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Submitted via *Regulations.Gov*

Director Charley Barth
Office of the Federal Register
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Re: Docket ID: OFR-2013-0001
Comments of Nina A. Mendelson

Dear Director Barth,

I am writing in reference to the Office of the Federal Register's proposed rule on incorporation by reference published at 78 Federal Register 60,784 (2013). I am the Joseph L. Sax Collegiate Professor of Law at the University of Michigan Law School. I have taught and researched in the field of administrative law, with a focus on rulemaking, for nearly 15 years. I will shortly be publishing a law review article discussing the difficulties with access limitations for incorporated-by-reference rules and arguing for substantial levels of free public access. *See Private Control over Access to the Law: The Puzzling Federal Regulatory Use of Private Standards,* 112 Mich. L. Rev. __ (forthcoming, Mar. 2014). I have appended the abstract; I have not included the article because of length but will gladly provide it if of interest.

While OFR's decision to revise the rules on incorporation by reference and to focus on the issue of public access is a welcome one, the proposed rule does not go far enough in ensuring that incorporated-by-reference rules, part of our body of federal regulatory law, are publicly available. Both the law and strong policy concerns require that IBR rules be widely available to the public without charge. I hope you will take the following comments into consideration as you revise the proposed rule.

I am in full agreement with the substantial arguments made in the comments of Public.Resource.Org; I also contributed significantly to and fully support the comments of the American Bar Association's Section on Administrative Law and Regulatory Practice. Finally, I also support the comments of Professor Peter Strauss on the need for public access to the law. In particular, current practices – and OFR's proposed rule, by continuing to permit them--

- Violate 5 U.S.C. 552's "reasonably available" requirement;

- Violate 5 U.S.C. 553's entitlement to a meaningful opportunity to comment on proposed rules and to petition to revise existing rules; and

- Raise constitutional concerns, including due process, equal protection, and First Amendment issues. It is thus beyond the statutory authority of the Office of the Federal Register to issue a rule that contemplates approval of such practices. *See* ABA Section Comments at 11-12.

Rather than repeat these arguments, I write separately to underscore a few additional points regarding the proposed rules:

- Agency reliance on SDO websites—even "Reading Rooms" which promise some level of free read-only access—is insufficient access to satisfy the statutory "reasonably available" requirement. This is because SDOs continue to claim the option to revoke access to an IBR rule, to charge for access, and to impose significant conditions on reading IBR rules. SDOs have also stopped making available in any form numerous standards that have been incorporated by reference into federal law.

- SDO standard development processes are not open and are not reliably balanced as to interests. Public access to the text of IBR standards is not only legally required, but critical to ensure that the government is accountable for properly selecting and employing these standards as IBR rules.

- The proposed rule would perpetuate IBR practices that systematically disadvantage citizens and entities based on income.

- The proposed rule would continue incorporation practices contrary to the American tradition of free access to the law.

- By permitting current practices to continue, the proposed rule would send a damaging message to the public that the government mainly needs to be accountable to those of means.

For these reasons, and as discussed in greater detail below, the Office of the Federal Register should revise the proposed rules to ensure widely available free public access to the text of IBR rules.

1. A**gency reliance on SDO websites – even "reading rooms" – is insufficient to meet the statutory "reasonably available" requirement.**

Administrative agencies that wish to adopt IBR rules may well point to the decision of some standards development organizations ("SDOs") to make available some IBR rules on a read-only basis on their websites. This is a very helpful step, to be sure. It is also a strong piece of evidence that making IBR rules available on a free read-only basis will not destroy the

market for books of standards, as some SDOs have claimed. Unfortunately, it is insufficient to satisfy 5 U.S.C. 552's "reasonably available" requirement.

The proposed rule tolerates and implicitly approves agency reliance on SDO websites to provide access to IBR rules. In doing so, however, the proposed rule also fails to implement the statutory "reasonable available" requirement. As I discuss in greater detail in my article, SDO websites do not currently and are highly unlikely to ensure that IBR rules are "reasonably available" under any reasonable understanding of 5 U.S.C. 552(a).

a. **SDOs typically claim the option to revoke access or charge for it.**

First, even when they provide some free, read-only access to the public, SDOs generally claim the option to revoke access or to charge for it. They also make significant demands of individuals who wish to read the standards. For example, as of August 2013, ASTM International (formerly the ASTM) has opened a read-only reading room, purportedly for standards that have been incorporated into federal law. *Reading Room*, ASTM Int'l, http://www.astm.org/READINGLIBRARY/index.html (last visited Sept. 29, 2013) ("This is a free service where you can view and read ASTM safety standards incorporated in United States regulations."). However, the coverage is spotty at best; searches I performed in 2013 revealed that the library appeared to exclude numerous ASTM standards incorporated by reference into federal regulations.[1]

Moreover, apart from granting a limited license to read the standards, ASTM asks readers to waive any challenges to its holding a full copyright, to agree to a bar on "in any way exploit[ing]" the material "in whole or in part," and even to agree to an indemnification clause and a forum selection clause requiring all disputes over the scope of the license to be litigated in Pennsylvania courts. *See ASTM License Agreement*, ASTM Int'l, *available at* http://www.astm.org/COPYRIGHT/Single_PDF_copyrightlicense_agreement.doc (last visited Jan. 31, 2014). Perhaps the release is aimed at entities who would copy and sell books of ASTM standards in competition with ASTM itself. But having to agree to the release would undoubtedly trouble or even deter the ordinary citizen or small business owner who merely wishes to read the standards to understand their content. Because "exploit" could be understood to mean "to make use of," the restrictions on "in any way exploit[ing]" could also be understood to interfere with the ability of an individual to confer with an attorney on a standard's contents or to discuss the standard with other citizens. Forcing a reader to sign such releases in order to see binding law undermines the "reasonable availability" of that law.

The American Petroleum Institute has also made some free read-only public access available to its federally cited standards, but it requires readers to sign an agreement similar to the ASTM release. Beyond this, it also specifically reserves API's rights to "suspend or discontinue providing the Online Document to you with or without cause and without notice." *Government-Cited and Safety Documents*, API, http://publications.api.org/GocCited_Disclaimer.aspx (last visited Sept. 29, 2013). Again, the risk of such an action is not consistent with ensuring that IBR rules are "reasonably available."

1. ANSI has indicated it will create an "IBR Portal," but as of January, 2014, I could not successfully locate such a portal on the website www.ansi.org.

SDOs also do not appear to consistently honor reported commitments to make standards available to the public on a free read-only basis. For example, a December 2012 proposed rule issued by the Consumer Product Safety Commission ("CPSC") for a hand-held infant carrier safety standard proposed to incorporate ASTM International Standard F2050-12. The proposed rule referred readers who wished to comment to http://www.astm.org. Despite a promise in the Federal Register that ASTM would make the standard freely available during the comment period, which ended February 25, 2013, *see* Safety Standard for Hand-Held Infant Carriers, 77 Fed. Reg. at 73,354, I was unable to access it during repeated visits to ASTM's "Reading Room" in January and February 2013, and I was instead only able to locate a copy for sale at the website's price of $ 49.20. The rule was finalized with the CPSC's adoption of an updated ASTM standard. Safety Standard for Hand-Held Infant Carriers, 78 Fed. Reg. 73.415 (Dec. 6, 2013) (to be codified at 16 C.F.R. pts 1112 & 1225) (incorporating by reference ASTM Standard F2050-13a, with modifications). As of January, 2014, that standard cannot be read in ASTM's "Reading Room," but is only available for purchase at the price of $ 42.00.

b, **SDO charges for access can be substantial.**

When SDOs do charge for access, prices may range from an apparent low of $ 42 for the hand-held infant carrier standards mentioned above to a high of hundreds or thousands of dollars for prescription drug compendia on which Medicare rules rely.[2] Needless to say, this interferes with the access of budget-constrained individuals and small businesses to the law. Even if a single standard might be considered in some sense affordable, entities and individuals may wish or need to read multiple standards.

c. **SDOs have made numerous IBR standards completely unavailable.**

A large number of IBR standards that federal agencies have incorporated by reference are now simply unavailable from the SDO's website. For example, OSHA rules note that the operation of paper products machines is particularly hazardous for minors. *See* 29 C.F.R. § 570.63(a) (2012). Yet minors are nonetheless permitted to load scrap paper balers that comply with ANSI Standard Z245.5-2008 or earlier. *See* 29 C.F.R. § 570.63(c)(1) (2012). As of January, 2014, that standard is unavailable from ANSI. Similarly, Energy Department requirements for contractors require compliance with the 2005 American Conference of

2. *E.g.*, *AHFS Drug Information 2013*, ASHP STORE, http://store.ashp.org/Default.aspx?TabID=216&ProductId=40143356 (last visited Sept. 29, 2013) (selling the American Hospital Formulary Service Drug Information 2013 at $349, or at $295 for "members"); *USP-NF*, U.S. PHARMACOPEIAL CONVENTION, http://store.usp.org/OA_HTML/usp2_ibeCCtpSctDspRte.jsp?section=10071&minisite=10020 (last visited Sept. 29, 2013) (pricing U.S. Pharmacopeia National Formulary standard at $850 each); Comment of Jacob Speidel, Staff Att'y, Senior Citizens Law Project, Vermont Legal Aid, Inc. 2 (OFR Docket June 21, 2012) [hereinafter Comment of Vermont Legal Aid], *available at* http://www.regulations.gov/contentStreamer?objectId=09000064810258aa&disposition=attachment&contentType=pdf (reporting Drugdex price of $6,000). Another source states that Drugdex is not available for purchase by members of the general public and that the publisher would not provide details of pricing. *CMA Report: Medicare Coverage for Off-Label Drug Use*, CTR. FOR MEDICARE ADVOCACY, INC., http://www.medicareadvocacy.org/InfoByTopic/PartDandPrescDrugs/10_09.16.OffLabelDrugCoverage.htm (last visited Sept. 29, 2013).

Governmental Industrial Hygienists ("ACGIH")'s "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices. *See* 10 C.F.R. § 851.23(a)(9) (2013) (requiring contractors to comply with "safety and health" standards and incorporating by reference the 2005 American Conference of Governmental Industrial Hygienists ("ACGIH")'s "Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices). These limits also now appear to be unavailable on the ACGIH website. *See* ACGIH, http://www.acgih.org (last visited Sept. 29, 2013).

Once an SDO ceases to make an IBR rule available, the only consistent alternative is reading the standard at the OFR Reading Room. For anyone who does not live in Washington, D.C., the requirement of travel, during business hours, to view the standard, is a very substantial burden. Such standards may be formally public in the OFR Reading Room, but they are in no way "available."[3]

Thus, incorporated materials are hard to locate even when available from SDOs and very often expensive to access. Nothing seems to require SDOs to enhance public availability or to restrict SDOs from simply removing the standards at will from their websites. These standards are not "reasonably available." To the extent that the proposed rule permits this situation to continue, it is contrary to law.

2. **SDO processes that generate standards are unlikely to balance interests reliably.**

The American Petroleum Institute suggests in its comments that its ANSI accredited standards process "calls for a balance of interest" on the standards committees. One implication of this argument could be that public access to standards is less important if a wide range of interests, or even the public at large, is already well-represented in the process of standards development. But in fact, there is no clear indication that such interest balancing is actually happening, and there are substantial reasons to be concerned that SDO processes may be closed to some perspectives or unrepresentative. Widespread public access to the outcome of these processes, if they are to be incorporated into the law, is thus not only legally required, but critical to ensure that agencies are acting appropriately in relying upon these standards.

3. Indeed, such a standard may become unenforceable, since it likely would not be understood as satisfying the government's obligation to supply "fair notice" of obligations to regulated entities. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012) (alteration in original) (refusing to defer to agency interpretation in view of "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires' " (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986))); Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (reaffirming fair notice requirement in civil administrative context). Revocation of binding federal rules in this fashion also appears to violate the Administrative Procedure Act's rulemaking provisions. See 5 U.S.C. 551 (defining "rulemaking" to include process for revising or repealing rule).

a. **There is no requirement of balance before a private rule is incorporated by reference.**

None of the policies or statutes encouraging agencies to rely upon private standards in preference to drafting so-called "government-unique" standards requires any sort of balance. The National Technology Transfer and Advancement Act of 1995 encourages agencies to use standards from "voluntary consensus standards bodies," but it contains no definition of or criteria for such a body.[4] OMB Circular No. A-119 does provide general criteria for this type of body, but neither the NTTAA nor OMB policy constrains an agency from incorporating a "nonconsensus standard," or even includes a preference for a consensus standard over a nonconsensus standard.[5]

b. **Imbalance in SDO processes is a persistent risk.**

SDO processes vary widely. At the API, outsiders apparently may participate in API committees—and the API has stated that governmental officials and academics do participate on committees—but the organization requires a company name for application to participate, warns that travel is required, and states that it is advisable to have "your management's support in order to facilitate effective participation."[6] Those obstacles, particularly the travel requirement, are likely to deter fully balanced participation. The API reports that its members come entirely from the petroleum industry.[7]

At ASTM International, only members may participate in standards development; the lowest level of membership costs $75 per year.[8] As one commenter pointed out to the OFR last year concerning ASTM toy standards incorporated into federal rules, "[S]ince this standard [must be purchased to be read] and is written by a[] [nongovernmental organization] that primarily intersects with industry and related groups, consumers have little opportunity to participate in rewriting the standard or expressing their feedback directly to ASTM."[9]

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4. *See* National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (2012) (Utilization of Consensus Technical Standards by Federal Agencies).

5. *E.g.* Circular No. A-119, para. 6(g) ("This policy does not establish a preference among [consensus and nonconsensus private] standards . . . . Specifically, agencies that promulgate regulations referencing non-consensus standards . . . . are not required to report on these actions . . . .").

6. *See Standards Committee Application*, AM. PETROLEUM INST., http://www.api.org/publications-standards-and-statistics/standards-committee-application.aspx (last visited Sept. 29, 2013).

7. *See API Member Companies*, AM. PETROLEUM INST., http://www.api.org/globalitems/globalheaderpages/membership/api-member-companies.aspx (last visited Sept. 29, 2013).

8. *See Technical Committees*, ASTM INT'L, http://www.astm.org/COMMIT/newcommit.html (last visited Sept. 29, 2013) ("Any interested individual can participate on a Technical Committee [that develops and maintains ASTM standards] through ASTM membership."). The least expensive membership is $75 per year, which entitles members to "participate in the development of high quality, market relevant standards" and to get a discount on ASTM publications. *See Benefits for ASTM Participating Members*, ASTM INT'L, http://www.astm.org/MEMBERSHIP/participatingmem.htm (last visited Sept. 29, 2013).

9. Comment of Samantha Gordon 1 (OFR Docket Mar. 30, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fe4d7a&disposition=attachment&cont

The North American Energy Standards Board ("NAESB") develops standards that the Federal Energy Regulatory Commission incorporates by reference to define all manner of public utility and natural gas pipeline regulation. Although it permits some state public utility commissions and the Department of Energy to join, NAESB describes itself as a trade organization and an "industry forum for the development and promotion of standards . . . ."[10] Membership costs $6,500. Rules under development are subject to very limited viewing by nonmembers. Although the organization accepts written comments on draft proposals, NAESB has reportedly relied on an in-person committee process for participation and drafting. Participation in that process now requires payment: "Non-members face charges for meeting participation by telephone or in person ($100 for a meeting of four hours or less; $300 for a longer one), or for a year's participation in the work of a given subcommittee ($1000)."[11]

The National Rural Electric Cooperative Association ("NRECA"), an association of over 900 nonprofit rural electric utilities that provide power to 42 million consumers, has commented on the difficulty of participating in NAESB proceedings. Although the NRECA itself is a member of the NAESB, a substantial number of its own members are not NAESB members. NRECA thus cannot "share the [draft] standards with its membership," although those members must comply with the standards once finalized.[12] This impedes the group's ability to participate in standards development on behalf of its members.[13]

The American Society of Health Systems Pharmacists Drug Information compendium, which lists acceptable off-label uses of pharmaceuticals and thus constrains Medicare coverage, does not appear to incorporate public input at all but instead is developed solely by a "professional staff of drug information analysts and editors with strong scientific and therapeutic backgrounds" subject to an unspecified "external review process."[14]

The American National Standards Institute ("ANSI") is probably the group with the most demanding procedural requirements for SDOs, aimed explicitly at attaining consensus.[15]

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entType=pdf. This problem parallels difficulties in international standards organizations. *See* TIM BÜTHE AND WALTER MATTLI, THE NEW GLOBAL RULERS 224 (2011) ("[C]onsumer representatives are frequently viewed as 'outsiders' in private-sector rule-making bodies.").

10. *See About NAESB*, N. AM. ENERGY STANDARDS BD., http://www.naesb.org/aboutus.asp (last visited Sept. 29, 2013).

11. Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 541 (2013).

12. Comment of Richard Meyer, Senior Regulatory Counsel, Nat'l Rural Elec. Coop. Ass'n, and Adrienne E. Clair, Stinson Morrison Hecker LLP 3 (OFR Docket Mar. 28, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fe3ed2&disposition=attachment&contentType=pdf.

13. *See id.* at 5–6.

14. *See Off-Label Uses: Overview*, AHFS DRUG INFO., http://www.ahfsdruginformation.com/off_label/overview.aspx (last visited Sept. 29, 2013).

15. *See generally* AM. NAT'L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS (2013), *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2013_ANSI_Essential_Requirements.pdf.

Nonetheless, its processes are far from fully "open." Public information on which standards are under development is hard to acquire, and draft standards must often be purchased to exercise any right to comment.[16] According to one official at ANSI, even if proposed standards modifications are freely available to the public, the underlying standards will only be made available through purchase.[17]

With respect to ANSI, it remains unclear whether participation in these standards development procedures is even roughly representative of the range of public views, despite ANSI's commitment to an "open" process. For example, among ANSI's accredited standards developers are groups whose members include only regulated industrial entities, such as the API, and the American Iron and Steel Institute ("AISI"),[18] which describes itself as the "voice of the North American steel industry."[19]

An interested citizen or small business may have a difficult time discovering that a standard is under development and will then have to pay to read it in order to comment—and may have to travel or to join the organization to participate. This is an obstacle to incorporating a variety of interests in the process. For example, when Congress passed the NTTAA, small business witnesses testified that significant costs—including traveling to SDO meetings—impeded their participation in SDO standards development.[20] As consumer group comments filed with the OFR in response to the petition demonstrate, obstacles to participation in SDO standards development are likely to be at least as significant for consumers, Medicare recipients, and other interested individuals.[21]

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16. *E.g., Call for Comment on Proposals Listed*, ANSI STANDARDS ACTION, Feb. 22, 2013, at 1, *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf (providing suggested changes to multiple standards but omitting full standards).

17. Telephone Interview with Patricia Schroeder, Am. Nat'l Standards Inst. (Jan. 29, 2013) (notes on file with author).

18. *See generally ANSI-Accredited Standards Developers Contact Information*, ANSI STANDARDS ACTION, Feb. 22, 2013, at 22, *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Action/2013_PDFs/SAV4408.pdf.

19. *About AISI*, AM. IRON & STEEL INST., http://www.steel.org/en/About%20AISI.aspx (describing its twenty-six "integrated and electric furnace steelmaker" members and 125 associate or affiliate members who are "suppliers to or customers of the steel industry") (last visited Sept. 29, 2013).

20. Small business representatives testified to this effect in the mid-1990s when Congress enacted the NTTAA. Tyler R.T. Wolf, Note, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 Wash. & Lee L. Rev. 807, 821 (2008) ("[M]embers of the business community testified that the standards development process discriminated against small business[es, which] often lack the time, money, and workforce necessary to send representatives across the country to participate in various SDO meetings.").

21. *See, e.g.*, Comment of Rachel Weintraub, Dir. of Prod. Safety and Senior Counsel, Consumer Fed'n of Am. 1 (OFR Docket June 1, 2012) [hereinafter Comment of Consumer Fed'n of Am.], *available at* http://www.regulations.gov/contentStreamer?objectId=0900006481023352&disposition=attachment&contentType=pdf ("Without unfettered access to these standards . . . important constituencies such as individual consumers and public interest and consumer organizations will be unable to participate in these proceedings.").

At best, then, full access to SDO decisionmaking is limited, and even when such an organization's process is formally open to participation, it is often difficult to tell who participates in decisions and whether interests are, indeed, "balanced." At worst, groups may be unrepresentative and decisionmaking closed. SDOs have long been criticized as being dominated by regulated entities and, in particular, by the largest of those entities.[22]

c. **Public access is accordingly critical to ensure that agencies properly use privately drafted standards.**

All this is not to judge the internal processes of any particular SDO or criticize any particular IBR rule. However, the evidence should raise concern regarding a relative lack of openness and significant obstacles to participating in SDO decision making. SDO processes clearly cannot substitute for public access to the text of the rule itself. Widely available free public access to the text of IBR rules is legally required. The evidence above underscores that it is also necessary to ensure that agencies properly incorporate IBR rules to implement the public interest, as required by agency authoroizing statutes. Having to pay a fee to read the law can, of course, obstruct individuals from learning their obligations and making informed decisions. And it can also obstruct individuals and entities from attempting to ensure, whether through agency procedures, public oversight, the electoral process, or judicial review, that the government is accountable for the standards it chooses to incorporate into binding regulatory law.

3. **The proposed rule perpetuates IBR practices that systematically disadvantage citizens and entities based on income.**

It is no answer to the public access problem to say that IBR rules remain accessible to those who can afford them or who can travel to Washington, D.C. The access limitations are not random; they systematically exclude people based on budgetary constraints. For many of these rules, budgetary constraints will likely be connected with the substantive interests under the rule. For example, consumers are generally likely to have smaller budgets than manufacturers. Employees affected by workplace safety rules are likely to have smaller budgets than the regulated manufacturers. Neighbors to a pipeline may well have smaller budgets than the pipeline operator. A financial barrier to accessing IBR rules thus is likely to distinctively and systematically disadvantage consumer, neighbor, and other individual interests as well as small business interests. As discussed in greater detail in the ABA Section comments, all these entities and individuals—even if not directly regulated--are among the "class of persons affected" by IBR rules, and so ensuring that these rules are "reasonably available" must include availability to these groups. *See* ABA Section Comments at 12-14.

Budget-constrained individual citizens and small businesses cannot readily understand rules that affect them, learn their compliance obligations, write their members of Congress,

22. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 534, 641–42 (2000); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 407–08 (2003). For example, the Pipeline Research Council International, which has supplied a few IBR standards to the Department of Transportation, is "a community of the world's leading pipeline companies." *About PRCI*, PIPELINE RESEARCH COUNCIL INT'L, http://prci.org/index.php/about/ (last visited Sept. 29, 2013).

petition an agency to change a rule, or even be fully informed for purposes of voting if they do not have meaningful public access to the text of IBR rules.

Besides violating the statutory "reasonably available" requirement, providing only disparate public access to the law is bad policy because it can worsen potential pathologies in the regulatory process. Resources among affected stakeholders will never be perfectly balanced, but it is well documented that individuals and small businesses are already disadvantaged in the standards development process, both in SDOs and in agencies. They may be disadvantaged in participating in decisionmaking and obtaining expert and technical legal assistance.[23] The access costs to read IBR rules worsen this imbalance since they may keep many consumers, neighbors, and small businesses from even getting in the door.

For example, as the Modification and Replacement Parts Association commented in response to the petition for rulemaking, "The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . ."[24]

Nor is it any answer to say that IBR rules cover "technical" matters and thus are not of particular public interest. As the comments in response to the petition for rulemaking demonstrated, at least some individuals are interested in and able to read rules that are purportedly technical.[25] Moreover, "technical" matters often effectively define policy issues, as the comments of the ABA Section point out. *See* ABA Section Comments at 17. In any event, the Office of the Federal Register is proposing, in this rule, to eliminate any consistent requirement that IBR rules be "technical" in focus. *See* ABA Section Comments at 20.

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23. CORNELIUS M. KERWIN, RULEMAKING 188 (2d ed. 1999); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 102 (2011); *see also* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999) (noting that regulated entities typically have an "advantage in influencing agency decisions" because they have the "incentive and means to monitor what the agency does on a day-to-day basis" and "information without which a regulatory agency cannot do its job").

24. *See* Comment of the Modification & Replacement Parts Ass'n 14 (Regulations.Gov, filed June 1, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf

25. *See, e.g.*, Comment of A Concerned Citizen (OFR Docket Mar. 20, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fdbec2&disposition=attachment&contentType=pdf ("Private citizens, even if they aren't subject to a regulation, are still directly and indirectly affected by it."); Comment of Penza Bailey Architects, *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fe7d25&disposition=attachment&contentType=pdf; Comment of Robert Tess 1 (OFR Docket Mar. 23, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fddd35&disposition=attachment&contentType=pdf.

4. **The proposed rule would continue incorporation practices that are contrary to the American tradition of free access to the law.**

Public.Resource.Org's comments discuss the history of the Federal Register Act. And as those comments point out, the current limitations on access to and difficulties in locating IBR rules closely parallel the difficulties in locating and reading federal rules in the 1930s. This was the very problem Congress sought to fix in enacting the Federal Register Act.

The Federal Register Act was not an isolated legislative action, but instead simply continued the longstanding U.S. tradition of providing inexpensive and widespread public access to the law. Since 1795, Congress has expressly taken on the distribution of the laws as a public function, agreeing on the need for "more general promulgation of the laws,"[26] and provided the public with free access through libraries. A complete edition of the laws to date, the Constitution, and current treaties, as well as newly enacted laws, was to be printed under the direction of the secretary of state and distributed to "each State or Territory." The texts would be deposited in "fixed and convenient places in each county or subordinate civil division," as the state government might judge "most conducive to the general information of the people."[27] This development coincided with a general increase in the number of libraries.[28] By 1859, Congress had provided for the permanent retention of governmental publications by libraries and other designated depositories.[29] The Statutes at Large, for example, were to be distributed to "State and Territorial libraries and to designated depositories."[30] Congress formally expanded the publication and free access regime to include federal agency rules beginning in 1936. Governmental depository libraries now maintain Federal Register sets as well as the CFR. Congress then expanded the publication regime to provide for free digital access at the approximately 1,200 governmental depository libraries for all federal statutes and regulations. Congress went further in 1993, requiring the Government Printing Office to make universal online access to statutes and regulations available, defining recoverable costs as the "incremental cost of dissemination,"[31] a very small charge per user in the information age,[32] and a charge

26. H.R. JOURNAL, 3d Cong., 2d Sess. 328–29 (1795) (describing Act of Mar. 3, 1795). Perhaps needless to say, an individual's purchase of a private bound copy of the multivolume U.S. Code would not be free of charge.

27. *Id.*; *see also* Act of Dec. 23, 1817, res. 2, 3 Stat. 473 (providing that the secretary of state must distribute a set of state papers and public documents to executives and legislatures in the "several states and territories," as well as to "each University and College in the United States").

28. *E.g.*, SCHUDSON, THE GOOD CITIZEN 119 (1998) ("From 1790 to 1815, five hundred New England towns established libraries.").

29. Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381.

30. Act of Jan. 12, 1895, ch. 23, §§ 54, 62, 73, 28 Stat. 601, 608, 610–20.

31. 44 U.S.C. § 4102(b) (2006).

32. *See* Bruce R. Kingma, *The Costs of Print, Fiche, and Digital Access: The Early Canadiana Online Project*, D-LIB MAG. (Feb. 2000), http://www.dlib.org/dlib/february00/kingma/02kingma.html ("In theory, once the fixed costs of digitization are incurred there is a zero marginal cost of providing an additional copy.").

barred, in any event, at depository libraries. Perhaps unsurprisingly, therefore, the Government Printing Office has elected not to impose any costs at all.[33]

In 1996, 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 FOIA, and, for records created beginning late in 1996, the records themselves.[34] Congress's express purpose was to "improve public access to agency records and information" and to "foster democracy by ensuring public access to agency records and information."[35] And in 2002, in the e-Government Act, Congress required agencies to provide for electronic rulemaking and electronic rulemaking dockets and to post on their websites a wide range of materials, with the express purposes of "increas[ing] access, accountability, and transparency" and "enhanc[ing] public participation in Government."[36] Access to IBR rules contrasts sharply with the accessibility of the U.S. Code and the CFR, both freely available to anyone online and in the over 1,200 depository libraries nationwide.[37]

In the face of repeated Congressional endorsements of public access to binding law and to a wide range of key government materials, it is mystifying that the Office of the Federal Register proposes to continue with a regime of binding regulatory law that is not readily available to the public. The Office of the Federal Register has failed to give thorough consideration to the strong Congressional policy of open access to the law.

5. By permitting current incorporation by reference practices to continue, the proposed rule sends a damaging message to the public contrary to this Administration's commitment to transparency and accountability.

Ironically, the reduced accessibility of IBR rules has coincided with increased calls for—and a heightened public commitment to—"open government" and transparency. President Obama expressed a commitment to transparency immediately upon taking office: "Transparency promotes accountability and provides information for citizens about what their Government is doing."[38]

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33. *See* NAT'L ACAD. OF PUB. ADMIN., REBOOTING THE GOVERNMENT PRINTING OFFICE 37 (2013), *available at* http://www.napawash.org/wp-content/uploads/2013/02/GPO-Final.pdf (noting that the Government Printing Office ("GPO") elected not to charge users for access to digital content because "administrative costs of collecting payments were higher than what GPO could charge").

34. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (amending 5 U.S.C. § 552(a) to require agencies to make documents available through "electronic means").

35. *Id.* § 2(b)(1)–(2), 110 Stat. 3048.

36. *See* E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)–(d), 207(f), 116 Stat. 2899, 2915–16, 2918–19 (codified as amended at 44 U.S.C. § 3501 (2006) note (Federal Management and Promotion of Electronic Government Services)).

37. Session laws and individual Federal Register issues dating from the early 1990s have been made available online; previous issues may be freely viewed at depository libraries.

38. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC., no. 10, at 1 (Jan. 21, 2009), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900010/pdf/DCPD-200900010.pdf.

Thus, even if the incremental costs of access might be understood as relatively minimal in some settings, such as compared with compliance costs, the government's decision to regulate by incorporating expensive, difficult-to-locate standards sends a damaging message to the public.

We have a long and constitutive history of free and widespread public access to federal laws. Indeed, it might be likened to our history of upholding free access to elections.[39] In that setting, the Supreme Court has invalidated poll taxes that might seem trivial compared with the costs of traveling to the polls or taking time off work to vote. The Court has stated that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[40] Similarly, standing as a candidate can obviously require significant resources, whether it is the cost of broadcast advertising or the resources to take time off to campaign. A filing fee of a few hundred dollars thus might appear trivial by comparison, but courts have nonetheless consistently invalidated these fees as violating equal protection, given "our tradition . . . of hospitality toward all candidates without regard to their economic status."[41]

Incorporating into the law standards that are generally available only after paying a significant fee set by a private entity or traveling to Washington, D.C., is a stark contrast. It is contrary to the strong American tradition of making statutes and regulations freely and widely available, including in the over 1,000 depository libraries nationwide and now over the internet.

Moreover, as Professor Cary Coglianese wrote in comments to the OFR, citizens now use "websites as their primary point of contact with their government, [so] even seemingly small and subtle barriers that inhibit fair public access to government information take on significance."[42]

The use of IBR rules sends citizens a set of messages that are profoundly inconsistent not only with our other practices and with presidential statements but also with core assumptions of a democratic government. The obstacles, including the expense, of accessing IBR rules are instrinsically opposed to the notion that a democratic government must govern publicly. Most obviously, for citizens to cast an informed vote and participate in public political discussion, they must be able to readily learn what the government is doing. IBR rules are not secret. But by making access expensive, difficult, or both for ordinary citizens, agencies are sending the message that the democratic process is beside the point for this set of quasi-legislative rules. Instead, the message is that the government mainly needs to be accountable to individuals and businesses of means. The concern may be worsened when private organizations largely control access to the law, including the apparent power to largely eliminate that access. This cluster of messages is likely to feed public cynicism regarding governmental functions and the

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39. U.S. CONST. amend. XXIV, § 2.

40. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–68 (1966) (invalidating a state $1.50 poll tax as violating equal protection and as effective denial of the right to vote and stating, "[A] State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

41. *E.g.*, Lubin v. Panish, 415 U.S. 710, 717–18 (1974) (striking down as violative of equal protection a $701 filing fee requirement for California county supervisor election).

42. *See* Comment of Comment of Cary Coglianese, Edward B. Shils Professor of Law, Univ. of Penn. Law Sch. 1 (OFR Docket May 30, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006481022904&disposition=attachment&contentType=pdf.

meaningfulness of voting and public participation, reducing civic engagement and the perceived legitimacy of government.[43]

By using IBR rules, one could also understand the government as communicating a message that is inconsistent with notions of equal protection and equal access to the government. Agency incorporation of privately drafted standards that the ordinary citizen can only access with significant cost, difficulty, or both is inconsistent with the idea that every citizen is subject to the same law, whatever her economic status.

In summary, the Office of the Federal Register should revise the proposed rule and instead make clear that it will approve an agency's incorporation by reference of rules only when there is widespread and free public availability to the content of the incorporated material. Thank you for your consideration of these comments.

Very truly yours,

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43. *See, e.g.*, Comment of Laura Breyers 1 (OFR Docket Mar. 21, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480fdc436&disposition=attachment&contentType=pdf ("There's parts of the law that are owned by private corporations? Really? Well, if that's ok with you, then let's just go ahead and privatize the court system . . . . In fact why do we need the government at all, wal-mart seems to be really efficient at what they do, lets [sic] have them run things.").

PRIVATE CONTROL OVER ACCESS TO THE LAW: THE PERPLEXING FEDERAL REGULATORY USE OF PRIVATE STANDARDS

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Abstract

To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into thousands of federal regulations—but only by "reference." These standards range widely, subsuming safety, benefits, and testing standards. An individual who seeks access to this binding law generally cannot freely read it online or in a governmental depository library, as she can the U.S. Code or the Code of Federal Regulations. Instead, she generally must pay a significant fee to the drafting organization, or else she must travel to Washington, D.C., to the Office of the Federal Register's reading room.

This law, under largely private control, is not formally "secret," but it is expensive and difficult to find. It raises the question of what underlies the intuition that law, in a democracy, needs to be readily, publicly available. Previous analyses of the need for publicity have focused almost wholly on the need of regulated entities for notice of their obligations. This Article assesses several other considerations, including notice to regulatory beneficiaries, such as Medicare recipients, consumers of dangerous products, and neighbors of natural gas pipelines. Ready public access to the law is also critical to ensuring that federal agencies are meaningfully accountable for their decisions, through both internal and external mechanisms, including voting, political oversight, and agency procedures. The need for ready public access is at least as strong in this collaborative governance setting as when agencies act alone. Finally, expressive harm—a message inconsistent with core democratic values—is likely to flow from governmental adoption of regulatory law that is, in contrast to American law in general, harder to find and costly to access. Full assessment of the importance of public access to law both strengthens the case for reform of access barriers to incorporated-by-reference rules and limits the range of acceptable reform measures.