

**ASME Comments on U.S. Office of Management and Budget (OMB)
Proposed Revision of OMB Circular No. A-119
“Federal Participation in the Development and Use of Voluntary Consensus
Standards
and in Conformity Assessment Activities”**

May 2014

The American Society of Mechanical Engineers (ASME) submits this response to the 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” submitted by the Office of Management and Budget (OMB) dated February 11, 2014.¹ These comments supplement those submitted by ASME on April 27, 2012 in response to a Request for Information submitted by OMB on March 30, 2012.^{2,3}

Background

Founded in 1880, ASME is a not-for-profit scientific, educational and technical organization which promotes the art and science of engineering to enhance safety and quality of life for all humankind. ASME is a volunteer based Society which at its inception made the deliberate decision not to permit corporate membership. ASME volunteers, which number nearly 125,000 worldwide all serve in their individual capacity. In furtherance of its public safety mission, ASME develops and maintains over 500 voluntary consensus standards, including 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.⁴

Many of ASME’s standards 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. All of ASME’s work in developing standards is open and transparent and each standard (or revision to a standard) is subject to a rigorous public comment procedure.

In further support of its public safety mission, ASME provides conformity assessment services to over 6,500 manufacturers in 75 countries in the areas of boiler, pressure vessel, and nuclear power component certification. This activity ensures that manufacturers throughout the world are knowledgeable and capable of manufacturing to ASME’s safety standards. An additional

¹ Federal Register Vol. 79, No. 28, 8207-8208

² See Regulations.gov, Docket OMB-2012-0003-0010

³ Federal Register Vol. 77, No. 62, 19357-19360

⁴ See <http://standards.gov/sibr/query/index.cfm> (Note: Some references designated as ANSI standards are ASME standards)

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attendant benefit of ASME’s certification activities is that it facilitates international trade by reducing the number of regulatory barriers between countries that recognize the ASME mark.

Comments on Proposed Revisions

On the whole, ASME is very supportive of the proposed revisions to OMB Circular A-119. In particular, we support OMB’s reaffirmation of the Circular’s Purpose and Goals, including alignment with trade regulations and strategic objectives for addressing national priorities.⁵ ASME offers some specific comments on several areas in which OMB is seeking comment; these are outlined below:

Copyright/Funding of Standards Development: We appreciate OMB’s expressed position that the public interest would not be well-served by requiring standards incorporated by reference to be made available “free of charge” and reinforcement of policies that underscore the need for federal agencies to observe and protect the rights of the copyright holder. Copyright enables standards developing organizations (SDOs) like ASME to fund their standards development activities from revenue generated from the publication and sale of their standards publications. 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, political, or other special interest influence. ASME does not have shareholders and, as a 501(c)3 organization, utilizes its surplus in furtherance of its mission. Accordingly, the revenue generated from the publication and sale of standards is largely used to develop and draft new standards as well as to update existing standards. As a major SDO, ASME responds (without charge to the requestor) to about 35,000 standards-related inquiries each year.

Some individuals have asserted that any private sector standard incorporated into law should lose its copyright. Besides being in direct conflict with the U.S. Constitution – which explicitly prohibits governmental taking of private property – removal of copyright protections would be contrary to the fundamental purpose of copyright law to encourage new creative and intellectual works that promote progress of science and the useful arts. Clearly, once a standard was made available for free, there would no longer be any incentive for anyone to pay for it.

If ASME were to lose its copyright in the standards that it independently created, it would be without an income stream to support its public health and safety mission. Although it might be easy to suggest that ASME should find an alternative income model, such proposed alternative models would have profound effect on public safety. For example, one suggested alternative model would have ASME rely upon funding from industry. However this “pay to play” model would exclude other interests such as small businesses, academics and public interest groups who would lack the substantial funds necessary to participate. ASME believes that the best technical standards are those that reflect the interests of all affected stakeholders and better standards translate to better public safety.

A second proposed model would rely on government funding to cover the cost of developing, drafting, publishing and updating standards. In the case of ASME standards development, volunteer (donated) time alone is estimated to be run well over 100 million USD per year.

⁵ See Memorandum M-12-08, “Principles for Federal Engagement in Standards Activities to Address National Priorities”

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Whether such would or could be replicated by government is highly questionable. Putting aside the obvious financial burden it would impose on tax payers, it would be difficult, if not impossible, for the government to assemble a drafting body which replicates the broad base of expertise that are represented throughout the consensus process.

A third model suggests that safety standards should be “crowd sourced,” essentially turning issues impacting public safety over to an anonymous crowd, with no specific duty of care. The dangers inherent in this approach are patent. Although one could spend pages addressing each of the arguments advanced by the opponents of voluntary consensus standards, the fact is that the existing funding mechanism works, and has resulted in an enviable history of safety. Indeed we must remember that the federal agencies involved must make public safety paramount, and their long standing selection of voluntary consensus standards for incorporation by reference is an implicit recognition that these standards best promote public safety.

Incorporation Choices: Section 6(e)(iii) addresses factors agencies should consider in evaluating whether to incorporate a standard. ASME believes that the factors articulated therein are reasonable and reflect the practical realities faced by governmental agencies who draft regulations that regulate constantly evolving highly complex technical activities.

Notion of “Reasonable Availability:” Section 6(p) establishes policy for agency determination of whether a voluntary standard is “reasonably available.” ASME supports the notion that reasonably available must be decided on a case by case basis based upon the factors articulated in the circular. Proponents of unlimited availability through uncontrolled publishing on the internet lump all safety standards together – arguing that making all standards available for free is protective of the “public” because the “public” is in danger of violating a standard which it does not have knowledge of. However, ASME’s standards largely address the manufacturing process and are used by manufacturers long before a product is in the hands of a consumer. In the case of such standards, a consumer is in no danger whatsoever of violating these manufacturing standards. The entities who have a need to know these standards are manufacturers who can well afford the costs of standards. In this circumstance it is hardly unreasonable to make the manufacturers that benefit from the standards recompense the SDOs for at least some portion of the cost of developing, drafting, publicizing and updating the standards. This is but one of many situations where a one size fits all approach does not work. The empowering of regulators to make decisions relating to reasonable availability on a case by case basis is a wise and pragmatic approach to a complex issue.

Treatment of Voluntary Consensus Standards: Section 6(f) f establishes a preference between voluntary consensus standards and other types of standards. ASME believes such a differentiation is appropriate. As discussed above, voluntary consensus standards must include: openness, balance of representation, due process, appeals process, and consensus. The World Trade Organization (WTO) principles for international standards development under the Technical Barriers to Trade (TBT) Agreement echo these same attributes and are applied in the development of voluntary consensus standards.

ASME’s process exemplifies these attributes by allowing for participation in the development of ASME standards by qualified individuals with a direct and material interest; imposing no fees for participation; having all meetings related to standards issues open to the general public; imposing numerical requirements on the percentage of a committee’s membership that can

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come from any single interest category; providing 40 different interest categories from which individual members may select; requiring public review of all standards actions and any subsequent substantive changes; requiring recirculation votes when there are unresolved objections from either committee members or the general public; providing a rigorous three-tier appeals process for individuals with continuing objections; and requiring criteria for establishing consensus approval of all materially interested parties before issuing a new or revised standard.

Each of these traits describes the attributes that ensure the best possible standards are drafted by all of the appropriate stakeholders. In addition, standards that are drafted by an expert group unencumbered by political affiliations have the best chance of being adopted by other countries that want to participate in international trade.

Federal Agency Participation in Standards Development: ASME is pleased that the draft revision strengthens current language on federal participation in standards development. We, like other SDOs, depend on input and participation from government policy and technical experts, who can ensure our standards meet their needs as well as those of other stakeholders. Participation by employees of federal agencies on ASME standards development committees has grown to about 250 individuals, and in order to facilitate input from the agencies, a number of ASME committees have established separate groups within their organizational structure comprised solely of government representatives. Federal employees participate on an equal basis as all other individual members on our committees and such participation does not justify elimination of copyright protection of any resulting standards, just as participation by any other private citizen does not justify the elimination of copyright protection.

International Standards: The proposed revision addresses international standards issues in much more detail than does the current version. Section 6(g) notes that “(f)or certain types of standards and regulations and where certain conditions apply, the United States is obligated to use relevant international standards under international trade agreements to which the United States is a party.” ASME believes this Section should clarify that agencies’ fulfillment of public safety objectives takes precedence over provisions of international agreements. The Section goes on to provide clarification on what constitutes a “technical regulation” as well as an “international standard.”

Federal agencies should recognize that there are distinct differences among SDOs. Some, such as the European Committee for Standardization (CEN), do not permit membership or voting by non-residents, while others, such as the International Organization for Standardization (ISO), operate using a one country, one vote consensus process. Hence, while some may consider standards developed under the auspices of these organizations to be in accord with WTO principles, the interests of U.S. stakeholders (including producers, service providers, and government regulators) may be inadequately represented; and the ability of such standards processes to comply with the openness and due process traits of voluntary consensus standards development is also highly questionable.

Section 6(g) goes on to recommend that agencies “consult with USTR on questions regarding international trade obligations relating to regulations, standards, and conformity assessment procedures or with respect to any requests from countries regarding the establishment of mutual arrangements with respect to standards-related activities” and Section 6(h) discusses

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agency obligations when considering whether to recognize a standard in use in a foreign market.

It has been ASME’s experience that not all jurisdictions around the world provide equal treatment of standards developed outside their native market. Given the potential for standards and conformity assessment programs to serve as technical trade barriers for U.S. exporters, OMB might consider making the recommendations in Sections 6(g) and 6(h) mandatory (“shall” requirements) in order to promote reciprocity, i.e. ensure that products conforming to alternative (but substantially commensurate) standards or technical regulations are accepted as equivalent in the respective markets.

Conformity Assessment: We believe the enhanced guidance regarding conformity assessment is both constructive and timely.