

SUBJECT: Incorporation by Reference

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1)

a) ASCE is a 501(c)(3) educational and scientific organization, and, consistent with its mission to further the science and technology of civil engineering for the benefit of humanity, ASCE has promulgated a number of voluntary consensus standards. These standards are developed in accordance with the rigorous consensus process put forth by the American National Standards Institute, to ensure that such standards capture the expertise and perspective of the civil engineering profession, industry, academia, government authority, and the public at large. While ASCE relies heavily on volunteer efforts in the development of its consensus standards, the development process still requires significant upfront expenditures. ASCE supports its standards activities through subsequent sales of standards publications as well as through membership fees that include as a member benefit reduced-cost access to ASCE's published material.

ASCE does not believe that the term "reasonably available" as used in 5 USC § 552(a) means that such information must necessarily be made available (i) free of charge; or (ii) publicly accessible online. ASCE notes that, in drafting this legislation, Congress selected the word "reasonably" as opposed to terms such as "freely" or even "readily"—words that might have more strongly conveyed the intent to ensure that matter incorporated by reference in the Federal Register must have the broadest possible distribution with the greatest possible ease. Reasonableness, by comparison, only suggests that availability be governed by the interests of fairness and moderation, and it implies the need for a reasoned balancing of the interests of all parties affected by the governmental action. In the case of voluntary consensus standards, ASCE believes that "reasonableness" must balance the right of individuals affected by regulation to gain access to those materials with the right of organizations responsible for the development of these materials to administer access to their intellectual property.

ASCE believes that the phrase "reasonably available" must be interpreted to facilitate public access and comment on the regulations which govern them, while still allowing some measure of protection for the private organizations funding the development of voluntary standards. Requiring free or online distribution would severely limit consideration of the intellectual property rights of standards developing organizations and would thus be inimical to the process of striking a reasonable balance of interests.

ASCE feels that incorporation of voluntary consensus standards into state or federal regulation reflects an understanding by public agencies of the merits of the consensus process. However, if such incorporation means that the developing organization loses the ability to establish conditions for the distribution of these standards, then organizations such as ASCE may lose the financial benefits that allow them to sustain that consensus process.

b) ASCE believes that online availability should not be a requirement for materials incorporated by reference in the Federal Register, and in such case, there would not be a question of creating a "digital divide."

2)

ASCE believes that the “class of persons affected” is highly dependent on the subject matter and circumstances of each individual standard; therefore, we do not believe that it would be productive to seek a specific definition of this term.

3)

While requiring the federal government to pay a licensing fee for the right to distribute privately developed standards would offer some financial incentives in support of standards developing organizations (SDOs), ASCE believes that such a requirement would place an unnecessary financial burden on federal agencies and would pose challenges for both the government and SDOs in sustaining their business models for promulgation of standards. One of the underlying philosophies behind the federal government’s incorporation by reference of voluntary standards is the cost benefit realized by agencies in relying upon material developed at the cost and expense of SDOs. If the government were required to secure a paid license for publication of such standards, it would place them in the difficult position of needing to come to terms with SDOs on a license to make the standards publicly available for free—at a fee which would need to reflect the likelihood that the public license will significantly hamper the SDO’s ability to recapture its costs through other commercial sales of the standard. With the federal government serving as the SDO’s primary commercial customer, this again would pose a significant burden on federal agency budgets (and the tax dollars and other assets which support them).

4)

As stated in the previous responses, ASCE believes that the proposed change would create a significant additional burden on agency budgets and infrastructure.

5)

ASCE has reviewed the comments submitted by the American National Standards Institute on this matter and concurs with the response to this question provided therein.

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