



A Publication of the Penn Program on Regulation

Opinion | Process | Aug 24, 2022

Introducing Incorporation by Reference

Emily S. Bremer



Incorporation by reference demonstrates how private and public actors collaborate to create modern regulation.

Any professional working in highly regulated areas of the economy should know about the practice of incorporation by reference. Fortunately, the [Penn Program on Regulation](#) has recently published an extensive suite of course [materials](#) that will make it easy for faculty to introduce incorporation by reference in their existing courses.

Incorporation by reference raises fascinating and challenging questions about the rule of law that lie at the intersection of technology, administrative law and policy, and intellectual property.

Through the practice of incorporation by reference, government agencies enact into law the standards developed by private organizations—often without giving the public free, easy access to what those private standards say. It is a modest caricature to say that incorporation by reference allows government officials to shortcut their work by imposing on individuals and businesses the relatively secret [dictates](#) of private actors. Introduced this way, incorporation by reference should pique the interest of professional students and anyone interested in the rule of law.

Although incorporation by reference raises fundamental questions about government under law, it is a well-established regulatory drafting tool that the U.S. Congress authorizes and even encourages. The [Freedom of Information Act](#) (FOIA) requires agencies to publish all legally binding regulations in the *Federal Register*. Later, these regulations must be codified and published in the Code of Federal Regulations (CFR). FOIA gives these requirements teeth by preventing an agency from enforcing a non-published regulation against any person lacking actual notice of the regulation.

But FOIA also [permits](#) agencies to fulfill their publication obligation by getting approval from the director of the Office of the Federal Register (OFR) to incorporate by reference “matter reasonably available to the class of persons affected thereby.” OFR regulations [establish](#) the standards and procedures that agencies must observe when incorporating by reference. According to FOIA, material properly [incorporated](#) by reference is “deemed published in the *Federal*

Register.” Incorporation by reference thus allows agencies to give binding legal effect to material that has not been published in the *Federal Register* or CFR.

Agencies incorporate by reference a wide variety of materials for many different purposes, but controversy arises when agencies incorporate “voluntary consensus standards” into regulations. Voluntary consensus standards are technical standards developed by private standard-setting organizations according to a process marked by the attributes of openness, balance of interest, due process, an appeals process, and consensus through general agreement, but not necessarily unanimity.

The [National Technology Transfer and Advancement Act of 1995](#) (NTTAA) requires federal agencies to use available voluntary consensus standards instead of creating “government unique” standards to meet standardization needs in procurement and regulation. Under the NTTAA, an agency may [decline](#) to use an available voluntary consensus standard if doing so “is inconsistent with applicable law or otherwise impractical.” But it must report its decision to the Office of Management and Budget (OMB). OMB offers guidance and direction to federal agencies subject to the NTTAA’s requirements through [Circular A-119](#), which addresses the role of federal agencies in developing and using voluntary consensus standards.

Agencies often incorporate voluntary consensus standards into regulations to fill in the technical details of regulatory requirements. In some cases, in addition to the general requirements of the NTTAA and OMB Circular A-119, an agency-specific statute may require an agency to use a particular voluntary consensus standard. For example, the [Consumer Product Safety Improvement Act of 2008](#) mandates that the Consumer Product Safety Commission’s toy safety [regulations](#) refer to [ASTM F963-17](#). ASTM F963-17 is a 90-page voluntary standard developed and maintained by a non-governmental organization, the [ASTM International](#), which is the largest standard-setting organization in the United States.

The difficulty is that, when an agency incorporates a private, voluntary standard into a regulation, regulated parties and the public must usually pay the private standard-setting organization to see the full text of the agency’s proposed or final regulation. This requirement is because most standard-setting organizations assert copyright over their

standards and rely on the revenue from the sale of the standards to fund their standard-setting processes. The resulting financial and practical barriers to public access to incorporated standards are contrary to modern administrative law norms, which have been shaped by the internet and the free, ready availability it provides to statutes, regulations, and agency documents.

In 2011, the Administrative Conference of the United States [recommended](#) a collaborative solution to this problem, urging agencies to work with standard-setting organizations and to use technological tools such as read-only access to improve the availability of incorporated standards. That recommendation has since been [adopted](#) by OFR and OMB. But some lawyers, including the American Bar Association and some administrative law scholars, [argue](#) that collaborative solutions do not go far enough. They have urged the government to require that all material incorporated by reference into regulations be provided for free on the internet.

Relatedly, the U.S. Court of Appeals for the D.C. Circuit is considering a second appeal in a [case](#) it has previously [considered](#), involving questions of fair use and continued copyright protection for standards incorporated by reference in regulations.

Despite the controversy over incorporation by reference, regulators will continue to find reasons to rely on the work of private standard-setting organizations. Law students and lawyers should know more about the practice of incorporation by reference. That is why the Penn Program on Regulation's broader project on teaching voluntary codes and standards includes a module on incorporation by reference. The module includes a teaching guide, PowerPoint slides, numerous videos in which experts discuss the issues, and a collection of links to key resources that are available online.

In addition to the intrinsic value in exposing law students to the world of voluntary standards that they and their clients will confront in practice, I have found that incorporation by reference provides an ideal, concrete context for synthesizing the three core components of most courses on legislation and regulation: the legislative process and Congress's role in modern regulation; statutory interpretation and the courts' role in the regulatory process; and administrative processes and the agencies' role in interpreting and enforcing statutes through regulation.