



BILLING CODE 1505-02-P

OFFICE OF THE FEDERAL REGISTER

1 CFR Part 51

[NARA 12-0002]

Incorporation by Reference

AGENCY: Office of the Federal Register, National Archives and Records Administration.

ACTION: Announcement of a petition for rulemaking and request for comments.

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SUMMARY: On February 13, 2012, the Office of the Federal Register (OFR or we) received a petition to amend our regulations governing the approval of agency requests to incorporate material by reference into the Code of Federal Regulations. We've set out the petition in this document. We would like comments on the broad issues raised by this petition.

DATES: Comments must be received on or before [insert date 30 days after publication in the Federal Register].

ADDRESSES: You may submit comments, identified using the subject line of this document, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [Fedreg.legal@nara.gov](mailto:Fedreg.legal@nara.gov). Include the subject line of this document in the subject line of the message.
- Mail: the Office of the Federal Register (NF), The National Archives and Records Administration, 8601 Adelphi Road, College Park, MD.

- Hand Delivery / Courier: Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, DC 20001.

Docket materials are available at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, DC 20001, 202-741-6030. Please contact the persons listed in the FOR FURTHER INFORMATION CONTACT section to schedule your inspection of docket materials. The Office of the Federal Register's official hours of business are Monday through Friday, 8:45 a.m. to 5:15 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Amy Bunk, Director of Legal Affairs and Policy, or Miriam Vincent, Staff Attorney, Office of the Federal Register, at [Fedreg.legal@nara.gov](mailto:Fedreg.legal@nara.gov), or 202-741-6030.

SUPPLEMENTARY INFORMATION:

We received a petition to revise our regulations at 1 CFR part 51 on February 13, 2012. The petition is set out below. It specifically requests that we amend our regulations to define “reasonably available” and to include several requirements related to the statutory obligation that material incorporated by reference (IBR) be reasonably available. The petition does not specifically request that we define “class of persons affected”; however, it assumes that this term encompasses anyone who is interested in reviewing the material agencies want to IBR into their regulations. The petitioners did include specific regulatory changes, as an example of what our regulations could look like. They are not asking for adoption of this exact language, however, so we are not including that text here.

We are requesting comments on the following issues:

1. Does “reasonably available”
  - a. mean that the material should be available:
    - i. for free and
    - ii. to anyone online?
  - b. create a digital divide by excluding people without Internet access?
2. Does “class of persons affected” need to be defined? If so, how should it be defined?
3. Should agencies bear the cost of making the material available for free online?
4. How would this impact agencies budget and infrastructure, for example?
5. How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final rule stage of the rulemaking?
6. Should OFR have the authority to deny IBR approval requests if the material is not available online for free?
7. The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?
8. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability?

9. How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?

Date: February 21, 2012

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February 10, 2012

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Gentlefolk,

Pursuant to 5 U.S.C. 553(e), we hereby petition for amendment of 1 CFR part 51, “Incorporation by Reference” to reflect the changed circumstances brought about by the information age. While it is only necessary to be an interested person to file such a petition, the undersigned include scholars of administrative law with particular, continuing interests in the avoidance of secret law and the development of the government’s law-related Internet activities, the President of Public Resource.Org (an NGO dedicated to the creation of a free web-based database of privately developed standards treated as mandatory by governmental authorities), and practitioners of administrative law.

1 CFR part 51 is your implementation of your responsibilities under 5 U.S.C. 552(a)(1), which provides in relevant part

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

As the statute states, and 1 CFR 51.3 recognizes, each incorporation by reference must be actively and individually approved by the Director of the Federal Register, after stated requirements have been met. As 1 CFR 51.1(b) recognizes, it is for the Director to “interpret and apply the language of action 552(a)”; the whole of the regulation is, in effect, an interpretation of what it means for matter incorporated by reference to be “reasonably available.” However, this regulation has not been amended in any respect since its appearance Aug. 6, 1982 at 47 FR 34108. Subsequent statutory and social

developments have transformed what it might mean for matter to be “reasonably available,” and this petition seeks the redefinition of “reasonably available” in the light of those changes. In the pre-digital world, it may have seemed reasonable to require persons wishing to know the law governing their activities to pay private standard-setting organizations for access to standards made mandatory by government regulations incorporating those standards by reference. These standards were sometimes voluminous, could be presented only in print, and could be made available to concerned parties only at some expense to the provider. Developments in both law and technology over the last two decades have undermined that rationale, however, transforming what it should mean for these standards to be “reasonably available.”

In particular, when section 552(a)(1) was enacted and at the time 1 CFR part 51 was adopted, substantive rules of general applicability, statements of general policy or interpretations of general applicability, as well, could be made available to the public only in printed form. Since the “published data, criteria, standards, specifications, techniques, illustrations, or similar material” made eligible for incorporation by reference in § 51.7(a)(2) were often voluminous in character, permitting their incorporation by reference would “[s]ubstantially reduce[] the volume of material published in the Federal Register.” § 51.7(a)(3). That effect was the primary impetus for permitting incorporation by reference. Again, this effect has been eliminated by the implementation of agency electronic reading rooms, under which unlimited volumes of materials may be stored or hyperlinked, and made readily searchable by common web-based tools.

Section 51.7(a)(4) of your regulations, defining eligibility for incorporation, today makes no effort to define “reasonable availability.” Although it conditions eligibility on whether the material to be incorporated “[i]s reasonably available to and usable by the class of persons affected by the publication,” it goes on to define *only* “usability,” and it does that for the pre-Internet age, in terms that plainly envision only *print* publication. Another element of your regulation, § 51.1(c)(1), provides that the terms of reference for the Director’s determinations are whether incorporation “is intended to benefit both the Federal Government and the members of the class affected.” Although we understand that respect for standards organizations’ copyrights may influence the Director’s determination that incorporated material is “reasonably available,” this language invokes that interest only indirectly. In the Internet age, that interest needs to be directly considered, in relation to the need of the regulated and citizens alike to know standards that may be proposed, or are later adopted, to governing their conduct. The possibility of protecting copyright owners’ financial interests in most uses of their standards by technical means (such as limited electronic access) is an appropriate element here, as is creating standards for “reasonable availability” that will maximize agency incentives to bargain hard over such licensing payments as might be appropriate.

With the Electronic Freedom of Information Act of 1996, the Government Paperwork Elimination Act of 2000, and the E-Government Act of 2002, public availability of government records has moved decisively from print media to electronic reading rooms. Indeed, the Federal Register no longer needs to be printed, especially given Federal Register 2.0, and in any event reducing the volume of material *in print* in it is no longer

an important consideration. While the CFR will doubtless remain in print, nonetheless the availability of materials incorporated by reference on government (or private) websites renders any concern about its volume also irrelevant to deciding whether material is “reasonably available.” Any agency publishing material to its electronic website, whether or not it is in print, will have made that material “reasonably available.” Indeed the obligations of E-FOIA for guidance material under 5 U.S.C. 552(a)(2) make this clear. Absent actual notice, agencies may not cite guidance materials adversely to private parties unless they have been posted in the agency’s electronic library – and there is no “reasonably available” qualification to this obligation, only the possibility of redaction for privacy protection.

These enactments and their impact are nowhere referenced or considered in part 51 – as they could not have been when it was last considered, in 1982. They make plain the necessity that the Director reconsider the now antiquated regulations implementing 5 U.S.C. 552(a)(1) and its criterion of reasonable availability, and in doing so assure Americans of ready access to the law that controls their conduct.

A recent action by the Administrative Conference of the United States failed directly to address the Director’s responsibility for shaping and administering the criterion of reasonable availability. However, the recommendation and its supporting report strongly suggest factors that should enter in:

1) Section 51 currently applies only to the publication of a final rule. However, notices of proposed rulemaking will often propose incorporation by reference, and public availability of materials is of special importance during the rulemaking stage to effectuate the APA's commitment (strongly reinforced by caselaw requiring agencies to reveal important data on which they may rely) to a meaningful public comment opportunity. The ready availability of materials proposed to be incorporated by reference, whether in FDMS, on an agency website, or on the website of a copyright holder (who may appropriately limit access to the comment period, and provide it only in read-only form), is essential to any ultimate determination that material that would otherwise be required to be placed in the body of a final rule is "reasonably available" to the concerned public and hence may be incorporated by reference. Here, particularly, the interests of a wide range of interests - citizens, local governments, small businesses – may be implicated. Agencies seeking approval for incorporations by reference of voluntary consensus standards that are referred to in their notices of proposed rulemaking should be required to demonstrate the steps that they have taken to enable comment on those standards, as one element of reasonable availability.

2) The National Technology Transfer Act of 1995 and the implementing OMB Circular A-119 properly distinguish, as the literature does, between regulations affirmatively requiring a specified course of conduct, and standards that serve to indicate one means by which those requirements may be satisfied. The policy favoring incorporation by reference of voluntary consensus standards embodied in the NTTA and Circular A-119 is limited to "standards" in the latter sense. Yet the Report to ACUS

details settings in which material incorporated by reference is *itself* taken as setting mandatory obligations. For example, OSHA treats as a violation of its regulations *any* departure from the form of warning placards detailed in certain standards it has incorporated by reference; it is merely a “minor” violation if, in departing from those forms, an employer has used warning placards suggested by subsequent voluntary consensus standards that OSHA has not yet incorporated by reference. “Reasonable availability” of *mandatory* standards in the age of the Internet requires their ready accessibility in agency electronic reading rooms or, at the very least, in linked websites of standards organizations that provide at least free read-only access to those with a need to know the law governing their conduct or otherwise affecting them.

3) When agencies use incorporation by reference to create *mandatory* standards, the legality of charging the public for access to material incorporated by reference by the voluntary standards organizations that may have developed them, under copyright, is in serious doubt. *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5<sup>th</sup> Cir. 2002). Free availability to the affected public of incorporated materials is of particular importance, as already suggested, when those materials create mandatory obligations whose violation could have adverse consequences, whether directly or on others whose interests may be affected by the behavior it controls. Measures such as the Unfunded Mandates Reform Act make plain that Congress has set its face against agency actions that export costs to others arguably unable to bear them. And in the age of information, secret law, that the public must pay for to know, is unacceptable. Today, binding law cannot be regarded as “reasonably available” if it cannot freely be found in or through an agency’s electronic

library. Perhaps this would require agencies to pay license fees for their use of such standards – and if so, they would then have proper bargaining incentives to keep those fees low.

Even should the Director disagree with this proposition – erroneously in our view – he should then make the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available. Since having the Internet eliminates any concern about having to print excessive materials, protecting copyright interests is the only possible rationale for permitting incorporation by reference of materials members of the public might be required to pay to see. The criterion for reasonable availability, as §51.1(c)(1) recognizes, is whether incorporation by reference “is intended to benefit both the Federal Government and the members of the class affected.” Without doubt, the Government’s interests are served by the work of voluntary standards organizations, yet the net benefits to the Federal Government of permitting incorporation by reference have been greatly reduced by today’s possibilities for electronic publication. Benefit to the members of the class affected requires ready accessibility, whether by the presence of this material in agency electronic reading rooms or its accessibility on standards organization web sites. Those benefits are reduced if they must be paid for – and high fees, particularly for local governments, small businesses and concerned citizens that may have a strong interest to know the governing law, will eliminate them. Any agency today proposing to export the costs of learning the law to those affected by it should, at the very least, be required to demonstrate its efforts to contain those costs (especially for small businesses, local

governments, citizens, etc.) as a necessary element of demonstrating reasonable availability.

For your convenience in understanding the changes sought by this petition, we set out in the pages following 1 CFR part 51 as it might appear if they were effected. For convenience, added language is italicized, and deleted language struck out. It is important to understand, however, that we are not asking for adoption of this exact language. Indeed, the bracketed language in §51.7(a)(3)(i(C)) is language we would prefer not appear in the regulation, but reflects the maximum recognition of voluntary standards organizations' authority to charge the public for access to incorporated materials we would regard as tolerable. What is essential is that you now reconsider the antiquated provisions of this regulation in light of the changes wrought by the Information Age and federal statutes and policies building on it.

As coordinator of this petition, Peter L. Strauss avers that each of the persons below has authorized him to include their name on this petition, with affiliations given for purposes of personal identification only.

Respectfully submitted,

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cc: Hon Susan Collins, Ranking Member  
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