



Standards Engineering

The Journal of SES – The Society for Standards Professionals

Volume 65, No. 2

March/April 2013

Technical Standards Meet Administrative Law: A Primer on an Ongoing Debate

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Introduction

Technical standards not only drive industry and commerce, but also are a crucial component of the federal government's efforts to promote public health and safety through regulation. Federal regulations often require conformity to specified technical standards. While such standards may be created by federal government entities, they more frequently are created by private standards development organizations. Indeed, federal law and executive policy generally require administrative agencies to use available voluntary consensus standards in regulations, instead of creating so-called "government-unique" standards to serve regulatory purposes. Incorporation by reference is a regulatory drafting tool that enables agencies to implement this federal standards policy by integrating voluntary consensus standards into binding regulations without infringing the standards development organizations' copyrights. Largely by virtue of this practice, today there are more than 9,500 incorporations by reference of standards in the United States Code of Federal Regulations (CFR).

In the age of open, electronic government, however, incorporation by reference raises difficult administrative law and process issues. In 2011, the Administrative Conference of the United States undertook a project designed to address these issues. I served as the Conference's in-house researcher for this project. The most difficult issue—and the one this article focuses on—is that of ensuring

the public has sufficient access to materials that are or may be incorporated by reference. Today, agencies are required or strongly encouraged to make many documents, including proposed and final rules, freely available via the Internet. Incorporated materials, including voluntary consensus standards, are frequently copyrighted, preventing agencies from simply posting them online for public viewing. In such situations, regulated and other interested parties may have to pay a private party to be able to view the full text of a proposed or final rule. To administrative lawyers, this is a serious problem. But any solution must respect copyright, preserve the valuable public-private partnership in standards that is facilitated by federal standards policy, and ensure that funding remains sufficient to support the development of essential technical standards.

In December 2011, the Administrative Conference adopted Recommendation

2011-5, *Incorporation by Reference*, urging a collaborative solution to incorporation by reference's public access problem. The recommendation sparked a public policy debate that is likely to rage on for the foreseeable future. This article will introduce you to the Administrative Conference, explain the administrative law and process issues raised by incorporation by reference, and explore the various facets of this ongoing public policy debate.

The Administrative Conference

The Administrative Conference of the United States is an independent federal agency charged with studying administrative law and process and making recommendations for improvement to Congress, the President, federal agencies, and the Judicial Conference. Non-partisan and politically balanced, the Conference is a public-private partnership composed of 101 members drawn from both government and the private sector. Only one Conference member serves on the staff, Chairman Paul R. Verkuil, who was appointed by President Obama and confirmed by the Senate for a five-year term. The remaining 100 members serve without pay. Forty of them are so-called "Public Members:" administrative law experts, frequently with past government service experience, working in academia, private practice, or public interest organizations. The rest are "Government Members:" high-level government officials drawn from a vast array of executive departments and administrative agencies. The Conference's expertise is further expanded by



the participation of a number of non-voting Liaison Members and Senior Fellows. The latter are administrative experts who have previously served as Conference members and continue to donate their knowledge, time, and experience to support the agency's core work of developing recommendations designed to make government work better.

The Conference crafts and adopts its recommendations through an open, consensus-based, and research-driven process. In-house researchers or outside consultants (typically, law professors or other administrative experts working on contract) independently research subjects selected for study. The research report is delivered to one of the Conference's six committees which hold one or more public meetings to discuss the report and develop a proposed recommendation. All committee meetings are webcast live, with the videos archived for later online viewing, and interested members of the public are invited to submit comments and attend committee meetings. The full membership of the Conference (referred to as "the Assembly") meets twice a year, in June and December, to debate and vote on proposed recommendations. These Plenary Sessions are open to the public and also are webcast. For any study or project, a final recommendation is issued only after it has been approved by a majority vote of the Assembly.

As the Conference's in-house researcher on the incorporation by reference project, I undertook a comprehensive examination of the complex issues raised by such incorporations in federal regulations. My research included interviews with staff at a diverse sampling of regulatory agencies that frequently incorporate by reference, including the Consumer Product Safety Commission, the Pipeline and Hazardous Materials Safety Administration, and the United States Coast Guard. In addition, I interviewed staff at the three agencies that have relevant oversight or coordination roles: the National Institute of Standards and Technology (NIST), the Office of the Federal Register (OFR), and the Office of Management and Budget (OMB). Finally, to ensure consideration of relevant private sector views, I interviewed public interest advocates and the representatives of six standards development organiza-

tions. These numerous interviews provided crucial real-world context for my legal and policy analysis.

Incorporation by reference is the primary means through which federal agencies implement a strong federal policy favoring regulatory use of voluntary consensus standards.

Federal Standards Policy

Incorporation by reference is the primary means through which federal agencies implement a strong federal policy favoring regulatory use of voluntary consensus standards. This policy originated in Administrative Conference Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*. Recommendation 78-4 identified circumstances in which it would be preferable for agencies to use available voluntary consensus standards in regulations aimed at promoting public health and safety. Shortly after the Conference adopted its recommendation in 1978, OMB issued the first version of Circular A-119, which establishes executive policy regarding federal participation in the development and use of voluntary consensus standards and in conformity assessment activities. Last revised in 1998, Circular A-119 requires agencies to use voluntary consensus standards in both regulations and procurement activities "except where inconsistent with law or otherwise impractical." Congress codified this requirement when it enacted the *National Technology Transfer and Advancement Act of 1995*, colloquially known as the "Tech Transfer Act."

The federal standards policy established in Circular A-119 and the Tech Transfer Act facilitates a public-private partnership in standards that benefits federal agencies, regulated industry, and the public. Using available technical standards saves agencies time and money in rulemaking, obviating the need for regulators to craft technical standards solely for use in federal regulations. It also allows regulators to capitalize on the extensive technical expertise that exists outside government and would be difficult, expensive, and perhaps impossible for agencies to bring to the table if

they sought to create their own technical standards. It even makes enforcement easier and less expensive. This is because voluntary consensus standards typically are used broadly across industry by the time an agency incorporates them by reference in federal regulations. This pre-incorporation buy-in makes compliance easier, which not only benefits regulated parties, but also positions the agency to more efficiently target limited enforcement resources to achieve maximum overall conformity. And all of these benefits flow ultimately to the public, which gets better and more effective regulations at a significantly lower cost.

NIST plays a central, coordinating role under Circular A-119 and the Tech Transfer Act. It provides training and advice to agencies participating in private sector standards development processes, using voluntary consensus standards in procurement or regulation, and engaging in conformity assessment activities. NIST also coordinates government interactions with private sector standards developers and is responsible for gathering from agencies and reporting to OMB information regarding the implementation of Circular A-119. One way NIST carries out these responsibilities is by maintaining a website (www.standards.gov) that provides resources for agencies and others interested in standards and conformity assessment issues. Among other things, the site houses the Standards Incorporated by Reference (SIBR) Database, which identifies all incorporations by reference of voluntary consensus standards, government-unique standards, private industry standards, and international standards in the CFR. For each entry, it identifies the standard, standard developer, incorporating agency, and location of the reference in the CFR.

Freedom of Information

While Circular A-119 and the Tech Transfer Act establish federal standards policy, it is the *Freedom of Information Act* (FOIA) that provides agencies with the tool necessary to give effect to that policy in regulations: incorporation by reference. A provision of FOIA, 5 U.S.C. § 552(a)(1), requires agencies to make binding regulations available to the public by publishing

them in a daily government publication, the *Federal Register*, for codification in the *Code of Federal Regulations* (CFR). The CFR is a special edition of the *Federal Register* printed annually and designed to provide a compact, orderly code of all generally applicable regulations intended to have legal effect. If an agency does not fulfill its obligation to properly publish a regulation, courts will not permit the agency to enforce that regulation by penalizing regulated parties found in noncompliance. This prohibition on enforcement extends to extrinsic materials, including technical standards, not properly incorporated by reference according to the standard established in FOIA.

Under FOIA, material that has already been published elsewhere will be "deemed published" in the *Federal Register* and CFR if it is "reasonably available to the class of persons affected" and if the Director of OFR has approved its incorporation by reference.¹ Originally, this provision was enacted in 1966 to address the concern that too much material was being published in the *Federal Register*, making it harder for regulated parties to discern what was required of them. In some instances, an agency's activities would be publicized and thoroughly analyzed in private, professional publications, such as those produced by West or Commerce Clearing House, only to be repetitiously printed in the *Federal Register*. Congress addressed this issue by authorizing agencies to incorporate by reference such materials without forgoing the ability to enforce them as part of a binding regulation. In the late 1970s and early 1980s, when federal administrative policy began to prefer that agencies use voluntary consensus standards in lieu of government-unique technical standards, incorporation by reference became significantly more common. Indeed, Conference Recommendation 78-4 and Circular A-119 treated incorporation by reference as the preferred method for agencies to "use" voluntary consensus standards in regulations.

OFR has adopted its own regulations that govern how it carries out its statutory

8546

Federal Register/Vol. 63, No. 33/Thursday, February 19, 1998/Notices

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

AGENCY: Office of Management and Budget, EOP.
ACTION: Final Revision of Circular A-119.

SUMMARY: The Office of Management and Budget (OMB) has revised Circular A-119 on federal use and development of voluntary standards. OMB has revised this Circular in order to make the terminology of the Circular consistent with the National Technology Transfer and Advancement Act of 1995, to issue guidance to the agencies on making their reports to OMB, to direct the Secretary of Commerce to issue policy guidance for conformity assessment, and to make changes for clarity.

DATES: Effective February 19, 1998.
ADDRESSES: Direct any comments or inquiries to the Office of Information and Regulatory Affairs, Office of Management and Budget, NEOB Room 10236, Washington, D.C. 20503. Available at <http://www.whitehouse.gov/WH/EOP/omb> or at (202) 395-7322.

FOR FURTHER INFORMATION CONTACT: Virginia Huth (202) 395-3785.

SUPPLEMENTARY INFORMATION:

I. Existing OMB Circular A-119.
II. Authority.
III. Notice and Request for Comments on Proposed Revision of OMB Circular A-119.
IV. Discussion of Significant Comments and Changes.

I. Existing OMB Circular A-119

Standards developed by voluntary consensus standards bodies are often appropriate for use in achieving federal policy objectives and in conducting federal activities, including procurement and regulation. The policies of OMB Circular A-119 are intended to: (1) Encourage federal agencies to benefit from the expertise of the private sector; (2) promote federal agency participation in such bodies to ensure creation of standards that are useable by federal agencies; and (3) reduce reliance on government-unique standards where an explanation of voluntary standards would suffice.

OMB Circular A-119 was last revised on October 20, 1993. This revision

stated that the policy of the federal government, in its procurement and regulatory activities, is to: (1) "rely on voluntary standards, both domestic and international, whenever feasible and consistent with law and regulation;" (2) "[p]articipate in voluntary standards bodies when such participation is in the public interest and is compatible with agencies' missions, authorities, priorities, and budget resources;" and (3) "[e]ncourage agency participation in voluntary standards bodies so that agency resources . . . do not conflict with the interests and views expressed by such representatives are in the public interest and . . . do not conflict with the interests and established views of the agencies." [See section 6 entitled "Policy".]

II. Authority

Authority for this Circular is based on 31 U.S.C. 1111, which gives OMB broad authority to establish policies for the improved management of the Executive Branch.

In February 1996, Section 12(d) of Public Law 104-112, the "National Technology Transfer and Advancement Act of 1995," (or "the Act") was passed by the Congress in order to establish the policies of the existing OMB Circular A-119 in law. [See 142 Cong. Rec. H1264-1267 (daily ed. February 27, 1996) (statement of Rep. Morella); 142 Cong. Rec. S1078-1082 (daily ed. February 7, 1996) (statement of Sen. Rockefeller); 141 Cong. Rec. H14353-54 (daily ed. December 12, 1995) (statements of Reps. Brown and Morella)]. The purposes of Section 12(d) of the Act are: (1) to direct "federal agencies to focus upon increasing their use of [voluntary consensus] standards whenever possible," thus, reducing federal procurement and operating costs; and (2) to authorize the National Institute of Standards and Technology (NIST) as the "federal coordinator for government entities responsible for the development of technical standards and conformity assessment activities," thus eliminating "unnecessary duplication of conformity assessment activities." [See Cong. Rec. H1262 (daily ed. February 27, 1996) (statement of Rep. Morella)].

The Act gives the agencies discretion to use other standards in lieu of voluntary consensus standards where use of the latter would be "inconsistent with applicable law or otherwise impractical." However, in such cases, the head of an agency or department must send to OMB, through NIST, "an explanation of the reasons for using such standards." The Act states that beginning with fiscal year 1997, OMB will transmit to Congress and its

committees an annual report summarizing all explanations received in the preceding year.

III. Notice and Request for Comments on Proposed Revision of OMB Circular A-119

On December 27, 1996, OMB published a "Notice and Request for Comments on Proposed Revision of OMB Circular A-119" (61 FR 68312). The purpose of the proposed revision was to provide policy guidance to the agencies, to provide instructions on the new reporting requirements, to conform the Circular's terminology to the Act, and to improve the Circular's clarity and effectiveness.

On February 10, 1997, OMB conducted a public meeting to receive comments and answer questions.

In response to the proposed revision, OMB received comments from over 50 sources, including voluntary consensus standards bodies or standards development organizations (SDOs), industry organizations, private companies, federal agencies, and individuals.

IV. Discussion of Significant Comments

Although some commentators were critical of specific aspects of the proposed revision, the majority of commentators expressed support for the overall policies of the Circular and the approaches taken. The more substantive comments are summarized below, along with OMB's response.

The Circular has also been converted into "Plain English" format. Specifically, the following changes were made. We placed definitions where the term is first used; replaced the term "you" and "I" and added a Table of Contents.

We replaced proposed sections 6, 7 and 10 ("Policy," "Guidance," and "Conformity Assessment") with sections 6, 7, and 10, respectively, reorganized the material. We reorganized the definitions for "standard," "technical standard," and "voluntary consensus standard." We reorganized proposed section 8 on "Procedures" into sections 8, 9, 10, 11, and 12. For clarity, we have referenced provisions by their location both in the proposed Circular and in the final Circular.

Proposed Section 1—Purpose. Final Section 1

1. Several commentators suggested that this section should be modified to make clear that the primary purpose of

is bound, numbered, and organized."⁵ This approach reflects the 1982, pre-Internet genesis of the current regulations.

Several of OFR's incorporation by reference requirements are designed to further Congress's original purposes for permitting incorporation by reference—to prevent repetition and reduce the size of the *Federal Register*. To prevent agencies from circumventing FOIA's publication requirements, OFR's regulations generally prohibit agencies from incorporating their own publications (such as, for example, a report or government-unique standard that an agency has posted on its website).⁶ Material previously published in the *Federal Register*, CFR, or United States Code is similarly ineligible for incorporation by reference.⁷ And even if a material is otherwise eligible, its incorporation must "[s]ubstantially reduce the

volume of material published in the *Federal Register*."⁸

Agencies need only seek approval when they incorporate by reference in a final regulation; OFR does not get involved at the proposed rule stage. As a matter of law, this is a consequence of OFR's reasonable interpretation of FOIA's text, which appears to contemplate OFR approval only as condition on the enforceability of a final regulation. As a practical matter, this interpretation of the law means that individual agencies must take responsibility for ensuring that a voluntary consensus standard or other material is reasonably available to regulated and other interested parties during the rulemaking process. By fulfilling this responsibility during any public comment period(s), an agency can ensure that all parties have access to the information necessary to comment meaningfully on a proposed incorporating regulation.

Copyright

One of the main reasons agencies incorporate by reference is to respect copyrights held by private authors and publishers of incorporated materials, including standards development organizations. Voluntary consensus standards are typically copyrighted,

responsibility to approve all incorporations by reference that appear in the CFR. Codified at 1 C.F.R. part 51, and elaborated upon in Chapter 6 of OFR's *Document Drafting Handbook*, these regulations establish a 20-day process that agencies must go through to seek approval to incorporate by reference. Approval will be granted only if an agency's submission conforms to the policy set forth in the regulations. Under this policy, only certain kinds of extrinsic materials are eligible for incorporation by reference. Eligibility extends to technical or graphic materials, including "published data, criteria, standards, specifications, techniques, illustrations, or similar material"⁹ that are "[r]easonably available to and usable by the class of persons affected by the publication."¹⁰ Some materials, including maps and certain kinds of graphics, must be incorporated by reference because they cannot be printed in the hard copy editions of the *Federal Register* and CFR. Neither OFR's regulations nor the *Document Drafting Handbook* define "reasonably available." "Usable" is defined in the regulation, but only in reference to the physical characteristics of the incorporated publication, including its "completeness and ease of handling,"¹¹ and "[w]hether it

and many standards development organizations rely on the revenues generated by the sale of their standards to fund the standards-development process. Recognizing this reality, paragraph 6(j) of Circular A-119 explicitly states that agencies using voluntary consensus standards in agency documents “must observe and protect the rights of the copyright holder and other similar obligations.” During the course of my research, several agencies noted this requirement and explained that the ability to incorporate by reference enables them to comply with it.

The general rule, however, is there can be no copyright in “the law.” This principle was firmly established by the Supreme Court in *Wheaton v. Peters*,⁹ and *Banks v. Manchester*.¹⁰ But these cases involved the question of whether a private publisher of federal or state judicial opinions, known as a “reporter,” could assert copyright against those who later sought to publish the same judicial opinions. The Court’s straightforward answer was “no.” While a reporter may have a copyright in the summaries, annotations, or other original material included in the publication, the judicial opinions themselves are in the public domain because they are the law. They cannot be copyrighted.

How this well-established legal principle applies in the inverse circumstances presented by incorporation by reference is a more difficult question. Does a privately-authored, copyrighted work enter the public domain by virtue of the government’s decision to give it the force of law?

On this point, there is some ambiguity in case law. Most of it stems from a 2002 *en banc* decision of the United States Court of Appeals for the Fifth Circuit, *Veck v. Southern Building Code Congress International, Inc.*¹¹ Peter Veck operated a noncommercial website devoted to providing information about North Texas. In 1997, he decided to post on this site the building codes of two small towns, Anna and Savoy. Both towns had adopted (with certain modifications) the 1994 version of the *Standard Building Code*, which was published by the Southern Building Code Congress International, Inc. (SBCCI). Facing difficulty getting a copy of the code from the towns, Veck purchased a copy of SBCCI’s model code, removed SBCCI’s copyright information, and posted

the code on his website. SBCCI first demanded that Veck take the code down and, when he refused, the organization sued to protect its copyright.

The Fifth Circuit held that while SBCCI retained copyright in the model code, it could not claim copyright in the code *qua* law.¹ The code entered the public domain when the local governments adopted it as law. In reaching this conclusion, the Fifth Circuit read *Wheaton* and *Banks* “to enunciate the principle that ‘the law,’ whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.” *Veck*.¹² The court was persuaded by the idea that because the law must be freely available, public access to it cannot be conditioned on a copyright holder’s consent.¹³ The court acknowledged, however, that its decision was in some tension with the way other courts had resolved similar issues in previous cases.¹⁴

The Fifth Circuit’s decision in *Veck* created some ambiguity in the law regarding the scope of copyright protection for materials that have been incorporated by reference into federal regulations. This is because the *Veck* court explicitly distinguished between model codes adopted as law and extrinsic standards incorporated by reference into law. The author of a model code such as the *Standard Building Code*, reasoned the court, intends for its work to be adopted wholesale as legislation. Model codes are written and promoted to serve this precise purpose.¹⁵ In contrast, voluntary consensus standards are developed to serve business, industrial, or technical purposes through voluntary conformity. Standards development organizations typically neither intend the standards to be mandatory nor promote them for such use by government agencies. For these reasons, the Fifth Circuit determined that copyright cases involving the “official incorporation of extrinsic standards” are “distinguishable in reasoning and result.”¹⁶ In a footnote to this discussion, the court cited Circular A-119, a clear signal that it had federal standards policy particularly in mind.

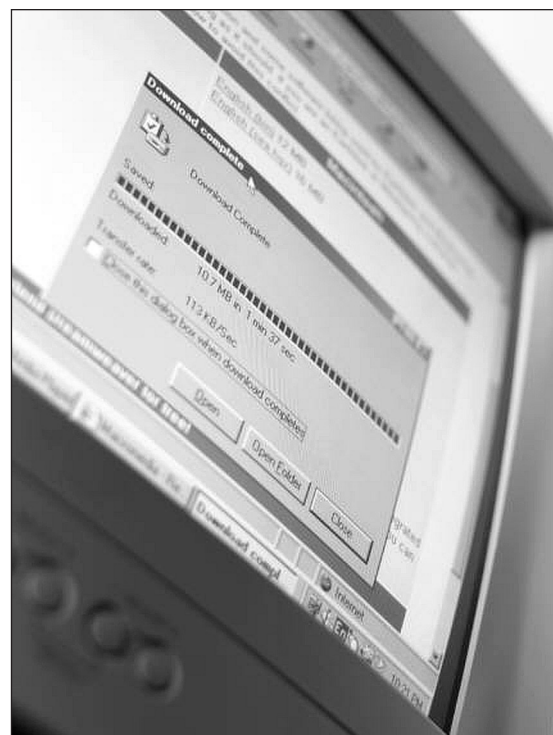
¹“Qua” is a Latin term meaning “in the capacity of” or “in the character of.”

These issues appear to be squarely presented in a suit recently filed in federal district court, *Public.Resource.org v. Sheet Metal and Air Conditioning Contractors’ National Association, Inc.*, No. 13-0815 (N.D. Cal.).

The Public Access Problem

From an administrative law perspective, the incorporation by reference of copyrighted standards is problematic for the reason identified in *Veck*: it requires the public to pay a private party to see the full text of a binding regulation. The traditional solution to this public access problem has been to require OFR and promulgating agencies to keep a hard copy of each incorporated document available for public inspection. This allows regulated and other interested parties to view incorporated documents, provided they are able to visit an agency’s reading room in person. In some cases, such reading rooms may be available in a promulgating agency’s regional offices. Most of the time, however, public inspection is available only in Washington, DC.

In an age of open government, public inspection is no longer a sufficient solution to incorporation by reference’s public access problem. Today, agencies either are required or strongly encouraged to use the Internet and other electronic tools to make informa-



tion readily available to regulated and other interested parties. The United States Code and CFR are available for free online. Regulations.gov and individual agency websites provide free access to rulemaking dockets and have largely rendered it unnecessary for the public to visit agency offices in person to inspect paper dockets. These and other similar shifts in the way agencies operate have raised the public's expectations. With most agency documents freely available through the Internet, fees for copyrighted, incorporated standards have become increasingly noticeable—and increasingly controversial.

The options for addressing this issue, however, are limited by several interrelated factors: (1) agencies are legally obligated to respect copyright; (2) the public-private partnership in standards facilitated by Circular A-119 and the Tech Transfer Act confers significant benefits on agencies, regulated parties, and the public; and (3) standards development organizations typically rely on the revenues generated by the sale of standards to fund the standards-development process.

Recommendation 2011-5

In Recommendation 2011-5, *Incorporation by Reference*, the Conference adopted a collaborative approach designed to address incorporation by reference's public access problem without undermining the valuable public-private partnership in standards. It urges agencies to work with standards development organizations and use available electronic tools, such as read-only access, to expand public access to incorporated materials. The recommendation recognizes that such expanded access may be both more important and more feasible during the course of a rulemaking. In these circumstances, regulated and other interested parties may need to see a copy of a standard in order to comment meaningfully on a proposed incorporating regulation. And because comment periods typically last just 30 or 60 days, making a read-only copy of a standard available for free online during this period is unlikely to seriously undermine the value of the copyright. Of course, free access to highly technical standards may not provide meaningful access for those who do not possess the relevant technical expertise. To address this issue, Recommendation 2011-5 suggests that in the preamble to a proposed

incorporating regulation, agencies should explain the standard and how its incorporation by reference will further the agency's regulatory purpose.

Recommendation 2011-5 represents the consensus position of the Assembly of the Administrative Conference, but some believe that it does not go far enough. Recent developments suggest that the recommendation marked the beginning, and not the end, of this important public policy debate.

Pipeline Safety: Congress Takes a Different Approach

In January 2012, Congress enacted a statute that requires the Pipeline and Hazardous Materials Safety Administration (PHMSA) to observe an extremely stringent standard governing public access to incorporated standards. Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 provides that PHMSA "may not issue guidance or a regulation . . . that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site." This uncompromising provision apparently has its roots in a misdirected request for a copy of a standard incorporated into PHMSA's regulations. A congressional staffer reportedly called the sales office of the relevant standards development organization to obtain a copy and was told it would cost more than \$1000. By the time the organization's government affairs staff learned of the request and forwarded a copy free of charge, the damage was done. Moreover, Section 24 was removed from the bill at one point and only reinserted at the eleventh hour. As a result, there is no committee report language available to explain the provision or how Congress intended it to operate. In July 2012, PHMSA held a public workshop to solicit suggestions for how to implement Section 24 without infringing copyright, violating the Tech Transfer Act, or undermining public safety. For those interested, video and other materials from the workshop will be available on PHMSA's website (www.phmsa.dot.gov) until July 2013.

Section 24 took effect in January 2013 and, as of the time of this writing, PHMSA is continuing to work towards a comprehensive implementation strategy. PHMSA

regulations incorporate by reference approximately 65 standards developed by a variety of standards development organizations. Some of these standards, including those developed by the National Fire Protection Association, were already available for free online in a read-only format when Congress enacted Section 24. Other standards may be made available as required by the statute under the terms of agreements that PHMSA has worked diligently to forge with other standards development organizations. It appears likely, however, that unless Section 24 is significantly amended or repealed, PHMSA may ultimately have to discontinue its use of some of its most important incorporated standards. This may require the agency to create its own technical standards to fill the resulting gaps, an alternative that may prove more time-consuming and costly, in terms of both dollars and public safety, than Congress could have imagined.

A Petition to Revise Incorporation by Reference Regulations

Another effort to achieve the goals of Recommendation 2011-5 through more aggressive measures is reflected in an ongoing rulemaking proceeding before OFR. In February 2012, Peter Strauss, a professor at Columbia Law School and Senior Fellow of the Administrative Conference, filed a petition for rulemaking with OFR. The petition was signed by a number of administrative law professors and other experts, and it urged OFR to amend its regulations governing incorporation by reference. As I previously explained, these regulations were last revised in 1982 and in many ways do not reflect the intervening rise of the Internet and the changes that have been wrought by the shift to electronic recordkeeping and communication. OFR put the petition out for public comment¹⁷ and the extended comment period ultimately closed on June 1, 2012.

Among other things, the petition urged OFR to explicitly define "reasonably available" in its regulations and use its authority to approve incorporations by reference to expand public access to incorporated materials at both the proposed and final rule stages. It argued that OFR should at a minimum consider the cost of a publication when determining whether it is reasonably available. The petition was accompanied by proposed

regulatory text, which OFR made available in the public docket on Regulations.gov (the docket ID number is NARA-12-002). More than 150 comments were filed in response to the petition, including comments filed by the Office of the Chairman of the Administrative Conference.

At the time of this writing, OFR has not yet acted on the petition, although the release of a final rule concluding the proceeding may be imminent.

Potential Revisions to Circular A-119

In a Request for Information issued in March 2012, OMB suggested that it may revise Circular A-119 to address, among other things, the issues raised when agencies incorporate voluntary consensus standards by reference in regulations.¹⁸ On April 11, 2012, OMB held a public workshop at NIST to facilitate a public discussion of the issues. The comment period on the Request for Information closed on June 1, 2012, with more than 70 comments having been filed on Regulations.gov (the docket ID number is OMB-2012-0003). It is expected that OMB will soon release a proposed revision of Circular A-119 for public comment. As of this writing, no such proposal has yet been issued.

Conclusion

The public policy debate over the public access issues raised by incorporation by reference is far from over. Many of the

options under consideration are harsh for all parties, threatening valuable copyrights and endangering a public-private partnership in standards that promotes regulatory efficiency and public safety. Administrative Conference Recommendation 2011-5 charts a path forward, but it is one that can only succeed through genuine collaboration between federal agencies and standards development organizations.



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References

1. See 5 U.S.C. § 552(a)(1)
2. 1 C.F.R. § 51.7(a)(2)
3. 1 C.F.R. § 51.7(a)(4)
4. 1 C.F.R. § 51.7(a)(4)(i)
5. 1 C.F.R. § 51.7(a)(4)(ii)
6. See 1 C.F.R. § 51.7(b)
7. See 1 C.F.R. § 51.7(c)
8. 1 C.F.R. § 51.7(3)
9. 33 U.S. (8 Pet.) 591 (1834)
10. 128 U.S. 244 (1888)
11. 293 F.3d 791 (5th Cir. 2002)
12. 293 F.3d at 800
13. See *id.* at 798-800
14. See e.g. *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516 (9th Cir. 1997); and *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994)
15. See 293 F.3d at 803-04
16. *Id.* at 804
17. See *Incorporation by Reference*, 77 Fed. Reg. 11,414 (Feb. 27, 2012)
18. See *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, 77 Fed. Reg. 19,357 (Mar. 30, 2012)

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