

Public Comment from John Cooney, Committee Chair

Technical comments on the Proposed Strauss Amendments

Professor Strauss's revised proposed amendments to the "Incorporation by Reference" recommendation would rewrite the entire first section of the recommendation. This section deals with the issue of promoting public access to incorporated materials.

Currently, the proposed recommendation acknowledges that sometimes regulated parties and other members of the public would have to pay to obtain a copy of incorporated materials, because those materials might be copyrighted. The proposed recommendation states that agencies incorporating such materials by reference should work with the copyright holder to promote better public access to the incorporated materials.

Professor Strauss's revised amendments are milder than the amendments he previously suggested. They no longer require that the Office of the Federal Register (OFR) approve materials as "reasonably available" only if they will be *freely* available in an agency's e-FOIA library. They no longer insist that if the incorporating agency cannot get consent of the copyright holder to free publication of incorporated material, the agency either not incorporate the material or pay for the material itself. But the amendments would remove from the recommendation any express acknowledgement that the public might have to pay for incorporated materials—for example, the recommendation would no longer state that agencies should take the cost of materials into account as a factor in deciding whether to incorporate the materials by reference.

I would oppose the Strauss amendments.

\* The amendments do not serve a clear purpose. As noted, if the amendments passed, the recommendation wouldn't insist that incorporated materials be available for free, but neither would it make any reference to the fact that people might have to pay for them. Therefore, the recommendation would be obscure. Readers would be left scratching their heads. The Conference should not try to hide the fact that the public will sometimes have to pay for incorporated materials. Also, given that people will sometimes have to pay for incorporated material, agencies should be considering the cost of the materials as a factor in determining whether to use incorporation by reference, and it's not a good idea to take that factor out.

\* The amendments limit the effects of most of the recommendations (1-3 in the proposed amended version) to the comment period. For example, the duty to make uncopyrighted materials easily electronically available is limited to the comment period (see proposed amended Recommendation 2). The suggestion is that the materials be placed in the electronic docket. That's fine, but ten years after the rulemaking is over, no one goes back and looks at the docket. If the incorporated materials are uncopyrighted, the agency should have them on the agency's website indefinitely. Similarly, proposed amended Recommendation 3 is limited to the comment period, but should extend afterwards.

\* Recommendation 4 is revised to be directed at OFR, and suggests that OFR consider stated factors (not including cost) in determining the definition of "reasonably available." The committee recommendation is that agencies should consider these factors (and cost) in determining whether to incorporate materials by reference. The committee's recommendation is better, because, at least with regard to some of the factors, OFR would not be in a good position to evaluate them because it would not have relevant subject-matter expertise. For example, OFR would not be in a good position to evaluate the degree to which public disclosure is needed to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny.