American Bar Association
Section of Administrative Law and Regulatory Practice
1050 Connecticut Avenue NW, Suite 400
Washington, DC 20036
(202) 662-1690
Fax: (202) 662-1529
www.americanbar.org/adminlaw

May 12, 2014

Re: Comments from the Section of Administrative Law and Regulatory Practice

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
COMMENTS IN RESPONSE TO THE OFFICE OF MANAGEMENT AND BUDGET'S PROPOSED REVISIONS TO CIRCULAR A-119[1]

The Section of Administrative Law and Regulatory Practice of the American Bar Association (the Section) respectfully submits these comments regarding the Office of Management and Budget's proposed revisions to Circular A-119. The Section appreciates OMB's solicitation of comments. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. The section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.[2]

[1] OMB's Request for Comments, though not the draft revisions to Circular A-119, appears at 79 Fed. Reg. 8207 (Feb. 11, 2014).

[2] Our Executive Branch Liaison Jeff Weiss took no part in the development of this letter and abstains from it.

INTRODUCTION

For over two centuries, the United States has maintained a constitutive tradition of meaningful free access to our binding laws. Congress has provided for free public access to federal statutes and, since the1930s, to federal regulations as well, through state and territorial libraries, the creation of the Federal Depository Library System, and ultimately, the internet.[3] In 1993, Congress required the Government Printing Office to make universal online access to statutes and regulations available.[4] This commitment to high levels of public access to statutes and regulations was expanded to other government documents and materials in the Electronic Freedom of Information of Act amendments in 1996 and the e-Government Act of 2002. Not only is meaningful public access to binding law a central American democratic tradition, it is legally required.

Among its purposes, Circular A-119 is intended to encourage agencies to use voluntary consensus standards in strong preference to "government-unique" standards. Agencies have already "incorporated by reference" numerously privately drafted standards, both consensus and non-consensus in origin. Draft Circular A-119 is clearly aimed at increasing agency reliance on such standards. Unfortunately, it does so without adequately attending to the law and policy requiring meaningful public access to those standards. Instead, the proposed revisions to Circular A-119 also continue to contemplate that agencies may leave the private standards development organizations ("SDOs") with the choice to charge for access to standards that are incorporated by reference. The only consistent alternative is access to the text of IBR standards, in the Office of the Federal Register's reading room in Washington, D.C., access for which a request in writing must be submitted in advance. *See* "Where to find Materials Incorporated by Reference at NARA Facilities," available at http://www.archives.gov/federal-register/cfr/ibr-locations.html (visited Apr. 30, 2014). This state of affairs impedes meaningful public access to IBR standards.

In its finalized revisions to Circular A-119, OMB must choose an approach that adequately ensures compliance with 5 U.S.C. §§ 552 and 553, and with the changes made to the concept of "reasonably available" by the fact of the information age, and government transparency legislation reflecting it. Regulated entities needing access to incorporated standards so they can comply with rules referencing them are often small businesses for whom the mass of necessary standards may be a significant cost.[5] Members of the public affected by product regulation,

---

[3] *See* H.R. Journal, 3d Cong., 2d Sess. 328-39 (1795 (describing Act of Mar. 3, 1795), Act of Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381; *see infra* notes 14-15 and accompanying text.

[4] 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as "incremental costs of dissemination" but providing for no charge-access in government depository libraries).

[5] Comments filed in response both to a petition to the Office of the Federal Register to revise the rules on incorporation by reference and in response to OFR's notice of proposed rule made this problem clear. For example, the National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR's notice of proposed rule that the costs of acquiring access "can be significant for small businesses in a highly regulated environment, such as the propane industry." *See* Comments of Robert Helminiak, National Propane Gas Ass'n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 ("Obtaining IBR material can add several thousands of dollars

occupational safety regulation, and environmental regulation also likely cannot afford to read these standards.[6] Though this law is not formally "secret," the cost of reading and difficulty of finding it render it, as a practical matter, inaccessible to the public. At root, then, the government must provide significant levels of free public access to all incorporated matter, if the evils of "secret law" the Freedom of Information Act was enacted to resist are to be avoided.[7]

---

of expenses per year to a small business, particularly manufacturers . . . [T]he ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards." *E.g.*, Comments of John Conley, National Tank Truck Carriers, NARA-2012-0002-0145 (May 30, 2012) (emphasizing the particular problem of purchasing standards not yet incorporated in order to comment on NPRMs, and remarking also that small businesses "have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. ... [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a 'dent' was. ... HM241 could impact up to 41,366 parties and ... there is no limit on how much the bodies could charge ... "); Comment of Robert Tess, NARA-12-0002-0073 (homeowner indicating that cost of accessing sprinkler system requirements are "financially unattainable to most ordinary citizens"); Comments of National Feed & Grain Ass'n, NARA-2012-0002-0153 (June 1, 2012) (addressing an OSHA proposal to amend its grain handling regulation associated with fires and explosions, 29 CFR 1910.272. OSHA had issued an ANPRM suggesting that it would deal replace existing regulatory text by incorporating National Fire Protection Association Standard 61. Yet, as NGFA observed, "NFPA standards offer a far more complex, stringent protocol that may be adopted in whole or in part by industry participants, voluntarily. These guidelines play an important role as voluntary practices that can enhance safety efforts. But they are entirely inappropriate as a replacement for effective rulemaking ...A review and comparison of 1910.272 and NFPA 61 reveals that there are more than 146 additional provisions addressing design, construction, and operation of affected grain handling facilities. Neither the NFPA technical committee, nor any other NFPA committee, conducts [either] an economic impact study ... [or] consider the impact of the feasibility or cost of its detailed recommendations on industry and small businesses, in particular. ... Only NFPA participants, who are required to pay to play, have the ability to comment in the development of consensus standards.").

[6] *E.g.,* Comments of Jacob Speidel, Staff Att'y, Senior Citizens Law Project, Vermont Legal Aid, Inc., NARA-0002-0154 (June 1, 2012), at 2 (noting that costs of accessing IBR rules interfere with Medicare recipients' ability to know their rights); Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes "many Vermont seniors" from accessing materials). *See also* Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that "free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . .and strengthen citizen participation in our democracy"); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers); *see supra* note 9 (citing other comments).

[7] The Section does not argue that the considerations that mandate public availability of incorporated standards in read-only electronic form necessarily require invalidation of SDOs' copyrights in those standards. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and beyond the scope of the Section's comments. *See Veeck v. Southern Building Code Cong. Int'l, Inc*., 293 F.3d 791 (5th

Thus, OMB should strengthen its revision of Circular A-119 to ensure that if agencies are utilizing private standards, consensus or not, meaningful levels of free access, at least free read-only digital access to the text of IBR standards, must be a condition of incorporation by reference. The Freedom of Information Act and the Administrative Procedure Act require such public access. As discussed in detail below, greater public access is required not only by law, but by principles of transparency and good governance. Moreover, the evidence to date—as shown by the creation, by the largest SDOs, of "reading rooms" with free read-only public access--suggests that requiring some level of meaningful free public access is unlikely to significantly affect the supply of privately drafted standards on which agencies can rely. In short, meaningful free public access is not only required by law, but necessary to ensure that regulation is in the public interest.[8]

DETAILED COMMENTS

I. OMB's Proposed Changes to Circular A-119 Include Steps Forward on Public Access to Binding Law, But They Continue to Encourage Agencies to Violate the Requirements of the Administrative Procedure Act and the Freedom of Information Act

Draft Circular Section 6(p) does usefully encourage agencies to increase their consideration of the extent of public access to private standards that may be incorporated by reference into federal regulations. In assessing whether incorporated material is "reasonably available," an apparent reference to the requirement of 5 U.S.C. § 552(a), agencies are asked to consider whether the standards drafting organization, or SDO, would provide free read-only access to the text of an IBR rule during the comment period. It also recognizes that public access may be needed to "achieve agency policy or to subject the effectiveness of agency programs to public scrutiny." Draft Section 6(p)(ii). It also asks agencies to consider whether the standards developer can provide a "freely available, non-technical summary." Section 6(p)(iv).

Asking agencies to consider these issues are steps forward, to be sure, but the draft Circular still would fail to ensure that agencies will comply with the requirements of law and the demands of good policy. The agencies are merely asked to "take into account" these factors, and indeed, are specifically instructed that "[t]he absence of one or more of these factors alone should *not* be used as a basis for agency decision not to use the standard." Section 6(p) (emphasis added). Section 6(p) thus raises a real concern that OMB policy is for agencies to incorporate private standards even without some level of free availability of an IBR standard during a public comment period or once the agency adopts the standard as a final rule.

Both the Administrative Procedure Act and the Freedom of Information Act, as well as good governance concerns, however, require meaningful, free public access to private standards that an agency incorporates by reference, both during the public comment period and once the agency has incorporated by reference.

Cir. en banc 2002), cert. denied, 537 U.S. 1043 (2002); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), *cert. denied*, 522 U.S. 933 (1997); *CCC Information Svc v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).

[8] Insofar as OMB is requesting comment on Administrative Conference Recommendation 2011-5, the Section supports that recommendation only to the extent it would be consistent with providing meaningful levels of free public access to IBR standards.

A. **5 U.S.C. § 553 requires meaningful levels of free public access to a standard that an agency proposes to incorporate by reference, as well as to underlying data.**

At the outset, we note that none of the comments filed in response to the OFR's Notice of Proposed Rule contested that free public access to the text of a proposed rule is required to effectuate 5 U.S.C. § 553(c)'s requirement that a rulemaking agency give interested persons the "opportunity to participate" in the rulemaking.

The Administrative Procedure Act requires that agencies proposing the incorporation of standards by reference must do so in a manner that assures the public a reasonable opportunity to comment on the proposal. This is, of course, most readily accomplished by assuring that the text of the standard proposed for incorporation are disclosed to the commenting public, either by the agency or the responsible standards development organization. In addition, supporting data and studies must also be disclosed. For forty years now it has been established that "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that[, to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C.Cir. 1973). If access is not provided on the agency's own website, or through the Federal Data Management Service, it can be provided on an SDO website under read-only access limitations—but it should be provided somewhere without cost. The only alternative to thus making the standard and its supporting data itself available, and it is an inferior one, is to require that the preamble or the language of the proposed rule explain what is proposed to be required in terms adequate for the public's ready understanding and comment.

And to emphasize, an explanation of the requirements, in itself, would be inadequate without access to underlying data -- that is, to records of the proceedings before the SDO on the basis of which it reached the standard being proposed for incorporation. To comply with the requirements of 5 U.S.C. § 553 as they have been authoritatively construed for decades, the preamble to the agency submission to OFR must also inform the public either that scientific data and studies underlying the proposal will have been placed in its rulemaking docket on FDMS at the time the proposal itself is published, or what these materials are and where they can readily be found, unhampered by significant access costs.

These procedural requirements, which are fundamental to ensuring the continued validity and legitimacy of agency rulemaking, require that "interested persons" must be able to participate in rulemaking by submitting public comments to the agency. *Id.* § 553(c). An "interested person" cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed. *Cf. Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (requiring agencies to disclose data to effectuate meaningful right to public comment). Requiring an "interested person" to pay a fee to learn the content of a proposed rule is a significant obstacle impeding that person's right to comment under Section 553(c).

Standards development organizations that have complied with ANSI's "essential requirements" already have the scientific data and studies underlying their standards as a consequence of their internal processes. Some, like the North American Energy Standards Board, make a point of providing it directly to the rulemaking agency -- in its case, the Federal Energy Regulatory Commission. But agencies cannot simply keep that information to

themselves during the comment process or -- worse -- leave it undisclosed in the possession of the SDO, relying perhaps on agency personnel's participation in the standards generating process. Again, "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that[, to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C.Cir. 1973).

In order to ensure agency compliance with the APA, then, OMB Circular A-119 should make clear that an agency may incorporate private material by reference into binding federal regulations only when it is clear that the incorporated material *and* supporting data has been readily available to any "interested person" during the comment period. That term, as used in Section 553, is generally understood to include any member of the public who is sufficiently interested in agency rules to wish to participate. For example, in inviting the public to file comments on pending proposed rules, the regulations.gov website stresses the importance of public participation as an "essential function of good governance." *See* http://www.regulations.gov/#!faqs;qid=6-9. Any more restrictive interpretation of the group to whom an IBR standard must be "reasonably available" could violate the legal entitlement of those "interested persons" under 5 U.S.C. § 553 to comment on proposed rules.

To avoid violation of the Administrative Procedure Act, then, Section 6(p) of the Draft Circular, then, should clarify that meaningful free availability of a standard during a public comment period is not simply one factor for an agency to consider in proposing the standard for incorporation, but instead is a requirement.

B. 5 U.S.C. § 552(a), the Freedom of Information Act, requires meaningful levels of free public availability of binding federal regulatory law.

1. "Reasonably Available" requires IBR Rules to be Meaningfully Available to the Public Without a Fee, at Least Through a Read-Only Digital Format

Any incorporation of a rule may not lawfully be permitted unless the standard is, at a minimum, available online without a requirement of payment. To provide legally sufficient understanding of any regulatory requirements imposed by material incorporated by reference, the agency must:

(a) make the incorporated standard available without cost on its agency website; or

(b) provide assurance that the standard is and will remain available for reading without cost; if this availability is through the website of a standards development organization at a location identified in the agency regulation, it ideally should be accessible through a direct link in digital versions of the regulation.

As explained more fully below, this conclusion is mandated by:

- The public's right to know the law that it has authored and owns, which is fundamental to ensuring the accountability of government;

- The proper interpretation of "persons affected" in 5 U.S.C. § 552 to mean "interested persons"; i.e., anyone who might be regulated by or benefit from the IBR material;

- The contemporary meaning of "reasonably available;"

- The APA right to petition for revision or repeal of any rule.

For IBR standards that create otherwise unexplained yet binding federal rules, "reasonably available" unquestionably must mean that the material is available to the public online – at least on a read-only basis - with no requirement of payment.

a. **As the authors and owners of the law, the public has a right to know it**

Free public access to the law is essential in a democratic society. First, as the 5th Circuit explained in *Veeck v. Southern Bldg. Code Cong. Int'l*, free public access to the law serves "the very important and practical policy that citizens must have free access to the laws which govern them" if they are to be able to conform their conduct to them. *See* 293 F.3d 791, 795-800 (5th Cir. 2002) (en banc). *Veeck* relied principally on the Supreme Court's holding in *Banks v. Manchester* that "[i]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes." *See* 128 U.S. 244, 253 (1888) (quoting *Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886)). As explained in *Veeck*, these justifications are not simply "due process" arguments. Rather, they rest on the idea that "public ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it." 293 F.3d at 799.

This "right to know" accrues to *all* citizens, not just those who must conform their conduct to the law. Broad public access to IBR material, beyond by those directly regulated, is as important as access by regulated entities. "Th[e] 'metaphorical concept of citizen authorship'" requires free public access to the law as a foundation to a legitimate democratic society. "The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." *Veeck,* 293 F.3d at 799 (quoting *Building Officials & Code Adm. v. Code Technology*, 628 F.2d 730, 734 (1st Cir. 1980)). Thus, even those who need not conform their conduct to regulatory requirements have a right to know. As comments filed to the OFR and OMB in 2012 make clear, the public has an interest in reading IBR material.[9]

Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving – or not serving – the public interest. As President Obama stated in his Memorandum on Transparency and Open Government (Jan. 21, 2009): "Transparency promotes accountability and provides information for citizens about what their Government is doing." This transparency, including public access to the content of regulations, is a critical safeguard against agency capture and other governance problems. Transparency regarding the content of material incorporated by reference is particularly important when that material has been prepared, in the first instance, by private organizations rather than governmental agencies – as when, for

[9] *See supra* note 6 (Vermont Legal Services comment); Comments of Ioana Rusu, Consumers Union, NARA-12-0002-0140 (June 1, 2012) (emphasizing the need for free access to standards to notify the CPSC and warn consumers regarding unsafe products); OMB-2012-0003-0074 (public interest organizations, including environmental, watchdog, and library organizations, emphasizing need for free access to engage government and public on range of public policy issues); NARA-12-0002-0035 ("A concerned Citizen," noting that knowledge of airbag standards allows citizen to be "a more educated consumer").

example, natural gas pipeline safety rules and offshore oil drilling rules incorporate standards drafted by the American Petroleum Institute, and even when motor vehicle safety standards incorporate standards drafted by the Society of Automotive Engineers. We note that regulatory standards created by industry associations such as the API, compared with professionally focused organizations such as ASME, may raise particular concerns warranting public awareness.

Without criticizing any particular standard or organization, transparency and ready access are critical to ensuring that the government makes proper use of incorporated material and that adopted standards do, in fact, protect the public interest as required by statute. And as the 5th Circuit pointed out in *Veeck*, citizens need access to the law not only to guide their actions and to hold the government accountable, but "to influence future legislation" and to educate others. 293 F.3d at 799.

Indeed, the draft revisions to Circular A-119 would continue to condone or even encourage an approach to incorporation by reference that raises constitutional concerns, because, as a practical matter, the public must pay to see incorporated material. First, impediments to a regulated entity's ability to access government standards may implicate due process concerns. In the context of whether to sustain a changed agency interpretation of a rule, the Supreme Court has endorsed "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires,'" and that due process thus bars the imposition of sanctions upon someone who could not have received notice of his or her obligations. *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012) (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)(Scalia, J.)). Comments filed in response to the Office of Federal Register's request for comment of February, 2012, indicated that SDO charges obstruct the ability of small entities and individuals to gain notice of their legal obligations. For example, as the American Trucking Associations warned the Office of the Federal Register, "Purchasing technical reference materials can be cost-prohibitive for small businesses, medium-sized businesses, and individuals."[10] Such agency practices are constitutionally suspect and thus ought to be understood as beyond the authority of the rulemaking agencies. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

Agency incorporation by reference of standards for which the public must pay to see is constitutionally suspect for a second reason as well. The public cannot discuss or criticize the government's decisions if it does not know what they are. As the Supreme Court noted in refusing to uphold a statute that would close criminal trials, "'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' [This] serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.'"[11] *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596,

---

[10] Comments of Dave Osiecki, American Trucking Association , NARA-12-0002-0152 (June 1, 2012), at 3.

[11] Needless to say, it is no answer that these standards are complex and technical. Even if only some individuals are interested reading IBR material, as the media cases cited above show, public access

604 (US 1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *see also Press Enterprise v. Superior Court*, 478 U.S. 1 (1986) (refusing to approve closure of preliminary hearing). *Cf. In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005) ("Only the most compelling reasons can justify non-disclosure of judicial records."); *Leigh v. Salazar,* 677 F.3d 892, 900 (9th Cir. 2012) ("[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. By reporting about the government, the media are 'surrogates for the public.'") (requiring consideration of public right of access to view Bureau of Land Management horse roundups). Charging for access to IBR standards raises heightened constitutional concerns, because the over 9,000 IBR standards are wide-ranging in subject and quasi-legislative in character, with broad and prospective effect.

Of course, the agencies are not prohibiting access to IBR rules. But that is not the relevant criterion. Assuring free access only in the Washington, D.C. Office of the Federal Register reading room obviously is insufficient when the government actions at hand include promulgation of several thousand standards with the force of law, affecting numerous industries and areas of regulation. The obstacles to access that must be overcome -- the charges and travel impediments -- effectively deny the public's right to know and discuss government actions. Legislative history accompanying the Freedom of Information Act draws the same link: "'The right to speak and the right to print, without the right to know, are pretty empty.'" *See* H. Rept. No. 1497, 89th Cong., 2d Session 2 (1966) (quoting Dr. Harold Cross). And with respect to public information around agency actions, the focus of Section 552, the point was not to ensure simply that government actions were not secret, but to provide "'the general public . . . ready means of knowing with definiteness and assurance.'" *Id.* at 3 (quoting S. Rept. 79-752 at 198 (79th Cong. 1st Sess. 1945)) (miscited as House Report in original). Significant access charges for regulatory standards are a real obstacle to knowing their content, and indeed, the Supreme Court has invalidated much smaller charges as inconsistent with similar core principles of democratic government. *Cf. Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-68 (1966) (invalidating state $1.50 poll tax as effective denial of right to vote). *See also* Circular A-130, Feb. 8, 1996, at sec. 8 (to facilitate public access, instructing agencies to "avoid[] improperly restrictive practice" including restricted distribution arrangements and restrictions that include "charging of fees or royalties").[12]

b. **Access limited to the regulated is unsatisfactory under Section 552(a)(1); IBR rules must be broadly available**

Section 552(a)(1)'s requirement that IBR materials be reasonably available to "the class of persons *affected thereby*" (emphasis added) must be read to cover not just those directly regulated by those materials, but all those with a stake in the content of IBR materials. Indeed, the legislative history accompanying 5 U.S.C. § 552's incorporation by reference provisions made

---

rights are not to be provided in proportion to the number of citizens wishing to exercise them. *See also supra* notes 5, 6 (citing public comments evincing broader public interest in reading IBR standards).

[12] This is not to say, of course, that a publisher may never charge for copies of standards. As with federal statutes and federal rules, charges may be collected for volumes for individual convenience or private collections. But American law has long required substantial free public access to the text of statutes and regulations through depository libraries and, since the mid-1990s, over the internet.

clear its concern with widespread public access, not simply that the IBR material would not be formally secret: "*Any member of the public* must be able to familiarize himself with the enumerated items . . . by the use of the Federal Register, or the statutory standards mentioned above will not have been met." S. Rep. No. 1219, 88th Cong., 2d Sess. 5 (1964) (emphasis added).

Other language in Section 552(a)(1) makes clear that "affected" persons includes a broader class than just those directly regulated. For example, Section 552(a)(1) provides that the Federal Register publication requirement protects not just those who are "required to resort to" government rules and policies, but those who may be "adversely affected" by them. Those required to resort to rules are presumably those who must modify their conduct; those "adversely affected" must include at least some additional members. Moreover, 5 U.S.C. § 702 uses the "adversely affected" language to help define who can seek judicial review; it is understood to cover a wide range of those with concrete stakes in agency action, beyond those directly regulated by the agency. *E.g., Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987) (one who is "adversely affected" may sue if the interest is "arguably within the zone of interests" to be protected or regulated by the statute); *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011) (same).

5 U.S.C. § 552(a)(1)'s "reasonably available" requirement extends even more broadly than Section 702, beyond availability to those "adversely affected," to require availability to those simply "affected" by the terms of the incorporated material. For example:

- Consumer Product Safety Commission toy safety regulations incorporate, without public explanation of their regulatory requirements sufficient to permit public understanding of them, a number of private standards by reference, including standards from ANSI and ASTM. *E.g.,* 16 C.F.R. §§ 1505.5, 1505.6 (requirements for electrically operated toys, including toys with heating elements, intended for children's use).

- National Highway Traffic Safety Administration (NHTSA) rules for vehicle windshield safety similarly incorporate by reference unexplained privately developed standards for glazing and windshield ability to withstand fracture (49 C.F.R. § 571.205) whose adequacy to assure public safety is self-evidently a matter of substantial interest.

- Operating and placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf incorporate the American Petroleum Institute's standards. *See* 30 C.F.R. § 250.108. API standards are also incorporated in Department of Transportation pipeline safety requirements. *E.g.,* 49 C.F.R. § 192.65.

- Storage requirements for propane tanks, aimed at limiting the tank's potential to leak or explode, incorporate design, construction and testing

requirements from the American Society for Mechanical Engineers' Rules for Construction of Unfired Pressure Vessels. *E.g.,* 26 C.F.R. §1910.110(b)(3)(i).

Parents, children, drivers, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline or propane tank – all of these individuals are obviously "affected" by these standards, and Section 552 requires that these standards be "reasonably available" to them. Finally, the Department of Transportation Pipeline and Hazardous Materials Safety Administration requires natural gas pipeline operators to provide public information and public communications according to an IBR standard of the American Petroleum Institute. 49 C.F.R. § 192.616. Community members who reside near natural gas pipelines at risk from a spill are obviously "affected" by the scope of public communication requirements; standards such as these must be "reasonably available" both to the community and to pipeline operators. Similarly, as Consumers Union and the Consumer Federation of America put it, "it is essential that affected parties—both those whom the standards would protect and those who would be subject to them—have ready access to them." *See* Comments of George Slover and Rachel Weintraub at 2, Consumers Union and Consumers Federation of America, OFR-2013-0001-0034 (Jan. 31, 2014). Even if some standards may be understandable only to small groups of professionally trained individuals, they may affect large numbers of citizens. Approving material that is incorporated by reference while permitting organizations to charge individuals an often-significant fee for access to the material violates the "reasonably available" requirement.

c. **Charging for access to final IBR rules also violates 5 U.S.C. § 553's right to petition**

Our discussion of the need for public access to proposed rules above, applies equally once a rule has been finalized. Even if Section 552's language could support a more constricted understanding of the class of persons for whom IBR material must be "reasonably available," final rules may include incorporated material only where that material is freely available to the public.

As discussed above, the Administrative Procedure Act provides a right to comment on a proposed rule. But independently, 5 U.S.C. § 553(e) requires an agency to provide "an interested person the right to petition" for issuance, amendment, or repeal of a rule. To effectuate that right, an agency must provide meaningful public access – in other words, at a minimum, free read-only access – to the text of an IBR rule as incorporated by an agency in a *final* rule. An "interested person" cannot meaningfully exercise the statutory right to petition for amendment or repeal of the adopted rule under 5 U.S.C. § 553(e) if he or she is required to pay a fee for access to the content of that standard.

d. **No statute authorizes the wide-ranging agency incorporation by reference of rules not freely available to the interested public**

As noted above, the whole point of creating the Federal Register and the CFR was to assure the public of the end of obscure or even "secret" law -- to provide ready access to the legal requirements affecting their lives in every one of the over 1,200 depository libraries, and through legal libraries as well. As discussed above, the creation of the Federal Register responded to a situation where binding regulatory law was merely difficult to locate.

Those who enacted Section 552 expressed confidence in doing so that incorporated materials would be similarly available, through the use of commercial legal reporting services to be found throughout the country. Although the legislative history betrays no express approval of access costs, a subscription to these services would not have cost hundreds or even thousands of dollars per use or have placed highly restrictive conditions on the use of the matter accessed.[13] With the exception of the OFR reading room, today's IBR rules not only present the reader with the challenge of locating the rules, scattered over disparate locations, but also the potential of paying significant fees before the rule may be read.

While it is sometimes argued that the National Technology Transfer and Advancement Act endorses all incorporations by reference, it is in fact limited to "technical standards." The National Technology Transfer and Advancement Act does encourage federal agencies to use "technical standards" developed by "voluntary consensus standards bodies." It does not mention, however, let alone validate, the practice of SDOs charging the public for access to read standards that an agency has chosen to adopt as binding law. And when "technical standards" that have been converted into legal obligations cease to be the voluntary consensus standards they initially were, because the adopting SDO has replaced them with new standards, their price ceases in any sense to be subject to market controls, and becomes a price solely for "law."

If anything, Congressional enactments such as the e-FOIA amendments and the e-Government Act of 2002 suggest that Congress's intent (to the extent there is a unitary intent) is for greater public availability, not less. These are general statutes, emphasizing accessibility to law across the board. For example, 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 Freedom of Information Act, and, for records created beginning late in 1996, the records themselves.[14] Congress's express purpose was to "enhance public access to agency records and information" and to "foster democracy by ensuring public access to agency records and information"--in short, to increase public access, not to reduce it. And in 2002, in the e-Government Act, Congress required agencies to provide for electronic rulemaking and electronic rulemaking dockets, as well as to post, on their websites, a wide range of materials "about that agency," with the express purposes of "increas[ing] access, accountability, and transparency;" and "[enhancing] public participation in Government . . . ."[15]

Congress specifically reacted in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, to API's excessive demands for payment for an IBR standard, by requiring all incorporated rules to be made available free of charge. That specific legislation, however, is completely consistent with Congress's recent enactments enhancing free and online public

---

[13] The argument that one might have to pay to subscribe to the Federal Register -- a proposition happily not in fact acted upon -- is for the same reason irrelevant to requirements of substantial payments to obtain, under the stringent use restrictions copyright entails, even a single standard.

[14] 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").

[15] 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)).

access to binding law as well as a wide variety of other forms of government information. It cannot be taken as implying any contrary judgment.[16]

With the development of the Internet, access to government legal resources has been expanded to every computer, and the government has come under a legal obligation to make all law -- even "soft law" that may affect a member of the public, 5 U.S.C. § 552(a)(2) – on line. These statutes, then, cannot be taken to endorse the variable charges private organizations impose for single access to particular standards, under tightly controlled conditions of use. These are substantial charges that in the best of circumstances may reflect the costs of standards development but that, particularly once a revised standard has been adopted by the standards organization, can only be thought a monopoly price for law.

In short, the contemporary meaning of "reasonably available," given this history and the fact of the Internet, is that the public must at the least be able to readily access the text of the law from readily available sources. Rules that for access permit payments to private organizations at uncontrolled rates and on use conditions they unilaterally set effectively make the law inaccessible – this is effectively "secret" law against which the White House and the Office of Management and Budget must set its face. The effect, intolerable in any democracy and unlawful in ours, is to place access to each such law subject to the monopoly price and conditions of use set by its creator.

2. OMB Circular A-119 encourages agencies to incorporate private standards by reference even when they are not "reasonably available," in violation of Section 552

The Freedom of Information Act requires publication in the Federal Register, "for the guidance of the public," of all rules of procedure and substantive rules of general applicability, and a host of other agency materials. 5 U.S.C. § 552(a). No person may "be required to resort to, or be adversely affected by," material that was not so published except if he or she has "actual and timely notice" of its terms. *Id.* 5 U.S.C. § 552(a)(1) creates a limited exception to this publication mandate for material incorporated by reference, when the material is "reasonably available to the class of persons affected thereby," upon approval of the Director of the Office of the Federal Register. 5 U.S.C. § 552(a)(1).

As the Section discussed in its comments in response to the Office of the Federal Register's proposed rule, Incorporation by Reference, OFR-2013-0001-0029 (Jan. 31, 2014),

---

[16] Some have pointed to the GPO Electronic Information Enhancement Act, 44 USC § 4102, to support the proposition that SDOs may lawfully charge for access to their incorporated "regulations," and then control the uses to which those standards once acquired can be put. But the same provisions require fully free digital access to the Federal Register and Congressional Record at the approximately 1,250 government depository libraries across the nation. 44 U.S.C. § 4102(a). Finally, that statute caps the price GPO is permitted to charge for electronic access to its resources -- the only access that, in practice, is now required – at "the incremental cost of dissemination," a very small, possibly negligible, charge per user in the information age. It is hardly surprising that the GPO has elected not to impose any costs at all; the administrative costs of collecting any payments are higher than the GPO is authorized to charge. *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").

current practices violate 5 U.S.C. § 552(a)'s "reasonably available" requirements. OFR makes IBR material available for inspection only at a single downtown Washington, D.C. location, and only upon the making of a written request and appointment. OFR provides no photocopying facilities of any sort, presenting yet another obstacle for a member of the public who wishes to rely on an agent. In the computer age, one physical copy at the National Archives and another in the incorporating agency's Washington offices cannot possibly satisfy the "reasonably available" requirement. Apart from this, OFR refers the public to the "standards organization that developed the standard." As the Section's comments noted in January, 2014, OFR's proposed rule would not change this practice. *See* OFR, "Where to Find Materials Incorporated by Reference at NARA Facilities," available at http://www.archives.gov/federal-register/cfr/ibr-locations.html#why (last visited May 1, 2014). Nor, apparently, would draft Circular A-119.

As a practical matter, access to IBR material is available almost exclusively through standards development organizations (SDOs). SDOs have significant latitude to charge a fee for access to those standards. Membership in a group such as the American National Standards Institute costs $750 per year, for example; access to an individual standard can range from $42 to upwards of $1000. As discussed above, numerous public commenters have indicated that these access charges impair their ability to read this binding law.[17]

At best, draft Circular A-119 proposes to let current practices continue. It would pay little or no heed to the possible costs of access -- particularly for small businesses such as foundries that may need access to hundreds of standards, or for the affected public. Paragraph 6(p) of the draft revisions to Circular A-119 would ask agencies to "take into account" multiple factors in determining whether a standard is "reasonably available." These factors include the prospect of read-only access to the standard during a public comment period and whether the standards developer will provide a "freely available nontechnical summary that generally explains" the standard's content. Both would be improvements if they actually were to be conditions of an agency's determination to utilize a private standard, though as discussed below, a "summary," even if free, is inadequate to satisfy the incorporating agency's legal obligations.

Nonetheless, draft Circular A-119 would clearly leave an agency free to choose a private standard over a government-unique one even if no greater free public access is provided than in the OFR reading room. As the Circular itself states, "The absence of one or more of these factors alone should *not* be used as a basis for an agency decision not to use the standard." Draft Circular, sec. 6(p) (p. 35). Indeed, this language could be read to suggest that OMB is directing agencies **not** to consider public availability as a critical factor in the decision whether to incorporate private standards.

To that extent, rather than moving public access forward in the digital age, in keeping with this Administration's commitment to transparency, the draft Circular would turn the clock back. This is much like the situation criticized by a U.S. House of Representatives committee when it decided to enact the Federal Register Act in 1935: "[R]ules and regulations frequently appear in separate paper pamphlets . . . . Any attempt to compile a complete private collection of [them] . . . would be wellnigh impossible. No law library, public or private, contains them all." H.R. Rep. No. 74-280, at 2 (1935). Going back in the direction of the 1930s is particularly ironic at a time when the U.S. Code, Code of Federal Regulations, and Federal Register (other than IBR

[17] *See supra* notes 5, 6.

rules) are all freely available not only in every one of the over 1,200 federal depository libraries, but freely, digitally available on computers nationwide, including in the public library system. Understood, as 5 U.S.C. § 552 must be, to focus on the core goal of public access, permitting significant access charges cannot by any stretch be considered "reasonable" availability.

In addition, a "freely available nontechnical summary," even if draft Circular A-119 were revised to require an agency to use it as a condition of incorporating an SDO rule, would not be sufficient to satisfy the agency's legal obligations under Sections 552(a) and 553. Section 552 requires publication of "substantive rules," not "summaries" of those rules. *See* 5 U.S.C. § 552(a)(1)(D).

This is because it is the text that comprises the legal obligation. It is thus critical for compliance as well as for commenting and the petition process under 553(e). As several commenters, both regulated entities and beneficiaries, pointed out, a summary, as an alternative to text, is "unacceptable." IBRd material can be "extremely detailed and technical" as well as "quite long," and a summary "will often omit the information that is most important to the person who is commenting on the proposal." Further, "in many instances the document that is IBR'd will be the enforceable part of the regulation. In those instances, the regulated community must have access to the actual document (not a summary)." *See* Comments of Susan Asmus, National Ass'n of Home Builders, OFR-2013-0001-0022 (Jan. 27, 2014), at 4; *see also* Comments of Rae McQuade, NAESB, OFR 2013-0001-0023 (Jan. 29, 2014), at 1 (a summary is "not a substitute for the text[;] Any affected parties are bound by the full text of the rule(s), not the summary."); Comments of Jacob Speidel, Vermont Legal Aid Senior Citizens Law Project OFR-2013-0001-0037 (Jan. 31, 2014), at 2 ("[A] summary of IBR'd materials is not a substitute for public access. . . [if] the incorporated material includes important additional information not included in the summary, then a reader who has access only to the summary by definition is missing important information.").

3. **There is insufficient data to conclude that providing some level of meaningful free public access will unduly harm SDOs or interfere with agencies' ability to incorporate privately drafted standards**

Draft Circular A-119 expresses concern that making standards available "free of charge" may "depriv[e] standards developing bodies of the funding through which many of them now pay for the development of these standards," in turn reducing the ability of U.S. regulators to rely on these standards. Draft Circular at 10.

Providing some meaningful free public access, such as through read-only access, seems unlikely, however, to impair the future ability of agencies to incorporate standards by reference. We note at the outset that although comments to this effect were filed in response to OFR's request for comment on the petition for rulemaking on IBR, little if any solid data has been provided to the public on how important copyright-based revenues are to SDO business models. For further discussion, we refer you to the Administrative Law Section's comments filed in response to the Office of Federal Register's request for information. NARA 12-0002-0157, at 7-8 (June 1, 2012).

In addition, nearly all the largest suppliers of IBR standards,[18] including ANSI and its member SDOs, ASTM, NFPA, and API, have now begun to provide free read-only digital access to incorporated standards in electronic "Reading Rooms" or "Portals." This strongly suggests that such access will not destroy their business model.

a. **Read-only access would not preclude SDOs from selling books of standards**

First, a practical requirement that, as a condition of incorporation by reference, SDOs provide free public access to incorporated standards in read-only form, whether on their websites or on those of the agency, would not prevent SDOs from enforcing their copyrights against other entities that attempt to republish the standards. Users who want a standard in hard copy could still be required to buy it from the SDO.

Second, it appears that most users of incorporated standards will continue to buy them even if they are available in read-only form online. Representatives of regulated entities and regulatory agencies alike have stated in public fora that, in any case where a standard is central to a regulation, there is simply no substitute for having one or more paper copies that can be highlighted, tabbed, carried around and referred to anywhere, anytime. Particularly in industrial settings, there will likely never be a time where online access is available at every location where a plant technician or an inspector is going to want to refer to a standard. SDOs should still sell significant numbers of incorporated standards even if they are available online.

Third, and perhaps most important, SDOs arose initially, and continue to exist primarily, for business reasons, unrelated to government regulation. Virtually all forms of commerce require some degree of agreement regarding the specifications of the products and services involved. Those business needs will not go away or even be diminished by requiring some free online availability of IBR standards. The producers and users of standards will continue to have an economic incentive to ensure that those standards persist and evolve.

b. **Many SDOs already make some level of free online public access to IBR standards available through reading rooms**

Strikingly, in response to the Office of Federal Register's proposed rule, several SDOs indicated in comments filed in 2013 and January, 2014, that they have begun to provide free online access to IBR standards. ANSI provides a large "IBR Standards Portal," available at ibr.ansi.org, in which 13 SDOs have agreed to participate. The Association of Home Appliance Manufacturers has indicated that it is one of these organizations. "Standards on the portal are available for reading online at no charge." Comments of Jennifer Clearly, Association of Home Appliance Manufacturers, OFR 2013-0001-0017, (Dec. 20, 2013), at 2. Similarly, the North American Energy Standards Board has indicated that it is providing "no-cost electronic access through a product that allows for electronic review of our standards for a limited period without the ability to copy, download, or otherwise store the text of the standard itself." Comments of Rae McQuade, North American Energy Standards Board, OFR 2013-0001-0023 (Jan. 29, 2014), at 2. ASTM International states that it is already providing free read-only access to IBR standards. Comments of James Thomas, ASTM International, OFR 2013-0001-0025 (Jan. 31, 2014), at 1 ("ASTM works with the agency to provide the public with read-only access to the standards at no

[18] *See* Emily Bremer, *Incorporation by Reference in an Open-Government* Age, 36 Harv. J. L. & Pub. Pol. 131, 150 (2013) (listing top ten organizations with standards incorporated by reference).

cost . . . .”). So are the American Petroleum Institute and the National Fire Protection Association. Comments of David Miller, American Petroleum Institute, OFR-2013-0001-0027 (Jan. 30, 2014), at 2 (“In 2010 API established an IBR policy that all its standards incorporated by reference in Federal Regulations along with all safety-specific standards be made available on API’s website for free viewing.”); Comments of Greg Cade, National Fire Protection Ass’n, OFR-2013-0001-0028 (Jan. 29, 2014), at 1 (“ NFPA has posted our standards to the NFPA website, using the program RealRead, which allows users to read the full text of the standards online, free of charge. We have found this to be a successful model for our organization.”); Comments of Ann Weeks, UL, OFR-2013-0001-0035 (Jan. 31, 2014), at 1 (“UL and many other SDOs already provide free read-only, online access to their standards that are incorporated by reference.”).

c. **The evidence is weak that free read-only public access to IBR standards would interfere with the SDO business model**

Although some SDOs asserted in 2012 that providing some free access to IBR standards might affect important revenue sources in response to the petition for rulemaking to OFR on this issue, none did so when OFR posted its rule for public comment in 2013. Commenters on that proposed rule included the largest suppliers of IBR standards, ASTM, ANSI, and API, as well as others.[19] Meanwhile, those SDOs have now moved to voluntarily providing free online read-only access to IBR standards. This undermines the conclusion that the supply of voluntary consensus standards on which agencies can draw will be significantly impacted if some level of free public access to the text of those standards is required.

Meanwhile, numerous public comments have been filed indicating that charging a price for standards interferes with the access of small businesses and individuals, in particular, to binding law.

To the extent that any disruption would be triggered by our recommendation—perhaps an agency might have to negotiate some level of public access as a condition of incorporating a particular SDO standard by reference--these impacts are worth bearing in order to bring FOIA’s standard of “reasonabl[e] availab[ility]” into the Information Age and to effectuate the principle of public access to the law.

d. **Any public access requirements should be sensitive to the ease of locating IBR standards.**

In short, the Section recommends that Draft Circular A-119 should be revised to clarify that agencies should not incorporate privately drafted standards by reference without assurances that the public will be provided with free read-only access. In addition, OMB should be sensitive to whether the standards can be readily located.

Although the willingness of some large SDOs to provide online reading rooms with free read-only access to IBR standards is a great improvement over previous practices, current online reading rooms still may not fully satisfy FOIA’s requirement that binding law be “reasonably available.” First, they can be very difficult to locate, since they have different names and are in a

[19] Only one commenter made such an assertion in response to the OFR proposed rule: Westinghouse Electric, which is merely a “participant” in the development of industry consensus standards, and not itself an SDO. Comments of J.A. Gresham, Westinghouse Electric Co., OFR-2013-0001-3038 (Jan. 31, 2014), at 2. The Section’s comments were prepared prior to the filing of any SDO comments in the present docket for draft Circular A-119, however, and do not attempt to reply to them.

wide variety of website locations. At a minimum, a weblink to a publicly accessible IBR standard should be supplied on the agency website and, additionally and preferably, in the online Code of Federal Regulations. Second, the SDO reading rooms do not appear to consistently contain all relevant incorporated standards or to consistently make text available. Casual searching in SDO reading rooms has revealed that not all SDO-drafted IBR standards are actually available, and that reading software does not work consistently. Finally, members of the public who seek to access IBR standards in these reading rooms are generally asked to agree to a variety of conditions and waive some legal claims. Some of these conditions may be unreasonable and may deter ordinary individuals from reading the binding law, interfering with 5 U.S.C. § 552's requirement that it be "reasonably available."

In revising Circular A-119, OMB should consider these issues. Even when SDOs have agreed to provide read-only public access to IBR standards, safeguards are necessary to avoid the very concern that arose around agency publications in the 1930s and prompted the publication of the Federal Register Act: the scattering of important agency rules in a variety of locations, making each obscure. If OMB is to encourage agencies to rely on private standards, it should do so in a way that permits citizens not only to be able to read the law without a charge, but to locate the law.

II. Draft Circular A-119's preference for "consensus" standards and more public notice of agency participation in SDO procedures is helpful, but does not obviate the need for public access.

Draft Circular A-119, unlike currently applicable Circular A-119, includes a preference for voluntary consensus standards, including that they come from organizations that meet criteria for "openness," with "meaningful opportunities to participate." (sec. 3(f), p. 18). The draft Circular would also ask agencies to consider barriers to membership and participation, including the organization's fee structures. (sec 6(e), (3)- (4), p. 24). Finally, the draft Circular asks agencies to notify the public of agency participation in SDO decision making. (p. 8) To the extent these criteria tend to make drafters of IBR standards more responsive to a wide variety of interests, they are helpful, and the Section supports them. However, the draft Circular also makes clear that compliance with these criteria is not required for an agency to incorporate a private standard by reference. (Agency "should consider" criteria including "the extent to which" the organization has the characteristics of voluntary consensus standards bodies, sec. 6(e)(3), p.24)

Further, even limiting incorporation by reference to standards that are generated by "voluntary consensus standards bodies" would not accomplish compliance with the legal requirements of the Administrative Procedure Act or the Freedom of Information Act. Neither of those statutes exempts a "consensus" standard from rulemaking or public disclosure requirements. Moreover, rulemaking under the APA, with centralized notification to the public of pending rules under regulations.gov and the ability to submit public comments without significant financial burden, is still far more open and participatory than opportunities provided by a disparate range of SDOs with varying public notification and participation opportunities. Participation in SDO procedures may be hampered by significant demands of time and resources. Some SDOs only permit in-person participation, requiring travel to a meeting site; others limit participation to members, who must pay. Finally, commenting on changes to some

SDO standards may require purchase of the underlying standard. Thus, a generalized comment in draft Circular A-119 that organizations provide "meaningful" opportunities to participate still may not mean full participation opportunities for members of the general public with useful information or valid viewpoints to offer.

III. Draft Circular A-119 Usefully Recommends That Agencies Regularly Update IBR Standards

Paragraph 6(o) recommends that agencies update standards every 3-5 years. We strongly support this recommendation. Independent of the demands of particular regulatory statutes, which may well require updating, agency incorporation of superseded SDO standards has led to public access problems. SDOs do make some superseded standards available (for a price that can only be understood as a price for law, as discussed above), but some are simply not available from the SDO at all. 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 April, 2014, that standard is unavailable for sale from ANSI and also does not seem available in its reading room. Similarly, pulp, paper, and paperboard mills are asked to comply with ANSI Standard Z88.2-1969 for respiratory protection under certain circumstances, *see* 29 C.F.R. 1910.261(f)(5). That standard also appears to be unavailable at any price from ANSI. 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 the following "safety and health" standards, 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 Apr. 29, 2014).

CONCLUSION

In short, meaningful public access is required for our entire system of laws, including regulatory requirements that are incorporated by reference. At a minimum, such access must be available through digital read-only access, with no payment required for access.[20] We would be pleased to discuss these comments further if that would be helpful.

Sincerely,

Joe Whitley
Chair, ABA Section of Administrative Law & Regulatory Practice

[20] We recognize that digital read-only access may not be sufficient to assure adequate access for individuals with disabilities. Additional access may be necessary in those settings; those issues, however, are beyond the scope of this comment letter.

Thank you for considering the Section's views on this important subject. If you have any questions regarding our views, please contact Nina Mendelson, the primary drafter of Section comments, at (734) 936-5071 or nmendel@umich.edu, or Jamie Conrad, Chair of the Section's Legislation Committee, at (202) 822-1970 or jamie@conradcounsel.com.