



May 12, 2014

Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
Washington, DC 20503

**Comments of Consumers Union and Consumer Federation of America
On
OMB Circular A-119, Proposed Revisions: Federal Participation in
The Development and Use of Voluntary Consensus Standards and in
Conformity Assessment Activities, Docket No. OMB-2014-0001-0001**

Consumers Union (CU)¹ and Consumer Federation of America (CFA)² appreciate the opportunity to comment regarding the proposed rule in the above-referenced matter. Our organizations have been regularly and actively engaged in safety standards development for many years, both in direct participation with industry-led consensus standards development organizations (SDOs) and in providing comments in agency rulemaking proceedings.

As each of our organizations has stated previously, we strongly believe that when technical safety standards are developed by SDOs, and then are incorporated into government regulations, appropriate care must be taken to ensure that those standards are adequately protective and fully serve the public interest. The same is true when such standards are otherwise deemed by government to satisfy legal requirements or to be acceptable in lieu of

¹ Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves, in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² Consumer Federation of America is a non-profit association of approximately 280 pro-consumer groups, with a combined membership of 50 million people that was founded in 1968 to advance the consumer interest through advocacy and education. CFA has participated in numerous voluntary standards activities for many years through participation in ASTM, UL and ANSI and in the policy arena.

government rulemaking. (For simplicity, our comments speak in terms of safety standards, but the same considerations apply to standards involving other important consumer protection and public interest issues.)

Specifically, we urge that the relevant regulatory agencies be sufficiently involved in the development of such standards. We further urge that both the development process and the resulting standards be sufficiently transparent – open and available to members of the public and those who advocate on their behalf – so that it can be independently verified that the standards are sufficiently protective and that there is compliance with those standards.

Ensuring that products and services sold in the marketplace are safe should be a priority of the U.S. government as it is a priority for consumers and consumer advocates. Privatization of certain technical aspects of standards development, as provided in OMB Circular A-119, has the potential to reduce costs and harness industry expertise; but it also has the potential, without adequate oversight by the government and by the public, to fall short of its objectives, with safety considerations being shortchanged in a quest for cost savings or other private commercial goals. It is important that regulatory policy recognize this inherent risk and take adequate measures to protect against it.

We recognize that Circular A-119 addresses the development and adoption of standards across the federal government. Some standards, for example, may be product specifications important primarily to the government in its own procurements. In those situations, there may be less need for highly technical, lengthy, and costly standards to be made available to the public. But when safety and other important consumer and public interests are implicated, those interests must be kept paramount, and private profit considerations must be kept subordinate.

Ensuring Transparency Through Public Availability of Standards Incorporated into Law

When safety standards developed by an industry-led SDO are adopted by a regulatory agency and take on the force of law, they enter into the public domain and lose their private, proprietary status. The public becomes legally entitled to protection under those standards, and regulated parties become legally required to comply with them. It is essential to our democratic system and the rule of law, as a matter of fundamental fairness and due process, that both groups have ready access to the laws under which they live.

Similarly, when an agency is considering the adoption of SDO-developed standards into law, 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 those standards, to enable fully informed participation in their consideration.

The public has a similar right of access to such standards when the government has made a less formal, de facto decision to adopt them by deeming them to satisfy legal requirements or to be acceptable in lieu of government rulemaking.

Whatever justification there might have been in a bygone era to allow imposition of a reasonable fee to cover printing costs, that no longer applies when the technology now enables the storage and retrieval of vast amounts of data for access through the Internet, at virtually no cost. In today's Digital Age, it simply no longer makes sense to force the public to pay in order to be able to read a law.

The Office of Management and Budget has tentatively concluded 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.'" We urge you to reconsider and reverse that tentative conclusion as it pertains to safety standards.

Some SDOs and industry commenters have suggested that giving the public free access to voluntary standards, even after they have been incorporated into regulation and given the force of law, would undermine incentives to participate in the voluntary consensus standards development process. Such concern is misplaced. Private parties participate in the voluntary, consensus-driven process because they benefit from doing so, in the results achieved. They just as surely benefit when an agency promulgating mandatory standards opts to use those results, rather than starting anew from scratch. Indeed, companies participating in voluntary standard-setting bodies have widely welcomed and encouraged this approach.

As is noted in the proposed revisions to Circular A-119, there is concern regarding whether the current requirement – that SDO-developed standards, when incorporated into federal rules by reference, must be "reasonably available to and usable by" those intended to be protected and those intended to be covered – provides adequate transparency. Comments are requested specifically on the adoption of Administrative Conference of the United States Recommendation 2011-5, which addresses this issue. In our view, the ACUS recommendation generally sets forth the appropriate considerations – especially in its recommendation to require that any such standard that is not copyright-protected be made freely and easily available electronically.

As to copyrighted standards, however, we would go one step further to ensure appropriate transparency. The copyright interest is not in restricting public awareness of what those standards are, but rather in conditioning their use by manufacturers who have not contributed to the cost of their development. Therefore, this copyright interest can be more narrowly addressed, through conditions on use of the standard by other manufacturers – although even here, if compliance with the standard has become a legal requirement, any royalty fee for use of the standard should not be so substantial as to impede competitive entry by new manufacturers. No copyright interest outweighs the public's right to full access to the substance of the law under which their safety is to be protected.

For the foregoing reasons, we urge the Office of Management and Budget to require that standards incorporated by reference into final rules, or being considered in proposed rules, or informally adopted in lieu of regulatory requirements, be made available to the public on the Internet, without charge.

Ensuring Sufficient Opportunity for Government and Public Involvement in Standards Development and Conformity Assessment

In addition to transparency regarding what the law is and regarding proposed changes to it, it is important that government and consumers, and those advocating on their behalf, have the opportunity to be fully involved in SDO development of safety standards that are likely to be incorporated into federal law or to be used in lieu of legal requirements – through direct participation or active oversight, or preferably, through both.

Most consumers have only limited familiarity, at best, with standard-setting processes. But consumers generally do assume and trust that products are tested by some responsible entity to ensure their safety before they are made available for sale. Few consumers understand the complexities of which products are subject to which mandatory or voluntary standards, whether or how these products are tested to make sure they meet those standards, or what criteria are used to measure any of those standards. It is clear, however, that consumers expect that products are safe to use as intended and will not cause harm to them and their families.

In order for voluntary, industry-developed standards to be relied upon to provide that safety, it is important that relevant government agency officials be appropriately involved – through direct participation or through active oversight – in the development of those standards, in their testing and assessment, and in the testing of products to assess whether they conform to the standards.

Experience has tragically shown that the fact that there is consensus among industry participants on a safety standard does not always ensure that the standard is adequately protective. And even if the standard is adequately protective, for it to provide protection it must be actually complied with.

In 2007, for example, imported toys were recalled by the millions, after popular toys were discovered to contain excessive levels of lead. There were voluntary, industry-developed standards in place, with a conformity assessment system. But there was not sufficient government oversight, and there was widespread non-compliance

We recommend using the following hallmarks for assessing whether a voluntary standards process produces a reliable safety standard that is being complied with.

1) There should be active participation by consumer groups and by users of the product, sufficient to ensure that the process and resulting standard are not unduly controlled by industry.

2) There should be active participation by relevant regulatory agencies, and the process should be evidence-based, with agency technical expertise given appropriate weight. As we recommended in our comments to the Consumer Product Safety Commission, Docket No. CPSC– 2013-0034, we believe this participation should include, where appropriate, the ability to take leadership positions on SDO committees and to vote on proposed standards.

- 3) The process should be transparent:
 - a. Information must be shared with all participants in a timely and ongoing basis.
 - b. The process must be appropriately publicized and understandable by the public.
- 4) The process should be clear and logical, so that developments occur in a predictable and timely manner, with adequate notice at each stage.
- 5) All participants must have the ability to raise issues, and those issues must be addressed.
- 6) The standard adopted should be widely used and accepted to be effective:
 - a. It must be clear which products, institutions, etc. do or don't comply with the standard.
 - b. There must be consequences for non-compliance.
 - c. Conformity assessment should be conducted by an independent third party with sufficient expertise. Such independent third parties should be accredited through an appropriately rigorous process involving adequate government oversight.
- 7) The standard adopted must effectively address the hazard or other consumer protection at issue. This should also be assessed by an independent third party with sufficient expertise.
- 8) In addition to the involvement of an independent third party, there should be appropriately active regulatory oversight to ensure that the standard is being satisfactorily adopted and complied with and is meeting its goals. This should include monitoring of injury reports.

Making Consumer Interests a Priority in International Standards Efforts

The proposed revisions to A-119 include a request for comment on the aspects of the proposed revised Circular A-119 that seek to promote international cooperation in standards development and adoption.

We agree that, as long as safety and fairness to consumers remains at the forefront, it is appropriate to endeavor to secure those objectives in ways that reduce unnecessary inconsistencies among jurisdictions, both domestically and internationally.

But it is important that consumer safety and other important consumer and public interests not be compromised. We would anticipate that, in the context of international trade negotiations and otherwise, there could be well-financed industry efforts to persuade trade negotiators and agencies to make streamlining and reducing regulatory requirements a priority, while downplaying these important interests. In addition, there is a considerable lack of transparency inherent to these trade negotiations, placing consumer stakeholders in the dark about critical issues. The directives in the revised Circular A-119 should clearly and firmly protect against any weakening of consumer protections. International efforts involving safety standards should prioritize the adoption of standards that reflect the strongest consumer protections.

Conclusion

We appreciate the opportunity to comment on the proposed revisions to OMB Circular A-119. For the foregoing reasons, we urge you to adopt our recommended improvements to better ensure that SDO-developed technical standards that are intended to serve important safety or other public interests are appropriately protective.

Respectfully submitted,

George P. Slover
Senior Policy Counsel
Consumers Union

Rachel Weintraub
Legislative Director and Senior Counsel
Consumer Federation of America