

Guidelines for Incorporating Standards by Reference in Regulations to Support Public Policy Objectives

2018-09-01



Standards Council of Canada
Conseil canadien des normes

Standards **experts**. Accreditation **solutions**.
Expert en normalisation. **Solutions** d'accréditation.

Canada

Contents

About the Standards Council of Canada	1
About these Guidelines	1
Key Terms and Definitions.....	2
Incorporating Standards by Reference in Regulations	4
Alternative References	5
Partial References	5
Qualified References	5
Forms of Incorporating Standards by Reference	5
Static References	5
Ambulatory References	7
Considerations when using Static and Ambulatory Referencing	8
Other Policy Considerations when Referencing Standards	9
Trade Implications	9
Timeliness	9
Monitoring Standards in Regulations	9
Conclusion	10



About the Standards Council of Canada

The Standards Council of Canada (SCC) is a Crown corporation within the portfolio of Innovation, Science and Economic Development (ISED). With the goal of enhancing Canada's economic competitiveness and social well-being, SCC leads, coordinates, and facilitates the development and use of national and international standards within Canada. SCC represents Canada at the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). Accreditation services are provided by SCC to various customers, including product certifiers and testing laboratories.

About these Guidelines

These guidelines have been developed in consultation with the Treasury Board of Canada Secretariat (TBS). For more information on Canada's federal regulatory policy framework, please consult the [Cabinet Directive on Regulation](#).

This document is not intended to provide legal advice. It is intended to provide general guidance and policy advice on approaches to incorporation by reference for federal, provincial, and territorial stakeholders, including regulators, and other interested parties. The availability of the use of incorporation by reference should be assessed in the specific context of each jurisdiction. Advice can be sought from the Department of Justice and TBS for federal stakeholders and from the respective legislative and legal services in the provinces and territories. SCC is also available to provide information and advice on the incorporation by reference of standards in regulation.

All references to standards contained within these guidelines are intended as examples only. Certain commercial entities, equipment and materials may be identified in this document in order to describe a procedure or concept adequately. Such identification is not intended to imply recommendation or endorsement by SCC nor is it intended to imply that the entities, materials or equipment are necessarily the best available for the intended purpose.

These guidelines will be routinely updated to ensure that changes made to the regulatory framework and developments in standardization are captured in a timely manner. Suggested considerations and revisions are welcome at any time at info@scc.ca.



Key Terms and Definitions

Ambulatory incorporation by reference: Also referred to as a dynamic, open or rolling, ambulatory incorporation by reference incorporates a standard in a regulatory text, as it is amended from time to time, often with no mention of a date of issue or specific version. As such, the regulation incorporates subsequent editions of, or amendments to, the same standard automatically, without the requirement to amend the regulation.

Conformity assessment: Demonstration that specified requirements of a particular standard relating to a product, service, process, system, person or body are fulfilled.

Incorporation by reference: A drafting technique used to include the content of a document, in whole or in part, in regulatory text as if it were reproduced directly in the text of the regulation. Standards can be incorporated by reference in regulation. A standard that is incorporated by reference in a regulation is mandatory and legally binding.

Regulation: Regulations are statutory instruments that are established pursuant to legislative powers that may result in the imposition of legal sanctions if they are contravened. They are used by government as an instrument for mandating or enabling particular behaviours or outcomes in order to achieve public policy objectives.

Revision: Modification, amendment, addition, or deletion of specific parts of the normative content of a standard.

Standard: For the purpose of these guidelines, a standard is a document developed under an accredited process that provides specifications, characteristics, guidelines, or requirements to ensure the consistency and usability of materials, products, processes, and services. Standards are developed through a process that includes transparency, consensus, and stakeholder balance.

Standards development organization (SDO): A body recognized as having the competence to develop standards in accordance with standards development requirements published by the Standards Council of Canada (SCC), the International Organization for Standardization (ISO), International Electrotechnical Commission (IEC), and/or other equivalent international, regional, and National Standards Bodies.

Static reference: Also referred to as a dated or fixed reference, static references incorporate a standard by reference into regulation by including its publication date or by including the words “as published on” or “issued on” or “as of a date”. Any revisions to the standard, made after the date specified in the reference, are not incorporated into the regulation.



Background

A variety of documents can be incorporated by reference in regulations. These guidelines focus on the incorporation by reference of standards. There are over 5,000 references to standards in federal, provincial and territorial (F/P/T) regulations in Canada. Standards are established by consensus and approved by a recognized body, often a National Standards Body; they provide specifications, characteristics, guidelines, or requirements to ensure the consistency and usability of materials, products, processes, and services.

Standards are essential for safeguarding the health and safety of Canadian citizens. Certification to standards through conformity assessment procedures also helps ensure market access for Canadian products, both domestically and internationally. All standards are voluntary in nature. They become mandatory and legally binding when incorporated by reference in a regulation. Standards in regulations cover a wide range of topics from marine anti-exposure work suit systems to passenger car windshield wiper systems and child-resistant packaging.

The importance of incorporation by reference as a regulatory tool is reflected in Canada's federal regulatory policy, the *Cabinet Directive on Regulation* (CDR). The CDR applies to all federal departments, agencies and entities over which Cabinet has authority relating to regulation-making. Incorporating standards by reference in regulation is a good way for governments to leverage prevailing resources, knowledge and expertise. The benefits of using standards include:

- Standards are developed through a consensus-based process, which is designed to balance the interests of diverse stakeholders.
- Standards, when adopted regionally or internationally, support global supply chains and facilitate internal and international trade.
- Standards are cost-effective, reliable and undergo cyclical reviews and updates.
- Standards are written in a manner that corresponds to the needs of industry and business, and they provide the administrative convenience of reflecting the latest scientific trends in innovation and technology.
- Referencing standards in regulations supports a strong regulatory system that can foster innovation and technological advancement.
- Referencing the same standard can help ensure inconsistencies in regulatory requirements are not introduced between jurisdictions.
- Referencing standards increases overall efficiencies and results in the reduction of the length of a regulatory text.

By incorporating specific standards by reference, F/P/T regulators are able to make use of the existing knowledge and expertise in Canada's extensive standardization network to efficiently and cost-effectively advance regulatory objectives.



Incorporation by reference is a drafting technique used to integrate the content of a document, such as a standard, either in whole or in part, into a regulation as if it were reproduced word for word. Documents incorporated by reference are as binding as the regulation in which they are incorporated and form part of the law. Incorporation by reference is authorized in various statutes both federally and provincially/territorially.

At the federal level, the *Statutory Instruments Act* (SIA) was amended in 2015 by the *Incorporation by Reference in Regulations Act* to allow for the use of incorporation by reference in all federal regulations.¹ While the SIA provides express legal authority to use the techniques of incorporation by reference in many cases, it does not provide regulators with guidance on when this authority is best used to achieve their regulatory objectives.

Using standards to achieve public policy objectives is a good regulatory practice in line with the WTO-TBT Agreement. In accordance with its mandate to provide leadership and governance of Canada's national standardization network, SCC is working with a number of federal government departments, as well as several provincial and territorial governments, to identify and monitor standards referenced in regulations. In doing so, SCC has identified many of the challenges associated with incorporating standards by reference in regulation. As a result, SCC has produced these guidelines to assist F/P/T regulators in choosing the drafting technique(s) that best suit their regulatory needs.

The sections that follow will provide guidance on how to determine the most effective and appropriate method of incorporating standards in regulations to achieve various policy objectives.

Methods for Using and Referencing Standards to Support Public Policy Objectives

Incorporating Standards by Reference in Regulations

When a standard is referenced in a regulation, compliance with the standard becomes mandatory and legally binding. To ensure clarity, it is strongly recommended that a standard is incorporated by reference within a regulatory text using its identification number and title. This provides certainty on what is required and allows regulators to avoid reproducing the standard word-for-word within the regulatory text.

Regulators can use several drafting techniques when referencing standards in regulations. Some of these techniques are presented below.

¹ For the full text of the SIA, see <http://laws-lois.justice.gc.ca/eng/acts/S-22/>. For the full text of the *Incorporation by Reference in Regulations Act* see http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2015_33/page-1.html.



Alternative References

Regulators may choose to reference more than one standard in a regulation to provide options by which compliance to certain performance requirements can be satisfied.

Example: A fuel must **meet one of the following standards**, as amended from time to time, to qualify as biodiesel fuel: the Canadian General Standards Board Standard CAN/CGSB-3.524-2017, *Biodiesel (B100) for blending in middle distillate fuels* or ASTM D6751-15ce1, *Standards Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels*.²

Partial References

Regulators often choose to incorporate a standard by reference as a whole in a regulation. This may be unsuitable though in cases when only a portion, or portions, of the standard is relevant to the regulatory objective. In these instances, regulators may choose to incorporate only selected portion(s) of a standard in a regulation.

Example: The minimum distance in metres must be maintained between each vulnerable place shown on the area plan, **as set out in clause 6.8** of CAN/BNQ 2910-510/2015, *Explosives — Quantity Distances*.

Qualified References

Regulators also have the option to exclude a portion, or several portions, of the referenced standard as being inappropriate for the regulatory purpose. This does not affect the incorporation of the remainder of the standard into the regulation, which would be legally binding.

Example: Work in extreme conditions must be undertaken in accordance with CAN/CSA Z1010-18, *Management of work in extreme conditions*, **excluding clauses 4.2.2 and 4.5.4**.

Forms of Incorporating Standards by Reference

References to standards can take the form of static or ambulatory references.

Static References

Static references, also referred to as dated or fixed, are used to incorporate by reference a document, such as a standard, as of a specific date into a regulation. By specifying the date, any subsequent revisions to the standard that may take place after the date specified in the reference, are not automatically incorporated into the regulation. The text of the standard as prescribed in the regulation is essentially frozen. The advantage of using this particular

² The regulatory text used in this example, and those that follow, are based on actual instances of incorporation by reference and are meant as examples only.



incorporation by reference technique is that the regulator has certainty over the content of the requirements and that no revisions will be imported into the regulation without action by the regulator.

As a result, any modifications made to the referenced standard can only be incorporated into a regulation by way of a regulatory amendment. This form of referencing is considered to be the most restrictive and is recommended for cases where the regulator believes that future versions of a standard may materially impact the intent or purpose of the regulation.

Example: Tanks must be built according to the following standard: CAN/ULC-S603-14, *Standard for Steel Underground Tanks for Flammable and Combustible Liquids*.

This is a static reference because “-14” in the standard name indicates the year the standard was published (in this instance 2014) and therefore incorporates a specific version of the standard.

For added clarity, the regulator can also include the words “as published on” or “issued on” or “as of” to indicate that the incorporation is a static reference.

Example: Floor coverings must meet the Canadian General Standards Board standard CAN/CGSB-4.2 No. 27.6, *Textile test methods – Flame resistance — Methenamine tablet test for textile floor coverings*, published in September 2015.

Regulators should be aware that standards are reviewed and updated on a regular basis to ensure that they reflect the latest expertise and technological trends. Based on SCC’s standards-development requirements, standards can be maintained on different cycles depending on their content: the periodic maintenance cycle ensures standards are maintained at least every five years; continuous maintenance ensures standards are kept current and should be applied to standards related to health and safety; and, stabilized maintenance addresses mature technology and practices that are not related to health and safety.³

As a result, SCC recommends that regulators participate in the standards-development process to ensure that they are aware of the revisions being made to standards incorporated by reference in their regulations. By being involved in standards-development, regulators can ensure that they are referencing current standards that reflect their regulatory objectives and are consistent with the regulation or enabling statute.

³ For information on the maintenance cycles of standards developed by SCC’s accredited SDOs, see SCC’s *Requirements & Guidance – Accreditation of Standards Development Organizations*, 2017 at: <https://www.scc.ca/en/about-scc/publications/exigences-et-procedures-accreditation/requirements-guidance-accreditation-standards-development-organizations>.



Ambulatory References

Ambulatory incorporation by reference incorporates a standard with no mention of a date of issue or specific version; the date noted in the standard name, often at the end of the name, should therefore not be included in the regulatory text (often seen as, for example, :2017, -14, or -2015). In addition to not mentioning a date or version, ambulatory incorporation by reference incorporates a standard using the phrase “as amended from time to time” or “latest edition of.” This type of incorporation by reference is also referred to as dynamic, open or rolling. This drafting technique is more flexible because the regulation incorporates by reference subsequent versions of the standard after it has undergone revisions without requiring a regulatory amendment.⁴

Sectors experiencing rapid and evolving technological development tend to require equally rapid standards development. In these cases, the use of ambulatory referencing is recommended as the most effective drafting technique for regulators, as static references would quickly become outdated.

Example: The bio-based carbon component shall be determined in accordance with Method B or Method C of the American Society for Testing and Materials document ASTM D6866, *Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis*, **as amended from time to time**.

OR

Example: Any reference in these regulations to ASTM D6866, *Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis*, must be read as a reference to the standard **as amended from time to time**.

OR

Example: The requirements must conform to the **latest edition of** ASTM D6866, *Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis*

Regulators should note that there are a number of limitations associated with the use of ambulatory incorporation by reference. First, for the purpose of clarity, regulators should avoid using ambulatory references if they intend to align their regulatory requirements with specific clauses, tables, figures, or annexes of a standard, because these can change from one version

⁴ Some provinces and territories also recognize semi-ambulatory referencing as a drafting technique. This technique recognizes the distinction between an amendment and an edition of a standard, as defined by ISO. SCC understands that regulators in Canada sometimes use the terms amendment and edition interchangeably. Federal regulatory policy does not recognize semi-ambulatory as a referencing technique.



of the standard to the next. Instead, regulators in this situation should always use static references.

Moreover, while the effect of an ambulatory incorporation by reference is that changes are automatically incorporated into a regulation, it is still important for regulators, and other affected stakeholders, to participate in the standards-development process. Standards can be withdrawn and superseded by other standards, in which case referenced standards may become inaccessible or the reference itself inaccurate. It is important for regulators to be aware of any changes made to standards that are incorporated by reference in their regulations and to understand the associated implications for those regulations.

Considerations when using Static and Ambulatory Referencing

Regulatory Scenario	Suggestion
The regulator wants to be certain that an exact technical solution encompassed within a standard is applied to meet a regulatory objective and that no changes to that solution should be incorporated.	Static incorporation by reference is recommended in this scenario if exact technical solutions are required and/or when the objectives of future versions of the standard are uncertain.
A regulator expects that revisions may be made to the standard referenced and that such changes are anticipated to continue to promote the regulatory objective(s).	Ambulatory incorporation by reference is recommended in this scenario given that there is no expected impact on the regulatory objective(s).
A standard needs to be applied to a sector that is experiencing rapid and evolving technological developments.	Ambulatory incorporation by reference is recommended in this scenario given that rapid technological development tends to necessitate equally rapid standards-development.
The regulation makes reference to specific clauses, tables, figures or appendices of a standard.	Static incorporation by reference is recommended in this scenario, as any revisions to the standard could lead to changes in its internal numbering. If this occurs, the reference to a table or figure in a regulation could deviate from the new numbering in the revised standard. Static referencing ensures that a regulation continues to reference a specific clause, table, figure, or appendices.



Regulators have the choice to use and apply several drafting techniques when referencing standards in regulations. Based on departments' regulatory environments and the content of standards incorporated by reference, regulators should assess their needs and choose the approach that is most suitable for achieving their regulatory objectives.

Other Policy Considerations when Referencing Standards

The following section highlights additional considerations that regulators need to be aware of when incorporating standards in regulation.

Trade Implications

The WTO-TBT Agreement includes requirements for regulators to use international standards, guidelines and recommendations as a basis for regulations, where such international standards meet the intended regulatory objective. An important consideration for making this requirement as effective as possible is attention to how standards are incorporated into regulation.

Incorporating standards by reference in a regulation requires precision to facilitate trade. SCC has observed cases where regulations contain incorrect references to standards. Common errors include inaccuracies in the standard's title, number, or in the name of the Standards Development Organization, which can lead to confusion around what is actually being referenced.

Timeliness

Standards are continually evolving. As previously noted, standards must be reviewed periodically to ensure they remain relevant and technically valid. F/P/T regulators rely on standards as a way to support public policy and regulatory objectives. It is critical that they have access to the most up-to-date and effective standards in order to serve the economic and social needs of Canadians.⁵

Monitoring Standards in Regulations

Since 2010, SCC has been monitoring and assessing standards incorporated by reference in Canadian regulations and has found over 5,000 references to standards in F/P/T regulations. Given its mandate, SCC is well positioned to support and facilitate the appropriate use of standards by F/P/T governments. To assist regulators in determining the most appropriate standards, SCC tracks and advises on the status of standards that are referenced in Canadian regulations and identifies potential standardization solutions for issues that face regulators.

⁵ SCC recognizes that regulators may have legitimate reasons for not using the most recent version of a standard. However, it is recommended that regulators compare the referenced version of the standard with the most recent version to determine if the referenced version is outdated and/or withdrawn and if it continues to support the desired regulatory intent.



F/P/T regulators periodically reference multiple versions of the same standard in a regulation. This practice may be necessary in order to comply with market trends, product/service requirements, and harmonization obligations with trading partners. As a result, SCC has been working closely with F/P/T regulators to ensure that these cases are being monitored consistently to ensure that the referenced standard remains accessible.

Sometimes regulators only provide a general summary of the standards that must be adhered to in order to meet technical requirements. In these instances neither a standard number nor title is specified. SCC encourages regulators to be as specific as possible in identifying the standard that has been incorporated by reference as well as with which parts of the standard the regulator requires compliance.

Example: All piping, valves, and fittings used in the hydraulic or pneumatic drive mechanism must be in accordance with the applicable provisions of the Society of Automotive Engineers (SAE) Standards.

Conclusion

Incorporation by reference of standards is a drafting technique frequently used by F/P/T departments and agencies to fulfill their regulatory and public policy objectives. By using standards as a component of regulations, governments can leverage the existing resources, knowledge and expertise of Canada's extensive standardization network, thereby reducing administrative burdens, lowering costs, improving government services, enhancing coordination among F/P/T departments, facilitating trade and addressing the needs of Canadian industry.