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**Open Source “America’s Operating System”**

“It’s Not Just A Good Idea—It’s The Law!”

February 18, 2021

Ms. Sharon Block, Acting Administrator  
Office of Information and Regulatory Affairs (OIRA)  
Office of Management and Budget  
The White House  
Washington, D.C. 20500

Dear Ms. Block:

I write on behalf of Public.Resource.Org (“Public Resource”), a 501(c)(3) nonprofit organization based in California in reference to President Biden’s Memorandum of January 20, 2021, titled “**Modernizing Regulatory Review**,” which tasks OIRA with creating a process to better “advance regulatory policies that improve the lives of the American people.” This letter highlights two important issues that we think OIRA address: accessibility of visual elements in the CFR and changes to the process of incorporation by reference.

As you wrote in the American Prospect in **April 2020**, OIRA needs to be “laser-focused on protecting the health and jobs of American workers...and OIRA can make sure that every regulation makes the best effort possible to advance this urgent priority.” You praised an April 2020 Roosevelt Institute report by Todd N. Tucker and Rajesh D. Nayak, “**OIRA 2.0**,” that laid out the case for embracing sustainability, inclusion, and other core values in our regulatory process and for avoiding capture of regulatory agencies through coordination across government and by including a broader community in that process.

I believe that you review the role of OIRA, it is important that the administration examine not only how regulations are drafted, but also how they are promulgated. As Lord Tom Bingham wrote in “**The Rule of Law**,” one cannot have laws that are fair and inclusive—laws of general applicability that address all of society, not just the rich or those inside the beltway—without broad promulgation of those laws through accessible means throughout society. Only when the text of the law is broadly available may citizens know their rights and their obligations. Those regulatory obligations affect individuals’ everyday work and livelihood.

In 2008 and 2009, I was pleased to work with the Obama–Biden transition and then with the administration on a significant reform of how the Federal Register is promulgated. My paper on **Federal Register 2.0** led to a number of actions, such as dropping the \$17,000 year dissemination fee on bulk access to the daily feed. Three young developers in California, looking for something to enter in an “Apps for Democracy” contest, coded a far better version of the Federal Register. In fact, it was so good that the Office of the Federal Register adopted their open source code, which is what you can see today when you visit [federalregister.gov](https://www.federalregister.gov).

This new site is considered to be the global standard in official gazettes of government and is widely admired throughout the world. The site was so successful that, as a member of the Administrative Conference of the United States (ACUS), I was honored to be able to nominate the Office of the Federal Register, which won the very first **Walter Gellhorn award** as the most innovative Federal agency of 2011.

But the job is only half-done. however. Notices of proposed rulemaking and notices of final rulemaking are how the regulations are created. Subsequently, those regulations are incorporated into the Code of Federal Regulations (CFR). In 2019, the CFR had **185,984 pages**. Not only are those regulations crucial for the public to be able to find and read, they are instrumental in regulations throughout the 50 states. Public Resource leads an effort that makes a unified feed of all the regulations of the states available, and as part of that process we have found 196,438 references to the CFR in state regulations.

While we applaud the recent unveiling of a new CFR web site at [ecfr.federalregister.gov](http://ecfr.federalregister.gov), there are some fundamental issues that need to be addressed —issues that are crucial to the success of your reform of our regulatory process.

**Accessibility of Current Graphics.** The first issue is that the CFR includes over 15,000 links to graphics files. Those graphics files contain a diversity of key regulatory materials but are not accessible to the visually impaired. For example, since there is no easy way to create a table using the Federal Register’s current text markup language for the Federal Register and the subsequent use of those materials in the CFR, many of the tables and other graphics ultimately printed in the CFR are mere photographs, provided as a low-resolution image. Likewise, most mathematical formulas are also provided as an image, as are many other materials.

Public Resource has been working closely with the Cornell Legal Information Institute and a number of contractors we employ to “reverse engineer” all of these graphics into modern formats. The tables are set as HTML, the formulas are set in MATHML, and the graphics are traced and redrawn using the open SVG vector format for images. All of these are open standards, and we have paid close attention to accessibility.

One result is that the Legal Information Institute’s version of the CFR is far more **accessible to the visually impaired**, as required by law. Not only that, providing high-quality markup in modern languages allows all users of the CFR to repurpose those materials for other uses. While the new eCFR site from the Office of the Federal Register is far better than the old one, the graphics are still set as images and lack accessibility features such as a verbal description of each image (see, e.g., **9 CFR 145.3**).

There are two actions that OIRA and OFR could take in this area:

1. We would be delighted to furnish the government with the images that we have reverse engineered. I believe it would be prudent for each agency to examine the images for potential errors, after which these materials could be used in the CFR. Several years of effort have gone into our work in this area, and a great deal of labor could be saved by the agencies if they start with what we have done.
2. Going forward, there need to be better coding standards for marking up regulations, both in the Federal Register and in the CFR. The Office of the Federal Register, along with the experts at the Government Publishing Office, could coordinate such a process. There should be modern standards for mathematics, tables, forms, maps, and images. These modern standards would also allow

government employees to use modern tools to create these materials. (As discussed below, as part of the reform of coding standards, each incorporation by reference should also be explicitly tagged.)

**Incorporation by Reference.** There is another issue, however, which is even more important. Many “voluntary consensus standards” are incorporated by reference into the law. The use of these materials is governed by [OMB Circular A-119](#) and the rules for incorporation by reference are specified in [1 CFR 51](#). The OFR regulations were most recently revised in 2014 ([79 FR 66267](#)). OMB Circular A-119 was revised in 2016 after a 2012 call for comment ([OMB-2012-07602](#)) and a 2014 notice of rulemaking ([OMB-2014-0001](#)).

The issue is this: While everybody—including standards bodies and government officials—agree that a standard incorporated by reference into the CFR is the law, those documents are not readily available. They are issued by private parties, which often sell the documents at exorbitant prices, and sometimes stop offering them entirely, even though they are the law. Just a few of them are available in libraries. Federal agencies are required to maintain a copy, but that requires a trip to Washington, D.C. and advance notice. Neither of these outlets are a very effective way of reaching people, especially so during a pandemic.

For many of these standards, the only public access is through privately run “read-only reading rooms” that some standards bodies maintain. Those sites have onerous terms of use, track what people are reading, and provide the most minimal functionality available. The sites don’t have search facilities, or permanent links, they don’t allow copying and pasting of text, and in most cases they are protected by Digital Rights Management features that make them totally inaccessible to the visually impaired. This is the kind of access that Chief Justice Roberts, in related litigation involving my organization, termed an “economy-class version” of the law. [Georgia v. Public.Resource.Org, Inc., No. 18-1150, 590 U.S. \\_\\_ \(2020\)](#).

How significant is this problem? Public Resource has posted 622 documents that we know are incorporated by reference into the CFR, a total of 41,389 pages, or an average of 67.26 pages per document. How many documents are actually incorporated into the CFR? That is very difficult to tell since there is no standardized markup tag that signals an incorporation by reference and the National Institute of Standards and Technology gave up maintaining the [Standards Incorporated by Reference \(SIBR\)](#) database in 2016.

As part of a study of Incorporation by Reference in the ACUS in 2011, which was used as support for the creation of [Recommendation 2011-5](#), Professor Emily Bremer estimated that there were at least 3,761 individual incorporations of standards in the CFR (and possibly much more). If the average size of those 3,761 documents is the same as those we have posted, that would be 252,964 pages.

What does this mean? It means that more than 50 percent of the effective CFR is not available to the public to read. This is a shocking result and is directly contrary to the goals of broader participation in the regulatory process and a focus on inclusion and sustainability. You can’t have better regulations if the public—and even lawmakers—can’t easily read those regulations. How can we make the law better if we cannot read the law?

In the process of incorporation by reference, unless there is an explicit incorporation of only a part of a document, the Office of the Federal Register regulations deems the entire document incorporated into law. Regulators rarely specify a section of a

document. In many cases, the agencies get lazy and over-incorporate too many documents. They incorporate too many standards and they incorporate entire documents when they could have done something more specific. Yet, these documents are still the law, no different from the text of the CFR that is visible on the government sites. As Joe Bhatia, the President and CEO of the American National Standards Institute **has said repeatedly**, “a standard that has been incorporated by reference does have the force of law.”

Several standards organizations sued Public Resource in 2013 for copyright infringement over our posting of standards incorporated by reference into federal and state law. The case is currently pending on remand before the United States District Court for the District of Columbia after we prevailed in the U.S. Court of Appeals. Some of the standards bodies recently dismissed their claims against us, and we are confident the courts will ultimately rule, as the Supreme Court did in the Georgia case, that the law belongs to the people and citizens must not be constrained to speak their laws by claims of copyright.

However, no matter the impact of this legislation, the core problem will remain. The ambiguity in OMB A-119 and in the Office of the Federal Register regulations on incorporation by reference do not address the anomaly that binding parts of the Code of Federal Regulations are still claimed as private property by non-governmental organizations, and are still not posted by the government itself. Indeed, even government regulators must purchase the documents that they have deemed to be part and parcel of the law. This problem must be fixed.

We believe strongly that there are solutions to these problems available to OMB and OFR that will allow free access to the law while addressing some of the concerns of standards bodies. By taking these actions, OMB and OFR can resolve the limbo that standards bodies find themselves in with a “win-win-win” solution, one that works for the standards bodies, for the regulators, and for the public.

First, agencies should review their current regulations for unnecessary incorporations by reference that are not essential to the regulation itself. Second, regulations should use incorporation by reference only as a last resort. Before doing so, they should direct consider incorporation rather than incorporation by reference.

In other words, regulators should paste the necessary text from the standard directly into the regulation, leaving out extraneous portions that are not needed. The regulation should clearly state where the text comes from and provide a link to the relevant standards body. Those wishing to purchase the full standard, such as individuals or businesses impacted by the regulation or those wishing to understand more about the context and principles, can go to the standards bodies and purchase a copy of the full standard, just as somebody wishing to understand a principle of law might purchase a treatise from a publisher.

Would standards bodies agree to this approach? We have, in our extensive experience studying incorporation by reference, not once found a standards body objecting to their materials being incorporated into the law. Indeed, most of them boast in their annual reports about the fact that the standards become law. In many cases, they work hand-in-hand with the regulators on developing the standards.

When a standard becomes part of federal law, the standards organization receives the seal of approval of the American people, which they use to great effect to promote numerous revenue streams, such as training, certification, commentary on the standards, redlines, and increased membership.

The standards bodies have wanted to have it both ways—making their standards part of the law yet demanding the right to control access to that law. The solution we propose here would place those portions of standards needed as law directly into the CFR, while keeping the full standards as unique products that standards bodies could sell.

In the pre-Internet era, a central purpose of incorporation by reference was to save trees, to reduce the size of the growing Code of Federal Regulations. But the Internet created the possibility of a larger CFR, where there is ample room to include text from incorporated standards. By incorporating the text directly, the standards body keeps their copyright and can exploit it, but the text of the Code of Federal Regulations can be freely posted by the government and distributed by others .

As to all the standards that remain today incorporated by reference, as opposed to directly incorporated, it is essential that the government make those documents available on a government website, so they can be freely used by citizens, just as any other law may be freely used. We ask that you not only commit to posting these provisions of law, but also commit to the principle that any outside entity has the right to copy and speak these provisions of law, including by posting them on their own websites, just as they would be able to use any other Work of the U.S. Government as specified in [17 USC § 105](#). These edicts of government are the raw materials of our democracy. We must be able to read the law, speak the law, and participate in our democracy to make it better.

The goals of the OIRA process are, as President Biden so eloquently stated, to “promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations” in our regulatory process. The actions to promote better promulgation and accessibility of those regulations is a necessary part of that process.

We would be grateful for the opportunity to meet with you and to discuss how we might assist OIRA in addressing these important issues.

With best regards,

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Carl Malamud, President  
Public Resource

cc: The Director, Office of Management and Budget  
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