

Comment from Consultative Group Member Thomas M. Susman on *Disclosure of Agency Legal Materials*  
June 9, 2022

Sorry to have missed Monday's meeting. Reading your email that provided some resources from the FOIA Federal Advisory Committee reminded me that the ABA is on record on the issue that Peter Strauss raised before the meeting—public availability of privately adopted standards that are incorporated by reference into agency rules or guidance. Attached are the ABA Recommendation and Report adopted by the ABA House of Delegates and Ron Levin's write-up on the subject.

**AMERICAN BAR ASSOCIATION****SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE  
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
SECTION OF INTELLECTUAL PROPERTY LAW  
SECTION OF PUBLIC UTILITY, COMMUNICATIONS, AND TRANSPORTATION LAW  
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW  
SECTION OF SCIENCE & TECHNOLOGY LAW****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges Congress to enact legislation that  
2 requires the following when a federal agency proposes or issues a substantive rule of general  
3 applicability that incorporates by reference any portion of a standard drafted by a private  
4 organization:

5 (a) The agency must make the portion of the standard that the agency intends to  
6 incorporate by reference accessible, without charge, to members of the public.

7 (b) If the material is subject to copyright protection, the agency must obtain authorization  
8 from the copyright holder for public access to that material.

9 (c) The required public access must include at least online, read-only access to the  
10 incorporated portion of the standard, including availability at computer facilities in  
11 government depository libraries, but it need not include access to the incorporated  
12 material in hard-copy printed form.

13 (d) The legislation should provide that it will have no effect on any rights or defenses  
14 that any person may possess under the Copyright Act or other current law.

15 FURTHER RESOLVED, That the American Bar Association urges Congress to permanently  
16 authorize agencies subject to these provisions to enter into agreements with copyright holders to  
17 accomplish the access described above.

18 FURTHER RESOLVED, That the American Bar Association urges Congress to require each  
19 agency, within a specified period, to:

20 (a) identify all privately drafted standards and other content previously incorporated by  
21 reference into that agency's regulations;

22 (b) determine whether the agency requires authorization from any copyright holder in  
23 order to provide public access to the materials as described above; and

24 (c) establish a reasonable plan and timeline to provide public access as described above,  
25 including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend  
26 or repeal the regulation to eliminate the incorporation by reference.

## REPORT

This resolution is a successor to Resolution 106A, which the Section of Administrative Law and Regulatory Practice submitted to the House of Delegates for action at the 2016 Midyear Meeting. That earlier version would have urged Congress to amend the Administrative Procedure Act to require “meaningful free public availability” of all text incorporated by reference into proposed and final substantive rules of general applicability.

However, that resolution elicited objections from several Sections. They asked Administrative Law to withdraw Resolution 106A from the Midyear Meeting agenda and to form an inter-Section task force charged with devising a substitute resolution that could attract broad support within the House. Administrative Law acceded to this request. As a result, a Task Force on Incorporation by Reference, composed of fifteen members from six Sections and one Division, was convened.<sup>1</sup> After extensive discussions, the task force recommended this resolution.

The resolution is intended to advance the general principle that citizens in a democratic society must be able to consult the laws that govern them. A corollary of that principle is that all citizens should have access in full to binding federal regulations. Regulations themselves are published in the Federal Register and are freely available online and at all federal depository libraries. Under present law as implemented, however, affordability problems often undermine the principle of public access with respect to material that has been included in such rules through incorporation by reference (IBR). The legislation proposed in the resolution would provide for a common baseline of availability by requiring agencies to provide an online source at which IBR material in such rules may be consulted without charge. The legislation would also provide for access without charge to material incorporated by reference into *proposed* rules while those rules are under consideration, so that citizens may comment on those proposals.

At the same time, federal law recognizes the valuable contributions that voluntary consensus standards make to the nation’s regulatory system. Moreover, the purposes and public interest served by copyright laws also deserve recognition and support. Recognizing these concerns, the resolution’s proposed legislation is aimed at ensuring meaningful citizen access without unduly impairing the ability and incentive of organizations to produce standards that can be incorporated by reference into federal regulations.

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<sup>1</sup> Entities represented on the task force included the Sections of Administrative Law and Regulatory Practice (James W. Conrad, Jr., Ronald Levin (chair), Nina Mendelson), Civil Rights and Social Justice (Estelle Rogers), Intellectual Property Law (Janet Fries, Susan Montgomery, Mary Rasenberger), Public Utility, Communications, and Transportation Law (William Boswell, Patricia Griffin), Real Property, Trust and Estate Law (James Durham), and Science & Technology Law (Ellen Flannery, Roderick Kennedy, Oliver Smoot), and the Government and Public Sector Lawyers Division (Gregory Brooker, Regina Nassen).

## I. BACKGROUND

For over two centuries, the principle that all citizens should be able to read the law has been bedrock. Since the 1800s, Congress has provided public access to federal statutes without charge and, since the 1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System.<sup>2</sup> Congress has further extended the public access framework, first by requiring the Government Printing Office to provide universal online access to statutes and regulations,<sup>3</sup> and then by requiring online public access to other government documents and materials in the Electronic Freedom of Information of Act Amendments of 1996 and the e-Government Act of 2002.<sup>4</sup>

The Freedom of Information Act generally requires Federal Register publication of all agency “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.”<sup>5</sup> However, it allows, in the so-called “incorporation by reference” (IBR) provision of 5 U.S.C. § 552(a)(1), that “matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”<sup>6</sup> Although the Office of the Federal Register (OFR) must approve all agency incorporations by reference, its regulations do not specify what level of access makes a particular standard “reasonably available” and thus eligible for incorporation by reference.<sup>7</sup>

Both the National Technology Transfer Act of 1995 and Office of Management and Budget Circular A-119 encourage federal agencies to rely on private voluntary consensus standards.<sup>8</sup> Accordingly, agencies have, on a great many occasions, worked with private standards development organizations (SDOs) and incorporated privately drafted standards by

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<sup>2</sup> 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.

<sup>3</sup> 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as “incremental costs of dissemination” and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.

<sup>4</sup> Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (1996); 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 note (2006)).

<sup>5</sup> 5 U.S.C. § 552(a)(1).

<sup>6</sup> *Id.*

<sup>7</sup> See 1 C.F.R. 51.7(a).

<sup>8</sup> See National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (2012) (“voluntary consensus standards”); Office of Management and Budget Circular A-119, [http://www.whitehouse.gov/omb/inforeg\\_infopoltech](http://www.whitehouse.gov/omb/inforeg_infopoltech) (revised Jan. 27, 2016). Circular A-119 also contemplates agency use of other private standards that may not qualify as “consensus.” *Id.* at 5.

reference into thousands of federal regulations. These privately drafted standards unquestionably have significant public value. SDOs often support and sometimes even seek to have their privately drafted standards adopted as the law of the land. And agencies indisputably find it useful to draw upon this stock of standards.

The Code of Federal Regulations (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These “IBR rules” have the same legal force as any other government rule.<sup>9</sup> Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by SDOs.<sup>10</sup> SDOs range from the ASTM International (formerly the Association for Testing and Materials) to the Society of Automotive Engineers and the American Petroleum Institute.

Federal agencies use privately-drafted IBR rules for a host of subjects, ranging from toy safety,<sup>11</sup> crib and stroller safety, safety standards for vehicle windshields (so they withstand fracture),<sup>12</sup> placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf,<sup>13</sup> and food additive standards,<sup>14</sup> to operating storage requirements for propane tanks, aimed at limiting the tanks’ potential to leak or explode.<sup>15</sup> Agencies are encouraged to participate actively in SDO technical committees that draft standards under their jurisdiction.<sup>16</sup>

However, obtaining public access to IBR standards can be difficult. In many cases, IBR rules cannot be accessed without charge either online or in the nearly 1,800 government depository libraries. Under OFR’s current approach, the public can access these rules without charge in OFR’s Washington, D.C. reading room, but only by written request for an

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<sup>9</sup> <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why> (as explained by OFR, “This material, like any other properly issued rule, has the force and effect of law. . . mak[ing] privately developed technical standards Federally enforceable.”)

<sup>10</sup> Emily J. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J. L. & Pub. Pol’y 131 (2013); Nina Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737 (2014); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

<sup>11</sup> E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children’s use, incorporating by reference National Fire Protection Association and ANSI standards)

<sup>12</sup> 49 C.F.R. § 571.2015.

<sup>13</sup> 30 C.F.R. 250.108 (incorporating by reference American Petroleum Institute Recommended Practice 2D).

<sup>14</sup> See 21 C.F.R. § 172.831 (sucralose regulation, incorporating by reference the Food Chemical Codex, 4<sup>th</sup> edition).

<sup>15</sup> 26 C.F.R. 1910.110(b)(3)(i) (incorporating by reference American Society for Mechanical Engineers’ Boiler and Pressure Vessel Code (1968 edition)).

<sup>16</sup> See Circular A-119, *supra* note 8.

appointment.<sup>17</sup> Apart from this, OFR refers the public to the SDO. IBR standards accordingly are distributed across many individually-maintained private websites and available for purchase from the SDO and from third-party resellers.

SDOs typically sell or license publications of their standards for a fee, which may be in excess of the copying cost or other simple cost of making a standard available. SDOs maintain that publication income supports the work of preparing the standards. When SDOs elect to charge for an individual standard, the price can range from \$40 to upwards of \$1,000.<sup>18</sup> The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at \$74;<sup>19</sup> the incorporated safety standard for hand-held infant carriers is \$43,<sup>20</sup> and the current edition of the Food Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at \$499.<sup>21</sup> The cost of reading the two newly-incorporated-by-reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is \$213.<sup>22</sup> As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is \$150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly \$10,000 as of September 2014.<sup>23</sup>

As publicly-filed comments and other public sources indicate, these fees constrain some citizens and entities from seeing the law's text. Regulated entities are often small businesses for

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<sup>17</sup> See Office of the Federal Register, "Where to Find Materials Incorporated by Reference at NARA Facilities," available at <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why>. Rulemaking agencies also sometimes make the text of IBR rules available for inspection in their own reading rooms, again, typically located in Washington, D.C.

<sup>18</sup> Membership in an SDO usually affords discounted access to its standards, but such memberships can be costly; for example, the American National Standards Institute charges \$750 per year.

<sup>19</sup> See 29 C.F.R. 1926.602(a)(2)(i) (incorporating Society of Automotive Engineers Standard J386-1969); [standards.sae.org/j386\\_196903/](http://standards.sae.org/j386_196903/).

<sup>20</sup> See 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); [www.astm.org](http://www.astm.org). For unexplained reasons, the standard is absent from the online reading room ASTM maintains for government-incorporated standards.

<sup>21</sup> See 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); [https://store.usp.org/OA\\_HTML/ibeCCtpItmDspRte.jsp?item=344067](https://store.usp.org/OA_HTML/ibeCCtpItmDspRte.jsp?item=344067).

<sup>22</sup> See Nuclear Regulatory Commission, Revisions to Transportation Safety Requirements and Harmonization with International Atomic Energy Agency Transportation Requirements, 80 Fed. Reg. 33,988, 34,010-11 (June 12, 2015) (reciting charges for incorporated by reference standards).

<sup>23</sup> Emily Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kansas L. Rev. 279 (2015). SDOs occasionally charge more for an older version than an agency has incorporated by reference into binding law—a reflection of its governmentally-created value--than for the SDO's current version of those same standards. See Strauss, *supra* note 10, at 509-10.

whom the mass of necessary standards may be a significant cost.<sup>24</sup> For example, as the Modification and Replacement Parts Association stated in its public comment to OFR: “The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . .”<sup>25</sup> Frequently, members of the public affected by regulatory frameworks relying upon IBR rules also cannot afford to read these standards. For example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.<sup>26</sup>

Some SDOs have created online reading rooms in which the public can view standards that agencies have incorporated by reference into federal regulations without payment of a fee. But these reading rooms do not consistently make all relevant standards available, and the

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<sup>24</sup> Public comments filed with OFR made this problem clear. 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 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.”); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (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 . . . .”); Comments of American Foundry Society, NARA-2012-0002-0147 (“\$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1,000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg. . . .”).

<sup>25</sup> *See* Comment of the Modification & Replacement Parts Ass’n (Regulations.Gov, filed June 1, 2012) at 14, available at <http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf>.

<sup>26</sup> *E.g.*, 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).



organizations uniformly reserve the right to revoke the access at will.<sup>27</sup> Some IBR content in rules, particularly older ones, is now simply unavailable from the SDOs at any price.<sup>28</sup>

To date, despite recent reviews by OFR and the Office of Management and Budget on related IBR practices, the executive branch has not acceded to proposals to provide for public access to IBR material in regulations without charge. In November 2013, OFR began a rulemaking in response to a 2012 rulemaking petition filed by Columbia Law School Professor Peter L. Strauss and joined by nearly two dozen signatories, mainly law professors. Arguing that the “reasonably available” language in 5 U.S.C. § 552(a) of the Freedom of Information Act had to be understood to require such access, the petition had asked OFR to approve IBR rules only if read-only access to the text without charge was provided to the public.<sup>29</sup> Ultimately, however, OFR declined to significantly revise its approach.<sup>30</sup> OFR has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.<sup>31</sup>

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<sup>27</sup> *E.g.*, ANSI, IBR Standards Portal, [ibr.ansi.org](http://ibr.ansi.org) (May 2, 2016) (“I agree that ANSI may terminate my access to the Licensed Materials at any time and for any reason. . .”); NFPA, “Accept Terms for Access,” [www.nfpa.org](http://www.nfpa.org) (May 2, 2016) (“NFPA may suspend or discontinue providing the Online Document to you with or without cause and without notice.”); American Petroleum Institute Acceptance of Terms, [http://publications.api.org/GocCited\\_Disclaimer.aspx](http://publications.api.org/GocCited_Disclaimer.aspx) (“API may suspend or discontinue providing the Online Document to you with or without cause and without notice.”)

<sup>28</sup> For example, the following editions of privately-drafted standards, both incorporated by reference into agency rules, seem completely unavailable to read or buy on the SDOs’ websites: American Conference of Governmental Industrial Hygienists, “Industrial Ventilation: A Manual of Recommended Practice” (22d ed. 1995), incorporated by reference in 29 C.F.R. 1910.124 (ventilation requirements for dip tanks); and ANSI 10.4-1963, “Safety Requirements for Personnel Hoists and Employee Elevators,” incorporated by reference in 29 CFR 1926.552(c) (hoist safety).

<sup>29</sup> *See* Office of the Federal Register, Incorporation by Reference (Partial Grant of Petition, Notice of Proposed Rulemaking), 78 Fed. Reg. 60,784 (Oct. 2, 2013).

<sup>30</sup> *See* Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov. 7, 2014) (final rule). Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain “the ways that the materials it incorporates by reference are reasonably available to interested parties” and “summarize” the incorporated material. *See* 1 C.F.R. § 51.5(b)(2), (3). Further, although an agency is required to “summarize” in the preamble to a final rule “the material it incorporates by reference,” that summary does not have to include the full text. 1 C.F.R. § 51.5(a)(2); 1 C.F.R. § 51.5(b)(3) (2015). In any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations.

<sup>31</sup> The Nuclear Regulatory Commission is currently proposing to incorporate by reference a variety of standards for nuclear plants; as the agency reports, the purchase prices for individual documents range from \$225 to \$720, and the cost to purchase all documents is approximately \$9,000. Nuclear Regulatory Commission, Proposed Rules: Incorporation by Reference of American Society of Mechanical Engineers Codes and Code Cases, 80 Fed. Reg. 56,820, 56,848 (Sept. 18, 2015).

## II. THE RESOLUTION

### A. Premises of the Resolution

This resolution would put the ABA on record in support of legislation that would promote public access to law, as well as public participation in federal regulation. The ABA should appeal to Congress now for two reasons: First, as noted, OFR has already engaged in a recent reexamination of its approach to implementing its responsibilities under the Freedom of Information Act. Adoption of the resolution would not signify any ABA view regarding OFR's interpretation of its authority under current law; it would, however, advocate a different approach under which a greater level of access would be required. Second, agency use of privately-drafted material incorporated into rules is likely to remain extensive, given continuing agency resource constraints, as well as executive and congressional policy favoring agency reliance on voluntary consensus standards. At this time, congressional action seems the most promising option to provide a higher, consistent level of public access.

As discussed above, facilitation of the public's ability to know the contents of binding law is a longstanding tradition in this country, tangibly reflected in the provisions of the Freedom of Information Act.<sup>32</sup> Indeed, this objective harmonizes with central principles of our constitutional tradition. After all, an essential element of due process of law is that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."<sup>33</sup> Similarly, broader access to the contents of regulations would advance principles underlying the First Amendment, because "'a major purpose of that Amendment was to protect the free discussion of governmental affairs,' [and thereby] ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."<sup>34</sup>

It should be noted that the public needs access to IBR material in *proposed* regulations no less than in *adopted* regulations. As well-established principles governing the rulemaking process require, an agency's notice of a proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment.<sup>35</sup> These procedural requirements, which serve to maintain the legitimacy of agency rulemaking, require that "interested persons" be able to participate in rulemaking by submitting "data, views, or

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<sup>32</sup> 5 U.S.C. § 552(a)(1)(D) (2012).

<sup>33</sup> *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

<sup>34</sup> *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>35</sup> 5 U.S.C. § 553(b)(3); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The object [of § 553(b)], in short, is one of fair notice.").

arguments” – public comments – to the agency.<sup>36</sup> Yet 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.<sup>37</sup> Requiring an “interested person” to pay a fee to learn the content of a proposed rule is a genuine obstacle impeding that person’s right to comment under the Administrative Procedure Act.

On the other hand, many SDOs reportedly rely heavily upon the revenue derived from the sale of their copyrighted standards in order to conduct their operations. They maintain that unconstrained public access to such material would leave them unable to continue to develop and produce the standards themselves unless an alternative revenue stream were made available. At the same time, many agencies would be unable, unwilling, or without sufficient resources to replicate what the SDOs currently do. Indeed, as discussed above, agencies often find that they greatly benefit from their ability to make use of these standards. Consequently, any legislation in this area should avoid creating a situation in which access to IBR material in regulations would be provided without charge, but the standards themselves would cease to be developed by the SDOs due to inadequate funding.

As discussed in greater detail below, the resolution incorporates a number of limitations on the recommended public access requirements, so as to ameliorate any reduction in the economic value of copyrighted standards. In some instances, however, these limitations may not obviate the need for additional funding from the government to compensate SDOs for the use of their standards. The extent to which the access requirements contemplated by the resolution would give rise to a need for compensation in a host of different contexts cannot be predicted with certainty. The resolution leaves these determinations to be made between agencies and SDOs during the process through which authorization for use of copyrighted material is secured. The ultimate point, however, is that society benefits from the public’s ability to obtain access to requirements incorporated by reference into federal regulations; thus, in situations in which agencies elect to continue to rely on IBR rules and conclude, in consultation with SDOs, that compensation is appropriate, the expenditure of public resources to support such access should be considered legitimate and worthwhile, and Congress should be willing to fund such expenditures.

## B. Authorization Provisions

In light of the objectives discussed above, the resolution urges Congress to enact carefully limited statutory requirements that would come into play when a federal agency

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<sup>36</sup> 5 U.S.C. § 553(c).

<sup>37</sup> *Cf.* *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *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).

proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization. The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public. To the extent that the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material. The agency might determine, as a threshold matter, that the particular material that the agency intends to incorporate by reference is not copyrightable or that the intended use is within the scope of fair use. But if the material is indeed subject to copyright protection, authorization from the copyright holder would be required. The Copyright Office should consider providing guidance to agencies as to how to handle copyright questions that would frequently arise in this connection, and agencies themselves should consider promulgating their own rules or internal guidance to regularize their responses to recurring situations that fall within their respective fields of authority.

The resolution also urges Congress to give agencies permanent authority to enter into agreements with copyright holders to implement the access requirements of the proposed legislation, such as license or assignment agreements, that would grant the agencies the right to implement the access requirements of the proposed legislation and to pay the copyright holders any negotiated fees. Long-term authorization would contribute greatly to the stability of the proposed regime by providing a basis for agency-SDO negotiations to ensure the newly required level of access.

### C. Access Provisions

Under the legislation proposed in the resolution, the public access provided by the agency should include, at a minimum, true read-only access to the incorporated portions of the standard, available without charge on a website. The legislation should also provide that such access must be available on computer facilities at government depository libraries; this requirement would address “digital divide” concerns by ensuring meaningful access for persons who do not have computers of their own. The recommended legislation would not, however, require access to a hard-copy version of the incorporated material. This limitation is one way in which the resolution seeks to respect the proprietary interests of SDOs. Read-only access should generally be sufficient to enable citizens to ascertain the contents of proposed or final rules that may affect their rights or obligations. On a voluntary basis, however, SDOs might choose (as some already do) to allow the agency to make downloadable text freely available, or to permit access to hard copies at depository libraries.

Furthermore, as noted, the public access required by the legislation would apply only to the portions of a standard that have been incorporated by reference into a regulation. This limitation is another accommodation to the interests of SDOs. To the extent that those organizations have customers that are willing to purchase an entire copy of a given standard, or

other products or services derived from it, the organizations would continue to be able to rely on profits from sales to such customers to recoup costs of creating the standards.

Another practical issue is that the “incorporated portion” of a standard may contain cross-references to a separate part of the standard, which in turn contains cross-references to a different part, and so forth. Agencies will need to be given discretion to make reasonable judgments about how much cross-referenced text they will need to make available through public access. In view of the competing policy considerations underlying the resolution, the legislation should make clear that the goal of this discretion should be to make available enough of the standard to enable members of the public to have access to and understand the portions of the standard that have been made part of federal law, but need not provide more than that limited amount.

Agencies providing public access should ensure that the incorporated material will be presented in a manner that enables reading such material in the context of the relevant section(s) of the associated regulation. For example, the software might provide for a hyperlink between the text of the regulation and the IBR text. However, data formats may vary according to the characteristics of the software platform and may evolve over time. Accordingly, the resolution leaves the details to Congress and the agencies to work out as present and future circumstances may warrant. Agencies providing public access will also need to be attentive generally to other accessibility concerns, including ensuring that the relevant text is available over time and that the public is readily able to locate and use the website on which the text appears.

#### D. Transition and Ancillary Provisions

Under the resolution, the foregoing requirements and expectations would apply to regulations issued after the effective date of the proposed legislation. In principle, access to IBR text in existing regulations is also highly desirable. However, the administrative burdens of bringing all existing IBR regulations into compliance with the access requirements of the proposed legislation would be considerable. Accordingly, the resolution urges Congress to require each agency to establish a reasonable plan and timeline to provide public access to IBR text in regulations as described herein, including obtaining relevant authorizations and amending or repealing regulations to eliminate incorporations by reference for which authorization is not obtained. The availability of funding to compensate SDOs for use of copyrighted material may be one factor that such plans would need to take into account.

Finally, the proposed legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other currently applicable law. For example, whatever rights a copyright holder may possess under current law to bring suit against a third party for infringement of their copyright interests in IBR material in regulations would continue to exist under the regime that the resolution advocates.

### E. The Scope of the Resolution

By adopting the resolution, the ABA would not, itself, endorse any view regarding the copyright status of any privately developed standards currently incorporated by federal agencies into regulations. Thus, the resolution would not imply a position regarding any pending litigation related to that issue. Nor would the resolution imply any ABA view regarding the desirability of additional legislation that would require public access on any broader basis than the statute that the resolution itself advocates.

However, *voluntary* agreements between agencies and SDOs to provide broader public access to IBR text than would be required by the legislation recommended herein would be entirely compatible with the spirit of the resolution. In considering the possibility of entering into those agreements, agencies and organizations should take account of the guidelines stated in Recommendation 2011-5 of the Administrative Conference of the United States<sup>38</sup> and Circular A-119 of the Office of Management and Budget.<sup>39</sup> Other recommendations to agencies in these pronouncements also deserve sympathetic consideration, such as their admonition that agencies should update incorporations by reference on a timely basis.

### III. CONCLUSION

This resolution seeks to protect and promote two essential public interests: the ability of the public to ascertain the requirements imposed by binding regulations governing private conduct, and the intellectual property interests of private entities whose standards may be incorporated by reference into those regulations. It is submitted that the resolution proposes a reasonable balance between these interests and deserves favorable consideration by the House of Delegates, and then by Congress.

Respectfully submitted,

Jeffrey A. Rosen  
Chair, Section of Administrative Law and Regulatory Practice  
August 2016

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<sup>38</sup> ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (2012).

<sup>39</sup> Revised OMB Circular No. A-119, *supra* note 8.

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeffrey A. Rosen, Section Chair

1. Summary of Resolution(s).

The resolution proposes legislation that would require federal agencies to provide an online source at which material that has been incorporated by reference into proposed or final regulations can be consulted without charge. At least read-only access would have to be afforded. This requirement would serve to enhance citizens' ability to see the law, to ascertain their legal obligations, and to comment on pending rulemaking proposals. The proposed legislation would contain limitations that are designed to accommodate the intellectual property interests of organizations that create incorporated standards.

2. Approval by Submitting Entity.

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on May 2, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously?

Resolution 106A, dealing with similar subject matter, was submitted to the House for consideration at the 2016 Midyear Meeting. Opposition to that resolution led to its withdrawal and to formation of an inter-entity task force. That task force, after deliberations, drafted and recommended this resolution.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

None is directly relevant.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Policy could be implemented by legislative action.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The five Sections that are cosponsoring the resolution were represented (along with Administrative Law, the principal sponsor) on the task force that drafted and recommended the resolution. The Government and Public Sectors Lawyers Division was also represented on the task force.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Professor Nina A. Mendelson  
University of Michigan Law School  
625 S. State St.  
Ann Arbor, MI 48109  
(734) 936-5071 (o)  
[nmendel@umich.edu](mailto:nmendel@umich.edu)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Professor Ronald M. Levin  
Washington University School of Law  
Campus Box 1120  
St. Louis, MO 63130  
(314) 935-6490 (office)  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The resolution proposes legislation that would expand public access to material that has been incorporated by reference into proposed or final federal regulations.

### 2. Summary of the Issue that the Resolution Addresses

Thousands of binding federal regulations “incorporate by reference” material that is contained in standards drafted by private organizations. In many instances, members of the public can obtain access to such material only by visiting a reading room in Washington, D.C., or by purchasing a copy of the standard from the organization that created it. This limited access can create a cost barrier for small businesses that wish to ascertain their obligations under these regulations, as well as for citizens who wish to comment on pending regulations. The policy challenge is to ensure public access to incorporated material in a manner that acknowledges the intellectual property interests of standards development organizations and that does not unduly impair their ability and incentive to continue to produce such standards.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution urges Congress to require that when a federal agency intends to incorporate material from an industry code into a proposed or final regulation, it must obtain authorization from the copyright holder for any portion of the incorporated material that is subject to copyright protection. The authorization must at least provide for members of the public to have access without charge to a read-only online copy of the incorporated material. Access to the online content must be available on computer facilities in depository libraries. The proposed legislation would also permanently authorize agencies to enter into agreements with copyright holders to accomplish the access requirements. Under the legislation, agencies would be expected to apply the access requirements directly to newly adopted regulations and to establish reasonable plans and timelines to bring existing regulations into conformity with the same regime.

### 4. Summary of Minority Views

None identified.

# ABA Adopts Incorporation by Reference Resolution

By Ronald M. Levin\*

*Ed. Note: On August 9, 2016, the ABA House of Delegates adopted Resolution 112, sponsored by the Administrative Law Section and co-sponsored by five other Sections. The resolution proposes legislation that would expand public access to material that has been incorporated by reference into federal regulations. Section Delegate Ronald Levin made the following remarks as he presented the resolution to the House:*

**M**adam Chair, I move adoption of Resolution 112 and ask for a second.

Members of the House, this resolution is cosponsored by six Sections: Administrative Law, Civil Rights, Intellectual Property, Public Utilities, Real Property, and Science & Technology. It has also been endorsed by other entities, including the Business Law Section, the National Conference of the Administrative Law Judiciary, and the Minority Caucus. I am not aware of any ABA entity that opposes it on the merits.

I imagine many of you find the subject matter unfamiliar and perplexing. To guide you through it, I will first explain why we are proposing the resolution, then how we created it, and then what it provides.

I urge your support for the resolution, because it strikes a balance between the right to know the law and the interests of copyright holders. The resolution will enable citizens to find out, without a charge, what federal regulations

require. It will also enable citizens to find out, without a charge, what proposed regulations would require, so that they can comment on those regulations to the agency that intends to adopt them.

You may think that they have these rights now, and in most situations that would be true—but *not* when the regulation or proposed regulation incorporates by reference provisions in a code written by a private organization. These groups are known as standards development organizations or SDOs. In those situations, the government doesn't publish the legal requirement, so you can find out what it is only from the SDO and

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*“The resolution strikes a balance between the right to know the law and the interests of copyright holders.”*

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only on terms that the SDO decides. The SDO may, for example, require you to buy the standard, at a price of \$40, or \$70, or hundreds of dollars, or thousands of dollars. Some small businesses may be governed by dozens of these codes, so the total cost can really become unaffordable.

Or consider an environmental group or a community group that is concerned about some local condition and wants to know whether a proposed regulation or existing regulation adequately protects public safety. It may not be able to afford to

find out, because the incorporated language is not in the public domain.

This situation is antithetical to fair notice and due process, and it is antithetical to the ability of citizens to hold government accountable, not to mention the ability of lawyers to do their jobs for their clients. Resolution 112 offers a carefully designed and balanced solution to these problems.

It is balanced because of the open and inclusive manner in which ABA entities worked together to produce it. Many of you will recall that six months ago I stood in the well of this House and announced that I would withdraw a prior resolution dealing with incorporation by reference, Resolution 106A. Instead, I said, a task force would be formed, and input from everyone would be welcome.

Well, the task force was formed, with me as chair, and every interested Section and Division was invited to send representatives. We wound up with fifteen members, who brought a wide variety of perspectives to the table. We had a former chairman of the American National Standards Institute (ANSI), the umbrella group for SDOs, and we had the general counsel of a major SDO. Another member was the current general counsel of ANSI, who disagreed with the task force's ultimate recommendation but certainly gave us her organization's viewpoint.

We also had the executive director of The Authors Guild, who helped us understand copyright issues. And on the other hand, we also had several members who were strong supporters of broad public access to the law.

This group worked intensively for more than two months to hammer out a compromise position. All members of the task force were encouraged to consult with interested members

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\* William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis. For the text of Resolution 112 and its supporting report, see [https://www.americanbar.org/content/dam/aba/directories/policy/2016\\_hod\\_annual\\_112.docx](https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_annual_112.docx).

of their entities during this process, and I know consultations did occur. We spent many hours on debate, editing, and mutual accommodation. Ultimately, this process resulted in the balanced and broad-based resolution that is now before you.

So let's talk about the substance of the resolution. The task force began by completely abandoning the prior resolution, 106A. Not a single provision in the old resolution remains in the new one. Resolution 106A revolved around competing ideas about what incorporated material is "reasonably available" within the meaning of the Administrative Procedure Act and about copyright issues that are currently in litigation. We knew we would not reach agreement on those issues, so we put them aside and replaced them with an entirely new legislative proposal. It has five key elements that I would like to highlight for you.

*First*, when an agency issues a proposed or final regulation, it would be required to post the incorporated portion online, accessible without charge. (This would apply to new regulations—not existing ones, which I'll discuss later.) This online posting would directly solve the problem of people not being able to find out what those regulations or proposed regulations require.

*Second*, as I just mentioned, the access requirement would apply only to the incorporated portion of the standard, not to the entire standard. For this reason, an SDO would still be able to sell copies of the standard to customers who want the whole thing, and this would

help defray the expenses of creating the standard. Now, bear in mind that, by one estimate, only 2-4% of private standards have provisions that are incorporated by reference into federal regulations in the first place. So, obviously, many businesses want to own copies of voluntary industry

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*“Legal requirements should be accessible to all citizens, with or without deep pockets, as a democratic society should rightly expect.”*

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standards for reasons that go beyond their incorporation into federal law. Those reasons would help maintain the customer base for SDOs with regard to *full* versions of standards that are *partially* incorporated into regulations.

*Third*, the required public access could be limited to a read-only format. Now, all of you know that when you work with a document, especially a highly technical one, you want to be able to mark it up, highlight it, print it, or copy and paste portions of it into another document. Anyone who wants to be able to do any of those things with a standard would still have reasons to want to

buy a copy, even if all or part of it is available online in a read-only format as a result of the incorporation by reference. This fact too would help maintain a market for the SDO.

*Fourth*, any material that is subject to copyright protection could be incorporated only if the agency obtains authorization from the SDO to allow the public access. This means that the plan involves no compulsory licensing and no stripping away of copyright protection. The SDO would still own the copyright. It could, for example, bring suit against third-party infringers to the same extent as it can today. In practice, the agency and SDO would have strong incentives to come to terms on an authorization agreement, in order to maintain existing public-private partnerships, but it would be their choice.

The resolution would leave it to the two parties to work out what the terms would be in any particular case. The agency and SDO could agree on a payment from the government to the SDO. There would be nothing odd about this, because government spends money now to make its laws available to the public, from publishing the U.S. Code to maintaining websites. But again, this payment would happen *only* if the agency and SDO mutually agree on it.

*Fifth*, the mandates in the resolution would apply only to *future* regulations. With regard to existing regulations, the resolution urges Congress to require agencies to study those regulations and formulate plans for achieving public access

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LIBRARY  
COMPLETE?**

Check the list of Administrative Law publications at [www.americanbar.org/groups/administrative\\_law/publications](http://www.americanbar.org/groups/administrative_law/publications) to be sure.

on similar terms. But that's all it requires—to produce plans. What they would then do with the plans would be up to them. Hopefully some agencies would proceed to convert existing rules to online public access, by conducting new rulemaking proceedings, *if* their resources permit. But Resolution 112 itself would not require the agencies to take any tangible action with respect to existing regulations. So, the resolution is not retroactive.

Now, if you put these five elements together, I think you can see why six Sections have joined forces to co-sponsor Resolution 112. Some members of the task force would individually have preferred more public access, and some would individually have preferred a better deal for SDOs. But they supported the compromise. This is what we in the ABA do so often and to such good effect when we address challenging problems.

Basically, Resolution 112 tries hard to hold down costs for SDOs, but it

also makes an important contribution towards a fundamental goal: to ensure that law should not be secret, and that the ability to find out what it says or what is proposed should not depend on terms dictated by a private entity with a self-interest of its own. Rather, legal requirements should be accessible to all citizens, with or without deep pockets, as a democratic society should rightly expect.

For these reasons, I urge you to approve Resolution 112. ○

## ABA RESOLUTION 112

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RESOLVED. That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

- (a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public.
- (b) If the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.
- (c) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.
- (d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

- (a) identify all privately drafted standards and other content previously incorporated by reference into that agency's regulations;
- (b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and
- (c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.