To:

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Subject: **OFR-2013-0001 – Incorporation by Reference**

I would like to thank the OFR for extending the comment period for the Notice Of Proposed Rulemaking, 78 FR 60784, issued in response to a petition to amend the OFR's regulations at 1 CFR 51. This gives interested individuals such as myself a better opportunity to voice opinions and participate in the rulemaking process.

In the NPRM, the OFR has agreed that the current regulations for approval of IBR requests at 1 CFR 51 need to be updated and proposes "to require that if agencies seek the Director's approval of an IBR request, they must set out the following information in the preambles of their rulemaking documents: discussions of the actions the agency took to make the materials reasonably available to interested parties or; summaries of the content of the materials the agencies wish to IBR."[1] The OFR has stated agency objectives of avoiding the creation of differentiation and the formation of a complicated secondary bureaucracy, and maintaining agency flexibility.

The OFR is making the right decision to amend its IBR regulations. The NPRM's new wording for 1 CFR 51 is a step in the right direction, but it's not ready to become a final rule for a few reasons: (1) The proposed requirement of 1 CFR 51.5(a)(1) will have the effect of creating differentiation and the formation of a complicated secondary bureaucracy, despite OFR's efforts to avoid this, and it creates more confusion and uncertainty in the rulemaking process. (2) The proposed alternative requirement of 1 CFR 51.5(a)(2) is unauthorized by 5 U.S.C. 552(a)(1) and exceeds the OFR's authority. (3) The OFR's findings in the discussion of comments received for NARA 12-0002 are in some cases contradictory, incomplete, and/or inaccurate. (4) The OFR has not considered a significant aspect of the petition regarding "mak[ing] the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available." (5) The OFR has not considered a critical argument made by some commenters regarding material that references and relies upon other documents.

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1 More formally, the proposed new wording of 1 CFR 51.5(a) states: "(a) In a proposed rule, the agency does not request formal approval but must either: (1) Discuss the ways in which it worked to make the materials it proposes to incorporate by reference reasonably available to interested parties in the preamble of the proposed rule, or (2) Summarize the material it proposes to incorporate by reference in the preamble of the proposed rule." 78 FR at 60797.

(1 & 2) The OFR is proposing to require as a condition for approval of an IBR request that the agency "(1) Discuss the ways in which it worked to make the materials it proposes to incorporate by reference reasonably available to interested parties" or "(2) Summarize the material it proposes to incorporate by reference" in the preamble of the proposed rule.[2]

Addressing 1 CFR 51.5(a)(2) first, the core problem is that 5 U.S.C. 552(a)(1) requires the matter *itself* to be "reasonably available to the class of persons affected". If an agency resorts to providing a summary of the matter, this is a clear admission that the matter itself is not reasonably available. After all, if the matter were reasonably available, then there would not be a need to provide a summary of its contents; members of the class of persons affected could simply review the matter directly. Providing a non-legally-binding summary of the matter does not cure the fact that the matter itself is not reasonably available. The Director of the OFR only has the statutory authority to approve IBR requests of matters that are "reasonably available to the class of persons affected". Therefore, to allow a summary of the matter to substitute for the matter itself is beyond the OFR's authority.

On the proposed 1 CFR 51.5(a)(1), other than the eligibility criteria of the proposed 1 CFR 51.7 and the procedural requirements of the proposed 1 CFR 51.5(b), 1 CFR 51.5(a) is critical because this requirement is designed to ensure that agencies "consider [the] many factors when engaging in rulemaking, including assessing the cost and availability of standards".[3] If this wording as proposed becomes a final rule of the OFR, the end result is that agencies will be making the determination for the Director of the OFR of whether a matter is "reasonably available to the class of persons affected". Granted, the proposed 1 CFR 51.7(a)(3) leaves some discretion with the Director of the OFR to determine whether a matter is reasonably available,[4] but the NPRM also states that the OFR considers the "burden [to be] on the subject matter expert to work with the SDOs to provide access to the standards these subject matter experts believe need to be IBR'd."[5] Therefore, it is unlikely that the Director will exercise this discretion and find a matter ineligible for IBR because it is not "reasonably available to … the class of persons affected by the publication".

With the agencies deciding for themselves whether a matter is "reasonably available", there will necessarily be different standards applied by different agencies. The OFR stated repeatedly that it wants to avoid creating differentiation and a secondary bureaucracy, but 1 CFR 51.5(a)(1) will result in differentiation and the creation of a secondary bureaucracy as different agencies settle upon different criteria that they consider to make a matter "reasonably available". Furthermore, letting agencies decide for themselves the criteria which make a matter "reasonably available" is contrary to the OFR's policy stated in 1 CFR 51.1, which is not proposed to be amended, and which states in part "*The Director will interpret* and apply the language of section 552(a) together with other requirements which govern publication in the Federal Register and the Code of Federal Regulations." (Emphasis added.) The OFR's policy is for the Director of the OFR to interpret the "reasonably available" criterion—not the agencies—and I believe that this was the intent of Congress when it enacted the Freedom of Information Act, in particular, 5 U.S.C. 552(a). The proposed requirement of 1 CFR 51.5(a)(1) is contrary to agency policy and is contrary to the intent of 5 U.S.C. 552(a) because the Director is leaving the determination of

2 78 FR at 60797

3 78 FR at 60788

4 "A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it … Is reasonably available to and usable by the class of persons affected by the publication."

5 78 FR at 60787

"reasonably available" to the agencies.

Requiring an agency to discuss the ways in which it worked to make the materials reasonably available to interested parties is a start, but this additional requirement falls very short of the primary purpose of the petition, which is to amend 1 CFR 51 "to reflect the changed circumstances brought about by the information age."[6] Presumably this was the goal of the OFR as well when it agreed to update the regulations, although no agency objectives for updating the regulations were stated in the NPRM. The OFR should not be content with the new requirement of 1 CFR 51.5(a) to satisfy the "reasonably available" requirement of IBR. As the petitioners wrote, "the whole of the regulation is, in effect, an interpretation of what it means for matter incorporated by reference to be 'reasonably available.' "[7] To this end, the new requirement of 1 CFR 51.5(a) is wholly insufficient.

(3) There are certain paragraphs in the NPRM, as outlined below, for which I have some comments:

78 FR at 60785:

> If we required that all materials IBR'd into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A-119.

How did the OFR reach this opinion? This is very much contradictory with the OFR's statement a few paragraphs down: "Another common theme throughout these comments was the idea that the SDOs derive significant, sometimes intangible, benefits from having their work IBR'd into a regulation and those benefits more than offset the cost of developing the standards themselves. Some of these benefits include increased name-recognition and trust, increased revenue from additional training opportunities, and an increase in the demand for standards. We don't have the knowledge or expertise to have an opinion on this issue"[8] On the one hand, the OFR is asserting that SDOs would cease developing standards for IBR should IBR'd material be required to be made available for free. On the other hand, the OFR states that it lacks the knowledge and expertise to determine whether SDOs derive benefits from having their work IBR'd into regulations. Is is contradictory that the OFR has the knowledge and expertise to predict the demise of the SDO industry if IBR'd standards were required to be made available for free, but lacks the knowledge and expertise to determine whether there exist other, perhaps significant benefits to SDOs that would keep SDOs in the standards development business.

This claim that SDOs would cease developing standards for IBR should IBR'd standards be required to be made available for free has been refuted by commenters as well as by the United States Court of Appeals for the Fifth Circuit in its *en banc* decision *Veeck v. Southern Bldg. Code Congress Intern.*, 293 F.3d 791 (5th Cir. 2002) (en banc)[9], *cert. denied*, 539 U.S. 969 (2003)[10]. In

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6 77 FR at 11414
7 77 FR at 11415
8 78 FR at 60788
9 http://www.law.cornell.edu/copyright/cases/293_F3d_791.htm
10 https://bulk.resource.org/courts.gov/c/US/539/539.US.969.02-355.html

Veeck, several organizations[11] submitted amicus briefs in support of SBCCI's position and the burden was on Veeck to show that the district court reached an erroneous decision. The Fifth Circuit held:

> Many of SBCCI's and the dissent's arguments center on the plea that without full copyright protection for model codes, despite their enactment as the law in hundreds or thousands of jurisdictions, SBCCI will lack the revenue to continue its public service of code drafting. Thus SBCCI needs copyright's economic incentives.
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> Several responses exist to this contention. First, SBCCI, like other code-writing organizations, has survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these. Second, the success of voluntary code-writing groups is attributable to the technological complexity of modern life, which impels government entities to standardize their regulations. The entities would have to promulgate standards even if SBCCI did not exist, but the most fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation. The self-interest of the builders, engineers, designers and other relevant tradesmen should also not be overlooked in the calculus promoting uniform codes. As one commentator explained,
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> > ... it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.
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> 1 Goldstein § 2.5.2, at 2:51.[22]
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> Third, to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with "value-added" in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. *In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves "the Progress of Science and useful Arts."* U.S. Const. art. I. § 8, cl. 8.

293 F.3d 791 at 805 (Emphasis added.) Please also refer to Public.Resource.Org's spot on analysis in its comment to the NPRM, OFR-2013-0001-0012. Through the many amicus briefs submitted in the case, any argument for the contention that making standards available for free would be detrimental to the SDO industry would presumably have been made in at least one of the briefs. The Fifth Circuit considered all of these arguments, but was "unpersuaded". Unless it demonstrably can be shown that there are arguments which the Fifth Circuit did not consider in *Veeck*, and which might have changed the Fifth Circuit's decision in *Veeck*, there is no reason to reject the determination of the Fifth Circuit.

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11 Building Officials and Code Administrators International (BOCA), International Code Council, International Conference of Building Officials, American Medical Association, American National Standards Institute (ANSI), American Society of Association Executives (ASAE), American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), American Society of Mechanical Engineers (ASME), National Fire Protection Association (NFPA), Texas Municipal League, and Underwriters Laboratories, Inc. (UL).

Additionally, I would like to point out that as part of the public comment period for NARA-12-0002, one SDO submitted comments in support of the petitioners. In NARA-12-0002-0099, ASHRAE wrote: "ASHRAE stands in general agreement with the Petitioner that IBR standards should be made available to interested individuals for free viewing online in read-only (non-downloadable) format. … ASHRAE strongly supports public access to our standards, and currently provides free-to-the-public online public read-only access, in non-downloadable format, to five of our standards. … In line with the recommendation of the Administrative Conference of the United States (77 FR 2257), ASHRAE encourages agencies to work with SDOs who hold the copyright to IBR standards to form a partnership wherein SDOs are able to provide public, read-only online access to IBR standards at no cost to the public."

Furthermore, as I outline below, many SDOs are now making IBR'd standards available online in read-only formats. If the OFR's opinion were correct, then SDOs would not do this.

78 FR at 60786:

> The daily Federal Register is not universally free. Section 1506(5) of the FRA authorizes the ACFR to set subscription rates for the Federal Register and other publications. Currently, a complete yearly subscription, that includes indexes, is $929.00. While GPO does not charge for online access to the Federal Register or to other federal government publications, including the CFR, Congress authorized the Superintendent of Documents to charge for online access to GPO publications. 44 U.S.C. 4101 requires the Superintendent of Documents, under the direction of the Public Printer, to maintain an electronic directory of Federal information and provide a system of electronic access to Federal publications, including the Congressional Record and the Federal Register, distributed by the Government Printing Office. Section 4102 allows the Superintendent of Documents to "charge reasonable fee for use of the directory and the system of access provided under section 4101." Paragraph (b) of this section states that the fees charged must be set to recover "the incremental cost of dissemination of the information" with the exception of the depository libraries, for electronic access to federal electronic information, including the Federal Register. While the Superintendent of Documents has chosen not to charge for electronic access to the daily Federal Register, this section does indicate that the Congress understands that there are costs to posting and archiving materials online and that recovering these costs is not contrary to other Federal laws, including the FRA and the APA.

In the NPRM, the OFR has not addressed whether the costs of distributing IBR'd material should be made a part of the OFR's regulations concerning when matters are "reasonably available". The OFR stated that it disagrees with the petitioners' assertion that the law requires IBR'd material to be made available for free to interested persons. However, the OFR has not considered whether a consideration of the costs for accessing matters IBR'd should be part of the determination of whether a matter is "reasonably available".

As the petitioners wrote: "Even should the Director disagree with this proposition—erroneously in our view—he should then make the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available. Since having the Internet eliminates any concern about having to print excessive materials, protecting copyright interests is the only possible rationale for permitting

incorporation by reference of materials members of the public might be required to pay to see."[12]

I also submitted the following comment: "Apart from the costs of physically obtaining the materials, including costs of printing, mailing supplies, postage, minimal material loan fees, necessary material handling fees, and/or nominal electronic document delivery fees ('distribution costs'), I believe that materials incorporated by reference must be free to all persons affected because it is further my belief that people are entitled to free access to copies of the laws and rules that they are required to follow. … Preconditions for access by affected persons to materials incorporated by reference **should never** include: payment of copyright royalties, intellectual property licensing fees, sublicense fees, patent fees, etc. or a requirement to sign or otherwise agree to be bound to a legal agreement such as an NDA that would infringe upon one's rights to understand, discuss with others, learn, debate, or speak of the existence of the material, or any part thereof, with or to any non-party to the agreement. I consider 'for free' to mean that a material is distributed without these blacklisted fees and/or costs, but allowing for the distribution costs mentioned earlier."[13]

Any meaningful amendment to the OFR's regulations at 1 CFR 51 must specify requirements as to what costs are reasonable. Considering the number of pages that are published in the Federal Register (78,961 in 2012[14]), $929.00 / 78,961 = $0.012 per page is unquestionably reasonable. NARA charges $0.80 per page for paper-to-paper reproduction[15]. Perhaps $0.80 per page should be the upper bound considered reasonable for the cost to reproduce a black-and-white page, with different upper bound charges applicable to color pages, color photos, and other types of media.

78 FR at 60787:

> Congress required that within one year of enactment (January 2013) the Pipeline and Hazardous Materials Safety Administration (PHMSA) no longer IBR voluntary consensus standards into its regulations unless those standards have been made available free of charge to the public on the Internet. Congress has not extended this requirement to all materials IBR'd by any Federal agency into their regulations. In fact, Congress has instructed the Consumer Product Safety Commission to use specific ASTM standards, which are not available for free. Thus, we disagree with the petitioners and the commenters who argue that Federal law requires that all IBR'd standards must be available for free online. By placing the requirement on PHMSA not to IBR standards that are not available free of charge on the Internet (and on CPSC to IBR standards that are not available free of charge), Congress rightfully places the burden on the subject matter expert to work with the SDOs to provide access to the standards these subject matter experts believe need to be IBR'd.

In the NPRM, the OFR pointed out how Congress has required that the Pipeline and Hazardous Materials Safety Administration (PHMSA) no longer IBR voluntary consensus standards into its regulations unless those standards have been made available free of charge to the public on the Internet. But, the OFR also stated "In fact, Congress has instructed the Consumer Product Safety Commission to use specific ASTM standards, which are not available for free. ([21] For

12 77 FR at 11416
13 NARA-12-0002-0098
14 Federal Register Pages Published 1936 – 2012. https://www.federalregister.gov/uploads/2013/05/FR-Pages-published.pdf
15 http://www.archives.gov/research/order/fees.html

example, 15 U.S.C. 2056b.)"

This is not entirely accurate or applicable to IBR and the Director's obligations under 5 U.S.C. 552(a).

First, the cited example of 15 U.S.C. 2056(b) requires the Consumer Product Safety Commission to "rely upon voluntary consumer product safety standards rather than promulgate a consumer product safety standard prescribing requirements described in subsection (a) of this section whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." This does not require voluntary standards from the ASTM to be used[16] and is only a direction to the CPSC to use standards instead of making their own when compliance with the voluntary standards would eliminate or adequately reduce the risk of injury addressed *and* it is likely that there will be substantial compliance with such voluntary standards anyway. If it is likely that there will be substantial compliance with such voluntary standards, then presumably this means that such standards are closer to being appropriately called "reasonably available" than standards which cannot be described as such. In other words, it is logical that such voluntary standards could not be termed "unavailable" or "unreasonably available".

Regardless, in cases where Congress requires an agency to rely upon certain standards for IBR, then the meaning of "reasonably available" of course means reasonably available within the parameters set by Congress, as Congress has required the agency to rely upon such standards; in cases where Congress has mandated that agencies use such standards, then the notion of matters "reasonably available" should take this into account. However, in all other cases where Congress has *not* imposed criteria, which is the majority of cases, "reasonably available" has *exactly the same meaning*. The preamble of the proposed rule could be used, in part, to describe such parameters set by Congress.

The OFR simply cannot infer from these two examples that Congress intends to "place[] the burden on the subject matter expert to work with the SDOs to provide access to the standards these subject matter experts believe need to be IBR'd". If anything, the OFR should infer the exact opposite. Congress is removing agency discretion with regard to making matters IBR'd reasonably available. In the case of PHMSA, IBR'd matters must be available free of charge on the Internet. In the case of the CPSC, the agency can only rely upon voluntary standards that meet the strict requirements of 15 U.S.C. 2056(b).

Second, where Congress passes a law requiring compliance with a specific standard[17], such standards are not, strictly speaking, IBR'd material.

Third, many IBR'd ASTM standards are available to read free of charge from ASTM International's reading room[18]. UL has a similar service[19].

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16 In fact, according to the CPSC's Voluntary Standards Activities FY 2013 Midyear Report (http://www.cpsc.gov//Global/Regulations-Laws-and-Standards/Voluntary-Standards/Voluntary-Standards-Reports/2013Midyear.pdf), the Commission also works with ANSI and Underwriters Laboratories Inc. (UL).

17 For example, Pub. L. 110–278, the 'Children's Gasoline Burn Prevention Act', states: "Effective 6 months after the date of enactment of this Act [July 17, 2008], each portable gasoline container manufactured on or after that date for sale in the United States shall conform to the child-resistance requirements for closures on portable gasoline containers specified in the standard ASTM F2517-05, issued by ASTM International."

18 http://www.astm.org/READINGLIBRARY/

19 http://www.ulstandards.com/IBR/ibrlogin.aspx

It is encouraging to see industry efforts to make IBR'd standards from SDOs available for free online. For example, one commenter to the NPRM has highlighted ANSI's new Incorporated by Reference (IBR) Standards Portal, available at http://ibr.ansi.org[20]. On ANSI's portal, the public can view read-only copies of IBR'd standards from IEC, ISO, AHAM, AWS, IAPMO, IES, and NEMA, and there are links to read-only viewing portals hosted by a few other SDOs including APA, API, ASHRAE, ICC, MSS, NACE, NFPA, and UL.

It is interesting to read ANSI's press release for its IBR portal[21], which quotes ANSI President and CEO S. Joe Bhatia as follows: "In all of our discussions about the IBR issue, the question we are trying to answer is simple. Why aren't standards free? In the context of IBR, it's a valid point to raise. … A standard that has been incorporated by reference does have the force of law, and it should be available. But the blanket statement that all IBR standards should be free misses a few important considerations. … Time and again, we heard that there is demand for a single solution, to make it easy for those affected by any piece of legislation to view the related IBR standards. But at the same time, there is also a strong need to allow for flexibility, so that each SDO can provide reasonable access in the way that makes sense for their business model and doesn't undermine their ability to function. … We believe that the ANSI IBR Portal does all that. And as coordinator of the U.S. standardization system, we are very proud to present this solution."

ANSI's IBR portal hosts standards in the FileOpen format, a read-only format for which FileOpen Systems, Inc. provides free browser plugins for Windows, Mac, Linux, iOS (iPad, iPhone, iPod), and Android systems[22]. ASTM uses an Adobe Flash solution. UL uses read-only PDFs. These are all acceptable solutions, and a win-win for the public, whose fundamental right to access the law and view IBR'd standards for free is preserved, and for the SDO industry, which can earn revenue by offering for sale a hard copy of the IBR'd standards.

78 FR at 60788:

> Transparency does not automatically mean free access. … An implied intent is to reduce the costs and burdens on taxpayers by not making them pay extra for something they don't need.

I think that this misses an important point. IBR is used to promulgate regulations by agencies who are carrying out work required by Congress, members of which are elected by the taxpayers themselves. The work of regulating agencies is not something "extra" that taxpayers do not need. The taxpayers elected their representatives to Congress and their representatives have enacted laws delegating rulemaking authority to agencies. In effect, the agencies are carrying out the work of the taxpayers[23]. Therefore, if an agency determines that IBR'ing material is the best way to carry out the agency's directives from Congress, then this is part of what all taxpayers have voted for and should be expected to pay for.

Perhaps there are individual taxpayers who do not "need" access to rules promulgated by certain agencies, but OFR should be considering the collective taxpayers, as every taxpayer is either

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20 OFR-2013-0001-0017

21 http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3771

22 http://plugin.fileopen.com/all.aspx

23 See also: *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915)

directly or transitively affected by the rulemaking activities of all agencies. An "obscure" agency rule might seem at first glance to have no impact on a particular individual, but everything is connected. The rule might affect the individual's employer, or a customer of the employer, or a family member, or a family member's employer or customer, etc.

78 FR at 60788:

> However, agencies are already directed to take into account the impact a rulemaking will have on small businesses, including an assessment of the costs involved, by various Federal statutes and Executive Orders. After making that assessment, agencies must then determine which standard, if any, is required.

An agency may be required to consider the costs involved should it decide to IBR certain materials, but the agency is not required to consider the costs of *only the "reasonably available" alternatives* for accessing the IBR'd matter.

Consider, for example, the Consumer Product Safety Commission's Safety Standard for Infant Bath Seats: Final Rule[24]: "Section 1215.2(a) explains that, except as provided in § 1215.2(b), each infant bath seat must comply with all applicable provisions of ASTM F 1967-08a, 'Standard Consumer Safety Specification for Infant Bath Seats,' which is incorporated by reference. Section 1215.2(a) also provides information on how to obtain a copy of the ASTM standard or to inspect a copy of the standard at the CPSC." Note that the CPSC revised this rule on December 9, 2013[25]. The revised 16 CFR 1215.2 states "Each infant bath seat shall comply with all applicable provisions of ASTM F1967-11a, Standard Consumer Safety Specification for Infant Bath Seats, approved September 1, 2011. … You may obtain a copy of these ASTM standards from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-2959 USA, phone: 610-832-9585; http://www.astm.org/. You may inspect copies at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal regulations/ibr_locations.html."

The Archives.gov URL referenced in the final rule is, unfortunately, broken. The new URL is: http://www.archives.gov/federal-register/cfr/ibr-locations.html. This page states: "If you are interested in obtaining a copy of a standard that has been incorporated by reference, contact the standards organization that developed the material. … In most cases, materials incorporated by reference are made available through the standards organization that developed the standard. Contact the standards organization or other designated sources through the address listed in the Federal Register or CFR. However, legal record copies of material incorporated by reference are also filed at the Office of the Federal Register (OFR) and other NARA facilities. **OFR does not distribute IBR materials.** Legal record copies are available for public inspection and limited photo-copying. If you would like to inspect material incorporated by reference at OFR's downtown Washington, DC location, you must submit a written request and make an

24 75 FR 31691. https://www.federalregister.gov/articles/2010/06/04/2010-13073/safety-standard-for-infant-bath-seats-final-rule

25 78 FR 73692. http://www.gpo.gov/fdsys/pkg/FR-2013-12-09/pdf/2013-29226.pdf

appointment for a specific day and time."

In other words, NARA instructs the public to contact the standards organization for copies. Alternatively, an interested person must submit a written request "at least a day in advance" containing "A detailed description of the material you wish to examine" in order to personally inspect a document only at the downtown Washington, DC office of the OFR. I don't believe that Congress had this convoluted procedure in mind when it required IBR'd material to be "reasonably available to the class of persons affected".

Technically, inspecting the IBR'd ASTM standard at the Office of the Secretary, U.S. Consumer Product Safety Commission in Bethesda, Maryland or at OFR's downtown Washington, DC office is "free" to affected persons, but if an affected person does not reside near Bethesda or Washington, DC, then expecting the affected person to travel to these locations is completely unreasonable. My point is that certain means of accessing IBR'd materials might be "free" or "low cost", but those means do not satisfy the "reasonably available" requirement, and regulating agencies are not required to consider the costs of *only the "reasonably available" alternatives* for accessing the IBR'd matter.

78 FR at 60791:

> In *Veeck*, the court held that *in some instances* model building codes developed by an organization adopted by government entities into regulations may become law, and to the extent that the building code becomes law it enters the public domain. Federal law still provides exclusive ownership rights for copyright holders ([42] 17 U.S.C. 106.) and provides that Federal agencies can be held liable for copyright infringement. ([43] 28 U.S.C. 1498(b).) Additionally, both the NTTAA and OMB Circular A-119 require that federal agencies "observe and protect" the rights of copyright holders when IBRing into law voluntary consensus standards.

This limiting interpretation of the Fifth Circuit's decision in *Veeck* is inaccurate. I am not sure where the phrase "in some instances" came from, but the *Veeck* opinion does not include that phrase.

In *Veeck*, the Fifth Circuit held:

> The issue in this *en banc* case is the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become "the law". Specifically, may a code-writing organization prevent a website operator from posting the text of a model code where the code is identified simply as the building code of a city that enacted the model code as law? Our short answer is that as *law*, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives. As model codes, however, the organization's works retain their protected status.

293 F.3d 791.

To the extent that a model code becomes the law, by being "identified simply as the building code of a city that enacted the model code as law", which individuals and businesses are subject to, the model codes "enter the public domain and are not subject to the copyright holder's exclusive prerogatives". However, the organization's works retain their protected status.

It is clear that like the model codes considered in *Veeck*, IBR'd material is part of the law. 5 U.S.C. 522(a) provides: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." However, IBR'd matter is deemed published in the Federal Register if IBR is approved by the Director of the OFR. Therefore, every affected person may "be required to resort to, or be adversely affected by" the IBR'd matter, making the IBR'd matter part of the law.

The reason why OFR should grant the petition more fully, in particular, grant the petitioners' request to require IBR'd matter to be available to the public either for free or at minimal cost, is that the *Veeck* precedent, as well as other precedents, and the dynamic "reasonably available" requirement of 5 U.S.C. 522(a) clearly require IBR'd matter, as *law*, to be available to public as such. Refusing to require that IBR'd material be available to the public either for free or at minimal cost does not change this fact. This is incredibly unfair to regulating agencies and SDOs because they might not be aware of the implications that IBR'd material is part of the law, and that therefore, the IBR'd material is "not subject to the copyright holder's exclusive prerogatives." If an SDO decides that it would be unable to sustain its standards development activities should its IBR'd standards be required to be made available to the public either for free or at minimal cost, then its standards must not be IBR'd. As the Fifth Circuit observed in *Veeck*, "the most fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation", but this won't happen to the level that is needed when the OFR does not require as a condition of IBR that the matter be available to the public either for free or at minimal cost.

(4) The OFR has not considered a significant aspect of the petition regarding "mak[ing] the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available."

I have already explained my comments on this point above, in discussing a certain paragraph on 78 FR at 60786.

(5) The OFR has not considered a critical argument made by some commenters regarding material that references and relies upon other documents.

For example, in NARA-12-0002-0147, the American Foundry Society (AFS) wrote: "Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers. These facilities are not only responsible for IBR standards that are referenced directly since there are many more standards that are indirectly enforced or used for interpretation. … The ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards."

Standards referencing other standards is a common occurrence. AFS mentions ASTM's foundry safety standard cross-referencing 35 other consensus standards. In NARA-12-0002-0109, Public.Resource.Org mentioned UL 142 Standard for Steel Aboveground Tanks for Flammable and Combustible Liquids which references UL 157 and UL 969[26]. The CPSC final rule on infant

26 http://www.comm-2000.com/productdetails.aspx?sendingPageType=BigBrowser&CatalogID=Standards&ProductID=UL142_9_S_20061228(ULStandards2)

bath seats mentioned earlier IBRs ASTM F1967-11a, which references ASTM standards D3359, F404, F963, and F977[27]. And, of course, referenced standards themselves reference other standards, such as ASTM D3359 referencing 10 other standards[28]. This creates a costly hierarchy of standards that are pulled in with a single act of IBR.

The OFR has not addressed this issue of standards referencing other standards, but I think that this is important. There needs to be a requirement that if a standard requested to be IBR'd depends on other documents, then these other documents must also be approved by the Director of the OFR for IBR.

Respectfully, I ask the OFR not to conclude the process of updating 1 CFR 51 here. It has been over 30 years since 1 CFR 51 was last considered in 1982. Accordingly, there are a lot of things to discuss which cannot adequately be covered through one notice—NPRM—final rule cycle.

The OFR should not adopt its NPRM as a final rule at this time. I request that the OFR consider the original petition's request to "make the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available"[29], revisit the findings made in the NPRM taking into account these comments, and revise the proposed wording of 1 CFR 51. Please also issue a revised NPRM so that I and others may comment on the changes to the proposed wording.

Sincerely,

Daniel Trebbien
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27 See the "Referenced Documents (*purchase separately*)" section: http://www.astm.org/Standards/F1967.htm
28 http://www.astm.org/Standards/D3359.htm
29 77 FR at 11416