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Subject: Comments in support of revised proposal for amendment of IBR recommendation

I had previously sent a proposed amendment to the recommendation on Incorporation by Reference to ACUS, which is appended to my initial comments on the ACUS public comment website. Extensive discussions with ACUS have persuaded me to revise it, and my new proposal is attached. I am hopeful that public members will also be willing to move and second this proposal, as they indicated they would its predecessor.

My intention is to address what are to me troubling elements of the first five sections of the recommendation.

1. The recommendation as written affirmatively endorses what it recognizes as at least an unsettled legal question, that the public and regulated entities can be required to pay to learn the content both of proposals for rulemaking and of final rules that control their conduct. The prefatory material to the recommendation commendably recognizes that this question is unsettled:

“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

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. ”

Doubt whether federal statutes endorse actions that might require the regulated and the public to pay to learn the law governing their conduct appears also in OMB’s explanation of its 1998 revisions to Circular A-119, its instructions to agencies respecting implementation of the National Technology Transfer Act of 1995, which embodies a strong policy of using voluntary consensus standards in government rulemaking:

“35. A few commentators inquired whether the Circular applies to “regulatory standards.” In response, the final Circular distinguishes between a “technical standard,” which may be referenced in a regulation, and a “regulatory standard,” which establishes overall regulatory goals or outcomes. The Act and the Circular apply to the former, but not to the latter. As described in the legislative history, technical standards 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.”

Developments since the enactment of the NTTA – the Electronic Freedom of Information Act of 1996, the E-Government Act of 2002, the ongoing development of Regulations.gov and the associated FDMS have strongly embodied the principle of free public electronic access to government actions – rules, decisions, guidance documents – that might control or adversely affect their actions. While the present recommendation deals only with incorporation by reference into final rules, not guidance documents, it is notable that

1) OMB appears to think the NTTA applies principally to the incorporation of standards that one would ordinarily think of in guidance terms – “the size, strength, or technical performance of a product, process or material,” and not “regulatory standards or requirements.”

2) As to guidance documents, no “reasonably available” exception exists in the statutory provision effectively requiring their presence in agency electronic reading rooms, 5 U.S.C. §552(a)(2). This subsection gives permission for redaction of a guidance document only to protect privacy interests.

These factors lead me, personally, to the legal conclusion that it is impermissible in the electronic age for binding standards to be withheld from agency websites. Although §552(a)(1) does authorize the Office of Federal Register to excuse from print publication in the Federal Register and the CFR “reasonably available” material that has been incorporated by reference, that provision, as the preamble to the recommendation very properly recognizes, “is first and foremost intended to—and in fact does—substantially reduce the volume of the CFR.” Since electronic publication of materials, without question, makes them “reasonably available,” this rationale for §552(a)(1) has simply evaporated. One is left *only* with the *unsettled* question whether the protection of private copyright interests supports (or requires) the conclusion that a standard embodied in a final agency rule, that must be paid for to be seen, is “reasonably available.”

My conversations with ACUS have persuaded me that it would be unwise to attempt to settle this legal question by a vote of the ACUS assembly, and so the present form of my amendment leaves it unaddressed. Taking no position on the question, it intentionally leaves it open. In my judgment, ACUS should not affirmatively endorse the proposition, as the recommendation now does, that in the electronic age it remains acceptable to require regulated entities and the public to pay to learn the content of the law governing their conduct.

2. The proposed recommendation conflates notices of proposed rulemaking with final rulemaking. However, at least as now implemented, §552(a)(1)’s “reasonably available” standard applies only at the final rulemaking stage. OFR, statutorily responsible for making that determination, requires no notice of an intended incorporation by reference until 20 days before publication of the final rule. Whether material that is proposed to be incorporated by reference should be available to those wishing to comment on a rulemaking proposal is, in current statutory and policy terms, a question what constitutes proper notice under §553.

My proposed amendment thus segregates the proposal stage, dealt with in (1), (2), and (3), from final rulemaking, dealt with in (4) and (5). On the whole (1), (2), and (3) simply consolidate the portions of the ACUS recommendation relevant to the proposal stage, minus its language affirmatively endorsing the possibility that persons might be required to pay to see this material.

I have in minor respects, that I imagine ACUS might welcome, strengthened these sound proposals – as by referring specifically to the electronic rulemaking docket (FDMS), and by substituting "make every effort" to ensure that incorporated material is available, rather than simply saying that agencies should "work with the copyright holder" to achieve this end.

3. The final significant difference between my proposed amendment and the ACUS draft concerns the final rulemaking stage. Here, the requirement that materials incorporated by reference be "reasonably available" is statutory, amplified by OFR regulations. Remarkable to me is that the recommendation, as drafted, does not appear to recognize that the administration of this standard is the responsibility of the Office of Federal Register. Under 5 U.S.C. §552(a)(1), incorporation by reference of materials otherwise required to be published the Federal Register or the CFR is impermissible unless it has "the approval of the Director of the Federal Register." OFR's regulations and handbook on this question have not been significantly revised since the coming of the electronic age eliminated the primary rationale for this provision, that "first and foremost [it was] intended to—and in fact does—substantially reduce the volume of the CFR."

In my judgment, then, the proper course is to request OFR to reconsider its regulatory definition of what it takes for materials to be "reasonably available," which at the moment is entirely formal in character. In updating its regulations, OFR should take into account the tectonic shifts in the realities underlying §551(a)(1), as well as the policies of accessibility to law generally that have been given such emphasis by the enactment of E-FOIA and E-Gov. Recommendation 4 in my proposal would achieve this, capturing the sound elements of the ACUS proposal relevant to what is here a statutory requirement of reasonable availability, but again minus direct endorsement of the proposition that the public may properly be required to pay standards bodies for material that could otherwise appear on agency websites. The draft affirmatively recognizes that electronic publication satisfies "reasonably available," and leaves open to OFR's judgment on the legal question, whether "the ready availability of the material to those participating in the rulemaking during the comment period" might not in itself suffice as *free* availability. Proposed consideration 4(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," does not preclude the assessment of "reasonable" user fees, but neither does it affirmatively declare them proper in the present legal environment.

Of course agencies need not await OFR's action, and recommendation 5 would ask them to anticipate those recommended changes.

Finally, if these changes seem too complex for consideration in the relatively brief time allotted to debate them, perhaps someone with standing to do so will assure their consideration by moving to recommit at least this much of the recommendation to committee with instructions to consider them and report back in time for action at the next plenary. I want to be very clear that, in my judgment, there is much good in this recommendation. I oppose it as currently drafted, but

only for the reasons stated above.

Respectfully submitted,

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(See attached file: revised proposal.pdf)

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