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To: Comments

Subject: Plenary Session Comment on Incorporation by Reference Recommendation

The recommendation on Incorporation by Reference, in my judgment, is seriously behind the times in its tolerance for making members of the public pay to find public law. This recommendation expresses doubt in the footnotes (3 & 4) of its preambular material whether government agencies are ever required to pay for the use of copyrighted materials incorporated by reference into regulations (or NPRMs or guidance), but then in text and in the recommendation itself imagines that the public might validly be required to pay for access to copyrighted materials that have been incorporated by reference.

If I can find someone to move them on my behalf, I intend to have proposed the attached amendments. The basic point of these amendments is that any payment that needs to be made for the use of copyrighted materials should be made by the agency that benefits (along with the SDO!) from their incorporation by reference. This will create proper bargaining incentives -- it is always easier to pay with someone else's money (consider, in this respect, the impulse underlying the Unfunded Mandates Reform Act) -- and it will also honor the thrust of the Electronic Freedom of Information Act and the rule of law generally, that government should never hide from its citizens the law by which they are constrained. A "strong federal policy ... in favor of agency use of voluntary consensus standards," which the ACUS recommendation notes and on which it relies, is commendable, but that policy does not require the threat of obscuring the law from those affected by it.

We should not be adding to agency incentives to incorporate materials by reference, by permitting them to shift to the affected public costs that are properly their own. To do so also potentially reduces the utility of the rulemaking process, by adding to the costs that potential commenters must pay in order to understand just what standards an agency is proposing to require.

The Recommendation appears to rely on 552(a)(1)'s provision permitting the Director of the Federal Register to approve the use of materials incorporated by reference in lieu of FR publication where FR publication is legally required, if those materials are "reasonably available." That phrase has long been understood to permit copyright holders to charge for access to their materials -- even if made binding by adoption in a regulation -- at least so long as a copy can be inspected gratis at the Office of the Federal Register and, perhaps, in one or more agency reading rooms. In my judgment, the Electronic Freedom of Information Act, with its universal requirements that rulemaking proposals, final rules, and guidance that might affect a member of the public be available on agency websites, has undermined any claim that public inspection at a physical site is adequate to make law "reasonably available."

Clearly enough, before 1996 and the development of electronic libraries, matters were different, and if agencies have continued in habitual ways that made the use of copyrighted materials free to them, that may not be so surprising. Nonetheless, in my judgment E-FOIA has changed this. Since it is the government using the standards, and profiting from their use, it is the government that should be paying for that use, not those citizens who are affected by their adoption. And if agencies must on occasion pay to be able to incorporate materials by reference, that will both incentivize its

attention to those costs and perhaps, in some cases, persuade them that it is cheaper and better to develop their own standards.

(See attached file: Proposed amendments to ACUS Incorporation by Reference Recommendation.pdf)

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Proposed amendments to “Incorporation by Reference”

1) Recommendation 1 is amended to read:

1. For materials otherwise required to be published in the Federal Register, 5 U.S.C. 552(a)(1) requires the Director of the Federal Register to determine that material incorporated by reference is reasonably available to the class of persons affected thereby – that is, to the regulated community and other interested parties. The Administrative Conference recommends that he not approve incorporations by reference unless he determines that the material proposed to be incorporated will be freely available to the public in the agency’s E-FOIA electronic library.

2. Recommendation 2 is replaced by

2. For materials not required to be published in the Federal Register, but that may affect a member of the public, 5 U.S.C. 552(a)(2) now requires that, subject to explained recissions justifiable and justified only as a protection of personal privacy, all such materials must be made freely available in the agency’s E-FOIA electronic library.

3. Recommendation 3 is amended to read

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

(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 in their own E-FOIA electronic libraries, .

(c) If copyright holders do not consent to free publication of incorporated materials, and it is determined the materials cannot be made available to the affected public without payment for their use, the agency should either decline to incorporate the materials or, if it is more efficient to do so, itself make the necessary payment. Members of the affected public should not be required themselves to pay to learn the standards to which they may or will be held.

Recommendation 4 is amended to read:

4. In deciding whether to incorporate 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; and
- (c) Its cost, if any, to obtain a copy of the material, including its cumulative cost to obtain incorporated material that itself incorporates further materials.

No amendments are proposed to Recommendations 5 - 18.