

**Memorandum**

To: Committee on Administration and Management
From: Scott Rafferty (Staff Counsel)
Date: October 27~~19~~, 2011
Re: Proposed Manager's Amendment to the Draft Recommendation

The following draft recommendation is based on Emily Bremer's draft report on incorporation by reference and the Committee's discussion at its September 21, 2011 public meeting. This draft is intended to facilitate the Committee's discussion at its October 28, 2011 public meeting, and not to preempt the Committee's discussion and consideration of the proposed recommendations. In keeping with the Conference's past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

INCORPORATION BY REFERENCE IN FEDERAL REGULATIONS**Draft Preamble**

Incorporation by reference allows agencies to comply with the requirement of publishing rules in the Federal Register to be codified in the Code of Federal Regulations (CFR) by referring to material published elsewhere.¹ The practice is first and foremost intended to—and in fact does—substantially reduce the volume of the CFR. But it also furthers important, substantive regulatory policies, enabling agencies to draw on the expertise and resources of private sector standard developers to serve the public interest. Incorporation by reference allows agencies to give effect to a strong federal policy, embodied in the National Technology Transfer and Advancement Act of 1995 and OMB Circular A-119, in favor of agency use of voluntary consensus standards.² This federal policy benefits the public, private industry, and standard developers.

¹ See 5 U.S.C. § 552(a)(1); 1 C.F.R. §§ 51.1-51.11.

² See National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 (1996); 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 (1998); see also Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979) (recommending agencies use voluntary consensus standards in health and safety regulation). Voluntary consensus standards are created by private standard-development organizations that use a consensus-driven approach that ensures public participation and transparency.



The Conference has conducted a study of agency experience with the practice of incorporation by reference, including the use of voluntary consensus standards. The study focused on three issues agencies frequently confront when incorporating by reference: (1) ensuring materials incorporated by reference are reasonably available to regulated and other interested parties; (2) updating regulations that incorporate by reference; and (3) navigating procedural requirements and resolving drafting difficulties when incorporating by reference. Agencies have used a variety of approaches to address these issues within the constraints of federal law and regulatory policy. This recommendation identifies and encourages those approaches that have proven most successful.

Availability of Incorporated Materials. Ensuring that regulated and other interested parties have reasonable access to incorporated materials is perhaps the greatest challenge agencies face when incorporating by reference. When the relevant material is copyrighted—as is often the case with voluntary consensus standards—access issues are particularly problematic. There is some ambiguity in current law regarding the continuing scope of copyright protection for materials incorporated into regulations,³ as well as the question of what uses of such materials might constitute “fair use” under section 107 of the Copyright Act.⁴ Efforts to increase transparency of incorporated materials may conflict with copyright law and with federal policies recognizing the significant value of the public-private partnership in standards.

This recommendation does not attempt to resolve the questions of copyright law applicable to materials incorporated by reference into federal regulations. Rather, the recommendation encourages agencies to take steps to promote the availability of incorporated materials within the framework of existing law. This effort is consistent with the National Science and Technology Council’s acknowledgment that “the text of standards and associated documents should be available to all interested parties on a reasonable basis, which may include

³ See, e.g., *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). This case held that where local law had incorporated a privately developed building code, a private party’s posting of the resulting local law did not violate copyright, because the law was in the public domain. *Id.* at 793, 802. However, the court distinguished cases concerning the incorporation by reference of materials “created by private groups for reasons other than incorporation into law,” *id.* at 805, leaving some uncertainty as to the rule applicable to many voluntary consensus standards.

⁴ See, e.g., OFFICE OF LEGAL COUNSEL, DEP’T OF JUSTICE, *Whether and under what Circumstances Government Reproduction of Copyrighted Materials Is a Noninfringing “Fair Use” under Section 107 of the Copyright Act of 1976* (1999). This opinion noted that there is no per se rule under which government reproduction of copyrighted materials for governmental use invariably qualifies as fair use, but also noted that such reproduction would in many contexts constitute a noninfringing fair use. The opinion focused on government reproduction for internal government use and did not consider government republication of copyrighted materials.



monetary compensation where appropriate.”⁵ The Conference’s research reveals that some agencies have successfully worked with copyright holders to further the goals of both transparency and public-private collaboration. Some agencies have, for example, secured permission to make a read-only copy of incorporated material available in the agency’s public, electronic docket during the pendency of the rulemaking proceeding relating to the material. In other cases, the copyright holder has made the material publicly available in read-only form on its own website. This recommendation encourages agencies to take these or other steps to promote availability of incorporated materials, such as encouraging copyright holders to make incorporated materials available in libraries.

Updating Regulations. Updating regulations that incorporate by reference is another challenge. Agencies are legally required to identify the specific version of material incorporated by reference and are prohibited from incorporating material dynamically.⁶ When an updated version of the incorporated material becomes available, the regulation must be updated if the agency wants the regulation to incorporate the new version. This can require the agency to engage in notice-and-comment rulemaking, which entails a significant investment of agency resources. For agencies that are statutorily required to provide rulemaking procedures beyond those required by Section 553 of the Administrative Procedure Act (APA), updating may prove to be an insurmountable challenge. Nonetheless, agencies have successfully used a variety of techniques to reduce the time and cost constraints of updating rules. Some agencies have used enforcement discretion or “equivalency determinations” to avoid penalizing parties that comply with an updated version of an incorporated standard that the agency finds to be equivalent to or superior to the version still incorporated in the agency’s regulations. Other agencies have reduced the burden of updating by tracking forthcoming revisions through participation in standard-development activities.⁷ Still others have used direct final rulemaking to reduce the costs of updating an incorporating regulation. The recommendation encourages these time and cost-saving techniques. A statutory solution may be unavoidable when these techniques have proven insufficient.

⁵ *See* 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).

⁶ *See* 1 C.F.R. § 51.1(f); 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 ¶ 6(j) (1998).

⁷ *See* 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* (Oct. 10, 2011).



Complying with Procedural Requirements. Finally, successfully incorporating by reference requires agencies to comply with detailed procedures and carefully draft regulations. The Office of the Federal Register (OFR) is statutorily charged with approving all incorporations by reference, and has issued regulations and guidance establishing policies and procedures for doing so. Procedural errors can delay the publication of rules that incorporate by reference. Poor drafting may create confusion among regulated parties or produce a rule that does not fulfill the agency's regulatory purpose. The Conference's research revealed that agencies reporting few or no problems in complying with OFR's incorporation by reference procedures followed identifiable best practices that other agencies should consider adopting.

Draft Recommendation

Ensuring Incorporated Materials are Reasonably Available

1. Agencies considering incorporating material by reference should ~~evaluate whether~~ensure that the material will be reasonably available both to the regulated community and other interested parties.
2. If an agency incorporates by reference material that can be published without violating copyright or other legal protection, the agency should make that material available electronically in a location where interested parties will be able to find it easily.
3. When an agency is considering incorporating by reference into a regulation material that cannot be published without infringing copyright, 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 ~~determine whether~~request holders of copyright ~~holders~~in incorporated material ~~to 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, either through the use of technological solutions, low-cost publication, or other appropriate means, ~~to~~promote the availability of the materials while respecting the copyright holder's interest in protecting its intellectual property.
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.
5. When 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.

Updating Incorporations by Reference

6. Agencies should periodically review regulations and make technical amendments (i.e., nonsubstantive amendments that do not require notice and comment) as necessary to ensure that complete and accurate access information is included in all regulations that incorporate by reference. Agencies should ensure that they are notified of all changes to access information.
7. Agencies that regularly incorporate private standards should adopt internal procedures to ensure good communication of emerging revisions to those within the agency charged with making policy decisions and writing rules. Agencies should consider participating in standard-setting activities in order to maintain awareness of emerging revisions.⁸
8. Agencies should not address updating challenges 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 regulation.
9. Agencies that find it prohibitively burdensome to keep up with revisions of standards incorporated by reference in regulations should use equivalency determinations or enforcement discretion to minimize the harm caused by out-of-date references. In the interests of fairness and transparency, agencies should publish regulations or guidance establishing the policies and principles governing equivalency determinations or guiding this use of enforcement discretion.

⁸ See Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979).



10. For non-controversial substantive updates to incorporations by reference in regulations, agencies authorized to regulate under Section 553 of the APA should use direct final rulemaking.⁹
11. Congress should consider authorizing agencies to use streamlined procedures to update incorporations by reference. An appropriate statutory solution would:
 - a. Require interested parties to file a petition for rulemaking that would notify the agency of a revised standard, identify the changes from the incorporated version of the standard, and explain why updating would be consistent with the agency's regulatory purpose, including providing information on the costs or benefits of incorporating the revised standard;
 - b. Vest the agency with authority to determine whether to act on the petition;
 - c. Authorize agencies bound by hybrid rulemaking requirements, upon a finding that updating is beneficial and consistent with the regulatory purpose of the relevant regulation, to issue a direct final rule under Section 553; and
 - d. Provide that the rule shall become effective if no adverse comments are received or after the agency's publication of a response to any adverse comments received, provided such comments do not demonstrate that updating is inconsistent with regulatory purpose.

Navigating Procedural Requirements

12. Each agency that incorporates by reference should task its Office of the Federal Register (OFR) liaison or another employee with being a point of contact with OFR and maintaining a close working relationship between the two agencies. Such agencies should take advantage of OFR's training opportunities and its Document Drafting Handbook (DDH).
13. When considering a regulation that would incorporate by reference, agencies should ensure legal counsel or other experts in OFR policy are involved early in the rulemaking process to reduce the potential for delays in publishing rules. Agencies considering incorporating by reference should reach out to OFR staff early in the rulemaking process.
14. OFR should continue and expand upon its efforts to make the process easier, including by transitioning to an electronic submission and review process for incorporation by reference requests.

⁹ See Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,108, 43,112 (June 15, 1995).



Improving Drafting Techniques

15. 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.
16. Agencies should review the language used in material they are considering incorporating by reference to determine whether it is mandatory or merely advisory or voluntary. Agencies promulgating mandatory regulations should only incorporate by reference materials that use appropriately mandatory language.
17. When an agency incorporates a document that references a second (or greater) tier document, the agency should acknowledge and explain the substantive legal effect of the secondarily referenced document(s). OFR should consider amending the DDH to highlight the potential issue of secondary references and explain its position. If an agency wants to make a second tier document mandatory, it should incorporate it by reference.
18. Agencies should be alert to the possibility that some part of their regulations may inadvertently conflict with a requirement incorporated by reference. When drafting regulations, agencies should avoid or resolve any such conflicts.