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January 30, 2014

To: Charles A. Barth, Director, Office of the Federal Register, National Archives and Records Administration

Subject: Notice of Proposed Rulemaking on 1 CFR Part 51, Incorporation by Reference

Reference: OFR-2013-0001 (78 Fed. Reg. 191, October 2, 2013 and 78 Fed. Reg. 224, November 20, 2013)

Dear Mr. Barth:

Please find ASME's comments on the subject Notice of Proposed Rulemaking attached.

Thank you for the opportunity to submit comments on this important issue. If you have any questions, please contact Paul Fakes, Sr. Government Relations Representative at fakesp@asme.org or 1.202.785.4780.

Sincerely,

June Ling

Deputy Executive Director
ASME

Attachment

**ASME Comments on U.S. National Archives and Records Administration (NARA)
Office of the Federal Register (OFR) Notice of Proposed Rulemaking on Incorporation by Reference
January 30, 2014**

The American Society of Mechanical Engineers (ASME) submits this response to the notice of proposed rulemaking on 1 CFR Part 51 submitted by the Office of the Federal Register (OFR) in response to a petition seeking clarifications and revisions based on the practice of incorporation by reference (IBR).¹ These comments supplement those submitted by ASME on May 30, 2012 in response to the original petition.²

Background

Founded in 1880, ASME is a not-for-profit scientific, educational and technical organization for mechanical engineers, with over 125,000 individual members worldwide. It has no corporate members. ASME serves several important functions, one of which is the development and maintenance of over 500 voluntary consensus standards associated with the art, science and practice of mechanical engineering. These include standards for complex machinery such as boilers, pressure vessels, elevators and escalators and items as ubiquitous as nuts, bolts and plumbing fixtures. According to statistics maintained by the National Institute of Standards and Technology (NIST), there are over 600 references to 90 ASME standards in the Code of Federal Regulations, spanning 11 federal agencies.³ In addition, as a major standards development organization, ASME responds to about 35,000 standards-related inquiries each year.

Many of ASME's standards development activities predate the establishment of the federal agencies that now make use of them. The Boiler and Pressure Vessel Code (BPVC), for example, was first published in 1914. Because of ASME's track record of providing technical rigor and ensuring due process for all, the BPVC has become a resource not just for federal agencies, but for state and local jurisdictions and foreign governments in over 100 countries around the world.

ASME's reputation as a trusted neutral convener is predicated on its ability to foster an inclusive process that is not dominated by special interests. Volunteers that serve on ASME standards committees do not need to be members of the Society and there are no fees to participate. This greatly facilitates participation by all stakeholders, including individuals representing small businesses, academia, government agencies and public interest groups. By selling its standards, rather than charging to participate or accepting sponsorship, ASME is able to remove barriers to involvement and remain independent from excessive commercial or political influence.

Comments on Proposed Rulemaking

ASME supports the expressed positions contained within the supplementary information to the proposed rulemaking recognizing that:

- (1) "reasonably available" does not mean free of charge and online;
- (2) individual agencies are best suited to determining that IBR'd material is reasonably available;
- (3) costs to provide access are distinct from the costs to develop standards;
- (4) requiring all materials IBR'd into the CFR be made available free of charge 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;

¹ NARA 12-0002 (77 Fed. Reg. 11414, February 27, 2012)

² NARA-12-0002-0123

³ See <http://standards.gov/sibr/query/index.cfm> (Note: Some references designated as ANSI standards are ASME standards)

- (5) federal law provides exclusive ownership rights for copyright holders and provides that Federal agencies can be held liable for copyright infringement;
- (6) 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;
- (7) shifting the cost burden to agencies would result in the entire burden of the standards development process being borne by taxpayers;
- (8) transparency does not automatically mean free of charge; and
- (9) creating a system where the only determining factor for using a standard is whether it is available free of charge and/or online would “minimize and undermine the role of the Federal agencies who are the substantive subject matter experts and who are better suited to determine what standard should be IBR’d into the CFR based on their statutory requirements, the entities they regulate, and the needs of the general public.”

ASME also supports OFR’s efforts in encouraging federal agencies to continue to coordinate with private sector standards developing organizations and to provide summaries of incorporated material in the preamble to rulemakings, particularly as doing so would support the recommendation from the Administrative Conference of the United States (ACUS) that “Incorporated material may provide detail, but a regulation should, by itself, make the basic concept of the rule understandable without the need for the reader to refer to the incorporated material.”⁴

However, while ASME agrees that individual agencies are best suited to determining that IBR’d material is reasonably available, mandating that an agency discuss “ways in which it worked to make the materials it incorporates by reference reasonably available” as proposed for inclusion in 1 CFR § 51.5(a)(1) and (b)(2) is problematic as this wording implies there are varying degrees of “reasonable availability,” when **in both principle and practice the determination of reasonable availability is of a binary nature: material proposed for reference is either reasonably available or it is not.**

Existing OFR regulations already require that publications eligible for incorporation by reference must be “reasonably available to and usable by the class of persons affected”⁵ and for agencies to clearly state “where and how copies may be examined and readily obtained with maximum convenience.”⁶ Furthermore, the distinctions between “reasonably available” and “free of charge” have already been well considered and addressed within areas of the federal government, which has concluded that “reasonable basis” does not mean “free.”⁷ However, **as worded, the proposed language requiring agencies to discuss ways it worked to make material reasonably available will likely cause an inaccurate association between “reasonably available” and “free of charge on an internet website,” creating an expectation that is not supported by federal statute or policy.** This will not only undermine standards developing organizations that rely on the sale of standards in order to recoup their development costs and to make their standards available for government use, but may also undermine agencies and the general public by directing their focus on the mode of availability rather than on the broad rationale for incorporating a given standard or document.

⁴ Administrative Conference of the United States (ACUS) Recommendation 2011-5 *Incorporation by Reference* (Dec. 8, 2011)

⁵ 1 CFR § 51.7.(4)

⁶ 1 CFR § 51.9(b)(4)

⁷ See National Science and Technology Council Report, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* (Oct. 10, 2011) and Administrative Conference of the United States (ACUS) Recommendation 2011-5 *Incorporation by Reference* (Dec. 8, 2011) which note “...the text of standards and associated documents should be available to all interested parties on a reasonable basis, which may include monetary compensation where appropriate.”

Federal policy on incorporation by reference is established by the Office of Management and Budget (OMB) in OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*. Para (6)f of the Circular highlights considerations agencies should make when considering using a standard, and is excerpted below:

f. What considerations should my agency make when it is considering using a standard?

When considering using a standard, your agency should take full account of the effect of using the standard on the economy, and of applicable federal laws and policies, including laws and regulations relating to antitrust, national security, small business, product safety, environment, metrication, technology development, and conflicts of interest. Your agency should also recognize that use of standards, if improperly conducted, can suppress free and fair competition; impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety. If your agency is proposing to incorporate a standard into a proposed or final rulemaking, your agency must comply with the "Principles of Regulation" (enumerated in Section 1(b)) and with the other analytical requirements of Executive Order 12866, "Regulatory Planning and Review."

While the above OMB guidance does not mention availability as a topic for agencies to consider, it is clear that **availability is but one factor among many for agencies to consider when choosing to incorporate a standard by reference.** Over-emphasis on availability may have the unintended consequence of having decisions to incorporate standards be heavily biased towards the cost of obtaining a standard rather than on its technical merit or commercial relevance. Directing regulatory agencies to focus on cost, rather than on safety, would create an obligation in direct conflict with the fulfillment of their public service objectives.

Recommendation

If the OFR believes additional explanatory language regarding agencies' decisions to incorporate a standard by reference is needed in the preamble of a proposed rule, it should not overemphasize the means of availability of the incorporated material; the directive should also be consistent with existing statutes and policies and not create a nebulous requirement for federal agencies. The below modifications would address our concerns.

1 CFR § 51.5

(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~~ factors it considered [including availability] in proposing to incorporate material by reference 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.

...

(b) In a final rule, the agency must request formal approval by:

(2) Discussing, in the preamble, the ~~ways in which it worked to make the materials it incorporates by reference reasonably available to interested parties and how interested parties can obtain the materials~~ factors it considered [including availability] in proposing to incorporate material by reference;

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