Laura McCarthy - Fwd: 1 CFR Part 51, Incorporation by Reference, NARA 12-0002 Petition for Rulemaking (comments)

From:	FedReg legal
To:	McCarthy, Laura
Date:	2/29/2012 10:47 AM
Subject:	Fwd: 1 CFR Part 51, Incorporation by Reference, NARA 12-0002 Petition for Rulemaking (comments)
CC:	Bunk, Amy
Attachments:	Croston comments.pdf

Laura,

Here's another. Thanks,
Miriam

On 2/29/2012 at 10:34 AM, in message
<CADtYVKNgTG6TGaEHto50TDvx7qyfGhqzn45Rhga_vAAroA4uwQ@mail.gmail.com>, Sean Croston
<seandcroston@gmail.com> wrote:

> My personal comments on the recent petition for rulemaking regarding incorporation by reference are attached.
> Thanks,
> Sean Croston
> seandcroston@gmail.com

February 29, 2012

Office of the Federal Register
Re: Incorporation by Reference
NARA-12-0002, Petition for Rulemaking

I am writing in my personal capacity to voice my strong support for the recent petition asking the Office of the Federal Register (OFR) to update the incorporation by reference (IBR) regulations in 1 CFR Part 51. *See* 77 FR 11414 (Feb. 27, 2012).

As you requested, below are my comments on your suggested issues:

1. Does "class of persons affected" need to be defined?
Yes. The "class of persons affected" must be defined, for the simple reason that the key statutory criterion for approving IBR involves determining whether "matter [is] reasonably available to the class of persons affected thereby." 5 USC 552(a). You cannot determine what is reasonably available without first determining the scope of the class of persons affected by regulation. For example, something that is reasonably available to Microsoft may not be reasonably available to a local library, or the interested next-door neighbor of a regulated facility.

If so, how should it be defined?
Given that "class of persons affected" needs to be defined, you should follow the path first suggested by Congress when drafting the IBR provision as part of the initial Freedom of Information Act (FOIA), a statute that was specifically intended "to permit access to official information long shielded unnecessarily from public view." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1262 (2011) (citation omitted). In S. Rep. No. 88-1219 (1964), the Senate Judiciary Committee described S. 1666 (1964), the first draft FOIA bill providing for IBR that successfully passed the Senate (before its later adoption by the House in similar form in 1966). Specifically, the Committee noted that the purpose of IBR was "to avoid the repetition of [incorporated] material in the Federal Register when it can be incorporated by reference and is *readily available to interested members of the public*." *Id.* at 4-5. For that reason, the Senate suggested a definition of IBR that would consider "*availability of the incorporated material to the public*," because "it is not intended that only a few persons having a special working knowledge of an agency's activities be aware of the location and scope of these materials. *Any member of the public* must be able to familiarize himself with the[se] items...." *Id.* Given this intent, it is not surprising that the introductory language of 5 USC 552(a) now indicates that its purpose is to mandate that "each agency shall make available *to the public* information," "for the guidance of *the public*." This is consistent with the purpose of the FOIA, as noted above.

Moreover, President Obama declared early in his Administration that "In our democracy, the Freedom of Information Act, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.... The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. *The presumption of disclosure should be applied to all decisions involving FOIA*....The presumption of disclosure also means that *agencies should take affirmative steps to make information public*." *See* Memorandum for the Heads of Executive Departments and Agencies, "Freedom of Information Act" at
http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.

Thus, it seems clear that OFR should revise 1 CFR Part 51 to define the "class of persons affected" by regulation generally to include any and all interested members of the public – similar to the Administrative Procedure Act's description of those with a right to file petitions for rulemaking, which applies to "an[y] interested person." *See* 5 USC 553(e). For example, while some may feel that regulated entities are the only "persons" with any legitimate interest in learning the law because they must comply with it, this is a much too-constrained view. Those legitimately interested in the scope of the law include many prospective rulemaking commenters and intervenors in agency proceedings as representatives of various environmental and other "public interest" groups, as well as neighbors of regulated facilities and other plain members of the public who, for whatever reason, have a keen interest in the activities of the federal government, especially with respect to facilities near them. Although these individuals/groups are not directly targeted for compliance, they are still among "the class of persons affected" by agency rules that incorporate various materials by reference. (For example, many of them might have Article III standing to challenge the final agency rules in court.) For these reasons, OFR must define "class of persons affected" to cover all interested members of the public.

2. Does "reasonably available"
a. Mean that the material should be available:
i. For free?
Yes. OFR should limit the scope of what it considers "reasonably available" to include only that information that is freely available. The simple reason for this strict limit is that, while many regulated entities may have large budgets allowing them to pay for private access to incorporated material, the same is not necessarily true for the other potential "persons affected by" IBR material. Some of the public interest groups, neighbors of regulated entities, and other members of the public with a legitimate interest in the affected regulations will have much smaller budgets, such that the cost of buying access to non-public IBR material could be prohibitive. At a policy level, this is not a desirable result. Participation in regulation must not be limited to those who "pay-to-play."

ii. To anyone online?
Yes. President Obama's memorandum on the FOIA, noted above, also stated that "All agencies should use modern technology to inform citizens about what is known and done by their Government." It seems obvious that this "modern technology" would include disclosure via the Internet. This is also consistent with the clear goals of the E-FOIA Amendments of 1996 and especially the E-Government Act of 2002, which was drafted to ensure that agencies would post rulemaking information online, and that each agency "website [would] include direct links to information made available to the public under . . . section 552 of title 5 of the United States Code." *See* E-Government Act of 2002, §§ 206, 207(f). Moreover, § 2 recognized that the purpose of that Act was specifically "to promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in the Government," and to "reduce costs and burdens," "to promote better informed decisionmaking," "to promote access to high-quality Government information and services across multiple channels," and "to make the Federal Government more transparent and accountable." To make those statutory goals mean something, OFR should ensure that IBR materials are available online to any interested member of the public.

b. Create a digital divide by excluding people without Internet access?
No. As noted above, the E-Government Act of 2002 established a federal policy of "promot[ing] access to high-quality Government information and services across multiple channels," specifically including "the Internet." Publishing IBR materials online will only serve to increase public access. It will not make those materials any *less* available to the dwindling number of interested persons without Internet access any more than the GPO's free publication of the CFR online (http://www.gpoaccess.gov/ecfr/) and a number of other statutory and regulatory materials online at its FDSYS site (http://www.gpo.gov/fdsys/) harms those without Internet access. In fact, continuing to follow the reasoning behind this relatively-cynical rationalization would suggest the absurd result that the Government should never make

information available through *any* medium, because there will always be the risk of creating a "divide" between those with access to that medium and those without access. (For example, should OFR cease publishing the CFR in all written forms, because this would decrease the "information divide" with respect to illiterate members of the public?)

3. Should agencies bear the cost of making the material available for free online?
Yes. As noted above, many affected persons with legitimate interest will not be able to afford the cost of purchasing access to some IBR material referenced in agency rules. While agencies might consider charging user fees to regulated entities to recover the cost of providing them previously non-public incorporated material (leading to no net benefit for those entities), there is reason to believe that many other interested persons simply cannot afford the necessary access, so agency-provided access could really make a substantive difference for them. Moreover, as noted above, the E-Government Act stated that its purposes were to "reduce costs and burdens," "provide enhanced access to Government information and services," and to "make the Federal Government more transparent." These goals are all served by free, open access to IBR material.

4. How would this impact agencies budget and infrastructure, for example?
The cost of accessing IBR material would presumably have a negligible impact on most agencies' budgets. As noted above, agencies struggling with costs might consider charging "fair" user fees, "based on the costs to the Government" and the "public policy or interest served," under 31 USC 9701. To the extent that fairness and public policy play an appropriate role, this would suggest limiting or eliminating any fees to non-regulated members of the public, in light of the policies expressed in the FOIA and E-Government Act of 2002.

5. How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final rule stage of the rulemaking?
6. How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?
OFR review of proposed rules should not significantly affect agency rulemaking and policymaking. If an IBR were to be rejected at the final rule stage (something that would be much more upsetting to agencies expecting upcoming publication, given that they had passed all other procedural hurdles), it would presumably be rejected first at the proposed rule stage. Agency rulemaking schedules should provide much more flexibility with respect to "fixing" defects in proposed rules, so agencies should appreciate an earlier chance to ensure proper IBRs at the proposed rule stage.

7. Should OFR have the authority to deny IBR approval requests if the material is not available online for free?
Yes. The law is quite clear that any effective IBR must first acquire "the approval of the Director of the Federal Register." 5 USC 552(a). That approval, in turn, may only be forthcoming when a proposed IBR meets the statutory criterion of being "reasonably available to the class of persons affected thereby." As explained above, I believe the most proper interpretation of that criterion is that material is not reasonably available to the class of persons affected by regulation unless it is freely available online.

8. The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?
No. Given that OFR has already decided to seriously consider this petition for rulemaking by issuing a Federal Register publication and requesting comments, it is not clear why updating some non-binding guidance documents would be preferable to simply completing the rulemaking process by amending the Part 51 regulations, which have not been updated in *thirty years*, despite the undeniably broad changes in background law and policies that have occurred since then, as ably outlined in the petition. Those changes are too significant to be left to non-binding guidance documents that could (and most certainly would) be ignored.

On the other hand, an agency that fails to comply with the *binding* requirements in Part 51 would be left with unenforceable regulations, which would provide a real and serious incentive to follow the rules. *See, e.g., PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (recognizing that improperly-incorporated materials are "without legal effect"); *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977) (holding that a referenced "Document is not a validly issued part of [an agency's] regulations," and thus "not enforceable" "because it has not been published in the Federal Register, nor have the *procedural requisites* for incorporation by reference been complied with") (emphasis added). *See also Appalachian Power Co.*, 566 F.2d at 455-57 (noting that "the director's approval" must be obtained by following procedures in "*the regulations* of the Office of the Federal Register") (emphasis added).

9. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability?
No. OFR is given the statutory responsibility of approving incorporations by reference -- not OMB. Therefore, it must not punt away all responsibility on this issue, even if it involves making some policy judgments. Moreover, this is not a new conclusion. When drafting the final FOIA bill, the House Committee on Government Operations explicitly noted that "[p]ermission to incorporate material in the Federal Register by reference would have to be granted by the Director of the Federal Register." H. Rep. No. 89-1497 at 7 (1966). Shortly thereafter, the Director of the Federal Register published the first set of regulations "establish[ing] standards and procedures governing his approval of instances of incorporation by reference...." 32 FR 7899 (June 1, 1967). In 1982, OFR updated those regulations. Thus, it has always been the executive branch's clear understanding that OFR is responsible for the content of the standards, as well as the procedures, in Part 51. There is no reason to refuse to recognize that responsibility now.

Thank you for considering my comments.

Sean Croston
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