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Miriam Vincent
Staff Attorney

RE: Petition for rulemaking and request for comments
1 CFR Part 51 – Incorporation by Reference (IBR)

Dear Mr. White and Mses. Bunk and Vincent:

The Aeronautical Repair Station Association (ARSA) respectfully submits these comments in strong support of the petition for rulemaking submitted by Peter L. Strauss on Feb. 21, 2012.[1]

General background

ARSA is the principal association for the international civil aviation maintenance industry. Its members include aircraft owners and operators, aviation maintenance facilities and individuals certificated by the Federal Aviation Administration (FAA). As such, ARSA members are directly impacted by the statutes and regulations regarding material that a federal agency, such as the FAA, incorporates by reference (IBR[2]) into regulations. The current IBR framework leaves much to be desired.

Case in point

The current IBR regime's shortcomings are illustrated by the FAA's practices in proposing and adopting Airworthiness Directives (ADs).[3]

Such rulemaking is undertaken almost daily to correct an identified unsafe condition in an existing civil aviation article.[4] The resulting corrective actions, required by the rule, are normally contained within a manufacturer's service instructions that the FAA has IBR. Unfortunately, wholesale adoption of commercially developed instructions precludes meaningful comment from affected persons when an AD is proposed, and results in compliance uncertainty after issuance.[5]

[1] As described at 77 FR 11414.
[2] Depending on the context IBR may either mean incorporation or incorporated by reference.
[3] See, Title 14 Code of Federal Regulations (14 CFR) part 39.
[4] In the context of these comments, the term "article" means an aircraft, airframe, aircraft engine, propeller, appliance, or component part.
[5] As stated in 14 CFR § 39.13, an AD is part of the Code of Federal Regulations.

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While an AD should only mandate inspections, conditions and limitations, and any actions that must be taken to resolve unsafe conditions before operating an aircraft, documents that are IBR often include unrelated tasks and information. Since FAA certificate holders must strictly adhere to the instructions contained in the referenced material,[6] or obtain FAA approval for an alternative means of compliance,[7] confusion arises over what actions in the IBR material are actually required by the AD.[8] That issue is particularly problematic when IBR material contains references incorporating additional documents or entire manuals.[9] As a result, many final rules make it impossible for either the regulated person or agency to truly establish compliance.[10]

The IBR of material at many "tiers"[11] exacerbates the problem of interested persons' active participation in the comment period for a proposed rule. Today, it is commonplace, if not the norm, for manufacturer service information IBR in a proposed AD to be unavailable for persons without a commercial relationship with the manufacturer.[12] That reality makes it all but impossible for all affected persons, such as those responsible for the compliance requirements of the AD, to comment on proposed rules; the detailed information is essentially "hidden" until a final rule is issued and the maintenance provider receives information to perform the AD-mandated instructions. This scenario is far from ideal.

We believe documents *essential* to compliance and enforcement *must* be made available during <u>all</u> phases of rulemaking – that is, during the notice and comment period as well as after a final rule is issued. Otherwise, interested persons directly responsible for strict compliance with a public safety regulation do not have the opportunity to provide substantive comments necessary for the agency to fulfill its obligations under the Administrative Procedures Act (APA).[13]

General comments

The background provided establishes factual support for the association's comments. When the government mandates an action, it is imperative that citizens can clearly establish compliance. If the

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[6] See, 14 CFR § 39.11.
[7] See, 14 CFR § 39.19.
[8] That is, questions arise over the applicability, and enforceability, of instructions pertaining to tasks other than those required to correct the unsafe condition identified in an AD.
[9] For instance, the AD may IBR a manufacturer's technical alert which, in turn, references a service bulletin that subsequently directs the reader to an entire maintenance manual. Not surprisingly, all tasks in that "chain" of information are not directly related to correcting the specifically identified unsafe condition.
[10] Alternatively, much of the material IBR in an AD is beyond the scope of tasks necessary to address the unsafe condition. Hypothetically, one may argue that a rule violation occurs if service instructions IBR in an AD call for maintenance personnel to remove bolts and place them in a white plastic bag, and the bolts were placed in a clear plastic bag. In either case, over-inclusive IBR material does not lend itself to regulatory clarity.
[11] See footnote 9.
[12] For example, an air carrier operating the aircraft type affected by a proposed AD may receive the information through permission granted by the aircraft manufacturer for the air carrier to access the information on a special website. However, maintenance providers that may actually perform the work on the air carrier's fleet will not have such "advance" access to the manufacturer's information at the time an AD is proposed. The same is true for other persons that are directly affected by the proposed rule.
[13] See, 5 U.S.C. § 553(c), which requires the agency to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments".

government fails to ensure that *essential* information is available, it creates "secret" requirements that inhibit participation in the rulemaking process, compliance and enforcement.[14]

Comments on specifically identified issues

Each issue identified in the request for comments is presented below in *italics* with the association's comments in **bold**.

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

As further comments will clarify; any *<u>information essential to compliance and enforcement</u>* must be made available to persons directly impacted by the action, whether IBR or contained in the *Federal Register* posting; it should be made available free of charge in at least one media. At present, the most logical method to distribute information is via the Internet, i.e., available online.

Indeed, Congress recently clarified the obligations of the Pipeline and Hazardous Materials Safety Administration to make any document incorporated by reference in guidance or regulation "available to the public, free of charge, on an Internet Web site."[15]

Currently, some information in rulemaking procedures is only available by purchase from the provider of the IBR information or by reviewing the docket in person, so a significant "information divide" exists. Online availability of IBR material would work to alleviate that problem, and no significant "digital divide" would develop. Internet access is available at many public facilities (e.g., public library) and persons not having access to the government websites are given the opportunity to obtain information *<u>from the government</u>* at a nominal fee, usually the cost of reproduction and delivery.

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

The government and courts have established a definition for the term "class of persons affected." While the petitioner in this matter assumes that the term "class of persons" encompasses anyone interested in reviewing the material agencies want to IBR into regulations, the government is *<u>required</u>* to ensure persons directly impacted by an agency action (interested persons) have the opportunity to review and provide substantive comments. Therefore, the term "class of persons" includes interested persons as that term is understood under the APA and as further refined by the courts.

[14] "[W]hen notice is a person's due, process which is merely a gesture is not due process…" (*Mulane v. Central Hanover Tr. Co.*, 339 US 306, 315 (1950).)

[15] See, Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1919.

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

Any information essential to establishing compliance and ensuring fair enforcement with a regulation must be made available to the persons required to comply with the rule. In other words, if the agency is going to use the IBR information when enforcing its rule, then it must be made available—without exceptions.

Agencies issue myriad requirements directly impacting businesses of all sizes; while it must be ensured that small businesses are not disproportionately impacted by individual rulemakings, the only manner to ensure that *collective* agency requirements do not unfairly impact small business is to have a "check" on the combined cost. Since the most basic cost of any regulation is having the documents and data needed to comply, the agency should bear the cost to keep it mindful of burdens placed on small businesses, and to encourage judicious use of its rulemaking power.

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

This is an impossible question to answer; too many factors are involved, none of which are sufficiently available to persons outside the agencies. An alternative question is: "what does it cost to enforce a rule if the information for compliance was not available?"

If it is impossible to enforce a regulation because the courts have ruled that a person cannot be responsible for complying with a "secret" requirement, then the cost of making it available is immaterial. Either the rule should not be issued, or it should be withdrawn.

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?*

If the requirement for review is carried out when rulemaking is proposed, as it should be, then denial at the final rule stage is immaterial. Additional time to review IBR impact is well worth the effort, as it will result in improved regulations that can be both complied with and enforced.

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

Yes. The IBR material must be available in at least one media for free or it should be denied.

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?*

Rulemaking is unnecessary if the Office has the authority to enforce updated guidance material. Since it is an internal governmental function that is impacted, it will be up to the Administration to determine whether it has the power to enforce new requirements on agencies through guidance.

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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 matter which governmental office makes the determination of what reasonable availability means, it should be based upon the requirement to comply with existing statutes and regulations. The statutes and case law require clear and unambiguous regulations; if an agency has determined that IBR information is necessary or expeditious, it must also be responsible for ensuring it is available in at least one media free of charge.

The policy issue raised is not strictly a matter of cost, which is the purview of the OMB. Indeed, during the agency and the OMB review of the regulatory cost, neither is required to look at the total costs of all regulations. Therefore, while the OMB could ensure that the cost of an individual regulation is higher or lower due to "availability" of essential documents, a review to determine what must be made available, and how, is problematic. Since the Federal Register is the official site for all official government postings, it is the only one that can see the entirety of the issues, including cost, associated with all regulations.

Although the petition raises policy issues, ensuring that the policy will be followed is undeniably procedural. The process should ensure each agency makes its rulemaking clear and unambiguous. If it is determined that an agency must make any information essential to compliance and enforcement available to the public during rulemaking procedures, OMB involvement would be unnecessary. IBR material would need to be available in at least one media free of charge.

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

If the policy is that essential information must be IBR in one media free of charge, then the review should not be any more extended or extensive than current practice. Indeed, the current review process does not ensure the IBR information is available in any format let alone whether there is a cost to availability.

As previously discussed, many documents IBR by the FAA in an Airworthiness Directive -- the highest form of safety information -- are either generally unavailable (only provided to air carriers or operators, for example), requires an extensive contract and cost, or is out of date (has been revised without informing the agency).

Additionally, if the agency does not have ready access to the IBR material, it should not be essential to compliance or enforcement.

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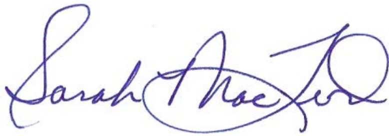
We thank you for your time. If you have any questions, please do not hesitate to contact us.

Respectfully submitted,



Sarah MacLeod
Executive Director