



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

June 1, 2012

Mr. Michael L. White
Acting Director
Office of the Federal Register
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD

Re: Announcement of Petition and Request for Comments, 77 Fed. Reg. 11,414

Dear Mr. White:

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 February 27, 2012 announcement of a petition for rulemaking and request for comments on the subject of incorporation by reference.¹ As you know, the Administrative Conference recently adopted Recommendation 2011-5, *Incorporation by Reference*,² which addresses many of the issues raised in the petition. Indeed, it is likely that the Conference's adoption of Recommendation 2011-5 inspired the petition. The Conference Recommendation identifies principles and best practices that can help agencies ensure public access to incorporated materials, keep regulations up-to-date as new versions of incorporated materials become available, comply with procedural requirements for incorporating by reference, and appropriately draft incorporating regulations.

We are sympathetic to the petition's goal of improving the availability of incorporated materials, and we believe that the Office of the Federal Register (OFR) should update its guidance and regulations to encourage agencies to improve the public availability of incorporated documents, but we nonetheless urge you to deny the petition. While we recognize that the petition has the public interest in mind, in our view, it proposes a solution to incorporation by reference's public access problem that may exceed OFR's statutory authority, burdens agencies with complicated compliance requirements, is at odds with copyright law and federal standards policy, and has the potential to undermine the valuable public-private partnership in standard setting that has been federal statutory and regulatory policy for decades. Consistent with Recommendation 2011-5, it is our view that promulgating agencies must take primary responsibility for ensuring that materials incorporated by reference are reasonably available to regulated and other interested parties. OFR has an important role to play, however, in encouraging agencies to take this responsibility seriously. We urge you to update your

¹ See 77 Fed. Reg. 11,414 (Feb. 27, 2012). We previously cross-filed in this docket comments responding 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 (March 30, 2012). Those comments may also inform the Office of the Federal Register's (OFR) consideration of the issues raised in the petition.

² 77 Fed. Reg. 2,257 (Jan. 17, 2012). For convenience, a copy of Recommendation 2011-5 has been included with these comments.



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guidance and regulations on the “reasonably available” requirement to further the petition’s goals and facilitate Recommendation 2011-5’s implementation.

Recommendation 2011-5 reflects the consensus position of the Assembly of the Administrative Conference,³ reached through an open, committee-based process. The recommendation was informed by a research report delivered to the Committee on Administration and Management.⁴ The research included interviews with officials at twelve federal agencies, including OFR, the National Institute of Standards and Technology, the Office of Management and Budget (OMB), and regulatory agencies, as well as representatives of seven standard development and public interest organizations.⁵ To the extent that these comments go beyond Recommendation 2011-5, they should be understood to reflect the considered views of the Conference’s Office of the Chairman, informed by the research conducted by the Conference’s staff attorney, Emily Bremer. However, these views have not been approved by and may not necessarily reflect the views of the Conference or its members.

I. Defining “Reasonably Available to the Class of Persons Affected”

As you know, incorporation by reference is permitted under 5 U.S.C. § 552(a)(1), a provision of the Freedom of Information Act (FOIA) that was initially enacted by Congress in 1966.⁶ This law provides that, in order to enforce a regulation, an agency must publish it in the *Federal Register* for codification in the Code of Federal Regulations (CFR).⁷ The law further provides, however, that material is “deemed published” if it is “reasonably available to the class of persons affected” and OFR approves its incorporation by reference.⁸ In your notice, you ask several questions regarding the interpretation of this statutory provision, beginning with:

- *Does “reasonably available” mean that the material should be available for free to anyone online?*

This inquiry implicates two related, but distinct, questions: (1) as a matter of law, must an incorporated material be available for free to anyone online in order to meet the standard of “reasonably available”; and (2) as a matter of policy, should the government seek to secure such

³ See 5 U.S.C. § 595(a).

⁴ See Emily S. Bremer, *Incorporation by Reference in Federal Regulations*, A Report to the Administrative Conference of the United States (2011), available at <http://www.acus.gov/research/the-conference-current-projects/incorporation-by-reference/> [hereinafter Bremer Report]. Although Mrs. Bremer prepared her report in her capacity as Conference staff, the views expressed are those of the author and do not necessarily reflect the views of the Conference, its committees, or its members.

⁵ See Bremer Report at 3.

⁶ See Pub. L. No. 89-487, 80 Stat. 250 (July 4, 1966). The 1966 amendments became effective in 1967, *see id.* and the statute was also revised again in 1967, *see* Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), with largely nonsubstantive amendments to the incorporation by reference provision, *see infra* note 23.

⁷ See *Appalachian Power Co. v. Envtl. Prot. Agency*, 566 F.2d 451, 455 (4th Cir. 1977). The CFR is a special edition of the *Federal Register* that “present[s] a compact and practical code . . . contain[ing] each Federal regulation of general applicability and legal effect.” 1 C.F.R. § 8.1(a); *see* 44 U.S.C. § 1510.

⁸ 5 U.S.C. § 552(a)(1).



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availability wherever possible? To the first question, we answer “no.” To the second question, we answer “yes.”

As a matter of law, “reasonably available” does not mean that an incorporated material must be available for free online. The inclusion of the qualifying term “reasonably” suggests that Section 552(a)(1) does not require absolute availability for incorporation by reference. Merriam Webster defines “reasonable” as “not extreme or excessive” and “inexpensive.”⁹ From this perspective, matter may be ineligible for incorporation by reference because it is no longer available for sale, as in the case of some outdated standards, or is available only for an unreasonably high cost. The plain meaning of the phrase “reasonably available” does not, however, support the absolute standard proposed in the petition.

The legislative history of Section 552(a)(1) and a memorandum issued by the Attorney General in 1967, shortly after Congress enacted FOIA, lends support to this interpretation. The Attorney General’s memorandum defines the “[s]tandard of what is ‘reasonably available’” in a manner suggesting that the primary consideration is whether the full text of the material is easy for affected members of the public to locate:

To meet this test [of “reasonably available”] the material incorporated must be set forth substantially in its entirety in the public or private publication and not merely summarized or printed as a synopsis. Also, if the publication to be incorporated is a private publication, it should be readily available to the class of persons affected thereby, and not be difficult for them to locate.¹⁰

This language is consistent with the legislative history of Section 552(a)(1),¹¹ which shows that Congress permitted incorporation by reference with the knowledge that incorporated material might be available only in a private publication. The concern to which Congress was responding was that *too much* material was being published in the *Federal Register*.¹² The Senate committee report explained that it would be “advantageous” to avoid repetition in the *Federal Register* when an agencies’ “activities are thoroughly analyzed and publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc.,” and the privately published material “can be incorporated by reference and is readily available to interested members of the public.”¹³ Congress thus apparently contemplated that incorporated materials might be available only from private publishers, presumably at some cost to interested parties.

⁹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2008).

¹⁰ Ramsay Clark, Memorandum for the Executive Departments and Agencies Concerning Section 3 of the Administrative Procedure Act as Revised Effective July 4, 1967 (June 1967), *available at* <http://www.justice.gov/oip/67agmemo.htm> [hereinafter *Attorney General’s Memorandum*].

¹¹ A full collection of the legislative history of the FOIA is available online in George Washington University’s National Security Archive, at <http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm>.

¹² *E.g.*, S. REP. 1219, at 11 (1964) (“[T]here have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of *too much* publication rather than *too little*.” (emphasis in original)).

¹³ *Id.* at 4.



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To meet the statutory standard of “reasonably available,” then, incorporated material must be publicly available in its entirety for a reasonable cost.¹⁴ But to whom is this level of availability owed? This is the essence of your next question:

- *Does “class of persons affected” need to be defined? If so, how should it be defined?*

Our research suggests there is presently no need for OFR to define “class of persons affected.” As Recommendation 2011-5 acknowledges, the primary hurdles to the free public availability of incorporated materials are copyright law¹⁵ and federal standards policy, as embodied in the National Technology and Transfer Act of 1995 (NTTAA)¹⁶ and Office of Management and Budget Circular A-119.¹⁷ These hurdles are tied to the characteristics of materials commonly incorporated by reference, not the characteristics of the persons who may be interested in viewing the full text of incorporated materials. We are not aware of any instances in which OFR or another federal agency has impeded public access to incorporated materials by resorting to an overly restrictive definition of “class of persons affected.” Moreover, as we explain below, the legal definition of “class of persons affected” appears in fact to be more restrictive than is warranted by sound public policy in an open government age.¹⁸ Recognizing this reality, the very first paragraph of Recommendation 2011-5 urges agencies to ensure that incorporated materials are reasonably available to both regulated *and other interested parties*.¹⁹ In our view, the goal of facilitating broader public access to incorporated materials can best be achieved by continued agency observance of this provision of the recommendation.

The petitioners’ goals would not be furthered by OFR’s interpreting “class of persons affected” because, when one considers the phrase in context, it appears to refer only to regulated parties.²⁰ The sentence that permits incorporation by reference is embedded in the free standing paragraph of Section 552(a)(1) that establishes the sanction for nonpublication of agency documents intended to have legal effect²¹ (i.e., the types of documents identified in Section 552(a)(1)(A)-(E)):

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be

¹⁴ See also Subcommittee on Standards, Nat’l Sci. & Tech. Council, Exec. Office of the President, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* 11 (Oct. 10, 2011) (recommending that “the text of standards and associated documents should be available to all interested parties on a reasonable basis, which may include monetary compensation where appropriate”).

¹⁵ See Bremer Report at 15-24.

¹⁶ See Pub. L. No. 104-113 (1996).

¹⁷ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES ¶ 4(a) (1998) [hereinafter CIRCULAR A-119].

¹⁸ See Recommendation 2011-5, 77 Fed. Reg. at 2,258; see also Bremer Report at 11-12.

¹⁹ See Recommendation 2011-5, 77 Fed. Reg. at 2,258.

²⁰ See Bremer Report at 12.

²¹ See, e.g., *Guangxi Gitic Import & Export Corp. v. United States*, 955 F. Supp. 1477, 1480-81 (Ct. Int’l Trade 1997) (quoting the incorporation by reference provision as part and parcel of Section 552’s non-publication sanction).



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published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.²²

The phrase “[f]or the purpose of this paragraph” suggests that “class of persons affected thereby” should be read as referring to those who may “be required to resort to, or be adversely affected by” the incorporated material.²³ Reading the two sentences together, it is reasonable to conclude that “class of persons affected” refers only to regulated parties and members of the public who may be adversely affected by incorporated material.²⁴ Indeed, the nonpublication sanction in Section 552(a)(1) “has been interpreted to mean that [the] ‘requirement for publication attaches only to matters which if not published would adversely affect a member of the public.’”²⁵

Congress considered—and rejected—a more expansive legal effects test that would have supported the legal interpretation urged by the petitioners. Before 1966, Section 3 of the Administrative Procedure Act (APA) did little to sanction agencies for failure to comply with the then-minimal publication requirements.²⁶ The 1966 revision reflects Congress’s judgment that there should be an “added incentive for agencies to publish the necessary details about their official activities.”²⁷ One issue debated in Congress was whether this “added incentive” should be so strong as to deny any legal force or effect to an agency document not properly published.²⁸ As the Attorney General has explained, however, Congress recognized that “not all rules, policy statements, and interpretations issued by Federal agencies impose burdens.”²⁹ It thus decided “that the ‘new sanction’ should apply only to matters which impose an obligation on persons affected, and not to matters which benefit such persons.”³⁰

Congress’s determination on this point has important consequences for the legal meaning of “class of persons affected.” If Congress had adopted a legal effects test for the nonpublication

²² 5 U.S.C. § 552(a)(1).

²³ That “paragraph” refers to just these two sentences is suggested by: (1) the odd, separated placement of the two sentences vis-à-vis the remainder of Section 552(a)(1); and (2) a comparison of the current text, enacted in 1967, and its predecessor, enacted in 1966. In 1967, Congress separated out the two final sentences of Section 552(a)(1) into a freestanding paragraph at the end of Section 552(a)(1). In so doing, Congress replaced “[f]or purposes of this subsection,” with “[f]or the purpose of this paragraph.” The symmetry between this linguistic change and the change in the structure of the provision strongly suggests that the incorporation by reference sentence must be read in the context of the preceding sentence establishing the nonpublication sanction.

²⁴ This is consistent with OFR’s practice of requiring approval for incorporation by reference only in final rules intended to have legal effect.

²⁵ *United States v. Goodman*, 605 F.2d 870, 887-88 (5th Cir. 1979) (quoting *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971)).

²⁶ The equivalent provision in the original text of Section 3 of the APA provided only that “[n]o person shall in any manner be required to resort to organization or procedure not so published.” *See* Pub. L. No. 79-404 § 3(a) (1946).

²⁷ *Attorney General’s Memorandum* (quoting S. REP. 1219, at 11).

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*



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sanction, then “class of persons affected” might be read expansively, as urged by the petitioners. But Congress took a narrower view of “class of persons affected.” In context, the phrase refers to those adversely affected by incorporated material. The disconnect between the scope of the publication requirements and the scope of the sanction for nonpublication—and its implications for the incorporation by reference provision—is confusing, to be sure. Indeed, in his statement to the Subcommittee on Administrative Practice and Procedure of the Senate’s Committee on the Judiciary, Professor Kenneth Culp Davis noted “the inconsistency between the unqualified requirement that the various documents be published and the provision in the last sentence that no person shall be required to resort to what is not published or incorporated by reference in the Federal Register,” chiding that “[e]ither incorporation by reference should be permitted or it should not; the draftsman can’t have it both ways at the same time.”³¹ But Congress did not heed this advice. The consequence is a narrower legal meaning of “class of persons affected.”

Beyond these legal technicalities, however, lies a profound issue of public policy that must be addressed. As the first paragraph of Recommendation 2011-5 recognizes, those charged with ensuring the reasonable availability of incorporated materials (an issue we examine below) should as a matter of sound public policy interpret the term more broadly, to include regulated *and other interested parties*.³² This recommendation reflects the judgment of the Assembly that, in an age of open government and e-rulemaking, agencies must ensure sufficient availability to enable interested, non-regulated parties to comment meaningfully on proposed rules and understand promulgated regulatory requirements.³³ Achieving these goals in the context of incorporation by reference requires agencies to ensure that materials that are or may be incorporated by reference are more broadly available than is technically required under Section 552(a)(1).

- *Would requiring free online availability create a digital divide by excluding people without Internet access?*

While we do not favor mandatory free online availability, we do favor expanded online availability, and we see this as a way to narrow the number of people who lack access to the law. So our view is that OFR should not rely on a digital divide to decline proposals to expand the availability of agency publications. The Conference believes the digital divide is a problem worth addressing. But it should be addressed separately from efforts to expand electronic access. Restriction of such access is in no one’s interest.

³¹ STATEMENT OF PROFESSOR KENNETH CULP DAVIS, S. COMM. ON THE JUDICIARY, HEARINGS BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE ON S. 1663 TO AMEND THE ADMINISTRATIVE PROCEDURE ACT, AND FOR OTHER PURPOSES 246 (1964).

³² Recommendation 2011-5, 77 Fed. Reg. at 2,258.

³³ See *id.*; Bremer Report at 11-12



II. The Role of OFR and Other Agencies in Ensuring Reasonable Availability

If the ultimate policy goal is to ensure broad, preferably free, electronic availability of incorporated materials, how do we get there? You ask several questions relevant to this inquiry, starting with:

- *Should OFR have the authority to deny IBR approval requests if the material is not available online for free?*

For purposes of evaluating the petition, the essential first question is one of law: does OFR have statutory authority to deny incorporation by reference requests if the material is not available online for free? While perhaps this is a question better directed to the Office of Legal Counsel in the Department of Justice, in our view it is doubtful that OFR has this authority. The primary reason, as previously explained, is that the legal test for reasonable availability requires only that the full text of an incorporated material be publicly available at a reasonable cost. To enforce a more stringent standard of free, electronic availability, OFR would have to go beyond what Congress has contemplated. There would also be many circumstances in which OFR's enforcement of a more stringent standard would cause promulgating agencies to violate other federal laws. For example, consider a regulatory agency that has decided to incorporate by reference a voluntary consensus standard that is copyrighted and sold by a standard development organization. As is often the case, the particular standard at issue is widely used by industry around the world. Although an individual copy of the standard costs, say, \$35, in the age of the Internet, the agency cannot afford to pay for free electronic availability because it might have to buy out the entire market for the standard.³⁴ By putting the standard online, all who use it can access it; access is not limited to regulated parties. If OFR were to disapprove the agency's request for incorporation by reference on grounds that the standard is not available online for free, the promulgating agency would be faced with a choice between: (1) infringing copyright by making the standard available for free online without the copyright owners' consent;³⁵ or (2) violating the NTTAA and OMB Circular A-119 by declining to use an available voluntary consensus standard that would be consistent with law and otherwise practical.³⁶

³⁴ For example, the Department of Transportation (DOT) has reported that the Pipeline and Hazardous Materials Safety Administration (PHMSA) pays \$150,000 every two years, just to make hard copies of the standards PHMSA uses available in hard copy to agency officials in the field and for public inspection the agency's regional offices. See Video, Remarks of Neil R. Eisner, *Incorporation by Reference Panel, Implementation Summit: Next Steps & Implementation of ACUS Recommendations on Incorporation By Reference and International Regulatory Cooperation*, <http://www.acus.gov/events/ibr-irc-implementation-summit/>. While costs vary by standard, this figure cautions that making the standards available for free online to all could be prohibitively expensive. Under Section 24 of Pub. L. No. 112-90 (Jan. 3, 2012), PHMSA "may not issue guidance or a regulation . . . that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site." DOT has expressed doubt that it will be able to update its regulations because complying with this requirement may be impossible. See *id.*

³⁵ See 28 U.S.C. § 1498(b). Circular A-119 urges agencies to "observe and protect the rights of the copyright holder and any other similar obligations." CIRCULAR A-119 at ¶ 6(j). The NTTAA includes no comparable provision, but this silence does not release agencies from the independent obligation to observe copyright.

³⁶ See Pub. L. No. 104-113; CIRCULAR A-119 at ¶ 6. Agencies may consider the availability of a voluntary consensus standard as one factor in evaluating whether use of the standard would be "impractical." See Recommendation 2011-5, 77 Fed. Reg. at 2258. "Impractical" includes circumstances in which such use would fail



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As Recommendation 2011-5 recognizes, there are also good policy reasons for making promulgating agencies, and not OFR,³⁷ responsible for ensuring that incorporated materials are reasonably available.³⁸ In most cases involving the incorporation by reference of copyrighted material such as a voluntary consensus standard, the key question will be whether the material is available for a reasonable cost. This question is heavily dependent on context. Paragraph four of Recommendation 2011-5 identifies a variety of factors that may be relevant to determining reasonableness, including:

- (a) The stage of the regulatory proceedings, because access may be necessary during rulemaking to make public participation in the rulemaking process effective;
- (b) The need for access to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny;
- (c) The cost to regulated and other interested parties to obtain a copy of the material, including the cumulative cost to obtain incorporated material that itself incorporates further materials; and
- (d) The types of parties that need access to the incorporated material, and their ability to bear the costs of accessing such materials.³⁹

These considerations require substantial knowledge of the regulatory context that is readily available to promulgating agencies, but beyond the expertise of OFR. Additionally, promulgating agencies are more likely to know how the cost of a standard compares to the overall cost of complying with the incorporating regulation. Agencies may also be able to assess whether there is a disconnect between those who need access to the full text of an incorporated standard and those who must comply with the regulation. For example, an employer may need to provide his employees with a hard hat that meets a specific standard.⁴⁰ This requires the employer to purchase, not construct, compliant hard hats. In such cases, reliable methods of conformity assessment may be significantly more important than free access to incorporated standards.

to serve the agency's program needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard." CIRCULAR A-119 at ¶ 6(a)(2).

³⁷ On December 8, 2011, at its 55th Plenary Session, the Assembly considered proposed amendments to Recommendation 2011-5 that would have given primary responsibility for ensuring reasonable availability to OFR. These amendments were proposed by one of the petitioners, Professor Peter Strauss, a Senior Fellow of the Conference. The Assembly voted not to adopt the proposed amendments. *See Video, Consideration of Proposed ACUS Recommendation on Incorporation by Reference, 55th Plenary Session*, http://acus.granicus.com/MediaPlayer.php?view_id=2&clip_id=14.

³⁸ It bears noting that the statute does not clearly vest OFR with sole responsibility for determining reasonable availability. By providing that "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register," 5 U.S.C. § 552(a)(1), the statute establishes reasonable availability and OFR approval as seemingly independent requirements for lawful incorporation by reference.

³⁹ Recommendation 2011-5, 77 Fed. Reg. at 2258-59.

⁴⁰ *See* 29 C.F.R. § 1926.100(b) (incorporating by reference an American National Standards Institute standard).



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Two other provisions of Recommendation 2011-5 demonstrate the central place of the promulgating agency in ensuring meaningful access to incorporated materials. First, paragraph two urges that if an incorporated material “is not copyrighted or subject to other legal protection, the agency should make that material available electronically in a location where regulated and other interested parties will be able to find it easily.”⁴¹ If an interested party wants to read the full text of a testing standard that the Environmental Protection Agency (EPA) has proposed to incorporate by reference, the most logical place to post the standard is in the rulemaking docket or in an appropriate location on EPA’s website. OFR is not in a position to do this or to require EPA to do it. Second, and more important, paragraph five of Recommendation 2011-5 provides that “[w]hen considering incorporating by reference highly technical material, agencies should include in the notice of proposed rulemaking an explanation of the material and how its incorporation by reference will further the agency’s regulatory purpose.”⁴² The NTTAA and OMB Circular A-119 only require agencies to use available *technical* standards.⁴³ As both OFR regulations⁴⁴ and paragraph 15 of Recommendation 2011-5⁴⁵ recognize, only technical standards, not regulatory standards, are appropriate for incorporation by reference. Understanding a technical standard often requires significant technical, mechanical, scientific, or other expertise. Understanding how a particular standard furthers an agency’s regulatory purpose requires greater knowledge still. Promulgating agencies are uniquely positioned to explain these issues to regulated and other interested parties. Such explanations may provide more meaningful public access than could be achieved by posting a copy of the technical material on the Internet.

Apparently acknowledging that the petition may raise issues beyond OFR’s purview, you next ask:

- *Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget (OMB) be better placed to determine reasonable availability?*

In our view, for the reasons set forth above, promulgating agencies are best positioned to ensure that incorporated materials are reasonably available to regulated and other interested parties. OMB may, however, be well positioned to provide agencies with guidance and support as they work to facilitate broader access to incorporated materials. Recommendation 2011-5 provides a solid foundation for these efforts. It is also flexibly drafted, in order to preserve agency discretion regarding the means through which access is provided. Moreover, this aspect of the recommendation has some bearing on another question you ask:

- *Should agencies bear the cost of making the material available for free online? How would this impact agencies budget and infrastructure, for example?*

A general rule to this effect would be unworkable. In some cases, it may be feasible and appropriate for an agency to purchase a license to provide free public access to an incorporated

⁴¹ Recommendation 2011-5, 77 Fed. Reg. at 2,258.

⁴² *Id.* at 2,259.

⁴³ *See, e.g.*, CIRCULAR A-119 at ¶ 3.

⁴⁴ *See* 1 C.F.R. § 51.7(a)(2).

⁴⁵ Recommendation 2011-5, 77 Fed. Reg. at 2,259.



material. Indeed, our research suggests that some agencies have successfully used this approach.⁴⁶ In many cases, however, agencies simply cannot afford to bear the cost of making an incorporated material available online for free. Voluntary consensus standards are often broadly used, both domestically and internationally, for important non-regulatory purposes. An agency interested in purchasing a license to make such a standard available online for free would conceivably have to pay for usage far beyond that which is required for regulatory purposes.⁴⁷ If agencies were required in all cases to bear this cost, the consequences could be significant. In some cases, if no affordable voluntary consensus standard is available, agencies would be forced to create government-unique standards, in violation of the NTTAA and OMB Circular A-119. This would be costly—and not just in monetary terms. It could mean less effective and timely regulations, greater regulatory burdens on the public, higher enforcement costs, and unintended consequences for international trade. Even in situations where an agency could afford to buy out the market for a standard, the result may be detrimental to the integrity of the standard development process. In short, a blanket rule that agencies bear the cost of providing free access to incorporated materials has real potential to upset the valuable public-private partnership in standards embodied in the NTTAA and OMB Circular A-119. The decision to take that step should be made, if at all, by Congress, after full consideration by OMB.

III. Potential Impacts on OFR's Approval Procedures

Next, you ask several questions about how the petition, if adopted, would affect OFR's incorporation by reference approval process:

- *How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final rule stage of the rulemaking?*
- *How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?*

While OFR and regulatory agencies are in the best position to answer these questions, our research suggests that extending OFR's approval process to the proposed rule stage or increasing the review period at the final rule stage would likely create some confusion and delay.⁴⁸ This is primarily a matter of resource allocation. Our main objections to the proposed amendments to OFR's regulations arise out of legal concerns and our view that the proposed amendments go too far and risk harming the standard development process. There may, however, be other things OFR could do to further the Petitioners' policy goals and assist the implementation of Recommendation 2011-5. We turn to these alternatives in the next section.

⁴⁶ See Bremer Report at 28-29.

⁴⁷ See *supra* note 34 and accompanying text.

⁴⁸ See *id.* at 49.



IV. Other Alternatives

While we believe you should not take the specific actions requested in the petition, we agree with the petitioners that OFR can and should use its centralized position within the federal government and its statutory responsibility for approving incorporations by reference to encourage broader public access to incorporated materials. You ask about one alternative that would further this end without amending the incorporation by reference regulations:

- *In light of the recent adoption of Recommendation 2011-5, should OFR update its guidance on this topic instead of amending its regulations?*

We request that OFR update its guidance to encourage agencies to implement Recommendation 2011-5. The Conference depends upon the persuasive force of its recommendations to secure their implementation.⁴⁹ This requires that the agency personnel be aware of our recommendations and confident that the policies we urge are sound. Including discussion of Recommendation 2011-5 in OFR’s incorporation by reference guidance would be an appropriate and effective way to achieve these ends. For example, OFR could update the guidance to include a section that: (1) urges agencies to take a broader view of “class of persons affected,” consistent with paragraph one of Recommendation 2011-5; (2) alerts agencies to the necessity of taking steps to ensure reasonable availability at the proposed rule stage; and (3) explains what agencies can and should do to determine and improve reasonable availability, consistent with paragraphs three and four of Recommendation 2011-5. We would be happy to assist OFR’s staff in any effort to update the guidance in light of Recommendation 2011-5.

A potentially more effective option would be for OFR to amend its regulations to incorporate the principles of Recommendation 2011-5. The petition makes two salient points that this alternative would address. First, OFR has not updated its incorporation by reference regulations since 1982, and they plainly contemplate only the use of print, not electronic, materials. Second, while the regulations define “usability,” they do not define “reasonably available.” These issues could be resolved by, for example, amending the regulations to define “usability” in electronic terms and to identify the factors agencies should consider in determining whether a particular material is reasonably available. Drafting the requirement in a way that would put the burden of determining reasonable availability on promulgating agencies would avoid many of the problems we have identified, while still furthering the goal of improving public access to the law. OFR could also require agencies to submit, as part of an application for approval to incorporate by reference, a certification that the agency has sought to ensure reasonable availability pursuant to Recommendation 2011-5. Some may object that such a certification would become merely a rote exercise. We are more optimistic. Even if some agencies did not take the certification seriously, others would. The requirement would make agency officials pause, if only for a moment, and consider whether they are fulfilling their obligation to ensure reasonable availability. The additional burden of such a certification requirement on OFR staff would be minimal, since they would only need to confirm that the certification was included in an agency’s application.

⁴⁹ See 5 U.S.C. §§ 595(a)(1), (c)(2).



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Some comments, including those filed by one of the petitioners, Professor Peter Strauss, have urged that a solution to the public access problem is for agencies to confine incorporations by reference to non-binding materials such as agency guidance documents. We accordingly address the following question:

- *Should OFR urge or require agencies to confine incorporations by reference to non-free materials to guidance?*

No. Paragraph eight of Recommendation 2011-5 advises that “[a]gencies should not address difficulties with updating by confining incorporations by reference to non-binding guidance documents. If an agency intends to make compliance with extrinsic material mandatory, it should incorporate that material by reference in a legislative rule.”⁵⁰ There are several reasons for this recommendation. First, if an agency does not incorporate a standard (or other material) by reference in a regulation, it cannot enforce compliance with that standard.⁵¹ Second, confining incorporations to guidance may not successfully address the updating issue, at least where the updated version of an incorporated standard meaningfully differs from the version first used by the agency. As the D.C. Circuit has held, “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”⁵²

The most important point here, however, is that “non-binding” guidance often becomes binding as a practical matter—and because publication in the *Federal Register* and codification in the CFR are not required, guidance binds less transparently.⁵³ The use of genuinely non-binding guidance is often appropriate and beneficial to all parties.⁵⁴ But the Conference has historically recommended against agencies “issu[ing] statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment).”⁵⁵ If an

⁵⁰ Recommendation 2011-5, 77 Fed. Reg. at 2,259.

⁵¹ See Bremer Report at 37; 5 U.S.C. 552(a); see, e.g., *Desmond v. Mukasey*, 530 F.3d 944, 957 (D.C. Cir. 2008) (noting that “guidance ‘does not carry the force of law and is not entitled to any special deference,’” though it may be “relevant” to a court’s interpretation of regulatory requirements (quoting *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 n.5 (10th Cir. 1999))). Federal standards policy contemplates that agencies will “use” voluntary consensus standards by incorporating them by reference into mandatory regulations. See CIRCULAR A-119 at ¶¶ 6(a)(1), 11.

⁵² *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). Scholars and at least one court have questioned whether this holding is an appropriate interpretation of Section 553 of the APA. See generally *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1138-40 (10th Cir. 2010) (examining *Alaska Professional* and related scholarly literature without deciding whether to adopt the D.C. Circuit’s approach).

⁵³ See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

⁵⁴ See Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992).

⁵⁵ *Id.* at ¶ I(A); see also Administrative Conference of the United States, Recommendation 89-5, *Achieving Judicial Acceptance of Agency Statutory Interpretations*, 54 Fed. Reg. 28,972 (July 10, 1989) (“In developing an interpretation of a statute that is intended to be definitive, an agency should use procedures such as rulemaking, formal adjudication, or other procedures authorized by Congress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.”).



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agency truly intends conformity to a particular standard to be simply one method of fulfilling a regulatory obligation, then incorporating the standard by reference into a guidance document may be appropriate. As a matter of principle and sound regulatory policy, however, an agency that expects regulated parties to adhere to a particular standard should say so clearly in the text of the relevant regulation. If such standards were confined to guidance, this crucial information would be eliminated from the text of the regulation. This would be particularly burdensome for those regulated parties who need only purchase conforming products in order to discharge their regulatory obligations.⁵⁶ In short, confining incorporations to guidance would not improve transparency. It would rather, paradoxically, accept less transparency as a solution to not having enough transparency.

V. Conclusion

Thank you for providing an opportunity for the public to comment on the important and complex issues of federal policy that are raised by the petition. While we agree that greater public access to incorporated materials is necessary, we urge you to deny the petition. We believe that the Conference's recent recommendation on incorporation by reference provides a better framework for reconciling the competing demands of agency publication requirements, federal standards policy, and modern values of transparency and open government. We look forward to working with you and your staff to implement Recommendation 2011-5 and improve the public availability of incorporated materials.

Sincerely,

Paul R. Verkuil
Chairman

Emily S. Bremer
Attorney Advisor

⁵⁶ See *supra* note 40 and accompanying text.