Regarding the incorporation by reference petition for rulemaking, I wanted to point out that the requirements of 5 USC 553(b) and the Court of Appeals for the D.C. Circuit's *Portland Cement* doctrine provide another reason why any third-party information that an agency proposes to incorporate by reference into its regulations should be freely available to the public.

Congress explicitly limited the reach of the incorporation-by-reference provision in 5 USC 552(a)(1) by stating that "*For the purpose of this paragraph*," information is deemed published in the Federal Register when incorporated by reference with the approval of the Office of the Federal Register. Thus, it only exempts agencies from the Federal Register publication requirements of 5 USC 552(a)(1), and not from any other publication requirements. And 5 USC 553(b) has an entirely separate Federal Register publication requirement, which covers all of "the terms or substance of [a] proposed rule or a description of the subjects and issues involved." (This requirement generally does not apply to guidance documents, but those are of less concern than binding requirements.)

Given the terms of 5 USC 553(b) and the prevailing interpretation set forth in *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (see below), an agency's notice of proposed rulemaking stating something like "[Agency stakeholders] must comply with ANSI standard 2012-X" does not satisfy this separate publication requirement, if the relevant substance of ANSI standard 2012-X is not also published or otherwise made freely available to the public.

In *Portland Cement*, the D.C. Circuit considered a case involving "rule-making proceedings to determine standards," and determined that "information should generally be disclosed as to the basis of a proposed rule at the time of issuance." 486 F.2d at 394. More specifically, the court interpreted the notice-and-comment requirements of 5 USC 553(b)-(c), concluding that "Obviously a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed." *Id*. at 393 n. 67. More recently, the D.C. Circuit confirmed *Portland Cement*'s ongoing viability, holding that "It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment. It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data that, to a critical degree, is known only to the agency." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008), citing *Portland Cement* at 393.

This reasoning logically extends to require agencies to make publicly available the contents of any technical standards whose incorporation by reference they propose. In the words of the D.C. Circuit, an interested person does not have a "meaningful opportunity for comment" when the contents of a key private standard (analogous to underlying scientific or technical data) incorporated in a proposed rule are only available to that person for a fee of $995 (as in the case of one incorporated standard noted on page 6 of the Pipeline Safety Trust's insightful public comment). Rather, the contents of such a document are essentially "known only to the agency" in that case, in violation of 5 USC 553(b)-(c).

Of course, the Office of the Federal Register has no specific statutory "approval" power over the contents of notices of proposed rulemaking like he has over incorporations by reference under 5 USC 552(a)(1), but the Federal Register Act gives the Director of the

OFR authority to prescribe regulations for carrying out that Act, which itself governs the Federal Register publication of “documents . . . required . . . to be published by Act of Congress.” See 44 USC 1502, 44 USC 1505. So the Director of OFR still has statutory authority to issue regulations requiring the public availability of all documents incorporated in notices of proposed rulemaking, as a means for carrying out the requirements of the Federal Register Act and 5 USC 553(b). He should exercise this authority to do so.

Thanks,
Sean Croston