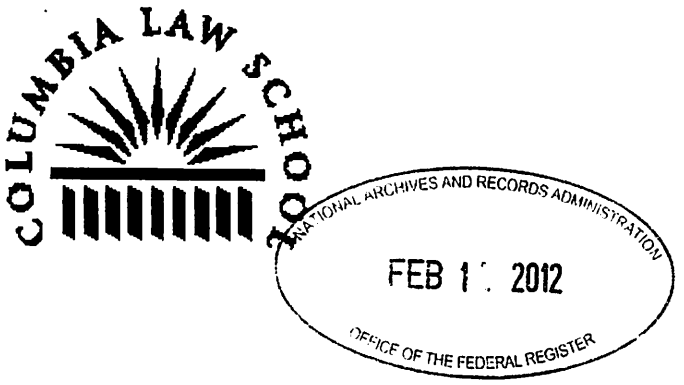

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February 10, 2012

Office of the Federal Register (NF)
The National Archives and Records Administration
8601 Adelphi Road College Park,
MD 20740-6001

Gentlefolk,

Pursuant to 5 U.S.C. §553(e), we hereby petition for amendment of 1 C.F.R. §51, "Incorporation by Reference" to reflect the changed circumstances brought about by the information age. While it is only necessary to be an interested person to file such a petition, the undersigned include scholars of administrative law with particular, continuing interests in the avoidance of secret law and the development of the government's law-related Internet activities, the President of Public Resource.Org (an NGO dedicated to the creation of a free web-based database of privately developed standards treated as mandatory by governmental authorities), and practitioners of administrative law.

1 C.F.R. §51 is your implementation of your responsibilities under 5 U.S.C. §552(a)(1), which provides in relevant part

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— ...
>
> > (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
> >
> > (E) each amendment, revision, or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. *For the purpose of this paragraph, matter reasonably available to the class of persons af-*

fected thereby is deemed published in the Federal Register when incorporated by reference therein ***with the approval of the Director of the Federal Register.*** [Emphases added.]

As the statute states, and 1 CFR §51.3 recognizes, each incorporation by reference must be actively and individually approved by the Director of the Federal Register, after stated requirements have been met. As 1 CFR §51.1(b) recognizes, it is for the Director to "interpret and apply the language of action 552(a)"; the whole of the regulation is, in effect, an interpretation of what it means for matter incorporated by reference to be "reasonably available." However, this regulation has not been amended in any respect since its appearance Aug. 6, 1982 at 47 FR 34108. Subsequent statutory and social developments have transformed what it might mean for matter to be "reasonably available," and this petition seeks the redefinition of "reasonably available" in the light of those changes. In the pre-digital world, it may have seemed reasonable to require persons wishing to know the law governing their activities to pay private standard-setting organizations for access to standards made mandatory by government regulations incorporating those standards by reference. These standards were sometimes voluminous, could be presented only in print, and could be made available to concerned parties only at some expense to the provider. Developments in both law and technology over the last two decades have undermined that rationale, however, transforming what it should mean for these standards to be "reasonably available."

In particular, when §552(a)(1) was enacted and at the time 1 CFR §51 was adopted, substantive rules of general applicability, statements of general policy or interpretations of general applicability, as well, could be made available to the public only in printed form. Since the "published data, criteria, standards, specifications, techniques, illustrations, or similar material" made eligible for incorporation by reference in §51.7(a)(2) were often voluminous in character, permitting their incorporation by reference would "[s]ubstantially reduce[] the volume of material published in the Federal Register." §51.7(a)(3). That effect was the primary impetus for permitting incorporation by reference. Again, this effect has been eliminated by the implementation of agency electronic reading rooms, under which unlimited volumes of materials may be stored or hyperlinked, and made readily searchable by common web-based tools.

Section 51.7(a)(4) of your regulations, defining eligibility for incorporation, today makes no effort to define "reasonable availability." Although it conditions eligibility on whether the material to be incorporated "[i]s reasonably available to and usable by the class of persons affected by the publication," it goes on to define *only* "usability," and it does that for the pre-Internet age, in terms that plainly envision only *print* publication. Another element of your regulation, §51.1(c)(1), provides that the terms of reference for the Director's determinations are whether incorporation "is intended to benefit both the Federal Government and the members of the class affected." Although we understand that respect for standards organizations' copyrights may influence the Director's determination that incorporated material is "reasonably available," this language invokes that interest only indirectly. In the Internet age, that interest needs to be directly considered, in relation to the need of the regulated and citizens alike to know standards that may be

proposed, or are later adopted, to governing their conduct. The possibility of protecting copyright owners' financial interests in most uses of their standards by technical means (such as limited electronic access) is an appropriate element here, as is creating standards for "reasonable availability" that will maximize agency incentives to bargain hard over such licensing payments as might be appropriate.

With the Electronic Freedom of Information Act of 1996, the Government Paperwork Elimination Act of 2000, and the E-Government Act of 2002, public availability of government records has moved decisively from print media to electronic reading rooms. Indeed, the Federal Register no longer needs to be printed, especially given Federal Register 2.0, and in any event reducing the volume of material *in print* in it is no longer an important consideration. While the CFR will doubtless remain in print, nonetheless the availability of materials incorporated by reference on government (or private) websites renders any concern about its volume also irrelevant to deciding whether material is "reasonably available." Any agency publishing material to its electronic website, whether or not it is in print, will have made that material "reasonably available." Indeed the obligations of E-FOIA for guidance material under 5 U.S.C. §552(a)(2) make this clear. Absent actual notice, agencies may not cite guidance materials adversely to private parties unless they have been posted in the agency's electronic library – and there is no "reasonably available" qualification to this obligation, only the possibility of redaction for privacy protection.

These enactments and their impact are nowhere referenced or considered in §51 – as they could not have been when it was last considered, in 1982. They make plain the necessity that the Director reconsider the now antiquated regulations implementing 5 U.S.C. 552(a)(1) and its criterion of reasonable availability, and in doing so assure Americans of ready access to the law that controls their conduct.

A recent action by the Administrative Conference of the United States failed directly to address the Director's responsibility for shaping and administering the criterion of reasonable availability. However, the recommendation and its supporting report strongly suggest factors that should enter in:

1) Section 51 currently applies only to the publication of a final rule. However, notices of proposed rulemaking will often propose incorporation by reference, and public availability of materials is of special importance during the rulemaking stage to effectuate the APA's commitment (strongly reinforced by caselaw requiring agencies to reveal important data on which they may rely) to a meaningful public comment opportunity. The ready availability of materials proposed to be incorporated by reference, whether in FDMS, on an agency website, or on the website of a copyright holder (who may appropriately limit access to the comment period, and provide it only in read-only form), is essential to any ultimate determination that material that would otherwise be required to be placed in the body of a final rule is "reasonably available" to the concerned public and hence may be incorporated by reference. Here, particularly, the interests of a wide range of interests - citizens, local governments, small businesses – may be implicated. Agencies seeking approval for incorporations by reference of voluntary consensus standards that are

referred to in their notices of proposed rulemaking should be required to demonstrate the steps that they have taken to enable comment on those standards, as one element of reasonable availability.

2) The National Technology Transfer Act of 1995 and the implementing OMB Circular A-119 properly distinguish, as the literature does, between regulations affirmatively requiring a specified course of conduct, and standards that serve to indicate one means by which those requirements may be satisfied. The policy favoring incorporation by reference of voluntary consensus standards embodied in the NTTA and Circular A-119 is limited to "standards" in the latter sense. Yet the Report to ACUS details settings in which material incorporated by reference is *itself* taken as setting mandatory obligations. For example, OSHA treats as a violation of its regulations *any* departure from the form of warning placards detailed in certain standards it has incorporated by reference; it is merely a "minor" violation if, in departing from those forms, an employer has used warning placards suggested by subsequent voluntary consensus standards that OSHA has not yet incorporated by reference. "Reasonable availability" of *mandatory* standards in the age of the Internet requires their ready accessability in agency electronic reading rooms or, at the very least, in linked websites of standards organizations that provide at least free read-only access to those with a need to know the law governing their conduct or otherwise affecting them.

3) When agencies use incorporation by reference to create *mandatory* standards, the legality of charging the public for access to material incorporated by reference by the voluntary standards organizations that may have developed them, under copyright, is in serious doubt. Veeck v. S. Bldg. Code Cong. Int'l, 293 F.3d 791 (5th Cir. 2002). Free availability to the affected public of incorporated materials is of particular importance, as already suggested, when those materials create mandatory obligations whose violation could have adverse consequences, whether directly or on others whose interests may be affected by the behavior it controls. Measures such as the Unfunded Mandates Reform Act make plain that Congress has set its face against agency actions that export costs to others arguably unable to bear them. And in the age of information, secret law, that the public must pay for to know, is unacceptable. Today, binding law cannot be regarded as "reasonably available" if it cannot freely be found in or through an agency's electronic library. Perhaps this would require agencies to pay license fees for their use of such standards – and if so, they would then have proper bargaining incentives to keep those fees low.

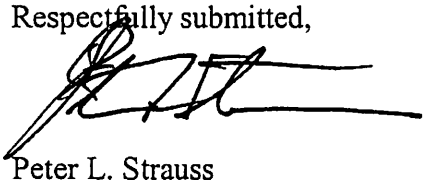
Even should the Director disagree with this proposition – erroneously in our view – he should then make the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available. Since having the Internet eliminates any concern about having to print excessive materials, protecting copyright interests is the only possible rationale for permitting incorporation by reference of materials members of the public might be required to pay to see. The criterion for reasonable availability, as §51.1(c)(1) recognizes, is whether incorporation by reference "is intended to benefit both the Federal Government and the members of the class affected." Without doubt, the Government's interests are served by

the work of voluntary standards organizations, yet the net benefits to the Federal Government of permitting incorporation by reference have been greatly reduced by today's possibilities for electronic publication. Benefit to the members of the class affected requires ready accessibility, whether by the presence of this material in agency electronic reading rooms or its accessibility on standards organization web sites. Those benefits are reduced if they must be paid for – and high fees, particularly for local governments, small businesses and concerned citizens that may have a strong interest to know the governing law, will eliminate them. Any agency today proposing to export the costs of learning the law to those affected by it should, at the very least, be required to demonstrate its efforts to contain those costs (especially for small businesses, local governments, citizens, etc.) as a necessary element of demonstrating reasonable availability.

For your convenience in understanding the changes sought by this petition, we set out in the pages following 1 C.F.R. §51 as it might appear if they were effected. For convenience, added language is italicized, and deleted language struck out. It is important to understand, however, that we are not asking for adoption of this exact language. Indeed, the bracketed language in §51.7(a)(3)(i(C)) is language we would prefer not appear in the regulation, but reflects the maximum recognition of voluntary standards organizations' authority to charge the public for access to incorporated materials we would regard as tolerable. What is essential is that you now reconsider the antiquated provisions of this regulation in light of the changes wrought by the Information Age and federal statutes and policies building on it.

As coordinator of this petition, Peter L. Strauss avers that each of the persons below has authorized him to include their name on this petition, with affiliations given for purposes of personal identification only.

Respectfully submitted,



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Title 1: General Provisions
PART 51—INCORPORATION BY REFERENCE

§ 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

(~~3~~ *6*) The regulations of the Administrative Committee of the Federal Register under the Federal Register Act (1 CFR Ch. I); and

(~~4~~ *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 (See §51.7).

(2) The language of incorporation meets the requirements of this part (See §51.9).

(3) The publication is on file with the Office of the Federal Register.

(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 (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 final 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; ~~and~~

(3) Demonstrate that if the rule has previously been open for comment, and its Notice of Proposed Rulemaking proposed incorporation by reference of any publication, that publication was available throughout the comment period either

(a) In the FDMS docket for the rulemaking proposal; or

(b) On the agency's website at a location appropriately referenced in the Notice of Proposed rulemaking; or

(c) On the website of the voluntary standards organization responsible for the publication, appropriately referenced in the Notice of Proposed rulemaking and readable without cost to those commenting on the proposed rule.

(4) Demonstrate that if the rule is an interim final rule that is now open for comment, and proposes incorporation by reference of any publication, that publication will be available throughout the comment period either

(a) In the FDMS docket for the rulemaking proposal; or

(b) On the agency's website at a location appropriately referenced in the Notice of Proposed rulemaking; or

(c) On the website of the voluntary standards organization responsible for the publication, appropriately referenced in the Notice of Proposed rulemaking and readable without cost to those commenting on the interim final rule.

(~~3~~5) 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?

(a) *Save for those matters excluded under subsections (b) and (c) of this paragraph, a* ~~A~~ publication is eligible for incorporation by reference under 5 U.S.C. 552(a) *while it is posted to the agency's electronic reading room and appropriately referenced in the rule incorporating it, or* if it—

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

(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material, *that informs the public how the regulation referring to it might be complied with*;

~~(3) Substantially reduces the volume of material published in the Federal Register;~~ and

(~~4~~3) Is reasonably available to and usable by the class of persons affected by the publication.

(i) In determining whether a publication not posted to the agency's electronic reading room is reasonably available, the Director will consider

(A) Whether it can be electronically accessed for reading without cost to per-

sons directly affected by the rule; and

(B) Whether it could have been electronically accessed for reading without cost to persons potentially affected by the rule during the rulemaking comment period; [or

(C) If the publication could not have been accessed without cost under either (A) or (B) of this subsection, whether

(1) the material to be incorporated is not made inappropriate for incorporation by reference by paragraph (c)(3) hereof, and

(2) was accessible by members of the public during the rulemaking comment period at a cost reasonable in relation to their needs and resources and

(3) 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 a print document,—*

(*A*~~i~~) The completeness and ease of handling of the publication; and

(*B*~~ii~~) 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 *unless it is hyperlinked to the document incorporating it.*. A publication produced by the agency *and not so linked* 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 creating a fixed obligation on members of the public that is inaccessible without payment of a fee to a private body.

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

(3) Informs the user that the incorporated publication *is published data, criteria, standards, specifications, techniques, illustrations, or similar material, that informs the public how the regulation referring to it might be complied with; or, if freely available by hyperlink from electronic versions of the regulation in which it appears, that it* is a requirement;

(4) *In electronic versions of the regulation, contains an active hyperlink to the publication or, should this not be possible, m*~~M~~akes 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.