

ALAC Incorporation by Reference Study

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The above disclaimer language was drafted by ALAC in 2008 and 2009 and was designed to appear on the Virginia Administrative Code website as a pop up when links navigate to outside sources. The language was approved by the Code Commission at the October 29, 2009, meeting and presented to DLAS, but may not have been fully implemented.

The following report was presented to ALAC at the May 21, 2008, meeting.

INCORPORATION BY REFERENCE

Agencies often incorporate other documents, such as federal regulations or nationally recognized standards, into their regulations by reference. When this occurs, the document incorporated becomes a part of the regulation, just as if the text of the document was set out in full in the regulation itself.

The Registrar's office receives about one call per month from agencies asking how they can update these references in regulations to reflect the most current standards without going through the regulatory process.

The Virginia Register Act provides for incorporation by reference in § 2.2-4103 as follows:

Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.

The scope is further defined and expanded in the Virginia Code Commission's regulations for implementing the Virginia Register Act. The Code Commission regulations exempt the Federal Register, Code of Federal Regulations, and U.S. Code from filing requirements. The Commission's regulations, last amended in 1994, also provide exemptions from filing the full text of certain documents incorporated by reference and allow these documents to be filed by description (these requests for filing by description must be submitted in writing and must be approved by the Registrar). Examples of documents filed by description include documents exceeding 500 pages that are generally available to the public, material not available in document form, and copyrighted material. However, descriptions must include the title of the referenced

document, author, date of publication or edition, and where publication is located and can be viewed.

The Code Commission regulations and Style Manual establish procedures for incorporation by reference. The document to be incorporated must be filed with the regulation and identified by its proper title, edition, volume number and date. By virtue of incorporation into a filed regulation, the incorporated document becomes a part of the regulation and is enforceable as such.

The Registrar's office requires agencies incorporating documents by reference to go through the regulatory process when they wish to change their regulation to reflect an update to the incorporated document. Many agencies attempt to incorporate future or prospective amendments by writing in the regulations that a regulant must comply with the "current edition" of the incorporated document.

The most common complaint from agencies is that it takes too long to go through the regulatory process to change a regulation to reflect the most up-to-date standard that has been incorporated into a regulation. A question to be considered is whether it would be appropriate to establish an exempt process for updating such documents in regulations. With the establishment of a fast-track rulemaking process in 2003, many agencies now use this process to update references to documents incorporated by reference.

Another issue to possibly consider is whether there should be a procedure in place to incorporate documents that can be accessed on the Internet. Agency regulatory coordinators have sometimes indicated that the referenced document is only available on the Internet. The Registrar's office currently requires agencies to print the document out and file it with the regulations. Should anything else be considered or required?

Under some circumstances, an agency will incorporate by reference its own material. This practice is discouraged by the Registrar's office, but not prohibited. An agency might incorporate by reference a guidance document that it has written; however, it

seems that once the guidance document (that does not have the force and effect of law) is incorporated by reference into a regulation and made a part of that regulation, it will then have the force and effect of law. If the guidance document needs to have the force and effect of law, it seems that it should be promulgated as a regulation and not incorporated by reference. On the other hand, the Department of Transportation writes a Road and Design Manual that contains over 700 pages of technical material, mostly illustrations, that it incorporates by reference into several of its regulations due to the nature of the material.

Many agencies promulgate regulations that contain documents incorporated by reference. Some suggested agencies regulations to review that contain a variety of documents incorporated by reference are Department of Housing and Community Development, Department of Transportation, Department of Health, Department of Environmental Quality, Department of Labor and Industry, Department of Medical Assistance Services, and boards under the Department of Professional and Occupational Regulation and Department of Health Professions.