From: Peter Straus [mailto:strauss@law.columbia.edu]
Sent: Monday, November 28, 2011 1:59 PM
To: Comments
Subject: Additional thoughts re IBR recommendation

These issues were discussed at the recent Council meeting of the ABA's Section of Administrative Law and Regulatory Practice, and I understand there to have been general agreement with the thrust of these comments. A presentation made to the Section by Amy Bunk, the Director of Legal Affairs and Policy at the OFR, which by statute must approve incorporation by reference of "reasonably available" materials that would otherwise be required to be published in the Federal Register, made clear that its concern is with form only, that it does not expect to be asked for approval until 20 days before publication of the FINAL rule, and that it exercises no controls over guidance documents. Although notices of proposed rulemaking must be published in the Federal Register, the statute does not require the publication of proposed text; and guidance documents are not required to be published there. And Section 552(a)(2) of the APA, requiring the availability of guidance materials if they are to be cited to the disadvantage of any member of the public, contains no "reasonably available" qualification.

It is also appears that neither has the OFR made any change in its applicable regulations respecting final rules, nor has OMB made any changes in its Circular A-119 concerning the use of voluntary technical standards, that purports to accommodate the enactment of the Electronic Freedom of Information Act of 1996 -- enacted subsequent to the NTTA of 1995 -- with its requirements of universal availability of rules and guidance documents in agency electronic reading rooms, the E-Government Act of 2002 (requiring internet availability of rulemaking materials), or the Openness Promotes Effectiveness in Our National Government Act of 2007. As already remarked, Section 552(a)(2) of the APA, requiring the availability of guidance materials on agency websites if they are to be cited to the disadvantage of any member of the public, contains no "reasonably available" qualification. Remarkably, the explanation given for the OMB Circular A-119 at its last revision in 1998, while tolerating the "ability of copyright holders to receive reasonable and fair royalties," para 22, states that "Neither the [NTTA of 1995] nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements," para 35.

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