



Incorporation by Reference in Federal Regulations

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Views presented are Mrs. Bremer's and do not necessarily reflect the views of the
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The Administrative Conference

- Independent federal agency that studies administrative process and makes recommendations for improvement to Congress, the President, agencies, and courts.
 - 101 members from government and the private sector.
 - Nonpartisan and politically balanced.
- Independent research conducted by consultants or in-house researchers.
- Recommendations crafted in open committee meetings and adopted by vote of the full Assembly of the Conference at semi-annual plenary sessions held in June and December.

What is Incorporation by Reference?

- The Freedom of Information Act requires agencies to publish mandatory regulations in the *Federal Register*. See 5 U.S.C. § 552.
 - Published regulations are codified in the Code of Federal Regulations (CFR).
- Under 5 U.S.C. § 552(a)(1), material published elsewhere is “deemed published” in the *Federal Register* and CFR if:
 - The material is “reasonably available to the class of persons affected thereby;” and
 - The Director of the Office of the Federal Register (OFR) approves the incorporation by reference.

Research for the Conference

- Examined issues agencies face when incorporating, including:
 - Ensuring incorporated materials are reasonably available;
 - Updating regulations when new versions of incorporated standards become available; and
 - Navigating procedural requirements and avoiding drafting pitfalls.
- Research included interviews with regulatory agencies, the National Institute of Standards and Technology (NIST), the Office of the Federal Register (OFR), and the Office of Management and Budget (OMB).
- Also interviewed six representatives of standard development organizations (SDOs) and public interest advocates.

OFR Regulations

- The Office of the Federal Register has promulgated regulations implementing 5 U.S.C. § 552(a)(1), found at 1 C.F.R. part 51.
 - OFR provides further guidance to agencies in Chapter 6 of its Document Drafting Handbook, available online.
- An agency must secure approval to incorporate by reference only when it is promulgating a final rule that incorporates by reference.
 - OFR is not involved at the proposed rule stage.
 - Requests to incorporate by reference are processed by the three members of OFR's Legal Affairs and Policy staff.
 - OFR has 20 days to process requests, and regulations cannot be published without approval. *See* 1 C.F.R. § 51.3(b), 51.5(a)(1).

Eligible Materials

- Must conform to OFR's stated policy. *See* 1 C.F.R. §§ 51.1, 51.7(a)(1).
- Technical or graphic materials, including “published data, criteria, standards, specifications, techniques, illustrations, or similar material,” *see* 1 C.F.R. § 51.7(a)(2).
- “Reasonably available to and usable by the class of persons affected by the publication,” *see* 1 C.F.R. § 51.7(a)(4). “Usability” is defined in the regulations, but “reasonable availability” is not.
- Incorporation must “[s]ubstantially reduce[] the volume of material published in the *Federal Register*,” *see* 1 C.F.R. § 51.7(3).
- An agency's own publication is generally ineligible for incorporation by reference, *see* 1 C.F.R. § 51.7(b), as is material previously published in the *Federal Register* or United States Code, *see* 1 C.F.R. § 51.7(c).

Why Incorporate by Reference?

- Original purpose was to shorten the *Federal Register* and CFR.
 - Avoid repetition of materials available in Commerce Clearing House, West publications, etc. *See* S. REP. 1219, at 11 (1964).
- Some materials cannot be printed in the hard copy editions of the *Federal Register* and CFR.
 - Maps, schematics, other technical material, etc.
- Some materials, including most voluntary consensus standards, are copyrighted.
 - *But see* *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002).

Federal Standards Policy

- Agencies are generally required to use voluntary consensus standards in regulations in lieu of creating government-unique technical standards to fulfill regulatory needs.
 - This approach can be traced back to Administrative Conference Recommendation 78-4, addressing the use of voluntary consensus standards in health and safety regulation.
- Office of Management and Budget Circular A-119 requires agencies to use voluntary consensus standards in regulatory and procurement activities “except where inconsistent with law or otherwise impractical.”
- This policy was partially codified in the National Technology Transfer and Advancement Act of 1995.

Standards in Regulations

- Under OMB Circular A-119 and the NTTAA, the National Institute of Standards and Technology (NIST) plays a central, coordinating role.
 - Provides training and advice to agencies and coordinates the Interagency Committee on Standards Policy.
 - More information at www.standards.gov.
- Standards Incorporated by Reference (SIBR) Database
 - As of November 13, 2012, the database identified 9,557 incorporations by reference of standards in the CFR.
 - Includes voluntary consensus standards, government-unique standards, private industry standards, and international standards.

Benefits of Federal Standards Policy

- Federal standards policy yields significant benefits for agencies, regulated industry, and the public.
 - Agencies save time and money in rulemaking, get access to extensive technical expertise outside government, and reduce enforcement costs.
 - Regulated parties benefit from additional opportunities to contribute to standards development, reduced compliance costs, and less regulatory confusion.
 - The public benefits from better regulations.
- The policy also facilitates an ongoing public-private partnership in standards that benefits all parties and improves public safety.

The Public Access Problem

- Incorporating copyrighted standards often means the public must pay a private party to see the full text of a proposed or final regulation.
 - Traditional solution was public inspection at agency offices.
 - This is no longer sufficient in light of shifting expectations generated by policies favoring transparency and e-Rulemaking.
- Options for addressing the problem are limited by:
 - Agency obligations to respect copyright; and
 - Federal standards policy and SDO reliance on publication revenue.

Questions About Copyright

- Some have questioned copyright for materials incorporated by reference into law—and there is some ambiguity in the case law.
 - No copyright in “the law.” *See* *Banks v. Manchester*, 128 U.S. 244 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).
 - Distinction between model codes adopted as law and extrinsic standards incorporated by reference. *See Veeck*, 293 F.3d 791.
 - Merger of copyrighted standard with fact of “the law.”
- Cost allocation is at the heart of the issue.
- Research showed that some agencies have successfully expanded access through collaboration with the SDO.

Rec. 2011-5 on Public Access

- Embraces principle that incorporated materials must be reasonably available to regulated *and other interested* parties.
- If the material is not copyrighted, the agency should post it online.
- For copyrighted materials, the recommendation urges a collaborative solution:
 - Agencies should work with copyright owners and use available technological tools (e.g., read-only access) to expand availability.
 - Flexible, context-specific approach to determining how available is “reasonably available.”
- Meaningful access requires agencies to explain technical standards.

The Challenge of Updating

- Agencies are required by law to identify the specific version of material incorporated by reference. *See, e.g.*, 1 C.F.R. § 51.9(b)(2).
- When a new version of an incorporated material becomes available, the agency must conduct a rulemaking to update the regulation.
 - SDOs can move more quickly than agencies—and they update more frequently.
- Some agencies, and particularly those that must observe heightened procedural requirements in rulemaking, cannot keep up.
- Research identified several practices that can make updating easier.
 - But the available options are not always workable.

Rec. 2011-5 on Updating

- Urges agencies to use available tools as appropriate to keep incorporating regulations up-to-date.
 - Direct final rulemaking.
 - Participation in standard development processes.
 - Enforcement discretion and equivalency determinations.
- Urges agencies not to move incorporations to non-binding guidance to address the challenge of updating.
- Recommends a statutory solution to address situations where available solutions have proven inadequate.

Procedure and Drafting

- Recommendation 2011-5 also addresses procedural and drafting issues agencies face when incorporating by reference.
 - Agencies should foster good working relationship with OFR.
 - Encourages OFR's transition to electronic submission and review.
- Drafting provisions identify issues agencies should consider, including:
 - The distinction between regulatory and technical standards;
 - Lurking issue of secondary references; and
 - Potential conflicts between standards and regulations.

OFR Petition for Rulemaking

- In the wake of the Conference's recommendation, Peter Strauss filed a Petition for Rulemaking with OFR, requesting that OFR revise its incorporation by reference regulations.
 - 77 Fed. Reg. 11,414 (Feb. 27, 2012).
- Notes that current regulations predate the electronic age.
- Urges OFR to take more active role in ensuring reasonable availability, including at the proposed rule stage.
- Suggests read-only access may be sufficient and requests that cost be included as one consideration in assessing reasonable availability.
- Comment period closed June 1, 2012.

OMB Request for Information

- Shortly after OFR put the Strauss Petition out for public comment, the Office of Management and Budget issued a Request for Information on OMB Circular A-119.
 - 77 Fed. Reg. 19,357 (Mar. 30, 2012).
- Invited interested parties to provide input on various issues that may warrant revisions to Circular A-119, which was last revised in 1998.
 - Federal participation in standard development, conformity assessment, and incorporation by reference.
- Held public workshop at NIST on May 15.
- Comments were accepted until June 1, 2012.

Congressional Activity

- Congress has also taken interest in the public access issue.
- Only relevant legislation that has passed to date is the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Public Law 112-90 (Jan. 3, 2012).
 - Section 24: As of Jan. 2013, the Pipeline and Hazardous Materials Safety Administration (PHMSA) “may not issue guidance or a regulation . . . that incorporates by reference any documents or portions thereof unless [they] are made available to the public, free of charge, on an Internet Web site.”
- PHMSA held a public workshop on July 13, 2012. *See* 77 Fed. Reg. 37,472 (June 21, 2012).
 - Video will be archived on PHMSA’s website for one year.

Looking Forward

- Action expected in the next six months or so:
 - OFR response to Strauss Petition.
 - Potential proposed revisions to Circular A-119.
 - Continued interest from Congress?
- This issue is likely to keep coming up.
- Reaching a workable resolution will require collaboration. The best course for all parties may be for Recommendation 2011-5 to be fully and consistently implemented.

For Further Information

- More information about the Conference's work on this issue is available at www.acus.gov.
- For documents related to the development of Recommendation 2011-5, go to www.acus.gov/incorporation.
- For materials related to implementation, including comments filed with OFR and OMB, go to <http://www.acus.gov/research/research-and-recommendations/implementation/incorporation-by-reference/>.
- If you have feedback, suggestions for further research, or information on implementation, please email ebremer@acus.gov.
- Thank you!