

Professor,

We are having some technical difficulty posting to regulations.gov. As soon as it is resolved your letter will be posted.

Legal Affairs and Policy Staff  
Office of the Federal Register

>>> Peter Strauss <strauss@law.columbia.edu> 2/27/2012 5:24 PM >>>

Hello -- As you know, I am the coordinator of the rulemaking petition you published in today's Federal Register at p. 11414.. I very much appreciate your bringing it to public attention. However

- 1) It does not yet appear (5 pm Monday, February 27) in the index of proposed rules with comment closing dates on regulations.gov
- 2) It appears from those rulemaking proposals that are there that you do not assign RIN numbers to proposals, as I believe you are asked to do.
- 3) The 30-day comment period is remarkably short -- part 51 has not been amended since 1982, so it is hard to understand any rush, Under Section 6(a) of E.O. 12866, "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Not a person I have corresponded with about this welcome publication has failed to comment on the unfortunate shortness of the comment period you have provided for.
- 4) While it is true that we did not demand adoption of the particular language we submitted, the petition is incomplete without that appendix, which is clearly referred to in the material you have published and which would assist any members of the public interested to comment in grasping the nature of the proposal, I protest its non-publication, and request that it be immediately added to the docket of the rulemaking proposal on FDMS, and cross-referenced on your site. If as seems possible you will not be maintaining an FDMS docket, as you do for other matters (the Regulations.gov link for submitting comments contains this line: "This Agency does NOT accept electronic comments for this Federal Register document. You must print out this comment and submit it to the agency by any method identified in the Federal Register document for the rule you are commenting on. Your comment will not be considered until this agency receives it. For further information, follow directions in the specific Federal Register document or contact the specific agency directly."), then I request that you publish the text in the Federal Register as an amendment to today's publication. I repeat the text below; you already have an electronic copy of it. Please promptly enter this preliminary comment in any publicly accessible electronic comment data base you maintain.

Thank you.

Peter Strauss

**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 ~~which govern publication~~ 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*

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

(4 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; ~~and~~

(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.*

(35) 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*~~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;*

~~(3) Substantially reduces the volume of material published in the Federal Register; and~~

(4) *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. A publication may be approved if it cannot be printed using the Federal Register /Code of Federal Regulations printing system.*

*(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 States the title, date, edition, author, publisher, and identification number of the publication;*

*(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.

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