

2015


Taking Public Access to the Law Seriously: The Problem of Private Control Over the Availability of Federal Standards

Nina A. Mendelson

University of Michigan Law School, nmendel@umich.edu

Available at: <https://repository.law.umich.edu/articles/1671>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Administrative Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Mendelson, Nina A. "Taking Public Access to the Law Seriously: The Problem of Private Control Over the Availability of Federal Standards." *Envtl. L. Rep.* 45, no. 8 (2015): 10776-82. (Adapted from article previously published under the title "Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards" in *Mich. L. Rev.* 112, no. 5 (2014): 737-807.)

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ARTICLE

Taking Public Access to the Law Seriously: The Problem of Private Control Over the Availability of Federal Standards

by Nina A. Mendelson

Nina A. Mendelson is the Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School.

In the 1930s, Harvard professor Erwin Griswold famously complained about the enormous numbers of New Deal regulations that were obscurely published on individual sheets or in “separate paper pamphlets.”¹ Finding these binding federal rules was difficult, leading to “chaos” and an “intolerable” situation.² Congress responded, requiring that agencies publish all rules in the *Federal Register* and in the *Code of Federal Regulations* (CFR).³ Currently, recent federal public laws, the entire *U.S. Code*, the *Federal Register*, and the CFR are all freely available online as well as in governmental depository libraries.⁴

But with respect to thousands of federal regulations, the clock has been turned back—and worse. To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into numerous federal regulations, but only by “reference.” These standards range widely. The CFR presently contains nearly 9,500 “incorporations by reference” of standards, often referred to as “IBR” rules. Many IBR rules incorporate privately

drafted standards from so-called “standards development organizations” or “SDOs,” organizations ranging from the American Society for Testing and Materials (ASTM) to the American Petroleum Institute (API).⁵ Recent IBR rules cover food additives, pipeline operation, and infant product safety.⁶ Agency use of IBR rules is likely to grow. Since the 1990s, both executive branch and congressional policies have officially encouraged agency use of privately drafted standards.

An individual who seeks access to this binding law generally cannot freely read it online or in a governmental depository library as she can the *U.S. Code* or the rest of the CFR. The SDOs generally claim copyright and reserve the right to earn revenue by selling standards. Accordingly, an individual typically must first locate the standard, either on the SDO’s website or by contacting the SDO, and then pay a significant SDO-set access fee. Otherwise she must travel to Washington, D.C., to the Office of the Federal Register’s (OFR) reading room.⁷

This law, under largely private control, is not formally “secret,” but it is difficult to find and expensive. The incorporated standard for infant sling carriers is currently priced at \$51.60⁸; incorporated pipeline safety standards are roughly \$150 per standard⁹; others can be far more

This Article was adapted from Nina A. Mendelson, Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards, 112 MICH. L. REV. 737 (2014). It has been excerpted and updated with permission of Michigan Law Review and Nina A. Mendelson. Please see the full article for footnotes and sources.

1. Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 199, 294 (1934). Griswold notes that the thousands of pages of “law” issued in one year were “scattered among 5,991 press releases during this period.” *Id.* at 199. These laws included hundreds of “industry” codes drafted under the auspices of the National Industrial Recovery Act. See Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1179 (2013).
2. Griswold, *supra* note 1, at 204, 205.
3. Note, *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439, 440-41 (1966).
4. E.g., Thomas, LIBRARY OF CONG., <http://thomas.loc.gov> (last visited Sept. 29, 2013) (access to legislative materials); *Federal Digital System*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/fdsys> (last visited Sept. 29, 2013) (providing decades of access to the CFR, *Federal Register*, and all statutes).

5. Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 150 (2013).
6. E.g. Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments, 78 Fed. Reg. 49996-99 (Aug. 16, 2013) (noting 64 incorporated-by-reference standards, including safety, transport, and public notification); Food Additive Regulations: Incorporation by Reference of the Food Chemicals Codex, 7th ed., 78 Fed. Reg. 71457 (Nov. 29, 2013); Safety Standards for Infant Walkers and Infant Swings, 78 Fed. Reg. 37706 (June 24, 2013).
7. Agencies also sometimes provide access in their reading rooms, typically in Washington, D.C.
8. *Standard Consumer Safety Specification for Sling Carriers*, ASTM INT’L, <http://www.astm.org/DATABASE.CART/HISTORICAL/F2907-14A.htm> (last visited Mar. 27, 2015). Although ASTM maintains a “reading room,” as of March 2015, the standard was inexplicably unavailable.
9. Emily Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 315 (2015).

expensive. Others have discussed the difficult question whether SDOs still possess a valid copyright in standards that an agency incorporates by reference. More generally, the IBR rule problem raises the question of what underlies the intuition that law, in a democracy, needs to be readily, publicly available.

Ready public access to the law is critical to provide notice of obligations not only to regulated entities, but also to consumers, neighbors, and other regulatory beneficiaries. This concern has been incorporated into constitutional due process doctrine.¹⁰ Access is also vital to ensure that federal agencies are meaningfully accountable to the public for their decisions.¹¹ Finally, expressive harm—a message inconsistent with core democratic values—is likely to flow from governmental adoption of regulatory law that is, in contrast to American law in general, harder to find and costly to access.

Fully considering why law needs to be public and how public it needs to be strengthens the case for IBR reform, whether administrative or legislative. It also limits the range of acceptable reform measures. The Freedom of Information Act (FOIA) permits incorporations by reference into the *Federal Register* only when the incorporated text is “reasonably available to the class of persons affected thereby.”¹² A clearer understanding of why law needs to be readily, publicly available could inform judicial interpretations both of FOIA and of the Administrative Procedure Act’s (APA’s) public participation requirements.¹³ In 2013, the OFR, which FOIA tasks with approving agency incorporations by reference, agreed to revise its rule. In November 2014, the OFR issued a final rule¹⁴ that, unfortunately, missed an opportunity to significantly expand the public availability of the thousands of IBR rules. But even if the OFR does not take on broader reform, individual agencies also could change their incorporation practices.

Finally, assessing public access needs in the setting of agency use of privately drafted IBR rules also sheds some light on how we should think about the value of governmental transparency. The law must be sufficiently public, with a meaningful level of free availability, to provide notice, ensure that government is accountable for its decisions, and to express a commitment to core democratic values.

10. See, e.g., Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414 (2007).

11. E.g., Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357, 389–404.

12. 5 U.S.C. §552(a)(1) (2012).

13. See 5 U.S.C. §552(a) (2012) (Freedom of Information Act); 5 U.S.C. §553 (2012) (Administrative Procedure Act rulemaking requirements).

14. Incorporation by Reference, 79 Fed. Reg. 66267 (Nov. 7, 2014).

I. Incorporation by Reference of Private Standards

A. The Use and Costs of Privately Developed Standards

In 1966, Congress included a provision in FOIA permitting the director of the *Federal Register* to approve an agency’s “incorporation by reference” of material published elsewhere into regulatory text without reprinting it in the *Federal Register*.¹⁵ The material must, however, be “reasonably available to the class of persons affected thereby.”¹⁶ Beyond this requirement, OFR regulations permit incorporation by reference of a publication only if it “substantially reduces the volume of material published in the Federal Register.”¹⁷ The publication must also consist of “published data, criteria, standards, specifications, techniques, illustrations, or similar material.”¹⁸ Congress expected this material at least to be available in libraries.¹⁹

In the mid-1990s, both Congress and the White House directed agencies, where practicable, to utilize privately developed standards rather than writing new “government-unique” standards. The Office of Management and Budget (OMB) issued Circular No. A-119 in 1982, most recently revising it in 1998, directing agencies to rely on voluntary standards, including industry standards or consensus codes, rather than “government-unique standards.”²⁰ After the publication of the original version of this article, OMB announced proposed revisions to Circular A-119, but the proposed revisions continue to emphasize use of such standards.²¹

Some such standards have been drafted without anticipating agency incorporation.²² Others undoubtedly have been written with the hope—or the plan—of incorporation into federal regulatory law.²³ Circular No. A-119 contemplates that agencies may provide financial support to an SDO to complete a standard.²⁴ Agency officials may also participate in SDO deliberations.²⁵

15. 5 U.S.C. §552(a)(1) (2012).

16. *Id.*

17. 1 C.F.R. §51.7(a)(3) (2013).

18. *Id.*

19. See Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 519 (2013).

20. 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) [hereinafter CIRCULAR NO. A-119], available at http://www.whitehouse.gov/omb/circulars_a119.

21. Request for Comments on a Proposed Revision of OMB Circular No. A-119, 79 Fed. Reg. 8207 (Feb. 11, 2014). Proposed revisions are available at WHITEHOUSE.GOV, INFORMATION POLICY, http://www.whitehouse.gov/omb/inforeg_infopoltech (last visited Feb. 18, 2015).

22. E.g., Strauss, *supra* note 19, at 546.

23. *Id.* at 513.

24. CIRCULAR NO. A-119, *supra* note 20, para. 7(b).

25. See Strauss, *supra* note 19, at 506.

In developing policy favoring the use of private voluntary standards, neither Congress nor the original drafters of OMB Circular No. A-119 appeared to anticipate that SDOs would both claim copyrights in their incorporated standards and charge access fees. In any event, current agency practice is to incorporate standards even if SDOs charge a significant price for access,²⁶ and OFR's rule requires only that agencies "discuss" what was done to provide public access to an incorporated rule. Meanwhile, the amounts charged far exceed the "direct costs of search, duplication, or review" that federal agencies may charge for FOIA requests for internal agency documents.²⁷ As numerous groups and citizens have recently written, the fees that SDOs charge can be prohibitive, particularly for ordinary citizens and small businesses subject to the standards.

In a positive development, some SDOs have begun to create online reading rooms in which some IBR rules can be freely viewed. But readers must waive rights or even agree to indemnification and forum selection clauses to view the rules. Meanwhile, access is erratic, and SDOs uniformly reserve the right to revoke that access at will. For most citizens, travel to a Washington, D.C., reading room is not a viable alternative.

B. SDO Procedures

Private organizations that issue standards have widely variable processes, and federal law requires no particular procedures for the development of outside material that an agency incorporates by reference.²⁸ Circular No. A-119 does provide general criteria for the voluntary consensus standard that it encourages agencies to adopt. A voluntary consensus standard is one that comes from a "voluntary consensus standards bod[y]," which generally has the attributes of "[o]penness," "[b]alance of interest," "[d]ue process," and an "appeals process," together with the goal of "[c]onsensus," which means that the procedure must be designed to yield "general agreement, but not necessarily unanimity," including a "process for attempting to resolve objections by interested parties."²⁹ But these "voluntary consensus standards body" attributes are not actually required. Neither statute nor OMB policy appears to constrain an agency from incorporating a "nonconsensus standard"³⁰ or even includes a preference for a consensus standard.

As a practical matter, and notwithstanding Circular No. A-119's criteria, SDO processes vary widely. For example, at the API, whose standards are incorporated close to 280 times in the CFR,³¹ standards development is undertaken primarily by committee. While outsiders apparently may

participate, the organization requires a company name for application to participate, warns that travel is required, and states that it is advisable to have "your management's support in order to facilitate effective participation."³² At ASTM International, the SDO that has supplied the most incorporated standards to the federal government (close to 900 standards, incorporated over 2,000 times in the CFR³³), only members may participate in standards development; the lowest level of membership costs \$75 per year.³⁴ Further, although SDOs may strive to implement detailed internal processes for standards development and drafting, SDOs are not subject to the transparency requirements of the APA or FOIA's hearing or public comment requirements, because those statutes apply only to "agencies."³⁵

At best, then, full public access to SDO decisionmaking is limited, and even when such an organization's process is formally open to participation, it is often difficult to tell who participates in decisions. At worst, groups may be unrepresentative and decisionmaking closed. SDOs have been criticized as being dominated by regulated entities and, in particular, by the largest of those entities.³⁶ Further, perhaps obviously, SDOs are not bound by agency authorizing statutes; thus, they are under no obligation to prepare standards that meet statutory criteria.

Although federal agencies generally conduct notice-and-comment proceedings when incorporating a private standard, and this federal rulemaking process is open to the public at <http://www.regulations.gov>, this process is unlikely to fill potential gaps in SDO processes. APA rulemaking requirements call for an agency to publish a proposed rule and provide an opportunity for public comment before finalizing the rule.³⁷ An agency will typically state in a proposed rule that it plans to incorporate private material by reference, and the revised OFR rule requires the agency to summarize the material to be incorporated. Unfortunately, contrary to the practice with agency-drafted rules, the text the agency plans to incorporate is generally not included in the *Federal Register*. Instead, a putative public commenter is generally referred to the SDO for the text of the rule, subject to whatever restrictions the SDO imposes, including an access fee. Further, unlike federal agencies, private SDOs appear to be under no particular or consistent obligation to disclose the data underlying their standards to the public, undermining any meaningful public right to comment.³⁸

26. Draft Circular A-119 devotes only a single cursory paragraph to public access issues. See OFFICE OF MGMT. AND BUDGET, PROPOSED REVISIONS TO THE CIRCULAR, 10 (Feb. 10, 2014), available at <https://www.whitehouse.gov/sites/default/files/omb/inforeg/revisions-to-a-119-for-public-comments.pdf>.

27. 5 U.S.C. §552(a)(4)(A)(iv) (2012).

28. 5 U.S.C. §552(a) (2012).

29. CIRCULAR No. A-119, *supra* note 20, para. 4.

30. *Id.* at para. 6(g).

31. See Bremer, *supra* note 5, at 150.

32. See *Standards Committee Application*, AM. PETROLEUM INST., <http://www.api.org/publications-standards-and-statistics/standards-committee-application.aspx> (last visited Sept. 29, 2013).

33. See Bremer, *supra* note 5, at 150.

34. See *Technical Committees*, ASTM INT'L, <http://www.astm.org/COMMIT/newcommit.html> (last visited Sept. 29, 2013).

35. See 5 U.S.C. §551(a) (2012) (defining "agency"); *id.* §552 (applying information disclosure requirements to agencies); *id.* §553 (applying rulemaking requirements to agencies).

36. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 534, 641-42 (2000).

37. 5 U.S.C. §553(b)-(c) (2012).

38. *E.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 251-52 (2d Cir. 1977).

Even after standards are incorporated, SDOs do not seem bound to continue making incorporated standards available at *any* price, even when they are referenced in and compose a portion of federally binding law. In fact, SDOs already have made some incorporated standards unavailable, likely undermining or even eliminating their enforceability.

II. Does Law Need to Be Public?

The IBR situation runs afoul of a widely shared intuition—that law created by the federal government needs to be meaningfully public. Public access issues around IBR rules have been less of a focal point compared with public access to a range of less broadly applicable, but more captivating, governmental decisions: say, wiretapping policy, or whether drone strikes can be used abroad (or domestically) to target American citizens who are suspected terrorists. Meanwhile, proponents of IBR rules have suggested that, despite the lack of access, agencies save significant resources by using these rules, and some citizens may not see them as terribly interesting or important because they are “technical.”³⁹ But these rules, which impact public health, safety, and the environment, are among the most far-reaching government actions. Meaningful public access is thus vital.

Understanding the importance of public access to these rules may matter immediately for several reasons. First, it could matter for purposes of legal reform by Congress, the executive branch, or the judiciary. Congress could simply require meaningful free public availability of all materials incorporated into federal rules, or it could expressly address the copyright and public access issues in another way.

Fully assessing why law needs to be public could affect executive reform decisions. The OFR could reform its IBR rules, or the OMB could revise Circular No. A-119 to emphasize public access.⁴⁰ Meanwhile, individual agencies could change their incorporation practices.

Further, IBR rules could face legal challenges under the APA and FOIA. One could argue that agency utilization of material for which SDOs charge access fees violates FOIA’s statutory requirement that incorporated materials be “reasonably available to the class of persons affected.”⁴¹ Any reasonable sense of the words “persons affected” would seem to encompass, depending on the subject area, large groups of consumers, employees in hazardous workplaces, and neighbors of natural gas pipelines.⁴² For such “affected” persons, the access fees charged may present a barrier that is far from “reasonable.”

A court might also hear arguments that a federal rule with incorporated private material for which access fees are charged violates the APA. The APA requires that an “inter-

ested person[]” be able to comment on a proposed rule and to petition to revise a final rule.⁴³ Commenting and petitioning are difficult, at best, when seeing the text of the rule requires either travel or a significant fee.

Finally, a more thorough assessment of the importance of ensuring meaningful access to federal rules is an opportunity to consider, more generally, why we need governmental transparency.

A. Transparency and Notice

The text of IBR materials needs to be readily and publicly accessible to give notice to those who must conform their conduct to the content of the standards. Regulated entities need to be able to learn their obligations easily.⁴⁴ Moreover, due process bars the imposition of sanctions on someone who could not have received notice of her obligations.⁴⁵ Small businesses charged with compliance have complained in comments filed with the OFR that the prices charged by SDOs are too high for them to apprise themselves of their obligations. SDOs can even make standards effectively unavailable by no longer offering them for sale.

Further, for regulatory regimes where incorporated standards are used, those standards also affect indirect regulatory beneficiaries, both individuals and entities. Congress enacts regulatory statutes specifically to guard wide swaths of the public. These range from the Safe Drinking Water Act and the Pipeline Safety Act to the Consumer Product Safety and Motor Vehicle Safety Acts.⁴⁶ The public can reasonably expect to benefit, including through helpful agency action.

Regulatory beneficiaries need notice of the content of regulatory standards because those standards can affect their choices of which toys or infant swings to buy, where to live, or whether to drink tap water. The content, not just the existence, of regulatory standards is important; a neighbor might view pipeline or drinking water standards, even if complied with, as inadequately protective. She still might choose to relocate or filter her water. If notice is to be effective, meaningful public access to the law’s content must be provided to anyone potentially affected, not just to those who must comply.

B. Accountability for Legislative and Quasi-Legislative Actions

In addition to the need for notice to both regulated entities and regulatory beneficiaries, IBR rules also need to be

39. See, e.g., Bremer, *supra* note 5, at 183.

40. Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 77 Fed. Reg. 19357 (Mar. 30, 2012).

41. 5 U.S.C. §552(a)(1).

42. E.g., Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011).

43. See 5 U.S.C. §553(c), (e); cf. United States v. N.S. Food Prods. Corp., 568 F.2d 240, 251-52 (2d Cir. 1977).

44. See Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 321 (2005).

45. See Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167-68 (2012) (refusing to defer to agency interpretation in view of “the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires’”).

46. See, e.g., Mendelson, *supra* note 10, at 415.

readily and publicly available so that citizens can hold the government accountable both for complying with the law and for devising it, safeguarding against arbitrary conduct or “capture.” A lack of ready public access undermines the public’s ability to hold government accountable.

Consider the agency’s own decision whether to utilize the SDO standard at all. Even the most public-interested agency official⁴⁷ is likely to be interested in the significant resource savings from adoption of SDO rules, including rules that represent less-than-perfect implementation of the agency’s statutory commands.

Pragmatic political concerns, including reducing the resistance of regulated entities, also may nudge an agency to adopt a less-than-ideal SDO standard rather than draft a “government-unique” standard. If regulated entities are well-represented in Congress or in the White House as well as in the relevant SDO, an agency also might expect fewer hassles from political overseers.

Further, once an agency has developed a pattern of relying on privately generated standards, an agency may find it even harder to modify or reject those standards, because devising or locating replacement standards likely will be costlier than if the agency had well-established regulatory resources and staff of its own.⁴⁸

Ensuring that the agency is accountable for wisely choosing which IBR rules to adopt depends on meaningful public access to those rules. For agency rulemaking to serve as any sort of useful safeguard against poor standards when an agency elects to incorporate an SDO standard, the SDO standard and supporting data has to be meaningfully available during rulemaking, to ensure the participation of regulatory beneficiaries and ordinary citizens.

Other mechanisms for holding agencies accountable for their choice of IBR rules also depend on ready public access to those rules. The public might wish to seek congressional oversight or new statutes that more specifically direct agency action,⁴⁹ to register disapproval through voting, or to file a lawsuit seeking judicial review of the agency’s decision. Our current regime of limited public access to IBR rules undermines all these accountability mechanisms.

C. *The Distinctive Burdens Imposed by Access Prices for IBR Rules*

One could say that IBR rule prices pale next to costs, like legal fees, that can accompany lawsuits challenging agency rules. But readers also need access to the text of rules to inform compliance decisions, purchases, medical choices, letters to Congress or comments to agencies, and voting. These are not necessarily costly activities. Prices for IBR rules accordingly represent a distinct obstacle. Moreover, these access limitations are not random; they systemati-

cally exclude people based on budgetary constraints. Consumers and neighbors are likely to have smaller budgets relative to regulated manufacturers and pipeline operators. Regulated entities typically have an advantage, compared with the general public, in participating in policymaking, including in obtaining expert and legal technical assistance and in joining SDOs. Access costs may worsen this imbalance by keeping many consumers and neighbors from even getting in the door.

D. *Expressive Harm Imposed by Access Fees*

Having to pay a fee to read the law can obstruct individuals from learning their obligations, making informed decisions, or seeking governmental accountability. The government’s decision to regulate by incorporating expensive, difficult-to-locate standards also sends a damaging message to the public that may feed public cynicism regarding the openness and accountability of government.

Incorporating standards into law that are generally available only after paying a significant fee set by a private entity or traveling to Washington, D.C., contrasts starkly with the strong American tradition, since at least 1795, of widespread public access to the law. This tradition includes, for example, the use of depository libraries starting in the mid-1800s and the passage of the Federal Register Act of 1935, the Electronic Freedom of Information Act Amendments of 1996, and the e-Government Act of 2002.⁵⁰

When private organizations largely control access to the law, including the apparent power to curtail access to the text, this category of law, unlike federal statutes, other federal regulations, and federal court opinions, does not appear to be under public control. Even if only some citizens are effectively prevented from reading IBR standards, agencies are expressing a view fundamentally inconsistent with the strong Congressional policy of open access to the law. Limited access to IBR rules also undermines the First Amendment’s core value of free discussion of governmental affairs.⁵¹ This value undergirds the “right of the people to choose” governmental officials, directly or indirectly, in the electoral process.⁵²

III. *Permissible Reform Measures*

Given a fuller understanding of the reasons why law must be readily available to the public, reform of IBR standards is required. Any further legislative or administrative action on agency use of incorporated private standards should ensure permanent, widespread public availability of those standards. At a minimum, full access is needed

47. Cf. Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 399 (2003).

48. *Id.* at 410-11.

49. See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1821 (2012).

50. *E.g.*, Act of Feb. 5, 1859, ch. 22, §10, 11 Stat. 379, 381; Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, §4(7), 110 Stat. 3048, 3049; 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 (2006) note (Federal Management and Promotion of Electronic Government Services)).

51. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

52. See *United States v. Classic*, 313 U.S. 299, 314 (1941).

to ensure that all interested parties, including both regulated entities and regulatory beneficiaries, have appropriate notice of their legal liabilities and entitlements. Any reform should provide citizens with assured access during the entire period the SDO rule has been incorporated into federal regulatory law. That access ought to be provided in a centralized location that is easy for individuals to find. Such centralized access must be freely available through governmental depository libraries. Library access to hard copies could be provided, although it seems likely that most members of the public now rely on digital access.⁵³ Ideally, reform would provide access to IBR rules through text or direct links on the Government Printing Office and *Federal Register* websites, and additionally through federal agency websites.⁵⁴ Access should be through federally controlled websites to address a second critical barrier to public access—the enormous difficulty of locating IBR standards currently strewn over many different SDO websites.

Full digital access without charge, beyond what is available at governmental depository libraries, would place access to IBR standards on the same footing as other federal regulations. The current read-only access to these standards occasionally provided at the option of and only upon conditions set by SDOs is insufficient.

Nor is the OFR's regulatory approach adequate. OFR has missed an opportunity to speak directly to the level of public access required before language can be incorporated by reference into federal agency rules without *Federal Register* publication. A federal agency finalizing a rule must now "[d]iscuss" the way the agency "worked to make the materials . . . reasonably available," but this modest requirement for an agency statement contemplates OFR approval of agency use of an IBR rule that is not, in fact, "reasonably available."⁵⁵

An agency might have a number of options to ensure meaningful access to private IBR standards, other than permitting the SDO to set access charges.⁵⁶ For example, an agency could negotiate a license with an SDO to make IBR standards readily available to the public through a link on the *Federal Register* or CFR website. While this public availability may result in some revenue losses for SDOs, federal agency incorporation also can increase the demand for books of SDO standards. No-longer-current versions of SDO standards are sometimes priced higher than current versions simply because a federal agency has elected to incorporate the older one by reference.⁵⁷ Particularly in groups where regulated entities are well represented, the strong interest in influencing the content of the law may even motivate an SDO to agree to online public access

without further charge.⁵⁸ The fact that several SDOs have elected to make IBR standards available on a read-only basis on their own websites following the initiation of the OFR rulemaking supports the conclusion that agency negotiation of a price for incorporated standards may not be tremendously difficult or expensive.

In the case of an SDO that regularly supplies governmental standards, such as the National Fire Protection Association or the API, governmental contracting may also be an option. Besides resolving in favor of the government the question of who owns the copyright to material that ends up in federal rules,⁵⁹ contracting would also permit the agency to solicit bids to supply standards, thus increasing competition among groups to do so and enabling the agency to specify more open and accessible processes for standards development.⁶⁰ For an SDO who is unwilling to sign such a contract or to negotiate to provide public access as a condition of incorporation, a federal agency intent on incorporating a publicly accessible standard would face a choice between drafting a government-unique standard or using compulsory licensing provisions.⁶¹

What should be out of bounds? Any proposal that continues to rely primarily on SDOs for public access, so that the SDOs can condition access on the payment of fees or revoke it altogether.⁶² Reforms must assure that groups currently underrepresented in agency and SDO processes have access to the text of these rules—and thus have a chance at participating in standards development and at invoking mechanisms of accountability. The best approach would be a straightforward one that provides free, easy-to-locate online access to the entire public.⁶³

Any charge, even a small fee, could obstruct access to the poor or those who seek access to multiple standards, and it would still communicate a message of hostility to core democratic values. These standards should be publicly available in the same manner as other federal regulatory standards—for free in governmental depository libraries and, ideally, through the Government Printing Office and agency websites as well.

IV. Conclusion: On Public Access

These over 9,000 IBR rules, covering areas ranging from infant seat safety to pipeline operation, are published ad hoc in numerous locations and are hard to locate, even when federal agencies provide SDO contact information in the CFR. Of even greater concern, public access to these standards is primarily through private organiza-

53. Comment of Michael Herz, Sec. Chair, Section of Admin. Law & Regulatory Practice, Am. Bar Ass'n 11 (OFR Docket June 1, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006481025ea5&disposition=attachment&contentType=pdf>.

54. Bremer, *supra* note 5, at 179.

55. Incorporation by Reference, 78 Fed. Reg. 60784, 60797 (revision to 1 C.F.R. §51.5(a)(1), proposed Oct. 2, 2013).

56. *E.g.*, Cunningham, *supra* note 44, at 338-41.

57. *E.g.*, Strauss, *supra* note 19, at 509-10.

58. See Comment of R. Bruce Josten, Exec. Vice President of Gov't Affairs, Chamber of Commerce of the U.S. 1 (OFR Docket Apr. 3, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480feb794&disposition=attachment&contentType=pdf>.

59. See Rights in Data—General, 48 C.F.R. §52.227-14(b) (2012).

60. See Strauss, *supra* note 19, at 544-45.

61. See Cunningham, *supra* note 44, at 332.

62. See, *e.g.*, Bremer, *supra* note 5, at 180-82.

63. Comment of Ronald E. Jarnagin, President, ASHRAE 4 (OFR Docket Mar. 30, 2012), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480fe4f56&disposition=attachment&contentType=pdf>.

tions empowered to charge significant fees and, effectively, to revoke access. With IBR rules, the public's access is impaired disproportionately based on income.

Access must be generally available to both regulated entities and the intended beneficiaries of legislation. If those burdened with obligations cannot learn their substance without paying hundreds of dollars to an SDO or traveling to Washington, D.C., the law is not meaningfully public.

Federal regulatory actions apply to the entire public—broadly and for an indefinite duration. These legislative or quasi-legislative actions are among the most significant powers exercised by the federal government. Access to the text of these rules cannot just be a formality; the text must be readily, meaningfully available to the public, including substantial levels of public access without charge. Increased transparency in the form of meaningful public access is the bare minimum for accountability.