



January 31, 2014

Mr. Charles A. Barth
Director
Office of the Federal Register
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD

Re: Partial Grant of Petition and Notice of Proposed Rulemaking, 78 Fed. Reg. 60,784

Dear Mr. Barth:

On behalf of the Office of the Chairman of the Administrative Conference of the United States, and pursuant to 5 U.S.C. § 595(c)(2), we submit these comments in response to your October 2, 2013 partial grant of a petition for rulemaking and notice of proposed rulemaking on the subject of incorporation by reference.¹ As you know, in December 2011, the Administrative Conference adopted Recommendation 2011-5, *Incorporation by Reference*, addressing a number of the issues raised in this proceeding.² This recommendation provides guidance to federal agencies on ensuring public access to incorporated materials, keeping regulations up-to-date as new versions of incorporated materials become available, complying with procedural requirements for incorporating by reference, and appropriately drafting incorporating regulations.

Administrative Conference recommendations, including Recommendation 2011-5 are consensus positions of the Assembly of the Administrative Conference.³ As we explained in our previously filed comments responding to the Office of the Federal Register's (OFR) announcement of the petition for rulemaking and request for comments,⁴ the positions reflected in Administrative Conference recommendations are developed through a public, committee-based process and informed by substantial research reports prepared by in-house researchers or non-staff experts. To the extent that these comments go beyond the text of Recommendation 2011-5, they should be understood to reflect the considered views of the Administrative Conference's Office of the Chairman, informed by the research conducted by the Administrative

¹ See 78 Fed. Reg. 60,784 (Oct. 2, 2013).

² See Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012), available at <http://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference.pdf>.

³ See 5 U.S.C. § 595(a).

⁴ See 77 Fed. Reg. 11,414 (Feb. 27, 2012); Letter from the Office of the Chairman of the Administrative Conference to Michael L. White, Acting Director, Office of the Federal Register (June 1, 2012), available at <http://www.acus.gov/sites/default/files/documents/Final-ACUS-Response-to-OFR-Petition-6-1-12.pdf>. We also filed comments in response to the Office of Management and Budget's request for information regarding "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities." See 77 Fed. Reg. 19,357 (Mar. 30, 2012); Letter from the Office of the Chairman of the Administrative Conference of the United States to Cass R. Sunstein, Administrator, Office of the Information and Regulatory Affairs, Office of Management and Budget (Apr. 30, 2012), available at <http://www.acus.gov/sites/default/files/documents/Final-ACUS-Response-to-OMB-RFI-4-30-12.pdf>.



Conference's staff attorney, Emily Bremer.⁵ It bears noting that, in this one respect, these views have not been approved by and may not necessarily reflect the views of the Conference or its members.

Overview

For reasons we explained in greater detail in our previously filed comments, we applaud OFR's efforts to encourage expanded availability of incorporated materials pursuant to its statutory authority, expertise, and resources. In its proposed rule, OFR recognizes the complexity of the issues raised in the petition. Although these issues most directly involve the publication requirements of 5 U.S.C. § 552, they also implicate agency obligations arising from copyright law and the federal standards policy embodied in the National Technology Transfer and Advancement Act of 1995 (NTTAA) and OMB Circular A-119. OFR's authority, however, extends only to the first of these three dimensions. In our view, the proposed rule does a commendable job of encouraging improved public availability of incorporated materials within the confines of OFR's legal authority and substantive expertise.

Implementing Recommendation 2011-5

We are pleased to see that the proposed rule implements Recommendation 2011-5 in several respects, including by:

- Affirming that promulgating agencies have the primary responsibility for ensuring that incorporated materials are reasonably available to regulated and other interested parties, both during the rulemaking process and following promulgation of an incorporating regulation;⁶
- Recognizing that “reasonable availability” is highly context dependent and that promulgating agencies, not OFR, have the substantive expertise and information necessary to define and ensure it with respect to an individual proposed or final rule;⁷
- Encouraging promulgating agencies to collaborate with copyright holders to ensure reasonable availability;⁸

⁵ Recommendation 2011-5 was informed by a research report delivered to the Committee on Administration and Management and subsequently published in the *Harvard Journal of Law & Public Policy*. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131 (2013), available at <http://www.acus.gov/sites/default/files/documents/Bremer%20Final%20IBR%20Article%20%5BJanuary%202013%5D.pdf>. Although Ms. Bremer prepared this report in her capacity as an attorney advisor with the Administrative Conference staff, the views expressed there are her own and do not necessarily reflect the views of the Conference, its committees, or its members.

⁶ See Recommendation 2011-5, *supra* note 2, at ¶¶ 1-3, 4(a).

⁷ See *id.* at ¶ 4.

⁸ Compare 77 Fed. Reg. at 60,792, with Recommendation 2011-5, *supra* note 2, at ¶¶ 3-4.



- Increasing the likelihood that promulgating agencies will explain in the preamble to a proposed rule any highly technical material proposed to be incorporated by reference;⁹ and
- Rejecting the argument that incorporations by reference of copyrighted materials should be moved from regulations to non-binding guidance documents in order to address the public’s need to access the law or the difficulty of updating regulations as newer versions of incorporated materials become available.¹⁰

We also appreciate OFR’s expressed intention to update its *Document Drafting Handbook* to include some of the provisions of Recommendation 2011-5.¹¹ We believe this action will improve agency awareness of the recommendation and support the smooth functioning of OFR’s incorporation by reference approval process. We would be happy to provide OFR with any assistance it may request to carry out this proposal.

Ensuring Reasonable Availability

OFR’s proposal to require promulgating agencies to address reasonable availability in the preamble of proposed and final incorporating regulations is a welcome improvement to current practices. Although OFR does not propose to extend the incorporation by reference approval process to the proposed rule stage,¹² the amended 1 C.F.R. § 51.5(a) would require agencies, in the preamble to a proposed rule, to either “[d]iscuss the ways in which it worked to make the materials it proposes to incorporate by reference reasonably available to interested parties” or “[s]ummarize the material it proposed to incorporate by reference.”¹³ In addition, the amended 1 C.F.R. § 51.5(b)(2) would require agencies to “[d]iscuss[], in the preamble, the ways in which it worked to make the materials it incorporates by reference reasonably available to interested parties and how interested parties can obtain the materials.”¹⁴ These new requirements raise the visibility of the “reasonably available” requirement in 5 U.S.C. § 552(a)(1), increasing the likelihood that agencies will proactively seek to improve the availability of incorporated materials throughout the rulemaking process.

OFR might consider strengthening this aspect of the proposal by replacing “or” with “and” in 1 C.F.R. § 51.5, thereby requiring agencies to discuss in the preamble to a proposed incorporating regulation *both* the content of the material to be incorporated *and* the steps the agency has taken to ensure reasonable availability. This change would be consistent with Recommendation 2011-5, which urges that “[w]hen considering incorporating by reference highly technical material, agencies should include in the notice of proposed rulemaking an

⁹ See Recommendation 2011-5, *supra* note 2, at ¶ 5.

¹⁰ See *id.* at ¶ 8.

¹¹ See 78 Fed. Reg. 60,791.

¹² This is our understanding of the revised requirement in 1 C.F.R. § 51.5(a) that “[i]n a proposed rule, the agency does not request formal approval.” 78 Fed. Reg. 60,797. If OFR intends this language to convey some other meaning, clarification in the final rule may be necessary.

¹³ *Id.*

¹⁴ *Id.* (proposed revision to 1 C.F.R. § 51.5(b)(2)).



explanation of the material and how its incorporation by reference will further the agency's regulatory purpose."¹⁵

Defining Eligibility for Incorporation

Finally, we urge OFR to reconsider its proposal to eliminate the requirement that a publication must be technical in nature to be eligible for incorporation by reference.¹⁶ Contrary to OFR's suggestion, this requirement, presently codified at 1 C.F.R. § 51.7(a)(2),¹⁷ has in the past been understood to mean that agencies must set forth regulatory requirements in the text of a regulation and incorporate by reference only those materials that provide necessary technical detail.¹⁸ Our understanding is that agencies took this requirement seriously in past years. The limitation is necessary to ensure that incorporated material does "not detract from legal and practical attributes" of the *Federal Register* system or allow the CFR to "become a mere index" to regulatory requirements published elsewhere.¹⁹ To that end, the Administrative Conference has recommended that:

Agencies should ensure that incorporations by reference support, rather than detract from, the usefulness and readability of the Code of Federal Regulations. Incorporated material may provide detail, but a regulation should, by itself, make the basic concept of the rule understandable without the need for the reader to refer to the incorporated material.

In a sense, the limitation to technical publications is the private-publication corollary of OFR's prudent rule that agencies may not incorporate by reference their own publications. OFR's proposal to eliminate it is inconsistent with the principles invoked by OFR in support of that rule and also articulated in the provision of Recommendation 2011-5 quoted above.

OFR needs neither substantive expertise nor expanded resources to retain and make effective its existing eligibility requirements, including the limitation to technical material. Promulgating agencies have the primary responsibility for ensuring they incorporate by reference only technical, and not regulatory, standards. OFR's regulations can increase the probability that agencies will be aware of this responsibility and take it seriously. Indeed, OFR's proposed amendments to 1 C.F.R. § 51.5, discussed above, acknowledge this reality with respect to the

¹⁵ Recommendation 2011-5, *supra* note 2, at ¶ 5.

¹⁶ See 78 Fed. Reg. 60,797; see also *id.* at 60,794.

¹⁷ 1 C.F.R. § 51.7(a)(2) provides that "[a] publication is eligible for incorporation by reference," see *id.* at § 51.7(a), if it "[i]s published data, criteria, standards, specifications, techniques, illustrations, or similar material," see *id.* at § 51.7(a)(2).

¹⁸ OFR states that "FOIA and the regulations in 1 CFR part 51 do not limit IBR approval to technical standards." *Id.* at 60,794. Although this is true with respect to FOIA, it does not appear to accurately describe the eligibility requirements in 1 C.F.R. § 51(a). Indeed, if this were an accurate description of the current eligibility requirements, OFR's proposal to amend 1 C.F.R. § 51(a), see *id.* at 60,797, would presumably be unnecessary. If it finalizes this proposed amendment, OFR should, at a minimum: (1) clarify what "published data, criteria," etc. refers to if not technical material; and (2) explain what the revision is intended to accomplish.

¹⁹ See 78 Fed. Reg. at 60,785.



“reasonably available” requirement. OFR can—and should—encourage observance of sound incorporation by reference principles through its regulations, even if, as a practical matter, it must largely rely on the substantive expertise and cooperation of promulgating agencies for those principles to be implemented.

Conclusion

Thank you for providing further opportunity for the public to comment on the important and complex issues raised by the petition for rulemaking. Apart from our concerns regarding OFR’s proposed revisions to its incorporation by reference eligibility requirements, we believe the proposed rule is tailored to improve the public availability of incorporated materials within the limits of OFR’s statutory authority. We are available to continue working with you and your staff to implement Recommendation 2011-5. To that end, you can reach Ms. Bremer at ebremer@acus.gov or 202.480.2086.

Sincerely,

A handwritten signature in cursive script that reads "Paul R. Verkuil".

Paul R. Verkuil
Chairman

A handwritten signature in cursive script that reads "Emily S. Bremer".

Emily S. Bremer
Attorney Advisor