

From: [Emily Bremer](#)
To: [Scott Cooper](#)
Subject: FW: Bloomberg BNA article
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FYI, meant to share this with you.

From: Lee, Stephen [mailto:stephenlee@bna.com]
Sent: Friday, February 07, 2014 12:21 PM
To: Megan Kindelan; Emily Bremer
Subject: Bloomberg BNA article

Public Interest, Business Groups Dissatisfied With Bid to Use Copyrighted Standards

Feb. 5 — The knotty debate over access to copyrighted material that is referenced in federal regulations inched closer to a resolution Jan. 31 when the Office of the Federal Register closed the comment period on its proposed fix.

But the comments submitted show continuing opposition to OFR's proposal from both public interest advocates and business groups, with each side arguing OFR's solution doesn't go far enough.

At issue is the question of how private standards referenced in a regulation can be made freely available to the public while still allowing standard-setting groups to be paid for their work. Good-government advocates argue that all laws should be available for free, but standards bodies counter that payment for their work is essential to their survival.

Public Citizen Demands More Access.

The Office of the Federal Register's proposed solution would require each federal agency to consult with the standards bodies in their areas to find solutions for access to referenced documents, and requires OFR to “informally approve” the incorporation of private standards in any regulation during the proposed rule stage (78 Fed. Reg. 60,784).

OFR will now review the comments and draft a final rule.

Public Citizen criticized the proposal for failing to explicitly make all material incorporated by reference freely available.

“It is imperative that the law be readily accessible for all to read and use,” wrote Public Citizen President Robert Weissman. “That is a central requirement of our democratic system. Accordingly, we strongly believe that standards incorporated by reference into federal regulations should be widely available to the public, without charge, and that such standards should be deemed in the public domain.”

Business Groups Also Unsatisfied.

The same argument was made by some business representatives. Robert Helminiak, director of regulatory affairs at the National Propane Gas Association, urged OFR to consider the potential costs to businesses if copyrighted standards aren't made available for free. More than 90 percent of the association's members are small businesses, making the costs even more

burdensome, Helminiak wrote.

Susan Asmus, senior vice president of the National Association of Home Builders, wrote that the OFR rule isn't detailed enough. She called on the agency to specify that documents incorporated by reference must be available on the Internet while a rule is still at the proposal stage.

Standards-writing bodies, however, broadly praised the flexibility of OFR's proposal. James Thomas, president of the American Society for Testing and Materials, wrote that "there is not one solution" to the problem and that it is best resolved on a case-by-case basis. The organization already works with agencies to provide free, read-only access to its standards while "taking steps" to ensure that it maintains ownership and control of its copyrighted material, Thomas said.

Standards Bodies Amenable.

Similarly, Greg Cade, government affairs director at the National Fire Protection Association, said his group has, for the last 10 years, posted its standards online for free. Not all the association's documents are freely available, however.

"Taking that action would be suicidal since most of the money we need to fund our process and other vital mission activities comes from the sale of codes," said association President Jim Shannon in a statement on the organization's website.

Lee Ann Stember, president of the National Council for Prescription Drug Programs, also submitted comments supporting OFR's proposal, saying its approach "provides the agencies with the necessary flexibility to come up with the best solution for a particular situation."

However, Ann Weeks, Underwriters Laboratories' vice president of global government affairs, wrote that agencies must understand that " 'reasonable availability' should not be defined simply as free or unlimited access," and that the definition should "recognize that reasonable availability can vary depending on the particular situation and in accordance with a particular standard development organization's practices."

ACUS: OFR 'Can Only Do So Much.'

Emily Bremer, attorney adviser at the Administrative Conference of the United States, told Bloomberg BNA Feb. 5 that OFR's proposal couldn't, and wasn't intended to, resolve the seemingly insoluble problem.

"As long as OFR stays within its statutory authority, anyone who wants to see a really bold change in incorporation by reference policy is going to be disappointed," Bremer said. "OFR's piece of this pie is just too narrow to allow it to address all the issues implicated in this debate. Congress could do it, if they were so inclined, but OFR acting alone can only do so much."

In Bremer's view, the petitioners to the agency's docket may be "looking for an obvious, definitive solution to this problem—a document they can point to that clearly requires free access to incorporated standards. I think the solution is more likely to be achieved through ongoing collaboration between agencies and the private sector."

Much progress has been made in recent years, Bremer said, with agencies and standards development organizations working together and providing free online access through voluntary means.

“But it's a lot harder to get excited about a victory achieved so incrementally,” she said.

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