PETER L. STRAUSS
BETTS PROFESSOR OF LAW
435 WEST 116TH STREET
NEW YORK, N.Y. 10027

PHONE:212-854-2370
FAX: 212-854-7946
EMAIL: STRAUSS@LAW.COLUMBIA.EDU

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Re: 1 C.F.R. Part 51 [NARA 12-0002] Incorporation by Reference

Gentlefolk:

These personal comments respond to the questions you published requesting comments on the request I submitted on behalf of myself and others, requesting OFR to revise 1 C.F.R. 51. I regret the appearance, both from the tone of your questions and from your decision to keep the commenting public from having immediate access to the regulatory language we suggested, that you are hostile to the request.

The text we suggested for 1 C.F.R. 51 is appended to this comment.

1. Does "reasonably available"
- **a. Mean that the material should be available:**
  - **i. For free and**
  - **ii. To anyone on line**
- **b. Create a digital divide by excluding people without Internet access?**

As the appended suggested text will reveal, these questions mischaracterize the proposal; they also ignore the impact of the information age.

The proposal suggests free access be required in only two circumstances, both of which could acceptably occur under constraints protecting the intellectual property interests of standards organizations' copyrighted materials. First, when agencies publish *proposed* rules that involve incorporation by reference, meaningful public comment requires that the public have available to it the standard that is proposed to be incorporated. Under today's electronic rulemaking process, that means accessability through Regulations.gov. However, it would be quite acceptable for *this* access to be limited to commenters (say, persons who come to it during the comment period and via Regulations.gov or an agency's web-site), and for it to be made available to them under controlled circumstances such as password access, read-only access, undertakings of use for comment purposes only, etc. Some government agencies already successfully employ access under such restrictions, with little cost to standards' organizations interest in sale of their standards to those who will be employing the standards in their business dealings. This would not be universal access.

Second, if *and only if* materials incorporated by reference are made mandatory elements of regulatory compliance – law – the contemporary values reflected in the Electronic Freedom of Information Act require that those standards be available on agency websites. The National Technology Transfer Act, strongly encouraging the government's use of voluntary standards, and implementing OMB guidance, both imagine that these standards will not be *law,* but rather that they will be guidance as to means by which regulatory standards may successfully be met. When material incorporated by reference has that character – that is, is not in itself legally binding, but only describes one means by which legal requirements may, but need not necessarily, be met – use of the standards is a voluntary matter for the regulated community. That community can assess the relative costs of procuring the standards and of determining for itself how the law's requirements can best be met.

Agencies are in fact not well advised to incorporate materials by reference as governing law, since then they will have to engage in more rulemaking required to change them as standards develop. If they choose to do so, however, it might again be acceptable to restrict access to the standards to those who have a need to know the law by which their conduct is to be governed. Again, there are a variety of electronic tools by which such restrictions could be achieved. "Reasonably available" does entail availability to would-be commenters and to those who must comply with legal requirements. It does not require availability "to anyone on line."

Your question about creating a digital divide is genuinely astonishing. No body likely to learn of and wish to comment on a proposed rule (much less one whose comments will be submitted in the detail that makes it likely the proposing agency will seriously consider them) will lack computer literacy and access. Nor will any corporation or other organization faced with the need to comply with mandatory standards that have been incorporated by reference into a regulation governing its conduct. The whole thrust of E-FOIA, Regulations.gov and so many other government initiatives is to recognize how Internet resources improve the relations between government and citizens, not divide them. Your office's refusal to come to grips with these developments in relationship to what it means for material to be "reasonably available" is the problem.

By ignoring in your rules the contributions of Internet access to ready availability, *you* create a much more extensive divide, between those persons vitally affected by a proposal or by a rule who can afford to come or send an agent to your offices or the agency's office for free access, and those who cannot. It is inconceivable that the presence of single physical copies in two places (or paid access at rates neither you nor agencies today make any effort to control) could be described as ready availability in the current day.

2. Does "class of persons affected" need to be defined? If so, how should it be defined.

When a notice of proposed rulemaking is published, the class of persons affected may be defined as those who have an interest to comment in the rulemaking – limited, that is,

to those who are commenting, and to their use in the comment process. When a rule has been adopted, the "class of persons affected" is primarily those who have a need to know the standards to which their conduct will be held.

3. Should agencies bear the cost of making the material available for free online?

To the extent this question appears to assume that online availability must be *universal*, it again considerably overstates the request of our petition. If there are costs in providing limited accessibility during a comment period, or access to mandatory standards, the petition does entail agencies bearing those costs. It is believed, however, that the costs can be set in bargaining with standards organizations and that in return for appropriate access restrictions and the benefits that come to the organizations from having their work given credit in this way, the costs will be relatively minor.

A comment already filed makes some reference to the issue of "unfunded mandates." It is important to recognize that when an agency requires citizens or corporations to pay private parties in order to know what actions are being proposed, or what are the standards that govern their conduct, *that* is an unfunded mandate. The agency is achieving its own ends (and financial savings) by exporting onto others costs that are properly its to pay. Note, too, that agencies will have much stronger incentives to bargain to appropriate financial outcomes when they, and not others, have a financial stake in those outcomes. Agencies bearing the cost, together with the natural interest of standards organizations in having their work valued and credited in this way, will produce lower costs than would be inflicted on a public required to pay for what principally benefits the agency.

Correspondence I have had with a user group that I understand will be filing comments makes clear that in some cases, incorporation by reference imposes costs on thousands of entities, most of them small businesses, that would have to pay significant amounts for information. Standards organizations, understandably seeking to boost their financial base, and some government agencies, in an effort to meet budgetary stringencies, are increasingly creating these unfunded mandates – and that without necessary regard for their obligations under the Small Business Regulatory Enforcement Fairness Act and Regulatory Flexibility Act to be especially mindful of the impact of their actions on small businesses. Only by channeling any costs associated with the use of *mandatory* standards or of commenting on rulemaking proposals through the agency concerned can the requirements of SBREFA and Reg-Flex reasonably be met.

A recent congressional action in a particular context where this effect would be importantly felt by small business forbade the use of incorporation by reference unless *unlimited* free access was provided on the agency website – more than we are requesting. H.R. 2845 Sec. 24, signed Jan. 3, 2012. H.R. 7, Sec. 9006, awaiting House floor action as I write, essentially embodies SBREFA/Reg-Flex thinking in requiring the Secretary of Transportation to consider both the costs and their impacts of incorporations by reference, as well as alternatives to that course.

4. How would this impact agencies budget and infrastructure, for example?

I am not in a position to answer this question in any detail, but believe that appropriately limited requirements of access – read-only access during comment periods, and free access only to *mandatory* standards and only by those with a need to know – would minimize those costs. One consideration here is that if standards are used as law and not guidance, respectable authority suggests that public access is mandatory, and copyrights may not be enforced. *Veeck v. S. Bldg Code Cong. Int'l,* 293 F.3d 791 (5th Cir. 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 stage of the rulemaking?

This question, too, mischaracterizes our petition. Our petition does *not* envision OFR review at the proposal stage. Rather, we seek a rule that creates conditions for IBR approval (or not) at the final stage of the rulemaking, conditions reflecting how the agency has treated the IBR proposal during the comment period. If Part 51 is amended as we request, agencies will know in proposing rules for comment that they can only expect approvals of IBRs if commenters had (appropriately limited) access to the proposed matter during the comment period. This will be an item in their submission to you for approval at the final stage of rulemaking, as will be whether the IBR'd material is mandatory [e.g., "conduct must demonstrate compliance with ANSI Standard XYZ"] or permissive [e.g. "conduct must satisfy the following standard ... which may be established by compliance with ANSI Standard XYZ] – just as other matters must now be shown in agency submissions. OFR needs see the matter only once, as it does now.

6. Should OFR have the authority to deny IBR approval requests if the material is not available online for free?

OFR is *required by 5 U.S.C. 552(a)(1)* to deny IBR approval requests if material is not reasonably available. That requires OFR to define what it means for material to be reasonably available, which it has never done – unless availability in NARA and agency print libraries is so regarded. But that implicit definition by your unamended 1982 regulations, if it be so regarded, has been undercut by the information age – both because availability is no longer limited to *print* availability and because the fact of electronic availability has undercut the principal rationale for IBR – avoiding printing obligations for the Federal Register and the Code of Federal Regulations that would greatly increase their bulk and diminish their usability. In exercising its authority over IBR requests in the electronic age, OFR has the responsibility to (re)define reasonable availability and it should do so in a manner that respects the changes brought about by that age, and by the statutes (such as the Electronic Freedom of Information Act) that Congress has enacted in response to it. These statutes demand public accessibility to law on agency websites, and contain no exception for IBR'd material.

7. The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?

The Administrative Conference resolved only to issue "best practice" recommendations to agencies, who are not statutorily responsible for making decisions about IBR. That responsibility lies in OFR, whose regulations currently have been outdated by the facts of the information age. Since OFR is authorized to approve incorporations by reference *only* upon determining that the incorporated material is reasonably available, and OFR has not revisited the question what reasonable availability entails since the dawn of the information age, it is OFR's responsibility to do that now. Guidance to agencies has already been achieved by the ACUS recommendation. What is now required is not advice to agencies, but OFR's responsible carrying out of its own statutory duties, which cannot be accomplished by guidance to others.

8. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability.

5 U.S.C. 552(a)(1) unmistakably places the responsibility to determine reasonable availability in the Director of the Office of the Federal Register. Of course, one fully expects that in carrying out that responsibility the Director will pay careful attention to the views of other concerned elements of government as well as to the public. But only he has the authority to issue regulations on that subject. Just as 1 C.F.R. Part 51 currently defines and requires "usability," a valuable element in IBR'd material (but not one explicitly required by statute), it should define and require reasonable availability, which *is* a statutory mandate. Reasonable availability is no more (or less) characterizable as a policy rather than a procedural issue than is usability. In any event, the statute embodies no such distinction in making it the responsibility of the Director to assure that IBR'd material is reasonably available.

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

The implicit premises of this question are faulty. First, the changes we have suggested entail *no* IBR review at the proposed rule, as discussed in replying to your question 5 above. Second, a revised Part 51 should and could be clear enough in its requirements for agency demonstration of reasonable availability to make any change in IBR review periods insignificant. While agencies will have to include some new materials in their requests for permission to IBR, they ordinarily should no longer need to demonstrate (nor will the Director need to inquire and make findings on) either "The completeness and ease of handling of the publication," or "Whether it is bound, numbered, and organized," as Part 51 presently demands for all cases.

Suggested text of 1 C.F.R. Part 51, as amended

Title 1: General Provisions
PART 51—INCORPORATION BY REFERENCE

§ 51.1 Policy.

(a) Section 552(a) of title 5, United States Code, provides, in part, that "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

(b) The Director will interpret and apply the language of section 552(a) together with other requirements which govern publication in the Federal Register and the Code of Federal Regulations, and the Internet accessibility of information about government law and policy. Those requirements include—

(1) The Federal Register Act (44 U.S.C. 1501 et seq.)

(2) The Administrative Procedure Act (5 U.S.C. 551 et seq.);

(3) The Electronic Freedom of Information Act of 1996

(4) The Government Paperwork Elimination Act of 2000,

(5) The E-Government Act of 2002

(6) The regulations of the Administrative Committee of the Federal Register under the Federal Register Act (1 CFR Ch. I); and

(*7*) The acts which require publication in the Federal Register (See CFR volume entitled "CFR Index and Finding Aids.")

(c) The Director will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference—

(1) Is intended to benefit both the Federal Government and the members of the class affected; and

(2) Is not intended to detract from the legal or practical attributes of the system established by the Federal Register Act, the Administrative Procedure Act, the Electronic Freedom of Information Act of 1996, the Government Paperwork Elimination Act of 2000, the E-Government Act of 2002, the regulations of the Administrative Committee of the Federal Register, and the acts which require publication in the Federal Register.

(d) The Director will carry out the responsibilities by applying the standards of part 51 fairly and uniformly.

(e) Publication in the Federal Register of a document containing an incorporation by reference does not of itself constitute an approval of the incorporation by reference by the Director.

(f) Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.

§ 51.3 When will the Director approve a publication?

(a) The Director will approve the incorporation by reference of a publication when the following requirements are met:

(1) The publication is eligible for incorporation by reference (See §51.7).

(2) The language of incorporation meets the requirements of this part (See §51.9).

(3) The publication is on file with the Office of the Federal Register.

(4) The Director has received a written request from the agency to approve the incorporation by reference of the publication.

(b) The Director will notify the agency of the approval or disapproval of an incorporation by reference within 20 working days after the agency has met all the requirements for requesting approvals (See §51.5).

§ 51.5 How does an agency request approval?

(a) Formal approval of a publication for incorporation by reference applies to a final rule document, including for these purposes an interim final rule. For timely approval by the Director of the Federal Register, the agency must—

(1) Make a written request for approval at least 20 working days before the agency intends to submit the final rule document for publication;

(2) Send with the written request a copy of the final rule document that uses the proper language of incorporation;

(3) Demonstrate that if the rule has previously been open for comment, and its Notice of Proposed Rulemaking proposed incorporation by reference of any publication, that publication was available throughout the comment period either

(a) In the FDMS docket for the rulemaking proposal; or

(b) On the agency's website at a location appropriately referenced in the Notice of Proposed rulemaking; or

(c) On the website of the voluntary standards organization responsible for the publication, appropriately referenced in the Notice of Proposed rulemaking and readable without cost to those commenting on the proposed rule.

(4) Demonstrate that if the rule is an interim final rule that is now open for comment, and proposes incorporation by reference of any publication, that publication will be available throughout the comment period either

(a) In the FDMS docket for the rulemaking proposal; or

(b) On the agency's website at a location appropriately referenced in the Notice of Proposed rulemaking; or

(c) On the website of the voluntary standards organization responsible for the publication, appropriately referenced in the Notice of Proposed rulemaking and readable without cost to those commenting on the interim final rule.

(~~3~~*5*) Ensure that a copy of the publication is on file at the Office of the Federal Register.

(b) Agencies may consult with the Office of the Federal Register at any time with respect to the requirements of this part.

§ 51.7 What publications are eligible?

(a) Save for those matters excluded under subsections (b) and (c) of this paragraph, a publication is eligible for incorporation by reference under 5 U.S.C. 552(a) while it is posted to the agency's electronic reading room and appropriately referenced in the rule incorporating it, or if it—

(1) Conforms to the policy stated in §51.1;

(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material, that informs the public how the regulation referring to it might be complied with; and

(3) Is reasonably available to and usable by the class of persons affected by the publication.

(i) In determining whether a publication not posted to the agency's electronic reading room is reasonably available, the Director will consider

(A) Whether it can be electronically accessed for reading without cost to persons directly affected by the rule; and

(B) Whether it could have been electronically accessed for reading without cost to persons potentially affected by the rule during the rulemaking comment period; [or

(C) If the publication could not have been accessed without cost under either (A) or (B) of this subsection, whether

(1) the material to be incorporated is not made inappropriate for incorporation by reference by paragraph (c)(3) hereof, and

(2) was accessible by members of the public during the rulemaking comment period at a cost reasonable in relation to their needs and resources and

(3) will be accessible thereafter at a cost reasonable in relation to their needs and resources .]

(ii) In determining whether a publication is usable, the Director will consider whether it is readily available from a website referenced in the rule incorporating it; or, if it is a print document,—

(A) The completeness and ease of handling of the publication; and

(B) Whether it is bound, numbered, and organized.

(b) The Director will assume that a publication produced by the same agency that is seeking its approval is inappropriate for incorporation by reference unless it is hyperlinked to the document incorporating it.. A publication produced by the agency and not so linked may be approved, if, in the judgment of the Director, it meets the requirements of paragraph (a) and possesses other unique or highly unusual qualities.

(c) The following materials are not appropriate for incorporation by reference:

(1) Material published previously in the Federal Register.

(2) Material published in the United States Code.

(3) Material creating a fixed obligation on members of the public that is inaccessible without payment of a fee to a private body.

§ 51.9 What is the proper language of incorporation?

(a) The language incorporating a publication by reference shall be as precise and

complete as possible and shall make it clear that the incorporation by reference is intended and completed by the final rule document in which it appears.

(b) The language incorporating a publication by reference is precise and complete if it—

(1) Uses the words "incorporated by reference;"

(2) Precisely identifies the publication incorporated, as by stating its title, date, edition, author, publisher, and identification number;

(3) Informs the user that the incorporated publication is published data, criteria, standards, specifications, techniques, illustrations, or similar material, that informs the public how the regulation referring to it might be complied with; or, if freely available by hyperlink from electronic versions of the regulation in which it appears, that it is a requirement;

(4) In electronic versions of the regulation, contains an active hyperlink to the publication or, should this not be possible, makes an official showing that the publication is in fact available by stating where and how copies may be examined and readily obtained with maximum convenience to the user; and

(5) Refers to 5 U.S.C. 552(a).

(c) If the Director approves a publication for incorporation by reference, the agency must—

(1) Include the following under the DATES caption of the preamble to the final rule document (See 1 CFR 18.12 Preamble requirements):

> The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of ___.

(2) Includes the term "incorporation by reference" in the list of index terms (See 1 CFR 18.20 Identification of subjects in agency regulations).

§ 51.11 How does an agency change or remove an approved incorporation?

(a) An agency that seeks approval for a change to a publication that is approved for incorporation by reference must—

(1) Publish notice of the change in the Federal Register and amend the Code of Federal Regulations;

(2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and

(3) Notify the Director of the Federal Register in writing that the change is being made.

(b) If a regulation containing an incorporation by reference fails to become effective or is removed from the Code of Federal Regulations, the agency must notify the Director of the Federal Register in writing of that fact within 5 working days of the occurrence.