INCORPORATION BY REFERENCE IN FEDERAL REGULATIONS

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Introduction

Incorporation by reference is a tool agencies use to comply with the requirement of publishing rules in the Federal Register to be codified in the Code of Federal Regulations (CFR) by referring to material published elsewhere. The legal effect of incorporation is that the referenced material is treated as if it were set out in full in the CFR. Incorporation by reference

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is first and foremost intended to—and in fact does—substantially reduce the volume of the CFR, thereby saving taxpayer dollars. It also enables agencies to give legal effect to material essential to a regulation, but not susceptible of publication in the Federal Register and CFR. But incorporation by reference has also evolved to further important, substantive regulatory policies. It promotes efficiency and the public interest by facilitating agency use of materials previously created by experts in both government and the private sector. More specifically, it facilitates federal policies favoring federal agency use of privately-developed voluntary consensus standards.

Over the years, and particularly as agencies have implemented the federal policy regarding the use of voluntary consensus standards, incorporation by reference has increased, and issues with the practice have emerged. Individual agencies have addressed these issues in various ways. This Report brings these individual experiences together, with the goal of sharing useful information across agencies and identifying best practices that all agencies can use to make incorporation by reference easier and more effective.

This Report examines three broad issues agencies commonly face when incorporating by reference. First, the practice may erect a barrier to public access to the law, particularly when incorporated materials are copyrighted. The Internet and e-Rulemaking have transformed expectations regarding the accessibility of agency processes and regulations. At the same time, a variety of statutes, federal policies, and principles of good governance restrict the options available to agencies to improve access to copyrighted, incorporated materials. Nonetheless, there are ways agencies have, and should, improve access to materials incorporated by reference into regulations. Second, agencies may face challenges updating regulations that incorporate by reference, because the incorporated material may be frequently revised by a non-governmental author or simply become out of date. Updating a regulation to accommodate such changes typically requires notice-and-comment rulemaking, which some agencies find prohibitively burdensome. Agencies have crafted several approaches to this problem that can make updating easier. Third, lawful incorporation by reference requires agencies to comply with various procedural and drafting requirements. Regulations issued by the Office of the Federal Register (OFR) govern this process and have evolved over the last decade in ways that improve the practice, but have confused some agencies. Some agencies, however, experience fewer difficulties with the process. They can provide a model of best practices for other agencies that must determine whether and how to incorporate by reference.

Several issues related to incorporation by reference are outside the scope of this Report. First, this Report is concerned with incorporation by reference in regulations, and thus does not address distinct issues raised by the practice as used in agency procurement or acquisition. Second, issues that arise within the standard-development process are outside the scope of this Report. Agencies that incorporate voluntary industry or consensus standards by reference into regulations may participate in the standard-development processes. To the extent that this participation may improve the practice of incorporation by reference, this Report will address it. Broader issues regarding how agencies should participate in voluntary standard-development process are unrelated to the practice of incorporation by reference, and are thus beyond the scope

of this Report. So too are intellectual property[1] and antitrust[2] issues that may arise within the voluntary standard-development process.

This Report is based on numerous interviews with agency personnel, representatives of standard development organizations, and individuals well versed in the issues, combined with research and review of relevant documents, including statutes, regulations, other administrative documents, private publications, and scholarly work. From June to August 2011, I interviewed employees from nine federal agencies, including the Coast Guard, Consumer Product Safety and Health Commission (CPSC), Environmental Protection Agency (EPA), Federal Aviation Administration (FAA), Federal Energy Regulatory Commission (FERC), National Highway Traffic Safety Administration (NHTSA), National Institute of Standards and Technology (NIST), Nuclear Regulatory Commission (NRC), Occupational Safety and Health Administration (OSHA), and Pipeline and Hazardous Materials Safety Administration (PHMSA). During the same time period, I interviewed representatives of seven standard-development and public interest organizations, including American Society for Testing and Materials (ASTM), American National Standards Institute (ANSI), American Society of Mechanical Engineers (ASME), Society of Automotive Engineers (SAE), National Fire Protection Association (NFPA), Organization for the Advancement of Structured Information Standards (OASIS), World Wide Web Consortium (W3C), and Public.Resource.org. On July 19, 2011, I attended the quarterly meeting of the Interagency Committee on Standards Policy (ICSP) and gave a presentation on this project, which generated a helpful discussion with the Standards Executives in attendance. Finally, I spent two days at OFR, where the Legal Affairs and Policy Staff gave me a comprehensive tutorial on how they process incorporation by reference requests.

The results of this research are organized in this Report in five parts. Part I provides background information essential to understanding the issues presented by incorporation by reference, including legal and procedural rules governing the practice, the diversity of purposes for which different agencies incorporate by reference, and the special role of voluntary consensus standards in federal regulatory policy. Part II examines how agencies can facilitate public access to materials incorporated by reference. Research revealed that agencies have used a variety of approaches to improve such access within the constraints of federal law and regulatory policy. Part three discusses the challenges agencies face updating regulations that incorporate regularly revised materials. Some agencies have experienced greater difficulty updating than others, and

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[1] *See, e.g.*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1901 (2002) (examining issues that arise when a standard-setting organization "adopts (or fails to adopt) a standards that is covered in whole or in part by an IP right"); Joseph Farrell, *Standardization and Intellectual Property*, 30 Jurimetrics J. 35, 44 (1989) (explaining how IP rights can reduce the likelihood of consensus and delay standard setting). The Federal Trade Commission (FTC) has been studying the issue of "patent hold-up" in standards, which occurs when a patent holder waits to seek compensation until a standard using the patented information has been adopted and parties are required to adhere to it—and are thus required to compensate the patent holder. FTC plans to release a report on this issue in fall 2011.

[2] *See, e.g.*, Tyler R.T. Wolf, Note, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 WASH. & LEE L. REV. 807, 839-48 (2008) (examining antitrust issues in standards-setting); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 434-36 (2006) (explaining how laws governing federal government use of privately-created standards mitigate antitrust issues).

different agencies have taken different approaches to facilitating timely updates. Part IV addresses procedural and drafting issues agencies face when they seek to incorporate by reference. Finally, Part V sets out the Report's key recommendations.

I. Background

"Incorporation by reference" is a term of art that describes a drafting technique agencies use to codify in the CFR material published elsewhere. Federal law requires that agencies publish in the Federal Register, and codify in the CFR, regulations that may adversely affect members of the public. An agency can fulfill this requirement with an appropriate reference to material published elsewhere. OFR, the agency statutorily charged with approving all incorporations by reference, has issued regulations and guidance establishing policies and procedures governing incorporation by reference.

Although incorporation by reference was originally intended to reduce the volume and improve the readability of the CFR, it has evolved to serve a variety of other regulatory policies. For each agency, a particular incorporation by reference furthers the specific regulatory goals of the regulation in which it appears. More generally, the practice supports modern federal policy that strongly encourages federal agencies to use voluntary consensus standards in regulation.

A. Publication Requirements and Incorporation by Reference

A regulation has no legal effect until it is properly published in the Federal Register and codified in the CFR.[3] The Freedom of Information Act (FOIA) permits agencies to comply with this publication requirement by incorporating by reference documents published elsewhere, provided such documents are "reasonably available to the class of persons affected thereby," and the agency secures the "approval of the Director of the Federal Register."[4] The primary purpose of permitting incorporation by reference is to make the CFR more readable and reduce the volume of the CFR, thereby saving taxpayer dollars.

OFR's regulations implement its statutory duty to approve all incorporations by reference published in the Federal Register and CFR.[5] Under these regulations, material is available for incorporation by reference only if it fits within the Federal Register's incorporation by reference policy,[6] which requires that regulations conform to and do not detract from applicable publication and APA requirements,[7] assumes incorporations by reference are "intended to benefit

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[3] 5 U.S.C. § 552(a)(1) ("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.").

[4] *Id.*; *see also* Appalachian Power Co. v. Envtl. Prot. Agency, 566 F.2d 451, 455 (4th Cir. 1977) (holding that a document EPA intended to incorporate by reference into a regulation was "not a validly issued part of the regulations, because it ha[d] not been published in the Federal Register, nor ha[d] the procedural requisites for incorporation by reference been complied with").

[5] *See* 1 C.F.R. §§ 51.1, 51.3, 51.5, 51.7, 51.9, 51.11.

[6] *See id.* § 51.7(a)(1) (cross-referencing 1 C.F.R. § 51.1, "Policy").

[7] *See id.* §§ 51.1(b), (c)(2).

both the Federal Government and the members of the class affected,"[8] and requires that the reference is limited to a particular edition of the incorporated material.[9] Incorporated material must consist of "published data, criteria, standards, specifications, techniques, illustrations, or similar material,"[10] and referring to it must "[s]ubstantially reduce[] the volume of material published in the Federal Register."[11] The material must also be "reasonably available to and usable by the class of persons affected by the" incorporated material,[12] with usability evaluated based on "[t]he completeness and ease of handling the publication,"[13] and "[w]hether it is bound, numbered, and organized."[14]

OFRs regulations are designed to ensure incorporation by reference serves the public interest in an orderly codification of legally effective agency pronouncements. The regulations vindicate the efficiency goals of incorporation by reference. Thus, for example, OFR's regulations reduce redundancy by explicitly providing that material published in the Federal Register or the United States Code is "not appropriate for incorporation by reference."[15] At the same time, OFR regulations serve the goals of publication by, among other things, requiring that incorporated materials are reasonably available to and usable by those affected. In like fashion, the regulations prohibit agencies from incorporating by reference material they publish themselves,[16] thus preventing agencies from circumventing publication requirements by publishing regulations elsewhere and then simply incorporating them by reference into the CFR.

B. Agency Uses of Incorporation by Reference

Incorporation by reference also serves more substantive regulatory policies, both for individual agencies and for the federal government generally. Agencies incorporate both government materials, such as state and federal regulations, and nongovernmental materials, from design specifications to product manuals to books to privately-created standards. In each case, incorporation serves an agency's specific regulatory needs. With respect to standards, incorporation by reference also vindicates a long-standing federal policy favoring federal agency use of voluntary consensus standards. While the issues the practice creates are common to all agencies—public access hurdles, updating challenges, and procedural and drafting difficulties—the techniques agencies have developed to address these issues vary. The success of these techniques depends on the nature of the material and the precise regulatory purpose for which it is incorporated. Identifying best practices worthy of broad adoption across agencies thus requires an understanding of what—and why—agencies incorporate by reference.

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8 *Id.* § 51.1(c)(1).
9 *See id.* § 51.1(f).
10 *Id.* § 51.7(a)(2).
11 *Id.* § 51.7(a)(3).
12 *Id.* at § 51.7(a)(4); *see also* 5 U.S.C. § 553(a)(1).
13 1 C.F.R. § 51.7(a)(4)(i).
14 *Id.* § 51.7(a)(4)(ii).
15 *Id.* § 51.7(c).
16 *See id.* § 51.7(b). Exception may be made if the material meets the requirements of Section 51.7(a) and "possesses other unique or highly unusual qualities," or "cannot be printed using the Federal Register/Code of Federal Regulations printing system." *Id.*

Government documents, including state and federal regulations and other government publications, are one kind of material often incorporated by reference into the CFR. Indeed, EPA's incorporation by reference of state environmental regulations accounts for a significant number of the incorporation by reference requests processed by OFR. The Clean Air Act requires state and local pollution control agencies to adopt federally approved air pollution control regulations.[17] EPA approves these regulations, referred to as "State Implementation Plans," by incorporating them by reference into the CFR.[18] Agencies may incorporate other government documents, including federal agency publications, to serve various regulatory purposes.[19]

Nongovernmental materials are also commonly incorporated by reference. FAA's incorporation of manufacturer service manuals into its airworthiness directives accounts for a substantial percentage of the incorporation by reference requests processed by OFR. Airworthiness directives, which FAA issues on a nearly daily basis, are "legally enforceable rules" regarding the proper maintenance of "aircraft, aircraft engines, propellers, and appliances."[20] FAA regulations broadly require anyone who operates such a "product" to maintain it in a safe and airworthy condition. This general obligation finds specific expression in airworthiness directives,[21] which the FAA issues when it finds "[a]n unsafe condition"[22] that "is likely to exist or develop in other products of the same type design."[23] These directives specify inspections, maintenance actions, or repairs that must be done in order to guard against the identified unsafe condition. In most cases, this information is already available in the repair manual published by the product's manufacturer. FAA incorporates the relevant provisions of the manual by reference in order to make the repair or inspection mandatory and to avoid any errors that might be made in an attempt to paraphrase or reprint the manufacturer's instructions directly in the text of the directive. Other agencies incorporate nongovernmental materials for radically different regulatory purposes. For example, NRC incorporates design specifications by reference as a means of approving "a final design for a nuclear power facility."[24]

Standards, which may be governmental or nongovernmental, are a third kind of material frequently incorporated by reference into the CFR, and they are particularly important to this Report because of the strong federal policy favoring agency use of voluntary consensus standards. This policy is embodied in the National Technology Transfer and Advancement Act

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17 *See* 42 U.S.C. § 7410

18 *See* 40 C.F.R. pt. 52.

19 *See, e.g.*, 16 C.F.R. § 1207.11(a) (referencing the Department of Commerce's "Statistical Abstract of the United States 1973" in the CPSC's safety standard for swimming pool slides); 29 C.F.R. § 29 C.F.R. 1926.1000(f)(3) (incorporating safety and health regulations for construction published by the Bureau of Mines into OSHA regulations); 29 C.F.R. 1926.202 (incorporating the Department of Transportation's "Manual on Uniform Traffic Control Devices" into OSHA regulations).

20 49 C.F.R. § 39.4.

21 *See, e.g., id.* § 39.7 ("Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section."); 49 C.F.R. § 39.9 ("If the requirements of an airworthiness directive have not been met, you violate §39.7 each time you operate the aircraft or use the product.").

22 *Id.* § 39.5(a).

23 *Id.* § 39.5(b).

24 10 C.F.R. § 53.1(a)

of 1995 (NTTAA) and Office of Management and Budget (OMB) Circular A-119.[25] The NTTAA[26] requires federal agencies to use technical standards created by voluntary consensus standard setting organizations[27] unless doing so "is inconsistent with applicable law or otherwise impractical."[28] It further directs federal agencies to "consult with voluntary, private sector, consensus standards bodies" and "participate with such bodies in the development of technical standards" when doing so "is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources."[29] OMB Circular A-119[30] expands upon the NTTAA's policy. First proposed in 1976,[31] and partially codified by the NTTAA, Circular A-119 "directs agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical."[32] Crucial to the definition of a "voluntary consensus standard" is the use of procedures designed to yield "[c]onsensus, which is defined as general agreement, but not necessarily unanimity."[33] The procedures must "include[] a process for attempting to resolve objections by interested parties" before the final vote on the standard.[34] The Circular clearly articulates the goals of the policy it establishes[35] and enumerates factors agencies should consider when evaluating a voluntary

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[25] An additional component of this regime is the Trade Agreements Act of 1979, *see* 19 U.S.C. §§ 2531-2573, but it is less relevant to the issue of incorporation by reference and will not be discussed in detail in this Report. It is more relevant, however, to another pending Administrative Conference project regarding international regulatory cooperation.

[26] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 (1996), *available at* http://standards.gov/standards_gov/nttaa.cfm (last visited Sept. 8, 2011).

[27] *Id.* § 12(d)(1) ("[A]ll Federal Agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments."). "[T]echnical standards" are defined as "performance-based or design-specific technical specifications and related management systems practices." *Id.* § 12(d)(4).

[28] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d)(3) (1996), *available at* http://standards.gov/standards_gov/nttaa.cfm (last visited Sept. 8, 2011); *see also* William P. Boswell and James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 Energy L.J. 147, 162 (2006) ("Congress has expressly required all federal agencies to use technical standards developed by voluntary consensus standards organizations as a means to carry out policy objectives or activities.").

[29] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d)(2) (1996), *available at* http://standards.gov/standards_gov/nttaa.cfm (last visited Sept. 8, 2011).

[30] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998), *available at* http://standards.gov/standards_gov/a119.cfm [hereinafter CIRCULAR A-119].

[31] *See* Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1335 n. 11 (1978) (citing Proposed OMB Circular on Federal Interaction with Voluntary Consensus Standards-Developing Bodies, 43 Fed. Reg. 48 (1978); 41 Fed. Reg. 536723 (1976)).

[32] CIRCULAR A-119, *supra* note 30, at ¶¶ 1, 6(a). "Impractical" is defined as "circumstances in which such use would fail to serve the agency's programs needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard." *Id.* ¶ 6(a)(2).

[33] *Id.* ¶ 4(a)(1)(v).

[34] *Id.*

[35] *See id.* ¶ 6(e).

consensus standard.[36] Any agency that uses a government-unique standard instead of an existing voluntary consensus standard must report and explain its decision to OMB.[37] In some cases, the agency has no such discretion because Congress has required it to use an identified voluntary consensus standard.[38]

The Conference has a role in the history of this federal policy. In the late 1970s, the Conference conducted a study that culminated in Conference Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*.[39] This recommendation provided guidance to agencies and Congress about how to maximize the benefits of agency participation in voluntary standard-development activities.[40] It urged agencies to "consider the use of existing relevant voluntary consensus standards in developing mandatory standards," but to do so using "due caution . . . on a case-by-case basis."[41] The recommendation enumerated factors agencies should consider in evaluating voluntary standards for inclusion in regulations,[42] provided guidance about how agencies could adapt voluntary standards to suit regulatory needs,[43] and urged agencies to "take special care to avoid needless inconsistencies between voluntary and mandatory standards" and "remain abreast of technological change."[44]

Incorporation by reference has been consistently viewed as the appropriate way for agencies to use voluntary consensus standards. Recommendation 78-4, taking the view of the Conference's consultant, Professor Robert W. Hamilton of the University of Texas School of Law,[45] identified incorporation by reference as the preferable means for including a voluntary standard in a mandatory health and safety regulation.[46] And Circular A-119 defines agency

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36 *See id.* ¶ 6(f).

37 CIRCULAR A-119, *supra* note 30, at ¶ 6(b); *see also id.* ¶ 6(k) (imposing no reporting obligation if a voluntary consensus standard does not exist); ¶¶ 9-12 (providing further detail on the scope and means of fulfilling reporting obligations).

38 *See, e.g.*, 15 U.S.C. § 2056b(a) (providing that "the provisions of ASTM International Standard F963-07 Consumer Safety Specifications for Toy Safety . . . shall be considered to be consumer product safety standards issued by the" CPSC); 42 U.S.C. § 17021 (using ASTM standards in defining and establishing labeling requirements for biomass-based diesel fuels).

39 *See* Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation* (Dec. 14-15, 1978).

40 *See id.* ¶¶ 1-5.

41 *Id.* ¶ 6.

42 *See id.* ¶¶ 6(a)-(f).

43 *See id.* ¶¶ 7(a)-(f).

44 *Id.* ¶ 8.

45 Hamilton, *supra* note 31, at 1458 ("On balance, . . . incorporation by reference should be the primary method of using acceptable voluntary standards."). Professor Hamilton devoted just a few pages (out of more than 150) to the subject. *See id.* at 1457-60.

46 *See* Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation* ¶ 7(f) (Dec. 14-15, 1978) ("The agency may adopt a voluntary standard into its regulations either by placing the text of the standard in the regulation, or, preferably, by incorporating the standard by reference pursuant to 1 CFR part 51.")

"use" of a voluntary consensus standard as "inclusion of a standard in whole, in part, or *by reference* in regulation."[47]

Today, standards, including voluntary consensus standards, account for thousands of incorporations by reference in the CFR. As of September 6, 2011, the National Institute of Standards and Technology (NIST) Standards Incorporated by Reference Database included 9,475 records of standards incorporated by reference into the CFR.[48] The top ten organizations with standards incorporated by reference are as follows:

Standards Developing Organization	Number of Standards Incorporated by Reference in CFR
American Society for Testing and Materials (ASTM)	2230
American National Standards Institute (ANSI)	554
American Society of Mechanical Engineers (ASME)	536
U.S. Environmental Protection Agency (EPA)	462
Society of Automotive Engineers (SAE)	435
National Fire Protection Association (NFPA)	370
American Petroleum Institute (API)	280
International Maritime Organization (IMO)	226
AOAC International (AOAC)	203
National Academy Press (NAP)	198

As this list shows, a variety of standards are incorporated by reference into the CFR, "includ[ing] . . . voluntary consensus standards, government unique standards, private industry standards, and international standards."[49]

Many different agencies incorporate standards into the CFR to serve diverse regulatory purposes. For example, the Coast Guard's marine engineering regulations "adopt a great number of industry standards for power boilers, piping systems, and main and auxiliary machinery" for

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[47] *Id.* ¶ 6(a)(1) (emphasis added). "[T]he reference must include the date of issuance," *id.* ¶ 6(j), thus requiring incorporation of particular version of a standard.

[48] *See* NIST, Regulatory SIBR (P-SIBR) Statistics, Standards Incorporated by Reference (SIBR) Database, http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total_regulatory_sibr (last visited Sept. 6, 2011).

[49] NIST, Home Page, Standards Incorporated by Reference (SIBR) Database, http://standards.gov/sibr/query/index.cfm.

various types of vessels, "include[ing] tank vessels, cargo and miscellaneous vessels, mobile offshore drilling units, off shore supply vessels, and small passenger vessels,"[50] while its equipment approval regulations incorporate voluntary consensus standards for, among other things, life preservers,[51] flares and distress signals,[52] inflatable liferafts,[53] and thermal protective aids.[54] The Federal Energy Regulatory Commission (FERC)[55] uses incorporation by reference to make industry standards, usually created by the North American Energy Standards Board (NAESB), mandatory for wholesale and retail energy providers.[56] The Nuclear Regulatory Commission (NRC)[57] incorporates voluntary consensus standards into its regulations governing construction permits and licenses for nuclear reactors.[58] Other agencies, including the Consumer Product Safety Commission (CPSC)[59] and the Occupational Health and Safety Administration (OSHA),[60] use voluntary consensus standards in health and safety regulation, as contemplated by Recommendation 78-4. These examples, though far from exhaustive, suggest the diverse purposes for which agencies incorporate standards by reference in regulations.

II. Ensuring Materials Incorporated by Reference Are Reasonably Available

While incorporation by reference can make the CFR shorter and more readable, it also has the potential to impede access to the law. Federal publication requirements tacitly acknowledge this by limiting incorporation by reference to materials that are "reasonably available" to regulated parties. Modern administrative policy, as embodied in e-rulemaking

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50 Rebecca Day and Tom Mielke, *Incorporation by Reference: Using external expertise to make Coast guard regulations more efficient*, PROCEEDINGS 26, *available at* http://www.uscg.mil/proceedings/spring2010/articles/26_Mielke,Day_IncorporationByReference.pdf; *see, e.g.*, 46 U.S.C. § 30.01-3 (listing standards incorporated by reference into regulations applicable to tank vessels); *id.* § 95.01-5 (listing standards incorporated by reference into regulations regarding fire protection equipment for cargo and miscellaneous vessels).

51 *See* 49 C.F.R. §§ 160.002-1, 160.005-1.

52 *See id.* §§ 160.021-1, 160.022-1, 160.023-1, 160.024-1, 160.036-1, 160.037-1, 160-057-1.

53 *See id.* § 160.151-5.

54 *See id.* § 160.174-3.

55 FERC, an independent agency within the Department of Energy, regulates the interstate transmission of electricity, natural gas, and oil and approves or licenses liquefied natural gas terminals, interstate gas pipelines, and hydropower projects. *See* 42 U.S.C. §§ 7134, 7172.

56 *See* 18 C.F.R. §§ 38.2, 284.12; *see generally* Boswell and Cargas, *supra* note 28 (tracing the history of the NAESB, exploring its activities, and examining legal and policy issues arising from FERC's incorporation by reference of NAESB standards in federal energy regulation); *see also* Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 74 Fed. Reg. 63,287, 63,289 (Dec. 3, 2009) (to be codified at 18 C.F.R. Part 38) ("NAESB is a non-profit standards development organization established in January 2002 that serves as an industry forum for the development of business practice standards that promote a seamless marketplace for wholesale and retail natural gas and electricity.").

57 NRC is an independent regulatory commission that regulates commercial nuclear power plants, nuclear waste, and other uses of nuclear materials. *See* 47 U.S.C. § 5841(a)(1); *see also*, U.S. Nuclear Regulatory Commission, *Our Governing Legislation*, http://nrc.gov/about-nrc/governing-laws.html (last visited Aug. 15, 2011) (providing an overview of the statutes governing the NRC's regulatory activities).

58 *See* 10 C.F.R. § 50.55a.

59 *See, e.g.*, 16 C.F.R. § 1420.3 (referencing an ANSI standard in a safety standard for all terrain vehicles (ATVs)).

60 *See, e.g.*, 29 C.F.R. § 1910.6 (indentifying various standards incorporated by reference into OSHA regulations).

initiatives, further counsels agencies to make regulatory processes and regulations accessible not only to regulated parties, but also to the public at large. When an agency incorporates material that is not subject to copyright or other legal protection, agencies may be able to easily improve access using electronic means. When incorporated materials are copyrighted—as is often the case with voluntary consensus standards—access issues are more difficult. Although a recent judicial decision,[61] combined with pressure from some scholars, activists, regulated parties, and government officials,[62] has raised questions regarding the strength of copyrights in incorporated standards, federal law and policy generally requires agencies to respect copyright claims.[63] And, even absent such concerns, large scale abrogation of copyright could jeopardize an important public-private partnership in standards. Nonetheless, several agencies reported success navigating these challenges and improving access to incorporated materials. Other agencies should, to the greatest extent possible, do the same.

A. The "Reasonably Available" Requirement

The publication requirement originally included in the Federal Register Act, and today included in FOIA, ensures regulated parties have notice of regulations with which they are required to comply. Indeed, courts have consistently held that the law "requires publication of those policies of which the public must be aware *in order to conform its conduct to the agency's requirements*."[64] This principle finds more specific expression in the statutory requirement that materials incorporated by reference be "reasonably available to the class of persons affected thereby."[65] Such availability is essential to the CFR's notice function. It bears emphasizing that if an agency improperly incorporates by reference (e.g., without OFR's approval), courts will not permit it to enforce the affected regulatory commands.[66]

The Federal Register and CFR were created in 1935, in response to a Supreme Court decision involving an agency's attempt to enforce regulations that, as it turned out, did not exist.[67] The case revealed a terrible problem in administrative governance: regulations were essentially unavailable, even to agency personnel tasked with enforcing them.[68] The legislative history of the Federal Register Act explains the problem:

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61 *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002).

62 *See infra* at Part II.D.2.

63 *See* 28 U.S.C. § 1498(b); CIRCULAR A-119, supra note 32, at ¶ 6(j).

64 Bunge Corp. v. United States, 5 Cl. Ct. 511, 523 (1984) (emphasis added); *see also* Pitts v. United States, 599 F.2d 1103, 1108 (1st Cir. 1979) ("The purpose of publication in the Federal Register is public guidance); Hogg v. United States, 428 F.2d 274, 280 (6th Cir. 1970) (holding that "the requirement for publication attaches only to matters which if not published would adversely affect a member of the public").

65 5 U.S.C. § 552(a); *see also* 1 C.F.R. §51.7(a)(4) (restating the statutory language with the additional requirement that the material be "usable by the class of persons affected"); PPG Indus., Inc. v. Costle, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (explaining that "[i]f a required definition or procedure is part of a rule, it must be published or incorporated by reference in the Federal Register").

66 *See Appalachian Power Co.*, 566 F.2d at 455.

67 *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

68 *See generally* Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934).

> The enactments of Congress are easily available, but often the regulations issued under them are more important that the basic acts. But these administrative rules and pronouncements oftentimes cannot be found. As to their publication and distribution, there is utter chaos. These rules and regulations frequently appear in separate paper pamphlets, some printed on single sheets of paper and easily lost. Any attempt to compile a complete private collection of these rules and regulations would be wellnigh impossible. No law library, public or private, contains them all. Officials of the department issuing them frequently do not know all of their own regulations.[69]

By publishing executive and administrative materials in the Federal Register, Congress sought to ensure regulated parties would receive actual, and not merely constructive, notice of the law. It did so by creating the Federal Register and CFR and requiring agencies to publish regulations in order to give them legal effect. To this day, publication and codification requirements, including those governing incorporation by reference, are primarily aimed at providing notice and access to regulated parties. Notice of the law is after all a fundamental underpinning of due process.

Modern administrative law and policy increasingly value broader public access to agency processes and regulations. Participation by members of the general public and interested parties that may not be directly subject to an agency's rules is encouraged. E-rulemaking initiatives are perhaps the most prominent, albeit not the only, manifestations of this modern shift in focus.

Agencies considering incorporating extrinsic material by reference should evaluate whether the material will be reasonably available both to regulated parties and the general public. This inquiry may depend on the stage of the rulemaking process. While broad public access may be important in rulemaking, access for regulated parties may be more crucial in the enforcement stage. Indeed, agencies must consider the public's interest in access to administrative materials during different stages of rulemaking in making decisions regarding the accessibility of incorporated materials.

B. Public Inspection of Incorporated Materials

Public inspection is the traditional method for providing access to incorporated materials. Members of the public, including regulated parties, may view incorporated materials in person at OFR or at an office of the agency that has promulgated the relevant regulation. All "document[s] having general applicability and legal effect," including those incorporated by reference, must be filed with the Office of the Federal Register (OFR) for public inspection.[70] Members of the public may view such documents at the OFR's reading room in Washington, DC

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[69] H. COMM. ON JUDICIARY, 74TH CONG., PUBLICATION OF GOVERNMENTAL RULES AND REGULATIONS, H. Rep. No. 74-280, at 2 (1935).

[70] 1 C.F.R. § 5.2(c); *see also id.* § 8.1 (providing for the publication of "a special edition of the FEDERAL REGISTER to present a compact and practical code called the 'Code of Federal Regulations', to contain each Federal Regulation of general applicability and legal effect").

during regular office hours.[71] "There are no formal inspection procedures or requirements,"[72] and those who come in to view documents may make photocopies at the inspection desk,[73] though the OFR no longer provides a photocopier.[74] Similar accommodations are typically provided by agencies. OFR and individual agencies consistently reported that there is little interest in viewing documents held for public inspection. Nonetheless, availability for public inspection is required by law, and in some cases may be the best option for interested parties to obtain access to the law.

Public inspection is sometimes complicated where incorporated material is older and has been accessioned under OFR's records schedules. An interested party may go to OFR's public inspection room to view a document only to find that he or she must travel to a different location to find the document. Substantial delay in inspection may result, but may sometimes be avoided if the party makes arrangements with OFR for viewing the material. OFR provides guidance and instructions on its website for those interested in inspecting or otherwise gaining access to incorporated materials.[75]

One way to improve public inspection would be for OFR to keep all incorporated materials in electronic form and onsite for public inspection so long as they remain incorporated by reference. This would ensure that a complete collection of incorporated materials is available for public inspection. On the other hand, this complete collection would be available only in OFR's public inspection room, thus rendering it of no use to those who are unable to physically visit OFR. Moreover, feedback from OFR suggests that transitioning to an electronic collection would be prohibitively costly.

C. Access to Incorporated Materials That Are Not Copyrighted

Although copyrighted standards often get the most attention in any discussion of incorporation by reference, agencies frequently incorporate other types of materials that are not copyrighted. For example, the Federal Communications Commission (FCC) incorporates FAA advisory circulars,[76] while OSHA incorporates certain safety requirements created by other federal agencies.[77] Such documents are generally ineligible for copyright because they are

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71 *Id.* § 3.2(a).

72 *Id.* § 3.2(a).

73 *Id.* § 3.2(d).

74 Members of the public may, and occasionally do, bring portable photocopiers in with them for use at the public inspection desk. Another option is to use a high-resolution camera to capture images of the documents, although my interviews did not suggest that anyone had used that method to get copies of materials incorporated by reference.

75 *See* OFR, Incorporation by Reference, http://www.archives.gov/federal-register/cfr/ibr-locations.html (last visited Sept. 6, 2011).

76 *See, e.g.*, 47 C.F.R. § 17.23 ("[E]ach new or altered antenna structure . . . must conform to the FAA's painting and lighting recommendations set forth on the structure's FAA determination of 'no hazard,' as referenced in . . . FAA Advisory Circulars . . . dated October 19, 1995.")

77 *See* 29 C.F.R. §§ 1926.1000(f)(2), 1926.1000(f)(3).

authored by the United States government.[78] Other materials, such as the state environmental regulations that EPA incorporates by reference[79] may similarly not be subject to copyright or other legal protections. If an agency incorporates material by reference that is not subject to copyright or other legal protection, the agency should make a copy of the document available electronically in a location where interested parties will be able to find it easily.

D. Access to Incorporated Materials That Are Copyrighted

Expanding access to incorporated materials may be more difficult when the materials in question are copyrighted. Although the issue may arise with respect to a variety of materials incorporated by reference, it garners the most attention with respect to voluntary consensus standards. As previously explained, federal policy generally requires agencies to use such standards in regulation where possible, and some standard developers assert copyright and use the funds from the sale of the standards to fund standard-development activities.[80] Although there is relatively little judicial guidance on the subject—and virtually none involving copyright for voluntary consensus standards incorporated into federal regulation—a recent Fifth Circuit decision has created some uncertainty regarding the implications for a copyright when certain kinds of documents are incorporated by reference into law. Pressure to limit copyright for standards incorporated by reference into federal regulations has recently come from several sectors, igniting a public policy debate.

Some agencies have successfully increased access to incorporated materials while respecting copyright. In the spirit of public-private partnership, and within the bounds of established federal law and policy, these agencies have worked with standard developers to make standards available during rulemaking and following promulgation. Technological tools have provided mutually agreeable methods for increasing access while protecting copyright. Agencies that reported success with this approach identified a number of factors they consider to determine what degree of access is necessary and how important such access is in relation to other regulatory goals that may be at stake. Replicating this approach at other agencies may increase access while protecting and promoting other regulatory values, including the public-private partnership in standards.

1. Copyright Protection for Standards Incorporated by Reference

In a 2002 en banc decision in *Veeck v. Southern Building Code Congress International, Inc.*,[81] the Fifth Circuit cast some doubt on the scope of copyright protection for privately-authored materials incorporated by reference into law. The case began in 1997, when Peter

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[78] *See* 17 U.S.C. § 105 ("Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.").

[79] *See, e.g.*, 40 C.F.R. § 88.104-94(k)(2) ("The standards in this section shall be administered and enforced in accordance with the California Regulatory Requirements Applicable to the Clean Fuel Fleet and California Pilot Programs, April 1, 1994, which are incorporated by reference.").

[80] *See* ANSI, Why Charge for Standards?, http://www.ansi.org/help/charge_standards.aspx?menuid=help (last visited Sept. 6, 2011).

[81] *See Veeck*, 293 F.3d 791.

Veeck, the operator of "a non-commercial website that provide[d] information about north Texas,"[82] decided to post the local building codes of two small towns in north Texas, Anna and Savoy. Both towns "had adopted the 1994 edition of the Standard Building Code written by [the] appellee [in the case], Southern Building Code Congress International, Inc. ('SBCCI')."[83] When he had trouble getting a copy of the codes from the towns, Veeck purchased a copy from SBCCI for $72.00. He then cut and pasted the text to his website, removing any suggestion that the codes were published by SBCCI, and identifying them simply as "the building codes of Anna and Savoy, Texas."[84] SBCCI "demanded that [Veeck] cease and desist from infringing its copyrights."[85] The district court granted summary judgment in favor of SBCCI, issuing a permanent injunction and awarding monetary damages. The Fifth Circuit upheld the decision on appeal, but "elected to rehear th[e] case en banc because of the novelty and importance of the issues it present[ed]."[86] The central issue was "the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become 'the law.'"[87]

The en banc court's "short answer" was that, while a code author retains copyright over a model code after it is adopted into law, the author cannot claim copyright over the code qua law.[88] The decision was grounded in long-standing Supreme Court precedents[89] the majority read "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."[90] Because the law must be freely available, reasoned the court, its accessibility to the public cannot be conditioned on the consent of a copyright holder.[91] The court found some support for this conclusion in a First Circuit case, *Building Officials & Code Administrators v. Code Technology, Inc. (BOCA)*, which expressed doubt about the continuing viability of copyright protection for a code adopted as law, but did not actually decide the issue.[92] The Fifth Circuit further buttressed its decision with an appeal to the merger doctrine,[93] holding that "[t]he codes are 'facts' under copyright

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82 *Id.* at 793.

83 *Id.*

84 *Id.*

85 *Id.* at 794.

86 *Id.*

87 *Id.* at 793.

88 *Id.* (holding that"[a]s model codes," a private "organization's works retain their protected status," but "as law, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives").

89 *See id.* at 794-99 (citing Banks v. Massachusetts, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)).

90 *Id.* at 800.

91 *See id.* at 798-99.

92 628 F.2d 730 (1st Cir. 1980); *see also* John G. Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 38-40 (1st Cir. 2003) (explaining that *BOCA* left open the difficult question of copyright protection for materials incorporated by reference into law, but leaving the question open because the issue before the court, copyright for materials reference in government contracts, did not raise the same concerns).

93 The merger doctrine provides that "when there are so few ways of expressing an idea, not even the expression is protected by copyright." BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1143 (11th Cir. 2007).

law" because "[t]hey are the unique, unalterable expression of the 'idea' that constitutes local law."[94]

Veeck did not address standards incorporated by reference into federal regulations.[95] The majority explicitly limited its holding to "the wholesale adoption of a model code promoted by its author . . . for use as legislation," distinguishing cases involving the "official incorporation of extrinsic standards."[96] One such case was *CCC Information Services v. Maclean Hunter Market Reports, Inc.*,[97] in which the Second Circuit rejected an argument that the Red Book, a compendium of used car values, entered the public domain when it was incorporated by reference in "the insurance statutes or regulations of several states."[98] The argument was "that the public must have free access to the content of the laws that govern it," and "if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection."[99] While "policy considerations" supported the argument, the law did not.[100] The Ninth Circuit reached a similar result in *Practice Management Information Corporation v. American Medical Association*,[101] holding that the American Medical Association's classification system for medical procedures did not enter the public domain by virtue of its being incorporated by reference into Medicare and Medicaid regulations.[102]

Veeck and related cases show that the scope of copyright protection for privately-authored materials used in the law depends upon a variety of factors, including the nature of the material at issue, the purpose for which it was created, and the way the government uses it. In *Veeck*, copyright protection was denied for a building code written "precisely for use as legislation," was in fact so used by local government.[103] In contrast, voluntary consensus standards are usually "created by private groups for reasons other than incorporation into law."[104] And agencies do not adopt such standards as the law, but rather incorporate them by reference—in whole or in part, and often with substantial modification or addition—to support substantive

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94 293 F.3d at 801.

95 *See id.* at 803-04.

96 *Id.* at 804. The practice of incorporation of extrinsic standards by reference in regulations promulgated by federal agencies under Circular A-119 was particularly in the court's mind here. *See id.* at 804 n.20.

97 44 F.3d 61 (2d Cir. 1994).

98 *Id.* at 73; *see also id.* at 74 ("We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright."). The court noted that such a holding "would raise very substantial problems under the Takings Clause of the Constitution." *Id.* at 74.

99 *Id.* at 73.

100 *Id.* at 74.

101 121 F.3d 516 (1997).

102 *See id.* at 518-20.

103 *Veeck*, 293 F.3d at 804.

104 *Id.* at 805.

requirements of federal regulations.[105] Copyright cases involving such "official incorporation of extrinsic standards" are, as *Veeck* acknowledged, "distinguishable in reasoning and result."[106]

While *Veeck* created some uncertainty in the law, standard-development organizations generally retain copyright in standards that have been incorporated by reference into federal regulations. And federal agencies "must observe and protect the rights of the copyright holder and any other similar obligations" when referencing voluntary consensus standards.[107] More generally, federal law provides federal agencies can be liable for copyright infringement.[108] In light of these legal restrictions, some agencies have explicitly respected copyright by incorporating by reference.[109]

2. An Emerging Public Policy Dispute

Veeck not only presented a difficult legal question—it revealed a "profound issue of public policy" that has particular importance in the context of federal regulation.[110] As agency use of voluntary consensus standards has evolved over the past several decades, so too have public expectations regarding the accessibility of the law generally and of agency regulations and processes more specifically. The ubiquitous availability and use of the Internet has contributed to these higher expectations, and e-rulemaking initiatives have brought them to bear in the regulatory context. This shift in administrative policy towards greater transparency and openness is in tension with copyright protection for incorporated materials. The *Veeck* decision, while it has not had the significant impact initially expected (or, at least by some, feared), has created some legal uncertainty regarding the continued viability of copyright for materials incorporated by reference. That uncertainty may partially explain the relative dearth of judicial guidance regarding the scope of copyright in this context.

Legal scholars, open source standard-developers, and non-profit public interest organizations have increasingly challenged copyright protection for incorporated standards as a matter of both law and policy. Legal scholars have argued, albeit not unanimously, that

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105 As explained in greater detail below, *see infra* at Part IV.A., the substantive policy established in a regulation should be clear from its text, without the need to examine material incorporated by reference. If this principle is properly observed, incorporated material plays only a supporting role in a regulation.

106 *See Veeck*, 293 F.3d at 804.

107 CIRCULAR A-119, *supra* note 30, at ¶ 6(j).

108 *See* 28 U.S.C. § 1498(b).

109 *See, e.g.*, Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement, Proposed Rule, Production Measurement Documents Incorporated by Reference, 75 Fed. Reg. 72761, 72761 (2010) ("When a copyrighted technical industry standard is incorporated by reference into our regulations, BOEMRE is obligated to observe and protect that copyright. BOEMRE provides members of the public with Web site addresses where these standards may be accessed for viewing--sometimes for free and sometimes for a fee. The decision to charge a fee is decided by standard developing organizations."); Environmental Protection Agency, Proposed Rules, Product Noise Labeling Hearing Protection Devices, Part II, 74 Fed. Reg. 39150, 39153 (2009) ("In recognition of the copyrights that protect these standards, the Agency is 'incorporating by reference,' into subpart B, the following ANSI and IEC standards.").

110 Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 297 (2005).

materials incorporated by reference into law should not be eligible for copyright.[111] These arguments have special force in the context of information technology standards,[112] which are valuable precisely because they are open source and freely available to all. Indeed, it is these new, ever-evolving technological standards that have created a division within the voluntary standards community. As a general matter, established standard-development organizations continue to use a business model heavily dependent upon copyright, while newer standard-development organizations often take an aggressive position in favor of open access. OASIS, an organization of the latter stripe, reported that its open-source technological standards are available freely online—and are downloaded an average of four times per second. These organizations have found allies among public interest organizations, including Public.resource.org, which has aggressively sought free, electronic access to the law, including all materials incorporated by reference into the CFR.[113]

Regulated parties have made similar arguments in comments on proposed federal regulations that would incorporate copyrighted standards by reference. For example, FERC has on several occasions considered comments critical of its practice of incorporating copyrighted standards by reference into its regulations.[114] In one recent proceeding, commenters urged FERC to abandon the practice of incorporation by reference and instead promulgate standards via the notice-and-comment process, provide greater access to the standards that would be incorporated by reference, "or, at a minimum, clarify that FERC will not attempt to assess civil penalties . . . for violations of standards that have merely been incorporated by reference into regulations."[115] These suggestions were grounded in concerns that incorporation by reference disadvantaged those parties unable to participate in the standard-development process and forced regulated entities to comply with "non-public standards" that could only be obtained for a fee.[116]

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111 *See, e.g.*, Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 195 (2007) ("This Article considers whether standards . . . , especially those whose use is mandated by government rules, should be eligible for copyright protection as a matter of U.S. copyright law."); Cunningham, *supra* note 110, at 293 (developing a three-part classification system for determining copyright protection for standards embodied in law); *but see* Katie M. Colendich, Note, *Who Owns "The Law"? The Effect on Copyrights When Privately-Authored Works are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589, 590 (2003) ("This Comment argues that the Fifth Circuit's *Veeck* decision created an unsupported exception to copyright law.").

112 *See* Samuelson, *supra* note 111.

113 *See, e.g.*, Letter from Raymond A. Mosley, Director of the Federal Register, to Carl Malamud, President & CEO, Public.Resource.org (Aug. 3, 2009) (on file with author) (denying a FOIA request for copies of all technical standards incorporated by reference into the CFR); Letter from Carl Malamud, President & CEO, Public.Resource.org, to Gary M. Stern, General Counsel, National Archives and Records Administration (July 14, 2009) (on file with author).

114 *See* Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 74 Fed. Reg. 63,287, 63,302-04 (Dec. 3, 2009) (to be codified at 18 C.F.R. pt. 38); Standards for Business Practices and Communication Protocols for Public Utilities, 70 Fed. Reg. 28,222, 28,223-24 (proposed May 17, 2005) (to be codified at 18 C.F.R. pts. 35, 37, and 38); Standards for Business Practices of Interstate Natural Gas Pipelines, 68 Fed. Reg. 13,813, 13,1816-18 (March 21, 2003) (to be codified at 18 C.F.R. 284); Standards for Business Practices of Interstate Natural Gas Pipelines, 64 Fed. Reg. 17,276, 17277 (April 9, 1999) (to be codified at 18 C.F.R. 284); Standards for Business Practices of Interstate Natural Gas Pipelines, 61 Fed. Reg. 55,208, 55,209-10 (Oct. 25, 1996) (to be codified at 18 C.F.R. 284).

115 Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 74 Fed. Reg. 63,287, 63,302 (Dec. 3, 2009) (to be codified at 18 C.F.R. pt. 38).

116 *Id.*

FERC has consistently rejected these arguments. In one proceeding, FERC called a commenter's argument that a standard was not "reasonably available" because one had to pay a "significant fee" to buy a copy "inappropriate hyperbole."[117] The agency, being familiar with the commenter, knew that the cost of the standard was significantly lower than the hourly rate the commenter was paying counsel to file its comments. That claim of unreasonable expense was therefore not credible in the circumstances.

Several interviewees noted that Congress has increasingly shown interest in legislation that would, at least in some limited contexts, abrogate copyright protection for incorporated standards. In the wake of a pipeline explosion in San Bruno, CA, the House of Representatives considered whether relevant pipeline safety standards should have been more freely accessible to first responders. Another recent, proposed bill would direct the Department of Energy to use specified voluntary consensus standards, provided they met certain regulatory requirements. If the standards did not meet the stated requirements, however, the Secretary would be authorized to take the standards with just compensation, modify them as necessary, and promulgate them as regulations of the Department of Energy. A few of those interviewed suggested that these developments, although they have been unsuccessful to date, indicate growing congressional discontent with restrictions on the free availability of incorporated standards. It is thus clear that there is an emerging public policy debate regarding the defensibility of copyright and other limitations on access to incorporated standards, particularly when such standards guard public safety.

3. The Larger Context: The Public-Private Partnership in Standards

The public policy question of how to broaden access to copyrighted standards incorporated by reference into federal regulations is complicated by the significant value of the public-private partnership in standards. Federal policy recognizes, and agencies consistently reported, significant benefits from the practice of incorporation by reference, particularly as it relates to the use of voluntary consensus standards. Indeed, agency personnel interviewed unanimously reported that, without the work of private standard-development organizations, agencies would not have the time, resources, or technical expertise to fulfill their regulatory missions.

Using voluntary consensus standards in federal regulation yields a variety of public benefits. It is more cost-effective for agencies than creating government-unique standards through the rulemaking process. OMB Circular A-119 recognizes this reality, identifying one of its goals as "[e]liminat[ing] the cost to the Government of developing its own standards and decreas[ing] . . . the burden of complying with agency regulation."[118] Agencies consistently agree. For example, FERC has explained that "[f]rom our experience, the NAESB process is far more efficient and cost effective method of developing technical standards for the industries involved than the use of a notice and comment rulemaking process involving numerous technical

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[117] Standards for Business Practices of Interstate Natural Gas Pipelines, Final Rule, 68 Fed. Reg. 13,813 (March 21, 2003) (to be codified at 18 C.F.R. pt. 284).

[118] OMB CIRCULAR A-119, *supra* note 30, at ¶ 2(a).

conferences in Washington that all believe they have to attend."[119] The practice also allows agencies to capitalize on considerable expertise and resources available outside government. In addition, it decreases the burden of regulation and the costs of enforcement by conforming regulatory requirements to industry best practices. Indeed, regulated parties are often already complying with the voluntary standards that are made mandatory by incorporation by reference. This reduces the discrepancy between industry practice and federal regulation, thereby avoiding confusion and reducing the costs of regulation.

The public-private partnership in standards also benefits the public by improving the process for developing voluntary consensus standards. It "provide[s] incentives and opportunities to establish standards that serve national needs."[120] It has also driven standard-development organizations to adopt more democratic, consensus-based procedures. As Professor Hamilton reported to the Conference in 1978, the original expansion of federal regulatory authority in health and safety was driven in part by concerns that voluntary standards were created in secret and did not adequately consider or serve the public interest. Standard developers responded to the threat of mandatory regulation by opening their processes and including a greater range of interests and perspectives in standard development. Over the past thirty years, the federal policy favoring agency use of voluntary consensus standards has driven voluntary consensus organizations to continue and expand upon these efforts. Of course, agencies play an important role in reviewing the results of the private sector process and determining whether incorporation into regulation, as is or with modifications, would be in the public interest and would carry out applicable statutory obligations. Nonetheless, the beneficial effects of improvements to the standard-development process go far beyond regulation because many if not most of the standards created through these modern, more open processes remain voluntary.

The public-private partnership in standards—which incorporation by reference facilitates—has reaped extraordinary benefits for both government and the private sector. In addressing the important public policy question of how to ensure the reasonable availability of incorporated, copyrighted materials, these benefits must be kept in mind. Any solution must preserve and improve—and not undermine—the valuable public-private partnership in standards.

4. Ways Agencies Have Increased Access to Copyrighted Materials

Although some have urged it, an abrupt, radical change to existing copyright protection for incorporated standards would jeopardize the public-private partnership in standards and, therefore, would be ill advised. Many standard-development organizations rely on proceeds from the sale of their publications to fund their standard-development activities. For example, in its 2010 Annual Report, ASTM reported total operating expenses of $41,969,030.[121] ASTM reported that $35,350,779 of its total operating revenues of $56,969,725 (approximately 62%)

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[119] Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 74 Fed. Reg. 63,287, 63,302 (Dec. 3, 2009) (to be codified at 18 C.F.R. pt. 38).

[120] OMB CIRCULAR A-119, *supra* note 30, at ¶ 2(b).

[121] ASTM International, 2010 Annual Report: Innovation and Standardization at 23, *available at* http://www.nxtbook.com/nxtbooks/astm/annualreport2010/index.php#/0.

was derived from publication sales.[122] Of course, this figure includes funds derived from *all* publication sales, and not just the sale of standards that have been incorporated by reference. Moreover, ASTM explained that only a small percentage of its standards are truly profitable, and many lose money or simply break even. Nonetheless, it is striking that member fees provided only $2,090,259 (approximately 3.7%) of total operating revenues.[123] The bottom line is that revenues generated from the sale of standards are critical to ASTM's operation. The same is true of many other standard developers.

Technological innovations that enable controllable electronic access to copyrighted standards may provide an opportunity to improve access for regulatory purposes without destroying the value of copyrights. Indeed, in recent years, several standard-development organizations have expanded public access to standards via the web using such technological devices. For example:

- In the wake of the Deepwater Horizon oil spill, the American Petroleum Institute (API) provided read-only access to "almost one-third of all API standards, including all standards that are safety-related or have been incorporated into federal regulation" on the organization's website.[124]

- NAESB has obtained software that enables it to make standards available in read-only form on its website to non-members at no charge for three consecutive days for evaluation and commenting purposes.[125]

- The National Fire Protection Association (NFPA) provides access via RealRead® to some of its codes on its website and has recently expanded read-only access to current and previous versions of its codes.[126]

These access options are typically read-only, meaning that the documents can be viewed electronically, but can neither be downloaded nor printed. This limitation allows interested parties to view the documents, while preserving incentives for regular users to purchase their own copy.

Some agencies have improved access by purchasing a license to distribute electronic copies of a standard they are considering using or have decided to incorporate by reference. Such agencies negotiate with the copyright holder for the right to distribute copies of the standard at an agreed cost, either during rulemaking, following promulgation, or both. One example of a situation in which this approach worked involves standards governing best

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122 *Id.*

123 *Id.*

124 Press Release, American Petroleum Institute, API Provides Expanded Online Access to its Safety Standards (Oct. 28, 2010), *available at* http://www.api.org/Newsroom/api-expanded-stds.cfm (last visited Aug. 30, 2011).

125 http://www.naesb.org/misc/NAESB_Nonmember_Evaluation_LockLizard.pdf.

126 News Release, National Fire Protection Association, NFPA Launches New Web Pages to Streamline Access to Technical Document Information (Nov. 16, 2009), *available at* http://www.nfpa.org/newsReleaseDetails.asp?categoryid=488&itemId=45446&rss=NFPAnewsreleases (last visited Aug. 30, 2011).

practices for first responders faced with biological threats. ASTM negotiated a deal with the Department of Homeland Security (DHS) that allowed the agency to broadly distribute electronic copies of the standard, which ordinarily costs $36 per copy, for a flat rate.[127] The standard is available for download for free to all on ASTM's website.[128] While this approach can work, several interviewees suggested that it might not be the best option. Not only does it have the potential to become prohibitively expensive but, more importantly, it risks creating unhealthy financial dependence between agencies and standard-development organizations. If widespread, the practice could undermine the strength and independence of our nation's robust standard-development community.

For these reasons, several agencies suggested that a better alternative is for agencies to work with standard-development organizations to facilitate access to copyrighted, incorporated standards on a case-by-case basis without purchasing a license. While some standard-development organizations are more flexible than others, many have demonstrated a willingness to work with agencies to increase access using emerging technologies, thereby striking a balance between availability and copyright. In some cases, a standard-development organization can provide read-only copies of a standard in the docket or on its own website during the rulemaking process. Agencies may be able to secure similar accommodations following promulgation of a regulation incorporating the standard, particularly where the standard relates to public safety, and the agency's regulatory purpose depends upon wide dissemination of the standard for success. In working with standard-development organizations on access issues, however, agencies should be aware that read-only access documents may not be 508 compliant.[129] One agency reported that, when faced with this issue, the standard developer offered to make accommodations upon request.[130]

One organization that depends upon copyright for funding, but has shown a particular willingness to accommodate access needs is ASTM. ASTM has worked with agencies and regulated parties to facilitate access to its standards, both during rulemaking and following promulgation of a regulation incorporating an ASTM standard. A good example of these efforts is ASTM and CPSC's coordinated efforts with respect to the mandatory toy standard, ASTM

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[127] *See, e.g.*, Barbara Jones, Laurie Locascio, Kenneth Cole, and Scott Coates, *Meeting the Unknown: Standards for Detecting Biological Weapons Agents*, Defense Standardization Program 20-21 (July/December 2007), *available at* http://www.dsp.dla.mil/app_uil/content/newsletters/journal/DSPJ-07-07.pdf (last visited Aug. 28, 2011) ("DHS . . . has obtained an unlimited license from ASTM to allow first responders and others to download the standard free of charge."). ASTM E2458-06, *Practices for Bulk Sample Collection and Swab Sample Collection of Visible Powders Suspected of Being Biological Agents from Nonporous Surfaces*, can be downloaded for free from www.astm.org/COMMIT/E54.htm. ASTM E2601-08, *Standard Practice for Radiological Emergency Response* is also available for free at the same web address.

[128] To download a copy, a user is required to register with ASTM using an email address. Registration is free, but the user must provide a physical mailing address and phone number before the download becomes available. I verified that the process works and takes just a few minutes.

[129] Section 508 of the Rehabilitation Act of 1973, as amended, requires federal agencies to make electronic and information technology accessible to those with disabilities. *See* 29 U.S.C. § 794.

[130] In most cases a standard developer provides read-only access on its own website, where it can keep track of downloads, and the agency simply provides a clear instruction regarding the particular web address of the standard. Some agencies expressed discomfort with this arrangement, however, and have insisted upon hosting the read-only document in a docket or website controlled by the agency.

F963, required by the Consumer Product Safety Improvement Act of 2008 (CPSIA).[131] During the initial rulemaking, ASTM provided a read-only copy of the standard on its website, and CPSC directed interested parties to the appropriate web address in its Federal Register notice.[132] One concern in the rulemaking was that small, independent toy manufacturers might not be able to afford the standard once promulgated. ASTM worked with the Handmade Toy Alliance to negotiate a license that permitted the organization to pay a flat fee of $800 per year to distribute up to 800 copies of the standard. This enabled the Handmade Toy Alliance to offer the standard to its over 650 members for just $10.

When an agency is considering incorporating copyrighted material by reference into a regulation, it should work with the copyright holder to ensure the material will be reasonably available to regulated parties and the public both during rulemaking and following promulgation. Agencies should avoid solutions that require them to obtain a license to achieve this goal. Instead, agencies should work with copyright holders and use available technological solutions to strike an appropriate balance between the public interest in access and the copyright holder's need to fund its standard-development activities.

5. Ensuring Reasonable Availability of Copyrighted Materials

Whether copyrighted material is reasonably available to regulated parties and the public may be relevant in two distinct contexts. First, an agency may consider whether such material is reasonably available when deciding whether to "use" that standard. If a voluntary consensus standard is not reasonably available, that may render it "impractical" within the meaning of OMB Circular A-119. For example, restrictions on access may make a standard "ineffectual, inefficient, or inconsistent with agency mission" or cause it to "impose more burdens, or . . . be less useful, than . . . another standard."[133] Second, an agency may consider whether a standard is reasonably available in evaluating whether and to what extent to work with a copyright holder to broaden access. This task may be appropriate during the rulemaking stage, and may also come into play once an agency has decided to promulgate a regulation incorporating the standard by reference.

In deciding whether to incorporate a particular copyrighted material by reference, and in working with a copyright holder to ensure the material is reasonably available, an agency should consider: (1) the stage of the regulatory proceedings, because greater access may be required during rulemaking than following promulgation; (2) whether the material is related to public safety or otherwise requires broad accessibility to accomplish the regulatory purpose of incorporation; (3) the cost to obtain a copy of the material, including the cumulative cost to obtain a standard or other material containing secondary references; (4) the identity of regulated

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131 Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314 (Aug. 14, 2008). The CPSC provides a very useful guide to the CPSIA, including a variety of supplemental information and agency documents in a central location on its website. *See* Consumer Prod. Safety Comm'n, Consumer Product Safety Improvement Act, http://www.cpsc.gov/about/cpsia/cpsia.html.

132 Notice of Consultation Pursuant to Section 106 of the CPSIA, Request for Comments and Information, 74 Fed. Reg. 35848, 35850 (July 21, 2009).

133 OMB CIRCULAR A-119, *supra* note 30, at ¶ 6(a)(2).

parties that must have access to the incorporated material; and (5) regulatory reasons to require regulated parties to independently obtain access to incorporated material.

The stage of the regulatory proceedings. During the rulemaking process, broad access to copyrighted materials may be of particular importance, to enable interested parties to provide meaningful comments on the regulatory proposal. Once a regulation that incorporates by reference has been promulgated, the access needs of regulated parties may take on particular importance. Agencies should thus evaluate "reasonable availability" in light of the stage of the regulatory proceeding.

Whether the material is related to public safety or otherwise requires broad accessibility to accomplish the regulatory purposes of incorporation. Many standards incorporated by reference consist of technical specifications of interest only to a small number of regulated entities. Other standards incorporated by reference may have important public safety implications or otherwise require broader accessibility to vindicate an agency's regulatory purpose. For example, some interviewees expressed the view that safety standards, particularly those that first responders may need, should be readily available. An agency should carefully consider the type of standard and its relationship to the agency's regulatory mission in determining whether it is "reasonably available."

The cost to obtain a copy of the copyrighted material. There is great variety in the cost of copyrighted materials incorporated by reference. For example ASTM's toy standard costs $62,[134] while ISO's toy standard costs approximately $241 (CHF 192,00)[135] and the equivalent European Standard costs approximately $386 (£236).[136] Some full codes may cost hundreds of dollars, while other individual standards cost much less. And if a standard contains secondary references, the purchase of two or more standards may be required. In such cases, agencies should take the cumulative cost into consideration. Agencies should also consider cost in conjunction with other facts that may affect whether a particular dollar amount is "reasonable." Cost to an individual or small business may be effectively higher than the same cost would be to a large corporation. The relative cost of a standard may also depend on the total cost of complying with the regulation. For example, if compliance costs $100,000, $100 to buy the standard may seem more reasonable. Moreover, regulated entities, and even members of the public, may reduce the costs of accessing standards by becoming members of the relevant standard-development organization. The costs of such membership can be reasonable, may be a business necessity in some industries, and frequently includes free access to standards.[137]

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[134] ASTM Int'l, *ASTM F963-08 Standard Consumer Safety Specification for Toy Safety*, http://www.astm.org/Standards/F963.htm (last visited Aug. 28, 2011). For $74.40, one can purchase a redline version of the standard showing changes from the previous version. *Id.*

[135] International Organization for Standardization, ISO 8124-1:2009, *Safety of toys – Part 1: Safety aspects related to mechanical and physical properties*, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=51974 (last visited Aug. 28, 2011).

[136] British Standards Institution, BS EN 71-1:2011, *Safety of Toys: Physical and Mechanical Properties*, http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030217312 (last visited Aug. 28, 2011).

[137] *See e.g.*, ASTM, Int'l, Member Types and Benefits, http://www.astm.org/MEMBERSHIP/MemTypes.htm.

The identity of regulated parties that must have access to the incorporated material. As many agencies acknowledged, paying for copyrighted materials incorporated by reference may be more difficult for individuals or small entities, while the burden may not be so heavy for large corporations. During rulemaking, this may mean that manufacturers are more likely to have access to a standard than consumers or public interest organizations. Some agencies noted that regulated parties might already have copies of the standard by virtue of their membership in standard-development organizations or practice of complying with industry standards. On the other hand, if an agency incorporates a standard from another industry—for example, the FAA has incorporated a ballistic standard in its requirement that planes include a bomb containment area—regulated parties may be less likely to have access to it.

Regulatory reasons to require regulated parties to independently obtain access to incorporated material. Some agencies may have good reasons for requiring regulated parties to independently obtain standards. For example, FERC strongly encourages regulated parties to become members of NAESB and participate in its standard-development activities. Members get access to standards for free. Membership also benefits the public interest by encouraging broad-based participation in the development of standards. Another example is FAA, which considers obtaining manufacturer manuals a reasonable business expense for owners and operators of aviation products, who are under a general duty to keep aircraft in a safe and airworthy condition regardless of whether an airworthiness directive requiring a specific inspection or repair has been issued.

Agencies should consider these and other relevant factors in determining how best to ensure that copyrighted material incorporated by reference is reasonably available to members of the public and regulated parties. Finally, it bears noting that most standards incorporated by reference into federal regulations are highly technical. Even if a copy of such a standard is freely available, it may not be meaningfully accessible to members of the public who do not possess requisite technical, scientific, or other expertise. To ensure that such standards are reasonably available to all, particularly during the rulemaking process, agencies should include in a rule's preamble an explanation of the copyrighted material and how its incorporation by reference will further the agency's regulatory purpose.

III. Updating Regulations That Incorporate by Reference

Many agencies find it challenging to keep regulations up-to-date with references to the most recent version of incorporated material. As previously explained, the law requires agencies to identify the date of the specific version of a standard or other material incorporated by reference. When a more recent version of the material becomes available, the regulation must be updated to reflect the change.[138] This requires the agency to conduct a rulemaking. Standard-development organizations typically revise their standards every few years, making it particularly difficult for agencies to keep up. In some cases, agencies have started a rulemaking

[138] *See, e.g.*, Combustible Dust, 74 Fed. Reg. 54,333, 54,339 (proposed Oct. 21, 2009) (to be codified at 29 C.F.R. pt. 1910) ("In the Agency's experience, consensus standards incorporated by reference into OSHA rules quickly become out of date, making it difficult for employers to comply when the out-of-date consensus standards become difficult to obtain.").

to update a regulation to reflect a new version of an incorporated standard, only to find a yet more recent version of the standard becomes available before the rulemaking is completed. The problem is not unique to incorporation by reference in regulation, of course, but has been noted in other contexts, including with respect to ageing federal statutes that prove nearly impervious to amendment or repeal.[139]

Agencies use several techniques to address the updating challenge. The effectiveness of each technique depends upon the nature of the regulation, the reasons and extent to which it may be considered outdated, and the circumstances that make updating difficult. Unfortunately, in some instances, updating proves to be an intractable challenge that cannot be surmounted using available regulatory techniques. A statutory solution to address these situations may thus be appropriate.

A. Legal Prohibitions on Dynamic Incorporations

An obvious way to avoid the updating issue would be to dynamically incorporate by reference in the first instance. A dynamic incorporation is one not keyed to a particular version of a referenced material, but rather providing that the most recent version should be consulted in complying with the regulation. This alternative is attractive because it does not require the agency to take any action to update a regulation when a revised version of an incorporated document becomes available—the most recent version is always and necessarily the one incorporated by reference.

Several legal provisions prohibit dynamic incorporations—and for good reason.[140] OFR's regulations[141] and Document Drafting Handbook (DDH)[142] require agencies to identify the particular version of any material incorporated by reference. Indeed, OFR regulations expressly state that "[f]uture amendments or revisions of [an incorporated] publication are not included" in the reference.[143] Circular A-119 mirrors this basic publication requirement, providing that "[i]n regulations, the reference [to a voluntary consensus standard] must include the date of issuance," thus keying the incorporation to a particular version of the standard. This requirement of static incorporation is consistent with the purpose of the publication requirement because it ensures clear notice of regulatory requirements. Relatedly, it prevents confusion—both for the agency and for regulated parties—regarding the requirements of the law at any given

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139 *See, e.g.*, Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (defining "legal obsolescence" as "the feeling that, because a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and that *some* of these laws . . . also do not fit, are in some sense inconsistent with, our whole legal landscape").

140 *See, e.g.*, Combustible Dust, 74 Fed. Reg. 54,333, 54,339 (proposed Oct. 21, 2009) (to be codified at 29 C.F.R. pt. 1910) ("OSHA cannot legally update NFPA or other consensus standards use in its rules by referring to the 'current' or 'most recent' edition of the consensus standards.").

141 *See, e.g.*, 1 C.F.R. § 51.1(f) ("Incorporation by reference of a publication is limited to the edition of the publication that is approved.").

142 *See* Nat'l Archives & Records Admin., Federal Register Document Drafting Handbook, Chapter 6: What is Incorporation by Reference, and How do I do it? (Jan. 2011), http://www.archives.gov/federal-register/write/handbook/chapter-6.pdf [hereinafter DDH].

143 1 C.F.R. § 51.1(f).

point in time. Perhaps most crucially, it preserves an agency's regulatory authority and responsibility. That the first version of a standard serves the public interest and warrants incorporation does not necessarily mean that subsequent incarnations of that standard will do the same. It is critical that agencies exercise independent judgment over each version to make certain that, as revised, the standard continues to carry out the public interest.

Dynamic incorporations may also offend more fundamental legal principles, including nondelegation principles and notice-and-comment requirements.[144] As to the first point, "[d]ynamic incorporation at least poses an issue under the nondelegation doctrine,"[145] whereas "static incorporation will *always* be constitutional."[146] Whether a dynamic incorporation constitutes an unconstitutional delegation may depend on the source of the material referenced. Dynamic incorporation of a federal statute would likely pose less constitutional risk because a delegation to Congress would be no delegation at all.[147] In contrast, dynamic incorporation to a privately-created standard would threaten constitutional norms by effectively delegating the agency's statutory authority to a standard-development organization.[148] As to the second point, dynamic incorporation by a federal agency may conflict with the APA's notice-and-comment requirements.[149] By permitting automatic modifications to administrative regulations, without the agency conducting a rulemaking, dynamic incorporation robs the public of the opportunity to examine and comment on future changes to the incorporated material.

B. Technical Amendments to Update Access Information

A comparatively minor problem with outdated incorporations by reference occurs when the public access information contained in the regulation becomes outdated, incorrect, or incomplete. As explained above, rules must include information about where the public can find a copy of any material incorporated by reference. Over time, this information may become outdated as, for example, publishers or resellers move or stop providing a particular document or version thereof. Moreover, in recent years, OFR has required agencies to include more public access information when incorporating material by reference.[150] Thus, even if information

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144 Department of Labor, Occupational Safety and Health Administration, Final Rule, Standards Improvement Project—Phase III, 76 Fed. Reg. 33,590, 33,593 (2011) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, et al.) ("The Agency notes that it cannot incorporate by reference the latest editions of consensus standards without undertaking new rulemaking because such action would delegate the government's regulatory authority to consensus standards developing organizations, as well as deprive the public of the notice-and-comment period required by law.")

145 Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1484-85 (2000).

146 *Id.* at 1485.

147 *Id.*; *see* Franklin v. United States, 216 U.S. 559, 569 (1910). Of course, OFR prohibits agencies from incorporating statutes by reference for other reasons. *See infra* at notes ___, and accompanying text.

148 *See id.* at 1487-88; *see also id.* at 1489 ("[A] dynamic incorporation constitutes a delegation, which must be evaluated under the applicable delegation doctrine, but a static incorporation is *not a delegation at all* and cannot, therefore, be invalid under any delegation doctrine.").

149 Department of Labor, Occupational Safety and Health Administration, Final Rule, Standards Improvement Project—Phase III, 76 Fed. Reg. 33,590, 33,593 (2011)

150 *See* DDH, *supra* note 142, at 6-4.

contained in a regulation remains current, it may be incomplete according to current OFR incorporation by reference requirements.

This problem gets worse if ignored, for two reasons. First, some agencies have found that when they make substantive changes to one of their parts of the CFR, OFR may insist they take the opportunity to update old access information. This can be particularly difficult if, for example, the incorporated material is a standard that is no longer being published or sold by resellers. Particularly if the OFR's request catches the agency by surprise, it can delay publication of a new rule. Second, and related, OFR has interpreted 5 U.S.C. § 552 and its own regulations as granting it authority to revoke approval of an incorporation by reference when the material at issue is no longer "reasonably available to and usable by the class of persons affected."[151] Although OFR has yet to exercise this authority, it may do so if an incorporation proves to be incurably outdated.

This problem is easily solved with a technical amendment to the affected regulation. A technical amendment is one that corrects non-substantive errors in previously published regulations. Chapter 4 of the DDH provides detailed guidance for agencies that need to so amend a regulation.[152] The process is simple and straightforward, and does not require an agency to conduct a rulemaking. It is important that regulated parties and members of the public are able to locate materials incorporated by reference in the CFR. Thus, agencies should periodically review their regulations and make technical amendments as necessary to ensure complete and accurate access information is included in all regulations that incorporate by reference.

C. Agency Practices That Can Facilitate Updating

Agencies that regularly incorporate private standards should participate in standard-setting processes and adopt complementary internal procedures to ensure good communication of emerging revisions to those within the agency charged with making policy decisions and writing rules. Participating in standard development ensures agency personnel are aware of revisions to standards as they are being considered, thereby providing a more efficient and reliable way for the agency to understand and evaluate new versions. When standard-setting organizations provide updates and schedules to members of the relevant committee, they will necessarily be updating the agency. And the communication runs both ways—agency participants can inform standard developers of the agency's concerns and priorities. This in turn may reduce the likelihood that a revised standard will be inconsistent with the agency's regulatory goals. Indeed, some agencies reported that they have on occasion requested that a standard-development organization examine a new problem and update an incorporated standard to address it. Thus, participation may not only help with updating, but may also serve the broader regulatory needs of the agency.

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151 1 C.F.R. § 51.7(a)(4).

152 *See* DDH, Chapter 4: How Do I Correct My Document (Oct. 1998), http://www.archives.gov/federal-register/write/handbook/chapter-4.pdf.

FERC is a good example of an agency that has formed a mutually beneficially partnership with a standard-development organization, NAESB. NAESB often creates or updates standards in response to industry needs, but has also updated its standards in response to FERC's regulatory activities and policy initiatives.[153] FERC employees participate in the NAESB's process, and when they are unable to attend a meeting, NAESB updates the agency on what was missed. The result is that FERC is generally aware of the direction NAESB is headed with particular standards. And agency personnel can communicate the agency's needs and views to NAESB during the standard-setting process, thereby shaping the resulting standard. Other agencies, including but not limited to CPSC and NRC, also participate in standard development and have crafted internal policies and procedures to make the most of that participation.

Agencies can decrease the costs and increase the usefulness of participation by taking advantage of relevant guidance and resources available within the federal government.[154] Under the NTTAA, the National Institute for Science and Technology (NIST), an agency of the Department of Commerce, coordinates the federal government's interaction with the private standard-development community.[155] NIST implements its duties under the NTTAA by working closely with standard-development organizations and coordinating with agencies through the Interagency Committee on Standards Policy (ICSP).[156] Through the ICSP, NIST formulates uniform federal policies and shares information regarding agency use of voluntary consensus standards. Each agency participates through its Standards Executive, typically a high-level official who represents the agency at quarterly ICSP meetings and implements federal standards policies within their own agencies.[157] NIST also provides a variety of resources to agencies that engage in private standard-setting processes or use voluntary consensus standards in regulation.[158] It maintains a website, Standards.gov, that provides background materials and information about federal standards policy, provides a complete database of all standards

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153 *See, e.g.*, Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 74 Fed. Reg. 63,287, 63,289 (Dec. 3, 2009) (to be codified at 18 C.F.R. Part 38) (revising regulations to incorporate by reference new versions of various NAESB standards, and explaining that the effort "include[s] standards adopted by NAESB in response to [FERC] Order Nos. 890, 890-A, and 890-B").

154 Professor Hamilton's 1978 report to the Conference may be a good starting point, as it includes detailed analysis of how agencies can best engage with voluntary standard-development efforts and use resulting voluntary standards to make health and safety regulation better. *See* Hamilton, *supra* note 31, at 1446-84.

155 15 U.S.C. § 272(b)(3) (providing that a function of NIST is "to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations"); *see also* U.S. Department of Commerce, National Institute of Science and Technology, NISTIR 5967, The National Technology Transfer and Advancement Act—Plan for Implementation 1 (Jan. 1997), *available at* http://gsi.nist.gov/global/docs/pubs/NISTIR_5967.pdf ("The [NTTAA] directs NIST to coordinate with other federal government agencies to achieve greater reliance on voluntary standards and conformity assessment bodies with lessened dependence on in-house regulations.") [hereinafter *NIST NTTAA Implementation Plan*].

156 *NIST NTTAA Implementation Plan*, *supra* note 155, at 5. As required by the NTTAA, NIST has issued policy guidance on federal agency conformity assessment activities. *See* Dep't of Commerce, National Institute of Standards and Technology, Guidance on Federal Conformity Assessment Activities, 65 Fed. Reg. 48,894 (2000).

157 NIST provides a directory of Standards Executives at http://standards.gov/standards_gov/standardsExecutives.cfm.

158 Other tools are available to help agencies understand the U.S. standards system. For example, ANSI offers a free, online educational resource at http://www.standardslearn.org/default.aspx.

incorporated by reference into the CFR,[159] and offers training and guidance to agencies. In December 2010, NIST issued a Request for Information seeking input from agencies on standards issues.[160] The Subcommittee on Standards is currently preparing an analysis of federal agency participation in standard-development activities based on the comments received. This should provide useful guidance to interested agencies.

D. Confining Standards to Appendices and Guidance

Agencies may be tempted to avoid the updating challenge by confining references to extrinsic materials to non-binding appendices and guidance documents. Taking this approach, an agency could promulgate a general standard in a regulation, and then use a non-binding supplementary document to direct regulated parties to privately-created standards that provide detail and alternatives for compliance. Such documents are easier to modify and update than regulations, because compliance with the APA's notice-and-comment requirements is not required. By confining standards to guidance, then, agencies could sidestep the updating issue. When a standard incorporated by reference into an appendix or guidance document is revised, the agency could easily update its document to reflect the change.

Agencies should not take this approach to address challenges faced in updating incorporations by reference. First, the legal implication of confining incorporations by reference to guidance, policies statements, and similar documents is that the referenced material is generally not mandatory. If a regulated party does not adhere to the referenced material, the agency may have difficulty imposing legal sanction unless the party has also violated the underlying regulation.[161] Second, the practice of using guidance to fill out regulatory details not included in the codified regulation is controversial because it tends to undermine fundamental principles of administrative law and good governance. Often, generally applicable substantive standards confined to "non-binding" agency documents such as guidance become binding de facto. The Conference has historically recommended against agencies "issu[ing] statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment)."[162] Although the process may be burdensome, notice-and-comment

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[159] *See* Standards Incorporated by Reference (SIBR) Database, Home Page, http://standards.gov/sibr/query/index.cfm. OFR maintains a similar database of materials approved for incorporation by reference, organized according to where in the CFR the material is referenced, but reports that the listing is not necessarily complete. National Archives and Records Administration, Electronic Code of Federal Regulations (e-CFR), Incorporation by Reference, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=ibr.tpl.

[160] *See* Effectiveness of Federal Agency Participation in Standardization in Select Technology Sectors for National Science and Technology Council's Sub-Committee on Standardization, Request for Information, 75 Fed. Reg. 76,397 (Dec. 8, 2010).

[161] *See* 5 U.S.C. 552(a); *see, e.g.*, Desmond v. Mukasey, 530 F.3d 944, 957 (noting that "guidance 'does not carry the force of law and is not entitled to any special deference,'" though it may be "relevant" to a court's interpretation of regulatory requirements (quoting Pack v. Kmart Corp., 166 F.3d 1300, 1305 n.5 (10th Cir. 1999))).

[162] Administrative Conference of the United States, Recommendation 92-2, *Agency Policy Statements* ¶ I(A) (June 18, 1992); *see also* Administrative Conference of the United States, Recommendation 89-5, *Achieving Judicial Acceptance of Agency Statutory Interpretations* (July 10, 1989) ("In developing an interpretation of a statute that is intended to be definitive, an agency should use procedures such as rulemaking, formal adjudication, or

ensures that affected parties and members of the public have the opportunity to participate in the adoption of regulatory standards. This principle of public participation and transparency should be observed with respect to incorporation by reference.

In sum, agencies should not address updating challenges by confining incorporations by reference to non-binding appendices or guidance documents. If an agency intends to make compliance with an extrinsic standard mandatory, it should incorporate that standard by reference in a regulation

E. Using Equivalency Determinations or Enforcement Discretion

Some agencies reported that they are able to effectively use enforcement discretion to mitigate the harms of an outdated standard incorporated by reference into a regulation. This may be accomplished informally or via a process or standard established in an agency's regulations. Whether formal or informal, an agency's approach may depend upon the nature of its position vis-à-vis regulated parties. If an agency is acting in permission-granting capacity, it can use procedures that allow it to grant approval to a party that complies with a more recent standard that is equivalent in material respects to the standard incorporated by reference. In contrast, if an agency is acting in an enforcement capacity, it may reduce a penalty or simply choose not to enforce its regulations against a party in compliance with a more recent, equivalent standard. Either approach is particularly justified when compliance with a newer version of a standard necessarily implies compliance with the earlier, incorporated version of the standard.

The Coast Guard is a good example of an agency that uses equivalency determinations in its permission-granting capacity to deal with outdated standards incorporated by reference. The process and principles governing the agency's approach are codified in its regulations. Under the Coast Guard's regulatory scheme, manufacturers seek pre-approval of the equipment and materials they intend to produce and market as Coast Guard-approved. If a manufacturer submits a design for approval that complies with a more recent version of a standard incorporated by reference in applicable regulations, the Coast Guard may nonetheless approve the design if the newer standard "has equivalent performance characteristics."[163] This requires the applicant to "demonstrate to the satisfaction of the Commandant that the item is at least as effective as one that meets the requirements" specified in the relevant regulation.[164] This approach works well because it puts the burden on the regulated party to demonstrate equivalency, and provides the Coast Guard with a process that prioritizes the public interest over rigid adherence to older, incorporated standards.

OSHA, in its capacity as an enforcement agency, uses a concept of "de minimis violations" to achieve a similar end. OSHA conducts inspections of employers alleged to be in

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other procedures authorized by Congress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.").

[163] 46 C.F.R. § 159.005-7(c). The regulation is not specifically aimed at permitting compliance with more recent versions of standards incorporated by reference. Rather, it is more broadly worded to permit equivalency determinations regardless of the explanation for the formal noncompliance with applicable regulations.

[164] *Id.*

violation of OSHA regulations.[165] The regulations explicitly grant inspectors discretion to issue "notices of de minimis violations that have no direct or immediate relationship to safety or health."[166] The agency reports that such de minimis violations may be assessed when an employer is technically not complying with a regulation because it is adhering to a more recent version of a standard incorporated by reference into an applicable regulation. The upside of this approach is that it provides some flexibility to mitigate the harms of an outdated incorporated standard. This is particularly important given that employers may need to—and perhaps should—comply with the most up-to-date version of a voluntary consensus standard the agency has incorporated. The downside of this approach, however, is that the employer is still cited with a violation, which carries a certain stigma, even if the agency has found the violation "de minimis." This is particularly troublesome if the violation was unavoidable because products meeting the older version of the standard are no longer available in the marketplace. As another agency noted, too, defining "de minimis" may be controversial depending upon the particular regulatory standard at issue.

Enforcement agencies may also take a more informal approach by declining to enforce a regulation against a party that is complying with a more recent version of an incorporated standard. Agencies reported this approach can be effective. While it is less transparent than the de minimis violation approach described above, it accommodates the possibility that products meeting an older standard may not be available, avoids the stigma of assessing a violation where there is no actual harm to public health and safety, and preserves agency resources for more necessary enforcement actions.

Agency experience with these approaches suggests a few guiding principles. Agencies that find it prohibitively burdensome to keep up with revisions of standards incorporated by reference in regulations should use equivalency determinations or enforcement discretion to minimize the harm caused by out-of-date references. Each such agency should structure its approach as appropriate in light of its position vis-à-vis regulated parties. In the interests of fairness and transparency, agencies should adopt regulations that clearly establish the policies and principles governing equivalency determinations or guiding the use of enforcement discretion.

F. Direct Final Rulemaking

Several agencies reported having effectively used direct final rulemaking to update regulations to reflect a revised version of a standard previously incorporated by reference. This approach permits an agency to lawfully truncate the rulemaking process. Rather than initiating the comment period by publishing a Notice of Proposed Rulemaking (NPRM), the agency publishes a Direct Final Rule. This rule becomes effective on a specified date unless an adverse comment is filed within the established comment period. For uncontroversial rules, the process can save an agency considerable time. Indeed, the Conference has previously recommended

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[165] *See, e.g.*, 29 C.F.R. § 1903.3 (establishing the agency's authority to inspect). OSHA regulations also permit the exercise of discretion in assessing a penalty. *See id.* § 1903.15.

[166] *Id.* § 1903.14(a)

that, "[i]n order to expedite the promulgation of noncontroversial rules, agencies should develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comment."[167]

The FAA provides a good example of how the direct final rule process should be structured.[168] FAA regulations explain that "[i]f an NPRM would be unnecessary because we do not expect to receive adverse comment, [the agency] may issue a direct final rule."[169] The direct final rule is published in the Federal Register and becomes effective on the date listed, provided no adverse comment or intent to file an adverse comment is received by the agency during the comment period, which generally extends for 60 days following publication.[170] An "adverse comment" is defined as one that "explains why a rule would be inappropriate, or would be ineffective or unacceptable without a change," or "challenge[s] the rule's underlying premise or approach."[171] This definition is not met if the comment is "frivolous or insubstantial,"[172] or suggests a different rule without explaining "why the direct final rule would be ineffective without the change."[173] If no adverse comment is received, the FAA publishes a confirmation of the effective date of the rule in the Federal Register within 15 days after the comment period closes.[174] If an adverse comment is received, however, the FAA publishes a notice to that effect in the Federal Register and "may withdraw the direct final rule in whole or in part."[175] If it withdraws the rule, the FAA "may incorporate the commenter's recommendation into another direct final rule or may publish a notice of proposed rulemaking."[176]

Several agencies identified direct final rulemaking as a viable option for noncontroversial updates to regulations that incorporate by reference. PHMSA regulations explicitly provide that its direct final rulemaking process is appropriate for issuing rules that "[i]ncorporate by reference the latest edition of technical or industry standards."[177] The Coast Guard similarly uses directly final rulemaking to update incorporations by reference. Indeed, it recently published a direct final rule and request for comments to "harmoniz[e] structural and performance standards for inflatable recreational personal flotation devices (PFDs) with the current voluntary industry consensus standards."[178] Other agencies, including but not limited to EPA, reported significant success using direct final rulemaking to update regulations that incorporate by reference.

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167 Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* ¶ I(A) (June 15, 1995); *see generally* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

168 *See* Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* ¶ I (June 15, 1995).

169 14 C.F.R. § 11.29(b).

170 *Id.* § 11.31(a).

171 *Id.* § 11.31(a).

172 *Id.* § 11.31(a)(2).

173 *Id.* § 11.31(a)(1).

174 *Id.* § 11.31(b).

175 *Id.* § 11.31(c).

176 *Id.* § 11.31(c).

177 *Id.* § 106.4(a)(2).

178 Inflatable Personal Flotation Devices, 76 Fed. Reg. 17,561, 17,561 (March 30, 2011) (to be codified at 46 C.F.R. Part 160, effective September 26, 2011, if no adverse comment is received by May 31, 2011).

For non-controversial substantive updates to incorporations by reference in regulations, agencies authorized to regulate under Section 553 of the APA should use direct final rulemaking.[179] Before an agency uses direct final rulemaking to update incorporations by reference, it should adopt regulations establishing the principles and procedures it will use. These principles and procedures should conform to the Conference's previous recommendations for direct final rulemaking.[180]

G. Statutory Solutions

In some situations, the tools discussed above are not sufficient for an agency to keep regulations that incorporate by reference updated. Dynamic incorporations are legally prohibited and bad policy. Where the required update relates to the substance of the incorporated material, and not merely to the access information published in the Federal Register and CFR, a technical amendment is of no use. Confining incorporations by reference to nonbinding policy and guidance documents is generally inadvisable. Using enforcement discretion can mitigate the harms of an out-of-date standard, but is not a genuine solution to the problem of outdated references. Finally, while direct final rulemaking can work, the approach has limitations. A single adverse comment can derail the agency's efforts. This risk, in the face of severe time and resource limitations, leads agencies to be cautious in using direct final rulemaking if there is any reason to believe that a revision will be controversial. And for agencies subject to procedural requirements beyond those provided in Section 553 of the APA, such as OSHA, direct final rulemaking may simply not be an option. A statutory solution establishing an abbreviated notice-and-and comment procedure for updating regulations to reflect new versions of materials incorporated by reference may thus be in order.

CPSC's statutes provide examples of potential statutory solutions to the updating challenge. Several provisions direct CPSC to use identified voluntary consensus standards, while providing a mechanism for updating the incorporation by reference. For example:

- Section 106 of the CPSIA declares the provisions of ASTM's toy standard "shall be considered to be consumer product safety standards issued by the Commissions."[181] With respect to updating, the statute provides that "[i]f ASTM International (or its successor entity) proposes to revise" the standard, "it shall notify the Commission of the proposed revision," and "[t]he Commission shall incorporate the revision or a section of the revision into the consumer product safety rule."[182] The updated regulation becomes "effective 180 days after the date

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[179] As the Conference has previously explained, "direct final rulemaking . . . complies with the basic notice-and-comment requirements in section 553 of the APA." *See* Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* ¶ I(A) (June 15, 1995). Agencies subject to procedural requirements beyond those contained in Section 553 may not be able to use direct final rulemaking.

[180] *See* Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* ¶ I (June 15, 1995).

[181] 47 U.S.C. § 2056b(a).

[182] *Id.* § 2056b(g).

on which ASTM International notifies the Commission of the revision unless, within 90 days after receiving that notice, the Commission notifies ASTM International that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard."[183] In the event the Commission makes such a determination, "the existing standard shall continue to be considered to be a consumer product safety rule without regard to the proposed revision."[184]

- CPSC's statutory mandate to regulate the safety of all-terrain vehicles (ATVs) similarly declares an ANSI standard to be a consumer product safety standard,[185] and requires ANSI or its successor to notify CPSC when it is considering a revision.[186] "Within 120 days after it receives notice of such a revision," the Commission is required to "issue a notice of proposed rulemaking in accordance with section 553 of title 5 to amend" its regulations "to include any such revision that the Commission determines is reasonably related to the safe performance of all-terrain vehicles."[187] The Commission is further required to "promulgate an amendment to the standard . . . within 180 days after" publishing the NPRM.[188]

- The statute governing CPSC's regulation of swimming pool and spa drain covers also declares an ANSI standard to be a consumer product safety standard.[189] The updating provision in this statute requires ANSI or its successor to notify CPSC if a revision is under consideration.[190] But the remainder of the updating process is simpler. "If the Commission determines that the proposed revision is in the public interest, it shall incorporate the revision into the standard after providing 30 days notice to the public."[191]

One benefit of these provisions is that they vest the agency with ultimate authority to decide whether to update a regulation to incorporate a new version of a standard. As several agencies reported, updating to a new version of an incorporated standard is not always desirable as a matter of substantive regulatory policy. Standard-development organizations typically revise standards on a set schedule, so a new version of a standard may not be different enough to warrant the investment required to conduct a rulemaking, even pursuant to minimized procedures such as those described above. Moreover, a new version of a standard may include meaningful changes that nonetheless do not further the agency's regulatory goal or purpose. The changes may affect parts of a standard an agency has not incorporated, may weaken the standard, or may move it in a direction inconsistent with the agency's statutory mandate or policy judgment.

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183 *Id.*
184 *Id.*
185 *See* 15 U.S.C. § 2089(a)(1).
186 *See id.* § 2089(b)(1).
187 *Id.* § 2089(b)(2).
188 *Id.*
189 *See* 15 U.S.C. § 8003(a), (b).
190 *See id.* § 8003(b).
191 *Id.*

At the same time, a statutory solution would not be workable if it required agencies to identify, evaluate, and respond to every revision of every standard incorporated by reference. Agencies consistently reported that they lack the resources to take on such a task. The CPSC statutes described above usefully put the burden on the standard developer to notify the agency of a pending revision. But they do not require the standard developer to identify and explain the changes to the standard, leaving the agency with the responsibility to do that work. Some agencies reported that they achieve a better result by requiring a regulated party or standard-development organization to file a petition notifying the agency that a new version of a standard is available and requesting the agency update the regulation incorporating it. The party filing such a petition typically must explain how the new version of a standard differs from the old version and demonstrate that updating would further the agency's regulatory purpose.

In light of these considerations, and considering the significant difficulty some agencies experience updating regulations to reflect revised standards, Congress should consider authorizing agencies to use streamlined procedures to update incorporations by reference. An appropriate statutory solution would: (1) require interested parties to file a petition for rulemaking that would notify the agency of a revised standard, identify the changes from the incorporated version of the standard, and explain why updating would be consistent with the agency's regulatory purpose; (2) vest the agency with authority to determine whether to act on the petition; (3) authorize the agency, upon a finding that updating is consistent with the regulatory purpose of the relevant regulation, to issue a direct final rule under Section 553; and (4) provide that the rule shall become effective if no adverse comments are received or, alternatively, following the agency's publication, prior to the effective date, of a response to any adverse comments received, provided such comments do not demonstrate that updating is inconsistent with regulatory purpose. Such a procedure would be of significant use to agencies that are otherwise required to comply with heightened rulemaking procedures. It would allow public participation in updating, while preventing a single adverse comment from derailing an agency's effort to keep incorporations properly up-to-date.

IV. Procedural and Drafting Issues

OFR regulations and Chapter 6 of the DDH[192] establish the policies and procedures agencies must follow to secure OFR approval to publish a rule that incorporates by reference. These requirements provide that an agency must submit a written letter requesting approval 20 working days before it intends to publish the relevant rule.[193] The request must include a draft "of the final rule document that uses the proper language of incorporation,"[194] as well as a copy of the material to be incorporated.[195] Only certain kinds of materials are eligible for incorporation by reference, an issue discussed in greater detail below.[196] The materials must be

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192 *See* DDH, *supra* note 142.

193 *See* 1 C.F.R. § 51.5(a)(1); DDH, *supra note* 142, at 6-3. The DDH provides an example of what an agency's request letter should look like. DDH, *supra note* 142, at 6-4.

194 1 C.F.R. § 51.5(a)(2); *see also id.* § 51.9 (establishing the proper language of incorporation by reference). The DDH clarifies that a copy of the *draft* rule document should be submitted. DDH, *supra* note 142, at 6-3.

195 *See* 1 C.F.R. § 51.5(a)(3).

196 *See infra* at Part IV.A.

"[c]learly identified by the title, date, edition, author, publisher, and identification number of the publication,"[197] and the draft rule must use proper incorporation by reference language and include information regarding where the public can view or obtain a copy of the incorporated material.[198] Finally, incorporation by reference language must meet certain formatting requirements.[199]

In some cases, OFR uses specialized procedures, established by long-standing letter agreements with particular agencies, for processing certain types of frequently recurring approval requests. For example, OFR has developed a specialized approval process for the FAA's Airworthiness Directives, which are published nearly every day and almost always incorporate by reference. Similarly, OFR and EPA have established a specialized procedure for EPAs approval via incorporation by reference of State Implementation Plans. In recent years, however, OFR has sought to make its approval process more formal and consistent. Thus, while observing existing letter agreements with agencies, OFR now is no longer creating new, specialized procedures.

OFR provides several resources, including written guidance, training, and staff assistance, to help agencies navigate its process and requirements. The DDH provides detailed guidance to agencies seeking to publish rules that incorporate by reference. In February 2011, the OFR's Legal Affairs and Policy Staff provided additional guidance on incorporation by reference on the OFR Blog.[200] In a two-part series, OFR staff addressed incorporation by reference generally, as well as particular incorporation by reference issues related to Executive Order 13563, which directed agencies to retrospectively review regulations. If these written guidance materials leave agency personnel confused or with additional questions, OFR provides staff assistance upon request.

Research revealed several procedural and drafting issues that commonly cause problems for agencies seeking to incorporate by reference. These issues included: (1) determining what types of materials are appropriate for incorporation by reference; (2) bringing new and existing regulations into compliance with OFR's relatively recent policies regarding proper formatting for incorporation by reference language; (3) determining the legal effect of secondary references; (4) resolving conflicts between regulations and incorporated materials; and (5) securing timely approval of incorporations by reference. Agencies that reported few or no problems complying with OFR's incorporation by reference process and requirements followed identifiable best practices that other agencies should consider adopting.

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197 DDH, *supra note* 142, at 6-3.

198 *See* 1 C.F.R. §§ 51.3(a)(2), 51.9; DDH, *supra note* 142, at 6-5 – 6-6.

199 *See* DDH, *supra note* 142, at 6-7 – 6-11.

200 *See* OFR Legal Staff, *Executive Order 13563 and Incorporation by Reference*, OFR BLOG (Feb. 18, 2011), http://www.federalregister.gov/blog/2011/02/executive-order-13563-and-incorporation-by-reference; OFR Legal Staff, *What is Incorporation by Reference?*, OFR BLOG (Feb. 17, 2011), http://www.federalregister.gov/blog/2011/02/what-is-incorporation-by-reference.

A. Determining What Types of Materials Should Be Incorporated

One broad principle that can be gleaned from OFR's requirements is that incorporations should support, and not detract from, the usefulness and readability of administrative rules. A regulation should convey clearly what an agency requires of regulated parties, and only incorporate material that provides the tools—such as data, standards, techniques, etc.—necessary for compliance.[201] A regulation should be complete on its face, without the need to resort to incorporated materials to understand the substantive policy established by the regulation. This approach ensures that regulated parties are sufficiently notified of what they must do to comply with the law.[202] When determining whether and how to incorporate by reference, an agency should consider whether the substantive policy established by its rule is complete on its face without referring to the incorporated material.

Material may also be inappropriate for incorporation by reference if it uses voluntary or advisory, rather than mandatory, language. Agencies reported that issues arise when a regulation provides that regulated parties "shall" comply with a voluntary standard saying that a particular policy "should" be followed. In such a situation, the "should" language signifies that the incorporated standard is merely advisory, and not mandatory.[203] Agencies that incorporate such seemingly advisory materials by reference may not be able to enforce regulations as intended. Alternatively, agencies may confuse regulated parties by incorporating by reference material that is phrased as—and was intended by its drafter to be—non-regulatory.[204] Therefore, agencies should carefully review the language used in material it is considering incorporating by reference to determine whether it is mandatory or merely advisory or voluntary. They should only incorporate by reference materials that use language appropriate for mandatory regulation.

Finally, agencies reported some frustration with OFR policies restricting the incorporation by reference of federal government publications. Material published in the Federal Register or United States Code may not be incorporated by reference because it is already published.[205] Nor are agencies generally permitted to incorporate their own documents by reference, although OFR may waive this prohibition in exceptional circumstances.[206] This rule, as previously explained, prevents agencies from circumventing publication requirements. Agencies further reported that they are not permitted to quote governing statutes in regulations, and are thus forced to paraphrase statutory requirements when promulgating implementing rules. Agencies worry that such paraphrasing is inefficient, awkward, and risks creating confusion

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201 *See* 1 C.F.R. § 51.1(c)(2).

202 *See, e.g.*, *In re FM Transmitter Site Map Submissions Required by FCC Forms 301 and 340*, 1 F.C.C.R. 86-482, 381 (F.C.C. 1986) (allowing rejected license applicants to refile where procedural requirements incorporated by reference were not properly explained in the text of the regulation, but limiting such relief to those who had preserved appeal rights). For additional discussion of the notice function of publication requirements and how it relates to incorporation by reference, see *infra* at Part II.A.

203 *See* Brown & Root, Inc., OSHRC Docket No. 76-2938 (1980).

204 An agency should revise a regulation if it concludes that it has incorporated non-regulatory material in error. *See, e.g.*, *Revision of Incorporation by Reference Provisions*, Final Rule, 70 Fed. Reg. 23001 (to be codified at 14 CFR pts. 71 and 97) (removing incorporation by reference of certain non-regulatory documents).

205 *See* 1 C.F.R § 51.7(c); DDH, *supra* note 142, at 6-3.

206 *See* DDH, *supra* note 142, at 6-3.

regarding statutory requirements. OFR reported, however, that agencies may cross-reference the CFR, and may cite to material published in the United States Code. They may also use the verbatim language of a statute without using quotation marks. These options may mitigate agency concerns. Thus, agencies should use statutory language or cite the statute when promulgating a regulation implementing that statute's mandate.

B. Standardizing Incorporation by Reference Language and Formatting

Over the last decade, OFR has made a concerted effort to standardize the formatting and language of incorporation to improve the clarity and readability of the Federal Register and CFR. Whereas, in the past, an agency was required only to include the "proper language of incorporation,"[207] OFR now further requires agencies to use specific formatting to do so.[208] If an agency is incorporating a single material in a single regulatory provision, the language of incorporation is included immediately after the first reference to the material.[209] If an agency is incorporating multiple provisions, it may include the language of incorporation immediately following each reference, may segregate the language into a separate paragraph, or may centralize all incorporation language in a single regulatory section.[210] The regulatory text must always use the phrase "incorporation by reference" and provide complete information on how to access the incorporated material.[211]

When an agency updates a part of the CFR that contains incorporations that do not conform to OFR's improved formatting and language requirements, OFR asks the agency to take the opportunity to bring those older incorporations into compliance. One agency that has responded to OFR's efforts in this respect is NHTSA, which has moved all of its incorporation by reference information to a table located in a single provision of the CFR.[212] Although the project takes some work and is ongoing, it is contributing to the clarity of NHTSA's regulations. As the gatekeeper to the CFR, OFR is the only agency in a position to ensure that such consistency and clarity is achieved throughout the CFR. But it would be very burdensome—for both agencies and OFR—to comprehensively reformat and rewrite all incorporations currently contained in the CFR. As a practical matter, OFR's strategy of asking agencies to reformat incorporation language when they are making other changes to the same part strikes a reasonable balance.

Some agencies, however, have reported OFR's efforts to standardize incorporation formatting and language have caused some confusion and unexpected delays in publishing rules. In some cases, agencies have been caught by surprise when they seek to publish changes to a regulation, and OFR asks them to reformat incorporation language in other provisions of the same part. The task can be particularly time-consuming when the part contains multiple or complicated, qualified incorporations. Improving communication and cooperation between OFR

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207 1 C.F.R. § 51.9.
208 *See* DDH, *supra* note 142, at 6-7 - 6-11.
209 *See id.* at 6-7.
210 *See id.* at 6-8.
211 *See id.* at 6-5.
212 *See* 49 C.F.R. § 571.5.

and individual agencies, as described in greater detail below, may be the best way to address these difficulties.[213]

C. Determining the Legal Effect of Secondary References

In some cases, an agency may incorporate a document that itself incorporates by reference one or more "second tier" documents. In some cases, the second tier document may even refer to a third tier document, and so on. For example, OSHA has proposed incorporating by reference an NFPA standard on combustible dust that "mandates compliance with 36 other NFPA standards" that, "in turn, reference additional standards."[214] Such secondary references raise several issues. By incorporating the first tier document by reference, does the agency require compliance with or indicate its approval of the secondary document? Is the agency legally required to directly incorporate the secondary document by reference into the relevant regulation? If the first tier document's reference to the second tier document is undated, which, if any, version of the second tier document is required? And does the failure to key the second tier document to a particular version violate OFR's requirement that incorporations by reference be limited to a particular version?

The procedural requirements for incorporation by reference address only a few of the issues raised by secondary references. OFR has taken the position that an agency is procedurally required to properly incorporate by reference only those external standards that it seeks to make mandatory. The staff does not review incorporated documents to determine whether they include secondary reference, and does not take a position on the legal effect of any such secondary references. Rather, if asked, OFR encourages individual agencies to evaluate any secondary references and determine for themselves whether it makes sense for them to directly incorporate the secondary documents into the regulation.

Secondary references are relatively common, but few agencies have explicitly considered or taken a position on the substantive issues raised by secondary references. One exception is OSHA. In the combustible dust rulemaking noted above, OSHA requested comment on its "concern" regarding "[t]he multitude of mandatory primary references, secondary references, and other subordinate references in each NFPA standards that could result in an unnecessary burden on employers."[215] Another exception is NRC. When NRC incorporated IEEE Standard 603-1991 by reference into Section 50.55a of its regulations, it took the position that, "[a]s a matter of law, the other standards referenced in IEEE Std. 603-1991 are not rulemaking requirements" because "Section 50.55a does not contain language explicitly requiring [their] use" and they "have not been approved for incorporation by reference by the [OFR]."[216] Whether compliance with a second tier reference is mandatory may be indicated by the language of the first tier document, but such language may not always be clear.

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213 *See infra* at Part IV.F.

214 Combustible Dust, 74 Fed. Reg. 54,333, 54,339 (proposed Oct. 21, 2009) (to be codified at 29 C.F.R. pt. 1910).

215 *Id.* at 54,345.

216 Codes and Standards: IEEE National Consensus Standard, Final Rule, 64 Fed. Reg. 17,944, 17,945 (April 13, 1999) (to be codified at 10 C.F.R. pt. 50).

When an agency incorporates a document that references a second (or greater) tier document, the agency should acknowledge, consider, and express a view regarding the substantive legal effect of the secondarily referenced document(s). If the agency wants to make the second tier document mandatory, it should incorporate it by reference. This will ensure proper notice of regulatory requirements. OFR should consider amending the DDH to highlight the potential issue of secondary references and explain its position. This may help bring attention to the issue and encourage agencies to consider and take a position on the legal status of secondary references in appropriate rulemakings.

D. Resolving Conflicts between Regulations and Incorporated Material

Another issue agencies identified is the potential for conflict to arise between an agency's regulations and a document it has incorporated by reference. Agencies should consider the possibility that a regulation may conflict with a requirement incorporated by reference and, if possible, should provide guidance to regulated parties regarding how the conflict should be resolved. For example, in its regulations governing the transportation of petroleum gas through pipelines, PHMSA has clearly stated that if its regulations conflict with the ANSI/NFPA standards it has incorporated by reference, the incorporated standards prevail.[217] Agencies may also consider adopting a regulation that establishes a default rule for resolving unforeseeable conflicts between regulatory provisions and incorporated materials. The advantage of a default rule is that it provides regulated parties with concrete guidance when faced with an unforeseeable conflict. On the other hand, such a default rule may not yield an agency's preferred regulatory outcome in particular applications.

E. Securing Timely OFR Approval

OFR has 20 working days to complete its review process, and an agency cannot publish a regulation that incorporates by reference until OFR completes its review and grants approval.[218] Requests for approval "do not qualify for expedited processing."[219] If a request is denied, the agency must resubmit it and, upon resubmission, the 20 day period starts over. The practical implication is that agencies must submit requests for approval no less than 20 working days before they want to publish the relevant rule.[220] If a rule contains multiple incorporations by reference or is complicated by an agencies' qualified approval of the incorporated material (e.g., the agency is incorporating only parts of a standard or is incorporating it with specified modifications or additions), it may be prudent to submit the request even earlier.

Research revealed several instances in which the publication of a rule was delayed because agencies did not comply with OFR's incorporation by reference requirements. In some cases, agencies were unaware of the 20-day process or simply failed to submit their application

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217 49 C.F.R. § 192.11(c).

218 *See* 1 C.F.R. §§ 51.3(b), 51.5(a)(1).

219 DDH, *supra* note 142, at 6-3.

220 *E.g.*, *id.* § 51.5(a)(1) (requiring agencies to "[m]ake a written request for approval at least 20 working days before the agency intends to submit the final rule document for publication").

to OFR ahead of filing a rule for publication.[221] This can be particularly problematic when the agency is subject to a congressional or other deadline for publishing the rule in question. The Legal Policy staff, which processes all incorporation by reference requests, and is also charged with a multitude of other tasks, consists of only three employees. While OFR staff make every effort to prioritize requests for approval that are submitted late, it is not always possible to do the work necessary to secure approval in a shortened timeframe. Publication can also be delayed if an agency submits an incomplete request for approval. Preparing an application for approval requires observance of highly technical requirements and meticulous attention to detail. This is especially true if the rule contains multiple or qualified incorporations by reference.

Improved communication and cooperation between OFR and individual agencies may be the best way to address these issues and prevent delays in publishing rules. This approach is examined in the next section.

F. Making the Process Work Better

Agencies that have experienced few or no problems with OFR's incorporation by reference requirements consistently reported that they had established good communication and working relationships with OFR. Agencies and OFR identified several successful tactics in this regard:

- *Designating the OFR liaison or another employee as the single point of contact with OFR to maintain a close working relationship between the two agencies*: Several agencies have tasked just one or two people with submitting all requests for incorporation by reference. This person may be the agency's OFR liaison officer[222] or a member of the agency's legal or rulemaking staff. The advantage is that this person becomes an expert in OFR policy and can form good working relationships with OFR staff.

- *Getting legal counsel or other experts in OFR policy involved early in rulemaking process*: One agency, the Coast Guard, uses a very effective team approach to rulemaking. Each team is assigned legal counsel early in the process. This ensures that someone involved in the rulemaking from the beginning is well-versed in incorporation by reference (and other legal) requirements and can prepare a timely and complete request for approval. EPA takes a slightly different approach, including incorporation by reference issues in its comprehensive

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[221] The DDH warns that "[s]ince this is a technical subject area, it sometimes creates confusion that can significantly delay [incorporation by reference] request review and approval of your final rule document." *See* DDH, *supra* note 142, at 6-1.

[222] *See, e.g.*, 1 C.F.R. § 16.1(a)(1) (requiring agencies to designate a liaison officer); *id.* § 16.2 (specifying the duties of the liaison).

internal rulemaking guidance, which provides employees with a flowchart of issues that must be addressed during rulemaking.[223]

- *Reaching out to OFR early in the rulemaking process*: OFR's regulations require it to assist agencies in publishing,[224] and the DDH "encourages regulation drafters and agency liaisons to contact [OFR staff] as early as possible when considering using an incorporation by reference in a regulation."[225] OFR and some agencies reported that taking advantage of this opportunity reduced or eliminated problems and delays in securing approval for incorporations by reference.

- *Taking advantage of OFR training opportunities*: OFR offers general publication training to agencies and has provided incorporation by reference training when requested. Agencies that have multiple offices or departments or large rulemaking staffs, frequently incorporate by reference, and have experienced difficulties with the approval process should consider working with OFR to set up a training session.

- *Adhering closely to the DDH*: Agency staff who will be responsible for submitting requests for approval to OFR should read and pay close attention to the guidance provided in the DDH. If something is unclear, they should reach out to OFR for clarification as early as possible.

Agencies that reported difficulties with OFR's incorporation by reference process and requirements can best address those issues by taking these steps to improve communication and establish a working relationship with OFR staff. Doing so would prevent confusion, surprise, and delays in publication, while facilitating the OFR's good efforts to make the CFR more consistent and readable. It would also help ensure that agencies secure timely approval of incorporations by reference.

OFR is currently testing an electronic method of submitting and processing incorporation by reference requests that holds significant promise to improve the process. The method uses an FTP server, to which agencies may upload electronic copies of their written requests for approval, final rule documents, and copies of the material to be incorporated. Agencies can create different folders on the server for different requests, and OFR can upload documents (e.g., redlines of incorporation language in draft final rules) as they work with agencies towards approval. Only the OFR staff is able, however, to delete documents from the server. OFR staff

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223 *See* Catherine M. Sharkey, Report to the Administrative Conference of the United States, *Federal Agency Preemption of State Law* (2010), *available at* http://www.acus.gov/wp-content/uploads/downloads/2011/02/Sharkey-Final-ACUS-Report_12_20.pdf (last visited Sept. 7, 2011).

224 *See, e.g.*, 1 C.F.R. § 15.1 (requiring the Director of the Federal Register to assist agencies in publication); *id.* § 15.3 (requiring OFR staff to "provide information assistance and advice to officials of the various agencies with respect to general or specific programs of regulatory drafting, procedures, and promulgation practices"); *id.* § 51.5(b) ("Agencies may consult with the [OFR] at any time with respect to the [incorporation by reference] requirements.").

225 DDH, *supra* note 142, at 6-1.

and participating agencies have reported that the procedure is working well so far. One particular advantage is the ability to submit incorporated documents in electronic form. This saves time and money, as it omits the need to deliver large amounts of paper (in some cases, a publication may occupy one or more boxes when printed out) to the OFR. It is also a convenient innovation as agencies are increasingly use electronic copies of standards themselves, and may be required to obtain a paper copy exclusively for submission to OFR.[226] OFR should continue and expand upon its efforts to transition to an electronic submission and review process for incorporation by reference requests

V. Summary of Recommendations

Ensuring Incorporated Materials are Reasonably Available

1. Agencies considering incorporating extrinsic material by reference should evaluate whether the material will be reasonably available both to regulated parties and the general public.

2. If an agency incorporates material by reference that is not subject to copyright or other legal protection, the agency should make a copy of the document available electronically in a location where interested parties will be able to find it easily.

3. When an agency is considering incorporating copyrighted material by reference into a regulation, it should work with the copyright holder to ensure the material will be reasonably available to regulated parties and the public both during rulemaking and following promulgation.

    a. Agencies should avoid solutions that require them to obtain a license to achieve this goal.

    b. Agencies should work with copyright holders and use available technological solutions to strike an appropriate balance between the public interest in access and the copyright holder's need to fund its standard-development activities.

4. In deciding whether to incorporate a particular copyrighted material by reference, and in working with a copyright holder to ensure the material is reasonably available, an agency should consider:

    a. The stage of the regulatory proceedings, because greater access may be required during rulemaking than following promulgation;

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[226] The OFR public inspection room is equipped with computer terminals, on which members of the public can view incorporated materials stored in electronic form. Omitting the requirement that an agency submit a paper copy of an incorporated document thus does not impair public inspection.

b. Whether the material is related to public safety and requires broader accessibility to accomplish the regulatory purpose of incorporation;

c. The cost to obtain a copy of the material, including the cumulative cost to obtain a standard or other material containing secondary references;

d. The identity of regulated parties that must have access to the incorporated material; and

e. Regulatory reasons to require regulated parties to independently obtain access to incorporated material.

5. When considering incorporating by reference a highly technical standard, agencies should include in a rule's preamble an explanation of the copyrighted material and how its incorporation by reference will further the agency's regulatory purpose.

Updating Incorporations by Reference

6. Agencies should periodically review regulations and make technical amendments as necessary to ensure complete and accurate access information is included in all regulations that incorporate by reference.

7. Agencies that regularly incorporate private standards should participate in standard-setting processes and adopt complementary internal procedures to ensure good communication of emerging revisions to those within the agency charged with making policy decisions and writing rules.

8. Agencies should not address updating challenges by confining incorporations by reference to non-binding appendices or guidance documents. If an agency intends to make compliance with an extrinsic standard mandatory, it should incorporate that standard by reference in a regulation.

9. Agencies that find it prohibitively burdensome to keep up with revisions of standards incorporated by reference in regulations should use equivalency determinations or enforcement discretion to minimize the harm caused by out-of-date references.

a. Each such agency should structure its approach as appropriate in light of its position vis-à-vis regulated parties.

b. In the interests of fairness and transparency, agencies should adopt regulations that clearly establish the policies and principles governing equivalency determinations or guiding the use of enforcement discretion.

10. For non-controversial substantive updates to incorporations by reference in regulations, agencies authorized to regulate under Section 553 of the APA should use direct final

rulemaking. Before an agency uses direct final rulemaking to update incorporations by reference, it should adopt regulations establishing the principles and procedures it will use. These principles and procedures should conform to the Conference's previous recommendations for direct final rulemaking.[227]

11. Congress should consider authorizing agencies to use streamlined procedures to update incorporations by reference. An appropriate statutory solution would:

    a. Require interested parties to file a petition for rulemaking that would notify the agency of a revised standard, identify the changes from the incorporated version of the standard, and explain why updating would be consistent with the agency's regulatory purpose;

    b. Vest the agency with authority to determine whether to act on the petition;

    c. Authorize the agency, upon a finding that updating is consistent with the regulatory purpose of the relevant regulation, to issue a direct final rule under Section 553; and

    d. Provide that the rule shall become effective if no adverse comments are received or, alternatively, following the agency's publication, prior to the effective date, of a response to any adverse comments received, provided such comments do not demonstrate that updating is inconsistent with regulatory purpose.

Navigating Procedural Requirements

12. Each agency should designate its OFR liaison or another employee as the single point of contact with OFR to maintain a close working relationship between the two agencies.

13. Agencies should get legal counsel or other experts in OFR policy involved early in the rulemaking process to ensure adherence with incorporation by reference and other publication requirements and reduce the potential for delays in publishing rules.

14. Agencies considering incorporating by reference should reach out to OFR staff early in the rulemaking process.

15. Agencies that frequently incorporate by reference should take advantage of OFR training opportunities and adhere closely to the DDH.

16. OFR should continue and expand upon its efforts to transition to an electronic submission and review process for incorporation by reference requests.

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[227] *See* Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* ¶ I (June 15, 1995).

Improving Drafting Techniques

17. When determining whether and how to incorporate by reference, an agency should consider whether the substantive policy established by its rule is complete on its face without referring to the incorporated material.

18. Agencies should carefully review the language used in material it is considering incorporating by reference to determine whether it is mandatory or merely advisory or voluntary. Agencies should only incorporate by reference materials that use language appropriate for mandatory regulation.

19. Agencies should use statutory language or cite the statute when promulgating a regulation implementing that statute's mandate.

20. When an agency incorporates a document that references a second (or greater) tier document, the agency should acknowledge, consider, and express a view regarding the substantive legal effect of the secondarily referenced document(s). OFR should consider amending the DDH to highlight the potential issue of secondary references and explain its position. If an agency wants to make a second tier document mandatory, it should incorporate it by reference.

21. Agencies should consider the possibility that a regulation may conflict with a requirement incorporated by reference and, if possible, should provide guidance to regulated parties regarding how the conflict should be resolved.