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June 1, 2012

*Submitted by regulations.gov*

Michael White, Acting Director  
Office of the Federal Register  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001

Re: Announcement of Petition for Rulemaking and Request for Comments,  
77 Fed. Reg. 11414 (Feb. 27, 2012), Docket ID: NARA-12-0002

Dear Mr. White,

I am pleased to attach comments from the Section of Administrative Law and Regulatory Practice in response to the above-referenced Request for Comments. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I hope the attached is useful. Thank you very much for your consideration of our views.

Sincerely,

Michael Herz  
Section Chair

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# AMERICAN BAR ASSOCIATION

## SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

### **Comments in Response to the Office of the Federal Register's Announcement of Petition for Rulemaking and Request for Comments<sup>1</sup>**

The Section of Administrative Law and Regulatory Practice of the American Bar Association (the Section) respectfully submits these comments regarding a petition to amend the regulations governing the approval of agency requests to incorporate material by reference into the Code of Federal Regulations, filed by 20 law professors and others (the petition). The Section appreciates OFR's solicitation of comments on the petition. We also appreciate OFR's extension of the comment period until June 1.

The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

In brief, the Section recommends that the Office of the Federal Register grant the petition and provide that it will approve requests to incorporate by reference material into the Federal Register or Code of Federal Regulations only if that material is available to the public without charge, subject to the considerations noted below. That requirement could be satisfied by read-only digital access, either on the agency's website or that of the private standards development organization. But that access would have to be available to the public without charge. The Section also responds below to the other questions raised in OFR's notice.

The Office of Management and Budget (OMB) has also solicited comments on a range of issues arising from OMB Circular A-119, including several involving incorporation by reference.<sup>2</sup> The Section is also submitting these comments to OMB.

#### **I. "Reasonably Available" Should Mean that Standards Incorporated by Reference Are Available to the Public Without a Fee, at Least Through a Read-Only Digital Format.**

The Freedom of Information Act requires publication in the Federal Register, "for the guidance of the public," of all rules of procedure and substantive rules of general applicability, and a host of other agency materials. 5 U.S.C. § 552(a). No person may "be required to resort

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<sup>1</sup> 77 Fed. Reg. 11414 (Feb. 27, 2012).

<sup>2</sup> 77 Fed. Reg. 19357, 19359-60 (March 30, 2012). On May 15, OMB announced that it had extended the comment period established in this notice until June 1.

to, or be adversely affected by,” material that was not so published except if he or she has “actual and timely notice” of its terms. *Id.* 5 U.S.C. § 552(a)(1) creates a limited exception to this publication mandate for material incorporated by reference, with the approval of OFR, that is “reasonably available to the class of persons affected thereby.” 5 U.S.C. § 552(a)(1).

OFR should clarify that it will not approve an agency’s incorporation by reference (IBR) of standards as “reasonably available” unless this material is, at a minimum, available online without a requirement of payment. As explained more fully below, this conclusion is mandated by:

- The public’s right to know the law that it has authored and owns, which is fundamental to ensuring the accountability of government;
- The proper interpretation of “persons affected” to mean “interested persons”; i.e., anyone who might be regulated by or benefit from the IBR material;
- The right to comment on proposed rules created by the Administrative Procedure Act and the APA right to petition for revision or repeal of such rules; and
- The contemporary meaning of “reasonably available.”

Before turning to the arguments, we note that the Section’s comments focus upon the subject of the petition: standards that are incorporated by reference into legally binding federal rules – standards that help compose the *law*. The petition does not raise the question whether, for example, an agency might charge user fees reflecting the cost of dissemination of other sorts of information. E.g., Office of Management and Budget Circular A-130, Feb. 8, 1996, at sec. 8 (authorizing agencies to recover, for information dissemination products, “the cost of dissemination but no higher”). Accordingly, these comments take no position on that further question.<sup>3</sup>

For IBR standards that are part of our body of binding federal rules, “reasonably available” unquestionably must mean that the material is available to the public online – at least on a read-only basis - with no requirement of payment.

#### **A. As the authors and owners of the law, the public has a right to know it**

Free public access to the law is essential in a democratic society. In the words of the petition: “[I]n the age of information, secret law, that the public must pay for to know, is unacceptable.” 77 Fed. Reg. at 11,415. First, as the 5<sup>th</sup> Circuit explained in *Veeck v. Southern Bldg. Code Cong. Int’l*, free public access to the law serves “the very important and practical policy that citizens must have free access to the laws which govern them” if they are to be able to

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<sup>3</sup> Even with respect to that material, however, OMB has, in Circular A-130, endorsed the policy that “the management of Federal information resources should protect the public’s right of access to government information,” *see* sec. 7.c., and announced its support for agency charges lower than dissemination costs where higher charges would be a “significant barrier” to “reaching members of the public whom the agency has a responsibility to inform.” *See* Circular A-130, sec. 8.

conform their conduct to them. *See* 293 F.3d 791, 795-800 (5th Cir. 2002) (en banc). *Veeck* relied principally on the Supreme Court’s holding in *Banks v. Manchester* that “[i]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes.” *See* 128 U.S. 244, 253 (1888) (quoting *Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886)). As explained in *Veeck*, these justifications are not simply “due process” arguments; rather, they rest on the idea that “public ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it.” 293 F.3d at 799.

This “right to know” accrues to *all* citizens, not just those who must conform their conduct to the law. Broad public access to IBR material, beyond by those directly regulated, is as important as access by regulated entities. “Th[e] ‘metaphorical concept of citizen authorship’” requires free public access to the law as a foundation to a legitimate democratic society. “The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.” *Veeck*, 293 F.3d at 799 (quoting *Building Officials & Code Adm. v. Code Technology*, 628 F.2d 730, 734 (1<sup>st</sup> Cir. 1980)). Thus, even those who need not conform their conduct to regulatory requirements have a right to know.

Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving – or not serving – the public interest. As President Obama stated in his Memorandum on Transparency and Open Government (Jan. 21, 2009): “Transparency promotes accountability and provides information for citizens about what their Government is doing.” This transparency, including public access to the content of regulations, is a critical safeguard against agency capture and other governance problems. Transparency regarding the content of material incorporated by reference is particularly important when that material has been prepared, in the first instance, by private organizations rather than governmental agencies – as when, for example, natural gas pipeline safety rules and offshore oil drilling rules incorporate standards drafted by the American Petroleum Institute or when motor vehicle safety standards incorporate standards drafted by the Society of Automotive Engineers. This is not to criticize any particular standard or organization, but to emphasize that transparency and ready access are critical to ensuring that the government makes proper use of incorporated material and that adopted standards do, in fact, protect the public interest as required by statute. And as the 5<sup>th</sup> Circuit pointed out in *Veeck*, citizens need access to the law not only to guide their actions and to hold the government accountable, but “to influence future legislation” and to educate others. 293 F.3d at 799.

Indeed, constitutional difficulties may be raised by OFR’s current practice of effectively limiting public access to incorporated material by allowing agencies to reference it when, as a practical matter, the public must pay to see that material. The public cannot discuss or criticize the government’s decisions if it does not know what they are. As the Supreme Court noted in refusing to uphold a statute that would close criminal trials, “‘a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.’ [This] serves to ensure that the individual citizen can effectively participate in and contribute to our republican system

of self-government.”<sup>4</sup> *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (US 1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see also *Press Enterprise v. Superior Court*, 478 U.S. 1 (1986) (refusing to approve closure of preliminary hearing). Cf. *In re Gitto Global Corp.*, 422 F.3d 1 (1<sup>st</sup> Cir. 2005) (“Only the most compelling reasons can justify non-disclosure of judicial records.”); *Leigh v. Salazar*, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 2012) (“[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. By reporting about the government, the media are ‘surrogates for the public.’”) (requiring consideration of public right of access to view Bureau of Land Management horse roundups). Charging for access to IBR standards raises heightened constitutional concerns, because the over 9,000 IBR standards are wide-ranging in subject and quasi-legislative in character, with broad and prospective effect. A financial impediment to the public’s ability to know about regulatory standards threatens free discussion of governmental affairs. Cf. *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-68 (1966) (invalidating state \$1.50 poll tax as effective denial of right to vote); Circular A-130, Feb. 8, 1996, at sec. 8 (to facilitate public access, instructing agencies to “avoid[] improperly restrictive practice” including restricted distribution arrangements and restrictions that include “charging of fees or royalties”).

### **B. Section 552(a)(1) requires making IBR material broadly available without charge**

The foregoing principles should govern the interpretation of 5 U.S.C. § 552(a)(1). First, Section 552(a)(1)’s requirement that IBR materials be reasonably available to “the class of persons *affected thereby*” (emphasis added) should be read to cover not just those directly regulated by those materials, but all those with a stake in the content of IBR materials. Other language in Section 552(a)(1) makes clear that “affected” persons includes a broader class than just those directly regulated. For example, Section 552(a)(1) provides that the Federal Register publication requirement protects not just those who are “required to resort to” government rules and policies, but those who may be “adversely affected” by them. Those required to resort to rules are presumably those who must modify their conduct; those “adversely affected” must include at least some additional members. Moreover, 5 U.S.C. § 702 uses the “adversely affected” language to help define who can seek judicial review; it is understood to cover a wide range of those with concrete stakes in agency action, beyond those directly regulated by the agency. E.g., *Clarke v. Securities Industry Ass’n*, 479 U.S. 388 (1987) (one who is “adversely affected” may sue if the interest is “arguably within the zone of interests” to be protected or regulated by the statute); *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011) (same).

5 U.S.C. § 552(a)(1)’s requirement of reasonable availability extends even more broadly than Section 702, beyond availability to those “adversely affected,” to require availability to those simply “affected” by the terms of the incorporated material. For example:

- Consumer Product Safety Commission toy safety regulations incorporate a number of private standards by reference, including standards from ANSI and ASTM. E.g., 16 C.F.R. §§ 1505.5, 1505.6 (requirements for electrically operated toys, including toys with heating elements, intended for children’s use).

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<sup>4</sup> Needless to say, it is no answer that these standards are complex and technical and citizens are not beating down the doors of the OFR to read them. As the media cases cited above show, public access rights are not to be provided in proportion to the number of citizens wishing to exercise them.

- National Highway Traffic Safety Administration (NHTSA) rules for vehicle windshield safety incorporate by reference privately developed standards for glazing. E.g., 49 C.F.R. § 571.205.
- NHTSA rules for grading motor vehicle tires similarly incorporate private standards by reference from ANSI and elsewhere. 49 C.F.R. § 575.104.
- Operating and placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf incorporate the American Petroleum Institute’s standards. See 30 C.F.R. § 250.108. API standards are also incorporated in Department of Transportation pipeline safety requirements. E.g., 49 C.F.R. § 192.65.

Parents, children, drivers, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline – all of these individuals are obviously “affected” by these standards, and Section 552 requires that these standards be “reasonably available” to them. Finally, the Department of Transportation Pipeline and Hazardous Materials Safety Administration requires natural gas pipeline operators to provide public information and public communications according to an IBR standard of the American Petroleum Institute. 49 C.F.R. § 192.616. Community members who reside near natural gas pipelines at risk from a spill are obviously “affected” by the scope of public communication requirements; standards such as these must be “reasonably available” both to the community and to pipeline operators. Even if some standards may be understandable only to small groups of professionally trained individuals, they may affect large numbers of citizens. Approving material that is incorporated by reference while permitting organizations to charge individuals an often-significant fee for access to the material violates the “reasonably available” requirement.

### **C. Charging for access to IBR material violates the APA**

Even if Section 552’s language could support a more constricted understanding of the class of persons for whom IBR material must be “reasonably available,” OFR should approve IBR only when the incorporated material is publicly available without cost during the comment period on a proposed rule and while any final rule is effective. Any narrower interpretation would violate the Administrative Procedure Act’s notice and comment provisions (5 U.S.C. § 553) as they have been authoritatively construed for decades. These procedural requirements, which are fundamental to ensuring the continued validity and legitimacy of agency rulemaking, require that “interested persons” must be able to participate in rulemaking by submitting public comments to the agency. *Id.* § 553(c). An “interested person” cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed. *Cf. Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (requiring agencies to disclose data to effectuate meaningful right to public comment). Requiring an “interested person” to pay a fee to learn the content of a proposed rule is a significant obstacle impeding that person’s right to comment under Section 553(c). Independently, 5 U.S.C. § 553(e) requires an agency to provide “an interested person the right to petition” for issuance, amendment, or repeal of a rule. It is therefore not sufficient for IBR material to be made available to the public only during the initial notice and comment period preceding adoption of a rule, because an “interested person” still could not meaningfully exercise

the statutory right to petition for amendment or repeal of the adopted rule if he or she were required to pay a fee for access to the content of that standard.

In order to ensure validity of the Part 51 rules under the APA, OFR is therefore required, at a minimum, to approve incorporations by reference only when it is clear that the incorporated material is readily available to any “interested person.” That term, as used in Section 553, is generally understood to include any member of the public who is sufficiently interested in agency rules to wish to participate. For example, in inviting the public to file comments on pending proposed rules, the regulations.gov website stresses the importance of public participation as an “essential function of good governance.” *See* <http://www.regulations.gov/#!faqs;qid=6-9>. Any more restrictive interpretation of the group to whom an IBR standard must be “reasonably available” could violate the legal entitlement of those “interested persons” under 5 U.S.C. § 553 to comment on proposed rules and to petition agencies to revise or amend rules once adopted.

Because of this interplay of Sections 552(a)(1) and 553 in determining who needs to have free access to incorporated standards, the Section believes that there is little virtue to attempting to define the “class of persons affected” more specifically than “the general public.” In addition, obstacles to public access to IBR standards arising from the restrictiveness of any definition may raise constitutional concerns of the sort discussed in Part I.A above. Finally, even if the only consideration were affording reasonable availability to statutorily defined groups, the task of attempting to identify and delimit “affected” classes and assess the availability to them of standards incorporated by reference is likely to be daunting in most cases. Even if the term “class of affected persons” in section 552(a)(1) is understood narrowly, for many standards this still will be a large and variable group. Consider the examples above, for whom the classes of affected persons could include drivers, automobile purchasers, parents, residents in communities near pipelines, and those who wish to use ocean resources potentially affected by a spill from an oil drilling platform. At least some such individuals will have significant income limitations, and a charge of \$60 to read the law, in addition to the costs of getting to the library to access the internet, may effectively put the contents of the law beyond their reach. Rather than attempting to define the relevant group more specifically, it accordingly makes most sense simply to approve IBR standards only when the general public can read them on the Internet without charge.

**D. Today, “reasonably available” means “available for no more than the cost of obtaining Internet access”**

OFR’s current approach to interpreting the “reasonably available” requirement in 5 U.S.C. § 552(a)(1) appears to focus on whether standards incorporated by reference can easily be located. Indeed, the cost of accessing incorporated standards is not mentioned specifically in either OFR’s current rules or the Federal Register Document Drafting Handbook guidance to agencies regarding incorporation by reference. *See* 1 C.F.R. § 51.7(a)(4) (repeating “reasonably available” requirement); “What is Incorporation by Reference, and How do I do it?,” Federal Register Document Drafting Handbook, ch. 6, available at <http://www.archives.gov/federal-register/write/handbook/chapter-6.pdf>. OFR makes IBR material available for inspection only at a single downtown Washington, D.C. location, and only upon the making of a written request and appointment. OFR provides no photocopying facilities of any sort, presenting yet another

obstacle for a member of the public who wishes to rely on an agent. Apart from this, OFR refers the public to the “standards organization that developed the standard.” See OFR, “Where to Find Materials Incorporated by Reference at NARA Facilities,” available at <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why> (last visited May 3, 2003).

The practical effect of OFR’s current policy has been that access to IBR material is available almost exclusively through standards development organizations (SDOs). SDOs have significant latitude to charge a fee for access to those standards. Membership in a group such as the American National Standards Institute costs \$750 per year, for example; access to an individual standard can range from \$50 to upwards of \$400. The ASTM toy safety standard costs \$69.

This is not adequate public access to binding law. As the petition cogently explains, “[d]evelopments in both law and technology have undermined th[e] rationale” that “it may [be] reasonable” to charge persons to know what the law is. Materials that could once be provided only in physical form, and transported only at cost, can now be made available regardless of file size, essentially instantaneously, for free. In an analogous setting also involving the Freedom of Information Act, the Second Circuit has opined that, “[a]s technology quickly changes, information becomes more readily available to the public.” *Inner City Press/Community on the Move v. Board of Governors*, 463 F.3d 239, 252 n. 15 (2d Cir. 2006) (holding that information contained in the SEC’s electronic EDGAR database is “freely available,” and thus subject to disclosure by the Fed, because of its “ready availability”). In light of the Internet’s unlimited ability to disseminate information and the ubiquity of Web-enabled devices, “reasonably available” with respect to the law must now be understood to mean available with no more than the minimal cost or effort required to travel to a public or government depository library to use the library’s free public access to the Internet.

## **II. Requiring Read-Only Access to Incorporated Standards Will Not Unduly Harm SDOs or Undermine Current Law Favoring Incorporation by Reference**

The Section acknowledges that many SDOs have premised their business models, at least in part, on the ability to sell the standards they develop, and that requiring read-only access to IBRed standards would likely have some deleterious economic impact on them, at least in the short term. However, the multiple fora convened recently on IBR have made two things clear:

- There is extraordinary heterogeneity among SDOs. For some, standards issuance is their principal activity. For many others, particularly those that are trade or professional associations, it is a side activity and potentially even a loss-leader to drive membership. Some SDOs already provide read-only access to their standards; others charge quite high prices. As a result, any option besides the status quo will have differing impacts on different SDOs.
- It is impossible for OFR or anyone else to predict either (i) what those effects will be in the short term, or (ii) what sorts of adaptive responses SDOs will adopt and how those will mitigate the initial financial impacts. Little if any systematic data exists on how important copyright-based revenues are to SDO business models. Similarly, little if any systematic empirical data exists regarding how much standards organizations typically charge.

For at least three reasons, explained below, the Section believes that the long-term effects of requiring internet access to IBR standards will not be as harmful to SDOs as they project – and, most to the point, that our recommendation will not seriously impair the ability of agencies in the future to incorporate standards by reference:

First, a practical requirement that, as a condition of incorporation by reference, SDOs give agencies an exclusive license to post incorporated standards on their websites in read-only form – or that SDOs do so on their own websites – would not prevent SDOs from enforcing their copyrights against other entities that attempt to republish the standards. Users who want a standard in hard copy could still be required to buy it from the SDO.<sup>5</sup>

Moreover, not having private standards incorporated in rules is likely to dramatically lessen the degree of interest in the standards, and thus would probably be even more financially deleterious to SDOs than making them available in read-only form online. So we do not expect many SDOs to simply refuse to allow their standards to be incorporated by reference.

Second, it appears that most users of incorporated standards will continue to buy them even if they are available in read-only form online. Representatives of regulated entities and regulatory agencies alike have stated in public fora that, in any case where a standard is central to a regulation, there is simply no substitute for having one or more paper copies that can be highlighted, tabbed, carried around and referred to anywhere, anytime. Particularly in industrial settings, there will likely never be a time where computer monitors are located at every location where a plant technician or an inspector is going to want to refer to a standard. SDOs should still sell significant numbers of incorporated standards even if they are available online.

Finally, and perhaps most important, SDOs arose initially, and continue to exist primarily, for business reasons, unrelated to government regulation. Virtually all forms of commerce require some degree of agreement regarding the specifications of the products and services involved. Those business needs will not go away or even be diminished by requiring IBR standards to be available online. The producers and users of standards will continue to have an economic incentive to ensure that those standards persist and evolve.

OFR also has requested comment on whether agencies should have to bear the cost of making incorporated material available online. Ordinarily, we would expect the agency to

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<sup>5</sup> The Section does not argue that the considerations that mandate public availability of incorporated standards in read-only electronic form necessarily require invalidation of SDOs' copyrights in those standards. Nor, of course, are SDOs' copyrights waived or vitiated by the fact that agencies or SDOs make them available in this fashion. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and beyond the scope of the Section's comments. See *Veeck v. Southern Building Code Cong. Int'l, Inc.*, 293 F.3d 791 (5<sup>th</sup> Cir. en banc 2002), *cert. denied*, 537 U.S. 1043 (2002); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 933 (1997); *CCC Information Svc v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).

negotiate terms of access to the work. Such terms could, if appropriate, include a licensing fee.<sup>6</sup> Requiring agencies, particularly small ones, to purchase sets of private standards could be exorbitantly costly, however, and having agencies buy worldwide licenses for incorporated standards at list price would create no incentive for SDOs to lower their prices or otherwise give those agencies favorable terms. To the contrary, SDOs might find the concept of having to sell standards only to the wealthy Federal government to be an attractive prospect.<sup>7</sup>

Such an option is unnecessary principally because, in the Section's view, providing read-only access to incorporated standards is unlikely to dramatically affect the circumstances of SDOs, as explained, and our sense is that SDOs may well negotiate such terms to facilitate incorporation of their standards into federal rules. Finally, agencies may have other means of supporting standards development activities, as contemplated in OMB Circular A-119.<sup>8</sup>

Again, we recognize that some degree of disruption would be triggered by our recommendation. But we believe, on balance, that these impacts are worth bearing in order to bring FOIA's standard of "reasonabl[e] availab[ility]" into the Information Age and, thereby, to effectuate the principle of public access to the law.

### **III. OFR Also Should Encourage Agencies to Consider Impacts on Small Entities to Ensure the Inclusiveness of SDO Processes**

Many industries may be typified by (i) heavy dependence on standards coupled with (ii) a predominance of small or very small businesses. These organizations face significant impacts of having to purchase many, potentially dozens, of standards referenced in, for example, DOT or OSHA regulations or guidance. Compounding these challenges are the costs of participating in the standards development process to ensure that standards remain feasible for implementation by small entities. Standards are revised on a regular basis, sometimes annually, and revisions typically entail lengthy meetings. Beyond the associated time and travels costs, some SDOs – particularly those that are trade associations – require entities to become members in order to participate in their standards development activities. At least one such association charges \$25,000/year.

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<sup>6</sup> In cases where the document was not developed for the purpose of being adopted into law, as with an atlas, dictionary, or automobile valuation guide, we would assume that the agency would seek a license. OFR could speak to this issue in the preamble to any final rule.

<sup>7</sup> At a conference on incorporation by reference hosted recently by the Administrative Conference of the United States and the U.S. Chamber of Commerce, a DOT speaker noted that DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) now pays \$150,000 every two years or so to buy enough copies of its IBRed standards to supply its reading rooms, inspectors and other personnel. Remarks of Neil Eisner (May 1, 2012). If SDOs are permitted to set the price, the amount that SDOs charge agencies to make standards available to the world could be spectacular – especially given how much a single user might pay now for copies of the standards referenced in an agency's rules. For example, PHMSA estimates that it would cost \$20,400 to purchase all the standards referenced in PHMSA's rules. At the same conference, the representative of the Consumer Product Safety Commission similarly stated that her agency could never afford to purchase for the public's use the standards referenced in CPSC rules.

<sup>8</sup> See Office of Management and Budget Circular A-119 Revised (Feb. 10, 1998) at section 7(c) (discussing forms of support agencies may provide to voluntary consensus standards activities, including financial and technical).

One way SDOs might attempt to make up reduced revenues from lower sales of standards would be to charge (or charge more) for the right to participate in their standards development activities. The Section would urge OFR to require agencies to try and ensure that SDO's membership or participation fees do not unduly close out small entities from participation in the development of voluntary consensus-based standards. This is consistent with OMB Circular A-119's definition of voluntary consensus standards bodies as those that have the attributes of openness, balance of interest, and due process.<sup>9</sup> Differential pricing based on annual sales might be a fairly simple way for SDOs to provide such assurances.

#### **IV. Proposed Revisions to Part 51**

The petition attached proposed revisions to Part 51 to effectuate its recommendations. These comments attach a slightly revised set of proposed revisions that differs in two respects. First, our attached proposal makes some technical corrections. Second, we do not distinguish between standards that are used to set specific regulatory requirements and those that are used as safe harbors, i.e., to define one way of complying with a more general, performance-based requirement. While the latter are generally preferable as a policy matter (see Circular A-119, § 6(i)), in many cases (e.g. permissible workplace air contaminant concentrations), there may be no distinction between the regulatory "standard" and a safe harbor. Also, a safe harbor that is incorporated by an agency into a regulatory standard inevitably will bind the agency to accept actions within the safe harbor as compliance. Beyond this, the safe harbor may come to dominate other means of compliance due to the greater ease of demonstrating and evaluating compliance with it and its cognitive availability to regulators. Partly for these reasons, the Section believes that the arguments for public access laid out in Part I above also apply to standards designated as safe harbors. While a safe harbor is literally not binding on a regulated entity, persons interested in the effects of a rule may be just as interested in the rule's safe harbor as they are in its general requirement.

#### **V. Responses to Other Issues Raised by OFR**

The foregoing addresses issues 1.a, 2, 3, 4, 6, and 8 in OFR's notice. Below we address the other issues OFR identifies.

##### **A. Online access will not create a "digital divide" (issue 1.b)**

"Public inspection" is the historic method for providing access to incorporated materials: interested members of the public can view incorporated materials in person at OFR or at an office of the agency that has promulgated the relevant regulation.<sup>10</sup> Public inspection made sense in a print world, but it is anachronistic in today's world. In today's world, it will be a rare circumstance that any person or entity that wishes to comment on, or must abide by a proposed regulation, lacks computer access. Internet access is pervasive and its use is growing exponentially. More than 68% of American households had Internet access by October 2010,

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<sup>9</sup> See Office of Management and Budget Circular A-119 Revised (Feb. 10, 1998), Section 4a.

<sup>10</sup> All "document[s] having general applicability and legal effect," including those incorporated by reference, must be filed with the Office of the Federal Register (OFR) for public inspection. 1 C.F.R. § 5.2(c).

according to the Census Bureau.<sup>11</sup> Indeed, approximately 80% of households had an individual who accessed the Internet either at home or another location.<sup>12</sup> The availability of the Internet in the business world is even greater. As of 2002, more than ten years ago, 77% of large business and 57% of small businesses used the Internet.<sup>13</sup> Likely, that number is much larger today. And the ease of access is increasing while the cost is declining, particularly with the growth of the Web-enabled phones and tablets that 63% of Americans already use to access the Internet.<sup>14</sup>

Admittedly, “[l]ower income families, people with less education, those with disabilities, Blacks, Hispanics, and rural residents generally lagged the national average in both broadband adoption and computer use.”<sup>15</sup> But free internet access now appears to be available to anyone who can access a public library. According to a 2011 study of the Information Policy and Access Center of the University of Maryland College of Information Studies, 100% of public libraries offer free public internet access and 90.5% provide free wireless access. 96.6% of public libraries reported that they provide assistance to patrons in applying for or accessing e-government services. See <http://cipeg.umd.edu/analysis>. “[W]ork, school . . . and someone else’s house” are other popular and free alternatives for Internet access among those with no home access.<sup>16</sup> Internet cafes are another option; while not free, they are relatively reasonably priced, especially when compared to either the cost of traveling to an agency office or OFR to view documents or the cost of paying for the right to obtain copyrighted material. Indeed, the purpose of E-FOIA, Regulations.gov and other recent government initiatives is to encourage and increase government dialogue with its citizenry.

The Section submits that OFR’s question actually has it backwards: it is the *current* process for making incorporated materials available that is causing a divide, between those who can afford to travel or send an agent to the Office of the Federal Register and those who cannot. We hazard that, for almost all Americans, those costs will exceed the cost of obtaining access to the Internet. And the alternative of buying incorporated material is probably most expensive of all. ASTM’s toy standard costs \$69, for example.<sup>17</sup> Moreover, these costs may be cumulative, as companies or individuals must purchase multiple layers of incorporated documents. In sum, online access to incorporated standards should greatly reduce the cost of access to incorporated standards, and expand the number of people with such access, compared to the present.

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<sup>11</sup>DEP’T OF COM., ECON. & STAT. ADMIN. & NAT. TELECOMMUN. & INFO. ADMIN., EXPLORING THE DIGITAL NATION: COMPUTER AND INTERNET USE AT HOME (November 2011), available at [http://www.ntia.doc.gov/files/ntia/publications/exploring\\_the\\_digital\\_nation\\_computer\\_and\\_internet\\_use\\_at\\_home\\_11092011.pdf](http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_computer_and_internet_use_at_home_11092011.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> JOANNE H. PRATT, E-BIZ: STRATEGIES FOR SMALL BUSINESS SUCCESS (2002) (written for the Small Bus. Admin.), available <http://archive.sba.gov/advo/research/rs220tot.pdf>.

<sup>14</sup> Kathryn Zickuhr & Aaron Smith, *Digital Differences* at 2 (Pew Research Center April 13, 2012), available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Digital\\_differences\\_041312.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Digital_differences_041312.pdf).

<sup>15</sup> E-BIZ, *supra* note 12. A recent survey, however, found that of the 22% of Americans who do not use the Internet, the predominant reason was “lack of interest”; cost was cited by only 10% of them (i.e., 2.2% of the entire population). *Digital Differences*, *supra* note 13, at 7.

<sup>16</sup> E-BIZ, *supra* note 12.

<sup>17</sup> ASTM Int’l, *ASTM F963-08 Standard Consumer Safety Specification for Toy Safety*, <http://www.astm.org/Standards/F963.htm>.

**B. The proposal would not increase comment process burdens on either OFR (issue #5) or agencies (issue #9)**

Issue #5 asks how OFR would review proposed rules for IBR impact. The revisions of Part 51 proposed by the petition do not require OFR to review proposed incorporations by reference. Rather, they require an agency, at the time it submits a draft final rule, to show that the incorporated standard was available online during the comment period. Nor do we think that such OFR review would be required as a practical matter under the proposal. Thus, it should not increase the burdens imposed on OFR. In fact, the Section believes that its proposal would actually reduce burdens on OFR, as OFR would no longer need to engage in case-by-case determinations of “reasonable availability.”

Issue #9 asks how “an extended IBR review period at both the proposed rule and final rule stages [would] impact agencies.” The Section is unclear as to what OFR is referring. The burdens imposed by our proposal would be fairly minimal: to ensure that the standard which is proposed to be incorporated by reference is available online in at least read-only form during the comment period and during the rule’s effective date. As just noted, these tasks are likely to be much less burdensome than making ad hoc determinations regarding what sorts of costs are reasonable for the types of entities or people “affected” by a rule.

**C. The ACUS recommendation does not supplant the need for revising Part 51 (issue #7)**

The petition was a direct reaction to Recommendation 2011-5 of the Administrative Conference of the United States (ACUS), which the petition noted “failed directly to address the Director’s responsibility for shaping and administering the criterion of reasonable availability.” In pertinent part, the ACUS recommendation says:

Agencies should request owners of copyright in incorporated material to consent to its free publication . . . . If copyright owners do not consent to free publication of incorporated materials, agencies should work with them and, through the use of technological solutions, low-cost publication, or other appropriate means, promote the availability of the materials while respecting the copyright owner’s interest in protecting its intellectual property.<sup>18</sup>

The Section appreciates that ACUS is required to accommodate a variety of interests in its deliberations. On this key issue, however, the Section believes that the ACUS recommendation essentially perpetuates the status quo. As is evident from the foregoing, the Section believes that OFR should break with current practice and amend Part 51 to ensure electronic access to incorporated standards.

**VI. Conclusion**

In short, our entire system of laws, including regulatory requirements that are incorporated

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<sup>18</sup> ACUS, Recommendation 2011-5, ¶ 3, available at [http://www.acus.gov/wp-content/uploads/2012/03/Recommendation%202011-5%20\(Incorporation%20by%20Reference\).pdf](http://www.acus.gov/wp-content/uploads/2012/03/Recommendation%202011-5%20(Incorporation%20by%20Reference).pdf).

by reference, must be available through digital read-only access, with no payment required for access.<sup>19</sup> Read-only access could be provided directly by the agency or by the SDO, with a link from the agency webpage.

We would be pleased to discuss these comments further if that would be helpful.

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<sup>19</sup> We recognize that digital read-only access may not be sufficient to assure adequate access for individuals with disabilities. Additional access may be necessary in those settings; those issues, however, are beyond the scope of this comment letter.

## Appendix: Proposed Revisions to Part 51

### § 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](#);

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

(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 (~~s~~See § 51.7);

(2) The language of incorporation meets the requirements of this part (~~s~~See § 51.9);

(3) The publication is on file with the Office of the Federal Register; ~~;~~ [and](#)

(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 (~~s~~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 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;

(3) Demonstrate that if the rule was previously open for comment, and the notice of proposed rulemaking proposed (or the notice regarding the prior interim rule included) incorporation by reference of any publication, that publication was available throughout the comment period either—

(i) In the Federal Document Management System docket or other electronic docket for the proposed or interim rule;

(ii) On the agency's website at a location appropriately referenced in the notice; or

(iii) On the website of the standards development organization responsible for the publication, appropriately referenced in the notice and readable without cost to those interested in commenting on the proposed or interim rule; and

~~(4)~~ 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? [preferred option]**

(a) A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it—

(1) Conforms to the policy stated in § 51.1;

(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material; and

~~(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) "Reasonably available" means that—~~

~~(A) The agency complied with the requirements of § 51.5(a)(3) where applicable; and~~

~~(B) The publication is posted to the agency's electronic reading room or the website of the standards development organization in such fashion that it can be electronically accessed for reading without cost to persons directly affected by the rule.~~

~~(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 only 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. A publication produced by the agency 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 that is inaccessible to commenters or affected persons without payment of a fee to a private body.

### **§ 51.7 What publications are eligible? [other option]**

(a) A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it—

(1) Conforms to the policy stated in § 51.1;

(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material; and

~~(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) “Reasonably available” means that—

(A)(I) The agency complied with the requirements of § 51.5(a)(3) where applicable; and

(II) The publication is posted to the agency’s electronic reading room or the website of the standards development organization in such fashion that it can be electronically accessed for reading without cost to persons directly affected by the rule; or

(B) The publication—

(I) Was accessible by members of the public during the rulemaking comment period; and

(II) 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 only 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. A publication produced by the agency 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*.

## § 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 title, date, edition, author, publisher, and identification number ~~of the publication~~;

(3) Informs the user whether that the incorporated publication is--

(A) informs the public how the regulation referring to it might be complied with; or

(B) 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.