

From: [Emily Bremer](#)
To: [Scott Cooper](#)
Subject: RE: A-119 RFC (Round Two)
Date: Friday, March 21, 2014 11:46:00 AM
Attachments: [FINAL ACUS Comments on OFR NPRM \[1-31-14\].pdf](#)

So sorry this response is massively overdue!! But I agree that this is a very interesting part of the NPRM and a good step forward. We actually did consider this issue in our project, because it's absolutely true that just making a copy of a standard available online is insufficient if you want everyone to have meaningful access to the standard. Unless you have significant technical expertise (and most of us don't!), seeing a copy of the standard itself is really not all that useful.

The relevant part of [our recommendation](#) is paragraph five (which appears towards the bottom of page six of the hyperlinked document). It says: "When considering incorporating by reference highly technical material, agencies should include in the notice of proposed rulemaking an explanation of the material and how its incorporation by reference will further the agency's regulatory purpose."

Needless to say, in our comments to OFR (filed on behalf of the Office of the Chairman and attached here), we applauded how the proposed requirement for preamble explanation will encourage implementation of this part of the recommendation (see the top of page 3).

I love incorporation by reference. It's the gift that just keeps on giving!

Oh, and I recently got my study of PHMSA's incorporated standards accepted for publication in the *University of Kansas Law Review*. Very exciting! I'm going to make some further edits to the piece before I put it up on SSRN. If you have any thoughts in that vein, please let me know. (I think I shared the draft with you a while back, but if not and you want to see it, please just let me know).

Best,
Emily

From: Scott Cooper [mailto:SCooper@ansi.org]
Sent: Thursday, February 20, 2014 2:50 PM
To: Emily Bremer
Subject: A-119 RFC (Round Two)

Hi Emily,

Some interesting proposed changes in this second iteration...

I am intrigued by the language ["Policy" question p. iv. page 34] dealing with the creation of a "non-technical summary" in an agency's determination of "reasonable availability".

"In determining whether a standard is "reasonably available" to regulated and other interested parties, agencies should take into account the following factors, given that reasonable

availability is context-specific.

iv. Whether the standards developer can provide a freely available, non-technical summary that generally explains the content of the standard in a way that is understandable to a member of the public who lacks relevant technical expertise”

This seems to be a variation (ie SDO not agency creates summary) on the NARA NRPM language:

51.5 How does an agency request approval?

(a) In a proposed rule, the agency does not request formal approval but must either:

(1) Discuss the ways in which it worked to make the materials it proposes to incorporate by reference reasonably available to interested parties in the preamble of the proposed rule, or Show citation box

(2) *Summarize the material it proposes to incorporate by reference in the preamble of the proposed rule* [emphasis added]

Interesting...

Just me speaking, I think this is a great step forward in capturing the middle ground on the IBR dispute. Judging from the Judiciary hearing, IBR is seen by policymakers as either: 1) All About Copyright; or b) All About Public Right to Know the Law. IE no middle ground. The fact that attempts to read your average standard from cover-to-cover will make your eyes glaze over and your brain addled does not seem to matter. Or the fact that 2-3 sentences into the standard is the first of many cites to a secondary level of standards, and so on.

A “freely available, non-technical summary that generally explains the content of the standard in a way that is understandable to a member of the public who lacks relevant technical expertise”, is a gift. A gift to the citizen who really wants to know how a standard impacts public policy issues of health and safety and *parens patriae*; and a gift to SDOs who don’t want their standard divested of copyright protections when it is incorporated. I hope others see it that way.

Is this something you-all looked at in developing the ACUS Recommendation?

Best
Scott