SUBMISSION TO
OFFICE OF MANAGEMENT AND BUDGET
EXECUTIVE OFFICE OF THE PRESIDENT

ATTN: Administrator Howard Shelanski
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

DATE: April 11, 2014

SUBJECT: RRC on a Proposed Revision of OMB Circular No. A-119:
"Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"

DOCKET: OMB-2014-001

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Public.Resource.Org submits this statement in response to the above-titled Request for Comments. Our comment is addressed to the issue of public access to standards incorporated by reference into federal law.

OMB's position, as expressed in the Federal Register, is:

- at odds with 180 years of U.S. court decisions that clearly state that the law cannot be protected by copyright because the law belongs to the people;
- at odds with President Obama's commitment to open and effective government;
- at odds with the promise of the Internet to create opportunity and economic growth; and
- at odds with the vitally important mission of our regulatory agencies to protect and promote public safety.

We respectfully request that OMB reconsider its analysis and revise OMB Circular No. A-119[1] ("the Circular") to clearly reflect the principal that standards—once they are incorporated into federal law—enter the public domain and must be freely available to citizens to read and speak as they please.

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[1] Office of Management and Budget, Circular No. A-119, Revised, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, February 10, 1998. http://www.whitehouse.gov/omb/circulars_a119

1. The Notice of Proposed Rulemaking (NPRM) paid short thrift to an important public concern.

OMB asserts that the current standards-setting process will collapse if citizens are fully permitted to read and speak those standards that have been incorporated into law. But the federal courts have examined and rejected that assumption, and rightly so. The theory is wrong.

OMB's analysis is the product of a flawed process that has favored the participation of a few self-interested standards development organizations (SDOs), and ignored the views of a wide range of Americans—small business, labor, public safety and consumer groups, Internet freedom and open government advocates, and many others. This flawed process has ignored the direct and specific requirements set out by President Obama in a series of ground breaking presidential directives governing how government data shall be managed and made available.

When the NPRM addresses the suggestion of Public.Resource.Org and other commenters that standards incorporated by reference should be, like other provisions of federal law, available for people to read and use without restrictions, it employs what appear to be "air quotes" to indicate that there is no "free lunch":

> *OMB does not believe the public interest would be well-served by requiring standards incorporated by reference to be made available "free of charge." As some commenters on the RFI pointed out, the costs of standards development are substantial, and requiring that standards be made available "free of charge" will have the effect of either shifting those costs onto others or else depriving standards developing bodies of the funding through which many of them now pay for the development of these standards. Such changes could have serious adverse consequences on important governmental objectives, including the ability of U.S. regulators to protect the environment and the health, welfare, and safety of U.S. workers and consumers.*[2]

We don't want to make a federal case out of quotation marks, but they do clearly indicate that OMB has not taken this process seriously. If the overall thrust of the NPRM's discussion of the IBR issue is any clue, we fear it may reflect OMB's conclusion that allowing citizens unfettered access to their own laws is unrealistic or naïve. When we say "free" we do not mean free as in "free beer" but free as in "freedom."

This is an important issue, the public deserves to be taken seriously, and OMB has an obligation to listen. Instead, OMB went through the motions in a flawed and unfair process that raced to a foregone conclusion. The public deserves better than a token rubber stamp when it comes to how we are allowed to read and speak the laws that govern our public safety.

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[2] Office of Management and Budget, Request for Comments on a Proposed Revision of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 79 FR 8207, February 11, 2014. https://federalregister.gov/a/2014-02891

2. The NPRM tries to make the case that paying hundreds of dollars to read a legally-mandated standard meets the definition of "reasonably available."

According to the NPRM, "OMB is seeking comment on whether to provide agencies with criteria to consider when determining whether a voluntary standard is 'reasonably available.'" This is a relevant inquiry because the Freedom of Information Act allows the Director of the Federal Register to deem as effectively published in the Federal Register material that is incorporated by reference into a regulation, but only if such material is "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a)(1) which is implemented in 1 CFR § 51.

The Director of the Federal Register is charged with approving each instance of incorporation by reference requested by federal agencies. In order to be eligible for incorporation for a reference, a publication must "substantially reduce[s] the volume of material published in the Federal Register" and be "reasonably available to and usable by the class of persons affected by the publication." 1 CFR § 51.7(a)(3) and (a)(4).

Instead of proposing that the "reasonably available" requirement reflect the mandate that citizens have open access to their own laws, the NPRM proposes revisions to the Circular that are in large measure taken from the December 2011 recommendations of the Administrative Conference of the United States (ACUS).[3] OMB's draft revised Circular states:

> *In determining whether a standard is "reasonably available" to regulated and other interested parties, agencies should take into account the following factors, given that reasonable availability is context-specific.*
>
> *i. Whether the standards developer is willing to make read-only access to the standard available for free on its website during the comment period, since access may be necessary during rulemaking to make public participation in the rulemaking process effective;*
>
> *ii. The need for access to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny;*
>
> *iii. The cost to regulated and other interested parties to obtain a copy of the material, including the cumulative cost to obtain incorporated materials, and their ability to bear the costs of accessing such materials in a particular context; and*
>
> *iv. Whether the standards developer can provide a freely available, non-technical summary that generally explains the content of a standard in a way*

[3] Administrative Conference of the United States, Incorporation by Reference, Recommendation 2011-5, December 8, 2011. http://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf

> *that is understandable to a member of the public who lacks relevant technical expertise.*

> …

> *If an agency incorporates by reference material that is freely available, the agency should ensure that the material is available electronically in a location where regulated and other interested parties will be able to find it easily by, for example, providing a link to the website of the voluntary standards body. If an agency incorporates by reference material that is copyrighted or otherwise subject to legal protection and not freely available, the agency should work with the relevant standards developer to promote the availability of the materials, such as through the use of technological solutions, low-cost-publication, or other appropriate means, while respecting the copyright owner's interest in protecting its intellectual property.*

These OMB and ACUS proposals provide for access to standards—but only the very minimal access possible. The proposals maintain that SDOs should set the terms for public access, and that the public be required to obtain a license before reading the law or speaking the law.

3. <u>The government proposals mirror those of a few well-heeled SDOs eager to extract rent from our public safety laws.</u>

The government proposals have proceeded in lock-step with those of a few SDOs—under intense pressure to appear to accept a measure of openness—to make some standards incorporated by reference available on their own websites, again with major restrictions.

For example, the American National Standards Institute has recently announced its new "IBR Portal." [4] ANSI maintains that this website should be the exclusive method for free access to standards and that any attempts to copy or distribute standards is subject to stringent license requirements and significant limitations:

- The "legal reading room" requires all users to pre-register before accessing standards and to agree to strong terms of use.
- Users are required to install special Digital Rights Management (DRM) software on their computer, software that only runs on selected operating systems and does not support mobile or other platforms.
- Users are required to re-register on each day they wish to access standards.
- Registered users are able to read the documents if they use one of the specific web browsers that are allowed, but cannot print, save, search, copy, or even take a screenshot.

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[4] American National Standards Institute, *ANSI Launches Online Portal for Standards Incorporated by Reference*, October 28, 2013. http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3771

ANSI joins other organizations, including the National Fire Protection Association, ASTM, ASHRAE, Underwriters Laboratories, and the American Petroleum Institute, who all have recently added their own carefully protected and monitoring "reading rooms." Because most agencies incorporate standards from numerous sources, if one wants to read the law pertaining for example to an area such as hazardous material transport, one can only do so by registering on a half-dozen incompatible sites, each with their own technical requirements and unique restrictions on use.

Reading the law is fundamental, but speaking the law is equally important. Activities that Public.Resource.Org undertakes—such as putting all the standards required by law in one location with common access methods or rekeying the texts in order to make them searchable and available on new platforms—are purportedly prohibited under this scheme advanced by the SDOs and their license agreements.

Even more insidious under this scheme advanced by ANSI, one's use of the law is carefully monitored. In a briefing to the International Electrotechnical Commission, for example, ANSI agreed to provide regular reports on usage of documents.[5] NFPA's reading room, as a condition for reading the law, requires that visitors agree to promotional messages and campaigns to up-sell them on goods and services.

Like these half-measures by the SDOs, the ACUS and OMB proposals are insufficient changes that ignore the case law mandating citizen access to the law, and impede the promises of a truly open society and economy.

4. People are entitled to full access to their laws, including standards incorporated by reference into federal law.

Edicts of government are the rules of general applicability by which we choose to govern ourselves as a society. When John Adams said we are "an empire of laws, and not of men," he meant that our democracy is based on public laws that we all know, not on the arbitrary actions taken in star chambers or smoke-filled back rooms. [6]

Public laws include without doubt the important public safety regulations that govern our daily life. As Joe Bhatia, the President of the American National Standards Institute said: "A standard that has been incorporated by reference does have the force of law, and it should be available."[7]

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[5] United States National Committee of the IEC, Meeting Minutes, USNC Council 576, August 13, 2013. http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/International%20Standardization/IEC/USNC%20COUNCIL/USNC%20COUNCIL%20576%20Minutes.pdf

[6] John Adams, Thoughts on Government in Revolutionary Writings, 1775-1783 (Library of America: 2011), p. 48.

[7] Joe Bhatia, ANSI's New IBR Portal Provides Access to Standards Incorporated by Reference, Administrative Conference of the United States Blog, November 4, 2013. http://www.acus.gov/newsroom/administrative-fix-blog/ansi%E2%80%99s-new-ibr-portal-provides-access-standards-incorporated

That ignorance of the law is no excuse is a principle firmly rooted in the law, a principle that can only be true if our laws are public.[8] All modern democracies are based on the doctrine of the rule of law, a doctrine firmly embedded in our common law, enshrined in international treaties, and one of the underpinnings of the constitutions of the United States and other nations.[9]

Legal scholars rarely agree on a single point, but on the idea that the law must be promulgated to be effective, they are unanimous. Professor Tamahana, for example, in his standard text on the subject stated, "Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance."[10] That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see, a point made so well by Senator Robert C. Byrd in his classic lectures on Roman history delivered on the floor of the U.S. Senate.[11]

The issue is about access to justice and, but having the laws accessible and the rules known to all is also essential to the proper functioning of our economy. Lord Bingham, in his essay on the rule of law, stated "the law must be accessible…the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations."[12]

The ability to know the law—to read the law—is essential to the functioning of our democracy. But the principle goes even further. Citizens must have the right to speak the law. The First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law.[13] By the

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[8] The doctrine of *ignorantia legis neminem excusat* has been repeatedly affirmed. *See, e.g.,* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.") https://law.resource.org/pub/us/case/reporter/US/402/402.US.558.557.html

[9] *See* Carl Malamud, 12 Tables of Code, Public.Resource.Org, January 7, 2013. https://law.resource.org/pub/12tables.html

[10] Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge University Press, 2004), p. 34. The classic statement of the doctrine is A.V. Dicey, Introduction to the Study of the Law of the Constitution (1885, reprinted by Liberty Fund: 1982).

[11] Robert C. Byrd, The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism (U.S. Government Printing Office, 1995), pp. 33, 128, 135. Public.Resource.Org has also made these lecture available on YouTube. http://www.youtube.com/playlist?list=PL1E1633114E0E358F

[12] Thomas Henry Bingham, The Rule of Law (Penguin Press: 2011), pp. 37–38.

[13] *Cf.* Nieman v. VersusLaw, Inc., No. 12-2810 (7th Cir. Mar. 19, 2013). ("The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed.") http://scholar.google.com/scholar_case?case=3425029550204747378

same token, equal protection of the laws and due process are jeopardized if some citizens can afford to purchase access to the laws that all of us are bound to obey—with potential criminal penalties for noncompliance—but others cannot.[14]

As discussed in greater detail in our comment in response to OMB Request for Information 2012–7602,[15] U.S. courts have made clear that the law cannot be denied from the people because of copyright claims. The Supreme Court in Wheaton v. Peters, 33 U.S. 591 (1834), and Banks v. Manchester, 128 U.S. 244 (1888), held that the law "is in the public domain and thus not amenable to copyright." Veeck v. Southern Bldg. Code Congress International, Inc. (SBCCI), 293 F.3d 791, 796 (5th Cir. 2002) (en banc), *cert. denied,* 539 U.S. 969 (2003).

Wheaton, Banks, and Veeck all concerned comparable fact patterns: One private party was trying to stop another private party from publishing material that was part of the law. In Wheaton, the issue was judicial opinions. Henry Wheaton claimed exclusive copyright on "his" opinions and tried to prevent another reporter, Richard Peters, from publishing opinions of the Supreme Court.[16] Without this important decision, the Westlaw National Reporter System® could never have come to be.

In Veeck, it was a model building code, incorporated by reference into the laws of two Texas towns, that Peter Veeck posted on his website to inform his fellow citizens about the requirements of the laws governing them. The en banc Fifth Circuit held for Veeck, concluding that "public ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it." 293 F.3d 791, 799. The Justice Department in 2003 told the U.S. Supreme Court that the Fifth Circuit had correctly decided Veeck, and the Supreme Court denied review.[17] We believe Veeck is entirely on point with today's debate over standards incorporated by reference into federal law.

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[14] *Cf.* Harper v. Va. State Bd.of Elections, 383 U.S. 663, 666 (1966). (A state violates the Equal Protection Clause "whenever it makes the affluence of the voter or payment of any fee an electoral standard"); See also Magna Carta cl. 29 (1297). ("We will sell to no man, we will not deny or defer to any man either Justice or Right.")
https://law.resource.org/pub/us/case/reporter/US/383/383.US.663.48.655.html
http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents

[15] Public.Resource.Org, Submission to the Office of Management and Budget, Docket No. OMB-2012-7602, April 11, 2012.
https://law.resource.org/pub/us/cfr/regulations.gov.docket.02/0900006480fed9f0.pdf

[16] Craig Joyce, 'A Curious Chapter in the History of Judicature': Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic), Houston Law Review, Vol. 42, 2005, p. 325.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=801226

[17] Brief for the United States As Amicus Curiae, U.S. Supreme Court 02-355, May 2003. ("The court of appeals reached the correct result in this case…plenary review of this case is not warranted.")
http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0355.pet.ami.inv.pdf

In none of those three cases was anyone trying to prevent the first party from selling copies of such material, and Public.Resource.Org does not question the right of SDOs to sell standards incorporated by reference into law. Rather, we believe, as the courts concluded in those cases, that once material has become law, then everyone has the right to read it and to speak it, without limitation—and that that proposition clearly applies to standards incorporated by reference into federal law.

5. <u>The NPRM undercuts President Obama's commitments to open, effective government and to economic innovation and growth.</u>

The President's first executive action upon taking office in January 2009 was a memorandum entitled "Transparency and Open Government."[18] The President boldly declared that his administration was "committed to creating an unprecedented level of openness in Government." He pledged the administration would "take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public."

Five years later, OMB, the nerve center of the Obama Administration's policy-making efforts, has issued an NPRM that goes against all the mandates of that presidential memorandum. In the NPRM, OMB advocates for the right of SDOs to continue to conceal, and prevent others from freely using, standards that are provisions of law with all the force of the texts of federal laws and regulations.

OMB adopts the position of a few well-heeled SDOs even though the president's directive demanded that government enhance citizens' ability to engage in the policy process, and citizens are now hampered from effective participation in crafting, evaluating and updating regulations because they do not have free access to read and disseminate the provisions of many standards that are to be, or have been, incorporated into those regulations.

OMB adopts the SDO position even though the power of the Internet makes it possible for government, non-profit groups, entrepreneurs, and average citizens to present the law, including standards incorporated into law, in useful and innovative ways. Making the law available is a threshold condition, without which the promise of the President's Open Government Directive[19] or his even more ambitious directive for Open and Machine Readable data[20] will lay fallow.

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[18] President Obama, Memorandum for he Heads of Executive Departments and Agencies, January 21, 2009. http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/

[19] President Obama, Open Government Directive, M-10-06, December 8, 2009. http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf

[20] President Obama, Executive Order—Making Open and Machine Readable the New Default for Government Information, May 9, 2013. http://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government-

6. The very purpose of the Official Journals and the Code of Federal Regulations is to promulgate the law.

To understand the imperative for and value of public access to materials incorporated by reference, consider how and why the Federal Register and Code of Federal Regulations became a component of our law in the first place.

The aim of the Federal Register was to take a disparate and increasingly unruly and inaccessible body of federal rules and aggregate them so citizens and institutions could better know, understand, and comply with the law. The catalyst for the creation of the Federal Register was a seminal 1934 law review article by Professor Erwin Griswold, written at the urging of Justice Brandeis and Felix Frankfurter.[21]

Griswold opened his essay by declaring:

> *Administrative regulations "equivalent to law" have become important elements in the ordering of our lives today. Many cases have reiterated the rule that executive regulations properly made have "the force and effect of law." The volume of these rulings has so increased that full, accurate, and prompt information of administrative activity is now quite as important to the citizen and to his legal advisor as is knowledge of the product of the Congressional mill. There should consequently be no need to demonstrate the importance and necessity of providing a reasonable means of distributing and preserving the texts of this executive-made law.*

Griswold then walked the reader through a growing inventory of federal government regulations and concluded:

> *No search of the statutes can be complete until the applicable executive pronouncements have been examined. When the legal effect of a statute depends on an administrative ruling, the order bringing the statute to life or tolling its existence should be as readily available as the statute itself.*

Griswold proposed the creation of an "Official Gazette" that published all federal regulations, as well as a regularly published index of all regulations in force—the blueprint for the Federal Register and Code of Federal Regulations. He concluded:

> *Until some such measure is adopted, it may well be said that our government is not wholly free from Bentham's censure of the tyrant who punishes men "for disobedience to laws or orders which he had kept them from the knowledge of."*

The Office of the Federal Register has a long proud history.[22] Griswold would be aghast to see that access to the law has become subject to passing a toll booth.

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[21] Erwin Griswold, "Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation." 48 Harv. L. Rev. 198, December 1934.

[22] Office of The Federal Register, A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register. http://www.archives.gov/federal-register/the-federal-register/history.pdf

7. Griswold's vision has been perverted into an attempt to grant monopolies over the right to read and speak the law, the very antithesis of public access.

What has become of Griswold's vision in our time? The work that he inspired and that many others carried out to bring order to the law and make its provisions once again accessible to the people through the Federal Register and CFR has been undone. It has been undone not by the practice of incorporation by reference itself, but by the lack of reasonable public access to many of the standards and materials that the government has incorporated by reference into federal regulations. The CFR has been transformed from a mechanism to inform citizens into a profit opportunity for a few private organizations.

This situation is particularly unfortunate because the power and widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees, a more legitimate argument when printed physical documents were the only means of transmission.

Today, the only thing impeding the broader availability to the public of standards incorporated by reference into the law—hyperlinked to the regulations that incorporate them, and presented in new and innovative ways to spur innovation and better understanding of government and the economy —is the self-interest of a few SDOs in charging monopoly prices for the standards.

If standards incorporated into law were freely available to read and disseminate, the results would be dramatic and immediate:

- Contractors, manufacturers, and other small businesses, homeowners and consumers, would be closer to the laws that bind us, and compliance with and understanding of the law would improve.
- Government managers and first responders would not have to choose between cutting valuable program budgets and buying the standards they need to access in an emergency, such as a pipeline explosion.
- Advocates, activists, researchers, journalists would be able to more effectively analyze and promote discussion of our laws, and engage with government on reforming and improving the law.
- Entrepreneurs could build new businesses presenting the interlocking world of laws, regulations, and incorporated standards in dynamic and useful new ways.
- Broader public availability of standards incorporated by reference would highlight the need for government to replace old, outdated standards with new ones—an issue of clear concern to OMB.

All of those benefits would be ours, if only OMB and NIST were not so in terror of their SDO partners threatening to shut down standards development if they face a potential diminishment of one component of one revenue stream.

8. There is no reason to believe, and to sacrifice important policy goals to the belief, that if OMB Circular No. A-119 required that only standards made available without restriction be eligible for incorporation by reference, the current standards process would collapse. The sky will not fall.

OMB's suggestion that, if the government expected that all materials incorporated by reference be available for free, then codes or standards published by SDOs might well be unavailable for incorporation by reference seems to rest on the assumption that if the government imposed such a requirement, SDOs would react not by making their standards truly available to the public online but rather by ending or curtailing their work to create standards and/or by resisting government efforts to incorporate their standards into law.

That assumption has been refuted, not only by comments filed in this proceeding and the related proceeding before the Office of the Federal Register, but also by the 5th Circuit in Veeck. The Fifth Circuit specifically addressed the policy and empirical issues regarding what might happen if courts, as that court did, expressly upheld the right of a citizen to communicate the law, in that case the right of a citizen to post the building code of his town, derived from a model code. Rather than assume, as the OMB's NPRM seems to, that the entire system of private standard-setting might collapse, the 5th Circuit examined the arguments of the code body asserting copyright, SBCCI, and determined that allowing citizens to speak their own laws would not end this beneficial system:

> *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.*
>
> *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. 1 Goldstein § 2.5.2, at 2:51.*

> *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.*
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> *293 F.3d 791, 806 (footnotes omitted).*

These conclusions expressed by the court in Veeck are even more powerful today. Notwithstanding the issuance of the Veeck decision itself, and the U.S. Supreme Court's denial of review, SDOs have continued to create and issue standards for over a decade. SDOs also have continued to press federal and state authorities to incorporate their standards into law while at the same time aggressively defending their purported exclusive rights to publish that law .[23]

Like the code body who pursued its copyright claim against Peter Veeck, the argument of SDOs in Washington today is that allowing citizen access to standards incorporated by law won't work because they need the money. The SDOs need money, but they make lots of money already:

- The National Fire Protection Association reported 2011 revenue of $80.7 million in 2011 and paid its non-profit CEO $1,044,035.[24]
- The American National Standards Institute reported 2012 revenue of $36.5 million and paid its non-profit CEO $1,036,926 for 35 hours of work a week.[25]
- The CEOs of the ten leading SDOs, all of them nonprofits, earned more than the President of the United States.[26]

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[23] *See* Public.Resource.Org, Inc., Counterclaim For Declaratory Judgment, Answer To Complaint For Injunctive Relief, And Jury Demand, American Society For Testing And Materials *et. al.* v. Public.Resource.Org, Inc., Case No. 1:13-cv-01215-EGS, Aug. 6, 2013, at 9–15.
https://archive.org/download/gov.uscourts.dcd.161410/gov.uscourts.dcd.161410.25.0.pdf

[24] National Fire Protection Association, Report of Organization Exempt From Income Tax, Form 990, 2011.
https://archive.org/download/IRS990-2012_10_EO/04-1653090_990_201112.pdf

[25] American National Standards Institute, Report of Organization Exempt From Income Tax, Form 990, 2012.
https://archive.org/download/IRS990-2013_07_EO/13-1635253_990_201212.pdf

[26] Public.Resource.Org, 12 Tables of Code, Table 3, Table of Revenue and Renumeration, January 7, 2013.
https://law.resource.org/pub/table03.html

The SDOs may need to adjust their business models to meet the realities of the Internet, but have not all organizations had to adjust their practices?

Incorporation into law is not an accidental taking of the SDOs' work, it is the very purpose of their enterprise. The NFPA wants its standards to be required in all 50 states and hires numerous full-time staff to convince states to require its codes.[27] NFPA lobbies vigorously for adoption of its codes, and when they are successful, they trumpet the news in press releases.[28] The NFPA is an active participant in coalitions such as Build Strong American which urge governments to incorporate more of their codes into law and to always incorporate the latest revisions.[29]

When a document such as the National Electrical Code is incorporated by law in all 50 states and required by the federal government, the NFPA has received an invaluable endorsement, the *Gold Seal of Approval of the United States of America.* They want these codes to become the law and when they are granted and delegated that privilege to make the law, they gain an amazing marketing advantage.

Allowing citizens to freely disseminate standards incorporated by reference will not eliminate the ability of SDOs like NFPA to earn revenue, including from selling standards. There will remain a market for print volumes officially transmitted from the relevant SDO, and for products related to the standards—commentary, FAQs, handbooks, annotated codes and other interpretive information. In addition, the SDOs today have numerous other means of earning revenue, including selling copyrighted standards that are not incorporated in to law, selling membership dues, conducting trainings, providing certification, charging conference fees, and obtaining government research grants.

Accepting the SDO sky-is-falling assertion as a reason to prevent serious reform not only ignores the facts, it disrespects the investment that taxpayers make in the their success and privileged position. OMB's proposed revisions to the circular, as the NPRM notes, would encourage federal agencies to continue to participate in the work of SDOs, including standards development activities.

OMB wants government officials, whose salaries are paid by taxpayers, to keep helping develop standards for private entities. Those SDOs are almost all IRS-

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[27] National Fire Protection Association, Website Provides Resources for National Electrical Code Adoption, June 11, 2013. http://www.nfpa.org/press-room/news-releases/2013/electrical-code-coalition-launches-website

[28] See, e.g., NFPA, "NFPA 101 Life Safety Code now required by Dept of Vet Affairs in state homes nationwide," March 29, 2011. http://www.nfpa.org/press-room/news-releases/2011/latest-from-nfpa-101-life-safety-code-now-required-by-dept-of-vet-affairs-in-state-homes-nationwide

[29] BuildStrong Coaltion, BuildStrong Coalition Testifies Before Congress on Importance of Strong Building Codes, July 24, 2012. http://www.buildstrongamerica.com/wp-content/uploads/T&I%20Subcommittee%20Hearing%20Press%20Release.pdf

certified charitable organizations who receive preferential treatment under the tax code. Yet OMB then defends the right of these SDOs, having developed standards with the assistance of federal workers, to deny citizens unrestricted access to those same laws. We cannot turn the laws that bind us into a private concession.

The government is indeed spending considerable amounts of money on supporting the SDOs' work. In the case of ASHRAE, for example:

- Over 100 U.S. government officials from organizations that include the Army, Air Force, Centers for Disease Control, numerous national laboratories, Department of Energy, Department of Housing and Urban Development, General Services Administration and even the National Gallery of Art play an integral part in the standards development process.[30]
- The government pays a $74,872 salary for an ASHRAE member to spend a year at DOE headquarters as an "ASHRAE DOE Fellow."[31]
- ASHRAE's effort to lobby governments to incorporate its codes as law are greatly assisted by the National Institute of Standards and Technology, which recently published a study urging all states to upgrade their laws to require the latest version of ASHRAE 90.1, the Energy Standard for Buildings.[32]

In addition to the costs of thousands of government employees participating in the standards development process, there are huge direct costs incurred by the government in purchasing copies of standards they must enforce. USASpending.Gov shows $7,659,842 in federal funds going to the National Fire Protection Association,[33] $88,706,506 in spending with the American Society for Testing and Materials,[34] and $36,896,262 in spending with the American National Standards Institute.[35]

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[30] Based on an analysis of published ASHRAE technical committee rosters on December 15, 2013. Note that not all technical committees publish their rosters and not all that do publish affiliations of their members.
http://www.ashraetcs.org/

[31] ASHRAE DOE Washington Fellowship, visited April 5, 2014..
https://www.ashrae.org/government-affairs/ashrae-doe-washington-fellowship

[32] Joshua Kneifel, Benefits and Costs of Energy Standard Adoption in New Commercial Buildings, NIST Special Publication 1147, February 2013.
http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1147.pdf

[33] USASpending.Gov Report, National Fire Protection Association, visited April 5, 2014.
http://usaspending.gov/explore?recipientid=001963206&recipientname=NFPA&fiscal_year=all

[34] USASpending.Gov Report, ASTM International, visited April 5, 2014
http://usaspending.gov/explore?contractorid=557163081&contractorname=ASTM%20international&fiscal_year=all

[35] USASpending.Gov Report, American National Standards Institute, visited April 5, 2014
http://usaspending.gov/explore?contractorid=073294837&contractorname=ANSI&fiscal_year=all

There is a tremendous amount of money in the standards development process, including public money, and those private organizations that have chosen to participate in the process have an explicit goal of making their work into law, a position they exploit with generous salaries and very large revenue streams. Making the law available to the public must be permitted as part of the bargain they have made with the American people to retain this privileged position. Having the law be available to the public is not a burden, it is a fundamental underpinning of the rule of law in our society.

Given these factors, we strongly believe that, if the OMB circular required that only standards made available without restriction be eligible for IBR, then SDOs would continue to promulgate standards and urge their incorporation into law; SDOs, government, and various private entities would make standards incorporated by reference available to the public without restriction; and the courts would uphold any challenges to such action.

9. <u>OMB's conclusions thus far come out of a flawed, one-sided process that has summarily dismissed the views of key stakeholders.</u>

OMB has reached the conclusions in the NPRM following a process that, it appears to us, has favored the special interest SDO lobby and largely shut out others.

Public Resource raised these significant due process concerns in a letter dated May 21, 2012, that we sent to your predecessor, Administrator Cass R. Sunstein.[36] Our letter expressed our concerns that the process had not been fair, and that the lack of fairness could potentially affect the result. We requested a response, but we never received one.

OMB's March 30, 2012, notice initiating this process announced not only a request for written comments but also a May 15, 2012, workshop whose stated purpose was to inform OMB on standards issues and the advisability of reforms. Public.Resource.Org requested from OMB the opportunity to participate in the workshop. We were not invited to participate, and nor we ever informed that we would not be invited to participate.

The presenters at the May 15 workshop, held at NIST in Gaithersburg, were almost entirely representatives of industry or the government. On the incorporation by reference panel, three representatives of industry gave emphatic presentations supporting the status quo; government representatives did not take strong positions; and only one participant, attorney James Conrad, expressly argued in favor of free

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[36] Public.Resource.Org, Letter to Hon. Cass R. Sunstein, OIRA, May 21, 2012. https://law.resource.org/pub/us/cfr/omb.workshop.20120521.pdf

access to standards incorporated by reference. Mr. Conrad was the only presenter all day who spoke even incidentally about public access.[37]

Similarly, a May 1, 2012, "Implementation Summit" co-sponsored by the Administrative Conference of the United States and the U.S. Chamber of Commerce, held at the Chamber building, included an IBR panel that featured five government speakers, none of whom argued expressly for free access to IBR materials, an industry representative, and no one who expressly advocated for strong reforms.

We do not take the position that Public.Resource.Org had a right to be on one of your panels, although we have built up expertise in this area, and did, to our knowledge, file the most extensive comment in support of reform. There were any number of individuals OMB might have invited to participate and add to the voices for reform, thus providing a more balanced discussion.

The lack of broader availability of these technical standards has been an issue of growing concern to a growing number of people and organizations, particularly as access to electronic information has become a priority for successive Congresses and Presidents.[38]

10. Public opinion—and the will of Congress—are firmly on the side of greater public access to standards required by law, but OMB has chosen not to listen to either.

The Congress was so shocked by the high cost of crucial, legally-mandated safety documents during the BP Gulf Oil Spill that it amended the Pipeline Safety Act of 2011 with a provision that "the Secretary may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site."[39] At a subsequent Department of

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[37] The lack of process fairness continued beyond the workshops. On May 16, 2012, a NIST staff member responded to an email from Malamud with a message that concluded "BTW, OMB has extended the comment period on their RFI to June 1st. This was announced at the close of the workshop yesterday." The original deadline was April 30. OMB did not publicly post, in the Federal Register or elsewhere, notification of that extension. Instead the only announcement (other than the "BTW" mention that we received because we happened to be have sent an email) was to a crowd that consisted almost entirely of industry and government representatives. This failure to notify the larger public gave people in the room exclusive information a head start that skewed the process further.

[38] *See, e.g.,* E-Government Act of 2002, 44 U.S.C. § 101 ("To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government.") and President Obama's Open Government Directive, M10-06, December 8, 2009 ("each agency shall take prompt steps to expand access to information by making it available online in open formats"). http://www.gpo.gov/fdsys/pkg/PLAW-107publ347/pdf/PLAW-107publ347.pdf

[39] Pipeline Safety Act of 2011, Pub. L. No. 112-90, January 3, 2012, § 24. http://www.gpo.gov/fdsys/pkg/PLAW-112publ90/pdf/PLAW-112publ90.pdf

Transportation workshop on implementation of this legislation, Carl Weimer, Executive Director of the influential non-profit Pipeline Safety Trust reaffirmed his organization's view that standards incorporated by reference must be freely available to the public.[40]

The Office of the Federal Register was sufficiently concerned by the lack of availability of standards that it turned an unsolicited petition by twenty law professors and practitioners into a call for input and its own subsequent Notice of Proposed Rulemaking.[41]

One hundred and fifteen prominent legal scholars signed a petition for an Edicts of Government Amendment that Public.Resource.Org submitted to the House Committee on the Judiciary Committee in connection with a hearing held by the committee on January 14, 2014.[42] The petition states:

> *To promote access to justice, equal protection, innovation in the legal marketplace, and to codify long-standing public policy, the Copyright Act of the United States, 17 U.S.C., should be amended as follows:*
>
> > *Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.*
>
> *This language comes directly from Section 206.01, Compendium of Office Practices II, U.S. Copyright Office (1984) and it reflects clear and established Supreme Court precedent on the matter in Wheaton v. Peters and Banks v. Manchester.*

This unanimity among prominent law professors was matched by strong bipartisan support in Congress. The idea that public safety standards are not available to the public brought cries of outrage by members from both sides of the aisle.[43]

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[40] Statement of Carl Weimer, Incorporation by Reference (Section 24) Public Workshop, Pipeline & Hazardous Materials Safety Administration, July 13, 2012. https://law.resource.org/pub/us/cfr/regulations.gov.docket.03/phmsa.workshop/workshop.01.13.html

[41] Office of the Federal Register, Incorporation by Reference, 78 FR 60784, October 2, 2013. http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-24217.pdf

[42] Testimony of Carl Malamud, House Judiciary Committee, U.S. House of Representatives, Hearing on the Scope of Copyright Protection, January 14, 2014. https://public.resource.org/edicts/

[43] *See, e.g.,* statements of Congressmen Farenthold, Issa, Johnson, and Lofgren, House Judiciary Committee, U.S. House of Representatives, Hearing on the Scope of Copyright Protection, January 14, 2014. https://archive.org/details/gov.house.judiciary.20140114

11. <u>OMB has steadfastly ignored numerous public comments in favor of public access submitted to their own proceedings.</u>

In June 2012, more than 25 advocacy organizations and labor unions submitted to OMB a comment in these proceedings strongly supporting the view that standards incorporated by reference are in the public.[44] The groups, which include the AFL-CIO, AFSCME, Association of Research Libraries, Electronic Frontier Foundation, National Council for Occupational Safety and Health, National Women's Health Network, Public Citizen, Public.Resource.OrgSierra Club, US PIRG, and the United Steelworkers, wrote:

> *We believe it is imperative that the law be readily accessible for all to read and use. That is a central requirement of our democratic system. Accordingly, we strongly agree that standards incorporated by reference into federal regulations should be widely available to the public, without charge, and that such standards should be deemed in the public domain rather than subject to copyright restrictions.*
>
> *Collectively, our organizations work on a range of public policy issues, including health, safety, consumer protection, the environment, open government, and civil rights. Allowing free access to standards incorporated by reference will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges. Such open access to standards will help protect public safety, promote economic opportunity, increase access to justice, and strengthen citizen participation in our democracy.*
>
> *We ask the Administration to implement reforms that make standards incorporated by reference in proposed rules and in final rules available for free on the Internet.*

The signers of that letter, and the much larger group of supporters of open access to standards incorporated by reference, are not some radical fringe. These are groups and people with whom this Administration works regularly on important policy initiatives that make a difference in people's lives. Yet on the important issue of ensuring that people can read the laws that govern them, their concerns are dismissed with "air quotes."

This broad coalition and their strong and unambiguous statement was just one of many comments submitted urging greater public access. Those comments have been received by OMB, and in parallel proceedings conducted by the Office of the Federal Register and the Pipeline and Hazardous Materials Safety Administration.

The National Association of Home Builders wrote that "because more than 95 percent of NAHB members meet the federal definition of a 'small entity,' as defined by the

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[44] Robert Weissman *et. al.*, Letter to Hon. Cass R. Sunstein, Submission to the Office of Management and Budget, Docket No. OMB-2012-003, June 1, 2012. https://law.resource.org/pub/us/cfr/notice.omb.20120601_to.pdf

U.S. Small Business Administration, it is all the more important that federal regulations that impact the construction industry be readily available, understandable, and reasonable."[45]

The American Bar Association section of Administrative Law and Regulatory Practice, the leading experts in this branch of the law, wrote firmly in favor of public access:[46]

> *OFR's proposal plainly contemplates that incorporated standards may remain hidden behind the shield of copyright. But OFR must choose an approach that adequately ensures compliance with 5 U.S.C. §§ 552 and 553, and with the changes made to the concept of "reasonably available" by the fact of the information age, and government transparency legislation reflecting it. Regulated entities needing access to incorporated standards so they can comply with rules referencing them are often small businesses for whom the mass of necessary standards may be a sign public affected by product regulation, occupational safety regulation, and environmental regulation likely cannot afford to read these standards. Though this law is not formally "secret," the cost of reading and difficulty of finding it render it, practically, inaccessible to the public. At root, then, access to all in corporated matter should be free, if the evils of "secret law" OFR was established to resist are to be avoided.*

The Consumer Federation of America wrote that "standards that are incorporated by reference into federal regulations must be widely and easily accessible to the public and must be available without charge."[47] A similar though was expressed by the National Automobile Dealers Association which pointed out that if the definition of "reasonably available" for a rule means that it is downloadable from the Federal Register, then it only makes sense that if a consensus standard has been incorporated by law that "reasonably available" can only mean that it is downloadable for free from a rulemaking docket.[48]

How often do you see the Consumer Federation of America singing from the same sheet of music as the National Automobile Dealers Association? How can OMB blithely dismiss these statements of concern from such a broad swath of the public?

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[45] National Association of Home Builders, Submission to the Office of the Federal Register, Docket No. OFR-13-001, January 27, 2014. https://law.resource.org/pub/us/cfr/regulations.gov.docket.04/OFR-2013-0001-0022.pdf

[46] American Bar Association,Section of Administrative Law and Regulatory Practice, Submission to the Office of the Federal Register, Docket No. OFR-13-001, January 30, 2014. https://law.resource.org/pub/us/cfr/regulations.gov.docket.04/OFR-2013-0001-0029.pdf

[47] Consumer Federation of America, Submission to the Office of Management and Budget, Docket No. OMB-2012-003, June 1, 2012. https://law.resource.org/pub/us/cfr/regulations.gov.docket.02/090000648102334b.pdf

[48] National Automobile Dealers Association, Submission to the Office of Management and Budget, Docket No. OMB-2012-003, June 5, 2012. https://law.resource.org/pub/us/cfr/regulations.gov.docket.02/090000648103964d.pdf

How can OMB conduct an inquiry without talking to the thousands of U.S. government officials—at agencies such as PHSMA, OSHA, EPA, MHSA, CPSC, NHTSA, FSIS, USGC, and many more front-line organizations who fight to protect the public safety—government officials who are unable to do their jobs because they cannot afford to purchase the standards which they must enforce? How can OMB dismiss out of hand the will of Congress and 180 years of court opinions? This process has been deeply flawed.

12. The inquiry OMB conducted was flawed and should be re-started with an open mind and an open process.

OMB has the opportunity, now, to change course and model its approach not on short-sighted views of a few self-interested SDO lobbyists, but on the forward-looking, inclusive, innovation-friendly approach to governing repeatedly emphasized by President Obama—and on the essential requirements of our system of democracy, which demands that people have the freedom to read and speak the laws that govern them.

OMB, with those dismissive "air quotes" about how there can be no standards that are "free of charge," has jumped to a foregone conclusion. When the Supreme Court has said that access to the law must be free of restrictions, they meant free as in freedom, free as in democracy, and free as in access to justice. OMB has conducted a flawed process and reached a flawed conclusion. The process should be restarted and conducted with the gravitas and fairness that is befitting of such an important issue.

As we have been advised by OMB staff that you will host a workshop on Circular No. A-119, we would strongly urge OMB to avoid another rubber stamp procedure that goes through the motions with no pretense of an open mind. Any future workshops should be fair and open, and any revision of a document as important as A-119 should receive the due consideration that the law requires.

The previous workshop was conducted in a small inconveniently-located room filled with special interests and no livestream of the workshop or even video, audio, or transcript after-the fact. There was no social media campaign to alert the public to this important event and questions were not only prohibited from the Internet, they were carefully controlled on site. We know the White House can talk to the Internet when it chooses to, and this case, it should so choose.

OMB will perhaps be as inspired as we were by the words of Associate Justice Stephen G. Breyer with which he concluded his keynote speech on June 16, 2011 to the Administrative Conference of the United States:

> *If a law isn't public, it isn't a law.*

This is not a radical position. This is the long-standing consensus of public policy and our courts that the rule of law only works if our laws are public. OMB should take that sage advice to heart.