



Incorporation by Reference

Committee on Administration & Management Proposed Recommendation | December 8-9, 2011

1 Incorporation by reference allows agencies to comply with the requirement of
2 publishing rules in the Federal Register to be codified in the Code of Federal Regulations (CFR)
3 by referring to material published elsewhere.¹ The practice is first and foremost intended to—
4 and in fact does—substantially reduce the **volume-size** of the CFR. But it also furthers
5 important, substantive regulatory policies, enabling agencies to draw on the expertise and
6 resources of private sector standard developers to serve the public interest. Incorporation by
7 reference allows agencies to give effect to a strong federal policy, embodied in the National
8 Technology Transfer and Advancement Act of 1995 and OMB Circular A-119, in favor of agency
9 use of voluntary consensus standards.² This federal policy benefits the public, private industry,
10 and standard developers.

11

12 The Conference has conducted a study of agency experience with the practice of
13 incorporation by reference, including the use of voluntary consensus standards. The study

¹ See 5 U.S.C. § 552(a)(1); 1 C.F.R. §§ 51.1-51.11.

² See National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 (1996); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998); see also Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979) (recommending agencies use voluntary consensus standards in health and safety regulation). ~~Voluntary consensus standards are created by private standard development organizations that use a consensus driven approach that ensures public participation and transparency.~~ Circular A-119 defines voluntary consensus standards as those created by private or international organizations whose processes provide attributes of openness, balance, due process, an appeal, and decision making by general agreement (but not necessarily unanimity). See also American National Standards Institute, “ANSI Essential Requirements: Due process requirements for American National Standards” (2010). **[Manager’s Amendment]**

Comment [E.S.1]: Manager’s Amendment



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14 focused on three issues agencies frequently confront when incorporating by reference: (1)
15 ensuring materials incorporated by reference are reasonably available to regulated and other
16 interested parties; (2) updating regulations that incorporate by reference; and (3) navigating
17 procedural requirements and resolving drafting difficulties when incorporating by reference.
18 Agencies have used a variety of approaches to address these issues within the constraints of
19 federal law and regulatory policy. This recommendation identifies and encourages those
20 approaches that have proven most successful.

21

22 *Availability of Incorporated Materials.* Ensuring that regulated and other interested
23 parties have reasonable access to incorporated materials is perhaps the greatest challenge
24 agencies face when incorporating by reference. When the relevant material is copyrighted—as
25 is often the case with voluntary consensus standards—access issues are particularly
26 problematic. There is some ambiguity in current law regarding the continuing scope of
27 copyright protection for materials incorporated into regulations,³ as well as the question of
28 what uses of such materials might constitute “fair use” under section 107 of the Copyright Act.⁴
29 Efforts to increase transparency of incorporated materials may conflict with copyright law and
30 with federal policies recognizing the significant value of the public-private partnership in
31 standards.

³ See, e.g., *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). This case held that where local law had incorporated a privately developed building code, a private party’s posting of the resulting local law did not violate copyright, because the law was in the public domain. *Id.* at 793, 802. However, the court distinguished cases concerning the incorporation by reference of materials “created by private groups for reasons other than incorporation into law,” *id.* at 805, leaving some uncertainty as to the rule applicable to many voluntary consensus standards.

⁴ See, e.g., OFFICE OF LEGAL COUNSEL, DEP’T OF JUSTICE, *Whether and under what Circumstances Government Reproduction of Copyrighted Materials Is a Noninfringing “Fair Use” under Section 107 of the Copyright Act of 1976* (1999). This opinion noted that there is no per se rule under which government reproduction of copyrighted materials for governmental use invariably qualifies as fair use, but also noted that such reproduction would in many contexts constitute a noninfringing fair use. The opinion focused on government reproduction for internal government use and did not consider government republication of copyrighted materials.



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33 This recommendation does not attempt to resolve the questions of copyright law
34 applicable to materials incorporated by reference into federal regulations. Rather, the
35 recommendation encourages agencies to take steps to promote the availability of incorporated
36 materials within the framework of existing law. This effort is consistent with the National
37 Science and Technology Council's acknowledgment that "the text of standards and associated
38 documents should be available to all interested parties on a reasonable basis, which may
39 include monetary compensation where appropriate."⁵ The Conference's research reveals that
40 some agencies have successfully worked with copyright **holderowner**s to further the goals of
41 both transparency and public-private collaboration. Some agencies have, for example, secured
42 permission to make a read-only copy of incorporated material available in the agency's public,
43 electronic docket during the pendency of the rulemaking proceeding relating to the material.
44 In other cases, the copyright **holderowner** has made the material publicly available in read-only
45 form on its own website. This recommendation encourages agencies to take these or other
46 steps to promote availability of incorporated materials, such as encouraging copyright
47 **holderowners** to make incorporated materials available in libraries.

Comment [E.S.2]: Manager's Amendment
(universal)

48

49 *Updating Regulations.* Updating regulations that incorporate by reference is another
50 challenge. Agencies are legally required to identify the specific version of material incorporated
51 by reference and are prohibited from incorporating material dynamically.⁶ When an updated
52 version of the incorporated material becomes available, the regulation must be updated if the
53 agency wants the regulation to incorporate the new version. This can require the agency to
54 engage in notice-and-comment rulemaking, which entails a significant investment of agency

⁵ See SUBCOMMITTEE ON STANDARDS, NAT'L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* 11 (Oct. 10, 2011).

⁶ See 1 C.F.R. § 51.1(f); *see also* **Manager's Amendment**, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES ¶ 6(j) (1998).



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55 resources. For agencies that are statutorily required to provide rulemaking procedures beyond
56 those required by Section 553 of the Administrative Procedure Act (APA), updating may prove
57 to be an ~~insurmountable-immense~~ challenge. Nonetheless, agencies have successfully used a
58 variety of techniques to reduce the time and cost constraints of updating rules. Some agencies
59 have used enforcement discretion or “equivalency determinations” to avoid penalizing parties
60 that comply with an updated version of an incorporated standard that the agency finds to be
61 equivalent to or superior to the version still incorporated in the agency’s regulations. Other
62 agencies have reduced the burden of updating by tracking forthcoming revisions through
63 participation in standard-development activities.⁷ Still others have used direct final rulemaking
64 to reduce the costs of updating an incorporating regulation. The recommendation encourages
65 these time- and cost-saving techniques. ~~A statutory solution may be unavoidable when these~~
66 ~~techniques have proven insufficient. This recommendation also proposes a statutory solution~~
67 ~~that would streamline the administrative process by which agencies can revise their regulations~~
68 ~~to account for updates to the incorporated material.~~

Comment [E.S.3]: Manager’s Amendment

Comment [E.S.4]: Manager’s Amendment

Comment [E.S.5]: Manager’s Amendment

69
70 *Complying with Procedural Requirements.* Finally, successfully incorporating by
71 reference requires agencies to comply with detailed procedures and ~~carefully to draft~~
72 regulations ~~carefully~~. The Office of the Federal Register (OFR) is statutorily charged with
73 approving all incorporations by reference, and has issued regulations and guidance establishing
74 policies and procedures for doing so. Procedural errors can delay the publication of rules that
75 incorporate by reference. Poor drafting may create confusion among regulated parties or
76 produce a rule that does not fulfill the agency’s regulatory purpose. The Conference’s research
77 revealed that agencies reporting few or no problems in complying with OFR’s incorporation by
78 reference procedures followed identifiable best practices that other agencies should consider
79 adopting.

Comment [E.S.6]: Manager’s Amendment

⁷ See SUBCOMMITTEE ON STANDARDS, NAT’L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* (Oct. 10, 2011).



RECOMMENDATION

80

81 Ensuring Incorporated Materials are Reasonably Available

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83 1. Agencies considering incorporating material by reference should ensure that the
84 material will be reasonably available both to ~~the regulated community~~ and other interested
85 parties.

86

87 2. If an agency incorporates by reference material that is not copyrighted or subject to
88 other legal protection, the agency should make that material available electronically in a
89 location where ~~regulated and other~~ interested parties will be able to find it easily.

90

91 3. When an agency is considering incorporating ~~copyrighted material~~ by reference ~~into a~~
92 ~~regulation~~ ~~copyrighted material~~, the agency should work with the copyright ~~holder~~ ~~owner~~ to
93 ensure the material will be reasonably available to regulated and other interested parties both
94 during rulemaking and following promulgation.

95

96 ~~(a) If more than one standard is available to meet the agency's need, it should consider~~
97 ~~restrictions on availability as one factor in determining which standard to use.~~

98

99 ~~(b)~~(a) Agencies should request ~~holder~~ ~~owner~~ of copyright in incorporated material to
100 consent to its free publication, and, if such consent is given, make the material available
101 as in paragraph (2), above.

102

103 ~~(b)~~ If copyright ~~holder~~ ~~owners~~ do not consent to free publication of incorporated materials,
104 agencies should work with them and, through the use of technological solutions, low-
105 cost publication, or other appropriate means, promote the availability of the materials

Comment [E.S.7]: Strauss Amendment: proposed text that would replace paragraphs 1-5 is reproduced at the end of this document.

Comment [E.S.8]: Manager's Amendment

Comment [E.S.9]: Manager's Amendment

Comment [E.S.10]: Manager's Amendment

Comment [E.S.11]: Manager's Amendment (reordering subsections)



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106 while respecting the copyright ~~holderowner~~'s interest in protecting its intellectual
107 property.

108
109 (c) ~~If more than one standard is available to meet the agency's need, it should consider~~
110 ~~restrictions on the availability of the standards as one factor in determining which~~
111 ~~standard to use.~~

Comment [E.S.12]: Manager's Amendment

112
113 4. In deciding whether to incorporate a particular copyrighted material by reference, and
114 in working with a copyright ~~holderowner~~ to ensure the material is reasonably available, an
115 agency should consider:

116
117 (a) The stage of the regulatory proceedings, because access may be ~~required-necessary~~
118 during rulemaking to make public participation in the rulemaking process effective;

Comment [E.S.13]: Manager's Amendment

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120 (b) The need for ~~public-disclosure-access~~ to achieve agency policy or to subject the
121 effectiveness of agency programs to public scrutiny;

Comment [E.S.14]: Manager's Amendment

122
123 (c) The cost to ~~regulated and other interested parties to~~ obtain a copy of the material,
124 including the cumulative cost to obtain incorporated material that itself incorporates
125 further materials; and

Comment [E.S.15]: Manager's Amendment

126
127 (d) The ~~identity-types~~ of parties that ~~must have need~~ access to the incorporated material,
128 and their ability to bear the costs of accessing such materials.

Comment [E.S.16]: Manager's Amendment

129
130 5. When considering incorporating by reference highly technical material, agencies should
131 include in the notice of proposed rulemaking an explanation of the material and how its
132 incorporation by reference will further the agency's regulatory purpose.

133



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134 **Updating Incorporations by Reference**

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136 6. Agencies should periodically review regulations and make technical amendments (i.e.,
137 nonsubstantive amendments that do not require notice and comment) as necessary to ensure
138 that complete and accurate access information⁸ is included in all regulations that incorporate
139 by reference. Agencies should ensure that they are notified of all changes to access
140 information.

141

142 7. Agencies that regularly incorporate private standards should adopt internal procedures
143 to ensure good communication of emerging revisions to those within the agency charged with
144 making policy decisions and writing rules. Agencies should consider participating in standard-
145 setting activities in order to maintain awareness of emerging revisions.⁹

146

147 8. Agencies should not address difficulties with updating challenges by confining
148 incorporations by reference to non-binding guidance documents. If an agency intends to make
149 compliance with extrinsic material mandatory, it should incorporate that material by reference
150 in a legislative rule.

151

152 9. In the interests of fairness and transparency, agencies should publish regulations or
153 guidance establishing the policies and principles governing equivalency determinations or
154 guiding this use of enforcement discretion in situations where they have been unable to update
155 incorporations by reference in regulations.

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Comment [E.S.17]: Manager's Amendment

⁸ "Access information" informs the public of where it can inspect or obtain a copy of the incorporated material. See 1 C.F.R. § 51.9(b)(4); Nat'l Archives & Records Admin., Federal Register Document Drafting Handbook § 6.4 (Jan. 2011).

⁹ See Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979).



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157 10. For ~~non-controversial substantive updates to incorporations by reference in regulations,~~
158 ~~agencies authorized to regulate under Section 553 of the APA should use direct final~~
159 ~~rulemaking~~ rulemakings subject to Section 553 of the APA, agencies should use direct final
160 rulemaking for noncontroversial updates to incorporations by reference.¹⁰

Comment [E.S.18]: Manager's Amendment

161
162 11. Congress should consider authorizing agencies to use streamlined procedures to update
163 incorporations by reference. An appropriate statutory solution would:

164
165 (a) Provide for interested parties to file a petition for rulemaking that would notify the
166 agency of a revised standard, identify the changes from the incorporated version of the
167 standard, ~~and~~ explain why updating would be consistent with the agency's regulatory
168 purpose, ~~including and provideing~~ information on the costs ~~of and~~ benefits of
169 incorporating the revised standard;

Comment [E.S.19]: Manager's Amendment

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171 (b) Vest the agency with authority to determine whether to act on the petition; and

172
173 (c) Authorize agencies to grant the petition by issuing a final rule, without regard to
174 otherwise applicable rulemaking requirements, provided that the agency first:

175
176 (1) Publishes a notice of the petition in the Federal Register, indicates in that notice
177 what regulations the requested update would affect, and provides for public
178 comment on the petition; and

179
180 (2) Finds that updating regulations as requested in the petition is beneficial and
181 consistent with the regulatory purpose of the relevant regulation.
182

¹⁰ See Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,108, 43,112 (June 15, 1995).



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183 **Navigating Procedural Requirements**

184

185 12. Each agency that incorporates by reference should task its Office of the Federal Register
186 (OFR) liaison or another employee with being a point of contact with OFR and maintaining a
187 close working relationship between the two agencies. Such agencies should take advantage of
188 OFR's training opportunities and follow the procedures of its Document Drafting Handbook
189 (DDH).

190

191 13. When considering a regulation that would incorporate by reference, agencies should
192 ensure legal counsel or other experts in OFR regulations, DDH, and policy are involved early in
193 the rulemaking process to reduce the potential for delays in publishing rules. Agencies
194 considering incorporating by reference should reach out to OFR staff early in the rulemaking
195 process.

196

197 14. OFR should continue and expand upon its efforts to make the process easier through an
198 electronic submission and review process for incorporation by reference requests.

199

200 **Improving Drafting Techniques**

201

202 15. Agencies should ensure that incorporations by reference support, rather than detract
203 from, the usefulness and readability of the Code of Federal Regulations. Incorporated material
204 may provide detail, but a regulation should, by itself, make the basic concept of the rule
205 understandable without the need for the reader to refer to the incorporated material.

206

207 16. Agencies should review the language used in material they are considering
208 incorporating by reference to determine whether it is mandatory or merely advisory or
209 voluntary. Agencies promulgating mandatory regulations should take care to specify in the
210 regulation which portions of the material will be considered mandatory after incorporation.



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212 17. When an agency incorporates a document that references a second (or greater) tier
213 document, the agency should acknowledge and explain the substantive legal effect of the
214 secondarily referenced document(s). OFR should consider amending the DDH to call attention
215 to the potential issue of secondary references. If an agency wants to make a second tier
216 document mandatory, it should ensure that such material is reasonably available both to the
217 regulated community and other interested parties.

218

219 18. Agencies should be alert to the possibility that some part of their regulations may
220 inadvertently conflict with a requirement incorporated by reference. When drafting
221 regulations, agencies should avoid or resolve any such conflicts.

222

223 **Proposed Strauss Amendment (replacing ¶¶ 1-5):**

224

225 1. Agencies publishing notices of proposed rulemaking incorporating material by reference
226 should ensure that the incorporated material will be reasonably available both to the regulated
227 community and other interested parties. [the following sentence is the unchanged text of
228 recommendation 5 of the proposal] When considering incorporating by reference highly
229 technical material, agencies should include in the notice of proposed rulemaking an explanation
230 of the material and how its incorporation by reference will further the agency's regulatory
231 purpose.

232

233 2. If an agency notice of proposed rulemaking incorporates by reference material that is
234 not copyrighted or subject to other legal protection, the agency should incorporate that
235 material into its electronic rulemaking docket and in other ways assure that interested parties
236 will be able to find it easily.

237



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238 3. To make public participation in the rulemaking process effective, agencies proposing to
239 incorporate copyrighted material by reference should make every effort to ensure that the
240 material will be available to regulated and other interested parties for comment, as by:

241
242 (a) Requesting the copyright holder's consent to free publication during the comment
243 period;

244
245 (b) Working with the copyright holder to put in place technological solutions permitting
246 commenters controlled access on the agency or copyright holder's website during the
247 comment period;

248
249 (c) If more than one standard is available to meet the agency's need, considering
250 restrictions on availability as one factor in determining which standard to use.

251
252 (d) Using other appropriate means permitting the availability of the materials while
253 respecting the copyright holder's intellectual property.

254
255 4. In consideration of recent statutory and technical changes emphasizing the role of the
256 Internet in informing regulated bodies and the public about the law governing their conduct,
257 the Office of the Federal Register should consider revising its rules defining what makes
258 materials incorporated by reference into final agency rules "reasonably available," so that they
259 need not be published in the Federal Register. The relevant factors should include:

260
261 (a) The ready availability of the material to those participating in the rulemaking during the
262 comment period.

263



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264 (b) The need for public disclosure to achieve agency policy or to subject the effectiveness of
265 agency programs to public scrutiny;

266
267 (c) Steps taken by the agency and the copyright holder that will assure ready and
268 reasonable electronic access to the incorporated materials by those who must have
269 such access to know how to meet their legal obligations. d. OFR's acceptance of
270 reasonably accessible electronic versions of the material in lieu of printed publication, as
271 meeting applicable publication requirements.

272
273 5. Without waiting for such changes in the Office of Federal Register rules, agencies
274 incorporating copyrighted material by reference into final rules should work with copyright
275 holders to achieve these ends.

276