

To:

Mr. Michael L. White
Acting Director, Office of the Federal Register
Officials at OFR, NARA

Subject: **NARA 12-0002 – Incorporation by Reference**

As part of the public comment period for NARA 12-0002 – Incorporation by Reference – and in response to the questions specifically raised by the Office of the Federal Register in the Notice of Proposed Rule, 77 FR 11414, I herewith wish to submit these comments.

I wholeheartedly agree with the petitioners that the OFR must ensure its rules for approving incorporations by reference are current with the changes brought by new technology, laws passed, and court cases decided since 1 C.F.R. §51 was last considered in 1982.

5 U.S.C. §522 provides in part:

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, 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.

The text of 5 U.S.C. §522 is clearly intended to preclude secret Federal law, unpublished materials imposing mandatory restrictions whose violation may be consequential to affected persons, by requiring that any such material be published in an open publication, the Federal Register. But, the statute makes an *exception* for practical reasons that materials may be considered published in the Federal Register as long as the materials are individually approved by the Director of the Office of the Federal Register for incorporation by reference and are “reasonably available to the class of persons affected”.

The concept of reasonable availability of materials has changed dramatically since that statute was first written; practices that were once unreasonable when 5 U.S.C. §522 was written are now considered reasonable—if not unquestionably commonplace—today. For example, before widespread access to high-speed Internet, in order to provide a copy of a large volume of text, one needed to obtain a printed copy and physically mail it to the recipient. Now, the recipient can simply download an electronic copy in fractions of the time and cost.

We have seen the changes brought by new technology being embraced by OFR itself, with Federal Register 2.0 and other information e-portals opening up the contents of the Federal Register to wider audiences via the Internet. The Federal Register will continue to be published indefinitely in physical media for the purpose of historical archives, but today, the dissemination of its text to interested persons is more likely to be through electronic means rather than interested persons obtaining bound copies through a service such as Interlibrary Loan.

It is not clear what the lawmakers intended by “reasonably available”, whether this is to be interpreted as a static or dynamic requirement. However, the fact that incorporation by reference

is an exception to publication in the Federal Register indicates that “reasonably available” is a dynamic requirement that should be updated as access to the Federal Register is expanded.

According to your current rules, materials to be incorporated by reference must be published in a “usable” form:

In determining whether a publication is usable, the Director will consider—

- i. The completeness and ease of handling of the publication; and
- ii. Whether it is bound, numbered, and organized.

These requirements pertain to physical media and do not contemplate the technological advancements that have allowed materials to be published in electronic form. The Internet as we know it today was just starting out in 1982; IPv4 was standardized in September 1981 (RFC 791) and the transition from ARPANET to TCP/IP occurred on January 1, 1983. The definition of “usable” needs to be updated to account for these changes in technology. Perhaps there will even come a time when agencies will wish to incorporate materials that are not normally published in print form.

The petitioners mentioned the Electronic Freedom of Information Act of 1996, the Government Paperwork Elimination Act of 2000, and the E-Government Act of 2002. I think that the Americans with Disabilities Act of 1990 should also enter into the discussion of requirements for reasonable accessibility because the Director should also consider the accessibility of reasonable accommodations to the materials for persons with disabilities.

I would now like to comment on the individual points of discussion raised in the Notice:

1. Does “reasonably available”
 - a. Mean that the material should be available:
 - i. For free and
 - ii. To anyone online?

Apart from the costs of physically obtaining the materials, including costs of printing, mailing supplies, postage, minimal material loan fees, necessary material handling fees, and/or nominal electronic document delivery fees (“distribution costs”), I believe that materials incorporated by reference must be free to all persons affected because it is further my belief that people are entitled to free access to copies of the laws and rules that they are required to follow. These beliefs are supported by, for example, [*Veeck v. Southern Building Code Congress International, Inc.*](#) and [*Building Officials & Code Administrators International, Inc. v. Code Technology, Inc.*](#)

Preconditions for access by affected persons to materials incorporated by reference **should never** include: payment of copyright royalties, intellectual property licensing fees, sublicense fees, patent fees, etc. or a requirement to sign or otherwise agree to be bound to a legal agreement such as an NDA that would infringe upon one's rights to understand, discuss with others, learn, debate, or speak of the existence of the material, or

any part thereof, with or to any non-party to the agreement. I consider “for free” to mean that a material is distributed without these blacklisted fees and/or costs, but allowing for the distribution costs mentioned earlier.

I do not believe that the Director has the obligation to ensure that the material is available online; however, making the material available online is perhaps the easiest way to ensure that an affected person can obtain the materials for free in a timely manner, and be fully accommodated for their disabilities. If the material is not online, then it must be that the material is readily available in enough libraries or public viewing areas that an affected person would need not travel an extraordinary distance to personally inspect them for free while being reasonably accommodated for disabilities.

b. Create a digital divide by excluding people without Internet access?

On March 18, 2004, Nielsen//NetRatings reported that three-fourths of Americans have access to the Internet.¹

The *New York Times* reported on June 23, 2005 that a study released by the American Library Association found “[n]early all libraries around the country have free public Internet access and an increasing number are offering wireless connections”.²

On March 25, 2010 the University of Washington's U.S. IMPACT study found:³

- Nearly a third of all Americans had used the Internet at a public library in 2009.
- 44% percent of people living in households below the Federal poverty line used public library computers and Internet access.
- 26 million library Internet users obtained government or legal information.

A “digital divide” is a concern, but I think a far more impacting “divide” is created when access to materials requires that an affected person pay costly license fees, copyright royalties, etc. just to be able to access the laws and regulations that they are legally required to follow. A person living below the Federal poverty line, even many individuals who earn more than that, are facing enough financial pressures that they are unable to afford these costs. I believe that it is unjust to require a person to be subject to a rule that they cannot access to learn of their obligations under it.

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

No, I believe it does not. The use in 5 U.S.C. §522 of the word “affected” and the usual English definition of the adjectival participle are sufficient in making clear that the “class of persons affected” broadly includes anyone who is either directly or tangentially

1 Three out of Four Americans Have Access to the Internet, According to Nielsen//NetRatings (March 18, 2004). Nielsen//NetRatings. http://www.nielsen-online.com/pr/pr_040318.pdf

2 Ruethling, Gretchen (June 23, 2005). “Almost All Libraries Offer Free Web Access”. *The New York Times*. <http://www.nytimes.com/2005/06/24/national/24library.html>

3 Opportunity for All: How Library Policies and Practices Impact Public Internet Access (2010). University of Washington. <http://cis.washington.edu/usimpact/us-public-library-study.html>

impacted by any part of the material when it is incorporated by reference.

I am concerned that any definition of “class of persons affected” not relying on the usual English meaning would be inadequate for many cases of IBR.

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

Agencies should bear the cost of however the material is made “readily accessible” for free to affected persons. The least expensive means for the agency will likely be electronic, and this will create an incentive for agencies to publish incorporated materials in electronic documents, which are arguably the most convenient to access by affected persons.

I agree with petitioners as well that agencies bearing the cost of making incorporated materials reasonably accessible for free will maximize the incentive to bargain over licensing agreements with standards development organizations (SDOs).

4. How would this impact an agency's budget and infrastructure, for example?

There will obviously be more costs to the agency to be able to incorporate materials by reference. However, I think that once the rules for IBR are changed, agencies will seek out better partnerships with SDOs in ensuring that incorporated materials are reasonably available for free to affected persons. SDOs will realize the benefits to being *the* organization that publishes a standard incorporated by reference:

- a. Opportunities to offer consulting services
- b. Official training and instruction programs
- c. Certification issuance
- d. Stewardship of professional societies
- e. Etc.

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?

I do not believe that the proposed changes to the rules for IBR will have much impact to this end. IBR approval requests may already be denied by the Director of the OFR. Agencies will need to work with the OFR sooner in the rulemaking process.

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

The Director of the OFR has this authority and should deny any IBR approval request if

the material is not reasonably available for free to affected persons.

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?

No. The rules need to be amended to address the concerns raised by petitioners and commenters during this public comment period.

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?

No. 5 U.S.C. §522 as well as your current regulations require the Director of the OFR to consider reasonable availability when approving IBR requests. If the OFR wishes to ask the Office of Management and Budget to draft the criteria of “reasonable availability”, and then ratify these criteria after considering whether they address the concerns raised by petitioners and commenters during this public comment period, that is within the OFR's authority.

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

The proposed changes will lengthen the time needed to issue a final rule relying on incorporated materials. However, I do not believe that this is a bad thing, as it might give affected persons more opportunity to participate in the rulemaking process.

Sincerely,

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