

## Proposed Amendment to “Incorporation by Reference,” for the December 8 plenary of ACUS

*Whereas* effective commentary on proposed rules requires knowledge what standards are being proposed; and

There is some ambiguity in current law regarding the continuing scope of copyright protection for materials incorporated into regulations, as well as the question of what uses of such materials might constitute “fair use” under section 107 of the Copyright Act; and

While encouraging federal agency use of voluntary consensus standards in compliance with the National Technology Transfer Act of 1995, the Office of Management and Budget has explained that the Act and its implementing Circular A-119 apply only to “technical standards [that] pertain to ‘products and processes, such as the size, strength, or technical performance of a product, process or material’ and as such may be incorporated into a regulation. [See 142 Cong. Rec. S1080 (daily ed. February 7, 1996) (Statement of Sen. Rockefeller.)] Neither the Act nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements.”; and

The Electronic Freedom of Information Act of 1996, the E-Government Act of 2002, and 5 U.S.C. §552(a)(2) as amended, and the rule-of-law values they embody both (1) provide alternatives to the paper publication that might otherwise substantially enlarge the volume of the Federal Register and Code of Federal Regulations, and (2) generally require agencies to provide electronic access to their regulations and applicable guidance that may affect members of the public; and

Since the enactment of these statutes, the Office of the Federal Register has not reconsidered the meaning of 5 U.S.C. §551(a)(1)’s requirement that final rules be physically published in the Federal Register unless “reasonably available”

that portion of the recommendation entitled “Ensuring Incorporated Materials are Reasonably Available” is amended to read as follows:

1. Agencies publishing notices of proposed rulemaking incorporating material by reference should ensure that the incorporated material will be reasonably available both to the regulated community and other interested parties. *[the following sentence is the unchanged text of recommendation 5 of the proposal]* 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.
2. If an agency notice of proposed rulemaking incorporates by reference material that is not copyrighted or subject to other legal protection, the agency should incorporate that material into its electronic rulemaking docket and in other ways assure that interested parties will be able to find it easily.

3. To make public participation in the rulemaking process effective, agencies proposing to incorporate copyrighted material by reference should make every effort to ensure that the material will be available to regulated and other interested parties for comment, as by

a. requesting the copyright holder's consent to free publication during the comment period;

b. working with the copyright holder to put in place technological solutions permitting commenters controlled access on the agency or copyright holder's website during the comment period;

c. if more than one standard is available to meet the agency's need, considering restrictions on availability as one factor in determining which standard to use.

d. using other appropriate means permitting the availability of the materials while respecting the copyright holder's intellectual property.

4. In consideration of recent statutory and technical changes emphasizing the role of the Internet in informing regulated bodies and the public about the law governing their conduct, the Office of the Federal Register should consider revising its rules defining what makes materials incorporated by reference into final agency rules "reasonably available," so that they need not be published in the Federal Register. The relevant factors should include

a. The ready availability of the material to those participating in the rulemaking during the comment period.

b. The need for public disclosure to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny;

c. Steps taken by the agency and the copyright holder that will assure ready and reasonable electronic access to the incorporated materials by those who must have such access to know how to meet their legal obligations.

d. OFR's acceptance of reasonably accessible electronic versions of the material in lieu of printed publication, as meeting applicable publication requirements.

5. Without waiting for such changes in the Office of Federal Register rules, agencies incorporating copyrighted material by reference into final rules should work with copyright holders to achieve these ends.