criteria to each non-governmental standard development process, unless an exemption is warranted and can be justified.

C. Access: As noted above, inadequate access to potentially incorporated-by-reference non-governmental standards can undermine the due process of notice and comment rulemaking, given that small business dealerships and their trade associations lacking access to a standard during a rulemaking may not be able to accurately comment on the matter at hand. Moreover, as noted above, access to any non-governmental standard incorporated by reference into a final federal regulation must be made “reasonably available” to any and all potentially regulated

persons (and their trade associations) consistent with reasonable expectations of compliance. Conversely, Circular A-119 should stress that agencies may refer to a non-governmental standard as an indicia of compliance or “standard of care,” in an enforcement context or otherwise, unless and until that standard it has been formally incorporated by reference into a federal regulation.

On behalf of NADA, I thank the OFR and OIRA for the opportunity to comment on this matter.

Respectfully submitted,

A handwritten signature in black ink, reading "Douglas I. Greenhaus". The signature is written in a cursive style with a large initial 'D' and a long, sweeping underline.

Douglas I. Greenhaus
Chief Regulatory Counsel
Environment, Health, and Safety