# INCORPORATION BY REFERENCE IN AN OPEN-GOVERNMENT AGE

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As part of this project, the Author spent two days working with the legal staff at the Office of the Federal Register (OFR), and gave a presentation at a quarterly meeting of the Interagency Committee on Standards Policy (ICSP). Additionally, the Author conducted in-depth interviews with agency officials at the Coast Guard, Consumer Product Safety Commission (CPSC), Department of Treasury, Environmental Protection Agency (EPA), Federal Aviation Administration (FAA), Federal Energy Regulatory Commission (FERC), National Highway Traffic Safety Administration (NHTSA), National Institute of Standards and Technology (NIST), Nuclear Regulatory Commission (NRC), Occupational Safety and Health Administration (OSHA), Office of Management and Budget (OMB), and Pipeline and Hazardous Materials Safety Administration (PHMSA). The Author also interviewed representatives from the American Society for Testing and Materials (ASTM), American National Standards Institute (ANSI), American Society of Mechanical Engineers (ASME), Society of Automotive Engineers (SAE), National Fire Protection Association (NFPA), Organization for the Advancement of Structured Information Standards (OASIS), World Wide Web Consortium (W3C), and Public.Resource.org. The Author would like to thank the many agency officials, Conference members and staff, standard developers, and other engaged citizens who made this work possible.

## INTRODUCTION

The time has come to reevaluate incorporation by reference, a little known but frequently used regulatory practice with profound public policy implications. To give a regulation legal effect, an agency must publish it in the Federal Register for codification in the Code of Federal Regulations (CFR).[1] As a centralized depository of regulatory commands, the CFR provides citizens with actual notice of legal requirements. In this context, incorporation by reference is a term of art for the practice of codifying material published elsewhere by simply referring to it in the text of a regulation. It is permitted only if the incorporated material is "reasonably available to the class of persons affected" and the promulgating agency secures the "approval of the Director of the

1. 5 U.S.C. § 552(a)(1) (2006). The CFR is a special edition of the Federal Register that "present[s] a compact and practical code . . . contain[ing] each Federal regulation of general applicability and legal effect." 1 C.F.R. § 8.1(a); *accord* 44 U.S.C. § 1510. This requirement, that regulations be centrally published by the Government Printing Office, was imposed in 1935 in response to a Supreme Court case involving an agency's attempt to enforce regulations that "did not exist." Panama Ref. Co. v. Ryan, 293 U.S. 388, 412 (1935). *See generally* Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934) (arguing for a centralized publication system to address the significant problem that agency pronouncements were often unavailable and unknown even to the government officials charged with enforcing them).

Federal Register."[2] The legal effect is that the material is treated as if it were set out fully in the regulation.[3]

Originally intended to reduce the size and improve the readability of the CFR,[4] incorporation by reference has taken on greater significance as the government has embraced the use of voluntary consensus standards in federal regulations. Voluntary consensus standards are technical standards[5] developed by private sector organizations using an open process that respects due process, includes an appeals process, and results in a consensus among participants representing a balance of interests.[6] In the 1970s, federal policy began to prefer that agencies use such standards in regulations instead of creating "government-unique" standards.[7] This policy, now codified in statute[8] and executive directive,[9] allows agencies and the public

2. 5 U.S.C. § 552(a)(1); *see also, e.g.*, Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977) (holding that a document that the EPA intended to incorporate by reference into a regulation was "not a validly issued part of the regulations, because it ha[d] not been published in the Federal Register, nor ha[d] the procedural requisites for incorporation by reference been complied with").

3. *See* 5 U.S.C. § 552(a)(1).

4. *See* 1 C.F.R. § 51.7(a)(3); *see also* S. REP. NO. 88-1219, at 11 (1964) ("[T]here have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of *too much* publication rather than *too little*."). *See generally* Memorandum from Ramsay Clark, Attorney Gen., to Executive Departments and Agencies on the Public Information Section of the Administrative Procedure Act (June 1967), *available at* http://www.justice.gov/oip/67agmemo.htm (explaining the purpose and meaning of the 1967 amendments to 5 U.S.C. § 552).

5. A technical standard "pertain[s] 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." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998) [hereinafter CIRCULAR A-119], *available at* http://standards.gov/a119.cfm (citing 142 CONG. REC. S1080 (daily ed. Feb. 7, 1996) (statement of Sen. Jay Rockefeller)). In contrast, a regulatory standard "establishes overall regulatory goals or outcomes" and should be created by the agency and not incorporated by reference. *See id.*; *see also infra* Part IV.A (examining the kinds of materials appropriate for incorporation by reference).

6. *See* CIRCULAR A-119, *supra* note 5.

7. *See infra* Part I.C.2. A government-unique standard is a standard "developed by the government for its own uses." *See* CIRCULAR A-119, *supra* note 5.

8. *See* National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, § 12(d), 110 Stat. 775 (1996) (codified at scattered sections of 15 U.S.C. (2006)), *available at* http://standards.gov/standards_gov/nttaa.cfm.

to reap the significant benefits of collaborative governance through a public-private partnership in standards.[10]

In large part due to this federal standards policy, the CFR today contains over 9,500 incorporations by reference of standards.[11] Many other kinds of materials aside from standards are also incorporated by reference, including government documents and technical publications from nongovernmental sources. The Office of the Federal Register (OFR) roughly and informally estimates that if all incorporated materials were printed out fully, the CFR would be six or seven times its current length.[12]

Despite its ubiquitous use, incorporation by reference in federal regulations has, until now, escaped scholarly examination.[13] Over the years, common issues with the practice have emerged, and individual agencies have labored independently to find solutions. This Article shines a light on the important policy impli-

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9. *See* CIRCULAR A-119, *supra* note 5.

10. *See, e.g.*, Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 334 ("Collaborative governance can take various forms, from network governance, public-private partnerships, and contracts, to deliberative democracy and innovative online tools for civic engagement. However, for people to collaborate and participate meaningfully in governance, they must have information."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 638–43 (2000) (examining the hazards and benefits of using privately developed voluntary consensus standards in federal regulations). *See generally* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (arguing that administrative law fails to adequately appreciate the role of private parties in the regulatory process).

11. *See infra* notes 81–84 and accompanying text. This number underestimates the total number of regulatory incorporations, because it includes only standards. Other kinds of materials which may be copyrighted, such as standards, are routinely incorporated by reference. *See infra* Part I.C.1.

12. Transcript of the 55th Plenary Session of the Administrative Conference of the United States at 39 (Dec. 8, 2011) (on file with the Administrative Conference).

13. Other scholars have examined the costs and benefits of incorporation by reference in legislation, primarily at the state level. *See* F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201 (2008); Ernest E. Means, *Statutory Cross References—The "Loose Cannon" of Statutory Construction in Florida*, 9 FLA. ST. U. L. REV. 1 (1981); Arie Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705 (1953); R. Perry Sentell, Jr., *"Reference Statutes"—Borrow Now and Pay Later?*, 10 GA. L. REV. 153 (1975); Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941); *cf.* Jeanelle R. Robson, Casenote, *"Lazarus Come Forth. And He That Was Dead Came Forth." An Examination of the Lazarus Rule:* Fisher v. City of Grand Island, 26 CREIGHTON L. REV. 221 (1992) (examining a rule of construction for statutes that refer to other statutes that are later repealed).

cations of incorporation by reference in a world transformed by open government. It brings together the experiences of various regulatory agencies with the goal of identifying best practices that can improve incorporation by reference.

The greatest challenge of incorporation by reference is that it can erect a barrier impeding access to the law, sometimes even requiring one to pay a private party to see the full text of a final or proposed regulation. This unfortunate consequence arises when the incorporated material is copyrighted, as is often the case with voluntary consensus standards. The traditional solution has been to require OFR and promulgating agencies to keep copies of incorporated materials available for public inspection in agency offices, but this solution is inadequate in an age of open government. Today, widespread use of the Internet, combined with e-rulemaking initiatives and pushes for greater transparency in government, have raised expectations regarding the accessibility of agency processes and regulations.[14] From this perspective, the public access problem posed by incorporation by reference is particularly acute during rulemaking. Because public inspection requirements are not triggered until a rule is final, interested parties may have to buy a copy of a standard that an agency is considering incorporating by reference to meaningfully comment on the proposed rule.

The problem is particularly challenging because the obvious solutions are not workable. One solution would be to avoid incorporation by reference and simply print the extrinsic material in full in the text of the Notice of Proposed Rulemaking (NPRM) or final regulation. Another option would be to post the incorporated material in a location that is easy to find on the agency's website. If the material is copyrighted, however, these options are unavailable without the consent of the copyright owner. Buying out the copyright is often prohibitively expensive for a federal agency, particularly in these times of budget austerity. More aggressive solutions, such as abrogating copyright or requiring a waiver of copyright as a condition on

14. *See, e.g.*, Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) (establishing a policy that government should be transparent, participatory, and collaborative). *See generally* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004) (exploring the promise of electronic tools to address rulemaking's democratic deficit).

incorporation, are likely to undermine the highly valuable public-private partnership in standards.

This Article proposes a collaborative solution to incorporation by reference's public access problem. Some agencies have successfully worked with standard developers to improve access to standards both during rulemaking and following promulgation. Technological tools such as read-only capability can provide ways to make the text of a standard broadly available to the public while retaining the value of the copyright to the standard developer. To date, just a few agencies have tried this approach, largely because the public access problem has only recently come to light. The success of these efforts, however, suggests that a collaborative approach provides the best chance for improving public access while retaining the benefits of the well-established federal standards policy.

A second challenge agencies face when incorporating by reference is keeping regulations current as incorporated standards are revised to reflect evolving technical knowledge. This issue arises because dynamic incorporations are prohibited. That is, agencies are required to identify the specific version of any material incorporated by reference. Incorporated materials, however, are typically highly technical and are regularly revised to reflect ever-evolving technical knowledge. Updating a regulation to reflect such changes typically requires an agency to conduct a notice-and-comment rulemaking. Particularly in light of other pressing regulatory priorities, agencies are not always able to expend the considerable resources required to update an incorporating regulation. Thus, for example, current regulations of the Occupational Safety and Health Administration (OSHA) continue to reference crane standards from the 1960s.[15]

Outdated references can endanger the public interest and cause a host of regulatory problems. Products available on the market are likely to conform to the most recent standards, so if a regulation uses an older standard, regulated parties may simply not be able to get equipment that is technically in compliance. This might actually be a good thing because technically noncompliant products that meet newer standards are likely to be safer. We would surely prefer construction companies use

15. *See* 29 C.F.R. § 1910.179(b)(1) (2012).

modern crane technology, rather than sticking with 1960s technology just to comply with outdated OSHA regulations.

Over the years, agencies have crafted a variety of approaches that can either mitigate the harms of outdated references or make updating easier. Using enforcement discretion or equivalency determinations can help ensure agency enforcement efforts genuinely serve the public interest. Other techniques, such as direct final rulemaking, can make it easier to update incorporating regulations. In some situations, however, available solutions are inadequate. This Article suggests a statutory solution to fill this gap.

Finally, incorporating by reference requires promulgating agencies to successfully navigate OFR's approval process and avoid common pitfalls in drafting regulations. OFR regulations govern this process and have evolved over the last decade in ways that improve the practice of incorporating by reference, but have caused some confusion. Some agencies experience fewer procedural and drafting difficulties than others. These agencies provide a model of best practices that other agencies should follow.

A number of issues related to incorporation by reference are outside the scope of this Article. First, this Article does not address distinct issues raised by incorporations by reference in agency procurements or acquisitions. Second, issues that arise within the standard-development process are outside the scope of this Article. Agencies that incorporate voluntary industry or consensus standards by reference into regulations may participate in the standard-development process. To the extent that this participation may improve the practice of incorporation by reference, this Article addresses the subject. Broader questions about how agencies should participate in voluntary standard-development processes are unrelated to the practice of incorporation by reference and are thus beyond the scope of this Article. So too are intellectual property[16] and antitrust[17] issues that may arise within the voluntary standard-development process.

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16. *See, e.g.*, Joseph Farrell, *Standardization and Intellectual Property*, 30 JURIMETRICS J. 35, 44–45 (1989) (explaining how IP rights can reduce the likelihood of consensus and delay standard setting); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1901 (2002) (ex-

This Article proceeds in five parts. Part I provides essential background information, including the legal and procedural rules governing incorporation by reference, the variety of regulatory purposes served by the practice, and the special role of voluntary consensus standards in federal regulation. Part II explores how agencies can expand public access to incorporated materials. There are a variety of approaches agencies have successfully used to achieve this goal within the constraints of federal law and regulatory policy. Part III discusses the challenges agencies face in updating regulations that incorporate regularly revised materials. Some agencies have greater difficulty updating than others, and different agencies have taken different approaches to ensure timely updates. Part IV addresses procedural and drafting issues agencies face when they seek to incorporate by reference. Here, as elsewhere, my research revealed winning strategies that agencies can and should adopt.

## I. BACKGROUND

### *A. Context: The Public-Private Partnership in Standards*

The significant value of the public-private partnership in standards merits careful consideration when evaluating the public policy questions raised by the practice of incorporation by reference. Federal policy recognizes, and agencies consistently report, that incorporating by reference conveys significant benefits, particularly as it relates to the use of voluntary consensus standards in regulations. Indeed, those agency personnel who were interviewed unanimously reported that, without the work of private standard-development organizations (SDOs), agencies would not have the time, resources, or technical expertise to fulfill their regulatory missions.

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amining issues that arise when a standard-setting organization "adopts (or fails to adopt) a standard that is covered in whole or in part by an IP right").

17. *See, e.g.*, Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 434–36 (2006) (explaining how laws governing federal government use of privately created standards mitigate antitrust issues); Tyler R.T. Wolf, Note, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 WASH. & LEE L. REV. 807, 839–48 (2008) (examining antitrust issues in standards setting).

Using voluntary consensus standards in federal regulation yields a variety of public benefits. It is more cost-effective for agencies than creating government-unique standards through the rulemaking process. Office of Management and Budget (OMB) Circular A-119 recognizes this reality, identifying one of its goals as "[e]liminat[ing] the cost to the Government of developing its own standards and decreas[ing] . . . the burden of complying with agency regulation."[18] Agencies consistently agree. For example, the Federal Energy Regulatory Commission (FERC) has explained that "[f]rom our experience, the [North American Energy Standards Board] process is [a] far more efficient and cost effective method of developing technical standards for the industries involved than the use of a notice and comment rulemaking process involving numerous technical conferences in Washington that all believe they have to attend."[19] The practice also allows agencies to capitalize on considerable expertise and resources available outside government. In addition, it decreases the burden of regulation and the costs of enforcement by conforming regulatory requirements to industry best practices. Indeed, regulated parties are often already complying with the voluntary standards that incorporation by reference makes mandatory. This reduces the discrepancy between industry practice and federal regulation, thereby avoiding confusion and reducing the costs of regulation.

The public-private partnership in standards also benefits the public by improving the process for developing voluntary consensus standards. It "[p]rovide[s] incentives and opportunities to establish standards that serve national needs."[20] It has also driven standard-development organizations to adopt more democratic, consensus-based procedures. As Professor Robert W. Hamilton reported in 1978, the original expansion of federal regulatory authority in health and safety was driven in part by concerns that voluntary standards were created in secret and did not adequately consider or serve the public interest.[21] Stan-

18. CIRCULAR A-119, *supra* note 5.

19. Standards for Business Practices and Communication Protocols for Public Utilities, 74 Fed. Reg. 63,288, 63,302 (Dec. 3, 2009) (to be codified at 18 C.F.R. pt. 38).

20. CIRCULAR A-119, *supra* note 5.

21. *See* Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1379–86 (1978).

dard developers responded to the threat of mandatory regulation by opening their processes and including a greater range of interests and perspectives in standard development.[22] Over the past thirty years, the federal policy favoring agency use of voluntary consensus standards has driven voluntary consensus organizations to continue to expand upon these efforts.[23] Of course, agencies play an important role in reviewing the results of the private sector process and determining whether incorporation into regulation, either as is or with modifications, would be in the public interest and would carry out applicable statutory obligations. Nonetheless, the beneficial effects of improvements to the standard-development process go far beyond regulation because industry voluntarily conforms to many, if not most, of the standards created through these modern, more open processes.

The public-private partnership in standards—which incorporation by reference facilitates—has reaped extraordinary benefits for both government and the private sector. In addressing the important public policy questions presented below, these benefits must be kept in mind. Any solution must preserve and improve—and not undermine—the valuable public-private partnership in standards.

### *B. Process: The Role of the Office of the Federal Register*

To incorporate by reference, an agency must secure the approval of OFR[24] through a process, and according to standards, established by OFR regulations.[25] Under these regulations, material is available for incorporation by reference only if it fits within the Federal Register's incorporation by reference policy,[26] which requires that regulations conform to and not detract from applicable publication and Administrative Procedure Act (APA) requirements,[27] assumes that incorporations by reference are "intended to benefit both the Federal Government

22. *See id.* at 1383–86.
23. CIRCULAR A-119, *supra* note 5.
24. 5 U.S.C. § 552(a)(1) (2006).
25. *See* 1 C.F.R. § 51 (2012).
26. *Id.* § 51.7(a)(1) (citing *id.* § 51.1).
27. *Id.* §§ 51.1(b), 51.1(c)(2).

and the members of the class affected,"[28] and demands that the reference be limited to a particular edition of the incorporated material.[29] Incorporated material must consist of "published data, criteria, standards, specifications, techniques, illustrations, or similar material,"[30] and referring to it must "[s]ubstantially reduce[] the volume of material published in the Federal Register."[31] The material must also be "reasonably available to and usable by the class of persons affected,"[32] with usability evaluated based on "[t]he completeness and ease of handling the publication,"[33] and "[w]hether it is bound, numbered, and organized."[34]

OFR regulations are designed to ensure that incorporation by reference serves the public interest in an orderly codification of legally effective agency pronouncements. By requiring that incorporated materials are reasonably available to and usable by those affected, OFR regulations serve the goals of publication. At the same time, OFR regulations vindicate the efficiency goals of incorporation by reference. For example, OFR regulations reduce redundancy in federal publications by prohibiting the incorporation by reference of material already published in the Federal Register or United States Code.[35] Agencies are further prohibited from incorporating by reference material they publish themselves.[36] This rule prevents agencies from pulling regulations out of the CFR, publishing them elsewhere (for example, in a pamphlet or on the agency's website), and then incorporating them by reference. This vindicates the fundamental precept that agency pronouncements with general legal effect should be uniformly codified in the CFR.

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28. *Id.* § 51.1(c)(1).
29. *Id.* § 51.1(f).
30. *Id.* § 51.7(a)(2).
31. *Id.* § 51.7(a)(3).
32. *Id.* § 51.7(a)(4)(i); *see also* 5 U.S.C. § 553(a)(1) (2006).
33. 1 C.F.R. § 51.7(a)(4)(i).
34. *Id.* § 51.7(a)(4)(ii).
35. *Id.* § 51.7(c).
36. *See id.* § 51.7(b). An exception may be made if the material meets the requirements of § 51.7(a) and "possesses other unique or highly unusual qualities" or "cannot be printed using the Federal Register/Code of Federal Regulations printing system." *Id.* § 51.7(a)–(b).

OFR enforces its incorporation by reference policies via an established approval procedure. The procedure requires that agencies submit a written request for incorporation by reference along with a draft final rule.[37] OFR has twenty working days to process each request, and an agency's rule will not be published until approval is secured.[38] As discussed in greater detail below, this can cause problems, particularly if agency personnel are not sufficiently familiar with OFR requirements.[39] Incredibly, the OFR Director's staff of only three people carry out the responsibility of approving every incorporation by reference that appears in the CFR.[40] As we shall see, this practical constraint is an important consideration in evaluating ways to address the issues associated with incorporation by reference.

Once material is incorporated by reference, both OFR and the promulgating agency are required to keep a hard copy available in a reading room for public inspection.[41] This is the traditional method for providing public access to agency documents, including incorporated materials. It allows the public to view materials in person at OFR or at the promulgating agency's office. Inspection is available during regular business hours in OFR's reading room at its Washington, D.C. office.[42] OFR regulations provide that photocopies may be made at the inspection desk,[43] but OFR no longer provides a photocopier.[44] Individual agencies typically provide similar accommodations for public inspection.

OFR's current incorporation by reference regulations predate the electronic age. They have not been amended since they

37. *Id.* § 51.5(a).

38. *Id.*

39. *See infra* Part IV.E.

40. *See* Amy Bunk, Office of the Fed. Register, Remarks at the 55th Plenary Session of the Administrative Conference of the United States 75 (Dec. 8, 2011) (transcript on file with the Administrative Conference of the United States).

41. *Id.* § 5.2(c) (OFR); *see also id.* § 51.9(b)(4) (promulgating agency).

42. *Id.* § 3.2(a).

43. *Id.* § 3.2(d).

44. Members of the public may, and occasionally do, bring portable photocopiers in with them for use at the public inspection desk. Another option is to use a high-resolution camera to capture images of the documents, although my interviews did not suggest that anyone had used that method to get copies of materials incorporated by reference.

were originally issued in 1982.[45] Since then, Congress has pushed agencies to use new technologies to expand access to agency documents beyond what was possible when materials could only be made available in print. The Electronic Freedom of Information Act Amendments of 1996,[46] the Government Paperwork Elimination Act of 1993,[47] and the E-Government Act of 2002[48] all require agencies to use digital technology to make information more available to regulated parties and the public. Although these statutes did not render OFR's incorporation by reference regulations unlawful, the regulations neither acknowledge nor affirmatively support the transition to the e-government age.

It bears emphasizing that "incorporation by reference," as defined by OFR regulations, occurs only upon a rule's promulgation. This is because OFR interprets 5 U.S.C. § 552(a), the statute that permits incorporation by reference with OFR approval, as applying only to materials that have general legal effect and are thus eligible for codification in the CFR.[49] This is important for two reasons. First, OFR does not get involved in evaluating an incorporating regulation until it is final and ready to be promulgated. During the rulemaking process, the promulgating agency must therefore take on the burden of evaluating whether a material is appropriate for incorporation, including whether it is "reasonably available." Second, the public inspection requirement is not triggered until a rule's promulgation. Agencies must therefore take responsibility for ensuring that materials are available for interested parties to review during the rulemaking process.

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45. *See* Approval Procedures for Incorporation by Reference, 47 Fed. Reg. 34,107 (Aug. 6, 1982) (codified at 1 C.F.R. pt. 51).

46. Pub. L. No. 104-231, 110 Stat. 3048.

47. Pub. L. No. 105-277, §§ 1701–1710, 112 Stat. 2681, 2681-749–2681-751 (codified at 44 U.S.C. § 3504 (2006)).

48. Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of 44 U.S.C. (2006)).

49. *Compare* 5 U.S.C. § 552(a)(1) (providing that properly incorporated material "is deemed published" for purposes of the rule that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published"), *with* 44 U.S.C. § 1510(a) (defining the CFR as a "complete codification[] of the documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the Federal Register").

### *C. Regulatory Uses of Incorporation by Reference*

Incorporation by reference serves a variety of substantive regulatory policies. Agencies incorporate government materials, such as state regulations or Government Printing Office (GPO) publications. Agencies also incorporate nongovernmental materials, ranging from design specifications to product manuals to books to privately-created standards. In each case, incorporation serves an agency's specific regulatory needs. With respect to standards, incorporation by reference also vindicates a longstanding federal policy favoring federal agency use of voluntary consensus standards.[50]

To properly evaluate incorporation by reference's current policy challenges, we must understand its broader role in regulatory policy. While the issues raised by the practice—public access hurdles, updating challenges, and procedural and drafting difficulties—are common to all agencies, the techniques used to address those issues vary. The success of each technique depends on the nature of the incorporated material and the precise regulatory purpose served by incorporation. In short, identifying best practices requires an understanding of what—and why—agencies incorporate by reference.

#### *1. Types of Incorporated Materials*

Government documents, including state regulations and GPO publications, constitute one kind of material often incorporated by reference into the CFR. Indeed, the incorporation by reference by the Environmental Protection Agency (EPA) of state environmental regulations accounts for a significant number of the incorporation by reference requests processed by OFR.[51] The Clean Air Act, for instance, requires state and local pollution control agencies to adopt federally approved air pollution con-

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50. *See, e.g.*, CIRCULAR A-119, *supra* note 5, ¶ 6 ("All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical."); *see also* NTTAA, § 12(d)(1), Pub. L. No. 104-112, 110 Stat. 775, 783 (1996) (codified as a note to 15 U.S.C. § 272 (2006)) ("[A]ll Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies").

51. *See, e.g.*, 40 C.F.R. § 88.104-94(k)(2) (1995) ("The standards in this section shall be administered and enforced in accordance with the California Regulatory Requirements Applicable to the Clean Fuel Fleet and California Pilot Programs, April 1, 1994, which are incorporated by reference.").

trol regulations.[52] EPA approves these regulations, referred to as "State Implementation Plans," by incorporating them by reference into the CFR.[53] Agencies may incorporate other government documents, including federal agency publications, to serve various regulatory purposes.[54] For example, OSHA has incorporated by reference the Federal Highway Administration's Manual on Uniform Traffic Control Devices into its regulations governing accident prevention for construction workers.[55]

Nongovernmental materials are also commonly incorporated by reference. The incorporation by the Federal Aviation Administration (FAA) of manufacturer service manuals into its airworthiness directives accounts for a substantial percentage of the incorporation by reference requests processed by OFR.[56] Airworthiness directives, which FAA issues on a nearly daily basis, are "legally enforceable rules" regarding the proper maintenance of "aircraft, aircraft engines, propellers, and appliances."[57] FAA regulations broadly require anyone who operates such a "product" to maintain it in a safe and airworthy condition. This general obligation finds specific expression in airworthiness directives,[58] which FAA issues when it finds "[a]n unsafe condition"[59] that "is likely to exist or develop in other products of the same type design."[60] The directives specify inspections, maintenance actions, or repairs necessary to guard against the identified unsafe condition. In most cases,

52. *See* 42 U.S.C. § 7410 (2006).

53. *See, e.g.*, 40 C.F.R. §§ 52.1020, 52.1037 (2011).

54. *See, e.g.*, 16 C.F.R. § 1207.11(a) (2012) (referencing the Department of Commerce's *Statistical Abstract of the United States 1973* in the CPSC's safety standard for swimming pool slides); 29 C.F.R. § 1926.1000(f)(3) (2012) (incorporating safety and health regulations for construction published by the Bureau of Mines into OSHA regulations).

55. *See* 29 C.F.R. §§ 1926.200(g), 1926.202 (2011).

56. *See Airworthiness Directives (ADs): Incorporation by Reference*, FED. AVIATION ADMIN., http://www.faa.gov/aircraft/air_cert/continued_operation/ad/type_incorp/ (last visited Nov. 22, 2012); *Airworthiness Directives; The Boeing Company Airplanes*, 77 Fed. Reg. 60, 889–91 (Oct. 5, 2012) (to be codified at 14 C.F.R. pt. 39).

57. 14 C.F.R. § 39.3 (2012).

58. *See, e.g.*, *id.* § 39.7 ("Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section."); *id.* § 39.9 ("If the requirements of an airworthiness directive have not been met, you violate § 39.7 each time you operate the aircraft or use the product.").

59. *Id.* § 39.5(a).

60. *Id.* § 39.5(b).

this information is already available in the repair manual published by the product's manufacturer. FAA incorporates by reference the relevant provisions of the manual to make the repair or inspection mandatory, while avoiding errors that might result if the agency attempted to paraphrase the manufacturer's instructions. Other agencies incorporate nongovernmental materials for radically different regulatory purposes. For example, the Nuclear Regulatory Commission (NRC) incorporates design specifications by reference as a means of approving "a final standard design for a nuclear power facility."[61]

Standards, which may be governmental or nongovernmental, are a third kind of material frequently incorporated by reference into the CFR. Although there are many types of standards, one is particularly important: voluntary consensus standards. For nearly four decades, federal policy has strongly favored the use of such standards in regulations in lieu of government-unique standards.[62] Created by private standard-development corporations and frequently copyrighted, these standards pose particular challenges in the incorporation by reference context.

### 2. *The Role of Federal Standards Policy*

The policy preference for voluntary consensus standards is embodied in the National Technology Transfer and Advancement Act of 1995 (NTTAA) and Office of Management and Budget (OMB) Circular A-119.[63] The NTTAA requires federal agencies to use technical standards created by voluntary consensus standard setting organizations[64] unless doing so "is inconsistent with applicable law or otherwise impractical."[65]

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61. 10 C.F.R. § 52.1(a) (2012).

62. *See* CIRCULAR A-119, *supra* note 5, ¶ 6; *see also* National Technology Transfer and Advancement Act (NTTAA) § 12, Pub. L. No. 104-113, 110 Stat. 775, 782–83 (1996) (codified as part of 15 U.S.C. § 272 (2006)).

63. An additional component of this regime is the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at ch. 13 of 19 U.S.C. (2006)), but it is less relevant to the issue of incorporation by reference and will not be discussed in detail in this Article. It is more relevant, however, to an Administrative Conference Recommendation adopted on the same day as Recommendation 2011-5. *See* Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2257-2261 (Jan. 17, 2012).

64. *See* NTTAA, *supra* note 62, § 12(d)(1).

65. *Id.* § 12(d)(3); *see also* William P. Boswell and James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus*

OMB Circular A-119[66] expands upon the NTTAA's policy. First proposed in 1976[67] and partially codified by the NTTAA, Circular A-119 "directs agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical."[68] Crucial to the definition of a "voluntary consensus standard" is the use of procedures designed to yield "[c]onsensus, which is defined as general agreement, but not necessarily unanimity."[69] The procedures must "include[] a process for attempting to resolve objections by interested parties" before the final vote on the standard.[70] Moreover, the Circular clearly articulates the goals of the policy it establishes[71] and enumerates factors agencies should consider when evaluating a voluntary consensus standard.[72] Any agency that uses a government-unique standard

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*Based Organization*, 27 ENERGY L.J. 147, 162 (2006) ("Congress has expressly required all federal agencies to use technical standards developed by voluntary consensus standards organizations as a means to carry out policy objectives or activities."). The NTTAA further directs federal agencies to "consult with voluntary, private sector, consensus standards bodies" and "participate with such bodies in the development of technical standards" when doing so "is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources." NTTAA, *supra* note 62, § 12(d)(2).

66. *See* CIRCULAR A-119, *supra* note 5. In early 2012, OMB issued a request for information on the operation of the Circular, suggesting that it might propose changes to the circular to address, among other things, the issue of incorporation by reference. *See* Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 77 Fed. Reg. 19,357 (Mar. 30, 2012); *see also* Letter from the Office of the Chairman of the Admin. Conference of the United States to Hon. Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget (Apr. 30, 2012), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/04/Final-ACUS-Response-to-OMB-RFI-4-30-12.pdf (commenting on the request for information). As of this writing, OMB has not yet proposed changes to Circular A-119.

67. *See* Hamilton, *supra* note 21, at 1335 n.11 (citing Proposed OMB Circular on Federal Interaction with Voluntary Consensus Standards-Developing Bodies, 43 Fed. Reg. 48 (1978); 41 Fed. Reg. 536723 (1976)).

68. CIRCULAR A-119, *supra* note 5, ¶¶ 1, 6(a). "Impractical" is defined as including "circumstances in which such use would fail to serve the agency's programs needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard." *Id.* ¶ 6(a)(2).

69. *Id.* ¶ 4(a)(1)(v).

70. *Id.*

71. *See id.* ¶¶ 2, 6(e).

72. *See id.* ¶ 6(f).

instead of an existing voluntary consensus standard must report and explain its decision to OMB.[73] In some cases, the agency has no such discretion because Congress has required the use of a particular voluntary consensus standard.[74]

This policy has roots in a recommendation of the Administrative Conference of the United States. In the late 1970s, the Conference conducted a study that culminated in Conference Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*.[75] This recommendation provided guidance to agencies and Congress on maximizing the benefits of agency participation in voluntary standard-development activities.[76] It urged agencies to "consider the use of existing relevant voluntary consensus standards in developing mandatory standards," but to do so using "due caution . . . on a case-by-case basis."[77] The recommendation enumerated factors agencies should consider when evaluating voluntary standards for inclusion in regulations,[78] provided guidance about how agencies could adapt voluntary standards to suit regulatory needs,[79] and urged agencies to "take special care to avoid needless inconsistencies between voluntary and mandatory standards" and "remain abreast of technological change."[80]

The use of voluntary consensus standards in regulations yields significant benefits to both the government and the public at large. It is an efficient, cost-saving approach that makes regulations easier to develop and enforce. It also captures many of the benefits of collaborative governance by engaging the private sector in a more cooperative regulatory effort and giving agencies access to the significant experience and techni-

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73. *Id.* ¶ 6(b); *see also id.* ¶ 6(k) (imposing no reporting obligation if a voluntary consensus standard does not exist); ¶¶ 9–12 (providing further detail on the scope and means of fulfilling reporting obligations).

74. *See, e.g.*, 15 U.S.C. § 2056b(a) (2008) (providing that "the provisions of ASTM International Standard F963-07 Consumer Safety Specifications for Toy Safety . . . shall be considered to be consumer product safety standards issued by the [CPSC]"); 42 U.S.C. § 17021 (2012) (using ASTM standards in defining and establishing labeling requirements for biomass-based diesel fuels).

75. 44 Fed. Reg. 1357 (Jan. 5, 1979) [hereinafter Recommendation 78-4].

76. *See id.* ¶¶ 1–5.

77. *Id.* ¶ 6.

78. *See id.* ¶¶ 6(a)–(f).

79. *See id.* ¶¶ 7(a)–(f).

80. *Id.* ¶ 8.

cal expertise outside government. These policy advantages are explored in greater detail below.

### *3. The Current State of Standards in Regulation*

Today, standards, including voluntary consensus standards, account for thousands of incorporations by reference in the CFR. As of January 6, 2012, the National Institute of Standards and Technology (NIST) Standards Incorporated by Reference Database included 9475 records of standards incorporated by reference into the CFR.[81] The top ten organizations with standards incorporated by reference are as follows:

| **Standard-Development Organization** | **Number of Incorporations by Reference in CFR[82]** |
|---|---|
| American Society for Testing and Materials (ASTM) | 2230 (885) |
| American National Standards Institute (ANSI) | 554 (179)[83] |
| American Society of Mechanical Engineers (ASME) | 536 (60) |
| U.S. Environmental Protection Agency (EPA) | 464 (287) |
| Society of Automotive Engineers (SAE) | 435 (156) |
| National Fire Protection Association (NFPA) | 370 (88) |
| American Petroleum Institute (API) | 280 (63) |
| International Maritime Organization (IMO) | 226 (78) |
| AOAC International (AOAC) | 211 (211) |
| National Academy Press (NAP) | 198 (187) |

81. *See* NIST, *Regulatory SIBR (P-SIBR) Statistics*, STANDARDS INCORPORATED BY REFERENCE (SIBR) DATABASE, http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total_regulatory_sibr (last visited Nov. 22, 2012).

82. Some standards are incorporated by reference multiple times in the CFR, so the number of incorporations is greater than the number of unique standards incorporated by reference. This table provides the former, with the latter in parentheses.

83. ANSI is an umbrella organization, so a standard may be labeled, for example, as both an ASTM standard and an ANSI standard. This status may affect the way incorporations are counted.

As this list shows, a variety of standards are incorporated by reference into the CFR, "includ[ing] . . . voluntary consensus standards, government unique standards, private industry standards, and international standards."[84]

Agencies incorporate standards into the CFR to serve a diverse array of regulatory purposes. For example, the Coast Guard's marine engineering regulations "adopt a great number of industry standards for power boilers, piping systems, and main and auxiliary machinery" for various types of vessels, "includ[ing] tank vessels, cargo and miscellaneous vessels, mobile offshore drilling units, off shore supply vessels, and small passenger vessels,"[85] while its equipment approval regulations incorporate voluntary consensus standards for, among other things, life preservers,[86] flares and distress signals,[87] inflatable liferafts,[88] and thermal protective aids.[89] The Federal Energy Regulatory Commission (FERC) uses incorporation by reference to make industry standards, usually created by the North American Energy Standards Board (NAESB), mandatory for wholesale and retail energy providers.[90] The Nuclear Regulatory Commission (NRC) incorporates voluntary consensus standards into its regulations governing construction permits and licenses for nuclear reactors.[91] Other agencies, including the Consumer

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84. NIST, STANDARDS INCORPORATED BY REFERENCE (SIBR) DATABASE, http://standards.gov/sibr/query/index.cfm (last visited Nov. 22, 2012).

85. Rebecca Day & Tom Mielke, *Incorporation by Reference: Using external expertise to make Coast Guard regulations more efficient*, PROCEEDINGS, *available at* http://www.uscg.mil/proceedings/spring2010/articles/26_Mielke,Day_IncorporationByReference.pdf; *see, e.g.*, 46 C.F.R. § 30.01-3 (2012) (listing standards incorporated by reference into regulations applicable to tank vessels); *id.* § 95.01-5 (listing standards incorporated by reference into regulations regarding fire protection equipment for cargo and miscellaneous vessels).

86. *See* 46 C.F.R. §§ 160.002-1, 160.005-1 (2012).

87. *See id.* §§ 160.021-1, 160.022-1, 160.023-1, 160.024-1, 160.036-1, 160.037-1, 160-057-1.

88. *See id.* § 160.151-5.

89. *See id.* § 160.174-3.

90. *See* 18 C.F.R. § 38.2; *see also* Standards for Business Practices and Communication Protocols for Public Utilities, 74 Fed. Reg. 63,287, 63,289 (Dec. 3, 2009) (to be codified at 18 C.F.R. pt. 38) ("NAESB is a non-profit standards development organization established in January 2002 that serves as an industry forum for the development of business practice standards that promote a seamless marketplace for wholesale and retail natural gas and electricity."). *See generally* Boswell and Cargas, *supra* note 65 (tracing the history of the NAESB, exploring its activities, and examining legal and policy issues arising from FERC's incorporation by reference of NAESB standards in federal energy regulation).

91. *See, e.g.*, 10 C.F.R. § 50.55a (2012).

Product Safety Commission (CPSC)[92] and the Occupational Health and Safety Administration (OSHA),[93] use voluntary consensus standards in health and safety regulation, as contemplated by Recommendation 78-4.[94] These examples, though far from exhaustive, suggest the diverse purposes for which agencies incorporate standards by reference in regulations.

### *4. Emerging Issues with Incorporation by Reference*

Incorporation by reference has been consistently—and uncritically—viewed as the appropriate way for agencies to "use" voluntary consensus standards in regulations. Recommendation 78-4, taking the view of the Conference's consultant, Professor Robert W. Hamilton of the University of Texas School of Law,[95] identified incorporation by reference as the preferable means for including a voluntary standard in a mandatory health and safety regulation.[96] And Circular A-119 defines agency "use" of a voluntary consensus standard as "inclusion of a standard in whole, in part, or *by reference* in regulation(s)."[97]

The time has come to think critically about the policy implications of incorporation by reference. Over the nearly four decades since federal policy began to embrace the use of voluntary consensus standards in regulation, incorporation by reference has expanded considerably. Agencies have had time to identify and begin to address the issues the practice raises. The rise of e-government has transformed the relationship between agencies and the public, throwing the public access implications of incor-

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92. *See, e.g.*, 16 C.F.R. § 1420.3 (2012) (referencing an ANSI standard in a safety standard for all terrain vehicles).

93. *See, e.g.*, 29 C.F.R. § 1910.6 (2012) (identifying various standards incorporated by reference into OSHA regulations).

94. Recommendation 78-4, *supra* note 75.

95. Hamilton, *supra* note 21, at 1458 ("On balance, . . . incorporation by reference should be the primary method of using acceptable voluntary standards."). Professor Hamilton devoted just a few pages (out of more than 150) to the subject. *See id.* at 1457–60.

96. *See* Recommendation 78-4, *supra* note 75, ¶ 7(f) ("The agency may adopt a voluntary standard into its regulations either by placing the text of the standard in the regulation, or, preferably, by incorporating the standard by reference pursuant to 1 CFR Part 51.").

97. CIRCULAR A-119, *supra* note 5, ¶ 6(a)(1) (emphasis added). "[T]he reference must include the date of issuance," *id.* ¶ 6(j), thus requiring incorporation of a particular version of a standard.

poration by reference into sharp relief. The passage of time has similarly revealed the significant challenges agencies face in keeping regulations up to date as standards are revised to reflect ever-evolving technical knowledge. In similar fashion, time and experience have revealed difficulties with OFR's approval process and potential pitfalls in drafting incorporating regulations. The rest of this Article confronts these considerable challenges.

## II. THE PUBLIC ACCESS PROBLEM

The greatest challenge presented by incorporation by reference is that it impedes access to the law. In all cases, the practice requires interested parties to find material outside of the CFR in order to view an entire regulation. In some cases, if the incorporated material is copyrighted and sold by a private party, incorporation by reference may even require interested parties to pay to see the law.

The traditional solution to this public access problem has been to require OFR and promulgating agencies to keep incorporated documents on file for public inspection in agency offices.[98] During the rulemaking stage, this is no solution at all. Materials are not "incorporated by reference," thereby triggering the public inspection requirement, until the final rule is promulgated.[99] Even following promulgation, public inspection is inadequate because it requires interested parties to physically go to an agency office—often located only in Washington, D.C.—to view the law. In the past, this limited availability was considered sufficient, but the burden is intolerable in an era of open government and increasingly ubiquitous use of the Internet.

An alternative approach would be to avoid incorporation by reference altogether by printing out the text of the extrinsic material verbatim in the text of the regulation. This approach would significantly lengthen the CFR, thereby defeating the original purpose of permitting incorporation by reference. This concern may have less force as the CFR transitions from its traditional print format to an electronic format.[100] However, there

98. *See* 1 C.F.R. §§ 51.9(b)(4), 5.2 (2012).

99. *See supra* note 49 and accompanying text.

100. The CFR is available in an online, electronic format that is updated continuously as regulations are finalized and published in the Federal Register. But this e-CFR is not legally authoritative because it does not yet include a tool that

are other difficulties with this approach. In some cases, the material may include charts or diagrams that simply do not fit in the CFR. More generally, including lengthy and highly technical materials in the text of a regulation may detract from its readability and clarity.[101] The regulatory standard might easily be lost amid the complexity of the supporting technical standards. Finally, if the material is copyrighted, reprinting it in the text of the regulation may simply not be an option.

The ideal solution would be for agencies to post incorporated materials online. This is an easy solution for incorporated materials that are not copyrighted. For example, the Federal Communications Commission (FCC) incorporates FAA advisory circulars,[102] and OSHA incorporates certain safety requirements created by other federal agencies.[103] Such documents are generally ineligible for copyright protection because they are authored by the United States government.[104] Other materials, such as the state environmental regulations that EPA incorporates by reference[105] may similarly not be subject to copyright or other legal protections. If an agency incorporates such material by reference, the agency should make a copy of it available electronically in a location where interested parties will be able to find it easily.

If the incorporated material is copyrighted—as is often the case with voluntary consensus standards—posting it online is more difficult. Although a recent judicial decision,[106] combined with

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can take a "snapshot" of effective regulations on a particular date. A regulation cannot be enforced unless the content of the law on the date of an alleged violation is known with certainty.

101. *See, e.g.*, 1 C.F.R. § 51.7(a)(2) (2012) (illustrating the type of information that could make a regulation less readable).

102. *See, e.g.*, 47 C.F.R. § 17.23 (2011) ("[E]ach new or altered antenna structure . . . must conform to the FAA's painting and lighting recommendations set forth on the structure's FAA determination of 'no hazard,' as referenced in . . . FAA Advisory Circulars.").

103. *See* 29 C.F.R. § 1926.1000(f)(2)–(3) (2012).

104. *See* 17 U.S.C. § 105 (2011) ("Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.").

105. *See, e.g.*, 40 C.F.R. § 88.104-94(k)(2) (1995).

106. *See* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002).

pressure from some scholars, activists, regulated parties, and government officials,[107] have raised questions regarding the strength of copyrights in incorporated standards, federal law and policy requires agencies to respect copyright. Agencies can be liable for copyright infringement[108] and, when using voluntary consensus standards, are required to "observe and protect the rights of the copyright holder and any other similar obligations."[109] In light of these legal principles, some agencies have incorporated by reference for the express purpose of respecting copyright.[110]

Aggressive approaches—such as changing copyright law, requiring a waiver of rights as a condition of incorporation, or buying out the copyright—are obvious but suboptimal solutions. Standard development is expensive. Most standard developers operate as nonprofit organizations and sell copies of their standards to fund standard-development activities. The alternative is to charge membership fees, but this approach erects barriers to participating in the standard-development process. Large corporations would likely be able to absorb these costs, but small businesses, consumer groups, and public interest organizations would find it difficult to participate in the standard-development process. Thus, forcing standard developers to change their business model would likely reduce the value of the resulting standards to the public and reduce the availability of standards appropriate for regulatory use. Additionally, private standard developers sometimes develop standards at the request of a government agency, saving the agency time and resources. But standard developers would be less inclined to take on such projects if they knew they would

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107. *See infra* Part II.C.

108. *See* 28 U.S.C. § 1498(b) (2006).

109. CIRCULAR A-119, *supra* note 5, ¶ 6(j).

110. *See, e.g.*, Production Measurement Documents Incorporated by Reference, 75 Fed. Reg. 72,761 (proposed Nov. 26, 2010) (to be codified at 30 C.F.R. pt. 250) ("When a copyrighted technical industry standard is incorporated by reference into our regulations, [Bureau of Ocean Energy Management, Regulation and Enforcement] is obligated to observe and protect that copyright. BOEMRE provides members of the public with Web site addresses where these standards may be accessed for viewing—sometimes for free and sometimes for a fee. The decision to charge a fee is decided by standard developing organizations."); Product Noise Labeling Hearing Protection Devices, 74 Fed. Reg. 39,150, 39,153 (proposed Aug. 5, 2009) (codified at 40 C.F.R. pt. 211) ("In recognition of the copyrights that protect these standards, the Agency is 'incorporating by reference,' into subpart B, the following ANSI and IEC standards.").

not be able to recoup their costs. Finally, buying out the copyright is not only impractical in the current budget climate, but would also eliminate cost reduction as one of the major benefits of federal standards policy. In short, the public-private partnership in standards is both highly beneficial and highly complex and likely would be undermined by an overly aggressive approach to incorporation by reference's public access problem.

My research revealed a more promising, collaborative solution. In the spirit of public-private partnership, and within the bounds of established federal law and policy, some agencies have worked with standard developers to make standards available electronically during rulemaking and following promulgation. Technological tools, such as read-only functionality, provided mutually agreeable methods for increasing access while protecting copyright. Agencies that reported success with this approach identified a number of factors they consider to determine what degree of access is necessary and how important such access is in relation to other regulatory goals that may be at stake. Replicating this approach in other agencies may increase access while protecting and promoting other regulatory values, including the public-private partnership in standards.

### *A. Threshold Questions*

We must first consider two threshold questions: (1) to whom should incorporated materials be "reasonably available"; and (2) should OFR or the promulgating agency take primary responsibility for ensuring reasonable availability?

#### *1. To Whom Must Materials Be Reasonably Available?*

With respect to the first question, publication requirements historically have focused on ensuring that regulated parties are notified of the regulations with which they must comply.[111] In-

111. Indeed, the Federal Register and CFR were created in 1935, in response to a Supreme Court decision involving an agency's attempt to enforce regulations that, as it turned out, did not exist. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). *See generally* Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934) (explaining the problem solved by the Federal Register Act); H. COMM. ON JUDICIARY, 74TH CONG., PUBLICATION OF GOVERNMENTAL RULES AND REGULATIONS, H. Rep. No. 74-280, at 2 (1935) ("[R]ules and regulations frequently appear in separate paper pamphlets, some printed on single sheets of paper and easily lost. Any at-

deed, courts have consistently held that the law "requires publication of those policies of which the public must be aware *in order to conform its conduct to the agency's requirements*."[112] This principle finds more specific expression in the statutory requirement that materials incorporated by reference be "reasonably available to the class of persons affected thereby."[113] Such availability is essential to the CFR's notice function.[114] If an agency does not get OFR's approval to incorporate by reference, courts will not allow the agency to enforce the affected regulatory commands.[115]

Today, the focus should be broader, going beyond regulated parties to include other interested parties and members of the public. Modern administrative law and policy increasingly value public engagement in agency processes and improved access to regulations and supporting documents. E-rulemaking initiatives are perhaps the most prominent, albeit not the only, manifestations of this modern shift in focus. Agencies should bring this broader focus to bear on incorporation by reference by ensuring that incorporated materials are "reasonably available" to regulated *and other interested* parties.

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tempt to compile a complete private collection of [them] . . . would be wellnigh impossible. No law library, public or private, contains them all. Officials of the department issuing them frequently do not know all of their own regulations.").

112. Bunge Corp. v. United States, 5 Cl. Ct. 511, 523 (1984) (emphasis added); *see also* Pitts v. United States, 599 F.2d 1103, 1108 (1st Cir. 1979) ("The purpose of publication in the Federal Register is public guidance."); Hogg v. United States, 428 F.2d 274, 280 (6th Cir. 1970) (holding that "the requirement for publication attaches only to matters which if not published would adversely affect a member of the public.").

113. 5 U.S.C. § 552(a) (2006); *see also* 1 C.F.R. § 51.7(a)(4) (2012) (restating the statutory language with the additional requirement that the material be "usable by the class of persons affected"); PPG Indus., Inc. v. Costle, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (explaining that "[i]f a required definition or procedure is part of a rule, it must be published or incorporated by reference in the Federal Register").

114. The Federal Register and CFR were created in 1935 to provide a centralized publication of administrative materials so that both regulated parties and government officials would have actual notice of the regulatory requirements. *See generally* Griswold, *supra* note 111.

115. *See, e.g.*, Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977).

### 2. *Which Agency Should Ensure Reasonable Availability?*

A second threshold question is whether OFR or the promulgating agency should be charged with the primary responsibility of ensuring reasonable availability. To be sure, the statute that permits incorporation by reference arguably vests OFR with this responsibility, providing that a "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."[116] OFR regulations require reasonable availability as a condition of approval to incorporate.[117] But in practice, OFR enforces the requirement minimally. OFR usually considers it sufficient that the material be available for purchase somewhere, regardless of cost.[118]

As a practical matter, OFR is poorly situated to enforce a more exacting requirement.[119] As discussed below,[120] a meaningful evaluation of reasonable availability entails considering a wide array of situation-specific facts. Are the regulated parties large corporations or small entities that are more sensitive to cost? What is the overall cost of complying with the regulation and how does the cost of the standard compare to the costs of compliance? What types of parties are likely to need access to the standard during rulemaking and are they likely to be able to bear the cost? Are they likely to already have copies of the standard by virtue of their participation in the standard-

116. 5 U.S.C. § 552(a)(1) (2006).

117. *See* 1 C.F.R. § 51.1(a), 51.7(a)(4) (2012).

118. In early 2012, OFR put out for public comment a petition requesting significant changes to OFR's incorporation by reference regulations. *See* Incorporation by Reference, 77 Fed. Reg. 11,414 (Feb. 27, 2012) (to be codified at 1 C.F.R. pt. 51). Among other things, the petition urged OFR to take greater responsibility for ensuring that incorporated materials are freely available online. *See id.* The comment period closed on June 1, 2012, *see* Incorporation by Reference, 77 Fed. Reg. 16,761 (Mar. 22, 2012) (to be codified at 1 C.F.R. pt. 51), and as of this writing, OFR had not yet acted on the petition.

119. *See generally* Letter from the Office of the Chairman of the Admin. Conference of the United States, to Michael L. White, Acting Dir., Office of the Fed. Register (June 1, 2012), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-ACUS-Response-to-OFR-Petition-6-1-12.pdf (commenting on the incorporation by reference petition).

120. *See infra* Part II.E.

development process? All of these questions—and others—require subject matter expertise that only the promulgating agency possesses.

Another difficulty is that OFR is not involved early enough in the process to ensure reasonable availability when it is needed most—during the rulemaking process. Agencies should be concerned about the availability of a standard even before they propose a rule. If there is more than one standard that will suit the agency's regulatory purpose, the agency should consider reasonable availability when choosing among available standards. Agencies also often have longstanding working relationships with certain standard developers and are better positioned to collaborate with them early in the rulemaking process to ensure standards or other materials being considered for incorporation are reasonably available.

Finally, my research suggests that OFR may not have the necessary political capital or resources to enforce a stronger standard of availability. In the status quo, agencies often chafe at OFR's enforcement of existing standards for incorporation by reference. Some view it as an unwarranted intrusion into their substantive regulatory authority. Even putting this difficulty to one side, there remains the question of resources. If OFR were to enforce a more stringent availability standard, or were to be involved earlier in the rulemaking process, it would need more personnel and resources. The three employees who are currently responsible for approving all incorporations by reference simply could not take on the task. In these austere times, it is unlikely that Congress would dedicate the necessary funds to expand OFR's capabilities on this front. For these reasons, promulgating agencies should undertake primary responsibility for ensuring the reasonable availability of incorporated materials.

### *B. Evaluating Copyright Claims*

To what degree does copyright limit agencies' ability to proactively address incorporation by reference's public access problem? This section first considers whether agency efforts to expand access to incorporated, copyrighted materials might constitute fair use. It next considers whether copyrighted materials enter the public domain by virtue of their incorporation by reference. Finally, it considers whether a material, once incorporated, merges into the "fact" that is the law, thereby losing copyright protection under the doctrine of merger.

### *1. Fair Use*

Courts have long held that some copying does not infringe copyright because it is a defensible "fair use" of the copyrighted work.[121] This doctrine of fair use, now codified in Section 107 of the Copyright Act,[122] "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[123] Fair use is traditionally viewed as an affirmative defense,[124] excusing the copying of a work "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[125] The statute declares, however, that a fair use "is not an infringement of copyright."[126] Government reproduction of copyrighted work may be a fair use under Section 107,[127] but there is no *per se* rule that government use is fair use.[128]

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121. NIMMER ON COPYRIGHT § 13.05 (2011).

122. *See* 17 U.S.C. § 107 (2006).

123. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (alteration in original) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (internal quotation marks omitted).

124. *See, e.g.*, *id.* at 590 (stating that "fair use is an affirmative defense"); *but see* Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch, J.) ("Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976," but "[r]egardless . . . , it is clear that the burden of proving fair use is always on the putative infringer.").

125. 17 U.S.C. § 107.

126. *Id.*

127. *See, e.g.*, Jartech, Inc. v. Clancy, 666 F.2d 403, 407 (9th Cir. 1982) (holding a local government made "fair use" of copyrighted material when it used "abbreviated copies" of an adult film as evidence in a nuisance abatement proceeding, reasoning the "use was neither commercially exploitive of the copyright, nor commercially exploitive of the copyright holder's market"); 4 FOIA UPDATE, no. 4, 1983, *available at* http://www.justice.gov/oip/foia_updates/Vol_IV_4/page3.htm ("[T]he position of the Department of Justice is that the release of [nonexempt copyrighted] materials under the FOIA is a defensible 'fair use.'").

128. Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing "Fair Use" Under Section 107 of the Copyright Act of 1976, 1999 WL 33490240 (O.L.C. Apr. 30, 1999), *available at* http://www.justice.gov/olc/pincusfinal430.htm (last visited Nov. 22, 2011); *see also* NIMMER, *supra* note 121, § 13.05[D][2] ("Reproduction of a work by a governmental instrumentality is not, in itself, necessarily privileged as a fair use.").

Whether a particular use of copyrighted work constitutes a "fair use" is determined by reference to four factors enumerated in Section 107:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[129]

The statute does not explain how these four factors ought to be considered. In keeping with the common law approach codified in Section 107, however, courts evaluate fair use on a case-by-case basis,[130] "weigh[ing] the factors the way they deem best in individual cases."[131] Because the analysis is highly fact-driven, "summary judgment or trial is [typically] required to ventilate the pertinent facts" and enable the court to explore how they interact.[132] "[P]owerful arguments [often] exist on both sides of each factor."[133] Thus, "reasonable minds can look at different aspects of a single situation and reach opposite conclusions regarding purpose, nature, amount of copying, and market effect."[134]

In the incorporation by reference context, the issue of fair use may arise in a variety of ways. For example, an agency may want to reprint all or some portion of a copyrighted work, such as a standard, in the text of a rule rather than incorporating the material by reference. Alternatively, an agency may want to publish the full text of a standard in PDF format in an electronic docket to facilitate public comment on a proposed rule that would incorporate the standard by reference. Another possibility is that an agency, having adopted a regulation that

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129. NIMMER, *supra* note 121, § 13.05.

130. *See, e.g.*, Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) ("Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered. This approach was 'intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.'" (quoting H. R. Rep. No. 94-1476, 66 (1976)) (alteration in original).

131. NIMMER, *supra* note 121, § 13.05[A][5][a].

132. *Id.*

133. *Id.* § 13.05[A][5][c].

134. *Id.*

incorporates by reference, may want to make the incorporated material widely available in electronic format on its website.

The fact-driven nature of the fair use analysis makes it difficult to provide abstract guidance about how fair use might apply in the incorporation by reference context.[135] Nonetheless, it is possible to identify some broad principles by examining the doctrine in light of an agency's likely goals: (1) broadening availability by providing copies of an entire copyrighted work in an electronic docket or on an agency's website; and (2) including some small portion of a copyrighted work in the text of a regulation.[136]

*a. The Purpose and Character of the Infringing Use*

The first factor—the purpose and character of the infringing use—is perhaps the most difficult to assess in analyzing fair use as a potential tool for broadening access to copyrighted materials incorporated by reference. In evaluating the purpose and character of the infringing use, courts consider whether that use is transformative, "having a new and different character and expression than" the copyrighted work.[137] A finding of fair use is also more likely where the infringer "transform[s] the purpose or character of the work by incorporating it into a larger commentary or criticism"[138] or "larger biographical work."[139] Finally, evaluating the "purpose and character" factor requires courts to consider "whether the 'use is of a commercial nature or is for nonprofit educational purposes.'"[140]

If an agency's goal is to publish the full text of a copyrighted standard in a regulation, online docket, or on its website, the first factor may favor neither the agency nor the standard developer. Courts have acknowledged that some fair use cases

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135. *See, e.g.*, Gaylord v. United States, 595 F.3d 1364, 1372 (Fed. Cir. 2010) ("Because the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.") (internal quotation marks omitted).

136. These two ends of the spectrum are used as reference points to give some focus to the fair use discussion. It bears emphasizing, however, that there are many intermediate possible circumstances in the incorporation by reference context that may cause an agency to consider the scope of fair use.

137. *Gaylord*, 595 F.3d at 1373 (internal quotation marks omitted).

138. *Id.*

139. *Id.* at 1373 n.3.

140. *Id.* at 1374 (quoting 17 U.S.C. § 107 (2006)).

"demonstrate the tension inherent in the 'purpose' and 'character' elements" because the "purpose" arguments favor one party, while the "character" arguments favor the other.[141] A case involving an agency's reproduction of an entire copyrighted work to improve the transparency of administrative processes or the law would likely be such a case.

*College Entrance Examination Board v. Pataki* illustrates how "character" may favor the standard developer, while "purpose" may favor the agency.[142] The case involved a state law that "mandated disclosure (and authorized subsequent reproduction) of 'secure test' questions administered within [the state's] borders, notwithstanding any adverse impact that would thereby accrue to the copyright owners of the tests."[143] The copyright owners argued that the law was preempted by the Copyright Act because it infringed on the copyright and was not fair use. The court agreed.[144] The court concluded that the character of the "disclosure requirements constitute [a] non-transformative use"[145] because it authorized simple and complete reproduction of the copyrighted works.[146] Character thus weighed in favor of the copyright holders. On the other hand, the uses of the disclosure requirements were "'non-profit educational purposes' expressly protected by section 107(1) that serve important public interests" in "ensuring the fairness and objectivity of standardized school admissions tests, evaluating the accuracy of the scoring process, eliminating potential bias, and opening up a process that has a major impact on the lives and careers of students in" the state.[147] Purpose thus weighed in favor of the state. Because character favored one party, but purpose favored the other, the court was compelled

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141. *See* Coll. Entrance Examination Bd. v. Pataki, 889 F. Supp. 554, 568 (N.D.N.Y. 1995).

142. *Id.*

143. NIMMER, *supra* note 121, § 13.05[A][4]; *Coll. Entrance Examination Bd.*, 889 F. Supp. at 564 (explaining the state law required copyright holders to disclose test forms and questions and "classifie[d] these disclosed materials as public records and, thereby, subject[ed] them to disclosure to, and reproduction by, the public").

144. *Coll. Entrance Examination Bd.*, 889 F. Supp. at 575.

145. *Id.* at 568.

146. *See id.* at 567.

147. *Id.* (citations omitted) (internal quotation marks omitted).

to "conclude that [the character and purpose] factor favor[ed] neither party."[148]

The same result would likely obtain in a case involving agency reproduction of an entire copyrighted standard. In such a case, the character of the use is probably not transformative because it consists of simple reproduction of the copyrighted work.[149] This conclusion would be more likely if the agency provided a copy of the entire standard—it might be less likely if the agency copied only an insubstantial part of a standard, say, in the text of a regulation.[150] Character may thus favor the standard developer. The agency's purpose, however, would be to further the public interest in the transparency and access to the law. This noncommercial purpose, though noneducational, may tip purpose in favor of the government.[151] Overall, this mix of considerations may compel the conclusion that, in the context of incorporation by reference, the character and purpose factor favors neither the standard developer nor the agency.

### *b. The Nature of the Copyrighted Work*

The second factor—the nature of the copyrighted work—"'recogni[zes] that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[152] This factor typically weighs in favor of the copyright holder when the work is creative or expressive, although it is more likely to weigh in favor of the defendant if the work is factual or informational.[153] In conducting the analysis, courts "may also consider whether [the work] represent[s]

148. *Id.* at 568.

149. *See* Gaylord v. United States, 595 F.3d 1364, 1374 (Fed Cir. 2010); *Coll. Entrance Examination Bd.*, 889 F. Supp. at 567–68.

150. *See, e.g.*, NIMMER, *supra* note 121, § 13.05[D][1] ("A number of courts have held that the defense of fair use is never available to immunize copying that results in similarity that is not only substantial, but is indeed virtually complete or almost verbatim," although "there may be certain very limited situations wherein copying of even the entire work for a different functional purpose may be regarded as a fair use.").

151. *See Coll. Entrance Examination Bd.*, 889 F. Supp. at 568.

152. *Gaylord*, 595 F.3d at 1374 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

153. *See id.*

a substantial investment of time and labor made in anticipation of a financial return."[154]

In the incorporation by reference context, this factor may favor the copyright holder. On one hand, standards are often highly technical and contain or have a basis in significant factual information, a characteristic that might tilt the second factor in favor of the agency. On the other hand, as with the standardized test questions at issue in *College Entrance Examination Board*, standards are developed via a "creative, imaginative, and original" process.[155] In most cases, the development of a standard also requires "substantial investment of time and labor" and is undertaken "in anticipation of a financial return."[156] These considerations may weigh the second factor in favor of the standard developer.

*c. The Amount and Substantiality of the Portion Used*

The third factor—the amount and substantiality of the portion used—may cut in either direction in the incorporation by reference context, depending on how the agency uses the copyrighted material. This "factor concerns whether 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . are reasonable in relation to the purpose of the copying.'"[157] In evaluating this factor, "[c]ourts consider both the quantity and quality of the materials used."[158] Where an agency includes a small, qualitatively insubstantial portion of a copyrighted work in the text of a regulation, this factor will probably tip in favor of the agency. At the other end of the spectrum, if an agency reproduced the full text of a copyrighted work in an electronic docket or on its website, this factor would likely weigh in favor of the copyright owner. Indeed, the "general" rule is that it "does not constitute a fair use if the entire work is reproduced."[159]

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154. NIMMER, *supra* note 121, § 13.05[A][2][a] (citations omitted) (internal quotation marks omitted).

155. *Coll. Entrance Examination Bd.*, 889 F. Supp. at 569 (internal quotation marks omitted).

156. NIMMER, *supra* note 121, § 13.05[A][2][a].

157. *Gaylord*, 595 F.3d at 1375 (quoting *Campbell*, 510 U.S. at 586).

158. *Id.*

159. NIMMER, *supra* note 121, § 13.05[A][3]; *see also, e.g.*, Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 926 (2d Cir. 1994) (explaining that although a conclusion that the defendant has reproduced an entire work "does not preclude a find-

### *d. Market Impact*

The fourth factor is "the effect of the use upon the potential market for or value of the copyrighted work."[160] It "requires courts to consider 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market.'"[161] The "adverse impact" relevant here is limited to that which occurs "by reason of usurpation of the demand for plaintiff's work through defendant's copying of protectable expression from such work."[162] If the infringing use eats into the copyright holder's market *or* destroys the value of the work by publicizing it, the factor will weigh against fair use.[163]

Like the third factor, this factor may cut in either direction, depending upon the nature of the use at issue. The inclusion of an insubstantial part of a standard, such as a definition, in the text of a regulation is unlikely to eat into the standard developer's market or otherwise destroy the value of the standard. On the other hand, if the agency uses or reproduces the full text of the standard, the fourth factor will likely tip in favor of the copyright holder. Although it is no doubt true that incorporation by reference increases the value of a work, the provision of the full text of the work may negate that effect. The easier it is for an interested party to access and use the standard as reproduced by the agency, the less likely he or she is to purchase that standard from the standard developer.

### *e. The Limited Usefulness of Fair Use to Increase the Availability of Incorporated Materials*

Fair use generally appears to be of limited usefulness to an agency seeking to increase the accessibility of copyrighted materials that are or may be incorporated by reference into regula-

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ing of fair use, it militates against such a finding, and weights the third factor in favor of the publishers" (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984))).

160. 17 U.S.C. § 107(4) (2006).

161. *Gaylord*, 595 F.3d at 1375 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590).

162. NIMMER, *supra* note 121, § 13.05[A][4].

163. *See id.*

tions. Because fair use requires a highly fact-intensive, case-by-case analysis, it is difficult to draw conclusions about its scope in the abstract. Nonetheless, two principles emerge: First, fair use may be easier to establish when an agency wants to reprint, rather than incorporate by reference, a small portion of a copyrighted work into the text of a regulation; and second, the fair use doctrine is probably not useful as a basis for making the full text of copyrighted materials more broadly accessible to regulated and other interested parties.

### *2. Public Domain*

In a 2002 en banc decision in *Veeck v. Southern Building Code Congress International, Inc.*,[164] the Fifth Circuit held that, in certain circumstances, a privately authored code adopted as law may enter the public domain *qua* law. The opinion thus cast some doubt on the scope of copyright protection for privately authored materials incorporated by reference into law.

The *Veeck* case began in 1997, when Peter Veeck, the operator of "a non-commercial website that provide[d] information about north Texas,"[165] decided to post the local building codes of two small towns in north Texas, Anna and Savoy. Both towns "had adopted the 1994 edition of the Standard Building Code written by [the] appellee, Southern Building Code Congress International, Inc. ('SBCCI')."[166] When he had trouble getting a copy of the codes from the towns, Veeck purchased a copy from SBCCI for $72.00. He then cut and pasted the text to his website, removing any suggestion that the codes were published by SBCCI and identifying them simply as "the local building codes of Anna and Savoy, Texas."[167] SBCCI "demanded that [Veeck] cease and desist from infringing its copyrights."[168] The district court granted summary judgment in favor of SBCCI, issuing a permanent injunction and awarding monetary damages.[169] The Fifth Circuit upheld the decision on appeal, but "elected to rehear [the] case en banc because of the novelty and importance of the

164. 293 F.3d 791 (5th Cir. 2002).
165. *Id.* at 793.
166. *Id.*
167. *Id.*
168. *Id.* at 794.
169. *Id.*

issues it present[ed]."[170] The central issue was "the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become 'the law.'"[171]

The en banc court's "short answer" was that even though a code's author retains copyright over a model code after it is adopted into law, the author cannot claim copyright over the code *qua* law.[172] The decision was grounded in long-standing Supreme Court precedents[173] that the majority read "to enunciate the principle that 'the law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law."[174] Because the law must be freely available, reasoned the court, its accessibility to the public cannot be conditioned on the consent of a copyright holder.[175] The court found some support for this conclusion in a First Circuit case, *Building Officials & Code Administrators v. Code Technology, Inc.* (*BOCA*),[176] which expressed doubt about the continuing viability of copyright protection for a code adopted as law, but did not actually decide the issue.[177]

*Veeck* did not address standards incorporated by reference into federal regulations.[178] The majority explicitly limited its holding to "the wholesale adoption of a model code promoted by its author . . . for use as legislation," distinguishing cases involving the

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170. *Id.*

171. *Id.* at 793.

172. *Id.* (holding that "[a]s model codes," a private "organization's works retain their protected status," but "as *law*, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives").

173. *See id.* at 794–99 (citing and discussing Banks v. Manchester, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)).

174. *Id.* at 800.

175. *See id.* at 798–800.

176. 628 F.2d 730, 732–35 (1st Cir. 1980).

177. *See id.* at 732–35; *see also* John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 38–40 (1st Cir. 2003) (explaining that *BOCA* left open the difficult question of copyright protection for materials incorporated by reference into law, but continuing to leave the question open because the issue before the court, copyright for materials referenced in government contracts, did not raise the same concerns); *Veeck*, 293 F.3d at 798–800 (citing and discussing *BOCA*).

178. *See Veeck*, 293 F.3d at 803–04.

"official incorporation of extrinsic standards."[179] One such case was *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,[180] in which the Second Circuit rejected an argument that the Red Book, a compendium of used car values, entered the public domain when it was incorporated by reference in "the insurance statutes or regulations of several states."[181] The argument was "that the public must have free access to the content of the laws that govern it," and "if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection."[182] Although "policy considerations" supported the argument, the law did not.[183] The Ninth Circuit reached a similar result in *Practice Management Information Corp. v. American Medical Ass'n*,[184] holding that the American Medical Association's classification system for medical procedures did not enter the public domain by virtue of its being incorporated by reference into Medicare and Medicaid regulations.[185]

*Veeck* and related cases show that the scope of copyright protection for privately authored materials used in the law depends upon a variety of factors, including the nature of the material at issue, the purpose for which it was created, and the way the government uses it. In *Veeck*, copyright protection was denied for a building code written "precisely for use as legislation" and adopted by local government.[186] In contrast, voluntary consensus standards are usually "created by private groups for reasons other than incorporation into law."[187] And agencies do not adopt such standards as the law, but rather incorporate them by reference—in whole or in part, and often with substantial modification or addition—to support substantive requirements of federal

179. *Id.* at 804. The practice of incorporation of extrinsic standards by reference in regulations promulgated by federal agencies under Circular A-119 was particularly in the court's mind here. *See id.* at 804 n.20.

180. 44 F.3d 61 (2d Cir. 1994).

181. *Id.* at 73; *see also id.* at 74 ("We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright."). The court noted that such a holding "would raise very substantial problems under the Takings Clause of the Constitution." *Id.* at 74.

182. *Id.* at 73.

183. *See id.* at 74.

184. 121 F.3d 516 (9th Cir. 1997).

185. *See id.* at 518–20.

186. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 804–06 (5th Cir. 2002).

187. *Id.* at 804–05.

regulations.[188] Copyright cases involving such "official incorporation of extrinsic standards" are, as *Veeck* acknowledged, "distinguishable in reasoning and result."[189]

### *3. Merger Doctrine*

The merger doctrine provides that "when there are so few ways of expressing an idea, not even the expression is protected by copyright."[190] This doctrine is grounded in Section 102(b) of the Copyright Act, which provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[191] To prevent the private monopolization of ideas, courts apply the merger doctrine "such that 'even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.'"[192]

The only court that appears to have considered the question—the Fifth Circuit in *Veeck*—held that the merger doctrine applies when a copyrighted code is adopted as law.[193] After deciding the public domain issue discussed above, the *Veeck* court alternatively held that "[t]he codes are 'facts' under copyright law" because "[t]hey are the unique, unalterable expression of the 'idea' that constitutes local law."[194] Reasoning that there is only one way to express what the law requires, the court held that, once adopted as a law, a copyrighted model code becomes, to the extent of its adoption, "'the law' of the

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188. CIRCULAR A-119, *supra* note 5, ¶¶ 4(a), 6. As explained in greater detail below, *see infra* Part IV.A, the substantive policy established in a regulation should be clear from its text, without the need to examine material incorporated by reference. If this principle is properly observed, incorporated material plays only a supporting role in a regulation.

189. *See Veeck*, 293 F.3d at 804.

190. BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1143 (11th Cir. 2007).

191. 17 U.S.C. § 102(b) (2006); *see* N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 497 F.3d 109, 116 (2d Cir. 2007).

192. *N.Y. Mercantile Exch., Inc.*, 497 F.3d at 116–17 (quoting Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991)).

193. *See Veeck*, 293 F.3d at 801–02.

194. *Id.* at 801.

governmental entities and may be reproduced or distributed as 'the law' of those jurisdictions."[195] *Veeck* thus strongly supports the proposition that a privately authored code, once adopted as law, loses its copyright protection *qua* law.

Four considerations counsel some caution to an agency considering relying on *Veeck*'s merger holding to increase the availability of copyrighted works that have been or may be incorporated by reference. First, if the agency has not yet incorporated the material by reference, merger cannot yet have occurred. *Veeck* is thus no help to an agency in search of a basis for making a copyrighted standard freely available for review and comment during the rulemaking process. Second, an agency that relied on *Veeck* to treat incorporated materials as having merged into uncopyrightable law could be easily rebuffed. It is arguably unclear whether *Veeck*'s merger holding extends to materials incorporated by reference, or whether the court intended that distinction to apply only in the case of materials adopted as law. As discussed above, the court clearly distinguished between adoption and incorporation in the course of addressing other precedent on the issue of public domain. The section of the opinion addressing merger, however, did not even mention the distinction between incorporation and adoption. A bold agency could read this as implying that incorporation is identical to adoption for purposes of merger. It would be very easy, however, for a court to reject that argument if it was disinclined to follow *Veeck* in a case involving a claim of merger resulting from incorporation rather than adoption. Third, an agency that reproduces the full text of a standard that has been incorporated by reference might not itself be able to rely on merger as a defense to an infringement claim. Some courts have taken the view that "if a defendant has actually copied the plaintiff's work, it is unlikely to be allowed to rely on merger to avoid liability."[196] Finally, a court may be reluctant "to hold that a[n agency's] reference to a copyrighted work . . . results in loss of the copyright" because such a hold-

195. *Id.* at 802.

196. Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, 688 n.12 (2d Cir. 1998) (quoting *Kregos*, 937 F.2d at 716 (Sweet, J., concurring in part and dissenting in part)). Underlying this point is a fundamental disagreement among courts and commenters regarding the very nature of the merger doctrine. Is it a question of copyrightability or a defense to infringement? *See generally Kregos*, 937 F.2d at 714–16 (Sweet, J., concurring in part and dissenting in part).

ing "would raise very substantial problems under the Takings Clause of the Constitution."[197]

### *C. An Emerging Public Policy Dispute*

*Veeck* not only presented difficult legal questions—it revealed a "profound issue of public policy" that has particular importance in the context of federal regulation.[198] As agency use of voluntary consensus standards has evolved over the past several decades,[199] so too have public expectations regarding the accessibility of the law generally and of agency regulations and processes more specifically.[200] The ubiquitous availability and use of the Internet have contributed to these higher expectations, and e-rulemaking initiatives have brought them to bear in the regulatory context.[201] This shift in administrative policy towards greater transparency and openness is in tension with copyright protection for incorporated materials. The *Veeck* decision, although it has not had the significant impact initially expected (or, at least by some, feared), has created some legal uncertainty regarding the continued viability of copyright for materials incorporated by reference. That uncertainty may partially explain the relative dearth of judicial guidance regarding the scope of copyright in this context.[202]

Legal scholars, open source standard developers, and nonprofit public interest organizations have increasingly challenged copyright protection for incorporated standards as a matter of both law and policy.[203] Legal scholars have argued,

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197. *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 74 (2d Cir. 1994).

198. Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 297 (2005).

199. *See* Tyler R.T. Wolf, Note, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 WASH. & LEE L. REV. 807, 813–14 (2008).

200. *See* Paul T. Jaeger & John Carlo Bertot, *Transparency and technological change: Ensuring equal and sustained public access to government information*, 27 GOV'T INFO. Q., 371, 372 (2010).

201. *See id.*; Sharon S. Dawes, *Stewardship and usefulness: Policy principles for information-based transparency*, 27 GOV'T INFO. Q. 377, 378 (2010).

202. Cunningham, *supra* note 198, at 343 (arguing there is a lack of judicial guidance concerning private standards incorporated in public law).

203. *See, e.g.*, Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 224 (2007); Brendan Greeley, *One Man's Quest to Make Information Free*, BLOOMBERG BUSINESS WEEK, Apr. 12, 2012, http://www.businessweek.com/articles/2012-04-12/one-mans-quest-to-make-information-free.

albeit not unanimously, that materials incorporated by reference into law should not be eligible for copyright.[204] These arguments have special force in the context of information technology standards,[205] which are valuable precisely because they are open source and freely available to all. Indeed, it is these new, ever-evolving technological standards that have created a division within the voluntary standards community. As a general matter, established standard-development organizations continue to use a business model heavily dependent upon copyright, and newer standard-development organizations often take an aggressive position in favor of open access.[206] OASIS, an organization of the latter stripe, reported that its open-source technological standards are freely available online—and are downloaded an average of four times per second. These organizations have found allies among public interest organizations, including Public.Resource.Org, which has aggressively sought free, electronic access to the law, including all materials incorporated by reference into the CFR.[207]

Regulated parties have made similar arguments in comments on proposed federal regulations that would incorporate copyrighted standards by reference. For example, FERC has, on several occasions, considered comments critical of its practice of incorporating copyrighted standards by reference into its

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204. *See, e.g.*, Cunningham, *supra* note 198, at 293 (developing a three-part classification system for determining copyright protection for standards embodied in law); Samuelson, *supra* note 203, at 195 (questioning whether standards, "especially those whose use is mandated by government rules, should be eligible for copyright protection"). *But see* Katie M. Colendich, Comment, *Who Owns "The Law"? The Effect on Copyrights When Privately-Authored Works are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589, 590 (2003) ("This Comment argues that the Fifth Circuit's *Veeck* decision created an unsupported exception to copyright law.").

205. *See* Samuelson, *supra* note 203, at 193–94.

206. *Compare Intellectual Property Policy of ASTM International*, ASTM INTERNATIONAL, http://www.astm.org/Itpolicy.pdf (last visited Nov. 22, 2012) (explaining that ASTM owns, maintains, and protects its copyright interests to better fulfill its mission), *with FAQ*, OASIS, https://www.oasis-open.org/org/faq (last visited Nov. 22, 2012) (explaining that its members usually work on a royalty-free basis).

207. *See, e.g.*, Letter from Carl Malamud, President & CEO, Public.Resource.Org, to Gary M. Stern, Gen. Counsel, Nat'l Archives & Records Admin. (July 14, 2009) (on file with author); Letter from Raymond A. Mosley, Dir. of the Fed. Register, to Carl Malamud, President & CEO, Public.Resource.Org, Inc. (Aug. 3, 2009) (on file with author) (denying a FOIA request for copies of all technical standards incorporated by reference into the CFR).

regulations.[208] In one recent proceeding, commenters urged FERC to abandon the practice of incorporation by reference and instead promulgate standards via the notice-and-comment process, provide greater access to the standards that would be incorporated by reference, "or, at a minimum, clarify that FERC will not attempt to assess civil penalties . . . for violations of standards that have merely been incorporated by reference into regulations."[209] These suggestions were grounded in concerns that incorporation by reference disadvantaged those parties unable to participate in the standard-development process and forced regulated entities to comply with "non-public standards" that could only be obtained for a fee.[210] FERC, however, has consistently rejected these arguments. In one proceeding, FERC called a commenter's argument—that a standard was not "reasonably available" because one had to pay a "significant fee" to buy a copy—"inappropriate hyperbole."[211] The agency, being familiar with the commenter, presumably knew that the cost of the standard was significantly lower than the hourly rate the commenter was paying counsel to file its comments.[212] That claim of unreasonable expense was therefore not credible under the circumstances.

Congress has increasingly shown interest in legislation that would, at least in some limited contexts, abrogate copyright

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208. *See* Standards for Business Practices of Interstate Natural Gas Pipelines, 68 Fed. Reg. 13,813, 13,1816–18 (Mar. 21, 2003) (to be codified at 18 C.F.R. § 284); Standards for Business Practices of Interstate Natural Gas Pipelines, 64 Fed. Reg. 17,276, 17,277 (Apr. 9, 1999) (to be codified at 18 C.F.R. § 284); Standards for Business Practices of Interstate Natural Gas Pipelines, 61 Fed. Reg. 55,208, 55,212–13 (Oct. 25, 1996) (to be codified at 18 C.F.R. § 284); Standards for Business Practices and Communication Protocols for Public Utilities, Final Rule, 74 Fed. Reg. 63,288, 63,302–04 (Dec. 3, 2009) (to be codified at 18 C.F.R. § 38); Standards for Business Practices and Communication Protocols for Public Utilities, 70 Fed. Reg. 28,222, 28,223–24 (proposed May 17, 2005) (to be codified at 18 C.F.R. §§ 35, 37, 38).

209. Standards for Business Practices and Communication Protocols for Public Utilities, 74 Fed. Reg. 63,288, 63,302 (Dec. 3, 2009) (to be codified at 18 C.F.R. § 38).

210. *Id.*

211. Standards for Business Practices of Interstate Natural Gas Pipelines, 68 Fed. Reg. 13,813, 13,817 (Mar. 21, 2003) (to be codified at 18 C.F.R. § 284).

212. *Compare id.* (stating that the agency charges $25 for its booklets which include all business practice standards), *with* Dominion Resources Inc., 102 Annual Report (Form 10-K) (Mar. 23, 2003) (listing earnings in 2002 as $1,365,000,000).

protection for incorporated standards.[213] In January 2012, Congress enacted a statute providing that, as of January 2013, the Pipeline and Hazardous Materials Safety Administration (PHMSA) "may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site."[214] The change was purportedly precipitated by a staffer's call to one of the Standard-Development Organizations (SDOs) that produces pipeline safety standards. The staffer called the SDO's sales office, rather than its government affairs office, and was told he would have to pay over $1000 to get a copy of the standard. SDOs ordinarily provide free copies to legislators, but by the time the error was discovered by the SDO's government affairs employees, the damage had been done. In July 2012, PHMSA took comment and held a public workshop to solicit suggestions on how it could complete an ongoing rulemaking to update its pipeline safety regulations while still complying with Congress's directive.[215] As of the fall of 2012, the agency has yet to find a solution to its conundrum.

Other legislative proposals addressing incorporation by reference have not been enacted. One such proposed bill would have directed the Department of Energy to use specified voluntary consensus standards, provided they met certain regulatory requirements.[216] If the standards did not meet the stated requirements, however, the Secretary would have been authorized to take the standards, modify them as necessary, and promulgate them as regulations of the Department of En-

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213. For example, one recent piece of legislation would require PHMSA to "maintain a copy or, at a minimum, a detailed summary of any industry-developed or professional organization pipeline safety standards that have been incorporated by reference into regulations, to the extent consistent with fair use." Pipeline Transportation Safety Improvement Act of 2011, S. 275, 112th Cong. § 8 (as passed by Senate, Oct. 17, 2011). This requirement would be "met if the information required to be made public is made available on the [PHMSA]'s public Web site." *Id.* § 60138(b).

214. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112–90 § 24, 125 Stat. 1904, 1919 (2012).

215. *See* Pipeline Safety: Notice of Public Workshop To Discuss Implementing Incorporation by Reference Requirements of Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, 77 Fed. Reg. 37,472 (June 21, 2012).

216. *See* Energy Savings and Industrial Competitiveness Act of 2011, S. 1000, 112th Cong. § 101(a) (2011).

ergy.[217] The bill specifically instructed the Department of Energy to "observe and protect the intellectual property rights of nationally recognized code and standards developers,"[218] without specifying precisely how the Secretary would achieve that goal. A few interviewees suggested that these developments, although largely unsuccessful to date, indicate growing congressional discontent with restrictions on the free availability of incorporated standards. This implies that there is an emerging public policy debate regarding the defensibility of copyright and other limitations on access to incorporated standards, particularly when such standards protect public safety. PHMSA's predicament demonstrates a pressing need for agencies to take affirmative steps to address the issue.

### *D. Tools to Expand Availability*

Although some have urged it, an abrupt, radical change to existing copyright protection for incorporated standards would jeopardize the public-private partnership in standards[219] and, therefore, would be ill advised. Many standard-development organizations rely on proceeds from the sale of their publications to fund their standard-development activities. For example, in its 2010 Annual Report, ASTM reported total operating expenses of $41,969,030.[220] ASTM reported that $35,350,779 of its total operating revenues of $53,969,725 (approximately 62%) was derived from publication sales.[221] Of course, this figure includes funds derived from *all* publication sales, and not just the sale of standards that have been incorporated by reference. Moreover, ASTM explained that only a small percentage of its standards are truly profitable, and many lose money or simply break even. Nonetheless, it is striking that member fees provided only $2,090,259 (approximately 3.7%) of total operating revenues.[222] ASTM is able to keep the barriers to participation

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217. *Id.*

218. *Id.*

219. *See supra* Part II.A.

220. ASTM INT'L, 2010 ANNUAL REPORT: INNOVATION AND STANDARDIZATION 2, 23 (2010), *available at* http://www.nxtbook.com/nxtbooks/astm/annualreport2010/index.php#/0.

221. *Id.*

222. *Id.*

low by using revenue from publication sales as the primary source of funding for its activities. The same is true of many other standard developers.

Technological innovations that enable controllable electronic access to copyrighted standards may provide an opportunity to improve access for regulatory purposes without destroying the value of copyrights. Indeed, in recent years, several standard-development organizations have expanded public access to standards via the web using such technological devices. For example:

- In the wake of the Deepwater Horizon oil spill, the American Petroleum Institute (API) provided read-only access to "almost one-third of all API standards, including all standards that are safety-related or have been incorporated into federal regulation" on the organization's website.[223]

- NAESB has obtained software that enables it to make standards available in read-only form on its website to nonmembers at no charge for three business days for evaluation and commenting purposes.[224]

- The National Fire Protection Association (NFPA) provides access to some of its codes on its website and has recently expanded read-only access to current and previous versions of its codes.[225]

These access options are typically read-only, meaning that the documents can be viewed electronically, but can neither be downloaded nor printed. This limitation allows interested par-

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223. Press Release, American Petroleum Institute, API provides expanded online access to its safety standards (Oct. 28, 2010), *available at* http://www.api.org/Newsroom/api-expanded-stds.cfm.

224. Press Release, NAESB, Procedures for Non-Members to Evaluate Work Products Before Purchasing (May 6, 2009), *available at* http://www.naesb.org/misc/NAESB_Nonmember_Evaluation_LockLizard.pdf.

225. News Release, National Fire Protection Association, NFPA Launches New Web Pages to Streamline Access to Technical Document Information (Nov. 16, 2009), *available at* http://www.nfpa.org/newsReleaseDetails.asp?categoryid=488&itemId=45446&rss=NFPAnewsreleases.

ties to view the documents, while preserving incentives for regular users to purchase their own copy.

Some agencies have improved access by purchasing a license to distribute electronic copies of a standard they are considering using or have decided to incorporate by reference. Such agencies negotiate with the copyright holder for the right to distribute copies of the standard at an agreed cost, either during rulemaking, following promulgation, or both. One example of a situation in which this approach worked involves standards governing best practices for first responders faced with biological threats. ASTM negotiated a deal with the Department of Homeland Security (DHS) that allowed DHS, for a flat fee, to broadly distribute electronic copies of the standard, which ordinarily costs $36 per copy.[226] The standard can be downloaded for free on ASTM's website.[227] While this approach can work, several interviewees suggested that it might not be the best option. Not only does it have the potential to become prohibitively expensive, it also risks creating unhealthy financial dependence between agencies and standard-development organizations. If widespread, the practice could undermine the strength and independence of our nation's robust standard-development community.

For these reasons, several agencies suggested that a better alternative is for agencies to work with standard-development or-

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226. *See, e.g.*, Barbara Jones, Laurie Locascio, Kenneth Cole, & Scott Coates, *Meeting the Unknown: Standards for Detecting Biological Weapons Agents*, DEF. STANDARDIZATION PROGRAM J., July—Dec. 2007, at 18, 20–21, *available at* http://www.dsp.dla.mil/app_uil/content/newsletters/journal/DSPJ-07-07.pdf (last visited Nov. 22, 2011) ("DHS . . . has obtained an unlimited license from ASTM to allow first responders and others to download the standard free of charge."). ASTM E2458-10, *Standard Practices for Bulk Sample Collection and Swab Sample Collection of Visible Powders Suspected of Being Biothreat Agents from Nonporous Surfaces*, ASTM, can be downloaded for free from http://www.astm.org/DHS/E2458.pdf. ASTM E2601-08, *Standard Practice for Radiological Emergency Response* is also available for free at the same web address.

227. To download a copy, a user is required to register with ASTM. Registration is free, but the user must provide a physical mailing address, e-mail address, and phone number before the download becomes available. I verified that the process works and takes just a few minutes. NIST is also piloting a program to measure and improve the first responder community's need for certain documentary standards. *See* Press Release, NIST, It's Your Standard Pilot Project: NIST to Offer Documentary Standards to First Responders (Aug. 2, 2011), *available at* http://www.nist.gov/director/first-responders-documentary-standards.cfm.

ganizations to facilitate access to copyrighted, incorporated standards on a case-by-case basis without purchasing a license. While some standard-development organizations are more flexible than others, many have demonstrated a willingness to work with agencies to increase access using emerging technologies, thereby striking a balance between availability and copyright. In some cases, a standard-development organization can provide read-only copies of a standard in the docket or on its own website during the rulemaking process. Agencies may be able to secure similar accommodations following promulgation of a regulation incorporating the standard—particularly where the standard relates to public safety—and the success of the agency's regulatory purpose depends upon wide dissemination of the standard. In working with standard-development organizations on access issues, however, agencies should be aware that read-only access documents may not be 508 compliant.[228] One agency reported that, when faced with this issue, the standard developer offered to make accommodations upon request.[229]

One organization that depends on copyright for funding, but has shown a particular willingness to accommodate access needs, is ASTM. ASTM has worked with agencies and regulated parties to facilitate access to its standards, both during rulemaking and following promulgation of a regulation incorporating an ASTM standard. ASTM and CPSC's coordinated efforts with respect to the mandatory toy standard, ASTM F963, required by the Consumer Product Safety Improvement Act of 2008 (CPSIA), provide a good example.[230] During the initial rulemaking, ASTM provided a read-only copy of the standard on its website, and CPSC directed interested parties

228. Section 508 of the Rehabilitation Act of 1973, as amended, requires federal agencies to make electronic and information technology accessible to those with disabilities. *See* 29 U.S.C. § 794 (2006).

229. In most cases a standard developer provides read-only access on its own website, where it can keep track of downloads, and the agency simply provides a clear instruction regarding the Internet location of the standard. Some agencies expressed discomfort with this arrangement, however, and have insisted upon hosting the read-only document in a docket or website controlled by the agency.

230. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008). The CPSC provides a very useful guide to the CPSIA, including a variety of supplemental information and agency documents in a central location on its website. *See Consumer Product Safety Improvement Act (CPSIA) of 2008*, CONSUMER PROD. SAFETY COMM'N, http://www.cpsc.gov/about/cpsia/cpsia.html.

to the appropriate web address in its Federal Register notice.[231] One concern in the rulemaking was that small, independent toy manufacturers might not be able to afford the standard once promulgated. ASTM worked with the Handmade Toy Alliance to negotiate a license that enabled the Handmade Toy Alliance to offer the standard to its more than 650 members for less than $10.

When an agency is considering incorporating copyrighted material by reference into a regulation, it should work with the copyright holder to ensure that the material will be reasonably available to regulated and other interested parties both during rulemaking and following promulgation. Agencies should avoid solutions that require them to obtain a license to achieve this goal. Instead, agencies should work with copyright holders and use available technological solutions to strike an appropriate balance between the public interest in access and the copyright holder's need to fund its standard-development activities.

### *E. Collaborating to Ensure Reasonable Availability*

Whether copyrighted material is reasonably available to regulated and other interested parties may be relevant in two distinct contexts. First, an agency may consider whether such material is reasonably available when deciding whether to "use" the material. Restrictions on availability may be one of the many factors an agency considers when evaluating whether using a particular standard is "impractical" within the meaning of OMB Circular A-119. For example, restrictions on access may contribute to a determination that using a particular standard would be "ineffectual, inefficient, or inconsistent with agency mission" or "impose more burdens, or . . . be less useful, than . . . another standard."[232] Second, an agency may consider whether a standard is reasonably available in evaluating whether and to what extent it should work with a copyright holder to broaden access. This task may be appropriate during the rulemaking stage, and it may also come into play once an agency has decided to promulgate a regulation incorporating the standard by reference.

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231. Notice of Consultation Pursuant to Section 106 of the CPSIA, Request for Comments and Information, 74 Fed. Reg. 35,848, 35,850 (July 21, 2009).

232. CIRCULAR A-119, *supra* note 5, ¶ 6(a)(2).

In deciding whether to incorporate a particular copyrighted material by reference, and in working with a copyright holder to ensure the material is reasonably available, an agency should consider the following: (1) the stage of the regulatory proceedings, because greater access may be required during rulemaking than following promulgation; (2) whether the material is related to public safety or otherwise requires broad accessibility to accomplish the regulatory purpose of incorporation; (3) the cost to obtain a copy of the material, including the cumulative cost to obtain a standard or other material containing secondary references; (4) the identity of regulated parties that must have access to the incorporated material; and (5) regulatory reasons to require regulated parties to independently obtain access to incorporated material.

*The stage of the regulatory proceedings.* During the rulemaking process, broad access to copyrighted materials may be of particular importance to enable interested parties to provide meaningful comments on the regulatory proposal. Once a regulation that incorporates by reference has been promulgated, the access needs of regulated parties may take on greater importance. Agencies should thus evaluate "reasonable availability" in light of the stage of the regulatory proceeding.

*Whether the material is related to public safety or otherwise requires broad accessibility to accomplish the regulatory purposes of incorporation.* Many standards incorporated by reference consist of technical specifications that are of interest only to a small number of regulated entities. Other standards incorporated by reference may have important public safety implications or otherwise require broader accessibility to vindicate an agency's regulatory purpose. For example, some interviewees expressed the view that safety standards, particularly those that first responders may need, should be readily available. An agency should carefully consider the type of standard and its relationship to the agency's regulatory mission in determining whether it is "reasonably available."

*The cost to obtain a copy of the copyrighted material.* There is great variety in the cost of copyrighted materials incorporated by reference. For example, ASTM's toy standard costs $71,[233]

233. ASTM F963-11 STANDARD CONSUMER SAFETY SPECIFICATION FOR TOY SAFETY, ASTM INT'L, *available at* http://www.astm.org/Standards/F963.htm (last

while the International Organization for Standardization (ISO)'s toy standard costs approximately $210 (CHF 196,00)[234] and the equivalent European Standard costs approximately $379 (£236).[235] Some full codes may cost hundreds of dollars, while other individual standards cost much less. And if a standard contains secondary references, the purchase of two or more standards may be required. In such cases, agencies should take the cumulative cost into consideration. Agencies should also consider cost in conjunction with other facts that may affect whether a particular dollar amount is "reasonable." Cost to an individual or small business may be effectively higher than the same cost would be to a large corporation. The relative cost of a standard may also depend on the total cost of complying with the regulation. For example, if compliance costs $100,000, $100 to buy the standard may seem more reasonable. Moreover, regulated entities, and even members of the public, may reduce the costs of accessing standards by becoming members of the relevant standard-development organization. The cost of such membership can be reasonable and frequently includes free access to standards. In some industries, membership may even be a business necessity.[236]

*The identity of regulated parties that must have access to the incorporated material.* As many agencies acknowledged, paying for copyrighted materials incorporated by reference may be more difficult for individuals or small entities, while the burden may not be so heavy for large corporations. During rulemaking, this may mean that manufacturers are more likely to have access to a standard than are consumers or public interest organizations. Some agencies noted that regulated parties might already have copies of the standard by virtue of their membership in stan-

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visited Nov. 22, 2012). For $85.20, one can purchase a redline version of the standard showing changes from the previous version. *Id.*

234. ISO 8124-1:2012, SAFETY OF TOYS—PART 1: SAFETY ASPECTS RELATED TO MECHANICAL AND PHYSICAL PROPERTIES, INT'L. ORG. FOR STANDARDIZATION, http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=62327 (last visited Nov. 22, 2012).

235. BS EN 71-1:2011, SAFETY OF TOYS: MECHANICAL AND PHYSICAL PROPERTIES, BRITISH STANDARDS INST., http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030217312 (last visited Nov. 22, 2012).

236. *See, e.g.*, *Membership/Member Types & Benefits*, ASTM INT'L, http://www.astm.org/MEMBERSHIP/MemTypes.htm (last visited Nov. 22, 2012).

dard-development organizations or practice of complying with industry standards. On the other hand, if an agency incorporates a standard from another industry—for example, the FAA has incorporated a ballistic standard in its requirement that planes include a bomb containment area—regulated parties are less likely to have access to it.

*Regulatory reasons to require regulated parties to independently obtain access to incorporated material.* Some agencies may have good reasons for requiring regulated parties to independently obtain standards. For example, FERC strongly encourages regulated parties to become members of NAESB and participate in its standard-development activities. Members get access to standards for free. Membership also benefits the public interest by encouraging broad-based participation in the development of standards. Another example is FAA, which considers obtaining manufacturer manuals a reasonable business expense for owners and operators of aviation products, who are under a general duty to keep aircraft in a safe and airworthy condition regardless of whether an airworthiness directive requiring a specific inspection or repair has been issued.

Agencies should consider these and other relevant factors in determining how best to ensure that copyrighted material incorporated by reference is reasonably available to members of the public and regulated parties. Finally, it bears noting that most standards incorporated by reference into federal regulations are highly technical. Even if a copy of such a standard is freely available, it may not be meaningfully accessible to members of the public who do not possess the requisite technical, scientific, or other specialized expertise. To ensure that such standards are reasonably available to all, particularly during the rulemaking process, agencies should include in a rule's preamble an explanation of the copyrighted material and how its incorporation by reference will further the agency's regulatory purpose.

## III. THE CHALLENGE OF UPDATING INCORPORATIONS BY REFERENCE

Another challenge of incorporation by reference is updating regulations to reflect revised versions of incorporated materials. Agencies are required to specifically identify the version of

an incorporated material. When a more recent version of that material becomes available, the agency must conduct a rulemaking to update its regulation to reflect the change.[237] Rulemaking demands significant resources, and it is particularly burdensome when the agency is required to use rulemaking procedures beyond those specified in Section 553 of Title 5 of the U.S. Code (that is, hybrid rulemaking requirements).

My research revealed several techniques agencies use to address the challenge of updating incorporating regulations. Unfortunately, in some instances, updating proves to be an intractable challenge that cannot be surmounted using available regulatory techniques. A statutory solution to address these situations may thus be appropriate.

### *A. Legal Prohibitions on Dynamic Incorporations*

Although dynamic incorporation is an obvious way to avoid the updating conundrum, it is prohibited. A dynamic incorporation is not keyed to a particular version of the referenced material, but rather incorporates whatever happens to be the most recent version of the material. Dynamic incorporation is attractive because the agency need not take any action to update the regulation when the incorporated material is revised; the most recent version is always and necessarily the one incorporated by reference.

Several legal provisions prohibit dynamic incorporations, and for good reason.[238] OFR's regulations[239] and Document Drafting Handbook (DDH)[240] require agencies to identify the particular version of any material incorporated by reference.

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237. *See, e.g.*, Combustible Dust, 74 Fed. Reg. 54,333, 54,339 (Oct. 21, 2009) (to be codified at 29 C.F.R. pt. 1910) ("In the Agency's experience, consensus standards incorporated by reference into OSHA rules quickly become out of date, making it difficult for employers to comply when the out-of-date consensus standards become difficult to obtain.").

238. *See, e.g.*, *id.* ("OSHA cannot legally update NFPA or other consensus standards used in its rules by referring to the 'current' or 'most recent' edition of the consensus standards.").

239. *See, e.g.*, 1 C.F.R. § 51.1(f) (2012) ("Incorporation by reference of a publication is limited to the edition of the publication that is approved."); CIRCULAR A-119, *supra* note 5, ¶ 6(j).

240. *See* NAT'L ARCHIVES & RECORDS ADMIN., FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK, CH. 6 (Jan. 2011) [hereinafter DDH], *available at* http://www.archives.gov/federal-register/write/handbook/chapter-6.pdf.

Indeed, OFR regulations expressly state that "[f]uture amendments or revisions of [an incorporated] publication are not included" in the reference.[241] Circular A-119 mirrors this basic publication requirement, providing that "[i]n regulations, the reference [to a voluntary consensus standard] must include the date of issuance," thus keying the incorporation to a particular version of the standard. This requirement of static incorporation is consistent with the purpose of the publication requirement because it ensures clear notice of regulatory requirements. Relatedly, it prevents confusion regarding the requirements of the law at any given point in time, both for the agency and for regulated parties. Perhaps most crucially, it preserves an agency's regulatory authority and responsibility. That the first version of a standard serves the public interest and warrants incorporation does not necessarily mean that subsequent incarnations of that standard will do the same. It is critical that agencies exercise independent judgment over each version to make certain that, as revised, the standard continues to carry out the public interest.

Dynamic incorporations may also offend more fundamental legal principles, including nondelegation principles and notice-and-comment requirements.[242] As to the first point, "[d]ynamic incorporation at least poses an issue under the nondelegation doctrine,"[243] whereas "static incorporation will *always* be constitutional."[244] Whether a dynamic incorporation constitutes an unconstitutional delegation may depend on the source of the material referenced. Dynamic incorporation of a federal statute would likely pose less constitutional risk because a delegation to Congress would be no delegation at all.[245] In contrast, dynamic incorporation to a privately created standard would

241. 1 C.F.R. § 51.1(f) (2012).

242. OSHA, Standards Improvement Project—Phase III, 76 Fed. Reg. 33,590, 33,593 (2011) [hereinafter SIP] (to be codified at scattered parts of 29 C.F.R.) ("The Agency notes that it cannot incorporate by reference the latest editions of consensus standards without undertaking new rulemaking because such action would delegate the government's regulatory authority to consensus standards developing organizations, as well as deprive the public of the notice-and-comment period required by law.").

243. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1484–85 (2000).

244. *Id.* at 1485.

245. *See, e.g.*, *id.*; *see also* Franklin v. United States, 216 U.S. 559, 569 (1910).

threaten constitutional norms by effectively delegating the agency's statutory authority to a standard-development organization.[246] As to the second point, dynamic incorporation by a federal agency may conflict with the APA's notice-and-comment requirements.[247] By permitting automatic modifications to administrative regulations without the agency conducting a rulemaking, dynamic incorporation robs the public of the opportunity to examine and comment on changes to the incorporated material.

### *B. Technical Amendments to Update Access Information*

A comparatively minor problem with outdated incorporations by reference occurs when the public access information contained in the regulation becomes outdated, incorrect, or incomplete. As explained above, rules must include information about where the public can find a copy of any material incorporated by reference. Over time, this information may become outdated as, for example, publishers or resellers move or stop providing a particular document or version thereof. Moreover, in recent years, OFR has required agencies to include more public access information when incorporating material by reference.[248] Thus, even if information contained in a regulation remains current, it may be incomplete according to current OFR incorporation by reference requirements.

This problem becomes worse if ignored, for two reasons. First, some agencies have found that when they make substantive changes to one of their parts of the CFR, OFR may insist that they take the opportunity to update old access information. This can be particularly difficult if, for example, the incorporated material is a standard that is no longer being published or sold by resellers. Particularly if the OFR's request catches the agency by surprise, it can delay publication of a new rule. Sec-

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246. *See* Siegel, *supra* note 243, at 1488; *see also id.* at 1489 ("[A] dynamic incorporation constitutes a delegation, which must be evaluated under the applicable delegation doctrine, but a static incorporation is *not a delegation at all* and cannot, therefore, be invalid under any delegation doctrine.").

247. *See* SIP, *supra* note 242, at 33,593.

248. *See* DDH, *supra* note 240, ch. 4 (entitled "How do I correct my document?"), *available at* http://www.archives.gov/federal-register/write/handbook/chapter-4.pdf.

ond, and related, OFR has interpreted Section 552 of Title 5 of the U.S. Code and its own regulations as granting it authority to revoke approval of an incorporation by reference when the material at issue is no longer "reasonably available to and usable by the class of persons affected."[249] Although OFR has yet to exercise this authority, it may do so if an incorporation proves to be incurably outdated.

This problem is easily solved with a technical amendment to the affected regulation. Technical amendments are changes to a regulation that can be made without notice-and-comment. For example, a technical amendment may correct nonsubstantive errors in previously published regulations. Updating access information for a previously published incorporation by reference fits squarely within the purposes of a technical amendment. Chapter four of the DDH provides detailed guidance for agencies that need to so amend a regulation.[250] Regulated and other interested parties must be able to locate incorporated material, and agencies should periodically review regulations and make technical amendments as necessary to ensure all incorporations by reference include complete and accurate access information.

### *C. Agency Practices That Can Facilitate Updating*

Agencies that regularly incorporate private standards should participate in standard-setting processes and adopt complementary internal procedures to ensure good communication of emerging revisions to those within the agency charged with making policy decisions and writing rules. Participating in standard development ensures that agency personnel are aware of revisions to standards as they are being considered, thereby providing a more efficient and reliable way for the agency to understand and evaluate new versions. When standard-setting organizations provide updates and schedules to members of the relevant committee, they will necessarily be updating the agency. And the communication runs both ways—agency participants can inform standard developers of the agency's concerns and priorities. This in turn may reduce the likelihood that a revised standard will be inconsistent with the agency's regulatory goals. Indeed, some agencies reported

249. 1 C.F.R. § 51.7(a)(4) (2012).
250. *See* DDH, *supra* note 240, ch. 4.

that they have, on occasion, requested that a standard-development organization examine a new problem and update an incorporated standard to address it. Thus, participation may not only help with updating, but may also serve the broader regulatory needs of the agency.

Several agencies have successfully used this approach to reduce the burden of updating. FERC is a good example of an agency that has formed a mutually beneficial partnership with a standard-development organization, NAESB. NAESB often creates or updates standards in response to industry needs, but it has also updated its standards in response to FERC's regulatory activities and policy initiatives.[251] FERC employees participate in the NAESB's process, and when they are unable to attend a meeting, NAESB updates the agency on what was missed. The result is that FERC is generally aware of the direction NAESB is headed with particular standards. And agency personnel can communicate the agency's needs and views to NAESB during the standard-development process, thereby shaping the resulting standard. Other agencies, including CPSC and NRC, also participate in standard development and have crafted internal policies and procedures to make the most of that participation.[252]

Agencies can decrease the costs and increase the usefulness of participation by taking advantage of relevant guidance and resources available within the federal government.[253] Under the

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251. *See, e.g.*, Standards for Business Practices and Communication Protocols for Public Utilities, 74 Fed. Reg. 63,288, 63,288–89 (Dec. 3, 2009) (to be codified at 18 C.F.R. § 38) (revising regulations to incorporate by reference new versions of various NAESB standards, and explaining that the effort "include[s] standards adopted by NAESB in response to [FERC] Order Nos. 890, 890-A, and 890-B.").

252. A related practice is for an agency to publish a notice in the Federal Register when a standard developer is accepting comments on revisions to an incorporated standard. *See* National Institute of Standards and Technology, National Fire Codes: Request for Comments on NFPA Technical Committee Reports, 76 Fed. Reg. 22,381 (Apr. 21, 2011) ("The National Institute of Standards and Technology (NIST) is publishing this notice on behalf of the National Fire Protection Association (NFPA) to announce the availability of and request comments on the technical reports that will be presented at NFPA's 2012 Annual Revision Cycle."). This can raise public awareness of the opportunity to participate in voluntary consensus standard-development activities and promote the agency's interest in understanding revisions as they are considered.

253. Professor Hamilton's 1978 report to the Conference is a good starting point, as it includes detailed analysis of how agencies can best engage with voluntary

NTTAA, the National Institute of Standards and Technology (NIST), an agency of the Department of Commerce, coordinates the federal government's interaction with the private standard-development community.[254] NIST implements its duties under the NTTAA by working closely with standard-development organizations and coordinating with agencies through the Interagency Committee on Standards Policy (ICSP).[255] Through the ICSP, NIST formulates uniform federal policies and shares information regarding agency use of voluntary consensus standards. Each agency participates through its Standards Executive, typically a high-level official who represents the agency at quarterly ICSP meetings and implements federal standards policies within his own agency.[256] NIST also provides a variety of resources to agencies that engage in private standard-setting processes or use voluntary consensus standards in regulation.[257] It offers training and guidance to agencies on standards issues and also maintains a website, Standards.gov, that provides background materials and information about federal standards policy, as well as a complete database of all

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standard-development efforts and use resulting voluntary standards to make health and safety regulation better. *See generally* Hamilton, *supra* note 21.

254. *See* 15 U.S.C. § 272(b)(3) (2006) (providing that a function of NIST is "to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations"); *see also* U.S. DEP'T OF COMMERCE, NAT'L INST. OF STANDARDS OF TECH., NISTIR 5967, THE NATIONAL TECHNOLOGY TRANSFER AND ADVANCEMENT ACT—PLAN FOR IMPLEMENTATION 1 (1997) [hereinafter NIST NTTAA IMPLEMENTATION PLAN], *available at* http://gsi.nist.gov/global/docs/pubs/NISTIR_5967.pdf ("The [NTTAA] directs NIST to coordinate with other federal government agencies to achieve greater reliance on voluntary standards and conformity assessment bodies with lessened dependence on in-house regulations.").

255. NIST NTTAA IMPLEMENTATION PLAN, *supra* note 254, at 5–15. As required by the NTTAA, NIST has issued policy guidance on federal agency conformity assessment activities. *See* Guidance on Federal Conformity Assessment Activities, 65 Fed. Reg. 48,894 (Aug. 10, 2000) (to be codified at 15 C.F.R. § 297).

256. NIST provides a directory of Standards Executives that is available online. *See Standards Executives*, STANDARDS.GOV, http://standards.gov/standards_gov/standardsExecutives.cfm (last visited Nov. 22, 2012).

257. Other tools are available to help agencies understand the U.S. standards system. For example, ANSI offers a free, online educational resource for conformity assessment education. *See, e.g.*, *U.S. Standards System—Today and Tomorrow*, WWW.STANDARDSLEARN.ORG, http://www.standardslearn.org/coursedetails.aspx?key=2 (last visited Nov. 22, 2012).

standards incorporated by reference into the CFR.[258] In December 2010, NIST issued a Request for Information seeking input from agencies on standards issues.[259] The Subcommittee on Standards recently released an analysis of federal agency participation in standard-development activities based on the comments it received.[260] This should provide useful guidance to interested agencies.

### *D. Confining Standards to Appendices and Guidance*

Agencies may be tempted to avoid the updating challenge by confining references to extrinsic materials to nonbinding appendices and guidance documents. Taking this approach, an agency could promulgate a general standard in a regulation, and then use a nonbinding supplementary document to direct regulated parties to privately created standards that provide alternatives for compliance. Such documents are easier to modify and update than regulations because compliance with the APA's notice-and-comment requirements is not required. Thus, by confining standards to guidance, agencies could sidestep the updating issue. When a standard incorporated by reference into an appendix or guidance document is revised, the agency could easily update its document to reflect the change.

Despite the apparent advantages of this approach, agencies should not use it to address the challenges of updating incorporations by reference. First, the legal implication of confining incorporations by reference to guidance, policy statements, and

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258. *See Standards Incorporated by Reference (SIBR) Database Home Page*, NAT'L INST. OF STANDARDS & TECH., http://standards.gov/sibr/query/index.cfm (last visited Nov. 22, 2012). OFR maintains a similar database of materials approved for incorporation by reference, organized according to where the material is referenced in the CFR, but reports that the listing is not necessarily complete. *Electronic Code of Federal Regulations (e-CFR), Incorporation by Reference*, U.S. GOV'T PRINTING OFFICE, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=ibr.tpl (last visited Nov. 22, 2012).

259. *See* Effectiveness of Federal Agency Participation in Standardization in Select Technology Sectors for National Science and Technology Council's Sub-Committee on Standardization, Request for Information, 75 Fed. Reg. 76,397 (Dec. 8, 2010).

260. SUBCOMMITTEE ON STANDARDS, NAT'L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, FEDERAL ENGAGEMENT IN STANDARDS ACTIVITIES TO ADDRESS NATIONAL PRIORITIES: BACKGROUND AND PROPOSED RECOMMENDATIONS (Oct. 10, 2011), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/federal_engagement_in_standards_activities_october12-final.pdf.

similar documents is that the referenced material is not mandatory. If a regulated party does not adhere to the referenced material, the agency may have difficulty imposing legal sanctions unless the party has also violated the underlying regulation.[261] Second, the practice of using guidance to fill out regulatory details not included in the codified regulation is controversial because it tends to undermine fundamental principles of administrative law and good governance. Often, generally applicable substantive standards confined to "non-binding" agency documents such as guidance become binding *de facto*.[262] The Conference has historically recommended against agencies "issu[ing] statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment)."[263] Although the process may be burdensome, notice-and-comment ensures that affected parties and members of the public have the opportunity to participate in the adoption of regulatory standards. This principle of public participation and transparency should be observed with respect to incorporation by reference.

In sum, agencies should not address updating challenges by confining incorporations by reference to nonbinding appendices or guidance documents. If an agency intends to make compliance with an extrinsic standard mandatory, it should incorporate that standard by reference in a regulation.

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261. *See* 5 U.S.C. § 552(a) (2006); *see also, e.g.*, Desmond v. Mukasey, 530 F.3d 944, 957 (D.C. Cir. 2008) (noting that "guidance 'does not carry the force of law and is not entitled to any special deference,'" though it may be "relevant" to a court's interpretation of regulatory requirements (quoting Pack v. Kmart Corp., 166 F.3d 1300, 1305 n.5 (10th Cir. 1999))).

262. *See, e.g.*, Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206, 212 (D.C. Cir. 1999); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 309-10 (2010).

263. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 92-2, AGENCY POLICY STATEMENTS ¶ I(A) (1992); *see also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 89-5, ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS (1989) ("In developing an interpretation of a statute that is intended to be definitive, an agency should use procedures such as rulemaking, formal adjudication, or other procedures authorized by Congress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.").

### *E. Equivalency Determinations and Enforcement Discretion*

Some agencies reported that they are able to effectively use enforcement discretion to mitigate the harms of an outdated standard incorporated by reference into a regulation. This may be accomplished informally or via a process or standard established in an agency's regulations. Whether formal or informal, an agency's approach depends upon the nature of its position vis-à-vis regulated parties. If an agency is acting in a permission-granting capacity, it can use procedures that allow it to grant approval to a party that complies with a more recent standard that is equivalent in material respects to the standard incorporated by reference. In contrast, if an agency is acting in an enforcement capacity, it may reduce a penalty or simply choose not to enforce its regulations against a party in compliance with a more recent, equivalent standard. Either approach is particularly justified when compliance with a newer version of a standard necessarily implies compliance with the earlier, incorporated version of the standard.

The Coast Guard is a good example of an agency that uses equivalency determinations in its permission-granting capacity to deal with outdated standards incorporated by reference. The process and principles governing the agency's approach are codified in its regulations. Under the Coast Guard's regulatory scheme, manufacturers seek preapproval of the equipment and materials they intend to produce and market as Coast Guard-approved. If a manufacturer submits a design for approval that complies with a more recent version of a standard incorporated by reference in applicable regulations, the Coast Guard may nonetheless approve the design if the newer standard "has equivalent performance characteristics."[264] This requires the applicant to "demonstrate to the satisfaction of the Commandant that the item is at least as effective as one that meets the requirements" specified in the relevant regulation.[265] This approach works well because it puts the burden on the regulated

264. 46 C.F.R. § 159.005-7(c) (2011). The regulation is not specifically aimed at permitting compliance with more recent versions of standards incorporated by reference. Rather, it is more broadly worded to permit equivalency determinations regardless of the explanation for the formal noncompliance with applicable regulations.

265. *Id.*

party to demonstrate equivalency, and it provides the Coast Guard with a process that prioritizes the public interest over rigid adherence to older, incorporated standards.

OSHA, in its capacity as an enforcement agency, uses a concept of "de minimis violations" to achieve a similar end.[266] OSHA conducts inspections of employers alleged to be in violation of its regulations.[267] The regulations explicitly grant inspectors discretion to issue "notices of de minimis violations which have no direct or immediate relationship to safety or health."[268] The agency reports that such de minimis violations may be assessed when an employer is technically not complying with a regulation because it is adhering to a more recent version of a standard incorporated by reference into an applicable regulation. The upside of this approach is that it provides some flexibility to mitigate the harms of an outdated incorporated standard. This is particularly important given that employers may need to—and perhaps should—comply with the most up-to-date version of a voluntary consensus standard the agency has incorporated. The downside of this approach, however, is that the employer is still cited with a violation, which carries a certain stigma, even if the agency has found the violation "de minimis." This is particularly troublesome if the violation was unavoidable because products meeting the older version of the standard are no longer available in the marketplace. And, as another agency noted, even defining "de minimis" may be controversial depending upon the particular regulatory standard at issue.

Enforcement agencies may also take a more informal approach by declining to enforce a regulation against a party that is complying with a more recent version of an incorporated standard. Agencies have reported that this approach can be effective. While it is less transparent than the de minimis violation approach described above, it accommodates the possibility that products meeting an older standard may not be available, avoids the stigma of assessing a violation where there is no actual harm to public health and safety, and preserves agency resources for higher priority enforcement actions.

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266. 29 C.F.R. § 1903.14(a) (2012).

267. *See, e.g.*, *id.* § 1903.3 (establishing the agency's authority to inspect). OSHA regulations also permit the exercise of discretion in assessing a penalty. *See id.* § 1903.15.

268. *Id.* § 1903.14(a).

Agency experience with these approaches suggests a few guiding principles. Agencies that find it prohibitively burdensome to keep up with revisions of standards incorporated by reference in regulations should use equivalency determinations or enforcement discretion to minimize the harm caused by out-of-date references. Each such agency should appropriately structure its approach in light of its position vis-à-vis regulated parties. In the interests of fairness and transparency, agencies should adopt regulations that clearly establish the policies and principles governing equivalency determinations or guiding the use of enforcement discretion.

### *F. Direct Final Rulemaking*

Several agencies reported having effectively used direct final rulemaking to update regulations to reflect a revised version of a standard previously incorporated by reference. This approach permits an agency to lawfully truncate the rulemaking process. Rather than initiating the comment period by publishing a Notice of Proposed Rulemaking (NPRM), the agency publishes a direct final rule. This rule becomes effective on a specified date unless an adverse comment is filed within the established comment period. For uncontroversial rules, direct final rulemaking can save an agency considerable time. Indeed, the Conference has previously recommended that, "[i]n order to expedite the promulgation of noncontroversial rules, agencies should develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comment."[269]

The FAA provides a good example of how the direct final rule process should be structured.[270] FAA regulations explain that "[i]f an NPRM would be unnecessary because we do not expect to receive adverse comment, [the agency] may issue a direct final rule."[271] The direct final rule is published in the Federal Register and becomes effective on the date listed, pro-

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269. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 95-4, PROCEDURES FOR NONCONTROVERSIAL AND EXPEDITED RULEMAKING ¶ I(A) (1995). *See generally* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

270. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 95-4, *supra* note 268, ¶ I.

271. 14 C.F.R. § 11.29(b) (2012).

vided no adverse comment or intent to file an adverse comment is received by the agency during the comment period, which generally extends for sixty days following publication.[272] An "adverse comment" is defined as one that "explains why a rule would be inappropriate, or would be ineffective or unacceptable without a change," or "challenge[s] the rule's underlying premise or approach."[273] This definition is not met if the comment is "frivolous or insubstantial,"[274] or suggests a different rule without explaining "why the direct final rule would be ineffective without the change."[275] If no adverse comment is received, the FAA publishes a confirmation of the effective date of the rule in the Federal Register within fifteen days after the comment period closes.[276] If an adverse comment is received, however, the FAA publishes a notice to that effect in the Federal Register and "may withdraw the direct final rule in whole or in part."[277] If it withdraws the rule, the FAA "may incorporate the commenter's recommendation into another direct final rule or may publish a notice of proposed rulemaking."[278]

Several agencies identified direct final rulemaking as a viable option for noncontroversial updates to regulations that incorporate by reference. PHMSA regulations explicitly provide that its direct final rulemaking process is appropriate for issuing rules that "[i]ncorporate by reference the latest edition of technical or industry standards."[279] The Coast Guard similarly uses direct final rulemaking to update incorporations by reference. Indeed, it recently published a direct final rule and request for comments to "harmoniz[e] structural and performance standards for inflatable recreational personal flotation devices (PFDs) with the current voluntary industry consensus standards."[280] Other agencies, including but not limited to the EPA,

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272. *Id.* § 11.31(a).
273. *Id.*
274. *Id.* § 11.31(a)(2).
275. *Id.* § 11.31(a)(1).
276. *Id.* § 11.31(b).
277. *Id.* § 11.31(c).
278. *Id.*
279. 49 C.F.R. § 106.40(a)(2) (2011).
280. Inflatable Personal Flotation Devices, 76 Fed. Reg. 56,294, 56,294 (Sept. 13, 2011) (to be codified at 46 C.F.R. pt. 160, effective September 26, 2011, if no adverse comment is received by May 31, 2011).

reported significant success using direct final rulemaking to update regulations that incorporate by reference.

For noncontroversial substantive updates to incorporations by reference in regulations, agencies authorized to regulate under Section 553 of the Administrative Procedure Act (APA)[281] should use direct final rulemaking.[282] Before an agency uses direct final rulemaking to update incorporations by reference, it should adopt regulations establishing the principles and procedures it will use. These principles and procedures should conform to the Conference's previous recommendations for direct final rulemaking.[283]

### *G. Statutory Solutions*

The tools discussed above are not always sufficient for an agency to keep incorporations up-to-date. Dynamic incorporations, however, are legally prohibited and bad policy. Where the required update relates to the substance of the incorporated material, and not merely to the access information published in the Federal Register and CFR, a technical amendment is of no use. Confining incorporations by reference to nonbinding policy and guidance documents is generally inadvisable. Using enforcement discretion can mitigate the harms of an out-of-date standard, but is not a genuine solution to the problem of outdated references. Finally, while direct final rulemaking can work, the approach has limitations. A single adverse comment can derail the agency's efforts. This risk, in the face of severe time and resource limitations, leads agencies to be cautious in using direct final rulemaking if there is any reason to believe that a revision will be controversial. And for agencies subject to procedural requirements beyond those provided in Section 553 of the APA, such as OSHA, direct final rulemaking may simply not be an option. A statutory solution establishing an abbreviated notice-and-comment procedure for updating regulations

281. 5 U.S.C. §§ 551–559, 701–706 (2006).

282. As the Conference has previously explained, "direct final rulemaking . . . complies with the basic notice-and-comment requirements in section 553 of the APA." ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 95-4, PROCEDURES FOR NONCONTROVERSIAL AND EXPEDITED RULEMAKING ¶ I(A) (1995). Agencies subject to procedural requirements beyond those contained in Section 553 may not be able to use direct final rulemaking.

283. *See id.* ¶ I.

to reflect new versions of materials incorporated by reference may thus be in order.

CPSC's statutes provide examples of potential statutory solutions to the updating challenge. Several provisions direct CPSC to use identified voluntary consensus standards, while providing a mechanism for updating the incorporation by reference.

First, Section 106 of the Consumer Product Safety Improvement Act (CPSIA)[284] declares that the provisions of ASTM's toy standard "shall be considered to be consumer product safety standards issued by the Commissions."[285] With respect to updating, the statute provides that "[i]f ASTM International (or its successor entity) proposes to revise" the standard, "it shall notify the Commission of the proposed revision," and "[t]he Commission shall incorporate the revision or a section of the revision into the consumer product safety rule."[286] The updated regulation becomes "effective 180 days after the date on which ASTM International notifies the Commission of the revision unless, within 90 days after receiving that notice, the Commission notifies ASTM International that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard."[287] In the event the Commission makes such a determination, "the existing standard shall continue to be considered to be a consumer product safety rule without regard to the proposed revision."[288]

A second example is found in CPSC's statutory mandate to regulate the safety of all-terrain vehicles (ATVs). This statute declares an ANSI standard to be a consumer product safety standard[289] and requires ANSI or its successor to notify CPSC when it is considering a revision.[290] "Within 120 days after it receives notice of such a revision," the Commission is required to "issue a notice of proposed rulemaking in accordance with section 553 of title 5 to amend" its regulations "to include any such revision that the Commission determines is reasonably related to the safe

284. Pub. L. No. 110-314, 122 Stat. 3016 (2008).
285. 15 U.S.C. § 2056b(a) (1996).
286. *Id.* § 2056b(g).
287. *Id.*
288. *Id.*
289. *See* 15 U.S.C. § 2089(a)(1) (1996).
290. *See id.* § 2089(b)(1).

performance of all-terrain vehicles."[291] The Commission is further required to "promulgate an amendment to the standard . . . within 180 days after" publishing the NPRM.[292]

Yet a third example is found in the statute governing CPSC's regulation of swimming pool and spa drain covers. Like the others, this provision declares an ANSI standard to be a consumer product safety standard.[293] The updating provision in this statute requires ANSI or its successor to notify CPSC if a revision is under consideration.[294] But the remainder of the updating process is simpler: "If the Commission determines that the proposed revision is in the public interest, it shall incorporate the revision into the standard after providing 30 days notice to the public."[295]

One benefit of these provisions is that they vest the agency with ultimate authority to decide whether to update a regulation to incorporate a new version of a standard. As several agencies reported, updating to a new version of an incorporated standard is not always desirable as a matter of substantive regulatory policy. Standard-development organizations typically revise standards on a set schedule, so a new version of a standard may not be different enough to warrant the investment required to conduct a rulemaking, even pursuant to minimized procedures such as those described above. Moreover, a new version of a standard may include meaningful changes that nonetheless do not further the agency's regulatory goal or purpose. The changes may affect parts of a standard an agency has not incorporated, weaken the standard, or move it in a direction inconsistent with the agency's statutory mandate or policy judgment.

At the same time, a statutory solution would not be workable if it required agencies to identify, evaluate, and respond to every revision of every standard incorporated by reference. Agencies consistently reported that they lack the resources to take on such a task. The CPSC statutes described above usefully put the burden on the standard developer to notify the agency of a

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291. *Id.* § 2089(b)(2).
292. *Id.*
293. *See* 15 U.S.C. § 8003(a)–(b) (2008).
294. *See id.* § 8003(b).
295. *Id.*

pending revision. But they do not require the standard developer to identify and explain the changes to the standard, leaving the agency with the responsibility of doing that work. Some agencies reported that they achieve a better result by requiring a regulated party or standard-development organization to file a petition notifying the agency that a new version of a standard is available and requesting that the agency update the regulation incorporating it. The party filing such a petition typically must explain how the new version of a standard differs from the old version and demonstrate that updating would further the agency's regulatory purpose.

In light of these considerations and the significant difficulty some agencies experience when updating regulations to reflect revised standards, Congress should consider authorizing agencies to use streamlined procedures to update incorporations by reference. An appropriate statutory solution would: (1) require interested parties to file a petition for rulemaking that would notify the agency of a revised standard, identify the changes from the incorporated version of the standard, and explain why updating would be consistent with the agency's regulatory purpose; (2) vest the agency with authority to determine whether to act on the petition; (3) authorize the agency, upon a finding that updating is consistent with the regulatory purpose of the relevant regulation, to issue a direct final rule under Section 553; and (4) provide that the rule shall become effective if no adverse comments are received or, alternatively, following the agency's publication, prior to the effective date, of a response to any adverse comments received, provided such comments do not demonstrate that updating is inconsistent with the regulatory purpose. Such a procedure would be of significant use to agencies that are otherwise required to comply with heightened rulemaking procedures. It would allow public participation in updating, while preventing a single adverse comment from derailing an agency's effort to keep incorporations properly up-to-date.

## IV. PROCEDURAL AND DRAFTING ISSUES

OFR regulations and Chapter six of the DDH[296] establish the policies and procedures agencies must follow to secure OFR approval to publish a rule that incorporates by reference. These requirements provide that an agency must submit a written letter requesting approval twenty working days before it intends to publish the relevant rule.[297] The request must include a draft "of the final rule document that uses the proper language of incorporation,"[298] as well as a copy of the material to be incorporated.[299] Only certain kinds of materials are eligible for incorporation by reference, an issue discussed in greater detail below.[300] The materials must be "[c]learly identified by the title, date, edition, author, publisher, and identification number of the publication,"[301] and the draft rule must use proper incorporation by reference language and include information regarding where the public can view or obtain a copy of the incorporated material.[302] Finally, incorporation by reference language must meet certain formatting requirements.[303]

In some cases, OFR has used specialized procedures, established by long-standing letter agreements with particular agencies, for processing certain types of frequently recurring approval requests. For example, OFR has developed a specialized approval process for the FAA's Airworthiness Directives, which are published nearly every day and almost always incorporate by reference. Similarly, OFR and EPA have established a specialized procedure for EPA's approval via incorporation by reference of State Implementation Plans. In recent years, however, OFR has sought to make its approval process more formal and consistent. Thus, while observing existing let-

296. *See* DDH, *supra* note 240.

297. *See* 1 C.F.R. § 51.5(a)(1) (2011); DDH, *supra note* 240, at 6-3. The DDH provides an example of what an agency's request letter should look like. *Id.* at 6-4.

298. 1 C.F.R. § 51.5(a)(2) (2011); *see also id.* § 51.9 (establishing the proper language of incorporation by reference). The DDH clarifies that a copy of the *draft* rule document should be submitted. DDH, *supra* note 240, at 6-3.

299. *See* 1 C.F.R. § 51.5(a)(3) (2011).

300. *See infra* Part IV.A.

301. DDH, *supra note* 240, at 6-3.

302. *See* 1 C.F.R. §§ 51.1(a)(2), 51.5(a)(2), 51.9 (2011); DDH, *supra note* 240, at 6-5.

303. *See* DDH, *supra note* 240, at 6-7 to 6-11.

ter agreements with agencies, OFR now is no longer creating new, specialized procedures.

OFR provides several resources, including written guidance, training, and staff assistance, to help agencies navigate its process and requirements. The DDH also provides detailed guidance to agencies seeking to publish rules that incorporate by reference. In February 2011, the OFR's Legal Affairs and Policy Staff provided additional guidance on incorporation by reference on the OFR Blog.[304] In a two-part series, OFR staff addressed incorporation by reference generally, as well as particular incorporation by reference issues related to Executive Order 13563, which directed agencies to retrospectively review regulations. If these written guidance materials leave agency personnel confused or with additional questions, OFR provides staff assistance upon request.

Research revealed several procedural and drafting issues that commonly cause problems for agencies seeking to incorporate by reference. These issues included: (1) determining what types of materials are appropriate for incorporation by reference; (2) bringing new and existing regulations into compliance with OFR's relatively recent policies regarding proper formatting for incorporation by reference language; (3) determining the legal effect of secondary references; (4) resolving conflicts between regulations and incorporated materials; and (5) securing timely approval of incorporations by reference. Agencies that reported experiencing the least difficulty with these issues follow identifiable best practices that other agencies should consider adopting.

### *A. Identifying Materials Appropriate for Incorporation*

Material is appropriate for incorporation only if it contributes to, and does not detract from, the usefulness and readability of administrative rules. A regulation should convey clearly what an agency requires of regulated parties, and only incorporate material that provides the tools—such as data, standards, tech-

304. *See Executive Order 13563 and Incorporation by Reference*, OFR BLOG (Feb. 18, 2011), http://www.federalregister.gov/blog/2011/02/executive-order-13563-and-incorporation-by-reference; *What is Incorporation by Reference?*, OFR BLOG (Feb. 17, 2011), http://www.federalregister.gov/blog/2011/02/what-is-incorporation-by-reference.

niques, and so on—necessary for compliance.[305] A regulation should be complete on its face, without the need to resort to incorporated materials to understand the substantive policy established by the regulation. This approach ensures that regulated parties are sufficiently notified of what they must do to comply with the law.[306] When determining whether and how to incorporate by reference, an agency should consider whether the substantive policy established by its rule is complete on its face without referring to the incorporated material.

Material may also be inappropriate for incorporation by reference if it uses voluntary or advisory, rather than mandatory, language. Agencies reported that issues arise when a regulation provides that regulated parties "shall" comply with a voluntary standard indicating that a particular policy "should" be followed. In such a situation, the "should" language signifies that the incorporated standard is merely advisory and not mandatory.[307] Agencies that incorporate such seemingly advisory materials by reference may not be able to enforce regulations as intended. Alternatively, agencies may confuse regulated parties by incorporating by reference material that is phrased as—and was intended by its drafter to be—nonregulatory.[308] Therefore, agencies should carefully review the language used in the material it is considering incorporating by reference to determine whether it is mandatory or merely advisory or voluntary. They should only incorporate by reference materials that use language appropriate for mandatory regulation.

Finally, agencies reported some frustration with OFR policies restricting the incorporation by reference of federal government publications. Material published in the Federal Register or U.S. Code may not be incorporated by reference because it is already

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305. *See* 1 C.F.R. § 51.1(c)(2) (2011).

306. *See, e.g.*, In the Matter of FM Transmitter Site Map Submissions Required by FCC Forms 301 & 340, 1 FCC Rcd. 381 (1986) (allowing rejected license applicants to refile where procedural requirements incorporated by reference were not properly explained in the text of the regulation, but limiting such relief to those who had preserved appeal rights).

307. *See* Sec'y of Labor v. Brown & Root, Inc., 9 BNA OSHC 1027 (No. 76-2938, 1980).

308. An agency should revise a regulation if it concludes that it has incorporated nonregulatory material in error. *See, e.g.*, *Revision of Incorporation by Reference Provisions*, Final Rule, 70 Fed. Reg. 23,002 (to be codified at 14 CFR §§ 71, 97) (removing incorporation by reference of certain nonregulatory documents).

published.[309] Nor are agencies generally permitted to incorporate their own documents by reference, although OFR may waive this prohibition in exceptional circumstances.[310] This rule, as previously explained, prevents agencies from circumventing publication requirements. Agencies further reported that they are not permitted to quote governing statutes in regulations, and are thus forced to paraphrase statutory requirements when promulgating or implementing rules. Agencies worry that such paraphrasing is inefficient, awkward, and confusing with regard to statutory requirements. OFR reported, however, that agencies may cross-reference the CFR and cite to material published in the U.S. Code. They may also use the verbatim language of a statute without using quotation marks. These options may mitigate agency concerns. Thus, agencies should use statutory language or cite the statute when promulgating a regulation implementing that statute's mandate.

### *B. Standardizing Language and Formatting*

Over the last decade, OFR has made a concerted effort to standardize the formatting and language of incorporation to improve the clarity and readability of the Federal Register and CFR. Whereas, in the past, an agency was required to include only the "proper language of incorporation,"[311] OFR now further requires agencies to use specific formatting to do so.[312] If an agency is incorporating a single material in a single regulatory provision, the language of incorporation is included immediately after the first reference to the material.[313] If an agency is incorporating multiple provisions, it may include the language of incorporation immediately following each reference, segregate the language into a separate paragraph, or centralize all incorporation language in a single regulatory section.[314] The regulatory text must always use the phrase "incorporation by reference" and provide complete information on how to access the incorporated material.[315]

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309. *See* 1 C.F.R § 51.7(c) (2011); DDH, *supra* note 240, at 6-3.
310. *See* DDH, *supra* note 240, at 6-3.
311. 1 C.F.R. § 51.9 (2012).
312. *See* DDH, *supra* note 240, at 6-6.
313. *See id.* at 6-7.
314. *See id.* at 6-8.
315. *See id.* at 6-5.

When an agency updates a part of the CFR that contains incorporations that do not conform to OFR's improved formatting and language requirements, OFR asks the agency to bring those older incorporations into compliance. One agency that has responded to OFR's efforts in this respect is NHTSA, which has moved all of its incorporation by reference information to a table located in a single provision of the CFR.[316] Although the project takes some work and is ongoing, it is contributing to the clarity of NHTSA's regulations. As the gatekeeper to the CFR, OFR is the only agency in a position to ensure that such consistency and clarity is achieved throughout the CFR. But it would be very burdensome—for both agencies and OFR—to comprehensively reformat and rewrite all incorporations currently contained in the CFR. As a practical matter, OFR's strategy of asking agencies to reformat incorporation language when they are making other changes to the same part strikes a reasonable balance.

Some agencies, however, have reported that OFR's efforts to standardize incorporation formatting and language have caused confusion and unexpected delays in publishing rules. In some cases, agencies have been caught by surprise when they seek to publish changes to a regulation and OFR asks them to reformat incorporation language in other provisions of the same part. The task can be particularly time-consuming when the part contains multiple or complicated qualified incorporations. Improving communication and cooperation between OFR and individual agencies, as described in greater detail below, may be the best way to address these difficulties.[317]

### *C. Determining the Legal Effect of Secondary References*

In some cases, an agency may incorporate a document that itself incorporates by reference one or more "second-tier" documents. In some cases, the second-tier document may even refer to a third-tier document, and so on. For example, OSHA has proposed incorporating by reference an NFPA standard on combustible dust that "mandates compliance with 36 other NFPA standards" that, "in turn, reference additional stan-

316. *See* 49 C.F.R. § 571.5 (2012).
317. *See infra* Part IV.F.

dards."[318] Such secondary references raise several issues. By incorporating the first-tier document by reference, does the agency require compliance with or indicate its approval of the secondary document? Is the agency legally required to directly incorporate the secondary document by reference into the relevant regulation? If the first-tier document's reference to the second-tier document is undated, which, if any, version of the second-tier document is required? And does the failure to key the second-tier document to a particular version violate OFR's requirement that incorporations by reference be limited to a particular version?

The procedural requirements for incorporation by reference address only a few of the issues raised by secondary references. OFR has taken the position that an agency is procedurally required to properly incorporate by reference only those external standards that it seeks to make mandatory. The staff does not review incorporated documents to determine whether they include secondary references, and does not take a position on the legal effect of any such secondary references. Rather, if asked, OFR encourages individual agencies to evaluate any secondary references and determine for themselves whether it makes sense for them to directly incorporate the secondary documents into the regulation.

Secondary references are relatively common, but few agencies have explicitly considered or taken a position on the substantive issues they raise. One exception is OSHA. In the combustible dust rulemaking noted above, OSHA requested comment on its "concern" regarding "[t]he multitude of mandatory primary references, secondary references, and other subordinate references in each NFPA standard that could result in an unnecessary burden on employers."[319] Another exception is NRC. When NRC incorporated IEEE Standard 603-1991 by reference into Section 50.55a of its regulations, it took the position that, "[a]s a matter of law, the other standards referenced in IEEE Std. 603-1991 are not rulemaking requirements" because "Section 50.55a does not contain language explicitly requiring [their] use" and they "have not been approved for incorporation by reference by the

318. Combustible Dust, 74 Fed. Reg. 54,333, 54,339 (Oct. 21, 2009) (to be codified at 29 C.F.R. § 1910).

319. *Id.* at 54,345.

[OFR]."[320] Whether compliance with a second-tier reference is mandatory may be indicated by the language of the first-tier document, but such language may not always be clear.

When an agency incorporates a document that references a second (or greater)-tier document, the agency should acknowledge, consider, and express a view regarding the substantive legal effect of the secondarily referenced document(s). If the agency wants to make the second-tier document mandatory, it should incorporate it by reference. This will ensure proper notice of regulatory requirements. OFR should consider amending the DDH to highlight the potential issue of secondary references and explain its position. This would bring attention to the issue and encourage agencies to consider and take a position on the legal status of secondary references in appropriate rulemakings.

### *D. Addressing Potential Conflicts*

Another issue agencies identified is the potential for conflict to arise between an agency's regulations and a document it has incorporated by reference. Agencies should consider the possibility that a regulation may conflict with a requirement incorporated by reference and, if possible, should provide guidance to regulated parties regarding how the conflict should be resolved. For example, in its regulations governing the transportation of petroleum gas through pipelines, PHMSA has clearly stated that if its regulations conflict with the ANSI/NFPA standards it has incorporated by reference, the incorporated standards prevail.[321] Agencies may also consider adopting a regulation that establishes a default rule for resolving unforeseeable conflicts between regulatory provisions and incorporated materials. The advantage of a default rule is that it provides regulated parties with concrete guidance when faced with an unforeseeable conflict. On the other hand, such a default rule may not yield an agency's preferred regulatory outcome in particular applications.

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320. Codes and Standards: IEEE National Consensus Standard, Final Rule, 64 Fed. Reg. 17,944, 17,945 (Apr. 13, 1999) (to be codified at 10 C.F.R. § 50).

321. 49 C.F.R. § 192.11(c) (2011).

### *E. Securing Timely Approval from the Office of the Federal Register*

OFR has twenty working days to complete its review process, and an agency cannot publish a regulation that incorporates by reference until OFR completes its review and grants approval.[322] Requests for approval "do not qualify for expedited processing."[323] If a request is denied, the agency must resubmit it, at which point the twenty day period starts over. The practical implication is that agencies must submit requests for approval no less than twenty working days before they want to publish the relevant rule.[324] If a rule contains multiple incorporations by reference or is complicated by an agency's qualified approval of the incorporated material (for example, the agency is incorporating only parts of a standard or is incorporating it with specified modifications or additions), it may be prudent to submit the request even earlier.

My research revealed several instances in which the publication of a rule was delayed because agencies did not comply with OFR's incorporation by reference requirements. In some cases, agencies were unaware of the twenty-day process or simply failed to submit their application to OFR before filing a rule for publication.[325] This can be particularly problematic when the agency is subject to a congressional or other deadline for publishing the rule in question. The Legal Policy staff, which processes all incorporation by reference requests and is also charged with a multitude of other tasks, consists of only three employees. While OFR staff make every effort to prioritize requests for approval that are submitted late, it is not always possible to do the work necessary to secure approval in a shortened timeframe. Publication can also be delayed if an agency submits an incomplete request for approval. Preparing an application for approval requires adherence to highly technical requirements and meticu-

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322. *See* 1 C.F.R. §§ 51.3(b), 51.5(a)(1) (2011).

323. DDH, *supra* note 240, at 6-3.

324. *See, e.g.*, 1 C.F.R. § 51.5(a)(1) (2011) (requiring agencies to "[m]ake a written request for approval at least 20 working days before the agency intends to submit the final rule document for publication").

325. The DDH warns that "[s]ince this is a technical subject area, it sometimes creates confusion that can significantly delay [incorporation by reference] request review and approval of your final rule document." *See* DDH, *supra* note 240, at 6-1.

lous attention to detail. This is especially true if the rule contains multiple or qualified incorporations by reference.

Improved communication and cooperation between OFR and individual agencies may be the best way to address these issues and prevent delays in publishing rules. This approach is examined in the next section.

### *F. Making the Process Work Better*

Agencies that have experienced few or no problems with OFR's incorporation by reference requirements consistently reported that they had established good communication and working relationships with OFR. A few tactics were reported as being particularly successful.

First, each agency should designate its OFR liaison or another employee as the single point of contact with OFR to maintain a close working relationship between the two agencies. Several agencies have tasked just one or two people with submitting all requests for incorporation by reference. This person may be the agency's OFR liaison officer[326] or a member of the agency's legal or rulemaking staff. The advantage is that this person becomes an expert in OFR policy and can form good working relationships with OFR staff.

Second, agencies should find a way to get legal counsel or other experts in OFR policy involved early in the rulemaking process. One agency, the Coast Guard, uses a very effective team approach to rulemaking. Each team is assigned legal counsel early in the process. This ensures that someone involved in the rulemaking from the beginning is well versed in incorporation by reference (and other legal) requirements, enabling the agency to prepare a timely and complete request for approval. The EPA takes a slightly different approach, including incorporation by reference issues in its comprehensive internal rulemaking guidance, which provides employees with a flowchart of issues that must be addressed during rulemaking.[327]

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326. *See, e.g.*, 1 C.F.R. § 16.1(a)(1) (2011) (requiring agencies to designate a liaison officer); *id.* § 16.2 (specifying the duties of the liaison).

327. *See* EPA, EPA'S ACTION DEVELOPMENT PROCESS: GUIDANCE ON EXECUTIVE ORDER 13132: FEDERALISM, 8, 39, 53 (2008), *available at* http://www.govexec.com/pdfs/111908rb1.pdf; *see also* CATHERINE M. SHARKEY, FEDERAL AGENCY PREEMPTION OF STATE LAW (2010), *available at* http://www.acus.gov/wp-content/uploads/

Third, agencies should reach out to OFR early in the rulemaking process. OFR's regulations require it to assist agencies in publishing,[328] and the DDH "encourages regulation drafters and agency liaisons to contact [OFR staff] as early as possible when considering using an incorporation by reference in a regulation."[329] OFR and some agencies reported that taking advantage of this opportunity reduced or eliminated problems and delays in securing approval for incorporations by reference.

Fourth, agencies should take advantage of OFR training opportunities. OFR offers general publication training to agencies and has provided incorporation by reference training when requested. Agencies that have multiple offices or departments, or large rulemaking staffs, frequently incorporate by reference, and have experienced difficulties with the approval process should consider working with OFR to set up a training session.

Finally, agencies should adhere closely to the DDH. Agency staff who will be responsible for submitting requests for approval to OFR should read and pay close attention to the guidance provided in the DDH. If something is unclear, they should reach out to OFR for clarification as early as possible.

Agencies that reported difficulties with OFR's incorporation by reference process and requirements can best address those issues by taking these steps to improve communication and establish a working relationship with OFR staff. Doing so would prevent confusion, surprise, and delays in publication, while facilitating the OFR's good efforts to make the CFR more consistent and readable. It would also help ensure that agencies secure timely approval of incorporations by reference.

OFR is currently testing an electronic method of submitting and processing incorporation by reference requests that holds significant promise to improve the process. The method uses an FTP server, to which agencies may upload electronic copies of their

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downloads/2011/02/Sharkey-Final-ACUS-Report_12_20.pdf (last visited Nov. 22, 2011).

328. *See, e.g.*, 1 C.F.R. § 15.1 (2011) (requiring the Director of the Federal Register to assist agencies in publication); *id.* § 15.3 (requiring OFR staff to "provide informal assistance and advice to officials of the various agencies with respect to general or specific programs of regulatory drafting, procedures, and promulgation practices"); *id.* § 51.5(b) ("Agencies may consult with the [OFR] at any time with respect to the [incorporation by reference] requirements.").

329. DDH, *supra* note 240, at 6-1.

written requests for approval, final rule documents, and copies of the material to be incorporated. Agencies can create different folders on the server for different requests, and OFR can upload documents (for example, redlines of incorporation language in draft final rules) as they work with agencies towards approval. Only the OFR staff, however, is able to delete documents from the server. OFR staff and participating agencies have reported that the procedure is working well so far. One particular advantage is the ability to submit incorporated documents in electronic form. This feature saves time and money by eliminating the need to deliver large amounts of paper (in some cases, a publication may occupy one or more boxes when printed) to the OFR. It is also a convenient innovation as agencies are increasingly using electronic copies of standards themselves, and only obtain a paper copy for submission to OFR.[330] OFR should continue to expand upon its efforts to transition to an electronic submission and review process for incorporation by reference requests.

## CONCLUSION

Over the past several decades, as incorporation by reference in the CFR has become more common, issues with the practice have emerged. Although these issues affect all agencies that incorporate by reference, different agencies have used different approaches to address them. Some of those approaches have proven more effective than others, for identifiable reasons. Using the information provided in this Article, other agencies should consider whether they too could use those techniques to improve the practice of incorporation by reference. Particularly with respect to the public access problem, such agency efforts are needed to reconcile incorporation by reference to the demands of modern regulatory values.

330. The OFR public inspection room is equipped with computer terminals, on which members of the public can view incorporated materials stored in electronic form. Omitting the requirement that an agency submit a paper copy of an incorporated document thus does not impair public inspection.