

FROM: Susan K. Tatiner, Director, Government Relations & Standards Education, IEEE Standards Association

TO: Assembly of the Administrative Conference

SUBJECT: Comments on the Proposed Recommendations on Incorporation by Reference

DATE: 6 December 2011

The standards developing community has followed the progress of the Committee on Administration & Management's review of Incorporation by Reference. I appreciate the efforts of the Committee as reflected in the Proposed Recommendations. I commend the Committee's desire to represent accurately and fairly the needs of a diverse set of stakeholders with an interest in this subject.

In that spirit, I offer two comments on the text that will come before the Assembly. I believe that the changes suggested below will strengthen the Recommendations in two areas through creating a better balance of the competing valued interests discussed, including the private-public partnership in U.S. standards development, access to regulations, copyright, and the agencies' needs.

RECOMMENDATION 3

Recommend a return to the wording used in the 19 October version of the Recommendations and approved by the Committee at that time. (See deletion and addition below.)

RATIONALE: It is appropriate for agencies to determine the intentions of copyright holders. That determination may be made in a number of ways that do not include a formal request. The original language acknowledges that.

3. When an agency is considering incorporating by reference into a regulation copyrighted material, the agency should work with the copyright holder to ensure the material will be reasonably available to regulated and other interested parties both during rulemaking and following promulgation.

- (a) If more than one standard is available to meet the agency's need, it should consider restrictions on availability as one factor in determining which standard to use.
- ~~(b) Agencies should request holders of copyright in incorporated material to consent to its free publication, and, if such consent is given, make the material available as in paragraph (2), above.~~
- **-(b) Agencies should determine whether copyright holders in incorporated material will consent to its free publication, and, if so, make the material available as in paragraph (2), above.**
- (c) If copyright holders do not consent to free publication of incorporated materials, agencies should work with them and, through the use of

technological solutions, low-cost publication, or other appropriate means, promote the availability of the materials while respecting the copyright holder's interest in protecting its intellectual property.

RECOMMENDATION 4

Recommend adding item "(e)" to the list of matters agencies should consider in making decisions related to incorporation by reference. (See addition below.)

RATIONALE: The four considerations currently listed are important and worthwhile. They serve as reminders to the agencies of key matters. What is missing from the list is a reminder of the value the Federal government has placed on reliance on voluntary consensus standards.

4. In deciding whether to incorporate a particular copyrighted material by reference, and in working with a copyright holder to ensure the material is reasonably available, an agency should consider:

- (a) The stage of the regulatory proceedings, because access may be required during rulemaking to make public participation in the rulemaking process effective;
- (b) The need for public disclosure to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny;
- (c) The cost to obtain a copy of the material, including the cumulative cost to obtain incorporated material that itself incorporates further materials; and
- (d) The identity of parties that must have access to the incorporated material, and their ability to bear the costs of accessing such materials.
- (e) The impact on compliance with directives stated in OMB Circular A-119 '...to use voluntary-consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical. ...'

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