



The Fertilizer Institute

Nourish, Replenish, Grow

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Manager, Regulatory and Scientific Affairs

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VIA Federal e-Rulemaking Portal

U.S Office of Management & Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Re: The Fertilizer Institute's Comments on the Proposed Revision of Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," Docket No. OMB-2014-0001

Dear Sir or Madam:

The Fertilizer Institute ("TFI"), on behalf of its member companies, submits these comments in response to the U.S. Office of Management & Budget ("OMB") notice and request for comments dated February 11, 2014 (the "Notice")¹ regarding proposed revision of Circular No. A-119, entitled "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"² (the "Circular").

I. STATEMENT OF INTEREST

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers, and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information, and public communication programs.

TFI and its members regularly monitor and participate in the development of standards that are applicable or relevant to the fertilizer industry. Most recently TFI members and staff have participated in the development of the National Fire Protection Association 400 Standard for storage of ammonium nitrate. Additionally TFI members and staff are actively engaged in updating the ANSI K61.1 standard for anhydrous ammonia storage and handling. Moreover, TFI has helped facilitate nationwide efforts to implement or apply consensus standards when they

¹ 79 Fed. Reg. 8,207 (Feb. 11, 2014).

² OMB, Circular No. A-119 Revised (Feb. 10, 1998), available at http://www.whitehouse.gov/omb/circulars_a119; see 63 Fed. Reg. 8,546 (Feb. 19, 1998) ("Final Revision of Circular A-119").

have been codified by regulation.³ As such, TFI and its members have an interest in OMB's proposed revisions to the Circular, and generally support federal adoption of consensus standards to clarify and streamline obligations for regulated entities, as well as for regulatory agencies that could benefit from incorporating appropriate consensus standards into their own operations.

II. DISCUSSION

As described below, TFI has four overarching comments regarding the possible revisions contemplated in the Notice:

- A. TFI supports the incorporation of consensus standards, such as NFPA and American National Standards Institute ("ANSI") standards,⁴ provided that agencies adopt them verbatim;
- B. OMB should acknowledge that the National Technology Transfer and Advancement Act ("NTTAA") of 1995,⁵ and the Circular, should not be interpreted to provoke any agency to adopt "standards which would set regulatory standards or requirements," as OMB has expressly stated in the past;⁶
- C. To avoid possible confusion based on certain language in the Notice, OMB should clarify that agencies planning to adopt consensus standards in their regulations or guidance must engage in appropriate public notice and comment processes; and,
- D. OMB should encourage agencies to rely upon internal compliance assessments for implementation of consensus standards (*i.e.*, in lieu of involuntary, external assessments (or similar enforcement-like implementation)).

As background, the primary basis of the Circular rests in Section 12(d) of the NTTAA, which provides that: "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments," except where it would be "inconsistent with applicable law or otherwise impractical" for

³ As just one example, TFI recently partnered with the U.S. Occupational Safety & Health Administration ("OSHA") to help make employers across the fertilizer industry aware of legal requirements, best practice recommendations, standards, and guidelines that could help improve safety at fertilizer facilities. Specifically, in a recent letter by OSHA, it noted that its regulation for "explosives and blasting agents" at 29 C.F.R. § 1910.109(i) was among various "[s]tandards or guidelines" that are available to assist fertilizer facilities. See Letter from Dr. David Michaels, Assistant Secretary for Occupational Safety and Health, to Fertilizer Industry Employer (Feb. 10, 2014), available at https://www.osha.gov/dep/fertilizer_industry/letter_fertilizer_industry.html. That OSHA regulation originally was based on National Fire Protection Association ("NFPA") standard 490-1970, "Code for the Storage of Ammonium Nitrate." See 36 Fed. Reg. 10,465, 10,553-10562 (May 29, 1971). Thus, possible updates to such standards are important to TFI and its members.

⁴ For instance, some TFI members currently follow the most recent version of ANSI K61, entitled "Safety Requirements for the Storage and Handling of Anhydrous Ammonia" (1999).

⁵ Pub. L. No. 104-113, 110 Stat. 775 (March 7, 1996) (codified at 15 U.S.C. § 272).

⁶ See 63 Fed. Reg. 8,546, 8,549 (Feb. 19, 1998)

agencies to use such standards.⁷ A primary goal of Section 12(d) was to direct “federal agencies to focus upon increasing their use of [voluntary consensus] standards whenever possible,” thus reducing federal procurement and operating costs.⁸

In past updates to the Circular, OMB has expressly recognized that “[n]either the [NTTAA] nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements” because they both address “technical” rather than “regulatory” standards.⁹

A. Consensus Standards Should Be Adopted Verbatim

First, OMB should state in the Circular that agencies should adopt any appropriate consensus standards *verbatim* to avoid disrupting the delicate balance such standards often strike among various goals or requirements. This approach will help avoid uncertainties or unintended consequences that could follow the selective “cherry-picking” of specific provisions from consensus standards (which, inherently, would deviate from the prevailing consensus). Selective rather than comprehensive adoption of consensus standards could create stark inconsistencies between the way agencies implement such standards, and the way regulated entities implement such standards. Further, the approach of adopting consensus standards *verbatim* is typical among federal agencies, and Congress has affirmatively required this approach in specific cases.¹⁰

Thus, OMB’s possible revisions to the Circular should specify that agencies should not invoke the Circular to adopt mere fragments of consensus standards. Instead, assuming a given standard is not “inconsistent with applicable law or otherwise impractical” for an agency, that agency should adopt the standard *verbatim*.

B. The NTTAA and the Circular Address Technical Standards, Not Regulatory Standards

Second, as OMB has recognized, “neither the [NTTAA] nor the Circular require any agency to

⁷ See 15 U.S.C. § 272 & note.

⁸ See 142 Cong. Rec. H1262 (daily ed. Feb. 27, 1996) (statements of Rep. Morella), available at <http://www.gpo.gov/fdsys/pkg/CREC-1996-02-27/html/CREC-1996-02-27-pt1-PgH1262-4.htm>.

⁹ See 63 Fed. Reg. 8,546, 8,549 (Feb. 19, 1998) (explaining that: “A few commentators inquired whether the Circular applies to ‘regulatory standards.’ In response, the final Circular distinguishes between a ‘technical standard,’ which may be referenced in a regulation, and a ‘regulatory standard,’ which establishes overall regulatory goals or outcomes. The Act and the Circular apply to the former, but not to the latter.”).

¹⁰ For example, when Congress established OSHA, it authorized the Secretary of Labor “to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.” 29 U.S.C. § 651(b)(3). To adopt an initial set of OSHA standards as rapidly as possible, Congress permitted OSHA to bypass formal rulemaking processes and promulgate “any national consensus standard” within OSHA’s initial corpus of regulations for numerous industries. *Id.* § 655(a); see *Noblecraft Indus., Inc. v. Sec’y of Labor*, 614 F.2d 199, 203 (9th Cir. 1980). However, Congress did not permit OSHA to make any substantive modification to the source standards, or impose requirements that the source standards themselves did not impose (otherwise, such changes would render the standard unenforceable as a matter of law). See *Diebold, Inc. v. Sec’y of Labor*, 585 F.2d 1327, 1332 (6th Cir. 1978); see also *Sec’y of Labor v. Kennecott Copper Corp.*, 577 F.2d 1113, 1117 (10th Cir. 1977).

use private sector standards *which would set regulatory standards or requirements.*¹¹ As OMB has explained in prior issuances of the Circular, this is because Section 12(d) of NTTAA refers to agencies' use of "technical" standards, rather than the imposition of "regulatory" standards upon the public.¹² However, the current language of the Notice anticipates "incorporating standards by reference *in regulation,*" and agencies using "the same version of a standard *in regulation* and procurements and coordinat[ing] conformity assessment *requirements,* where feasible."¹³ The Notice also states that OMB's revisions to the Circular ultimately will reflect "more detailed guidance," including topics relevant to "the Administration's current work in Open Government, developments in *regulatory policy* and international trade, and changes in technology."¹⁴

Given the above statements in the Notice, OMB should clarify in the Circular or its preamble language in the *Federal Register* (as OMB has in the past) that "neither the [NTTAA] nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements."¹⁵ Where it may be appropriate to incorporate a consensus standard by rule in a manner than would regulate the public, that process should be governed by typical rulemaking procedures, as described briefly below.

C. If Agencies Make Consensus Standards Applicable to The Public, They Must Do So Via Rulemaking

Third, to highlight the process that typically should apply to rulemakings that might impact the rights or duties of the regulated public, OMB should specify in the updated Circular that an agency planning to adopt a consensus standard in its regulations or guidance as any form of "rule" must engage in appropriate public notice and comment procedures applicable to that "action."¹⁶ Although TFI generally supports widespread adoption of consensus standards, the statements from the Notice quoted in Section II *supra* could provoke some agencies to misinterpret the provisions of the NTTAA (or the Circular) to presume that they provide an adequate, independent basis for setting regulatory standards or requirements (which they do not).

Instead, agencies must follow typical administrative procedures when contemplating the use of a consensus standard as a "rule,"¹⁷ and provide regulated entities with opportunities for notice and comment on such proposed regulatory standards. Thus, OMB should clarify this point in the

¹¹ See 63 Fed. Reg. at 8,549 (emphasis added).

¹² See *id.*

¹³ See 79 Fed. Reg. at 8,207 (emphasis added).

¹⁴ See *id.* at 8,208 (emphasis added).

¹⁵ See 63 Fed. Reg. at 8,549.

¹⁶ See, e.g., 5 U.S.C. §§ 551(4), 551(13) (providing that a "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency," and an "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").

¹⁷ See generally 5 U.S.C. §§ 551, *et seq.* Generally, under the Administrative Procedure Act, courts must strike down as unlawful any agency actions, findings, or conclusions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a).

updated Circular.

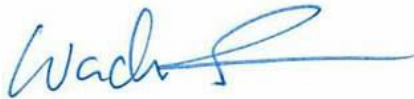
**D. Compliance Assessments for
Consensus Standards Should Be Internal**

Fourth, OMB should encourage agencies to rely upon internal compliance assessments for implementation of consensus standards, including with respect to standards that might be incorporated by “rule” as regulatory requirements. In the Notice, OMB already appears to be advocating this approach.¹⁸ Clearly, members of the regulated public usually do not have the same opportunity as agencies to use alternatives where a codified consensus standard would be “inconsistent with applicable law, or otherwise impractical”¹⁹ for their own specific operations. This exemption was incorporated into the NTTAA to avoid the unintended consequences of a one-size-fits-all approach based on existing consensus standards. Thus, because consensus standards usually are structured and qualified to allow exceptions for non-typical operations or other developments (*e.g.*, technological advancements that outpace revisions to a given consensus standard), OMB should encourage agencies to rely on internal compliance assessments, rather than external or enforcement-like assessment processes.

III. CONCLUSION

TFI appreciates your consideration of these comments on the Notice and the proposed revision of the Circular. Please contact me by phone at 202-515-2701 if you would like to further discuss our comments.

Sincerely yours,



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¹⁸ See 79 Fed. Reg. at 8,207 (“The revised Circular would encourage agencies to consider international conformity assessment schemes and private sector conformity assessment activities in lieu of conformity assessment activities or schemes developed or carried out by the government . . .”).

¹⁹ See NTTAA § 12(d)(3).