



Public Works for a Better Government

April 6, 2012

Ms. Amy Bunk
Director of Legal Affairs and Policy
Office of the Federal Register
800 North Capitol Street, N.W., Suite 700
Washington, D.C. 20001

Comments on Agency/Docket Number NARA 12-0002

Dear Ms. Bunk:

I am writing to you on the subject of availability of technical standards incorporated by reference into the Code of Federal Regulations. Public.Resource.Org has recently conducted an extensive examination of the text of the Code of Federal Regulations with specific focus on Incorporations by Reference, coupled with an extensive examination of the Standards Incorporated by Reference (SIBR) database maintained by the National Institute of Standards and Technology (NIST). We have also purchased or attempted to purchase many of the documents specified as binding under the law.

In the course of our audit, we have uncovered a number of anomalies in the Code of Federal Regulations. Even if the Office of the Federal Register decides against revision of the provisions of 1 CFR Part 51 relating to IBR, it is our recommendation that at the very least a comprehensive audit of the current incorporations be conducted.

Some of our findings include the following:

1. Many of the standards Incorporated by Reference are simply unavailable for purchase. For example, the NIST SIBR database has 96 entries for standards created by the Compressed Gas Association (CGA) covering topics such as the Standards for Safety Release Devices, for Visual Inspection of Cylinders, and the Safe Handling of Compressed Gases. CGA has an explicit policy of not making any historical standards available for purchase, either on their site or through their 2 designated retail outlets, Thomson Reuters Techstreet and the IHS Standards Store. It is impossible to buy the CGA standards required by law and very few, if any, public libraries have the documents in question.
2. Some nonprofit organizations appear to have an explicit policy of gouging taxpayers because of their privileged position as the supplier of documents required by law. For example, the American Herbal Products Association (AHPA) has issued a number of press releases boasting that their publication Herbs of Commerce “has become the law of the land” in 21 CFR 101.4(h). The version of Herbs of Commerce

incorporated into law is the 1st Edition, published in 1992. AHPA sells only a PDF version of this document for \$250 and has secured the PDF document so that purchases may not print, transfer, or sell the document. On the other hand, the more up-to-date 2nd Edition sells for \$99.99 as either print or a PDF file and has no such restrictions.

3. Some of the documents incorporated by reference seem to not exist. For example, the DOT/PHMSA hazmat standards in 49 CFR 179.300–9(a) et. seq. require the use of the Association of American Railroads (AAR) Specification M–1002, Standards and Recommended Practices for Tank Cars, year 2000 Edition. After searching on all available retail outlets for the year 2000 edition, we wrote to the AAR and after extensive discussions, Publications Specialist Kathy Trujillo researched the matter and wrote back that “of the 23 sections of the Manual of Standards and Recommended Practices, none of the sections has a 2000 date. I do not know what manual the federal regulations is referring to but it is not one of my manuals.”
4. Some of the incorporations incorporate things that don’t appear to be actual documents but are instead concepts. For example, 45 CFR 162 has a series of incorporations by HHS/AR for documents produced by the Washington Publishing Company. In 45 CFR 162.1802(a)(2), the 2000 version of the document “ASC X12N 837: Health Care Claim: Dental” is incorporated. The company sells a variety of XML Schemas and Implementation Guides, but it is unclear from the CFR exactly what is being incorporated.
5. The OFR regulations require that a specific version of standards be incorporated. Specification of a standard requires a specific title and document number and the date that the standard was published. However, the NIST SIBR database lists 536 entries in the Code of Federal Regulation that have No Date Given (NDG). In some cases, this is because NIST has incorrectly read the CFR. For example, NIST lists NFPA Standards 496 and 70 as having No Date Given in 46 CFR 111.105–7(b) despite the fact that 46 CFR 110.10–1 lists the dates for those standards. It seems that technical coordination between NIST and OFR might increase the accuracy of the results in the NIST database, which is heavily used by standards professionals.
6. Many of the technical standards incorporated by reference are so old as to be unsafe. The United States Coast Guard still requires the use of a 1941 standard for Packaging of First-Aid Unit Dressings in 46 CFR 160.041–2(b) and our federal hazmat standards administered by DOT/PHMSA still specify the 1943 Code for Unfired Pressure Vessels in 49 CFR 173.32(c)(4). Not only are such old standards unsafe, they are impossible to procure.
7. A large number of the standards incorporated by reference carry onerous shrink wrap license agreements that attempt to convince consumers that they have agreed to give up rights normally available to purchasers of printed documents. For example, the NIST SIBR database has 543 entries for the American Society of Mechanical Engineers (ASME). One may not purchase and read an ASME document without first ripping through a shrink wrap EULA that purports to prohibit the user from giving the document they purchased to somebody else and attempts to imply that the reader has given up all fair use rights. Most users reading these documents, even if they understand that edicts of government have no copyright (see Section

206.61 of the Compendium II of Copyright Offices Practices), will experience great trepidation in exercising their rights to read, copy, and speak the law of the land.

8. The principle of incorporation by reference depends on the fact that the standards incorporated have become available to the populace, if not directly through the government then through the private, nonprofit organizations. However, the prices for these standards have made the principle of availability a charade. The Underwriters' Laboratories standard UL 42, Steel Above Ground Tanks for Flammable and Combustible Liquids, required in 49 CFR 1910, cost \$849. The National Sanitation Foundation standard NSF 61, Health Effects of Drinking Water Components, required in 424 CFR 3280, costs \$570. Prices like that make the standards unavailable for the vast majority of Americans, perverting the fundamental principles of notification and an informed citizenry that led to the establishment of the OFR.

In response to your specific questions, Public.Resource.Org draws on our extensive experience purchasing, transforming, and making available legal documents, including public safety standards incorporated by reference at both the state and federal levels. Our specific answers are as follows:

1. You asked if "reasonably available" mean that materials should be available for free and to anyone online. It is a cardinal principal of American democracy that ignorance of the law is no excuse. The very purpose of the Office of the Federal Register is to notify citizens of the laws they must obey. As such, reasonably available must mean available for free and to anyone. Anything less is a poll tax on access to justice and is contrary to well-established principles of American law that go back to the definitive and seminal opinion in *Wheaton v. Peters* (33 U.S. 591, 1834) and has been reiterated in a series of decisions, most recently *Veeck v. Southern Building Code Congress International* (293 F.3d 791, 2002), which ruled on the specific issue of incorporation by reference of standards critical to the public safety.
2. You asked if making technical standards incorporated by reference would create a digital divide by excluding people without Internet Access. It is important to understand that the law must be available for viewing without restrictions. The issue is not whether a particular nonprofit should be asked to create an Internet site that permits, for example, read-only access to standards. The issue is that the law must be unencumbered. If the initial publication of these standards is on the Internet with no restriction on use, printed copies can be made for libraries and other access facilities, shrinking both the digital divide and the access to justice divide.
3. You asked if agencies should bear the cost of making the material available for free online. Today, the government bears no costs and, more importantly, no responsibility for making these technical standards incorporated by reference available. The SDOs have exploited this situation to extract rent from the American people, reaping windfall profits on the backs of those that must obey the law. We have no opinion on whether the government should pay money, or if the SDOs should face up to their public interest responsibilities as IRS-certified public charities under section 501(c)(3) nonprofits. What we do know is that government has not faced up to its responsibilities to make sure that the regulations they promulgate are available to an informed citizenry. The answer might be to

encourage the SDOs to take a more public-spirited approach to their work, it might involve government paying for rights, it might involve switching to the many SDOs that do make their standards available to citizens at no charge and with no restrictions. The creation of the law is a public responsibility, not a profit opportunity.

4. You asked if OFR should have the authority to deny IBR approval requests if the material is not available online for free. Not only should OFR have this authority, it must have this responsibility. Anything less is a perversion of the principles upon which your office was founded. Notification of the members of the public who can afford charges of \$850 per document is not notification of the public.

In summary, the rules for Incorporation by Reference, while attractive in theory, have been carried out in a way that subverts the very purposes of the Official Journal of Government for notification of the public and for the creation of an authentic, stable registry of regulations in force in the United States. Standards Development Organizations, while perhaps well-intentioned, have perverted our public-private partnership for voluntary, consensus-based standards into the extraction of rents in an unfair and uncompetitive manner. The system is not working and requires more systematic audits and revisions of the rules.

The issue of public access to the law is not an afterthought of the law-making process, it is a foundational principle under our constitution. The Office of the Federal Register is to be congratulated for taking this responsibility seriously and for creating this opportunity for public comment on this important issue.

Sincerely yours,

Carl Malamud
Public.Resource.Org