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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 Notice of Proposed Rulemaking on Incorporation by Reference[1]

The Section of Administrative Law and Regulatory Practice of the American Bar Association (the Section) respectfully submits these comments regarding the Office of Federal Register's Notice of Proposed Rulemaking on Incorporation by Reference. The Section appreciates OFR's solicitation of comments on the proposed rule. 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 policy of the American Bar Association.

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.[2]

[1] 78 Fed. Reg. 60,784 (Oct. 2, 2013).

[2] Our Executive Branch Liaison Jeff Weiss took no part in the development of this letter and abstains from it.

INTRODUCTION

In brief, the Section appreciates the Office of Federal Register's thoughtful response both to the petition for rulemaking on incorporation by reference that was published on October 2, 2013 and to the recommendation of the Administrative Conference of the United States, as well as OFR's consequent effort to revise Part 51. While finding merit in some elements of the proposal, however, it is our firm conviction that it fails adequately to conform the Director's exercise of his authority and responsibilities to the requirements of 5 U.S.C. § 552(a), 5 U.S.C. § 553, and the realities of today's information age. In the paragraphs following we amplify these concerns with explanation and concrete proposals for change. In making these proposals, we have honored to the maximum extent we find consistent with law

- The resource limitations of the Office of the Federal Register and its consequent need to frame Part 51 in a manner that encourages agency understanding and compliance, and, by directing agency submissions in a clear way, eases the Office's tasks of enforcement.
- The resource limitations, as well, of agencies wishing to incorporate by reference into their regulations appropriate standards independently developed by recognized standards development organizations.
- The importance to the public under the law of full opportunity to participate in agency rulemakings and to have regulatory obligations stated in terms adequate for their ready understanding.
- The importance to agencies of being able to conduct rulemakings in full compliance with the contemporary requirements of notice and comment rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553.
- The importance to the American economy of standards development organizations, that require a sustainable business model to continue their valuable contributions.
- Finally, the importance to effective regulation of developing safeguards against the continuance of incorporated standards as legal obligations long after they have been displaced as industrial standards by the organizations responsible for their development – indeed, after they may essentially have disappeared from view.

OFR's proposal plainly contemplates that incorporated standards may remain hidden behind the shield of copyright. But OFR must choose an approach that adequately ensures compliance with 5 U.S.C. §§ 552 and 553, and with the changes made to the concept of "reasonably available" by the fact of the information age, and government transparency legislation reflecting it. Regulated entities needing access to incorporated standards so they can comply with rules referencing them are often small businesses for whom the mass of necessary standards may be a significant cost.[3] Members of the

[3] Comments in response to the petition that initiated this rulemaking made this problem clear. E.g., NARA-2012-0002-0145 (National Tank Truck Carriers, emphasizing the particular problem of purchasing standards not yet incorporated in order to comment on NPRMs, and remark also that small businesses "have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. ... [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a 'dent'

public affected by product regulation, occupational safety regulation, and environmental regulation likely cannot afford to read these standards.[4] Though this law is not formally "secret," the cost of reading and difficulty of finding it render it, practically, inaccessible to the public. At root, then, access to all incorporated matter should be free, if the evils of "secret law" OFR was established to resist are to be avoided.[5]

DETAILED COMMENTS

I. OFR's proposed changes to §§51.3 and 51.5 are a step forward, but fail to reflect OFR's legal responsibilities under 5 U.S.C. §552(a)(1) and are inconsistent with the Administrative Procedure Act.

A. *OFR's proposed changes to 51.3(a) helpfully focus upon access to materials at the proposed rule stage, but significant problems remain.*

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was. ... HM241 could impact up to 41,366 parties and ... there is no limit on how much the bodies could charge ... "); NARA-2012-0002-0147 (American Foundry Society; "$ 75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg ..."); NARA-2012-0002-0153 (National Grain & Feed Ass'n, addressing an OSHA proposal to amend its grain handling regulation associated with fires and explosions, 29 CFR 1910.272. OSHA had issued an ANPRM suggesting that it would deal replace existing regulatory text by incorporating National Fire Protection Association Standard 61. Yet, as NGFA observed, "NFPA standards offer a far more complex, stringent protocol that may be adopted in whole or in part by industry participants, voluntarily. These guidelines play an important role as voluntary practices that can enhance safety efforts. But they are entirely inappropriate as a replacement for effective rulemaking ...A review and comparison of 1910.272 and NFPA 61 reveals that there are more than 146 additional provisions addressing design, construction, and operation of affected grain handling facilities. Neither the NFPA technical committee, nor any other NFPA committee, conducts [either] an economic impact study ... [or] consider the impact of the feasibility or cost of its detailed recommendations on industry and small businesses, in particular. ... Only NFPA participants, who are required to pay to play, have the ability to comment in the development of consensus standards.")

[4] E.g., Letter from Jacob Speidel, Staff Att'y, Senior Citizens Law Project, Vermont Legal Aid, Inc., to Office of the Fed. Register, Nat'l Archives & Records Admin. 2 (June 21, 2012) available at http://www.regulations.gov/contentStreamer?objectId=09000064810258aa&disposition=attachment&contentType=pdf (noting that costs of accessing IBR rules interfere with Medicare recipients' ability to know their rights).

[5] 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. 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 (5th Cir. en banc 2002), *cert. denied,* 537 U.S. 1043 (2002); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th 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).

We fully support the basic thrust of OFR's imaginative response in §51.3(a) to the recommendations of the Administrative Conference, and the demands of 5 U.S.C. §553, that agencies proposing rulemaking the incorporation of standards by reference must do so in a manner that assures the public a reasonable opportunity to comment on the proposal. This is, of course, most readily accomplished by assuring that the text of the standard proposed to be incorporated, and supporting data and studies, are themselves disclosed to the commenting public, either by the agency or by the standards development organization responsible for it. For forty years now it has been established that "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that[, to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C.Cir. 1973). If access is not provided on the agency's own website, or through the Federal Data Management Service, it can be provided on an SDO website under read-only access limitations; but it should be provided somewhere without cost. The only alternative to thus making the standard and its supporting data itself available, and it is an inferior one, is to require that the preamble or the language of the proposed rule explain what is proposed to be required in terms adequate for the public's ready understanding and comment. To emphasize, an explanation of the requirements, in itself, would be inadequate without access to underlying data -- that is, to records of the proceedings before the SDO on the basis of which it reached the standard being proposed for incorporation.

The proposed language of § 51.5(a), however, is insufficient to satisfy either OFR's statutory responsibilities under 5 U.S.C. § 552(a)(1) or the requirements of 5 U.S.C. § 553.

1. While OFR may and should construct Part 51 so as to assure agency actions demonstrate compliance with the demands of "reasonably available," OFR may not defer the "reasonably available" determination to the rulemaking agency.

The text of Section 552(a)(1) unmistakably assigns to the Office of the Federal Register the responsibility to approve incorporations by reference as satisfying an agency's obligations to publish in the Federal Register. In rulemaking, the agency's publication obligations under Section 553(b), (d), and 552(a)(1)(D), subsume both proposed rule materials and the final rule. To implement this authority, OFR has promulgated rules defining incorporation procedures and materials eligible for incorporation by reference. As OFR itself argued in the Notice of Proposed Rule, "[T]he Director has the sole authority to issue regulations governing the IBR approval request procedures." 78 Fed. Reg. at 60,785. And indeed, OFR has promulgated a number of regulatory requirements for incorporation by reference, which, as it has pointed out, have been on the books since the 1960s. *Id.* OFR's disclaimer of its own authority to assess "reasonably available" is inconsistent both with Congress' direct command to it, and its longtime implementation of its authority.

OFR's proposed approach would reduce its role under 5 U.S.C. § 552(a) in ascertaining "reasonably available" to a formality, and also fail to encourage the agency behavior that would assure compliance with 5 U.S.C. § 553. With respect to proposed rules, in proposed 1 C.F.R. 51.5(a), if the agency elected (a)(1), OFR would simply have to check to ensure that the agency included a "discussion," without necessary attention to the public's ability effectively to comment. What must be "reasonably available" is the information that permits effective commenting. A discussion of efforts does not convey that information; only the actual provision of information, or demonstration that it is in fact readily available to the public, does so. The

proposed approach thus effectively delegates the "reasonably available" decision to the rulemaking agency.

"Reasonably available" is the only statutory condition expressly imposed by 5 U.S.C. § 552 upon incorporation by reference. Having OFR delegate the only statutory criterion it has been asked to implement cannot be what Congress envisioned in requiring OFR approval of agency incorporations by reference. OFR should thus retain meaningful review approval under 5 U.S.C. § 552 and should, as discussed in greater detail below, define "reasonably available" to mean widely available, free access.

2. Mere "discussion" of how an agency worked to assure availability during the comment period does not assure the public the information it requires for effective comment.

Both as a matter of policy and law, permitting agencies to propose incorporation by reference without assuring the public's ready understanding of any regulatory requirements being proposed, with only a description of how it has "worked" to achieve that end, is deeply problematic. Mere "discussion" of what an agency may have tried to increase availability of materials does not assure that the public will in fact have the information it needs to comment effectively. As well-established elements of the rulemaking process require, an agency's notice of proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment. 5 U.S.C. 553(b)(3); *Long Island Care at Home v. Coke* 551 U.S. 158, 174 (2007) ("The object [of 553(b)], in short, is one of fair notice.").

Indeed, the agency interest in minimizing its budgetary burden may prompt it to propose incorporation of a standard in a manner that does not meet any plausible understanding of "reasonably available." The agency may wish to avoid having to negotiate access terms with an SDO or bear the burden of a potential cost associated with ensuring public access. The same pitfalls that may dog an agency's choice of substantive requirement (including an SDO-drafted requirement) may affect its decision to conclude that despite unsuccessful efforts to increase access, a standard will be adequately available during the comment process. As discussed in greater detail below, transparency and ready access are critical to ensure that agencies are properly accountable for the standards they issue, and particularly so when the standards emanate from private organizations. By the same token, the extent of allowed access also should not be left to the incorporating agency.

3**. In the "information age," "reasonably available" during the comment process cannot mean access burdened by significant cost.**

OFR's proposed approach to interpreting the "reasonably available" requirement in 5 U.S.C. § 552(a)(1) fails to address the often significant cost of accessing incorporated standards -- a matter of particular sensitivity during the comment process, when the capacity of persons other than regulated entities to know and comment on proposals is critical, and any expense they may face for access is most likely to be discouraging.

It also fails to reflect the characteristics of the information age. 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.

Recognizing this, and the importance of public engagement during the comment process, the American National Standards Institute and many of its member organizations have already created digital-rights-management websites where free access to standards being proposed for incorporation will be available. Agencies can direct interested persons to those websites where they exist. Where they do not, the absolute minimum required by contemporary rulemaking law is not that the agency has tried to make this happen, but that if it does not itself make the standard available on such a basis, it must in its proposal describe the regulatory requirements that would result from incorporation in sufficient detail to permit ready public understanding. Note that this should not be a significant burden for the agency, since the SDO whose standard might be incorporated should find it in its interest to help the agency state the regulatory requirements in sufficient detail to inform the public of their gist, while maintaining the integrity of its "technical standard."

4. To comply with 5 U.S.C. § 553 as has long been understood, agencies must assure access to supporting data as well as sufficient information about the proposed rule to permit effective comment.

To comply with the requirements of 5 U.S.C. § 553 as they have been authoritatively construed for decades, the preamble to the agency submission to OFR must also inform the public either that scientific data and studies underlying the proposal will have been placed in its rulemaking docket on FDMS at the time the proposal itself is published, or what these materials are and where they can readily be found, unhampered by significant access costs. 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).

Standards development organizations that have complied with ANSI's "essential requirements" already have the scientific data and studies underlying their standards as a consequence of their internal processes. Some, like the North American Energy Standards Board, make a point of providing it directly to the rulemaking agency -- in its case, the Federal Energy Regulatory Commission. But agencies cannot simply keep that information to themselves during the comment process or -- worse -- leave it undisclosed in the possession of

the SDO, relying perhaps on agency personnel's participation in the standards generating process. Again, "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that[, to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C.Cir. 1973).

In order to ensure validity of the Part 51 rules under the APA, then, OFR is therefore required, at a minimum, to approve incorporations by reference only when it is clear that the incorporated material has been readily available to any "interested person" during the comment period. 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.

5. The foregoing comments do not significantly threaten OFR's limited resources, while assuring compliance with law.

The nature of these requirements places their substantial burden on agencies, not OFR, while providing OFR with the information it should have in order to make the determinations it has properly proposed to make in connection with rulemaking proposals submitted for publication in the Federal Register. Consequently, while differing from OFR's proposal for the content of 51.5(a), language requiring the agency actually to assure public awareness of proposed regulatory requirements and their basis in a manner that permits effective comment should not significantly increase the burden on OFR, while effecting proper compliance with the currently understood demands of 5 U.S.C. § 553 and carrying forward OFR's own responsibility to determine the "reasonably available" issue.

B. A similar analysis demonstrates that the proposed language of §51.5(b)(2) is inadequate to satisfy OFR's statutory obligations, the requirements of notice and comment rulemaking as presently understood, and the federal statutory obligations of transparency in the Information Age. Preambular discussion of efforts can satisfy neither OFR's responsibility itself to determine that incorporated material is reasonably available nor federal statutory requirements incompatible with secret law, not readily available from public sources, in the information age.

As it is proposed to be amended, 1 C.F.R. 51.5(b)(2) would permit agency use of incorporated material in a final rule so long as the agency simply discusses in the preamble how it "worked to make [the IBR material] reasonably available to interested parties." OFR's only function would be to check for the existence of the discussion. It proposes to make no independent assessment of whether the materials are "reasonably available." As discussed above, this is contrary to 5 U.S.C. § 552 because the delegation to the rulemaking fails to implement OFR's own clear legal obligations to ensure public access to agency law.

The deficiencies in this proposal mirror those already discussed respecting 1 C.F.R. 51.5(a). Here, however, the proposal not only threatens the validity of the agency's notice and comment process; it also fails to implement OFR's own clear legal obligations to ensure public access to agency law. Under Section 552, what must be "reasonably available" (thus satisfying Federal Register

publication obligations under 5 U.S.C. § 552(a)(1)(D)) is the rule. Those who must comply must have ready access, so they can be considered to have appropriate notice of their obligations, and individuals must have ready access to have an opportunity to understand the government action and how it affects them, as well as the ability to respond to it, including through the right to petition under 5 U.S.C.§ 553(e), seeking new legislation, or educating the public. Indeed, OFR's proposed approach leaves open the possibility that the availability of IBR rules will vary wildly, agency to agency, and SDO to SDO. As discussed below, OFR's approach of permitting SDOs to charge for access interferes with the public's ability to know the law and is inconsistent with § 552's "reasonably available" requirement. By making access not only potentially expensive, but unpredictable, OFR's preferred approach will make this category of "law" even less accessible.

1. OFR's proposed rule fails to ensure that IBR rules are "reasonably available," in violation of its obligations under section 552

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 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, on the condition that OFR has found that it is "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a)(1). As discussed above, implementing this requirement is OFR's statutory responsibility under 5 U.S.C. § 552. It cannot be satisfied merely by an agency's description of its efforts to make incorporated material reasonably available. It must in fact be available, and it is OFR's statutory responsibility to determine that it is.

Nor, in the computer age, can it possibly satisfy the "reasonably available" requirement that one physical copy of an incorporated standard is available at the National Archives and another in the incorporating agency's Washington offices. 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;" the proposed rule would not change this practice. 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 $1000. OFR's proposal, like its current regulation, pays no heed to the possible costs of access -- particularly for small businesses such as foundries that may need access to hundreds of standards, or for the affected public. As discussed above, OFR's proposed rule merely would ask agencies to report how they "worked" on the access question. It is thus unlikely to assure any more consistent availability to the public. This is not adequate public access to binding law.

As the original petition to the Office of the Federal Register to issue rules cogently argued, "[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. The Electronic Freedom of Information Act and other statutes enacted since Part 51 was last revised, have both expanded and greatly facilitated agency abilities to make even the most voluminous material available. A regulation could, for example, state that full text is available at a stated location on the agency's website -- and this step would both protect the volume of the printed Federal Register and CFR, and self-evidently satisfy the requirements of reasonable availability. Since the reference in "incorporation by reference" can now be to an agency's own website, protecting print volume, as such, is no longer a relevant criterion for incorporation by reference. The only proper criterion is the public's ability to ascertain and understand the requirements of law.

Rather than moving public access forward in the digital age, in keeping with this Administration's commitment to transparency, the OFR proposed rule, if adopted, would turn the clock back. OFR would permit incorporation of standards by reference, as long as an agency has reported how it "worked" on access issues, even when standards are located in disparate places and are subject to widely varying access restrictions that are under the effective control of private organizations. This is much like the situation criticized by a U.S. House of Representatives committee when it decided to enact the Federal Register Act in 1935: "[R]ules and regulations frequently appear in separate paper pamphlets . . . . Any attempt to compile a complete private collection of [them] . . . would be wellnigh impossible. No law library, public or private, contains them all." H.R. Rep. No. 74-280, at 2 (1935). Going back in the direction of the 1930s is particularly ironic at a time when the U.S. Code, Code of Federal Regulations, and Federal Register (other than IBR rules) are all freely available not only in every one of the over 1,200 federal depository libraries, but freely, digitally available on computers nationwide, including in the public library system. Understood, as 5 U.S.C. § 552 must be, to focus on the core goal of public access, permitting significant access charges cannot by any stretch be considered "reasonable" availability.

2. "Reasonably Available" requires IBR Rules to be Available to the Public Without a Fee, at Least Through a Read-Only Digital Format

Any incorporation of a rule may not lawfully be permitted unless the standard is, at a minimum, available online without a requirement of payment. To provide legally sufficient understanding of any regulatory requirements imposed by material incorporated by reference, the agency must:

(a) make the incorporated standard available without cost on its agency website; or

(b) provide assurance that the standard is and will remain available for reading without cost on the website of a standards development organization, at a location identified in the agency regulation, ideally accessible through a direct link in digital versions of the regulation.

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 APA right to petition for revision or repeal of any rule; and
- The contemporary meaning of "reasonably available."

For IBR standards that create otherwise unexplained yet 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 5th 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 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 (1st Cir. 1980)). Thus, even those who need not conform their conduct to regulatory requirements have a right to know. As comments filed to the OFR and OMB in 2012 make clear, the public has an interest in reading IBR material.[6]

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

[6] See supra note 4 (Vermont Legal Services comment); NARA-12-0002-0140 (Consumers Union, emphasizing the need for free access to standards to notify the CPSC and warn consumers regarding unsafe products);OMB-2012-0003-0074 (public interest organizations, including environmental, watchdog, and library organizations, emphasizing need for free access to engage government and public on range of public policy issues); NARA-12-0002 ("A concerned Citizen," noting that knowledge of airbag standards allows citizen to be "a more educated consumer")..

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, and even when motor vehicle safety standards incorporate standards drafted by the Society of Automotive Engineers. We note that regulatory standards created by industry associations such as the API, compared with professionally focused organizations such as ASME, may raise particular concerns warranting public awareness. Still, 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 5th 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 proposed rule, which permits agencies to limit public access to incorporated material by allowing agencies to reference it when, as a practical matter, the public must pay to see that material. First, impediments to a regulated entity's ability to access government standards may implicate due process concerns. In the context of whether to sustain a changed agency interpretation of a rule, the Supreme Court has endorsed "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires,'" and that due process thus bars the imposition of sanctions upon someone who could not have received notice of his or her obligations. *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012) (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)(Scalia, J.)). Comments filed in response to the Office of Federal Register's request for comment of February, 2012, indicated that SDO charges obstructed the ability of small entities and individuals to gain notice of their legal obligations. For example, as the American Trucking Associations warned the Office of the Federal Register, "Purchasing technical reference materials can be cost-prohibitive for small businesses, medium-sized businesses, and individuals."[7] In the preamble of the proposed rule, OFR acknowledges that agencies may wish to permit SDOs to charge for standards. 78 Fed. Reg. at 60,785 (requiring free access would "compromise the ability of regulators to rely on voluntary consensus standards"). Because it would acquiesce in the SDO practice of charging for access to IBR rules, OFR's proposed implementation of 5 U.S.C. § 552(a)'s "reasonably available" requirement is constitutionally suspect. It thus ought to be understood as beyond OFR's authority. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

OFR's proposed implementation of the "reasonably available" standard is constitutionally suspect for a second reason as well. The public cannot discuss or criticize the government's decisions if it does not know what they are. As the Supreme Court noted in

[7] Comments of American Trucking Association, June 1, 2012, at 3, available at www.regulations.gov.

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.'"[8] *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 (1st Cir. 2005) ("Only the most compelling reasons can justify non-disclosure of judicial records."); *Leigh v. Salazar,* 677 F.3d 892, 900 (9th 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.

The preamble to the proposed rule states that the government is not "prohibiting access" to IBR rules. 78 Fed. Reg. at 60,787. But that is not the relevant criterion here. Even if media access to records in the local courthouse regarding a single criminal trial could be considered as adequate, an assurance of free access only in the Washington, D.C. Office of the Federal Register reading room is insufficient when the government actions at hand are promulgation of several thousand standards with the force of law, affecting numerous industries and areas of regulation. The obstacles to access that must be overcome -- the charges and travel impediments -- effectively deny the public's right to know and discuss government actions. Legislative history accompanying the Freedom of Information Act draws the same link: "'The right to speak and the right to print, without the right to know, are pretty empty.'" *See* H. Rept. No. 1497, 89th Cong., 2d Session 2 (1966) (quoting Dr. Harold Cross). And with respect to public information around agency actions, the focus of Section 552, the point was not to ensure simply that government actions were not secret, but to provide "'the general public . . . ready means of knowing with definiteness and assurance.'" *Id.* at 3 (quoting S. Rept. 79-752 at 198 (79th Cong. 1st Sess. 1945)) (miscited as House Report in original). Significant access charges for regulatory standards are a real obstacle to knowing their content, and indeed, the Supreme Court has invalidated much smaller charges as inconsistent with similar core principles of democratic government. *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). *See also* 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. Access limited to the regulated is unsatisfactory under Section 552(a)(1); IBR rules must be broadly available

Section 552(a)(1)'s requirement that IBR materials be reasonably available to "the class of persons *affected thereby*" (emphasis added) must be read to cover not just those directly

[8] Needless to say, it is no answer that these standards are complex and technical. Even if only some individuals are interested reading IBR material, 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. See also supra notes 4, 6 (citing public comments evincing broader public interest in reading IBR standards).

regulated by those materials, but all those with a stake in the content of IBR materials. Indeed, the legislative history accompanying 5 U.S.C. § 552's incorporation by reference provisions made clear its concern with widespread public access, not simply that the IBR material would not be formally secret: "*Any member of the public* must be able to familiarize himself with the enumerated items . . . by the use of the Federal Register, or the statutory standards mentioned above will not have been met." S. Rep. No. 1219, 88th Cong., 2d Sess. 5 (1964) (emphasis added).

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 "reasonably available" requirement 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, without public explanation of their regulatory requirements sufficient to permit public understanding of them, 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).
- National Highway Traffic Safety Administration (NHTSA) rules for vehicle windshield safety similarly incorporate by reference unexplained privately developed standards for glazing and windshield ability to withstand fracture (49 C.F.R. § 571.205) whose adequacy to assure public safety is self-evidently a matter of substantial interest. .
- 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.
- Storage requirements for propane tanks, aimed at limiting the tank's potential to leak or explode, incorporate design, construction and testing requirements from the American Society for Mechanical Engineers' Rules for Construction of Unfired Pressure Vessels. E.g., 26 C.F.R. 1910.110(b)(3)(i).

Parents, children, drivers, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline or propane tank – 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 rules violates the APA

Our discussion of the need for public access to proposed rules above, applies equally once a rule has been finalized. 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 may approve IBR rules only when the incorporated material is publicly available without cost while any final rule is effective. 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 "regulations" to be made freely 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.

d. No statute authorizes OFR to permit wide-ranging incorporation by reference of rules not freely available to the interested public

As noted above, the whole point of creating the Federal Register and the CFR was to assure the public of the end of obscure or even "secret" law -- to provide ready access to the legal requirements affecting their lives in every one of the over 1200 depository libraries, and through legal libraries as well. Those who enacted Section 552 expressed confidence in doing so that incorporated materials would be similarly available, through the use of commercial legal reporting services to be found throughout the country. Although the legislative history betrays no express approval of access costs, a subscription to these services would not have cost hundreds or even thousands of dollars per use or have placed highly restrictive conditions on the use of the matter accessed.[9]

While it is sometimes argued that the National Technology Transfer and Advancement Act, and OMB Circular A-119 supporting it, endorse all incorporations by reference, they are in fact limited to "technical standards" -- as, indeed, is the current Part 51 (at least nominally) in

[9] The argument that one might have to pay to subscribe to the Federal Register -- a proposition happily not in fact acted upon -- is for the same reason irrelevant to requirements of substantial payments to obtain, under the stringent use restrictions copyright entails, even a single standard.

Section 51.9. Meanwhile, the OFR proposal to make reduction of pages in the Federal Register and CFR, in and of itself, a sufficient condition for incorporation welcomes the use of incorporation for standards extending far beyond any notion of "technical" standards. In explaining the 1998 revisions of A-119, for example, OIRA Administrator Sally Katzen wrote

"35. A few commentators inquired whether the Circular applies to "regulatory standards." In response, the final Circular distinguishes between a "technical standard," which may be referenced in a regulation, and a "regulatory standard," which establishes overall regulatory goals or outcomes. The Act and the Circular apply to the former, but not to the latter. As described in the legislative history, technical standards pertain to "products and processes, such as the size, strength, or technical performance of a product, process or material" and as such may be incorporated into a regulation. [See 142 Cong. Rec. S1080 (daily ed. February 7, 1996) (Statement of Sen. Rockefeller.)] Neither the Act nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements."[10]

Even as to "technical standards" given the force of law, an agency's taking the further step of permitting SDOs to charge individual prices for individual access under controlled conditions is highly doubtful. The National Technology Transfer and Advancement Act does encourage federal agencies to use "technical standards" developed by "voluntary consensus standards bodies." It does not mention, however, let alone validate, the practice of SDOs charging the public for access to read standards that an agency has chosen to adopt as binding law.[11] OMB Circular A-119 is neither "law" nor binding upon agencies. Its encouragement to respect copyright could readily be interpreted to authorize agency payments to SDOs for permission to republish the standards. And when "technical standards" that have been converted into legal obligations cease to be the voluntary consensus standards they initially were, because the adopting SDO has revised them, their price ceases in any sense to be subject to market controls, and becomes a price solely for "law."

If anything, Congressional enactments such as the e-FOIA amendments and the e-Government Act of 2002 suggest that Congress's intent (to the extent there is a unitary intent) is for greater public availability, not less. These are general statutes, emphasizing accessibility to law across the board. For example, in the Electronic Freedom of Information Act Amendments, Congress required agencies to make available, by "electronic means," indices of records that have been released to the public under the Freedom of Information Act, and, for records created beginning late in 1996, the records themselves.[12] Congress's express purpose was to "enhance public access to agency records and information" and to "foster democracy by ensuring public access to agency records and information"--in short, to increase public access, not to reduce it.[13] And in 2002, in the e-Government Act, Congress required agencies to provide for electronic rulemaking and electronic rulemaking dockets, as well as to post, on their websites, a wide range of materials "about that agency," with the express purposes of

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10 63 Fed. Reg. at 8549.

11 National Technology Transfer and Advancement Act of 1995, sec. 272, Pub. L. 104-113 (1996), codified at 15 U.S.C. 272 note (2012). The statute also says nothing about copyright.

12 See Pub. L. 104-231, sec. 4(7) (amending sec. 552(a) to require agencies to make documents available through "electronic means").

13 See Pub. L. 104-231, sec. 2(a), (b).

"increas[ing] access, accountability, and transparency;" and "[enhancing] public participation in Government . . . ."[14]

As the OFR preamble notes, Congress specifically reacted in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, to API's excessive demands for payment for an IBR standard, by requiring all incorporated rules to be made available free of charge.[15] That specific legislation, however, is completely consistent with Congress's recent enactments enhancing free and online public access to binding law as well as a wide variety of other forms of government information. It cannot be taken as implying any contrary judgment.

OFR points to the cost of subscribing to the Federal Register and to the GPO Electronic Information Enhancement Act, 44 USC § 4102, to support the proposition that SDOs may lawfully charge for access to their incorporated "regulations," and then control the uses to which those standards once acquired can be put.[16] But the same provisions require fully free access at the approximately 1,250 government depository libraries across the nation, and, once one is in the door, access is also free in the libraries that subscribe. Finally, that statute caps the price GPO is permitted to charge for electronic access to its resources -- the only access that, in practice, is now required – at "the incremental cost of dissemination," a very small, possibly negligible, charge per user in the information age.[17] With the development of the Internet, access to government legal resources has been expanded to every computer, and the government has come under a legal obligation to make all law -- even "soft law" that may affect a member of the public, 5 U.S.C. § 552(a)(2) -- on line. And it is hardly surprising that the GPO has elected not to impose any costs at all; the administrative costs of collecting any payments are higher than the GPO is authorized to charge.[18] These statutes, then, cannot be taken to endorse the variable charges private organizations impose for single access to particular standards, under tightly controlled conditions of use. These are substantial charges that in the best of circumstances may reflect the costs of standards development but that, once a revised

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[14] See E-Government Act of 2002, Pub. L. 107-347, secs. 206(a)-(d), 207(f), codified at 44 U.S.C. 3501 note.

[15] Pub. L. 112-90, sec. 24 (to be codified at 49 U.S.C. 60102(p)), *amended by* Pub. L. 113-30 § 1, 127 Stat. 510 (2013) (delaying effective date; retaining free availability requirement, but striking website requirement).

[16] The costs OFR points to at most could be understood to be simply nonprofit analogs to the subscription charges for private reporting services such as CCH, that Congress in enacting Section 552 anticipated would be the source of incorporated material. Subscription charges for CCH, the Federal Register or electronic access to GPO's resources are general, not specific. They do not vary with particular matters accessed, and they permit essentially unrestricted use of material found, once it has been accessed.

[17] See Bruce R. Kingma, The Costs of Print, Fiche, and Digital Access: The Early Canadiana Online Project, D-Lib Magazine, Feb. 2000 ("In theory, once the fixed costs of digitization are incurred there is a zero marginal cost of providing an additional copy.")(available at http://www.dlib.org/dlib/february00/kingma/02kingma.html) (last visited Oct. 28, 2013). Once servers are set up, the marginal cost associated with adding an additional user approaches zero.

[18] See National Academy of Public Administration, **Rebooting the Government Printing Office** 37 (Jan. 2013), available at http://www.napawash.org/wp-content/uploads/2013/02/G.PO-Final.pdf (last visited Oct. 2, 2013)(noting that GPO elected not to charge users for access to digital content because "administrative costs of collecting payments were higher than what GPO could charge").

standard has been adopted by the standards organization, can only be thought a monopoly price for law.[19]

The contemporary meaning of "reasonably available," given this history and the fact of the Internet, is that the public must at the least be able to access the text of the law from readily available sources. Rules that for access require payments to private organizations at uncontrolled rates and on use conditions they unilaterally set are "secret law" against which OFR must set its face. The effect, intolerable in any democracy and unlawful in ours, is to place access to each such law subject to the monopoly price and conditions of use set by its creator.

3. No different treatment should be afforded to "safe harbors" or "technical" rules

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 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.

"Technical" standards, however defined, should also be readily accessible to the public. All the arguments for free access to legal obligations apply equally well, even if some such "technical" rules may appear to be of less public interest. First, compliance obligations are no different. Even so-called "technical" standards represent binding rules. A regulated entity, including a small entity, will still need to comply. Moreover, as indicated above,[20] there are those (small businesses especially) who would be subject to these legal requirements for whom access subject to SDO fees could be intolerably expensive. The SDO process already favors big business,[21] and it would be unfortunate to add to these disadvantages by impeding small business access to legal obligations. Second, technical standards may still encapsulate key policy decisions. For example, materials specifications, called out particularly in Circular A-119 as "technical standards," can have obvious policy implications. Consider voluntary

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[19] The 1992 first edition of "Herb of Commerce," created by the American Herbal Products Association, has been incorporated by the Food and Drug Administration as containing the legally required nomenclature for certain ingredients in over-the-counter dietary supplements.. There is a second edition, not yet incorporated but advertised on the AHPA website as a must-have for anyone in the business. The second edition has a market price, $99, and is sold without any use restriction other than would attend the sale of any book. The first edition, still the law, can be acquired only for $250 and is sold under stringent use restrictions. Whether or not this behavior is common, it illustrates the power conferred on private actors by recognizing in them a copyright on law.

[20] See supra note 3.

[21] See generally Tim Büthe and Walter Mattli, The New Global Rulers: The Privatization of Regulation in the World Economy (Princeton 2011).

industry standards (now lapsed) specifying the maximum quantity of lead in paint.[22] And as the Modification and Replacement Parts Association pointed out in response to OFR's request for comment on the original petition: "Standard-setting organizations or companies may attempt to lock out their competitors via incorporated standards that restrict processes or allowable materials or practices."

Third, the line between standards that are "technical" and those that are not may be exceedingly difficult to draw. The NTTAA itself, for example, defines "technical" standards broadly (as well as circularly) as "performance based or design-specific technical specifications." See Pub. L. 104-113, sec. 12(d)(4). Circular A-119 encourages use of voluntary consensus "standards," expressly including not only materials specifications, but "specification of . . . performance, designs, or operations . . . ." These sorts of standards clearly can raise policy issues. And the very difficulty for OFR in drawing a line between a "technical" rule for which one might argue free access to text is less necessary and other binding rules weighs against suggesting such an exception. Indeed, there is a risk that the exception could swallow the rule. Even under OFR's current rules, ostensibly limiting IBR to "technical" standards, OFR approved the Department of Transportation's incorporation by reference of American Petroleum Institute 1162, "Public Awareness Programs for Pipeline Operators," a set of requirements hard to reconcile with any notion of "technical." And finally, neither Section 552's "reasonably available" requirement or Section 553's notice and comment and petition provisions make any distinction based on whether the standard can be understood as "technical."

C. Agencies May Arrange Alternative Means of Relying on SDO Standards Without Sacrificing Ready Public Access

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 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:

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[22] See generally Gerald Markowitz and David Rosner, "Cater to the Children": the role of the lead industry in a public health tragedy, 1900-1955, Am. J. Pub. Health 36, 44 (2000) (describing voluntary industry standards in 1950s capping percentage of lead in paint but not including warning label).

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.

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 negotiate terms of access to the work. Such terms could, if appropriate, include a licensing fee. [23] 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.[24]

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[23] 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.

[24] At a 2012 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

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.[25]

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.

II. What we find unnecessary and highly objectionable in OFR's proposed rule is the provision of 51.7 (a)(2) making a standard eligible for incorporation by reference even if it is not "published data, criteria, standards, specifications, techniques, illustrations or similar material," so long as it "substantially reduces the volume of material published in the Federal Register"

As shown above, the National Technology Transfer and Advancement Act and OMB Circular A-119 all are inconsistent with agency incorporation by reference of anything broader than "technical standards." Until now, Part 51 has recognized this limitation, which is the norm for the use of incorporated standards in most if not all other developed legal systems as well.

Nor is there any reason to lift this limitation. The availability of agency Internet resources makes the criterion of reducing the volume of printed material irrelevant. In the current era, *any* rule could properly take the form, "The safety of propane tanks must be assured by construction meeting the requirements affirmatively stated at [location] on the agency website," where the material on the agency website states the regulatory requirements. The electronic version of the CFR (as well as the regulation on the agency's own website) can readily keep that connection current.

To the extent OFR declines to ensure that IBR rules are publicly available as the law requires, lifting this limitation will spur further inappropriate incorporations by reference. Since agencies must pay for each page they publish in the Federal Register and the CFR, in a period of diminished government resources, even the wish to avoid this cost will provide an incentive to agencies to incorporate standards by reference and, particularly absent the changes suggested above, the result will be to increase the burdens of secret law, in conflict with the Constitution, § 552(a)(1), § 553, and 1 CFR 51.1(c).

III. The proposed text of 51.7(a)(3), oriented to print rather than electronic publication, well illustrates the failures of the proposed rule to deal effectively with the realities and opportunities of the Internet era

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Commission similarly stated that her agency could never afford to purchase for the public's use the standards referenced in CPSC rules.

[25] *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).

The Director's responsibility under Section 552(a)(1) is to enforce the "reasonably available" requirement, and as we have shown above, OFR's proposal makes no attempt to define that statutory criterion. It could, and in our judgment it must, do so. In the first detailed section of these comments, we have indicated the way in which, in our judgment, this could and should be done.

Section 51.7(a)(3) does state a criterion, requiring "usability." This is, in the first place, *not* a statutory criterion. Second, if "usability" were to be defined, it should be defined in terms of the realities of the current day, when ready computer access is the need most users will have, as well as in terms of cost burdens, which will significantly impede the ability of individual citizens and small businesses to "use" a standard. Astoundingly, Section 51.7(a)(3) unnecessarily assumes that "availability" will be determined in print terms (ease of handling, bound, numbered, organized) only.

IV. Section 51.1 should now be revised to reflect statutes enacted since 1982, that address incorporation by reference and/or are reflective of the electronic age -- The E-Government Act and The Electronic Freedom of Information Act

These statutes, as the comments above reflect, bear importantly on the transparency obligations of agencies respecting their documents potentially affecting members of the public, and also the means by which they may appropriately be satisfied. To fail even to mention them is to reveal OFR's regrettable indifference to the realities of the Information Age. We accordingly strongly suggest that OFR revise 51.1 to expressly list them.

V. Section 51 should be revised to include a "sunset" provision.

As the comments filed in response to the petition for rulemaking reveal, two-thirds of the standards currently incorporated as legal obligations were adopted in 1995 or earlier. This has created a most unfortunate situation, in which many standards are no longer available, reasonably or unreasonably, from any source other than, possibly, the OFR Reading Room. OFR should require incorporations to include "sunset" provisions that would limit the duration of incorporations by reference, or, alternatively, that for each successive edition of the C.F.R. agencies must certify to OFR that any standard that has previously been incorporated by reference remains available, as meeting the conditions suggested in these comments.

VI. Finally, we strongly oppose and believe outside the proper dimensions of "reasonably available" incorporations by reference of rules that require payment of a fee to a standards development organization for access to them. Should OFR persist in permitting such situations, it must at a minimum

A) Assure that the regulatory requirements are stated in the rule incorporating them in sufficient detail to permit public understanding of them;

B) Require as a condition of permission to incorporate by reference that the rule must state the price at which the incorporated standard was available as a voluntary consensus standard, before its adoption, and provide that should that price rise, or the incorporated standard become unavailable on the website of the standards organization developing it at that price, the regulation's obligations will then be unenforceable. The reasons for this should be evident:

1) The initial price for voluntary consensus standards has a tendency to be a "market" price, since the standard is not yet law, and the adopting SDO needs to set its price at a level permitting demand that will compensate it for its effort. Raising the price after incorporation has occurred is, precisely, relying on the monopoly power that its resulting status as law may confer, and the government cannot conscionably act to permit such abuses.

2) The determination whether a standard is "reasonably available" must consider the entire period during which it may constitute a legal obligation. The materials in the FDMS docket resulting from the petition for rulemaking in this matter, especially those filed by Carl Malamud of PublicResource.org, amply demonstrate that, as they age, incorporated standards may disappear from the adopting SDOs' websites -- even disappear from the Internet completely -- yet remain ostensible legal obligations. As is well known, the creation of the Federal Register itself was prompted by the discovery during Supreme Court consideration of *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), that a regulation imposing legal obligations had disappeared. It is surely ironic -- and a signal demonstration of the need for a different approach -- that Part 51, as it has been, has so often permitted the same situation to arise. For OFR to tolerate a regime that produces disappearing, unavailable law, when it can use Part 51 to avoid this happening, is a repudiation of its heritage and mission.

Thank you for considering the Section's views on this important subject. If you have any questions regarding our views, please contact Nina Mendelson, the primary drafter of Section comments, at (734) 936-5071 or nmendel@umich.edu, or Jamie Conrad, Chair of the Section's Legislation Committee, at (202) 822-1970 or jamie@conradcounsel.com.

Sincerely,

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