No. 20-1373

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LISA MILICE,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for Review of a Direct Final Rule of the Consumer Product Safety Commission

BRIEF FOR RESPONDENT

Of Counsel:

J. GIBSON MULLAN
General Counsel

MELISSA V. HAMPSHIRE
Assistant General Counsel

ALEXANDER W. DENNIS
Attorney
Office of the General Counsel
Consumer Product Safety Commission

ETHAN P. DAVIS
Acting Assistant Attorney General

SCOTT R. MCINTOSH
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division, Room 7246
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-8189

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STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 15 U.S.C. § 2060(c). That provision provides a court with jurisdiction to review a petition filed under 15 U.S.C. § 2060(a) for review of a consumer product safety rule promulgated by the Consumer Product Safety Commission (Commission). Section 2060(a) states that such a petition may be filed "with the United States court of appeals for the District of Columbia, or for the circuit in which [the consumer] resides." *Id.*

Certain consumer product safety standards are not subject to § 2060(c), but are rather subject to the special judicial review provisions of 15 U.S.C. § 2060(g), which authorize a consumer to file a petition for review in the D.C. Circuit, and vests that court with jurisdiction to review the rule. *Id.* § 2060(g)(2)-(3). These special judicial review procedures apply to, *inter alia*, "any standard promulgated by the Commission under section 2056a of this title (relating to durable infant and toddler products)." *Id.* § 2060(g)(1)(C). They apply "in lieu of the preceding subsections of this section," including the subsection that otherwise would vest jurisdiction in the regional court of appeals where the petitioner resides as well as the D.C. Circuit. *Id.* § 2060g(1).

Petitioner here petitions for review of an infant bath seat safety standard promulgated by the Commission pursuant to 15 U.S.C. § 2056a. *See* 84 Fed. Reg. 49,435 (Sept. 20, 2019). The definition of "durable infant and toddler products" in § 2056a specifically includes bath seats. 15 U.S.C. § 2056a(f)(2)(D). The petition would therefore appear to be subject to the special judicial review procedures of 15

U.S.C. § 2060(g), which apply "in lieu of" the general judicial review provisions in § 2060, and which state that the D.C. Circuit "shall have jurisdiction" to review such a rule. 15 U.S.C. § 2060(g)(2)-(3).

STATEMENT OF THE ISSUE

The Administrative Procedure Act (APA) requires agencies to publish a variety of matters, including "substantive rules of general applicability," in the Federal Register. 5 U.S.C. § 552(a)(1). However, the APA permits agencies to satisfy this publication requirement by incorporating material into the Federal Register by reference. *See id.* § 552(a). Material incorporated by reference "is deemed published in the Federal Register" so long as the material is "reasonably available to the class of persons affected thereby," and the Director of the Federal Register "approv[es]" the incorporation by reference. *Id.*

Here, the Commission has published in the Federal Register an amended safety standard for infant bath seats that incorporates by reference a technical standard created by ASTM International (ASTM), a private standards setting organization. ASTM owns a copyright in its technical standard. The Director of the Federal Register approved the incorporation by reference. The incorporated standard may be inspected at the Commission's headquarters and the National Archives and Records Administration; purchased from ASTM; and viewed for free online in read-only format on ASTM's website.

The question presented is whether the Commission's incorporation by reference of ASTM's standard into the Federal Register pursuant to the APA's incorporation-by-reference provision, 5 U.S.C. § 552(a), is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Federal Register and Incorporation by Reference

The Administrative Procedure Act, as amended by the Freedom of Information Act, requires agencies to publish substantive rules "in the Federal Register for guidance of the public." 5 U.S.C. § 552(a)(1). Absent publication in the Federal Register (or other "actual and timely notice" of legal requirements), a person "may not in any manner be required to resort to, or be adversely affected by," an agency's rule. *Id.*

Since 1966, this law has explicitly authorized agencies to "incorporate[] by reference" material into the Federal Register. *See* Pub. L. No. 89-487, 80 Stat. 250, 250 (1966) (codified at 5 U.S.C. § 552(a)). So long as the material incorporated by reference is "reasonably available to the class of persons affected thereby," and the Director of the Federal Register "approv[es]" the incorporation by reference, the material incorporated by reference "shall be deemed published in the Federal Register" and will have the force and effect of law, just as if it were set out in the Federal Register in full. *Id.*

Responsibility for publishing the Federal Register is vested in the Office of the Federal Register, a component of the National Archives and Records Administration. *See* 44 U.S.C. §§ 1502, 1505; *see also* 5 U.S.C. § 552(a). The Director of the Federal Register has the authority to "interpret and apply the language of" the APA's incorporation-by-reference provision, 1 C.F.R. § 51.1(b), and has promulgated regulations to govern agencies' use of incorporation by reference and the process for seeking the Director's approval, *see* 1 C.F.R. pt. 51. To obtain the Director's approval, an agency must, for example, "[s]ummarize, in the preamble of its rule, the material it incorporates by reference"; "discuss . . . the ways that the materials it incorporates by reference are reasonably available to interested parties and how interested parties can obtain the materials"; and use "the proper language of incorporation," *id.* § 51.5(b), as set forth by regulation, *see id.* § 51.9 (requiring, for example, agencies to "[r]efer[] to 5 U.S.C. § 552(a)," and specify that the incorporated material is a legal requirement). The publication must be eligible for incorporation by reference, *id.* § 51.3, as specified by regulation, *id.* § 51.7; and the agency must send a copy of the material incorporated by reference to the Office of the Federal Register in Washington, D.C., *id.* §§ 51.3(b)(4), 51.5(b)(5), where it is available for public viewing during business hours, *see id.* § 3.2(a); *see also* Office of the Fed. Register, *IBR Handbook* (July 2018) (providing detailed procedures and guidance on incorporation by reference).[1]

[1] https://www.archives.gov/files/federal-register/write/handbook/ibr.pdf.

The APA does not define "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a). The Office of the Federal Register has not adopted a general definition of that term, and it has declined requests to interpret "reasonably available" to require that material incorporated by reference be "available for free online." *See* Office of the Fed. Register, *Incorporation by Reference*, 79 Fed. Reg. 66,267, 66,269-70 (Nov. 7, 2014) (final rule).

2. Voluntary Consensus Technical Standards

Voluntary consensus standards bodies, also known as standards development organizations, are private organizations that, through a collaborative, consensus development process, establish technical standards for voluntary use in an industry or profession. *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-119, at 15-16 (2016), https://go.usa.gov/xfj47 (OMB Circular A-119) (describing voluntary consensus technical standards). Examples of standards development organizations include the American Society of Mechanical Engineers, the American Petroleum Institute, the Association of American Railroads, and ASTM. *See* Maureen A. Breitenberg, Nat'l Inst. of Standards & Tech., NISTIR 7614, *The ABCs of Standards Activities* 10-13 (Aug. 2009).[2]

Since 1996, Congress has required "all Federal agencies and departments" to "use technical standards that are developed or adopted by voluntary consensus

[2] https://www.nist.gov/system/files/nistir_7614.pdf.

standards bodies . . . as a means to carry out policy objectives or activities determined by the agencies and departments," unless it is "inconsistent with applicable law or otherwise impractical" for an agency to do so. National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, § 12(d)(1), (3), 110 Stat. 775, 783 (1996) (codified at 15 U.S.C. § 272 note). This statutory requirement codified longstanding Executive Branch policy that it is "more efficient[] and effective[]" for agencies to use voluntary standards that have been created through a consensus process by private organizations with "expertise" in an industry, than it is for the government to formulate its own standard to impose upon an industry. *See* Administrative Conf. of the United States, 44 Fed. Reg. 1357, 1357 (Jan. 5, 1979); *see also* Office of Mgmt. & Budg., *Issuance of Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Standards,"* 47 Fed. Reg. 49,496 (Nov. 1, 1982) (original OMB Circular A-119); OMB Circular A-119, at 17-18 (2016 revised standard).

Private organizations that create "original works of authorship fixed in any tangible medium of expression" generally enjoy copyright protections in their works, 17 U.S.C. § 102(a), and have the exclusive right to reproduce and distribute those works, *id.* § 106. In light of copyright protections, agencies that rely on private voluntary consensus technical standards generally use the APA's incorporation-by-reference procedures to incorporate the private voluntary consensus standards into rules published in the Federal Register, rather than reproducing the text of the private standards in full. *See* 79 Fed. Reg. at 66,270 (explaining that "U.S. copyright law" is a

relevant consideration in determining whether to incorporate material by reference); OMB Circular A-119, at 21 (explaining that agencies relying on private standards should "respect[] the copyright owner's interest in protecting its intellectual property"); *see also id.* at 22 ("[Y]our agency must observe and protect the rights of the copyright holder and meet any other similar obligations.").

Over 10,000 private technical standards are incorporated by reference into the Federal Register. *See* Nat'l Inst. of Standards & Tech., *Standards Incorporated by Reference (SIBR) Database*, https://sibr.nist.gov/ (last visited July 16, 2020). A wide range of federal agencies have incorporated private standards by reference into law, including the Department of Housing and Urban Development, the Department of Energy, the Nuclear Regulatory Commission, the Environmental Protection Agency, the Food and Drug Administration, the Pipeline and Hazardous Materials Safety Administration, the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, and others. *See id.*[3]

3. Consumer Product Safety Standards

The Consumer Product Safety Commission (Commission) is an independent agency, 15 U.S.C. § 2053, that was created in 1972 to, *inter alia*, promulgate consumer product safety standards to reduce unreasonable risk of injury from consumer

[3] *See also* Office of the Fed. Register, *Electronic Code of Federal Regulations: Incorporation by Reference*, https://go.usa.gov/xfjXy (last visited July 16, 2020) (providing links to "where in the [Code of Federal Regulations] material is incorporated by reference and the publisher's contact information so that readers can obtain the material").

products, *id.* § 2056; *see also id.* § 2051(b); *see* Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972). Consistent with government-wide federal policy requiring agencies to use voluntary consensus standards whenever possible, *see supra* pp. 5-6, Congress specifically directed the Commission to "rely upon voluntary consumer product safety standards" if the Commission determines that "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury . . . and it is likely that there will be substantial compliance with such voluntary standards." 15 U.S.C. § 2056(b)(1).

In 2008, Congress passed the Consumer Product Safety Improvement Act, which addressed safety standards with respect to a number of specific consumer products, including durable infant or toddler products. See Pub. L. No. 110-314, § 104, 122 Stat. 3016, 2028 (2008) (codified at 15 U.S.C. § 2056a). As relevant here, Congress directed the Commission to "examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products," and to promulgate Commission safety standards that are either "substantially the same as such voluntary standards," or "more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products." 15 U.S.C. § 2056a(b).

If the Commission promulgates a safety standard for durable infant or toddler products that is based "in whole or in part" on a voluntary standard, the Commission must "notify the organization that issued the voluntary standard." 15 U.S.C.

§ 2056a(b)(4)(A). If the organization subsequently revises its voluntary standard, the organization must notify the Commission of the revision. *Id.* § 2056a(b)(4)(B). Once an organization has notified the Commission that it has revised its standard, "[t]he revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission," unless the Commission determines that the revision "does not improve the safety of the consumer product" and the Commission retains its existing standard. *Id.* Absent such a determination, the revised voluntary standard becomes the new federal safety standard by operation of law. *See id.*

B. The Commission's Infant Bath Seats Rulemaking

1. In 2008, the Commission began to assess the effectiveness of voluntary standards with respect to infant bath seats, a durable infant or toddler product. *See* 74 Fed. Reg. 45,719, 45,719-20 (Sept. 3, 2009). In 2009, the Commission published a notice of proposed rulemaking, which proposed to adopt with modifications a voluntary safety standard for infant bath seats developed by ASTM. *See id.* The Commission explained that manufacturers of infant bath seats already voluntarily "submit[ted] their products to an independent test laboratory to test the product for conformance to the ASTM standard," and that design of infant bath seats had "changed significantly" in response to ASTM's voluntary standard. *Id.*

The Commission's proposed rule summarized ASTM's voluntary standard, and discussed the data the Commission had reviewed and the safety testing it had performed. 74 Fed. Reg. at 45,720. The Commission concluded that "most of the

requirements of the current ASTM standard are sufficient to reduce the risk of injury posed by bath seats," though the agency proposed some specific modifications to further enhance the safety and clarity of the standard. *Id.* at 45,720-21 (proposing, for example, modifications to the standard's "leg opening requirement," including a modification to specify a 1.45 inch radius, rather than a 1 inch radius). With those modifications, the agency proposed to incorporate the ASTM standard by reference into the Federal Register. *See id.* at 45,722.

The Commission published its final infant bath seats rule in 2010. *See* 75 Fed. Reg. 31,691, 31,696 (June 4, 2010). The agency responded in detail to comments that it received from manufacturers and consumer groups about the ASTM standard and the safety of infant bath seats in general, and maintained its conclusion that ASTM's bath seat standard, as modified by the Commission, reduced the risk of injury associated with infant bath seats. *See id.* at 31,696. The Commission incorporated by reference ASTM's voluntary standard into the Federal Register. The Commission explained that "[t]he Director of the Federal Register approves this incorporation by reference," and that interested parties could "obtain a copy" of the standard from ASTM, or could "inspect a copy" at the Commission's headquarters or at the National Archives and Record Administration, the parent agency of the Office of the Federal Register. *Id.* at 31,698.

ASTM revised its infant bath seat standard in 2012 and 2013. *See* 77 Fed. Reg. 45,242 (July 31, 2012); 78 Fed. Reg. 73,692 (Dec. 9, 2013). On each occasion, the

Commission did not find that the changes would not improve the safety of infant bath seats, and thus issued rules that incorporated ASTM's revised standard by reference into the Federal Register, with the approval of the Director of the Federal Register. *See* 77 Fed. Reg. at 45,243, 45,246; 78 Fed. Reg. at 73,692.

2. In June 2019, ASTM notified the agency that it had made further revisions to its infant bath seat standard. *See* App'x 27-28 (Letter from ASTM to Commission). The Commission thereafter published notice in the Federal Register of ASTM's revisions, and summarized in detail the changes that ASTM had made to its standard. *See* 84 Fed. Reg. at 49,436. The Commission explained, for example, that ASTM's revised standard "move[d] wording from an explanatory note into the enforceable performance requirement," and the Commission quoted in full the text that had been moved. *See id.* (quoting Section 6.1.2.3 of the ASTM standard). The Commission also explained that ASTM "reference[d] a new test surface" for certain testing procedures, and the Commission set forth ASTM's definition of that new test surface. *See id.* (""Test Surface #3' is defined as '(a)ny area on the side(s) of the test platform (for example, inside surface, outside surface, and top ledge), where safety tread strips are not applied"); *see also id.* at 49,436-37 (further discussing "Test Surface #3" and explaining ASTM added that test surface to its "static load test" and "suction cup test methods"); *see also id.* at 49,437 (describing and quoting other changes).

For each revision, the Commission concluded that the change either improved the safety of infant bath seats or, at a minimum, was neutral to the safety of infant

bath seats (as was the case for some editorial changes). *See* 84 Fed. Reg. at 49,436-37. The Commission therefore declined to find that the updated standard "does not improve the safety of bath seats," 15 U.S.C. § 2056a(b)(4)(B), and explained that the updated ASTM standard would become the Commission's standard, and would be incorporated by reference into the Federal Register, unless the Commission received "timely significant adverse comments" within thirty days, 84 Fed. Reg. at 49,435; *see also id.* at 49,438.

The Commission explained that interested persons could "obtain a copy" of the revised standard from ASTM, and the Commission provided ASTM's address, phone number, and website address. *See* 84 Fed. Reg. at 49,439. The Commission further explained that interested persons could "inspect a copy" of ASTM's revised standard at the Commission's headquarters in Bethesda, Maryland, or at the National Archives and Records Administration. *Id.* The Commission provided the website address for the National Archive and Records Administration's resource page on incorporation by reference. *See id.* (citing www.archives.gov/federal-register/cfr/ibr-locations.html).

3. The New Civil Liberties Alliance (NCLA)—counsel for plaintiff here—submitted a comment to the Commission. *See* App'x 91 (NCLA Letter to Commission). NCLA did not take issue with the substance of the infant bath seat standard. Instead, NCLA asserted that the Commission's incorporation of the ASTM standard by reference violated due process because the incorporated standard was not

"freely accessible to everyone" online. App'x 96. The comment asserted that the Commission should "reproduc[e] th[e] standard[] in full," rather than incorporate it by reference. App'x 97.

The General Counsel of the Commission responded by letter to NCLA's comment. *See* App'x 99 (Letter to NCLA). That letter explained that "nearly all voluntary standards [are] protected by copyright" and that the Commission had therefore followed the procedures for incorporation by reference set forth in the APA and Office of the Federal Register regulations. App'x 100-01.

4. Because the Commission did not receive any significant adverse comments, the Commission's rule adopting ASTM's revised infant bath seats standard became effective on December 22, 2019, and the Commission's incorporation by reference into the Federal Register also became effective on that date. *See* 16 C.F.R. § 1215.2. The Director of the Federal Register approved the Commission's incorporation by reference. *See* App'x 48-49 (Formal Approval Notice).

The full text of ASTM's infant bath seats standard may be inspected free of charge at CPSC's headquarters in Bethesda, Maryland, or at the Office of the Federal Register in Washington, D.C. *See* ECF 25-2, at 2 (Mills Decl. ¶ 8); *see also* 1 C.F.R. §§ 3.2(a), 51.3(b)(4), 51.5(b). The standard is also available from ASTM. A copy of the standard may be purchased from ASTM for $56. *See* ASTM Int'l, *ASTM F1967-19, Standard Consumer Safety Specification for Infant Bath Seats* (2019), https://www.astm.org/Standards/F1967.htm. In addition, ASTM has made all of its

standards that have been incorporated by reference into federal law—including the infant bath seats standard at issue in this case—available for read-only viewing, at no cost, in ASTM's online "Reading Room." *See* ASTM Int'l, *Reading Room*, https://www.astm.org/READINGLIBRARY/ (last visited July 17, 2020).

SUMMARY OF ARGUMENT

A. The Commission permissibly incorporated ASTM's standard by reference into the Federal Register pursuant to the APA's express incorporation-by-reference provision, which permits an agency to incorporate extrinsic material into the Federal Register so long as the material is "reasonably available to the class of persons affected thereby," and the Director of the Federal Register "approve[s]" the incorporation. 5 U.S.C. § 552(a). The Director of the Federal Register formally approved of the Commission's incorporation by reference here, confirming that the Commission complied with the Office of the Federal Register's regulatory requirements for incorporation by reference. *See* 1 C.F.R. pt. 51. And ASTM's incorporated standard is "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a). The standard was incorporated into the Federal Register by reference in light of ASTM's copyright interests in its privately created standard, but ASTM's standard can be inspected without charge at the Commission's headquarters and at the National Archives and Records Administration, and it may be purchased from ASTM for $56, a reasonable cost in light of the nature of the standard as a technical standard for use by commercial manufacturers. ASTM has also made all

of its standards that have been incorporated by reference into law, including the standard at issue here, available for free online viewing in read-only format. To the extent petitioner wishes to view the standard to know what the law requires, she may do so online without charge. Neither she nor anyone else is placed in the position of having to pay to know what the law is.

Petitioner contends that the APA's "reasonably available" standard requires that incorporated material be freely available online. But ASTM's standard *is* available online for free—it may be read without charge on ASTM's website. And in any event, the APA does not require that all material incorporated by reference be freely available on the Internet. It requires only that material be "*reasonably* available to the class of persons affected thereby," 5 U.S.C. § 552(a) (emphasis added), a flexible standard that allows agencies to take account of surrounding circumstances, including relevant legal constraints such as copyright law. Although petitioner questions whether ASTM retains its copyright in its standard following the incorporation of the standard into the Commission's rule, petitioner does not identify any legal authority to support the proposition that existing copyright protections terminate in a work merely because an agency has incorporated the work by reference into federal law pursuant to the APA. For decades, the APA's flexible incorporation-by-reference provision has allowed agencies to choose a path that satisfies their legal obligation to use voluntary consensus standards, provides the public with reasonable access to those standards, and minimizes the risk of infringement liability.

Petitioner asserts that she and her counsel contacted the Commission to view ASTM's standard but were told by an unnamed employee or employees of the Commission that it was not available. As the Commission's Secretary has explained in her own declaration, however, to the extent petitioner's declarations accurately capture what petitioner and her counsel were told, they regrettably were misinformed. Any such misinformation would not justify setting aside the Commission's incorporation, particularly where ASTM's standard is reasonably available through other means, where the standard is in fact available for inspection at the Commission's headquarters, and where the Commission has taken steps to ensure that any misinformation does not occur in the future.

Petitioner's remaining arguments likewise do not support setting aside the Commission's incorporation by reference. Petitioner cites a provision of the Consumer Product Safety Act, 15 U.S.C. § 2058(c), that requires the Commission to publish the text of proposed rules, but that provision does not apply here, where the Commission is determining only whether to adopt revisions to a voluntary consensus standard that has already been incorporated into federal law. And in any event, nothing in the Commission's substantive statutes purports to override the APA's preexisting and longstanding incorporation-by-reference procedures. Petitioner additionally relies on the Constitution's Due Process Clause, but petitioner is not a manufacturer of infant bath seats, and she does not allege that she has engaged or intends to engage in any activity that would subject her to the requirements of the

Commission's bath seat standard, much less expose her to any enforcement action (and let alone without adequate notice of the law's requirements). Petitioner lacks standing to assert due process interests on behalf of manufacturers, and in any event, petitioner's fear that manufacturers could be subject to an enforcement action without adequate notice is precluded by the APA itself, which expressly bars the government from taking enforcement actions if it has failed to make the regulation reasonably available to affected persons.

Finally, even if this Court were to agree with petitioner that the Commission's incorporation by reference violates the APA's publication requirements, the proper remedy would be to remand to the Commission without vacatur to provide the agency an opportunity to bring the publication of its safety standard into compliance with the Court's understanding of the APA. There is no cause to vacate the Commission's safety standard itself.

B. Petitioner also asserts that the Commission violated the APA's rulemaking notice requirements, 5 U.S.C. § 553(b)(3), by failing to "publish" the full text of ASTM's standard prior to incorporating it as the Commission's standard. That is incorrect. Even assuming that provision applies where the Commission is determining whether to accept revisions to a standard it has already adopted into federal law, the Commission complied with its requirements. Section 553 permits agencies to publish "either the terms or substance of the proposed rule or a description of the subjects and issues involved," and the Commission unquestionably

provided the public with a "description of the subjects and issues involved" in its rule prior to the rule taking effect. 5 U.S.C. § 553(b)(3). Petitioner relies on cases in which agencies relied on staff-prepared surveys and data known only to the agency, but this case involves nothing of the sort. The Commission relied only on ASTM's standard, which it did not create and which is available to the public. And even assuming the Commission was required under § 553 to publish the text of ASTM's standard, which it was not, petitioner must demonstrate prejudice, and petitioner does not identify anything to suggest that, had she had free online access to ASTM's standard before the revisions to the Commission's rule took effect, she would have offered any critical comment on the revisions.

STANDARD OF REVIEW

This Court reviews agency action pursuant to the Administrative Procedure Act, and may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see Christ the King Manor, Inc. v. Secretary U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 305 (3d Cir. 2013).

ARGUMENT

THE COMMISSION'S INCORPORATION BY REFERENCE IS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE CONTRARY TO LAW

Since 2010, the Commission has incorporated a version of ASTM's voluntary safety standard for infant bath seats as the Commission's safety standard. *See* 75 Fed.

Reg. 31,691 (June 4, 2010). Pursuant to the Consumer Product Safety Improvement Act, when a standards development organization revises a voluntary safety standard that has been adopted by the Commission, "[t]he revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission," unless the Commission determines that the revision "does not improve the safety of the consumer product." 15 U.S.C. § 2056a(b)(4)(B). Here, the Commission concluded that the revisions made by ASTM to its infant bath seats standard improved the safety of infant bath seats. *See* 84 Fed. Reg. 49,435, 49436 (Sept. 20, 2019). ASTM's revisions therefore became part of the Commission's safety standard by operation of law. The Commission incorporated ASTM's revised standard by reference into the Federal Register pursuant to 5 U.S.C. § 552(a), the APA's incorporation-by-reference provision. *See* 84 Fed. Reg. at 49,436-37, 49,439; *see also* 16 C.F.R. § 1215.2 (published rule).

Petitioner does not challenge the Commission's substantive determination that the revisions made by ASTM to its standard improved the safety of infant bath seats. Rather, petitioner contends that the Commission's incorporation by reference must be set aside under the APA because the Commission has not made ASTM's rule "freely available online" on the Commission's website. *See* Br. 23, 35. Petitioner additionally contends that the Commission's failure to publish ASTM's standard in full prior to the Commission's rule taking effect violated the APA's rulemaking requirements, 5 U.S.C. § 553. *See* Br. 10.

Petitioner's arguments are meritless. For over fifty years, the APA has authorized agencies to incorporate extrinsic material by reference into the Federal Register as long as the incorporated materials are reasonably available elsewhere. The Commission satisfied those requirements here, and petitioner's arguments to the contrary ignore the APA's text and context. The Commission also satisfied the APA's standards for apprising the public of the rule's contents prior to the rule taking effect, and even if the Commission had not done so, petitioner fails to demonstrate any prejudice and thus presents no basis to set aside the Commission's infant bath seats standard.

A. The Commission Permissibly Incorporated by Reference ASTM's Standard into the Federal Register

1. The Commission Followed the APA's Incorporation-By-Reference Requirements

Since 1966, the APA has expressly authorized agencies to incorporate extrinsic material by reference into the Federal Register. The referenced material shall be "deemed published in the Federal Register," just as if the material were set out in full in the Federal Register itself, so long as the material is "reasonably available to the class of persons affected thereby," and the Director of the Federal Register "approv[es]" the incorporation by reference. 5 U.S.C. § 552(a); *see* 1 C.F.R. §§ 51.3, 51.5 (setting forth regulatory requirements for obtaining the Director's formal approval).

a. The Commission satisfied these requirements in incorporating by reference ASTM's revised infant bath seats standard.

ASTM is a private organization, and its original works are entitled to copyright protections, which "vest[] immediately upon the creation of the work." *Brownstein v. Lindsay*, 742 F.3d 55, 66 (3d Cir. 2014); *see* 17 U.S.C. §§ 102, 201(a). Those copyright protections grant the copyright holder the "exclusive rights" to publish and distribute the work, *id.* § 106, subject to certain fact-dependent exceptions, such as the doctrine of fair use, *id.* § 107 (listing "factors to be considered" to determine "whether the use made of a work in any particular case is a fair use"). ASTM's bath seat standard is copyrighted, and ASTM has registered the copyright with the Copyright Office. *See* U.S. Copyright Office, ASTM F1967-19, Copyright No. TX0008752610 (May 6, 2019); https://go.usa.gov/xfjuz; *see also* 17 U.S.C. § 408.

In light of ASTM's copyright in its voluntary consensus standard, the Commission permissibly chose to utilize the APA's express incorporation-by-reference procedures, 5 U.S.C. § 552(a), rather than publish the full text of ASTM's copyrighted standard directly into the Federal Register. *See* App'x 99-101 (Letter to NCLA). Indeed, the Office of Management and Budget has explicitly directed agencies to "respect[] the copyright owner's" intellectual property interest when an agency adopts a voluntary consensus standard into law. *See* OMB Circular A-119, at 21; *see also id.* at 22 (directing agencies to "observe and protect the rights of the copyright holder" when using and publishing copyrighted works).

The Director of the Federal Register formally approved the Commission's incorporation by reference, App'x 48-49 (Formal Approval Letter), confirming that the Commission satisfied the Office of the Federal Register's requirements for incorporation by reference, *see* 1 C.F.R. §§ 51.1, 51.3. In order to obtain formal approval, the Commission "[s]ummarize[d], in the preamble of [its] final rule, the material it incorporate[d]," *id.* § 51.5(b)(3); discussed how ASTM's standard could be obtained, *id.* § 51.3(b)(2); and used "the proper language of incorporation," *id.* § 51.5(b)(4), including by making clear that ASTM's incorporated standard is a legal requirement, and referring to 5 U.S.C. § 552(a), the APA's incorporation-by-reference provision, *see* 1 C.F.R. § 51.9; *see also* 16 C.F.R. § 1215.2 (final rule); 84 Fed. Reg. at 49,437-38 (Federal Register notice).

ASTM's incorporated standard is also "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a); *see* 1 C.F.R. § 51.5(b). As discussed, copyright protections vested in ASTM's original standard at the time it was created. In view of ASTM's copyright interest in its standard, the Commission did not reproduce the text of the copyrighted standard in the body of the Commission's rule. But the standard may be inspected without charge at the Commission's headquarters in Bethesda, Maryland; may be inspected without charge at the National Archives and Records Administration in Washington, DC; and may be purchased from ASTM, the copyright holder, for $56, *see ASTM F1967-19*, *supra* p. 13, a reasonable cost given the nature of the standard as a technical manufacturing standard for use by commercial

manufacturers of infant bath seats. In light of ASTM's copyright, these forms of access are sufficient to make ASTM's incorporated standard "reasonably available" to affected persons.

In addition to these means of reasonable access, ASTM has made the full text of its standard available online, for free, in read-only format. *See Reading Room*, *supra* p. 14. The read-only format does not permit users to electronically copy or print the document, but users may read the standard in full online at no cost.

b. Petitioner acknowledges that the APA allows agencies to incorporate by reference material into the Federal Register so long as the material is "reasonably available to the class of persons affected thereby" and the Director of the Federal Register approves the incorporation. *See* Br. 20 (citing 5 U.S.C. § 552(a) and 1 C.F.R. § 51.5(b)). Petitioner insists, however, that in order for the material to be "reasonably available" under the APA, the standard must be "freely available online," and petitioner asserts that ASTM's standard is not sufficiently available here. Br. 23, 35. Petitioner is incorrect, for several reasons.

To begin, ASTM's standard *is* available for free online. As discussed, any consumer wishing to read the full text of ASTM's standard may do so for free, using ASTM's online "Reading Room." Petitioner's amici (but not petitioner herself) contend that ASTM's "read-only" format is insufficient because users cannot electronically print or "cut and paste[]" the document's text. *See* Law Prof. Amicus Br. 13. But amici fail to explain how those minimal restrictions on electronically

printing or copying would meaningfully impair a consumer's ability to read the full text of the standard to know what it means, or would in any way prevent a consumer from discussing the contents of the standard or the Commission's rule with attorneys, lawmakers, or members of the public. Petitioner asserts that she wishes to view ASTM's standard in order to know what it says. *See* Br. 2. She may do so online, without charge.

In any event, petitioner is incorrect that the APA "dictate[s]" that all material incorporated by reference be "freely available online." Br. 23. The APA requires only that material incorporated by reference be "*reasonably* available to the class of persons affected thereby." 5 U.S.C. § 552(a) (emphasis added). Whether incorporated material is "reasonably available" depends upon the particular circumstances, including the regulation at issue and the nature of the material incorporated. *See IBR Handbook* 7-8 ("We interpret 'reasonably available' in a flexible, case-by-case manner that takes specific situations into consideration."); *cf. Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214, 220 & n.6 (3d Cir. 2000) (interpreting regulatory term "reasonably understandable" "in light of the . . . nature of the matter discussed," and explaining that "as in other areas of the law, what is reasonable depends on the surrounding circumstances") (Alito, J.).

The Office of the Federal Register, the agency with the authority to "interpret and apply" § 552(a), *see* 1 C.F.R. § 51.1(b), has explicitly declined to interpret "reasonably available" to mean "free to anyone online." *See* 79 Fed. Reg. at 66,269-

70. Rather, it has explained that whether material is "reasonably available" will depend upon several factors, including "U.S. copyright law." *Id.* at 66,270; *see IBR Handbook* 7-8; *see also* OMB Circular A-119, at 21 (explaining that "reasonable availability is context-specific," and listing non-exhaustive "factors" for agencies to consider in determining whether a particular standard is reasonably available under the circumstances).

Restrictions on unauthorized reproduction and distribution of copyrighted works may prevent an agency from providing a private voluntary consensus standard for free on the Internet. That standard is nonetheless "reasonably available" to affected persons if it can be inspected at the agency and purchased from the copyright holder at a reasonable price. *See* 79 Fed. Reg. at 66,272; OMB Circular A-119, at 21. For decades, § 552(a)'s incorporation-by-reference provision has allowed agencies to strike a reasonable balance between their legal obligation to make use of voluntary consensus standards (*see supra* pp. 5-6), private copyright interests in those standards, and public access. *See* Admin. Conf. of the United States, *Adoption of Recommendations, Incorporation by Reference*, 77 Fed. Reg. 2257, 2257 (Jan. 17, 2012) (explaining that incorporation by reference "allows agencies to comply" with the APA while also complying with the National Technology Transfer and Advancement Act of 1995, and "strong federal policy" favoring incorporation by reference).

Although petitioner acknowledges that whether material is "reasonably available" depends on the particular circumstances, Br. 22, petitioner nonetheless

argues that federal agencies and courts must disregard every factor save one—the "technological advances" of 2020. *See* Br. 22-23. Petitioner thus seeks to transform § 552(a)'s reasonableness standard into a "more rigorous" bright-line requirement that all material must be made "freely available online." *See id.* That turns § 552(a)'s flexible "reasonably available" standard into a straightjacket.

Petitioner's interpretation of § 552(a) is particularly untenable in light of the broader statutory context. *Contra* Br. 26. Congress has not required that even the Federal Register and Code of Federal Regulations themselves be made freely available online. Congress has long authorized the government to set prices for print "copies" and "subscriptions" to the Federal Register and Code of Federal Regulations. *See* 44 U.S.C. §§ 1504, 1506. The price for a 2020 annual print subscription to the Code of Federal Regulations is $1,804.00.[4] In 1993, Congress established "a system of online access to . . . the Federal Register" and other government documents. *See* 44 U.S.C. § 4101. In so doing, Congress explicitly authorized the Government Publishing Office to "charge reasonable fees for use of . . . the system of access" for all users other than federal depository libraries. *Id.* § 4102. The Government Publishing Office has thus far chosen to make the daily Federal Register and Code of Federal Regulations freely available online to anyone, but that free online access is not

[4] *See* U.S. Gov't Publ'g Office Bookstore, *Code of Federal Regulations 2020 (Paperback Subscription Service)*, https://bookstore.gpo.gov/products/code-federal-regulationspaper2020 (last visited July 16, 2020).

mandated by Congress. *See* 44 U.S.C. § 4102; *see* Off. of the Fed. Register, *Incorporation by Reference*, 78 Fed. Reg. 60,784, 60,786 (Oct. 2, 2013) (proposed rule) ("While the Superintendent of Documents has chosen not to charge for electronic access to the daily Federal Register, [the statute] does indicate that the Congress understands that there are costs to posting and archiving materials online and that recovering these costs is not contrary to other Federal laws.").

Congress's legislation with respect to the Pipeline and Hazardous Materials Safety Administration (PHMSA) removes any doubt that § 552(a) does not require agencies to make all material incorporated by reference freely available online. The PHMSA relies on voluntary consensus standards for its regulations, and because those standards are generally protected by copyright, PHMSA has incorporated dozens of standards by reference into the Federal Register pursuant to the APA. *See* 77 Fed. Reg. 37,472, 37,473 (June 21, 2012) (discussing the agency's incorporation-by-reference practices). In 2012, in order to ensure greater transparency with respect to PHMSA's regulations, Congress enacted a provision that prohibited the agency from issuing any pipeline regulation "that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site." Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) ("Limitation on Incorporation of Documents by Reference"). PHMSA immediately faced hurdles in implementing this requirement in light of standards development

organizations' intellectual property rights. *See* 77 Fed. Reg. at 37,473-74 (listing financial, practical, and legal concerns). Accordingly, one year after Congress enacted the requirement into law, Congress amended it to strike the requirement that PHMSA make incorporated materials available for free "on an Internet Web site." *See* Availability of Pipeline Safety Regulatory Documents, Pub. L. No. 113-30, 127 Stat. 510, 510 (2013) ("striking 'on an Internet Web site'"). Congress explained that, although it imposed the free-online-access requirement "in good faith," the requirement had caused "unintended consequence[s]," including that it threatened the "business model" of the standards development organizations who held intellectual-property rights in their standards that were incorporated by reference into PHMSA rules. *See* H.R. Rep. No. 113-152, at 2, 3 (2013).

If petitioner's interpretation of § 552(a) were correct, and the APA independently requires agencies to make material incorporated by reference available online for free even when the material is copyrighted, then Congress's 2012 legislation requiring PHMSA to make any standards incorporated by reference "available to the public, free of charge, on an Internet Web site," 125 Stat. at 1919, was superfluous. Moreover, Congress's repeal of that requirement in 2013 would be a nullity, as PHSMA would still be required today by the APA to make any material incorporated by reference freely available online. However, courts properly presume that Congress intends for its legislation and its amendments "to have real and substantial effect."

Ross v. Blake, 136 S. Ct. 1850, 1858 (2016). Petitioner's argument that "reasonably available" requires free online access to copyrighted technical standards is meritless.

c. Petitioner additionally asserts that the Commission acted arbitrarily and capriciously in incorporating ASTM's standard by reference into the Federal Register because the Commission's "underlying premise" that ASTM's standard is protected by copyright is "baseless." Br. 36. That is also incorrect. As discussed above, ASTM is a private organization, and copyright "vests immediately upon the creation of" its original work. *Brownstein*, 742 F.3d at 66; *see* 17 U.S.C. §§ 102, 201(a); *see also supra* p. 21. The Commission reasonably took that copyright interest into account in deciding to use the APA's express incorporation by reference procedures. Indeed, as discussed, Executive Branch policy requires agencies to "respect[] the copyright owner's interest in protecting its intellectual property." *See* OMB Circular A-119, at 21; *see also id.* at 22 (directing agencies to "observe and protect" copyrights when using private voluntary consensus standards).

Petitioner insists that once a copyrighted standard is incorporated by reference into federal law, any copyright interests a private organization has in its standard cease to apply. Br. 36. But petitioner does not identify any provision of the Copyright Act that would terminate existing copyright protection in a work merely because the work was subsequently incorporated by reference into the Federal Register by a federal agency. Indeed, the Second Circuit has observed that such an interpretation of the Copyright Act could raise "substantial problems under the Takings Clause of the

Constitution." *See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994). The Second Circuit has thus held that a law's "reference to a copyrighted work as a legal standard" does not "result[] in loss of the copyright." *Id.* (rejecting argument that states' laws reference to a copyrighted car valuation method as method of legal compliance meant that the copyrighted work "passed into the public domain"); *see also Practice Mgmt. Info. Corp. v. American Med. Ass'n*, 121 F.3d 516, 517, 518 (9th Cir. 1997) (rejecting argument that a federal regulation requiring Medicaid reimbursement applicants to use a copyrighted "Physician's Current Procedural Terminology" coding system meant that the coding system "entered the public domain").

Petitioner cites *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020), but that case involved the "government edicts doctrine," which provides that officials empowered "to make and interpret the law" "cannot be the 'author'" of works under the Copyright Act. *Id.* at 1503-04, 1507-08 (citing *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888)). That case did not address any question regarding a copyright in a work authored by a party other than a government entity or official. The Commission's incorporation by reference of ASTM's private standard into federal regulation does not alter the fact that the standard was developed by a private organization and not on behalf of a government entity. *See* ASTM Int'l, *How Standards Are Developed*, https://www.astm.org/MEMBERSHIP/standardsdevelop.html (last visited July 14, 2020); *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730,

737 (1989) ("As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.").

Petitioner's reliance on the Fifth Circuit's decision in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002), is also unavailing. That case involved an organization that had written a "model building code[]" with "the sole motive and purpose of" becoming law. *Id.* at 793, 805. When the model code became the law of two towns in Texas, the organization attempted to assert a copyright interest in the towns' laws, and attempted to prevent an individual who obtained the text of the codes from the private organization from copying the text on an internet website, where the text was "identified simply as" the towns' building codes. *Id.* at 793. The Fifth Circuit held that "the building codes of [the towns] cannot be copyrighted," and that the organization's copyright interest in its model building code was not infringed by a website reprinting "only 'the law' of th[e] municipalities," identified as the law of the municipalities. *Id.* at 800; *see also id.* at 796.

This case, unlike *Veeck*, does not involve an attempt by ASTM to claim an ownership interest in "the law" "identified" as such. *See* 293 F.3d at 793, 800. Nor does this case involve a "model code" which was created for the "sole motive and purpose" of being enacted into law. *Id.* at 804, 805; *see* ASTM Int'l, *FAQs*, https://www.astm.org/ABOUT/faqs.html (last visited July 14, 2020) (explaining ways in which ASTM's voluntary standards are used by individuals and industries).

ASTM has asserted a copyright interest only in its privately created voluntary consensus standard, and this case concerns whether the Commission appropriately followed the APA's express incorporation-by-reference procedures in incorporating that standard into law. *Veeck* did not address this situation. Indeed, the Fifth Circuit expressly distinguished the circumstances at issue there from "the common practice of governmental entities' incorporating [private voluntary consensus standards] in laws and regulations." *Veeck*, 293 F.3d at 803-04 & n.20 (citing OMB Circular A-119 which "direct[s] federal agencies to adopt privately developed standards 'whenever practicable and appropriate'"); *see also* Office of the Fed. Register, *Incorporation by Reference*, 79 Fed. Reg. at 66,268 ("[T]he Veeck decision . . . ha[s] not eliminated the availability of copyright protection for privately developed codes and standards referenced in or incorporated into federal regulations.").

Petitioner asserts that individuals would have a "fair use defense for personal use" of ASTM's standard now that it has been incorporated into federal law. Br. 37 n. 10 (quoting *CCC Info. Servs., Inc.*, 44 F.3d at 74 n.30). But the fact that particular uses of ASTM's standard might qualify as fair uses now, following its incorporation by reference into law, does not suggest (as petitioner claims) that "copyright protections do not apply" at all to ASTM's standard. Br. 36.

Nor does it demonstrate that the Commission acted arbitrarily and capriciously by not publishing ASTM's copyrighted standard in full in the Federal Register or online. The APA unambiguously authorizes agencies to incorporate existing

standards by reference rather than writing those standards into an agency's rule. *See* 5 U.S.C. § 552(a). Agencies across the federal government have commonly used that method to account for private copyright holders' interests and to avoid any risk of violating copyrights in an area where legal rules are fact-intensive and the potential scope of infringement liability is uncertain. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (explaining that whether a use is "fair" under the Copyright Act "calls for case-by-case analysis"); *see also, e.g.*, 17 U.S.C. § 107 (setting forth fair-use factors). Although there may be fair uses of ASTM's standard now that it has been incorporated by reference into federal law, there may still be other uses which might infringe ASTM's copyright. Moreover, even assuming arguendo that fair use principles might permit the Commission to publish the voluntary standard on the Internet in read-only format, as ASTM has already done, it is a separate question whether fair use would likewise permit the Commission to publish the standard in a format that would allow unrestricted copying and distribution by all comers. *Cf.* 17 U.S.C. § 107(4) (fair use analysis shall consider, *inter alia*, "the effect of the use upon the potential market for or value of the copyrighted work"). Whatever the precise contours of ASTM's exclusive rights under the Copyright Act may be in this setting, the Commission here acted reasonably by using the APA's express incorporation-by-reference procedures to minimize any risk of infringement and "observe and protect" ASTM's copyright interests, while ensuring that ASTM's standard is "reasonably available" to affected parties. *See* OMB Circular A-119, at 21-22.

d. Finally, petitioner contends that ASTM's standard is not "reasonably available," and the Commission has acted unlawfully, because petitioner and her counsel contacted the Commission in January 2020 in order to inspect the infant bath seats standard at the Commission's headquarters, but one or more unnamed employee or employees of the Commission informed petitioner and her counsel that the standard was not available for inspection. *See* App'x 102-03 (Milice Aff.); App'x 104-06 (McClain Aff.). As the Commission's Secretary, Alberta Mills, explains in her own declaration, ASTM's infant bath seat standard is and has been available for inspection at the Commission's headquarters. *See* ECF 25-2, at 1-2 (Mills Decl. ¶¶ 2-4, 8). If petitioners' declarations accurately report what petitioner and her counsel were told, then petitioner and her counsel were misinformed. *See id.* at ¶¶ 5-6. Any such mistake, however, provides no basis to set aside the Commission's incorporation by reference, particularly in light of the fact that ASTM's standard is and has been reasonably available through other means, and the Commission has taken steps to ensure that any misinformation does not occur in the future. *See id.* ¶¶ 6-9.

2. The Commission's Substantive Statutes Do Not Displace the APA's Preexisting and Longstanding Incorporation-by-Reference Procedures

Petitioner additionally asserts that the Commission's incorporation by reference must be set aside because the Commission's substantive statutes "unambiguously prohibit[]" the Commission from promulgating a consumer product safety rule unless the Commission "publishes" the full text of the rule in the Federal Register, which

petitioner contends the agency failed to do here. Br. 18-19 (citing 15 U.S.C. § 2058(c)). Petitioner is wide of the mark.

As an initial matter, the provision of the Consumer Product Safety Act upon which petitioner relies, 15 U.S.C. § 2058, does not apply here. That provision sets forth a detailed rulemaking process that the Commission must follow when it "propos[es]" a "consumer product safety rule." *See id.* § 2058(c). Among other things, the Commission must issue a "preliminary regulatory analysis," which evaluates the potential costs and benefits of the proposed rule and evaluates the potential costs and benefits of any "reasonable alternatives." *Id.* § 2058(c)(1), (4). Before promulgating a final rule, the Commission must issue a "final regulatory analysis" that revisits those factors and must make a series of specific findings, including affirmative findings that the rule is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product," that compliance with a voluntary standard "is not likely to result in the elimination or adequate reduction of [the] risk of injury" or "substantial compliance" with the voluntary standard is not likely, and that the rule "imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated." *Id.* § 2058(f)(2)-(3).

These detailed rulemaking procedures and requirements are inapplicable where, as here, the Commission has previously adopted a voluntary standard for a durable infant or toddler product as a consumer product safety standard, and the standards

organization has subsequently revised the voluntary standard. In that situation, the "[p]rocess for considering subsequent revisions to [a] voluntary standard" is prescribed not by 15 U.S.C. § 2058, but rather by 15 U.S.C. § 2056a(b)(4)(B).

Section 2056a(b)(4)(B) prescribes a very different and far simpler process. It provides that "[i]f an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this subsection," then "[t]he revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 2058 of this title," unless the Commission determines within 90 days that "the proposed revision does not improve the safety of the consumer product." 15 U.S.C. § 2056a(b)(4)(B). Congress thus did not provide for the agency to respond to a revised voluntary standard by initiating a rulemaking proceeding under § 2058, publishing the voluntary standard as a proposed rule, issuing preliminary and final regulatory analyses, and making a series of affirmative findings about the effectiveness of the standard and the inadequacy of regulatory alternatives. Instead, Congress provided for the revised voluntary standard to become the agency's safety standard by operation of law, subject only to an adverse determination by the agency regarding a different regulatory question (whether the proposed revision "improve[s] the safety of the consumer product"). *Id.*

§ 2056a(b)(4)(B); *see* 84 Fed. Reg. at 49,436. The rulemaking procedures of § 2058 have no applicability to this proceeding.[5]

In any event, § 2058(c) provides only that the Commission may not "propose[]" a consumer product safety rule unless, among other requirements, it "publishes in the Federal Register the text of the proposed rule." The Commission here published the text of its infant bath seats rule prior to the rule taking effect. *See* 84 Fed. Reg. at 49,439 (quoting intended language of 16 C.F.R. § 1215.2). The text of the Commission's rule proposes to incorporate by reference ASTM's standard pursuant to the APA's express incorporation-by-reference provision, *see id.*, but nothing in § 2058(c) suggests that if the Commission proposes a rule that intends to incorporate material by reference, then the Commission must publish the text of the referenced material directly in the Federal Register. *See id.* Congress enacted § 2058(c) against the backdrop of the APA's pre-existing and longstanding incorporation-by-reference provision. *Compare* Pub. L. No. 97-35, tit. XII, § 1203(a),

[5] Indeed, not only are the rulemaking procedures in § 2058 inapplicable when the Commission revises an existing safety standard under § 2056a, but they are also inapplicable when the Commission adopts a new safety standard for durable nursery products under § 2056a in the first instance. Section 2056a(b) sets forth a rulemaking timetable that requires the Commission to "promulgate [safety] standards for no fewer than 2 categories of durable infant or toddler products every 6 months . . . until the Commission has promulgated standards for all such product categories," and provides that such rules are to be promulgated "in accordance with section 553 of title 5," the general rulemaking provisions of the APA—not the quite different and highly detailed rulemaking provisions applicable under § 2058. *See* 15 U.S.C. § 2056a(b)(1)(B), (2).

95 Stat. 357, 704 (1981) (enacting § 2058(c) requirement); *with* Pub. L. No. 89-487, 80 Stat. 250, 250 (1966) (enacting APA's incorporation-by-reference provision). Had Congress wished to displace the ordinary rules of incorporation by reference and require the Commission to publish directly into the Federal Register the text of any material the agency even proposes to incorporate, notwithstanding copyright or any other relevant constraints, Congress would have said so. *See Jones v. United States*, 526 U.S. 227, 234 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so."); *see also Whitman v. American Trucking Assocs.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

3. The Commission's Incorporation By Reference Does Not Present Constitutional Concerns

Petitioner's constitutional arguments are likewise misplaced. Petitioner is correct that the Due Process Clause requires that "regulat[ed] persons or entities" have "fair notice" of the law's requirements before it may be enforced against them. Br. 40 (quoting *Federal Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). But this case does not involve any "regulat[ed] persons or entities." *Id.* Petitioner is not a manufacturer of infant bath seats, and she does not allege that she has engaged or intends to engage in any activity that would subject her to the requirements of the Commission's bath seat standard, much less expose her to any enforcement action. Petitioner does not have standing to raise any constitutional

claims on behalf of regulated parties, none of whom are before the Court. *See Amato v. Wilentz*, 952 F.2d 742, 748 (3d Cir. 1991) ("The longstanding basic rule . . . is that 'in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

Regardless, petitioner has failed to show that regulated companies lack "fair notice" of ASTM's standard, a version of which has been incorporated by reference as the Commission's standard for ten years. *See* 75 Fed. Reg. at 31,691 (first incorporating ASTM's infant bath seat standard as the Commission standard in 2010, and noting that manufacturers of infant bath seats were already relying on ASTM's standard voluntarily). Manufacturers may read the standard for free on ASTM's website and may purchase a copy for $56, a negligible regulatory burden for a commercial manufacturer. Moreover, if ASTM's standard were to become inaccessible in the future, the APA itself would excuse regulated entities from compliance with the standard. *See* 5 U.S.C. § 552(a) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."). Accordingly, the scenario on which petitioner's due process argument rests—the enforcement of the agency's rule against regulated parties who lack fair notice of the rule's contents—simply cannot arise, because the APA precludes it.

Petitioner's reliance on the First Amendment is equally unavailing. Petitioner has reasonable access to ASTM's incorporated standard, and she may freely discuss ASTM's standard and the Commission's rule. Petitioner suggests that she would be prevented from doing so by ASTM's copyright protections in its standard, but copyright law "contains built-in First Amendment accommodations" through doctrines such as fair use and the idea/expression distinction. *See Eldred v. Ashcroft*, 537 U.S. 186, 218-19 (2003). To the extent petitioner asserts that she is entitled under the First Amendment to free and convenient access to any and all material incorporated by reference so that she may "discuss governmental affairs" and "petition the government," Br. 45, that argument "requires a level of abstraction" of the First Amendment's protections that cannot be "ascribe[d] to the framers." *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-68 (3d Cir. 1986); *see also* Br. 22 & n.5 (recognizing that, in 1795, the law was not free, but was rather published in newspapers).

Finally, without identifying any specific provision of the Constitution, petitioner contends that the law cannot be "own[ed]" by private parties. *See* Br. 39-40. As discussed, however, ASTM has not claimed ownership of the "law"; ASTM has asserted a copyright interest only in its privately created voluntary consensus standard, which has been incorporated by reference into law pursuant to the APA's incorporation-by-reference provision. Nothing in the Constitution provides that a privately authored copyrighted standard loses its copyright protections upon being

incorporated by reference into law, and indeed, as set forth above, that could present its own constitutional concerns. *See CCC Info. Servs., Inc.*, 44 F.3d at 74. Petitioner's constitutional arguments are meritless.

4. If the Commission's Incorporation by Reference Violated the APA, the Appropriate Remedy Would Be Remand Without Vacatur

For the foregoing reasons, the Commission acted lawfully in incorporating ASTM's standard by reference. But even if the Court were to conclude otherwise, there would be no basis for vacating the Commission's rule. Instead, the proper course for the Court would be to remand to the agency without vacatur.

"To determine whether to remand without vacatur," courts consider "the 'seriousness of the [action's] deficiencies'" and the "likely 'disruptive consequences' of vacatur." *American Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 518 (D.C. Cir. 2020) (alteration in original) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Here, petitioner does not challenge the agency's substantive determination that ASTM's revisions to its infant bath seats standard improve the safety of infant bath seats, or the incorporation of the revisions into the federal safety standard—an outcome required by statute. Petitioner challenges only the agency's incorporation by reference, and asserts only that the agency has failed to make ASTM's incorporated standard sufficiently available. If this Court were to agree with petitioner, a remand without vacatur would provide the agency an opportunity to bring the published federal safety standard into compliance

with the Court's understanding of the APA's publication requirements. There is no cause in this circumstance to set aside the Commission's rule itself and vacate requirements that both the Commission and ASTM have determined would improve the safety of infant bath seats, *see* 84 Fed. Reg. at 49,435, which would cause substantial disruption.

B. The Commission Provided Adequate Notice of Its Rule Prior to the Rule Taking Effect

Petitioner also asserts that the Commission violated 5 U.S.C. § 553(b)(3), which provides that an agency's notice of proposed rulemaking shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* According to petitioner, § 553(b)(3) required the Commission to "publish" the full text of ASTM's standard into the Federal Register prior to incorporating it as the Commission's standard. *See* Br. 14.

Petitioner is incorrect. It is doubtful that § 553(b)(3) applies here at all; as explained above, when the Commission has already adopted a voluntary industry standard for durable infant and toddler products as an agency safety standard, subsequent revisions to the voluntary standard do not require the agency to initiate a proposed rulemaking, but instead become part of the existing federal standard by operation of law unless the agency finds that the revisions do not improve the safety of the products. *See supra* pp. 35-37. But even if § 553(b)(3) is applicable, petitioner misunderstands its requirements. Section 553(b)(3) requires notice of "*either* the terms

or substance of the proposed rule *or* a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (emphases added). An agency is therefore not required during the rulemaking stage to publish the full text of even its proposed rule itself, let alone the full text of any material the agency proposes to incorporate by reference into a proposed rule.

Here, before the rule took effect, the Commission published notice in the Federal Register that clearly identified its statutory authority for promulgating safety standards for infant bath seats, as well as the statutory process for updating safety standards once a private organization has notified the Commission of revisions to a voluntary safety standard incorporated into law. *See* 84 Fed. Reg. at 49,435, 49,436. The Commission also provided a detailed summary of ASTM's revisions to its bath seat standard. *See id.* at 49,436-37. For example, the Commission quoted "Section 6.1.2.3" of ASTM's standard, and explained that ASTM had moved that section "from an explanatory note into the enforceable performance requirement" for stability testing. *See id.* at 49,436. The Commission also explained that ASTM had added a "new test surface" to its testing procedures, and the Commission quoted the definition of that new test surface. *Id.* (quoting "Test Surface #3"); *see also id.* at 49,436-37 (discussing addition of Test Surface #3 to different testing procedures). The Commission described ASTM's new requirement of "perpendicular" force during stability testing procedures, rather than "horizontal" force. *Id.* at 49,437. And the Commission quoted the edits that ASTM made to its warning label. *See id.* (explaining

that ASTM revised the standard warning label to be more "personalized," such that the warning now reads "Stay in arms reach of your baby," rather than "ALWAYS keep baby within adult's reach").

For each of ASTM's changes, the Commission explained why the revision improved the safety of infant bath seats (or, in the case of certain editorial changes, were at a minimum neutral as to the safety of infant bath seats). *See* 84 Fed. Reg. at 49,436-37. The Commission also explained its intent to incorporate ASTM's revised standard by reference into the Federal Register pursuant to § 552(a), and explained where ASTM's standard could be obtained. *See id.* at 49,437-38. The Commission's publication in the Federal Register thus "fairly apprise[d] interested persons of the subjects and issues before the [agency]" prior to the Commission's rule taking effect. *See Louisiana Forestry Ass'n, Inc. v. Secretary of U.S. Dep't of Labor*, 745 F.3d 653, 677 (3d Cir. 2014).

The cases relied upon by petitioner are inapposite. Petitioner relies on cases in which agencies promulgated rules that relied upon "staff-prepared scientific data" that the agency failed to disclose. *See American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 239 (D.C. Cir. 2008) (emphasizing "narrowness of [its] holding under section 553 of the APA"); *see also Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (Environmental Protection Agency adopted "emission control level" based upon tests conducted by the agency, but the agency failed to disclose details of those tests); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977)

("[A]ll the scientific research was collected by the agency, and none of it was disclosed to interested parties as the material upon which the proposed rule would be fashioned."). That rule has no application here, where the Commission did not rely on any staff-prepared study or data known only to the Commission. *See American Radio Relay League*, 524 F.3d at 239. The Commission considered and addressed only the revisions that ASTM had made to its voluntary consensus standard, which is available to the public.

Petitioner's reliance on the Ninth Circuit's decision in *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 685 (9th Cir. 1981), is even further afield. That case involved a provision of the Fishery Conservation and Management Act of 1976, which requires fishery management plans to "include a summary of the information utilized in making" fishery specifications. *Id.* (quoting 16 U.S.C. § 1853(a)(3)). The Court discussed only the requirements of a "summary" under that statute, and did not address any requirement of the APA. *See id.* To the extent that case has any bearing here, it only cuts against petitioner, as the Ninth Circuit held that extrinsic material could be referred to in a fishery-management-plan summary so long as the material was "reasonably available to the interested public," which the Court described as requiring only that the material be "accessible to the interested public" "in some form." *Id.* at 686 & n.2.

Finally, even assuming the Commission was required under § 553 to publish in the Federal Register the text of ASTM's standard, which it was not, "[a] party

challenging the sufficiency of the public comment process bears the burden of showing it was prejudiced by the lack of opportunity to comment." *Delaware Riverkeeper Network v. Secretary Pa. Dep't of Envt'l Prot.*, 833 F.3d 360, 378 (3d Cir. 2016); *see* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). Petitioner does not identify anything to suggest that, had she had the free online access to ASTM's standard that she contends is required, she would have offered any critical comment on ASTM's revisions. *See* Br. 15-16. Indeed, petitioner does not challenge at all the Commission's substantive conclusion that ASTM's revised standard improves the safety of infant bath seats. Petitioner provides no basis to set aside the agency's rule.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General

SCOTT R. MCINTOSH
s/ Courtney L. Dixon
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division, Room 7246
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-8189
courtney.l.dixon@usdoj.gov
California State Bar No. 308847

Of Counsel:

J. GIBSON MULLAN
General Counsel

MELISSA V. HAMPSHIRE
Assistant General Counsel
ALEXANDER W. DENNIS
Attorney
Office of the General Counsel
Consumer Product Safety Commission

July 2020

COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,339 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

3. On July 17, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

4. The text of the electronic version of this document is identical to the text of the hard copies that will be provided.

5. This document was scanned for viruses using virus scanning software, and no virus was detected.

s/ Courtney L. Dixon
Courtney L. Dixon

ADDENDUM

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5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

. . . .

15 U.S.C. § 2060

§ 2060. Judicial review of consumer product safety rules.

(a) Petition by persons adversely affected, consumers, or consumers organizations

Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia or for the circuit in which such person, consumer, or organization resides or has his principal place of businesses for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28. For purposes of this section, the "record" means such consumer product safety rule; any notice or proposal published pursuant to section 2056, 2057, or 2058 of this title; the transcript required by section 2058(d)(2) of this title of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule.

. . . .

(c) Jurisdiction; costs and attorneys' fees; substantial evidence to support administrative findings

Upon the filing of the petition under subsection (a) of this section the court shall have jurisdiction to review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief, including interim relief, as provided in such chapter. A court may in the interest of justice include in such relief an award of the costs of suit, including reasonable attorneys' fees (determined in accordance with subsection (f)[)] and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of Title 28 or any other provision of law. The consumer product safety rule shall not be affirmed unless the Commission's findings under sections 2058(f)(1) and 2058(f)(3) of this title are supported by substantial evidence on the record taken as a whole.

. . .

(g) Expedited judicial review

(1) Application

This subsection applies, in lieu of preceding subsections of this section, to judicial review of--

(A) any consumer product safety rule promulgated by the Commission pursuant to section 2064(j) of this title (relating to identification of substantial hazards);

(B) any consumer product safety standard promulgated by the Commission pursuant to section 2089 of this title (relating to all-terrain vehicles);

(C) any standard promulgated by the Commission under section 2056a of this title (relating to durable infant and toddler products); and

(D) any consumer product safety standard promulgated by the Commission under section 2056b of this title (relating to mandatory toy safety standards).

(2) In general

Not later than 60 days after the promulgation, by the Commission, of a rule or standard to which this subsection applies, any person adversely affected by such rule or standard may file a petition with the United States Court of Appeals for the District of Columbia Circuit for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28.

(3) Review

Upon the filing of the petition under paragraph (2) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter.

. . . .

15 U.S.C. § 2056a

§ 2056a. Standards and consumer registration of durable nursery products

(a) Short title

This section may be cited as the "Danny Keysar Child Product Safety Notification Act".

(b) Safety standards

(1) In general

The Commission shall--

(A) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products; and

(B) in accordance with section 553 of Title 5, promulgate consumer product safety standards that--

(i) are substantially the same as such voluntary standards; or

(ii) are more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products.

(2) Timetable for rulemaking

Not later than 1 year after August 14, 2008, the Commission shall commence the rulemaking required under paragraph (1) and shall promulgate standards for no fewer than 2 categories of durable infant or toddler products every 6 months thereafter, beginning with the product categories that the Commission determines to be of highest priority, until the Commission has promulgated standards for all such product categories. Thereafter, the Commission shall periodically review and revise the standards set forth under this subsection to ensure that such standards provide the highest level of safety for such products that is feasible.

(3) Judicial review

Any person adversely affected by such standards may file a petition for review under the procedures set forth in section 2060(g) of this title, as added by section 236 of this Act.

(4) Process for considering subsequent revisions to voluntary standard

(A) Notice of adoption of voluntary standard

When the Commission promulgates a consumer product safety standard under this subsection that is based, in whole or in part, on a voluntary standard, the Commission shall notify the organization that issued the voluntary standard of the Commission's action and shall provide a copy of the consumer product safety standard to the organization.

(B) Commission action on revised voluntary standard

If an organization revises a standard that has been adopted, in whole or in part, as a consumer product safety standard under this subsection, it shall notify the Commission. The revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 2058 of this title, effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard.

. . . .

(f) Definition of durable infant or toddler product

As used in this section, the term "durable infant or toddler product"--

(1) means a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years; and

(2) includes--

(A) full-size cribs and nonfull-size cribs;

(B) toddler beds;

(C) high chairs, booster chairs, and hook-on chairs;

(D) bath seats;

(E) gates and other enclosures for confining a child;

(F) play yards;

(G) stationary activity centers;

(H) infant carriers;

(I) strollers;

(J) walkers;

(K) swings; and

(L) bassinets and cradles.

1 C.F.R. § 51.1

§ 51.1 Policy

(a) Section 552(a) of title 5, United States Code, provides, in part, that "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

(b) The Director will interpret and apply the language of section 552(a) together with other requirements which govern publication in the Federal Register and the Code of Federal Regulations. Those requirements which govern publication include—

(1) The Federal Register Act (44 U.S.C. 1501 et seq.)
(2) The Administrative Procedure Act (5 U.S.C. 551 et seq.);
(3) The regulations of the Administrative Committee of the Federal Register under the Federal Register Act (1 CFR Ch. I); and
(4) The acts which require publication in the Federal Register (See CFR volume entitled "CFR Index and Finding Aids.")

(c) The Director will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference—

(1) Is intended to benefit both the Federal Government and the members of the class affected; and
(2) Is not intended to detract from the legal or practical attributes of the system established by the Federal Register Act, the Administrative Procedure Act, the regulations of the Administrative Committee of the Federal Register, and the acts which require publication in the Federal Register.

(d) The Director will carry out the responsibilities by applying the standards of part 51 fairly and uniformly.

(e) Publication in the Federal Register of a document containing an incorporation by reference does not of itself constitute an approval of the incorporation by reference by the Director.

(f) Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.

1 C.F.R. § 51.3

§ 51.3. When will the Director approve a publication?

(a) (1) The Director will informally approve the proposed incorporation by reference of a publication when the preamble of a proposed rule meets the requirements of this part (See § 51.5(a)).

(2) If the preamble of a proposed rule does not meet the requirements of this part, the Director will return the document to the agency (See 1 CFR 2.4).

(b) The Director will formally approve the incorporation by reference of a publication in a final rule when the following requirements are met:

(1) The publication is eligible for incorporation by reference (See § 51.7).

(2) The preamble meets the requirements of this part (See § 51.5(b)(2)).

(3) The language of incorporation meets the requirements of this part (See § 51.9).

(4) The publication is on file with the Office of the Federal Register.

(5) The Director has received a written request from the agency to approve the incorporation by reference of the publication.

(c) The Director will notify the agency of the approval or disapproval of an incorporation by reference in a final rule within 20 working days after the agency has met all the requirements for requesting approvals (See § 51.5).