Incorporation by Reference in Federal Regulations

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Views presented are Mrs. Bremer’s and do not necessarily reflect the views of the Administrative Conference or its members.

SES Webinar
November 15, 2012
The Administrative Conference

- Independent federal agency that studies administrative process and makes recommendations for improvement to Congress, the President, agencies, and courts.

- 101 members from government and the private sector.

- Nonpartisan and politically balanced.

- Independent research conducted by consultants or in-house researchers.

- Recommendations crafted in open committee meetings and adopted by vote of the full Assembly of the Conference at semi-annual plenary sessions held in June and December.

- Published regulations are codified in the Code of Federal Regulations (CFR).

Under 5 U.S.C. § 552(a)(1), material published elsewhere is “deemed published” in the *Federal Register* and CFR if:

- The material is “reasonably available to the class of persons affected thereby;” and

- The Director of the Office of the Federal Register (OFR) approves the incorporation by reference.
Research for the Conference

- Examined issues agencies face when incorporating, including:
  - Ensuring incorporated materials are reasonably available;
  - Updating regulations when new versions of incorporated standards become available; and
  - Navigating procedural requirements and avoiding drafting pitfalls.

- Research included interviews with regulatory agencies, the National Institute of Standards and Technology (NIST), the Office of the Federal Register (OFR), and the Office of Management and Budget (OMB).

- Also interviewed six representatives of standard development organizations (SDOs) and public interest advocates.
OFR Regulations

- The Office of the Federal Register has promulgated regulations implementing 5 U.S.C. § 552(a)(1), found at 1 C.F.R. part 51.

- OFR provides further guidance to agencies in Chapter 6 of its Document Drafting Handbook, available online.

- An agency must secure approval to incorporate by reference only when it is promulgating a final rule that incorporates by reference.

- OFR is not involved at the proposed rule stage.

- Requests to incorporate by reference are processed by the three members of OFR’s Legal Affairs and Policy staff.

- OFR has 20 days to process requests, and regulations cannot be published without approval. See 1 C.F.R. § 51.3(b), 51.5(a)(1).
Eligible Materials

- Must conform to OFR’s stated policy. *See* 1 C.F.R. §§ 51.1, 51.7(a)(1).

- Technical or graphic materials, including “published data, criteria, standards, specifications, techniques, illustrations, or similar material,” *see* 1 C.F.R. § 51.7(a)(2).

- “Reasonably available to and usable by the class of persons affected by the publication,” *see* 1 C.F.R. § 51.7(a)(4). “Usability” is defined in the regulations, but “reasonable availability” is not.

- Incorporation must “[s]ubstantially reduce[] the volume of material published in the *Federal Register,*” *see* 1 C.F.R. § 51.7(3).

- An agency’s own publication is generally ineligible for incorporation by reference, *see* 1 C.F.R. § 51.7(b), as is material previously published in the *Federal Register* or United States Code, *see* 1 C.F.R. § 51.7(c).
Why Incorporate by Reference?

- Original purpose was to shorten the *Federal Register* and CFR.
  - Avoid repetition of materials available in Commerce Clearing House, West publications, etc. *See S. REP. 1219, at 11 (1964).*

- Some materials cannot be printed in the hard copy editions of the *Federal Register* and CFR.
  - Maps, schematics, other technical material, etc.

- Some materials, including most voluntary consensus standards, are copyrighted.
Federal Standards Policy

- Agencies are generally required to use voluntary consensus standards in regulations in lieu of creating government-unique technical standards to fulfill regulatory needs.

- This approach can be traced back to Administrative Conference Recommendation 78-4, addressing the use of voluntary consensus standards in health and safety regulation.

- Office of Management and Budget Circular A-119 requires agencies to use voluntary consensus standards in regulatory and procurement activities “except where inconsistent with law or otherwise impractical.”

- This policy was partially codified in the National Technology Transfer and Advancement Act of 1995.
Standards in Regulations

- Under OMB Circular A-119 and the NTTAA, the National Institute of Standards and Technology (NIST) plays a central, coordinating role.

  - Provides training and advice to agencies and coordinates the Interagency Committee on Standards Policy.


- Standards Incorporated by Reference (SIBR) Database

  - As of November 13, 2012, the database identified 9,557 incorporations by reference of standards in the CFR.

  - Includes voluntary consensus standards, government-unique standards, private industry standards, and international standards.
Federal standards policy yields significant benefits for agencies, regulated industry, and the public.

- Agencies save time and money in rulemaking, get access to extensive technical expertise outside government, and reduce enforcement costs.

- Regulated parties benefit from additional opportunities to contribute to standards development, reduced compliance costs, and less regulatory confusion.

- The public benefits from better regulations.

- The policy also facilitates an ongoing public–private partnership in standards that benefits all parties and improves public safety.
The Public Access Problem

- Incorporating copyrighted standards often means the public must pay a private party to see the full text of a proposed or final regulation.
  - Traditional solution was public inspection at agency offices.
  - This is no longer sufficient in light of shifting expectations generated by policies favoring transparency and e-Rulemaking.
- Options for addressing the problem are limited by:
  - Agency obligations to respect copyright; and
  - Federal standards policy and SDO reliance on publication revenue.
Questions About Copyright

- Some have questioned copyright for materials incorporated by reference into law—and there is some ambiguity in the case law.

  - No copyright in “the law.” See Banks v. Manchester, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

  - Distinction between model codes adopted as law and extrinsic standards incorporated by reference. See Veeck, 293 F.3d 791.

  - Merger of copyrighted standard with fact of “the law.”

- Cost allocation is at the heart of the issue.

- Research showed that some agencies have successfully expanded access through collaboration with the SDO.
Rec. 2011–5 on Public Access

- Embraces principle that incorporated materials must be reasonably available to regulated and other interested parties.

- If the material is not copyrighted, the agency should post it online.

- For copyrighted materials, the recommendation urges a collaborative solution:
  - Agencies should work with copyright owners and use available technological tools (e.g., read-only access) to expand availability.
  - Flexible, context-specific approach to determining how available is “reasonably available.”

- Meaningful access requires agencies to explain technical standards.
The Challenge of Updating

- Agencies are required by law to identify the specific version of material incorporated by reference. See, e.g., 1 C.F.R. § 51.9(b)(2).

- When a new version of an incorporated material becomes available, the agency must conduct a rulemaking to update the regulation.
  - SDOs can move more quickly than agencies—and they update more frequently.

- Some agencies, and particularly those that must observe heightened procedural requirements in rulemaking, cannot keep up.

- Research identified several practices that can make updating easier.
  - But the available options are not always workable.
Rec. 2011–5 on Updating

- Urges agencies to use available tools as appropriate to keep incorporating regulations up-to-date.
  - Direct final rulemaking.
  - Participation in standard development processes.
  - Enforcement discretion and equivalency determinations.

- Urges agencies not to move incorporations to non-binding guidance to address the challenge of updating.

- Recommends a statutory solution to address situations where available solutions have proven inadequate.
Procedure and Drafting

- Recommendation 2011–5 also addresses procedural and drafting issues agencies face when incorporating by reference.

  - Agencies should foster good working relationship with OFR.

  - Encourages OFR’s transition to electronic submission and review.

- Drafting provisions identify issues agencies should consider, including:

  - The distinction between regulatory and technical standards;

  - Lurking issue of secondary references; and

  - Potential conflicts between standards and regulations.
In the wake of the Conference’s recommendation, Peter Strauss filed a Petition for Rulemaking with OFR, requesting that OFR revise its incorporation by reference regulations.


- Notes that current regulations predate the electronic age.

- Urges OFR to take more active role in ensuring reasonable availability, including at the proposed rule stage.

- Suggests read-only access may be sufficient and requests that cost be included as one consideration in assessing reasonable availability.

- Comment period closed June 1, 2012.
Shortly after OFR put the Strauss Petition out for public comment, the Office of Management and Budget issued a Request for Information on OMB Circular A-119.


Invited interested parties to provide input on various issues that may warrant revisions to Circular A-119, which was last revised in 1998.

Federal participation in standard development, conformity assessment, and incorporation by reference.

Held public workshop at NIST on May 15.

Comments were accepted until June 1, 2012.
Congressional Activity

- Congress has also taken interest in the public access issue.

- Only relevant legislation that has passed to date is the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Public Law 112-90 (Jan. 3, 2012).

- Section 24: As of Jan. 2013, the Pipeline and Hazardous Materials Safety Administration (PHMSA) “may not issue guidance or a regulation . . . that incorporates by reference any documents or portions thereof unless [they] are made available to the public, free of charge, on an Internet Web site.”


- Video will be archived on PHMSA’s website for one year.
Looking Forward

- Action expected in the next six months or so:
  - OFR response to Strauss Petition.
  - Potential proposed revisions to Circular A–119.
  - Continued interest from Congress?
- This issue is likely to keep coming up.
- Reaching a workable resolution will require collaboration. The best course for all parties may be for Recommendation 2011–5 to be fully and consistently implemented.
More information about the Conference’s work on this issue is available at www.acus.gov.

For documents related to the development of Recommendation 2011–5, go to www.acus.gov/incorporation.

For materials related to implementation, including comments filed with OFR and OMB, go to http://www.acus.gov/research/research-and-recommendations/implementations/incorporation-by-reference/.

If you have feedback, suggestions for further research, or information on implementation, please email ebremer@acus.gov.

Thank you!