

AMERICAN BAR ASSOCIATION

**SECTION OF ADMINISTRATIVE LAW AND REGULATORY
PRACTICE**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to amend 5 U.S.C.
2 Section 552(a)(1) of the Freedom of Information Act (FOIA) to require that when a
3 standard drafted by a private organization is exempted from Federal Register publication
4 because it has been “incorporated by reference” (IBR) into a substantive rule of general
5 applicability, the rulemaking agency must ensure meaningful free public availability of
6 the incorporated text, such as through online access in a centralized online location or
7 access in all government depository libraries.

8
9 FURTHER RESOLVED, That the American Bar Association urges Congress to amend
10 5 U.S.C. Section 553, the Administrative Procedure Act’s rulemaking provisions, to
11 require meaningful free public availability of a proposed IBR standard’s text during the
12 public comment period.

13
14 FURTHER RESOLVED, That the American Bar Association urges Congress to ensure
15 that private organizations, where appropriate, have access to compensation for financial
16 losses attributable to making their standards publicly available.

REPORT

I. INTRODUCTION AND BACKGROUND

For over two centuries, the United States has maintained a constitutive tradition of meaningful free access to our binding laws: that all citizens should be able to see the law is bedrock. Since the 1800s, Congress has provided free public access to federal statutes and, since the 1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System.¹ Congress further deepened the tradition by requiring the Government Printing Office to make available universal online access to statutes and regulations² and then requiring online public access to other government documents and materials in the Electronic Freedom of Information Act Amendments in 1996 and the e-Government Act of 2002.³

For numerous federal rules, however, public access is far from assured; these rules can be difficult to find and costly to read. The Freedom of Information Act generally requires Federal Register publication for all agency “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.”⁴ However, it allows, in the so-called “incorporation by reference” provision of 5 U.S.C. § 552(a)(1), that “matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”⁵

To save resources and build on private expertise, federal agencies have, on numerous occasions, worked with private organizations, incorporating privately drafted standards by reference into thousands of federal regulations. The Office of the Federal Register (OFR) must approve all agency incorporations by reference, but the Freedom of Information Act provides no further specifics on what level of access might be understood to make a particular standard “reasonably available” and thus eligible for incorporation by reference. Meanwhile, OFR has declined to define “reasonably available” in its regulations, despite its statutory responsibility to approve agency

¹ See H.R. Journal, 3d Cong., 2d Sess. 328-39 (1795) (describing Act of Mar. 3, 1795), Act of Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381.

² 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as “incremental costs of dissemination” and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.

³ Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (1996); E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)-(d), 207(f), 116 Stat. 2899, 2915-16, 2918-19 (codified as amended at 44 U.S.C. § 3501 note (2006)).

⁴ 5 U.S.C. § 552(a)(1).

⁵ *Id.*

incorporations.⁶ See 1 C.F.R. 51.7(a). Research also has revealed no public consideration by OFR of access charges to incorporated standards.⁷

The Code of the Federal Register (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These “IBR rules” have the same legal force as any other government rule. Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by so-called “standards development organizations,” or “SDOs.”⁸ Standards development organizations range from the Society of Automotive Engineers to the American Petroleum Institute. As the Office of the Federal Register has explained, “[t]he legal effect of incorporation by references is that the material is treated as if it were published in the *Federal Register* and CFR. This material, like any other properly issued rule, has the force and effect of law. . . mak[ing] privately developed technical standards Federally enforceable.”⁹

Federal agencies seek to use privately-drafted IBR standards on subjects ranging from toy safety,¹⁰ crib, toddler bed, and stroller safety, safety standards for vehicle windshields (so they withstand fracture),¹¹ placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf,¹² and food additive standards,¹³ to

⁶ See Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov., 7, 2014) (final rule). Beyond that, the OFR Director is to assess whether incorporation would “substantially reduce the volume of material published in the Federal Register,” and whether the material is “usable,” considering “the completeness and ease of handling of the publication; and . . . [w]hether it is bound, numbered, and organized.” 1 C.F.R. 51.7(a). In the digital age, these requirements now would seem to serve little purpose.

⁷ E.g. Consumer Product Safety Commission, *Children’s Gasoline Burn Prevention Act* Regulation, 80 Fed. Reg. 16,961, 16,962-63 (Mar. 31, 2015) (OFR approval of incorporation by reference of ASTM F2517-15 despite lack of free access); www.astm.org (charging \$43 for standard; unavailable in reading room). As of November, 2014, an agency requesting approval of incorporation by reference must itself discuss how the materials are “reasonably available to interested parties.” 1 C.F.R. 51.5(a)(1), but it is unclear whether the OFR will make any independent determination on that question or simply defer to the agency.

⁸ Emily J. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J. L. & Pub. Pol’y 131 (2013); Nina Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737 (2014); Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

⁹ <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why>. In some instances, as discussed below, a regulated entity might be able to argue that the lack of public access undermines notice sufficiently to prevent federal enforcement.

¹⁰ E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children’s use, incorporating by reference National Fire Protection Association and ANSI standards)

¹¹ 49 C.F.R. § 571.2015.

¹² 30 C.F.R. 250.108 (incorporating by reference American Petroleum Institute Recommended Practice 2D).

¹³ See 21 C.F.R. § 172.831 (sucralose regulation, incorporating by reference the Food Chemical Codex, 4th edition).

operating storage requirements for propane tanks, aimed at limiting the tank's potential to leak or explode.¹⁴ Executive policy, embodied in Circular A-119, now encourages agencies to contribute funds to private standards drafting as well as informal agency staff participation in the SDO process.

Meanwhile, public access to such standards can be extremely difficult, as it is typically impeded by privately set access charges. Unlike the U.S. Code and the rest of the C.F.R., there is no assured free access to IBR rules either online or in the nearly 1800 government depository libraries. Under OFR's approach, these standards can be freely read by the public in the Washington, D.C. reading room of the Office of the Federal Register, but only by written request for an appointment.¹⁵ Apart from this, OFR refers the public to the SDO. These IBR standards accordingly are strewn across many individually-maintained private websites. SDOs also can set a fee for access, typically one that far exceeds the transactions costs, such as copying costs, of making a standard available.

Membership in an SDO usually affords discounted access to its standards, but such memberships are costly; for example, the American National Standards Institute charges \$ 750 per year. Otherwise, access to an individual standard can range from \$40 to upwards of \$1000. The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at \$72;¹⁶ the incorporated safety standard for hand-held infant carriers is \$43,¹⁷ and the current edition of the Food Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at \$ 499.¹⁸ As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is \$150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly \$10,000 as of September 2014.¹⁹ The cost of reading the two newly-incorporated-by-reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is \$ 213.²⁰

¹⁴ 26 C.F.R. 1910.110(b)(3)(i) (incorporating by reference American Society for Mechanical Engineers' Boiler and Pressure Vessel Code (1968 edition)).

¹⁵ See Office of the Federal Register, "Where to Find Materials Incorporated by Reference at NARA Facilities," available at <http://www.archives.gov/federal-register/cfr/ibr-locations.html#why>. Rulemaking agencies also sometimes make the text of IBR rules available for inspection in their own reading rooms, again, typically located in Washington, D.C.

¹⁶ See 29 CFR 1926.602(a)(2)(i) (incorporating Society of Automotive Engineers Standard J386-1969); standards.sae.org/j386_196903/. The price of \$72 is for the current revision of Standard J386. It is unclear whether the 1969 version can be accessed at all on SAE's website.

¹⁷ See 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); www.astm.org. The standard is inexplicably absent from the online reading room ASTM maintains for government-incorporated standards.

¹⁸ See 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); https://store.usp.org/OA_HTML/ibeCCTpItnDspRte.jsp?item=344067.

¹⁹ Emily Bremer, On the Cost of Private Standards in Public Law, 63 U. Kansas L. Rev. 279 (2015).

²⁰ See Nuclear Regulatory Commission, Revisions to Transportation Safety Requirements and Harmonization with International Atomic Energy Agency Transportation Requirements, 80

The SDOs have no obligation to make standards available at any price, and some standards, particularly older ones, are now simply unavailable from the SDOs. On the other hand, SDOs occasionally charge more for an older version than an agency has incorporated by reference into binding law—a reflection of the newly conferred monopoly value—than for the SDO’s current version of those same standards.²¹

As publicly-filed comments and other public sources indicate, the fees charged for IBR rules significantly obstruct citizens and entities from seeing the text of this law. Regulated entities needing access to incorporated standards are often small businesses for whom the mass of necessary standards may be a significant cost.²² For example, as the Modification and Replacement Parts Association commented in response to the petition for rulemaking, “The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees”²³

And given the access fees charged, members of the public affected by regulatory frameworks relying upon IBR rules likely cannot afford to read these standards. For

Fed. Reg. 33,988, 34,010-11 (June 12, 2015) (reciting charges for incorporated by reference standards).

²¹ For example, the American Herbal Products Association charges \$250 for a digital-rights-protected copy of the first edition of its *Herbs of Commerce*, use of which is a legal obligation under FDA regulations; the more recent second edition, a “must-have” for anyone in the business but not yet made legally obligatory, can be bought as a book for \$99. Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

²² Public comments filed with the Office of Federal Register made this problem clear. The National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR’s notice of proposed rule that the costs of acquiring access “can be significant for small businesses in a highly regulated environment, such as the propane industry.” See Comments of Robert Helminiak, National Propane Gas Ass’n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 (“Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers . . . [T]he ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards.”); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (small businesses “have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. . . . [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a ‘dent’ was. . . . HM241 could impact up to 41,366 parties and . . . there is no limit on how much the bodies could charge”); Comments of American Foundry Society, NARA-2012-0002-0147 (“\$ 75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg . . .”).

²³ See Comment of the Modification & Replacement Parts Ass’n 14 (Regulations.Gov, filed June 1, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf>

example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.²⁴

In a positive development, some of the many SDOs have begun to create online reading rooms in which IBR rules can be viewed without payment of a fee. But standards are still very hard to locate, not consistently available, and readers must identify themselves, waive a variety of rights, and even agree to objectionable conditions, including broad indemnification and forum selection clauses, in order to see the text of the rules. And SDOs uniformly reserve the right to revoke the access at will. This insufficiently assures meaningful public access.

Agency use of IBR rules raises two particularly pressing issues. The first is the lack of consistent and meaningful public access to the text of these binding federal rules. While IBR rules are not formally secret, the financial obstacles that must be overcome to read the text undermine any notion of meaningful public availability. Second, the lack of access to proposed IBR rules, as well as supporting data, undermines the public's right to comment on proposed agency rules under the Administrative Procedure Act.

The present resolution would put the ABA on record in support of the principle of meaningful public access to law, as well as public participation in federal regulation. The ABA should speak now for two reasons: First, as described below, the Office of the Federal Register has recently declined an opportunity to use its Freedom of Information Act implementation powers to effectuate these principles. Second, agency use of privately-drafted rules is likely to increase, given continuing agency resource constraints, as well as executive and congressional policy favoring agency use of privately drafted rules in preference to "government-unique" rules.²⁵ Unfortunately, neither policy has directly engaged the resulting public access problems.²⁶ Only Congressional action will remedy this unsatisfactory situation. A clear and strong statement by the ABA on the topic should help prompt such action.

²⁴ E.g., Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes "many Vermont seniors" from accessing materials). See also Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that "free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . . and strengthen citizen participation in our democracy"); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers).

²⁵ See National Technology Transfer and Advancement Act of 1995, sec. 12(d), 15 U.S.C. § 272 note (2012); Office of Mgmt & Budget, Circular A-119 Revised; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), available at http://whitehouse.gov/omb/circulars_a119.

²⁶ Concerns about the pitfalls of incorporation by reference were also highlighted in a recent recommendation of the Administrative Conference. See ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (2012).

II. DISCUSSION

A. The Bedrock Principle of Public Access to the Law Should Be Reaffirmed in the IBR Rules Setting

IBR rules are not formally “secret”—access is not prohibited outright. Self-evidently, however, the cost of reading it, together with the difficulty of finding it, render these standards inaccessible to the public. At root, there must be meaningful free access to all incorporated rules, if the evils of “secret law” that the Freedom of Information Act was established to resist are to be avoided. In the words of Columbia Law Professor Peter Strauss, joined by numerous other professors: “[I]n the age of information, secret law, that the public must pay for to know, is unacceptable.”²⁷ The ABA accordingly should resolve that the Freedom of Information Act be clarified to ensure meaningful levels of free public access to all binding law.

1. As the authors and owners of the law, the public has a right to know it

First, free public access to the law is essential in a democratic society. As the 5th Circuit explained in *Veeck v. Southern Bldg. Code Cong. Int'l*, free public access to the law serves “the very important and practical policy that citizens must have free access to the laws which govern them” if they are to be able to conform their conduct to them.²⁸ *Veeck* relied principally on the Supreme Court’s holding in *Banks v. Manchester* that “[i]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes.”²⁹ As explained in *Veeck*, these justifications are not simply “due process” arguments. Rather, they rest on the idea that “public ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it.”³⁰

This “right to know” accrues to *all* citizens, not just those who must conform their conduct to the law. Broad public access to IBR material, is as important as access by directly regulated entities. “Th[e] ‘metaphorical concept of citizen authorship’” requires free public access to the law as a foundation to a legitimate democratic society. “The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public,

²⁷ Incorporation by Reference, 77 Fed. Reg. 11,414, 11,415 (Feb. 27, 2012) (posting of law professors’ petition to revise IBR rules; seeking comment on same).

²⁸ 293 F.3d 791, 795-800 (5th Cir. 2002) (en banc).

²⁹ See 128 U.S. 244, 253 (1888) (quoting *Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886)).

³⁰ 293 F.3d at 799.

expressed through the democratic process.”³¹ Thus, even those who need not conform their conduct to regulatory requirements have a right to know. As public comments filed to the Office of the Federal Register and the Office of Management and Budget make clear, the public has an interest in reading IBR material.³²

Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving – or not serving – the public interest. As President Obama stated in his Memorandum on Transparency and Open Government, on January 21, 2009: “Transparency promotes accountability and provides information for citizens about what their Government is doing.” This transparency, including public access to the content of regulations, is a critical safeguard against agency capture and other governance problems. Transparency regarding the content of IBR standards is particularly important when that material has been prepared, in the first instance, by private organizations rather than governmental agencies – as when, for example, natural gas pipeline safety rules and offshore oil drilling rules incorporate standards drafted by the American Petroleum Institute, and even when motor vehicle safety standards incorporate standards drafted by the Society of Automotive Engineers. We note that regulatory standards created by industry associations such as the API, compared with professionally focused organizations such as ASME, the American Society of Mechanical Engineers, may raise particular concerns warranting public awareness. Still, this is not to criticize any particular standard or organization, but to emphasize that transparency and ready access are critical to ensuring that the government makes proper use of *all* incorporated material and that adopted standards do, in fact, protect the public interest as required by statute. And as the 5th Circuit pointed out in *Veeck*, citizens need access to the law not only to guide their actions and to hold the government accountable, but “to influence future legislation” and to educate others.³³

2. Limits on public access raise constitutional difficulties

The current system may raise constitutional difficulties by allowing agencies to reference incorporated material, when the public must pay to see that material. (Travel to a Washington, D.C., reading room will not, for most, be a viable alternative.) First, impediments to a regulated entity’s ability to access government standards raises due

³¹ *Veeck*, 293 F.3d at 799 (quoting *Building Officials & Code Adm. v. Code Technology*, 628 F.2d 730, 734 (1st Cir. 1980)).

³² See *supra* note 24 (Vermont Legal Services comment); NARA-12-0002-0140 (Consumers Union, emphasizing the need for free access to standards to notify the CPSC and warn consumers regarding unsafe products); OMB-2012-0003-0074 (public interest organizations, including environmental, watchdog, and library organizations, emphasizing need for free access to engage government and public on range of public policy issues); NARA-12-0002 (“A concerned Citizen,” noting that knowledge of airbag standards allows citizen to be “a more educated consumer”). Public comments on access issues were filed in an Office of the Federal Register rulemaking on whether to revise its criteria for revising IBR rules; comments also were filed in a 2012 Office of Management Budget proceeding on whether to revise Circular A-119. As of October 2015, Circular A-119 remains unrevised.

³³ 293 F.3d at 799.

process concerns. As noted, small businesses have complained that the access fees charged to read the text of the law can be a significant obstacle to their ability to learn their legal obligations. In the context of whether to sustain a changed agency interpretation of a rule, the Supreme Court has endorsed “the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires,’” and that due process thus bars the imposition of sanctions upon someone who could not have received notice of his or her obligations.³⁴

The current use by agencies of incorporated private material without meaningful public access is constitutionally suspect for a second reason as well. The public cannot discuss or criticize the government’s decisions if the substance of those decisions is not available. As the Supreme Court noted in refusing to uphold a statute that would close criminal trials, “‘a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.’ [This] serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”³⁵ The potential significant charges to read IBR standards raises heightened constitutional concerns, because the thousands of IBR standards are wide-ranging in subject, affecting numerous industries, and quasi-legislative in character, with broad and prospective effect. An assurance of free access only in a Washington, D.C. reading room is insufficient. The obstacles to access that must be overcome -- the charges and travel impediments -- effectively deny the public’s right to know and discuss government actions. Legislative history accompanying the Freedom of Information Act draws the same link: “‘The right to speak and the right to print, without the right to know, are pretty empty.’” *See* H. Rept. No. 1497, 89th Cong., 2d Session 2 (1966) (quoting Dr. Harold Cross). Significant access charges for regulatory standards are a real obstacle to knowing their content, and indeed, the Supreme Court has invalidated much smaller charges as inconsistent with similar core principles of democratic government, such as the right to vote.³⁶

³⁴ *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012) (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)(Scalia, J).

³⁵ *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (US 1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see also *Press Enterprise v. Superior Court*, 478 U.S. 1 (1986) (refusing to approve closure of preliminary hearing). *Cf. In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005) (“Only the most compelling reasons can justify non-disclosure of judicial records.”); *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) (“[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. By reporting about the government, the media are ‘surrogates for the public.’”) (requiring consideration of public right of access to view Bureau of Land Management horse roundups).

³⁶ *Cf. Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-68 (1966) (invalidating state \$1.50 poll tax as effective denial of right to vote). OFR’s approval of IBR rules under this system of private fees may also raise equal protection concerns, given the central importance, in a democracy, of public access to the law’s text. In other settings, the courts have relied on equal protection grounds to invalidate comparable fees imposed upon participation in government. *Harper v. Virginia Bd. Of Elections*, *supra*; *Lubin v. Panish*, 415 U.S. 710, 717–18 (1974) (striking down \$701 filing fee requirement for California election, given “our tradition . . . of

3. IBR rules must be broadly available; assuring meaningful free access only to regulated entities is insufficient

The need for public notice of the contents of federal regulations goes well beyond the regulated entities tasked with complying with them. Congress enacts regulatory statutes specifically to guard wide swaths of the public, and the public accordingly has a specific interest in the content of rules. Consumers of food and toys, parents who wish to purchase infant carriers, strollers, walkers, or infant bath seats, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline or propane tank – all of these individuals are obviously affected by these standards, and should be entitled to notice of them. For one last example, the Department of Transportation Pipeline and Hazardous Materials Safety Administration requires natural gas pipeline operators to institute “public awareness programs” to provide public information and public communications regarding spills according to an IBR standard of the American Petroleum Institute. 49 C.F.R. § 192.616 (incorporating API Standard 1162). Community members who reside near natural gas pipelines at risk from a spill are obviously affected by the scope of public communication requirements. Standards such as these must be meaningfully available both to pipeline operators and to the community. The content of these standards can affect individual choices of which toys or infant carriers to buy, where to live, and whether to file public comments with the regulating agency or write one’s member of Congress. In short, regulatory beneficiaries have a cognizable stake in these standards, and the content of the standards can affect their conduct. They therefore need notice of the text as well; meaningful public access without cost has to be understood as essential.

4. The public must be able to locate the law.

Public access principles require not only the provision of meaningful free access to the text of the law, but that the law be reasonably easy to locate. IBR rules are referenced in the Code of Federal Regulations, but the text of the rules is often very hard to find. IBR rules are distributed across a wide variety of differently-organized websites, and neither the online CFR nor Federal Register typically contains any sort of specific link to the IBR rule’s text. The current distribution of IBR rules in numerous locations makes each obscure, raising the same sorts of concerns that prompted the passage of the Federal Register Act.³⁷ Further, although agencies are required to “summarize” in the preamble to a final rule “the material it incorporates by reference,”³⁸ that summary does not include the full text, and in any event, preambles are published neither in the Code of

hospitality toward all candidates without regard to their economic status.”). For many rules, moreover, budget constraints may be connected with substantive interests; access constraints will distinctively, systematically disadvantage those interests. For example, consumers will likely have smaller budgets than manufacturers; neighbors to a pipeline will likely have smaller budgets than the pipeline operator.

³⁷ Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 204, 205, 294 (1934) (distribution of federal rules among “pamphlets” or upon a “single sheet of paper” amounted to “chaos” and an “intolerable” situation). See Federal Register Act of 1935, 74 Pub. L. 220, 49 Stat. 500-503 (H.R. 6323) July 26, 1935.

³⁸ 1 CFR 51.5(a)(2); 1 CFR 51.5(b)(3) (2015).

Federal Regulations nor on agency websites containing regulations. The ABA accordingly should resolve not only that meaningful levels of free access be provided to IBR rules, but that such access enable the public to readily find the text of those rules.

5. Current law as implemented has failed to ensure sufficient public access to the law

One might think that these interests would already be protected under the Freedom of Information Act's Section 552, which requires, as a condition of Office of Federal Register approval of incorporation by reference, that incorporated material be "reasonably available" to the "class of persons affected thereby." 5 U.S.C. § 552(a)(1). Indeed, the legislative history accompanying 5 U.S.C. § 552's incorporation by reference provisions made clear its concern with widespread public access, not simply that the IBR material would not be formally secret: "*Any member of the public* must be able to familiarize himself with the enumerated items . . . by the use of the Federal Register, or the statutory standards mentioned above will not have been met." S. Rep. No. 1219, 88th Cong., 2d Sess. 5 (1964) (emphasis added).

Arguments could be made that the Freedom of Information Act's "reasonably available" language, particularly in this age of information, already requires meaningful levels of free access to all incorporated standards not only to regulated entities, but to regulatory beneficiaries and the public at large. Implementation, however, has fallen far short of this understanding. In November 2013, the Office of the Federal Register began a rulemaking on its "incorporation by reference" approval procedures in response to a 2012 rulemaking petition led by Columbia Law School Professor Peter L. Strauss and joined by numerous law professors. The petition had asked OFR to approve IBR rules only if free read-only access to the text were provided to the public.³⁹ Despite embarking on a rulemaking, OFR ultimately declined to significantly revise its approach.⁴⁰ The Office of Federal Register has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.

Accordingly, Congressional action to clarify the requirements of the Freedom of Information Act and the Administrative Procedure Act is now critical.

6. Other concerns do not justify sacrificing the bedrock principle of ensuring meaningful public access to the law

SDOs typically favor and sometimes even seek having their privately drafted standards adopted as the law of the land, and agencies undoubtedly find it useful to draw

³⁹ See Office of the Federal Register, Incorporation by Reference (Partial Grant of Petition, Notice of Proposed Rulemaking), 78 Fed. Reg. 60,784 (Oct. 2, 2013).

⁴⁰ Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain "the ways that the materials it incorporates by reference are reasonably available to interested parties" and "summarize" the incorporated material. See 1 C.F.R. 51.5(b)(2), (3).

upon this stock of standards. But SDOs also have raised concerns that agreeing to meaningful free public access will result in undercompensation for the cost of preparing these standards even if SDOs can still sell books of standards to the public.

These standards surely can be valuable, and SDOs consistently claim a copyright in them. The ABA need not resolve that the considerations that mandate meaningful public availability of incorporated standards necessarily require invalidation of the SDOs' copyrights in those standards. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and accordingly is beyond the scope of the Resolution.⁴¹ Very often, so little of a full SDO standard is incorporated by reference as to constitute fair use, and to defeat any claim that publication of the incorporated material would diminish the value of the whole. Agencies can be encouraged to minimize the extent of their incorporations to this end. Moreover, legislation to implement this resolution could also address the issue, such as by clarifying the continuing validity of copyrights in IBR materials made publicly available as recommended here or by addressing compensation an agency could offer an SDO for the use of its privately drafted standards.⁴² Some SDOs affirmatively seek incorporation by reference of their standards; others receive financial contributions from agencies specifically to finish a particular standard that the agency can then incorporate; some may benefit because there is a larger market for either their current or superseded standards.

Providing some level of meaningful free public access to these standards, such as through online access or in government depository libraries, does seem unlikely to impair the future development of these standards or the ability of agencies to incorporate them. As noted, some SDOs have recently set up free online reading rooms for their standards

⁴¹ See *Veeck v. Southern Building Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. en banc 2002), *cert. denied*, 537 U.S. 1043 (2002); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), *cert. denied*, 522 U.S. 933 (1997); *CCC Information Svc v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).

⁴² Though the law in this area is far from clear, an agency that republishes the text of a copyright-protected standard, over the drafting organization's objection and with harm to the standard's commercial value, could, under some circumstances, lose a "fair use" claim and instead face copyright infringement liability or even liability for taking property without just compensation. 28 U.S.C. § 1498(b) (2006); *see generally* Office of Legal Counsel, U.S. Department of Justice, *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 3390240 (1999), at * 3-4 ("The case law provides very little guidance, [but] there is no basis for concluding that the photocopying . . . by the federal government automatically . . . constitutes a fair use."); *id.* at *11 (concluding that although government photocopying can be "noninfringing," there is no 'per se' rule protecting government reproduction of copyrighted material). Perhaps because of the potential legal risks, we are unaware of cases in which agencies have published the text of standards over the objection of the SDO. *Cf.* Office of Management and Budget Circular A-119, 63 Fed. Reg. 8555 (Feb. 19, 1998) (calling on an agency publishing a voluntary standard to "observe and protect the rights of the copyright holder and any other similar obligations").

that have been incorporated by reference. These actions blunt any concern that the supply of voluntary consensus standards on which agencies can draw will be significantly impacted if some level of free public access to the text is required. SDOs will still be able to earn revenue by selling books of standards, and demand may increase as a result of government incorporation of such standards. In addition, there may be other solutions to this concern, whether through agency negotiation with SDOs or payments to them. Agencies already can and do contribute funds to the SDO standards development process, and executive policy encourages agency staff participation in the SDO process.⁴³

Agencies should seek the SDO's agreement to meaningful public access prior to utilizing a privately drafted standard. Under some circumstances, it may be appropriate for an agency to offer an SDO compensation for use of a standard as part of reaching an agreement.⁴⁴ Accordingly, the Resolution urges Congress to provide for such compensation.

On the other hand, it is abundantly clear that requiring individuals to pay a significant fee, or to travel to Washington, D.C., to see the text of the binding law, substantially burdens public access. The potential need in some cases for agencies to offer compensation to the drafters of private standards to ensure public access to the text should not defeat the obligation of government agencies to make legally binding regulations available to the public.

The Resolution does not suggest any specific resolution of these concerns. Instead, the ABA should simply resolve that Congress enact legislation that at its core bars the outcome that requires a reader to pay significant fees in order to read the binding law of the land.

B. To effectuate the statutory right to participate in rulemaking, the Administrative Procedure Act should be clarified to ensure that the public receives meaningful access to the substance of a proposed IBR rule.

⁴³ Office of Mgmt. & Budget, Circular No. A-119 Revised: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), available at http://www.whitehouse.gov/omb/circulars_a119.

Both the NTTAA and OMB Circular A-119 affirmatively encourage agency staff participation in the SDO processes that develop standards, *see* Pub. L. 104-113, sec. 12(d)(2) (Mar. 7, 1996), and Circular A-119 also contemplates financial contributions of the SDO process. While this may be sensible, in the absence of public access to SDO materials, it can have two problematic consequences. First, it leaves understanding of supporting science and rationales in private hands, thus evading the APA's public notice-and-comment rulemaking process not only by concealing what is being proposed, but also by hiding the support for it. Second, it creates the appearance, and potentially the reality, of agency staff promoting a regulatory agenda in an effectively *ex parte* context.

⁴⁴ Such opportunity for compensation, if Congress were to make it available, should not be understood to foreclose an SDO's ability to seek compensation by other means if necessary. *See supra* note 41.

As well-established elements of the rulemaking process require, an agency's notice of proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment.⁴⁵ These procedural requirements, which are fundamental to ensuring the continued validity and legitimacy of agency rulemaking, require that "interested persons" must be able to participate in rulemaking by submitting "data, views, or arguments" -- public comments--to the agency.⁴⁶ An "interested person" cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed.⁴⁷ Requiring an "interested person" to pay a fee to learn the content of a proposed rule is a significant obstacle impeding that person's right to comment under Section 553(c).

III. CONCLUSION

In short, the ABA should resolve—simply—three propositions. First, the ABA should resolve that the Freedom of Information Act be clarified to require meaningful levels of free public access to the text of all binding law. That meaningful free public access could be provided online, for example, or in depository libraries. To ensure that the public can readily locate IBR standards, the access ought to be in a centralized location. If not the government depository library system or live online links in the Code of Federal Regulations, IBR standards at least should be available through a single federally-maintained website. To the extent any disruption would be triggered by this Resolution—perhaps an agency might have to negotiate some level of public access as a condition of incorporating a particular standard by reference or provide compensation to an SDO for financial losses occasioned by the use of its standard—the impact is worth bearing in order to bring FOIA's standard of "reasonabl[e] availabil[ity]" into the Information Age and to effectuate the bedrock principle that the law, in a democracy, must be meaningfully available to the public.

And second, no standard should become part of binding federal regulatory law without the public being assured of the full opportunity to participate normally afforded by section 553 of the Administrative Procedure Act. Therefore, the ABA should resolve that section 553 be clarified to require meaningful free public availability, during the public comment period, of a proposed IBR standard's text.⁴⁸

⁴⁵ 5 U.S.C. § 553(b)(3); *Long Island Care at Home v. Coke* 551 U.S. 158, 174 (2007) ("The object [of 553(b)], in short, is one of fair notice.").

⁴⁶ 5 U.S.C. § 553(c).

⁴⁷ Cf. *Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (requiring agencies to disclose data to effectuate meaningful right to public comment).

⁴⁸ Although 5 U.S.C. § 553(b)(3) formally authorizes an agency merely to give notice of a "description of subjects and issues involved," as a practical matter agency notices of proposed rule generally contain text the agency is proposing to promulgate. (Advance notices of proposed rulemaking are more frequently phrased in general terms.) The ABA accordingly should resolve that the text of proposed IBR rules also be made publicly available to make meaningful the right to comment.

Finally, the ABA should resolve that, in order to effectuate these critical principles, Congress should ensure that agencies are able, where appropriate and necessary, to compensate private organizations for financial losses attributable to making their standards publicly available.

Respectfully submitted,

Jeff Rosen, Chair
Section of Administrative Law and Regulatory Practice

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeff Rosen, Section Chair

1. Summary of Resolution(s).

To effectuate the bedrock principle of public access to the law, the resolution urges Congress to strengthen the Freedom of Information Act and Administrative Procedure Act to ensure meaningful free public access to the text of all binding federal rules. The resolution responds to the current use in federal rules, by agencies, of thousands of privately drafted standards that the public must pay to view. The resolution also urges Congress to ensure meaningful free public availability of a proposed standard's text during the public comment period.

2. Approval by Submitting Entity.

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 10, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

None are directly relevant.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Policy could be implemented by legislative action.

8. Cost to the Association. (Both direct and indirect costs)
None.

9. Disclosure of Interest. (If applicable)
N/A

10. Referrals.

Business Law Section
Civil Rights and Social Justice Section
Government and Public Sectors Lawyers Division
Intellectual Property Law Section
Science & Technology Law Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

To effectuate the bedrock principle of meaningful public access to the law, the resolution urges Congress to strengthen public availability to the text of all federal regulations. Meaningful free access should be afforded both when agencies propose adoption of these standards and after promulgation as final rules.

2. Summary of the Issue that the Resolution Addresses

Federal agencies currently “incorporate by reference” thousands of outside standards into binding federal regulations. Free public access to the text is reliably provided only in the Office of the Federal Register’s reading room in Washington, D.C. Otherwise a reader may be required to pay substantial access fees set by drafting organizations, significantly obstructing public access, particularly by individuals and small businesses. The right to comment on an agency’s proposed “incorporation by reference” of such standards into federal regulations is also impeded by the lack of public access to the text.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution urges Congress to amend the Freedom of Information Act to ensure meaningful levels of free public availability to all federal regulations, including text that is “incorporated by reference.” Such public access could be afforded through centralized online access, for example, or in government depository libraries. The resolution also urges Congress to amend the Administrative Procedure Act’s rulemaking provisions to require meaningful free public availability of such text during the public comment period.

As a safeguard against the (probably remote) possibility that the prospect of free public access might induce a drafting organization to decline to make its standard available for incorporation, the report also recommends that Congress should ensure that agencies have access to the ability to compensate such organizations where appropriate.

4. Summary of Minority Views

None identified.