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May 12, 2014

Jasmeet Seehra
Office of Management and Budget,
Office of Information and Regulatory Affairs
Room 10236, New Executive Office Building
725 17th Street, N.W.
Washington, D.C. 20503

***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. Seehra:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am pleased to submit these comments on the Office of Management and Budget’s (OMB) request for comments on a proposed revision of OMB Circular No. A-119 that was published in the *Federal Register* on February 11, 2014 (79 *Federal Register* 8207) (Draft Circular). As an affected stakeholder and leading participant in various standard-setting activities, NAHB is interested in ensuring that federal agencies receive clear guidance on the role they assume when they engage in the standard-setting process.

NAHB is a Washington, D.C.-based trade association involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing, and other aspects of residential and light commercial construction. NAHB is affiliated with more than 800 state and local home builders associations around the country and NAHB’s builder members will construct about 80 percent of the new housing units completed in 2014. Further, more than 95 percent of NAHB members meet the federal definition of a “small entity,” as defined by the U.S. Small Business Administration.

NAHB is a frequent standards development participant and proponent of voluntary consensus standards that concern the construction of single family and multifamily dwellings. Federal agencies carry considerable influence in all areas in which they operate, in large part because by their very nature, the agencies represent the full force and effect of the federal government. Because of this, NAHB believes it is paramount that OMB clearly define the role agencies should play in voluntary standard-setting activities. This definition should include clearly delineated

limits on participation and require agencies to be fully transparent in their activities. NAHB's responses to the specific requests for comments in the Draft Circular are provided in more detail below in the order in which they appear in the proposal.

1. Encouraging Agency Use of Standards and Participation in Standards Developments

NAHB supports the proposed preference for voluntary consensus standards. In NAHB's experience, these standards represent the accumulated knowledge of experts in the field of construction methods and materials, and are developed in an open consensus process, meaning that no single entity is able to unduly influence the process. NAHB recognizes the need for federal agencies to be involved with setting standards and agrees that guidance from OMB on how they may participate with standard-setting bodies is critical to ensure that federal agencies act in a manner that is consistent with their statutory authority, regulations, and guidance. Agency participation must also be transparent and responsive to the commenting public.

Question 7 of the Draft Circular outlines the policy for federal participation in voluntary standards bodies. Principally, this section recognizes the National Technology Transfer and Advancement Act of 1995 (NTTAA) requirement that agencies must consult with voluntary standards bodies and participate in the development of standards "when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budgetary resources." Draft Circular at 35. The section goes on to describe the agency's role to include participation in standard-writing and to act as a liaison, providing information and the agency's viewpoint. The Draft Circular envisions knowledgeable agency representatives with sufficient authority acting on equal footing with other participants in the voluntary standards body. At the same time, OMB cautions that "agency representatives should avoid the practice or the appearance of undue influence relating to their activities in standards bodies and activities." Draft Circular at 37. This caution is critical and should be further elaborated on in this section.

First, OMB should clarify that, in order for federal agencies to participate in standard-setting in accordance with the NTTAA, the agency must limit its participation to its statutory authority. In other words, if an agency cannot require the installation of elevators in certain structures under its statutory authority, it cannot participate in a standard-setting activity that concerns elevator installation for those structures. The same holds true for conformance to an agency's regulations and other public statements. If an agency's regulations have established an acceptable safety factor for redundancy at a threshold of 1.5, the agency may not use the standard-setting process to raise that level to 2.

Current agency approaches to participating in standard-setting bodies vary substantially, even within the context of the same standard. For example, both the U.S. Access Board and the U.S. Department of Housing and Urban Development (HUD) have developed independent guidelines offering guidance to builders who must comply with either the American with Disabilities Act (ADA) or the Fair Housing Act (FHA). Both of these agencies also participate in the development of the International Code Council's ICC A117.1 Standard for Accessible and Useable Buildings and Facilities. There is a stark contrast between how the two agencies participate in the development of the standard. For example, HUD remains silent on proposed changes to the standard on issues that are not within HUD's purview. The U.S. Access Board,

however, regularly supports changes that exceed the minimum requirements contained in that agency's guidelines, which would make the standard exceed the minimum requirements enforced by the U.S. Department of Justice under the ADA.

Another example is the Consumer Products Safety Commission, which participates on several National Fire Protection Association codes and standards technical committees. Representatives from this agency on the various technical committees are observers and do not vote on any of the technical changes. Their biggest contribution to the committees is sharing their technical expertise related to product testing and safety recall studies, and to provide supporting documentation for the committee's consideration during code change proposals. The purpose of providing these examples is not to weigh their relative value, but simply to demonstrate the vast differences among agency approaches.

Second, if an agency has no intention of using a privately-developed standard in lieu of a standard created by the government, it should not participate in the standard-setting process for the rejected standard. Agencies should also be encouraged to use standards even if they do not represent the agency's wish list, so long as the standard contains all statutorily compelled components. For example, both the U.S. Access Board and HUD have participated in the development of the ICC A117.1 Standard for more than twenty years, yet neither agency has incorporated by reference or adopted the standard.

2. Ensuring the Timely Updating of Standards

OMB's Draft Circular provides a welcome opportunity for agencies to not only coordinate which versions of standards to use, but also to ensure that the various standards employed by different agencies for the same class of regulated entities do not conflict. For example, NAHB members frequently are confronted with conflicting agency requirements when it comes to accessible parking spaces. Under the ADA guidelines, the U.S. Access Board states that all accessible parking spaces must be located on the shortest accessible route to the accessible entrance of the building. Under HUD's guidelines, the minimum number of accessible parking spaces shall be provided along the shortest accessible route to the building. HUD's guidelines go on to require that if there is more than one type of parking (surface, covered, or garages) at least one of each type of parking must have an accessible space. In some cases, builders working on projects that are covered by both the ADA and FHA requirements have been required to install more accessible parking spaces than would be required by either set of guidelines.

NAHB appreciates OMB's recognition that agencies may have good reasons for not employing the most recent version of a standard – for example, if a standard significantly increases compliance costs with little benefit to the agency's mission, the agency should be free to decline to adopt the standard.

The use of retrospective review, as outlined by Executive Orders 13563 and 13610, can ensure that the best version of a standard is being used by agencies; that agencies do not subject their shared regulated entities to conflicting requirements; and, more broadly, to ensure that the need for the standard and the regulation referencing it still exists.

3. Enhancing Transparency and Stakeholder Participation

NAHB strongly urges OMB to strengthen and expand each agency's obligation to fully inform the public of its voting positions and participation in any standard-setting process. It is NAHB's experience that commitment to a transparent public process varies considerably across agencies. For example, there are many agencies who participate in the development of private sector codes and standards. However, with the exception of the U.S. Department of Energy (DOE) during the most recent round of International Code Council hearings in 2013, none of the other agencies NAHB interacts with have published on their website or in the Federal Register a list of code change proposals on which they intended to take a position. It is impossible to find information on the agencies' websites concerning in which codes and standards-making bodies they participate, who the voting representative or alternate is on the various code making committees, or where they receive guidance or direction to take positions on a range of topics. Without this openness and transparency, it is difficult to address issues early in the development stages or to follow up with the agency to resolve future conflicts.

NAHB agrees that agencies should increase their use of Advance Notice of Public Rulemakings (ANPRs) in order to inform the public of the positions the agency proposes to take and to solicit public input prior to publicly declaring their intent. Each agency must accept and respond to comments on its standard-setting participation just as it would to a rule proposal, guidance development, or other formulation of agency policy. Agencies should also be encouraged to use their web sites to keep the public aware and involved with their standard-setting activities, including proposals and voting positions.

To ensure that agencies uniformly and fully implement the revised A-119, an enforcement mechanism, which also offers an appeal process, is needed. The Interagency Committee on Standards Policy is in an ideal position to serve this function. By establishing a process for the public to interact directly with the Committee, OMB can provide a process for an outside entity to ensure that agencies are fully complying with the Circular. NAHB therefore supports OMB's proposal to gather public input on developments in the standards arena, but challenges OMB to equip the Interagency Committee with the tools needed to effectively oversee agency compliance with A-119. Moreover, OMB should develop a process for the public to use to appeal an agency's action when it is contrary to the Circular's provisions.

Incorporation By Reference

OMB proposes to adopt Administrative Conference of the United States (ACUS) Recommendation 2011-5 with certain modifications. Draft Circular at 9. NAHB recently commented on a similar proposal by the Office of the Federal Register on incorporation by reference and in particular the meaning of "reasonably available."

NAHB agrees with OMB that "reasonably available" should not mean "free of charge." NAHB also agrees that agencies can and should make arrangements for a document that the agency proposes to incorporate by reference to be available on the internet or be made available to any person requesting the document. At the proposal stage, all documents upon which an agency relies must be freely available to ensure that the public can meaningfully comment. It is unfair to require the public to purchase incorporated documents in order to determine the impact of the proposed rule. Furthermore, the time that is required to obtain such a document reduces the time a commenter has to provide his or her input, which could effectively negate the whole

purpose of the commenting exercise. As OMB recognizes, technology exists to limit printing and downloading of documents. Thus, an agency that wishes to incorporate by reference can place the document on the internet (during the comment period) in such a manner that those who wish to review it are able to, without having the ability to download or print the document.

It is acceptable to incorporate by reference a document in a final rule that must be purchased from a governmental or non-governmental vendor. In many instances, agencies incorporate standards that must be purchased from either governmental or non-governmental organizations. NAHB supports this model because the negative consequences of the alternatives far outweigh the benefits. First, if agencies are required to provide standards that are incorporated by reference for free on the internet, organizations that rely on the sale of those materials are put between a rock and a hard place. If such organizations cannot raise other revenue, they may go out of business. The government would then be forced to develop its own standards. This outcome obliterates the purpose of the government incorporating non-governmental standards and could result in the creation of standards that are based more on politics than science and practicality. In the alternative, standard organizations could raise revenue from corporate sponsors, but this model could lead to biased standards that benefit the sponsors. Finally, the standard development organizations could seek revenue from the federal government. Again, however, that model fails to benefit from the expertise of the standards development organization and leads to the development of standards based on politics.

NAHB also recommends that a document that has been incorporated by reference in a regulation be available free to the public in at least one location within the agency for the lifetime of the document that incorporates it.

OMB raises the issue of providing a non-copyrighted, non-technical summary of the copyrighted materials. While a summary may be a useful document to assist the general public in gaining a basic understanding of an agency's proposed actions, it cannot take the place of the full text of the standard. A summary of a document to be incorporated can too easily omit the information that is most important to the person who is commenting on the proposal. Furthermore, in many instances the incorporated document will be the enforceable portion of the regulation. In those instances, the regulated community must have access to the actual document (not a summary) so that it may fully understand and evaluate the proposal's impact.

4. Strengthening the Role of Agency Standards Executives

NAHB agrees that the agency standards executives must possess a minimum level of qualifications and authority to participate in the standards-setting process. Equally important, agency standards executives must be identified to the public, along with the means to contact these individuals. Otherwise, the resolutions and follow up, which are a vital part of the code and standard development process, cannot take place. Agencies should also publish a process by which complaints against an agency standard executive should be handled. The Draft Circular is clear that the agency should not use its position to unduly influence the standard-setting process, yet without knowing how to resolve issues as they arise, or to whom the complaints should be filed, it is not clear that there is any recourse.

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NAHB appreciates the opportunity to provide comments on this important undertaking and believes that with NAHB's recommended changes, OMB's Circular A-119 will bring much-needed clarity and certainty to the federal agencies' role in the standard-setting process. If you have any questions or would like to discuss any of NAHB's recommendations, please do not hesitate to contact me at (202) 266-8232.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jee', with a long horizontal flourish extending to the right.

Amy C. Chai
Senior Counsel
National Association of Home Builders