June 1, 2012

BY ELECTRONIC MAIL
Michael L. White
Acting Director, Office of the Federal Register
National Archives and Records Administration
800 North Capitol Street, NW, Suite 700
Washington, DC 20001
Electronic Address: http://www.regulations.gov (Docket ID NARA 12-0002)

Re: Comments on Petition for Rulemaking on "Incorporation by Reference" and "Reasonably Available"

Dear Acting Director White:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Office of the Federal Register's (OFR) request for comments on the *Petition for Rulemaking on "Incorporation by Reference" and the term "Reasonably Available"* that was recently published in the Federal Register.[1] The petition was filed with OFR by a group of legal scholars affiliated with the Administrative Conference of the United States (ACUS) and asks OFR to define the term "reasonably available" with respect to matters that may be properly incorporated by reference under 1 CFR Part 51.[2] A more detailed discussion of the request for comments is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),[3] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[4] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order (EO) 13272[5] requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by

[1] 77 Fed. Reg. 11414 (March 30, 2012).
[2] *Id.*
[3] 5 U.S.C. § 601 et seq.
[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[5] EO 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

Advocacy. Further, both EO 13272 and a recent amendment to the RFA, codified at 5 U.S.C. 604(a)(3), require the agency to include in any final rule the agency's response to any comments filed by Advocacy and a detailed statement of any change made to the proposed rule as a result of the comments.

Background

Incorporation by Reference (or "IBR") refers to federal agencies' adopting materials, such as industry consensus standards, into their regulations by simply referencing them in the Federal Register. The National Technology Transfer Advancement Act (NTTAA) encourages federal agencies to use private standards (rather than writing their own standards), and the Office of Management and Budget (OMB) has issued guidance in the form of OMB Circular A-119, "*Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*." However, the Federal Register is not allowed to publish IBRs unless they are "reasonably available" to affected persons. [6]

As discussed in OFR's request for comments, ACUS recently issued a Recommendation on Incorporation by Reference, that, among other things, called on federal agencies considering incorporating by reference "to ensure that the materials will be reasonably available both to regulated and other interested parties."[7] Following ACUS' Recommendation, a group of legal scholars affiliated with ACUS filed the referenced petition with OFR, asking OFR to define the term "reasonably available" – including the possibility that all IBR materials should be available on the internet for free. OFR now requests public comment on how it should proceed with respect to the petition

Small Entities Have Expressed a Strong Interest in IBR

A number of small entity representatives contacted Advocacy and expressed concerns with agency use of IBR and the referenced petition. In response, Advocacy hosted a small business roundtable on May 9, 2012 to discuss the petition, as well as the broader issue of IBR. Attendees at the roundtable included small businesses, small entity representatives, representatives from several private standards development organizations (SDOs), the OFR, and several other federal agencies. Many of the small entity representative attendees are active participants in some of these SDOs and have broad experience with them. The following comments reflect the views expressed during the roundtable discussion and in subsequent conversations with small entity representatives.

1. There is no uniform small entity perspective on "reasonably available."

Almost every industry regulated by the Federal government includes small entities, whether for-profit businesses, non-profits, or small governmental jurisdictions. In addition, many SDOs themselves are small entities. It is therefore not surprising that small entities are divided on the

[6] Under a provision of the Freedom of Information Act, 5 U.S.C. 552(a), matters incorporated by reference and published in the Federal Register with the approval of the Director of the Federal Register are deemed to be reasonably available to the class of persons affected thereby. 5 U.S.C. 552 (a)(1).
[7] Administrative Conference Recommendation 2011-5, Incorporation by Reference, p. 5.

questions put forward by this petition. As a result, there is no single policy on "reasonably available" that will benefit all small entities in all cases.

However, all parties agree that IBR is a useful tool for Federal rulemaking that helps improve the quality and efficiency of rulemaking and the resulting rules. However, there can be significant risks to small entities if their interests are not adequately considered during rulemaking. Advocacy believes that the use of IBR can be improved by a greater focus on whether IBR is fair to small entities.

2. Regulated small entities want a seat at the table and easy access to the law.

Fairness to small entities includes a number of factors, each of which agencies should consider before adopting private technical standards through IBR, including the following:

- Small entities need to have a reasonable opportunity to participate in key decisions and express their views during the standards development process (including at the working group level) and have those views fairly considered and accommodated.

- Small entities need access to standards referenced in proposed rules to protect public participation through public comments.

- Small entities need access to standards referenced in final rules so they can easily comply with the rules.

Each of these steps represent both a potential cost to regulated small entities and a potential revenue stream to small SDOs. SDOs balance these factors in their business models. Since fair and equitable treatment in the standards development process is so important, many small entities are hesitant to call for universal free access to IBR standards. They understand that free access would likely lead to significantly higher costs to participate in SDO processes, which would further hinder small entity participation.

This balancing of interests goes beyond the traditional limit of regulatory analysis, since only the cost of access to standards in final rules would appear in a cost-benefit accounting. Overall fairness to small entities should be the touchstone, which requires Federal agencies to exercise reasonable judgment.

3. SDOs want a reliable set of rules that values the service they provide to industry and the Federal government.

Small entities generally favor the adoption of voluntary consensus standards, and thus favor the continued existence of a vibrant and robust SDO community. The Federal government should avoid actions that jeopardize this community.

Federal policies on IBR should therefore accommodate the wide range of SDOs. In Advocacy's brief review of the issue, we now understand that SDOs have varied relationships with regulated entities, cost structures, policies on small entity participation, and cooperative relationships with

the regulating agency. "Reasonably available" might mean very different things to different SDOs.

However, since development of voluntary consensus standards is a complex and resource-intensive exercise, SDOs need confidence in their future revenue streams in order to engage in the exercise. However, the Federal government is not well positioned to replace revenue from sale of copyrighted materials on a universal basis. SDOs are similarly concerned that electronic piracy will cut into sales of standards if free, read-only versions are mandated. Doubts about the revenue stream will discourage development of these voluntary consensus standards. In their absence, the Federal government may choose non-consensus standards, to the disadvantage of small entities, or to develop its own. Neither of these outcomes is necessarily desirable.

4. There is no one policy best for small entities in all circumstances.

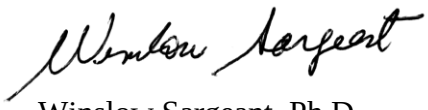
Because of the balancing of interests required, Advocacy believes that issues such as the definition of "reasonably available" and "class of persons affected" are highly dependent on the specific circumstance of each rulemaking and should therefore be part of each agency's deliberations, subject to the requirements of EO 12866, successor EOs, the RFA, and the Paperwork Reduction Act.

Advocacy therefore recommends that OFR encourage agencies to request comment on the proposed rule on whether standards incorporated by reference are "reasonably available" to the "class of persons affected." Advocacy will separately recommend to OMB that it issue guidance to agencies on this balancing of interests and to ensure fairness to small entities.

Conclusion

Thank you for the opportunity to comment on the OFR's request for comment on the Petition for Rulemaking on "Incorporation by Reference" and "Reasonably Available." One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. As such, we hope these comments are helpful and constructive to OFR and others considering this issue. Please feel free to contact me or either Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) or David Rostker (at (202) 205-6966 or david.rostker@sba.gov) if you have any questions or require additional information.

Sincerely,



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget