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Ms. Jasmeet Sehra
Office of Management and Budget
Office of Information and Regulatory Affairs
Washington, DC 20503
<http://www.regulations.gov>

Via Electronic Mail

May 12, 2014

**Re: 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”**

Dear Ms. Sehra:

API appreciates the opportunity to comment on the Office of Management and Budget’s (OMB) 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” contained in the OMB Federal Register notice published February 11, 2014. API is a nationwide, non-profit, trade association that represents over 590 member companies that are engaged in all aspects of the petroleum and natural gas industry, including exploration and production, refining, transportation, and distribution of petroleum products. API itself publishes more than 600 industry standards applicable to all aspects of the oil and natural gas industry, with over 130 incorporated by reference more than 350 times in six federal agencies’ regulations. API and API’s members are directly impacted by the proposed revisions to OMB Circular A-119.

Broadly speaking, API and its members are supportive of the OMB’s proposed revision to Circular A-119. The following comments serve to clarify certain issues and raise additional points for consideration; they are organized according to the table of contents of the proposed revision.

API thanks OMB for its thorough and thoughtful analysis of the issues surrounding Federal participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities and looks forward to continuing discussions on this important topic.

Sincerely,

Introduction

API is an American National Standards Institute (ANSI) accredited standards developing organization (SDO). As such we are pleased to see that overall the proposed revision to OMB Circular A-119 is in general alignment with ANSI's *Essential Requirements: Due process requirements for American National Standards* as API's ANSI approved procedures for standards development are based on this ANSI document. API is also pleased to note the preference for agency reference of performance based voluntary consensus standards.

The following comments follow subject presented in the request for comments and in order of subjects presented in the "Table of Comments of Circular A-119, Revised" as contained in the Federal Register notice.

6. What is the Policy for Federal Use of Standards?

a. When must my agency use voluntary consensus standards?

API appreciates the reference to the NTTAA that "all Federal Agencies must use voluntary consensus standards in lieu of agencies' developing and using their own standards" but is concerned about the later introduction in this section of the concept of "voluntary non-consensus standards". Oftentimes these standards are developed in a non-transparent and non-open fashion, and great care must be taken in considering their use.

e. When deciding to use a standard, what are some of the things my agency should consider?

API would like to comment on the text in this section as it pertains to the intellectual property rights of the voluntary consensus standards bodies, and in particular, the following statement: "This evaluation should include consideration of the economic effect of the intellectual property rights (IPR) policies of the voluntary consensus standards bodies on standards implementers, such as the extent to which entities practicing the standards may obtain licenses to patented technology incorporated into the standard on a non-discriminatory and reasonable royalty or royalty-free basis." (Emphasis added) API's policy is to develop its standards on a performance basis as opposed to a prescriptive approach in order to encourage innovation and to allow for different operating conditions, and only includes items covered by patents on a royalty-free basis to ensure the broadest application of the standards. Any language on patented technology contained in the proposed revision of OMB Circular A-119 should include the "royalty-free basis" language each time this issue is addressed. This is in conformance with ANSI's *Essential Requirements: Due Process requirements for American National Standards* which allows for SDOs to use either option when addressing patented technology in their standards.

f. Does this policy establish a preference between voluntary consensus standards and other types of standards?

API strongly supports the preference for voluntary consensus standards. We are concerned, however, with section iii of this part that states "Where a voluntary consensus standard does not exist...this policy allows agencies to use standards that are not developed or adopted by

voluntary consensus standards bodies.” The background section of the notice also notes that OMB’s comments on the existence, value, and utility of “contributions of standardization activities that take place outside of the voluntary consensus process, particularly in emerging technology areas”. API is concerned that without proper safeguards adoptions of these “voluntary non-consensus standards” at the Federal level could bring unintended consequences if these documents contain patented technology that would put the Federal Government in the position of “endorsing” one particular approach or technology solution over another.

g. Are there standards-related international obligations that agencies must adhere to regarding the use of standards?

API is pleased to see greater attention paid to the importance of globally relevant standards in the proposed revision to OMB Circular A-119. When it comes to international standardization, good practices are measured against the World Trade Organization (WTO) Technical Barriers to Trade (TBT) Agreement Committee Decision¹, which states that the global relevance of a standard is determined by how it was developed, not where. More specifically, the Decision states that the development of international standards must rely upon a number of principles, including openness, impartiality, consensus, transparency, and coherence, among others.

In other words, the global relevance of a standard cannot and should not be measured by which organization developed it. Ultimately, there are multiple paths to global relevance, and it is the marketplace that decides the utility or applicability of any given standard.

Finally, as a point of clarification, we note that ANSI approves American National Standards (ANS) that are developed by more than 225 ANSI-accredited standards developers, including API. Though the word “national” is in the name, many standards with the ANS designation, including API’s, also qualify as international or globally relevant standards, according to the terms of the WTO TBT agreement. In fact, in the 2010 report entitled “Regulator’s Use of Standards” prepared by the International Association of Oil and Gas Producers concluded in its “Main findings” section that “API standards are dominating, with 225 references, including 49 API Manual of Petroleum Measurement (MPMS) standards.” by international regulators in the fourteen major petroleum producing regions of the world.

j. What should my agency consider with regard to intellectual property and the development of standards?

In keeping with API’s comments on section 6e, *When deciding to use a standard, what are some of the things my agency should consider?* API would recommend the following sentence be revised as follows: “Many standards developing bodies have policies which require participating IPR holders to commit to license any patented technology incorporated into a standard on reasonable and non-discriminatory terms or on a royalty-free basis.” (Suggested text added).

¹ G/TBT/ 1/REV. 10. “Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement”

k. Should my agency give preference to performance standards?

API is strongly supportive of the use of performance standards, as expressed in “*k. Should my agency give preference to performance standards?*” As stated earlier in our comments, it is API’s policy to write its standards in performance based language to the maximum extent possible, only using prescriptive language when required for safety and interchangeability. This approach is also in line with the performance-based approach was espoused by a variety of regulators at the 2012 “Expert Forum on the Use of Performance-Based Regulatory Models in the U.S. Oil and Gas Industry, Offshore and Onshore”. At this event, all of the participating agencies, including OSHA, BSEE, PHMSA, USCG, and EPA, stated that their regulations are a mix of performance-based and more prescriptive-based regulations as the best approach to improve safety.

m. What if no voluntary consensus standards exist?

API stated earlier in section *f. Does this policy establish a preference between voluntary consensus standards and other types of standards?* our concerns regarding the use of “*suitable voluntary standards that are not developed by voluntary consensus bodies*”. Again, API is concerned that without proper safeguards adoptions of these “voluntary non-consensus standards” at the Federal level could bring unintended consequences if these documents contain patented technology that would put the Federal Government in the position of “endorsing” one particular approach or technology solution over another.

o. How should my agency ensure that standards incorporated by reference are updated on a timely basis?

API supports this discussion and its recommended solutions as standards are updated on a constant basis as revisions are created and/or identified that improve the qualities of the standard or better meet the needs of the marketplace.²

p. How should my agency determine whether a voluntary standard is “reasonably available” in a regulatory or non-regulatory context?

The Code of Federal Regulations (CFR) states that when a standard is to be incorporated by reference, or “IBR-ed,” a federal agency should determine that the standard is “reasonably available” to those affected by the anticipated regulation. In section 6.p. on page 34, the proposed revisions to OMB Circular A-119 describe several factors that should be considered as part of this determination. On page 35, the proposed revisions go on to state that reasonable availability is context-specific, and that the absence of one or more of these factors alone should not remove a standard from consideration. This is a significant step in the right direction for the standards community, and API is strongly supportive of this language.

² For example, approved American National Standards are required to be reviewed at least every five years, but many are updated much more frequently.

First, it is in alignment with December 2011 recommendations³ by the Administrative Conference of the United States (ACUS), which encouraged agencies to “take steps to promote the availability of incorporated materials within the framework of existing law.” That availability is defined as “...on a reasonable basis, which may include monetary compensation where appropriate.”

Second, the revised text is flexible and non-prescriptive. This allows for a number of different reasonable availability scenarios, which will go a long way to accommodating the different needs and business models of the various SDOs whose work is being referenced. For example, API made the decision in 2010 to make all its safety standards and those incorporated by reference – roughly one-third of API’s entire suite – available on-line for free online viewing.

7. What is the Policy for Federal Participation in Voluntary Standards Bodies?

API supports active participation by Federal Agency representatives in its standards development work, including assuming leadership positions, and encourages Federal government agencies to give adequate priority to the resources needed for appropriate participation in standards development work.

³ www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf