

SENIOR CITIZENS LAW PROJECT

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Submitted electronically: <http://www.regulations.gov>

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

Re: Incorporation by Reference
File Code OFR-2013-0001
78 Fed. Reg. 60,784 (Oct. 2, 2013)

The Senior Citizens Law Project of Vermont Legal Aid, Inc. (VLA) submits the following comments regarding the Office of Federal Register's Notice of Proposed Rulemaking on Incorporation by Reference. VLA is a nonprofit organization founded in 1968 that provides civil legal assistance to citizens unable to afford private legal advice. The Senior Citizens Law Project represents Vermont residents aged 60 and older in a wide range of civil legal issues.

We previously commented and explained that many Vermont seniors are unable to access materials incorporated by reference when those materials can be read only by those individuals able to pay hundreds or thousands of dollars.

Although we believe the OFR should amend its IBR regulations, the new wording of 1 CFR 51 is unacceptable and contrary to law. The fundamental problem is that the proposed wording would allow incorporation of materials that are not, in fact, reasonably accessible. The OFR has failed to address the issue of the cost of access to IBR'd materials. While the OFR has said that it does not agree that IBR'd material must be made available for free, it has not addressed the broader point that unaffordable expensive materials cannot be considered "reasonably available."

The costs for accessing matters IBR'd must be part of the determination of whether a matter is "reasonably available." The proposed wording of 1 CFR 51 would allow any federal agency to IBR materials costing a thousand dollars, a million dollars, or even a billion dollars. This is fundamentally wrong. Surely it cannot be argued that materials are "reasonably available" if a person affected by the regulations must pay one billion dollars for the privilege of reading the materials. Yet that is precisely what the proposed language provides.

It is not true that Congress has authorized the Office of the Federal Register to make federal regulations inaccessible due to cost. The Federal Register must be provided essentially free online. While statute does provide the option of charging for the incremental cost of online distribution, that incremental cost of providing a document to one more person is basically zero. Thus, if even if the Office of the Federal Register were to begin charging for the “incremental cost” of providing one more copy of a regulation over the internet, it would basically be providing the Federal Register for free.

It is untrue that “Congress has instructed the Consumer Product Safety Commission [CPSC] to use specific ASTM standards, which are not available for free.” In fact, the ASTM standards are available for free at <http://www.astm.org/READINGLIBRARY>. In particular, the standard referenced by 15 U.S.C. 2056b is available for free at <http://www.astm.org/READINGLIBRARY/VIEW/F963-07E1.html>. Congress has never instructed the CPSC to use ASTM standards that are not available for free online. Thus, Congress’s mention on ASTM standards does nothing to contradict the commonsense conclusion that standards are “reasonably available” only if they can be read for free.

If the OFR really faces a choice between ensuring that IBR’d materials are reasonably available and promoting the use of voluntary consensus standards – a premise that we dispute, and which is outside the competence of the OFR -- the OFR is bound by statute to ensure that the materials are reasonably available, regardless of the effect on the use of voluntary standards.

A procedural requirement that the agency “discuss” the ways that it worked to make the materials reasonably available is a mere phantasm if the agency can meet that requirement by stating that a copy of the publication has been placed at the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying “Beware of the Leopard.” It is not enough that the agency *say* the publication is reasonably accessible. The Director may not approve a publication for incorporation unless the publication actually *is* accessible. That can happen only by looking at the cost of access to the materials.

Finally, a summary of IBR’d materials is not a substitute for public access. If the summary provides all the same information as the material being incorporated by reference, then the agency should simply include the summary in its regulation, without the need to incorporate any materials by reference. If, however, the incorporated material includes important additional information not included in the summary, then a reader who has access only to the summary by definition is missing important information.

If you have any questions about these comments, please contact Jacob Speidel at (802) 885-5181 or by email at jspeidel@vtlegalaid.org.

Sincerely,
/s/ Jacob Speidel
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