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

Re: Comments of Nina Mendelson, submitted to Docket ID: OMB-2014-0001; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

Dear Administrator Shelanski:

I am writing in reference to the Office of Management and Budget's draft Circular A-119, referenced at 79 Fed. Reg. 8207 (Feb. 11, 2014). I have taught and researched in the field of administrative law, with a focus on rulemaking, for 15 years. I have recently published a law review article discussing the difficulties with access limitations for incorporated-by-reference rules and arguing for substantial levels of free public access. *See Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards,* 112 Mich. L. Rev. 737 (Mar. 2014). I have appended the abstract; I have not included the article because of length but will gladly provide it if of interest.

These comments primarily concern the issue of public access to privately drafted rules, incorporated by reference into binding federal regulatory law ("IBR rules"). While OMB's somewhat greater attention in the draft Circular to public access is to be applauded, the draft Circular's text is insufficient to ensure proper public access to the text of regulatory law. Both the law and strong policy concerns require that IBR rules be meaningfully available to the public without charge.

In addition, OMB's own approach to the public access issue must be a balanced one. The draft Circular's treatment of the need for meaningful free access to binding federal law is cursory. Draft Circular at 10. Meanwhile, the draft Circular suggests, without providing data, detail, or recognition of the recent creation of SDO reading rooms, that private standards organizations may cease drafting standards if a meaningful level of free public access to the text is a condition of incorporation by reference. *Id.*

I hope you will take the following comments into consideration as you revise the draft Circular. I am in agreement with the substantial arguments made in the comments of Public.Resource.Org; I also contributed to and support the comments of the American Bar

Association's Section on Administrative Law and Regulatory Practice. Finally, I support the comments of Professor Peter Strauss on the need for public access to the law. In particular, current practices —

- Violate 5 U.S.C. 552's "reasonably available" requirement;
- Violate 5 U.S.C. 553's entitlement to a meaningful opportunity to comment on proposed rules and to petition to revise existing rules; and
- Raise constitutional concerns, including due process, equal protection, and First Amendment issues. It is thus beyond the statutory authority of the rulemaking agencies to incorporate such standards without assurances of public access. *See* ABA Section Comments at 8-9.

And, as the ABA Section comments discuss, several SDOs have now decided to provide free read-only digital access to a range of IBR standards. This strongly suggests that requiring some meaningful free access to IBR standards is unlikely to undermine either the business model of SDOs or the supply to agencies of privately drafted standards. *See* ABA Section Comments at 16-17.

Rather than continuing to encourage current practices, OMB's draft Circular accordingly should be revised to ensure that agencies comply with the law. I write separately to underscore a few additional points regarding public access issues:

- Agency reliance on SDO websites—even "reading rooms" which promise some level of free read-only access—is insufficient access to satisfy the statutory "reasonably available" requirement. This is because SDOs continue to claim the option to revoke access to an IBR rule, to charge for access, and to impose significant conditions on reading IBR rules. SDOs have also stopped making available in any form numerous standards that have been incorporated by reference into federal law.

- SDO standard development processes are not truly open to the public and are not reliably balanced as to interests. Public access to the text of IBR standards is not only legally required, but critical to ensure that the government is accountable for properly selecting and employing these standards as IBR rules.

- The draft Circular would perpetuate IBR practices that systematically disadvantage citizens and entities based on income.

- The draft Circular rule would continue to encourage incorporation practices contrary to the American tradition of free access to the law.

- By permitting current practices to continue, the draft Circular would send a damaging message to the public that the government mainly needs to be accountable to those of means.

For these reasons, and as discussed in greater detail below, the Office of Management and Budget should revise Circular A-119 to ensure widely available free public access to the text of IBR rules.

1. A**gency reliance on SDO websites – even "reading rooms" – is insufficient to meet the statutory "reasonably available" requirement.**

The free access accorded to IBR rules in the Office of Federal Register's Washington, D.C., reading room, is obviously inadequate to meet 5 U.S.C. 552's requirement that they be "reasonably available." Administrative agencies that wish to adopt IBR rules may well point to the decision of some standards development organizations ("SDOs") to make available some IBR rules on a read-only basis on their websites. This is a very helpful step, to be sure. It is also a strong piece of evidence that making IBR rules available on a free read-only basis will not destroy the market for books of standards, as some SDOs have claimed. Unfortunately, it is insufficient to satisfy 5 U.S.C. 552's "reasonably available" requirement.

The draft Circular tolerates and implicitly approves agency reliance on SDO websites to provide access to IBR rules. In doing so, however, the draft Circular also fails to implement the statutory "reasonable available" requirement. As I discuss in greater detail in my article, SDO websites—even when they provide some free read-only access--do not currently and are highly unlikely to ensure that IBR rules are "reasonably available" under any reasonable understanding of 5 U.S.C. 552(a).

a. **SDOs typically claim the option to revoke access or charge for it.**

First, even when they provide some free, read-only access to the public, SDOs generally claim the option to revoke access or to charge for it. They also make significant demands of individuals who wish to read the standards. For example, ASTM International (formerly the ASTM) has opened a read-only reading room, purportedly for standards that have been incorporated into federal law. *Reading Room*, ASTM Int'l, http://www.astm.org/READINGLIBRARY/ (last visited May 12, 2014) ("This is a free service where you can view and read ASTM safety standards incorporated in United States regulations."). However, the coverage is spotty at best; searches I performed in 2013 and 2014 revealed that the library appeared to exclude numerous ASTM standards incorporated by reference into federal regulations.

Moreover, apart from granting a limited license to read the standards, ASTM asks readers to waive any challenges to its holding a full copyright, to agree to a bar on "in anyway exploit[ing]" the material "in whole or in part," to agree to an indemnification clause, and to consent to be sued in Pennsylvania courts. *See ASTM License Agreement*, ASTM Int'l, *available at* http://www.astm.org/COPYRIGHT/Single_PDF_copyrightlicense_agreement.doc (last visited May 12, 2014). Perhaps the release is aimed at entities that would copy and sell books of ASTM standards in competition with ASTM itself. But having to agree to the release would undoubtedly trouble or even deter the ordinary citizen or small business owner who merely wishes to read the standards to understand their content. Because "exploit" could be understood to mean "to make use of," the restrictions on "in any way exploit[ing]" could also be understood to interfere with the ability of an individual to confer with an attorney on a standard's contents or

to discuss the standard with other citizens. Forcing a reader to sign such releases in order to see binding law undermines the reasonable availability of that law.

The American Petroleum Institute has also made some free read-only public access available to its federally cited standards, but it requires readers to sign an agreement similar to the ASTM release, including consenting to be sued in the District of Columbia. Beyond this, it also specifically reserves API's rights to "suspend or discontinue providing the Online Document to you with or without cause and without notice." *Government-Cited and Safety Documents*, API, http://publications.api.org/GocCited_Disclaimer.aspx (last visited May 12, 2014). Again, having to sign such a release is not consistent with ensuring that IBR rules are "reasonably available," as with API's reservation of the ability to revoke access to standards for any reason whatsoever. Access to standards in the ANSI IBR Portal, at ibr.ansi.org, requires a user to waive any challenges to the SDO's copyright and to agree that access may be terminated "for any reason." Moreover, readers must provide ANSI not only with full name and address, but institutional affiliation and telephone number. *See* http://ibr.ansi.org/Checkout/EULA.aspx.

SDOs also do not appear to consistently honor reported commitments to make standards available to the public on a free read-only basis. For example, a December 2012 proposed rule issued by the Consumer Product Safety Commission ("CPSC") for a hand-held infant carrier safety standard proposed to incorporate ASTM International Standard F2050-13a. The proposed rule referred readers who wished to comment to http://www.astm.org. Despite a promise in the Federal Register that ASTM would make the standard freely available during the comment period, which ended February 25, 2013, *see* Safety Standard for Hand-Held Infant Carriers, 77 Fed. Reg. at 73,354, I was unable to access it during repeated visits to ASTM's "Reading Room" in January and February 2013, and I was instead only able to locate a copy for sale at the website's price of $ 49.20. The rule was finalized with the CPSC's adoption of an updated ASTM standard. Safety Standard for Hand-Held Infant Carriers, 78 Fed. Reg. 73.415 (Dec. 6, 2013) (to be codified at 16 C.F.R. pts 1112 & 1225) (incorporating by reference ASTM Standard F2050-13a, with modifications); *see* 16 C.F.R. 1225.2(a). As of May, 2014, that standard cannot be read in ASTM's "Reading Room," but is only available for purchase at the price of $ 42.00. Similarly, occupational safety and health rules incorporate by reference numerous ASTM standards that appear available only for sale, rather than in ASTM's free reading room. *See, e.g.,* 29 C.F.R.1910.137 (referencing ASTM standards F1236 and F819), and 29 C.F.R. 1910.269 (referencing ASTM F1117-03).

b, **SDO charges for access can be substantial.**

When SDOs do charge for access, prices may range from an apparent low of $ 42 for the hand-held infant carrier standards mentioned above to a high of hundreds or thousands of dollars for prescription drug compendia on which Medicare rules rely.[1] Needless to say, this interferes

1. *E.g.*, *AHFS Drug Information 2013*, ASHP STORE, http://store.ashp.org/Default.aspx?TabID=216&ProductId=40143356 (last visited Sept. 29, 2013) (selling the American Hospital Formulary Service Drug Information 2013 at $349, or at $295 for "members"); *USP-NF*, U.S. PHARMACOPEIAL CONVENTION, http://store.usp.org/OA_HTML/usp2_ibeCCtpSctDspRte.jsp?section=10071&minisite=10020 (last visited Sept. 29, 2013) (pricing U.S. Pharmacopeia National Formulary standard at $850 each); Comment of Jacob Speidel, Staff Att'y, Senior Citizens Law Project, Vermont Legal Aid, Inc. 2 (OFR Docket June

with the access of budget-constrained individuals and small businesses to the law. Even if a single standard might be considered in some sense affordable, entities and individuals may wish or need to read multiple standards.

c. **SDOs have made numerous IBR standards completely unavailable.**

A large number of IBR standards that federal agencies have incorporated by reference are now simply unavailable from the SDO's website. For example, OSHA rules note that the operation of paper products machines is particularly hazardous for minors. *See* 29 C.F.R. § 570.63(a) (2012). Yet minors are nonetheless permitted to load scrap paper balers that comply with ANSI Standard Z245.5-2008 or earlier. *See* 29 C.F.R. § 570.63(c)(1) (2012). As of May, 2014, that standard appears to be unavailable from ANSI either through the IBR Portal or by sale, and a later revised version is available only for $150. Similarly, Energy Department requirements for contractors require compliance with the 2005 American Conference of Governmental Industrial Hygienists ("ACGIH")'s "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices. *See* 10 C.F.R. § 851.23(a)(9) (2013) (requiring contractors to comply with "safety and health" standards and incorporating by reference the 2005 American Conference of Governmental Industrial Hygienists ("ACGIH")'s "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices). These limits also now appear to be unavailable on the ACGIH website. *See* ACGIH, http://www.acgih.org (last visited Sept. 29, 2013).

Once an SDO ceases to make an IBR rule available, the only consistent alternative is reading the standard at the OFR Reading Room. For anyone who does not live in Washington, D.C., the requirement of travel, during business hours, to view the standard, is a very substantial burden. Such standards may be formally public in the OFR Reading Room, but they are in no way "available."[2]

Thus, incorporated materials are hard to locate even when available from SDOs and very often expensive to access. Nothing seems to require SDOs to enhance public availability or to

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21, 2012) [hereinafter Comment of Vermont Legal Aid], *available at* http://www.regulations.gov/contentStreamer?objectId=09000064810258aa&disposition=attachment&contentType=pdf (reporting Drugdex price of $6,000). Another source states that Drugdex is not available for purchase by members of the general public and that the publisher would not provide details of pricing. *CMA Report: Medicare Coverage for Off-Label Drug Use*, CTR. FOR MEDICARE ADVOCACY, INC., http://www.medicareadvocacy.org/InfoByTopic/PartDandPrescDrugs/10_09.16.OffLabelDrugCoverage.htm (last visited Sept. 29, 2013).

2. Indeed, such a standard may become unenforceable, since it likely would not be understood as satisfying the government's obligation to supply "fair notice" of obligations to regulated entities. *See Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2167–68 (2012) (alteration in original) (refusing to defer to agency interpretation in view of "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires' " (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986))); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (reaffirming fair notice requirement in civil administrative context). Revocation of binding federal rules in this fashion also appears to violate the Administrative Procedure Act's rulemaking provisions. See 5 U.S.C. 551 (defining "rulemaking" to include process for revising or repealing rule).

restrict SDOs from simply removing the standards at will from their websites. These standards are not "reasonably available." To the extent that the draft Circular permits this situation to continue, it is contrary to law.

2. **Despite a preference for "consensus" standards, SDO processes that generate standards are unlikely to balance interests reliably.**

Draft Circular A-119 does propose to include an express preference for voluntary "consensus" standards over non-consensus standards. See Section 6(f). Section 3(f) of the draft Circular includes a variety of criteria for defining the "voluntary consensus standards body" that would produce a voluntary consensus standard, including "openness," a "balance of representation." "due process," an "appeals process," and "consensus."[3] These criteria are virtually identical to and may have been meant to refer to ANSI's accreditation criteria for its standards developers. See Introduction to ANSI: National Standardization, http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 (last visited May 12, 2014) (listing "openness, balance, consensus, and due process" as its essential requirements; also mentioning "appeals.").

One implication of asking agencies to prefer voluntary consensus standards could be that public access to standards is less important if a wide range of interests, or even the public at large, is already well-represented in the process of standards development. But in fact, there is no clear indication so far that attempts at interest balancing are effective.

Instead, there are substantial reasons to be concerned that SDO processes, even those currently perceived as "consensus-focused," may be closed to some perspectives or unrepresentative, owing to access barriers. As discussed below, this is true not only of groups that ANSI currently accredits as meeting the criteria listed above, but of ANSI itself. Widespread public access to SDO-drafted standards when agencies incorporate them into the binding law, is thus not only legally required, but critical to ensure that agencies are acting appropriately in relying upon these standards.

a. **Imbalance in SDO processes is a persistent risk.**

SDO processes vary widely. At the API, outsiders apparently may participate in API committees—and the API has stated that governmental officials and academics do participate on committees—but the organization requires a company name for application to participate, warns that "participation . . . requires travel to committee meetings" and states that it is desirable to have "your management's support in order to facilitate effective participation."[4] Those obstacles,

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3. ANSI's requirements are stated in detail. *See generally* AM. NAT'L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS (2013), *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2013_ANSI_Essential_Requirements.pdf. It is not clear which, if any, of these requirements are meant to be referenced by Circular A-119.

4. *See Standards Committee Application*, AM. PETROLEUM INST., http://www.api.org/publications-standards-and-statistics/standards/committee-information/standards-committee-application (last visited May 12, 2014).

particularly the travel requirement, are likely to deter fully balanced participation. The API reports that its members come entirely from the petroleum industry.[5] It is not fully clear whether the API would qualify as a consensus-focused group under draft Circular A-119's criteria, since they are generally stated, but as the API itself points out, it is an ANSI-accredited organization.

At ASTM International, another ANSI-accredited organization, only members may participate in standards development; the lowest level of membership costs $75 per year.[6] As one commenter pointed out to the OFR last year concerning ASTM toy standards incorporated into federal rules, "[S]ince this standard [must be purchased to be read] and is written by a[] [nongovernmental organization] that primarily intersects with industry and related groups, consumers have little opportunity to participate in rewriting the standard or expressing their feedback directly to ASTM."[7]

The North American Energy Standards Board ("NAESB"), also accredited by ANSI, develops standards that the Federal Energy Regulatory Commission incorporates by reference to define all manner of public utility and natural gas pipeline regulation. Although it permits some state public utility commissions and the Department of Energy to join, NAESB describes itself as a trade organization and an "industry forum for the development and promotion of standards . . . ."[8] Membership costs $6,500. Rules under development are subject to very limited viewing by nonmembers. Although the organization accepts written comments on draft proposals, NAESB has reportedly relied on an in-person committee process for participation and drafting. Participation in that process now requires payment: "Non-members face charges for meeting participation by telephone or in person ($100 for a meeting of four hours or less; $300 for a longer one), or for a year's participation in the work of a given subcommittee ($1000)."[9]

The National Rural Electric Cooperative Association ("NRECA"), an association of over 900 nonprofit rural electric utilities that provide power to 42 million consumers, has commented on the difficulty of participating in NAESB proceedings. Although the NRECA itself is a

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5. *See API Member Companies*, AM. PETROLEUM INST., http://www.api.org/globalitems/globalheaderpages/membership/api-member-companies (last visited May 12, 2014).

6. *See Technical Committees*, ASTM INT'L, http://www.astm.org/COMMIT/newcommit.html (last visited May 12, 2014) ("Any interested individual can participate on a Technical Committee [that develops and maintains ASTM standards] through ASTM membership."). The least expensive membership is $75 per year, which entitles members to "participate in the development of high quality, market relevant standards" and to get a discount on ASTM publications. *See Benefits for ASTM Participating Members*, ASTM INT'L, http://www.astm.org/MEMBERSHIP/participatingmem.htm (last visited May 12, 2014).

7. Comment of Samantha Gordon 1 (OFR Docket Mar. 30, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fe4d7a&disposition=attachment&contentType=pdf. This problem parallels difficulties in international standards organizations. *See* TIM BÜTHE AND WALTER MATTLI, THE NEW GLOBAL RULERS 224 (2011) ("[C]onsumer representatives are frequently viewed as 'outsiders' in private-sector rule-making bodies.").

8. *See About NAESB*, N. AM. ENERGY STANDARDS BD., http://www.naesb.org/aboutus.asp (last visited Sept. 29, 2013).

9. Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 541 (2013).

member of the NAESB, a substantial number of its own members are not NAESB members. NRECA thus cannot "share the [draft] standards with its membership," although those members must comply with the standards once finalized.[10] This impedes the group's ability to participate in standards development on behalf of its members.[11]

The American Society of Health Systems Pharmacists Drug Information compendium, which lists acceptable off-label uses of pharmaceuticals and thus constrains Medicare coverage, does not appear to incorporate public input at all but instead is developed solely by a "professional staff of drug information analysts and editors with strong scientific and therapeutic backgrounds" subject to an unspecified "external review process."[12]

Even the processes of ANSI itself are far from fully open. Public information on which standards are under development is hard to acquire, and draft standards must often be purchased or the SDO joined to exercise any right to comment.[13] According to one official at ANSI, even if proposed standards modifications are freely available to the public, the underlying standards will only be made available through purchase.[14]

With respect to ANSI, it remains unclear whether participation in these standards development procedures is even roughly representative of the range of public views, despite ANSI's commitment to an "open" process. For example, among ANSI's accredited standards developers are groups whose members include only regulated industrial entities, such as the API, and the American Iron and Steel Institute ("AISI"),[15] which describes itself as the "voice of the North American steel industry."[16]

An interested citizen or small business may have a difficult time discovering that a standard is under development and will then have to pay to read it in order to comment—and may have to travel or to join the organization to participate. This is an obstacle to incorporating a variety of interests in the process. For example, when Congress passed the NTTAA, small

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10. Comment of Richard Meyer, Senior Regulatory Counsel, Nat'l Rural Elec. Coop. Ass'n, and Adrienne E. Clair, Stinson Morrison Hecker LLP 3 (OFR Docket Mar. 28, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fe3ed2&disposition=attachment&contentType=pdf.

11. *See id.* at 5–6.

12. *See Off-Label Uses: Overview*, AHFS DRUG INFO., http://www.ahfsdruginformation.com/off_label/overview.aspx (last visited Sept. 29, 2013).

13. *E.g., Call for Comment on Proposals Listed*, ANSI STANDARDS ACTION, Feb. 22, 2013, at 1, *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf (providing suggested changes to multiple standards but omitting full standards).

14. Telephone Interview with Patricia Schroeder, Am. Nat'l Standards Inst. (Jan. 29, 2013) (notes on file with author).

15. *See generally ANSI-Accredited Standards Developers Contact Information*, ANSI STANDARDS ACTION, Feb. 22, 2013, at 22, *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf.

16. *About AISI*, AM. IRON & STEEL INST., http://www.steel.org/en/About%20AISI.aspx (describing its twenty-six "integrated and electric furnace steelmaker" members and 125 associate or affiliate members who are "suppliers to or customers of the steel industry") (last visited Sept. 29, 2013).

business witnesses testified that significant costs—including traveling to SDO meetings—impeded their participation in SDO standards development.[17] As consumer group comments filed with the OFR in response to the petition demonstrate, obstacles to participation in SDO standards development are likely to be at least as significant for consumers, Medicare recipients, and other interested individuals.[18]

Draft Circular A-119 seems unlikely to prompt much more significant openness or participation opportunities in SDOs. First, it calls only for "meaningful" opportunities to participate. It is not clear whether participation might be "meaningful" in the language of Circular A-119 when an SDO can charge for access to draft standards or require in-person participation. Perhaps it could be argued that at least some entities could afford to participate and to send representatives to SDO meetings. The process would not be truly open, however, because individual members of the public or small businesses would face significant obstacles. By the same token, it is unclear just how diverse participation in a consensus standard must be to satisfy the "balance of representation" requirement. In particular, it is unclear whether individual consumers, say, must be represented in the development of a automotive safety standard, or whether those implementing Circular A-119 might view it as sufficient to have automotive manufacturers, automotive parts manufacturers, and engineers.

At best, then, full access to SDO decisionmaking is limited, and even when such an organization's process is formally open to participation, as encouraged by draft circular A-119, it will be difficult to tell who is likely to participate in decisions and whether interests are, indeed, "balanced." At worst, groups may be unrepresentative and decisionmaking closed. SDOs have long been criticized as being dominated by regulated entities and, in particular, by the largest of those entities.[19]

b. **Public access is accordingly critical to ensure that agencies properly use privately drafted standards.**

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17. Small business representatives testified to this effect in the mid-1990s when Congress enacted the NTTAA. Tyler R.T. Wolf, Note, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 Wash. & Lee L. Rev. 807, 821 (2008) ("[M]embers of the business community testified that the standards development process discriminated against small business[es, which] often lack the time, money, and workforce necessary to send representatives across the country to participate in various SDO meetings.").

18. *See, e.g.*, Comment of Rachel Weintraub, Dir. of Prod. Safety and Senior Counsel, Consumer Fed'n of Am. 1 (OFR Docket June 1, 2012) [hereinafter Comment of Consumer Fed'n of Am.], *available at* http://www.regulations.gov/contentStreamer?objectId=0900006481023352&disposition=attachment&contentType=pdf ("Without unfettered access to these standards . . . important constituencies such as individual consumers and public interest and consumer organizations will be unable to participate in these proceedings.").

19. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 534, 641–42 (2000); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 407–08 (2003). For example, the Pipeline Research Council International, which has supplied a few IBR standards to the Department of Transportation, is "a community of the world's leading pipeline companies." *About PRCI*, PIPELINE RESEARCH COUNCIL INT'L, http://prci.org/index.php/about/ (last visited Sept. 29, 2013).

All this is not to judge the internal processes of any particular SDO or criticize any particular IBR rule. However, the evidence should raise concern regarding a relative lack of openness and significant obstacles to participating in SDO decision making. SDO processes clearly cannot substitute for public access to the text of the rule itself. Widely available free public access to the text of IBR rules is legally required. Neither the Administrative Procedure Act nor the Freedom of Information Act contains an exception for "consensus" standards to comment opportunity requirements or public access requirements. The evidence above underscores that meaningful free public access is also necessary to ensure that agencies are properly incorporating IBR rules to implement the public interest, as required by their authorizing statutes. Having to pay a fee to read the law can, of course, obstruct individuals from learning their obligations and making informed decisions. And it can also obstruct individuals and entities from attempting to ensure, whether through agency procedures, public oversight, the electoral process, or judicial review, that the government is accountable for the standards it chooses to incorporate into binding regulatory law.

3. **The draft Circular would perpetuate IBR practices that systematically disadvantage citizens and entities based on income.**

It is no answer to the public access problem to say that IBR rules remain accessible to those who can afford them or who can travel to Washington, D.C. The access limitations are not random; they systematically exclude people based on budgetary constraints. For many of these rules, budgetary constraints will likely be connected with the substantive interests under the rule. For example, consumers are generally likely to have smaller budgets than manufacturers. Employees affected by workplace safety rules are likely to have smaller budgets than the regulated manufacturers. Neighbors to a pipeline may well have smaller budgets than the pipeline operator. A financial barrier to accessing IBR rules thus is likely to distinctively and systematically disadvantage consumer, neighbor, and other individual interests as well as small business interests. As discussed in greater detail in the ABA Section comments, all these entities and individuals—even if not directly regulated--are among the "class of persons affected" by IBR rules, and so ensuring that these rules are "reasonably available" must include availability to these groups. *See* ABA Section Comments at 9-11.

Budget-constrained individual citizens and small businesses cannot readily understand rules that affect them, learn their compliance obligations, write their members of Congress, petition an agency to change a rule, or even be fully informed for purposes of voting if they do not have meaningful public access to the text of IBR rules.

Besides violating the statutory "reasonably available" requirement, providing only disparate public access to the law is bad policy because it can worsen potential pathologies in the regulatory process. Resources among affected stakeholders will never be perfectly balanced, but it is well documented that individuals and small businesses are already disadvantaged in the standards development process, both in SDOs and in agencies. They may be disadvantaged in participating in decisionmaking and obtaining expert and technical legal assistance.[20] The access

20. CORNELIUS M. KERWIN, RULEMAKING 188 (2d ed. 1999); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air*

costs to read IBR rules worsen this imbalance since they may keep many consumers, neighbors, and small businesses from even getting in the door.

For example, as the Modification and Replacement Parts Association commented in response to the petition for rulemaking, "The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . ."[21]

Nor is it any answer to say that IBR rules cover "technical" matters and thus are not of particular public interest. As the comments in response to OFR's petition for rulemaking demonstrated, at least some individuals are interested in and able to read rules that are purportedly technical.[22] Moreover, "technical" matters often effectively define policy issues, as the comments of the ABA Section filed in the OFR rulemaking point out. *See* ABA Section Comments, OFR-2013-0001-0029 (Jan. 31, 2014), at 17.

The draft Circular's only nod in this direction is to ask agencies to consider whether an SDO might provide a "freely available, non-technical summary." Section 6(p)(ii). As discussed in the ABA Section comments, access to the summary, rather than the text, is inadequate. In any event, draft Circular A-119 would continue to encourage agencies to use privately drafted standards even without this meager level of public information, specifically instructing them that the "absence of one or more of these factors" should not be a basis for an agency deciding not to use the standard. *See* Section 6(p).

4. **The draft Circular would continue incorporation practices that are contrary to the American tradition of free access to the law.**

Public.Resource.Org's comments discuss the history of the Federal Register Act. And as those comments point out, the current limitations on access to and difficulties in locating IBR

Toxic Emission Standards, 63 ADMIN. L. REV. 99, 102 (2011); *see also* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999) (noting that regulated entities typically have an "advantage in influencing agency decisions" because they have the "incentive and means to monitor what the agency does on a day-to-day basis" and "information without which a regulatory agency cannot do its job").

21. *See* Comment of the Modification & Replacement Parts Ass'n 14 (Regulations.Gov, filed June 1, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf

22. *See, e.g.*, Comment of A Concerned Citizen (OFR Docket Mar. 20, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fdbec2&disposition=attachment&contentType=pdf ("Private citizens, even if they aren't subject to a regulation, are still directly and indirectly affected by it."); Comment of Penza Bailey Architects, *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fe7d25&disposition=attachment&contentType=pdf; Comment of Robert Tess 1 (OFR Docket Mar. 23, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fddd35&disposition=attachment&contentType=pdf.

rules closely parallel the difficulties in locating and reading federal rules in the 1930s. This was the very problem Congress sought to fix in enacting the Federal Register Act.

The Federal Register Act was not an isolated legislative action, but instead simply continued the longstanding U.S. tradition of providing inexpensive and widespread public access to the law. Since 1795, Congress has expressly taken on the distribution of the laws as a public function, agreeing on the need for "more general promulgation of the laws,"[23] and provided the public with free access through libraries. A complete edition of the laws to date, the Constitution, and current treaties, as well as newly enacted laws, was to be printed under the direction of the secretary of state and distributed to "each State or Territory." The texts would be deposited in "fixed and convenient places in each county or subordinate civil division," as the state government might judge "most conducive to the general information of the people."[24] This development coincided with a general increase in the number of libraries.[25] By 1859, Congress had provided for the permanent retention of governmental publications by libraries and other designated depositories.[26] The Statutes at Large, for example, were to be distributed to "State and Territorial libraries and to designated depositories."[27] Congress formally expanded the publication and free access regime to include federal agency rules beginning in 1936. Governmental depository libraries now maintain Federal Register sets as well as the CFR. Congress then expanded the publication regime to provide for free digital access at the approximately 1,200 governmental depository libraries for all federal statutes and regulations. Congress went further in 1993, requiring the Government Printing Office to make universal online access to statutes and regulations available, defining recoverable costs as the "incremental cost of dissemination,"[28] a very small charge per user in the information age,[29] and a charge barred, in any event, at depository libraries. Perhaps unsurprisingly, therefore, the Government Printing Office has elected not to impose any costs at all.[30]

In 1996, in the Electronic Freedom of Information Act Amendments, Congress required agencies to make available, by "electronic means," indices of records that have been released to the public under the FOIA, and, for records created beginning late in 1996, the records

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23. H.R. JOURNAL, 3d Cong., 2d Sess. 328–29 (1795) (describing Act of Mar. 3, 1795). Perhaps needless to say, an individual's purchase of a private bound copy of the multivolume U.S. Code would not be free of charge.

24. *Id.*; *see also* Act of Dec. 23, 1817, res. 2, 3 Stat. 473 (providing that the secretary of state must distribute a set of state papers and public documents to executives and legislatures in the "several states and territories," as well as to "each University and College in the United States").

25. *E.g.*, SCHUDSON, THE GOOD CITIZEN 119 (1998) ("From 1790 to 1815, five hundred New England towns established libraries.").

26. Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381.

27. Act of Jan. 12, 1895, ch. 23, §§ 54, 62, 73, 28 Stat. 601, 608, 610–20.

28. 44 U.S.C. § 4102(b) (2006).

29. *See* Bruce R. Kingma, *The Costs of Print, Fiche, and Digital Access: The Early Canadiana Online Project*, D-LIB MAG. (Feb. 2000), http://www.dlib.org/dlib/february00/kingma/02kingma.html ("In theory, once the fixed costs of digitization are incurred there is a zero marginal cost of providing an additional copy.").

30. *See* NAT'L ACAD. OF PUB. ADMIN., REBOOTING THE GOVERNMENT PRINTING OFFICE 37 (2013), *available at* http://www.napawash.org/wp-content/uploads/2013/02/GPO-Final.pdf (noting that the Government Printing Office ("GPO") elected not to charge users for access to digital content because "administrative costs of collecting payments were higher than what GPO could charge").

themselves.[31] Congress's express purpose was to "improve public access to agency records and information" and to "foster democracy by ensuring public access to agency records and information."[32] And in 2002, in the e-Government Act, Congress required agencies to provide for electronic rulemaking and electronic rulemaking dockets and to post on their websites a wide range of materials, with the express purposes of "increas[ing] access, accountability, and transparency" and "enhanc[ing] public participation in Government."[33] Access to IBR rules contrasts sharply with the accessibility of the U.S. Code and the CFR, both freely available to anyone online and in the over 1,200 depository libraries nationwide.[34]

In the face of repeated Congressional endorsements of public access to binding law and to a wide range of key government materials, it is mystifying that OMB proposes to continue encouraging agencies to incorporate by reference private standards into binding federal regulatory law, when that law is not readily available to the public. The Office of Management and Budget has failed to give thorough consideration to the strong Congressional policy of open access to the law.

5. **By permitting current incorporation by reference practices to continue, the draft Circular sends a damaging message to the public contrary to this Administration's commitment to transparency and accountability.**

Ironically, the reduced accessibility of IBR rules has coincided with increased calls for—and a heightened public commitment to—"open government" and transparency. President Obama expressed a commitment to transparency immediately upon taking office: "Transparency promotes accountability and provides information for citizens about what their Government is doing."[35]

Thus, even if the incremental costs of access might be understood as relatively minimal in some settings, such as compared with compliance costs, the government's decision to regulate by incorporating expensive, difficult-to-locate standards sends a damaging message to the public. The damaging message is driven home by dismissive statements such as OMB's in the preamble that it does not "believe the public interest would be well-served by requiring standards incorporated by reference to be made available 'free of charge.'" Draft Circular A-119 at 10.

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31. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (amending 5 U.S.C. § 552(a) to require agencies to make documents available through "electronic means").

32. *Id.* § 2(b)(1)–(2), 110 Stat. 3048.

33. *See* E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)–(d), 207(f), 116 Stat. 2899, 2915–16, 2918–19 (codified as amended at 44 U.S.C. § 3501 (2006) note (Federal Management and Promotion of Electronic Government Services)).

34. Session laws and individual Federal Register issues dating from the early 1990s have been made available online; previous issues may be freely viewed at depository libraries.

35. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC., no. 10, at 1 (Jan. 21, 2009), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900010/pdf/DCPD-200900010.pdf.

The United States has a long and vital history of free and widespread public access to federal laws. Indeed, it might be likened to our history of upholding free access to elections.[36] In that setting, the Supreme Court has invalidated poll taxes that might seem trivial compared with the costs of traveling to the polls or taking time off work to vote. The Court has stated that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[37] Similarly, standing as a candidate can obviously require significant resources, whether it is the cost of broadcast advertising or the resources to take time off to campaign. A filing fee of a few hundred dollars thus might appear trivial by comparison, but courts have nonetheless consistently invalidated these fees as violating equal protection, given "our tradition . . . of hospitality toward all candidates without regard to their economic status."[38]

Incorporating into the law standards that are generally available only after paying a significant fee set by a private entity or traveling to Washington, D.C., is a stark contrast. It is contrary to the strong American tradition of making statutes and regulations freely and widely available, including in the over 1,000 depository libraries nationwide and now over the internet.

Moreover, as Professor Cary Coglianese wrote in comments to the OFR, citizens now use "websites as their primary point of contact with their government, [so] even seemingly small and subtle barriers that inhibit fair public access to government information take on significance."[39]

The use of IBR rules sends citizens a set of messages that are profoundly inconsistent not only with our other practices and with presidential statements but also with core assumptions of a democratic government. The obstacles, including the expense, of accessing IBR rules are intrinsically opposed to the notion that a democratic government must govern publicly. Most obviously, for citizens to cast an informed vote and participate in public political discussion, they must be able to readily learn what the government is doing. IBR rules are not secret. But by making access expensive, difficult, or both for ordinary citizens, agencies are sending the message that the democratic process is beside the point for this set of quasi-legislative rules. Instead, the message is that the government mainly needs to be accountable to individuals and businesses of means. The concern may be worsened when private organizations largely control access to the law, including the apparent power to largely eliminate that access. This cluster of messages is likely to feed public cynicism regarding governmental functions and the meaningfulness of voting and public participation, reducing civic engagement and the perceived legitimacy of government.[40]

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36. U.S. CONST. amend. XXIV, § 2.

37. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–68 (1966) (invalidating a state $1.50 poll tax as violating equal protection and as effective denial of the right to vote and stating, "[A] State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

38. *E.g.*, Lubin v. Panish, 415 U.S. 710, 717–18 (1974) (striking down as violative of equal protection a $701 filing fee requirement for California county supervisor election).

39. *See* Comment of Comment of Cary Coglianese, Edward B. Shils Professor of Law, Univ. of Penn. Law Sch. 1 (OFR Docket May 30, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006481022904&disposition=attachment&contentType=pdf.

40. *See, e.g.*, Comment of Laura Breyers 1 (OFR Docket Mar. 21, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fdc436&disposition=attachment&cont

By using IBR rules, one could also understand the government as communicating a message that is inconsistent with notions of equal protection and equal access to the government. Agency incorporation of privately drafted standards that the ordinary citizen can only access with significant cost, difficulty, or both is inconsistent with the idea that every citizen is subject to the same law, whatever her economic status.

In summary, the Office of Management and Budget should revise draft Circular A-119 and instead make clear that the executive branch policy on use of voluntary standards is for agencies to incorporate standards by reference only when there is meaningful, free public availability to the content of the incorporated material. Thank you for your consideration of these comments.

Very truly yours,

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Joseph A. Sax Collegiate Professor of Law

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entType=pdf ("There's parts of the law that are owned by private corporations? Really? Well, if that's ok with you, then let's just go ahead and privatize the court system . . . . In fact why do we need the government at all, wal-mart seems to be really efficient at what they do, lets [sic] have them run things.").

PRIVATE CONTROL OVER ACCESS TO THE LAW: THE PERPLEXING FEDERAL REGULATORY USE OF PRIVATE STANDARDS

Nina A. Mendelson
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Abstract

To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into thousands of federal regulations—but only by "reference." These standards range widely, subsuming safety, benefits, and testing standards. An individual who seeks access to this binding law generally cannot freely read it online or in a governmental depository library, as she can the U.S. Code or the Code of Federal Regulations. Instead, she generally must pay a significant fee to the drafting organization, or else she must travel to Washington, D.C., to the Office of the Federal Register's reading room.

This law, under largely private control, is not formally "secret," but it is expensive and difficult to find. It raises the question of what underlies the intuition that law, in a democracy, needs to be readily, publicly available. Previous analyses of the need for publicity have focused almost wholly on the need of regulated entities for notice of their obligations. This Article assesses several other considerations, including notice to regulatory beneficiaries, such as Medicare recipients, consumers of dangerous products, and neighbors of natural gas pipelines. Ready public access to the law is also critical to ensuring that federal agencies are meaningfully accountable for their decisions, through both internal and external mechanisms, including voting, political oversight, and agency procedures. The need for ready public access is at least as strong in this collaborative governance setting as when agencies act alone. Finally, expressive harm—a message inconsistent with core democratic values—is likely to flow from governmental adoption of regulatory law that is, in contrast to American law in general, harder to find and costly to access. Full assessment of the importance of public access to law both strengthens the case for reform of access barriers to incorporated-by-reference rules and limits the range of acceptable reform measures.