

## **The Federal Register and the Code of Federal Regulations**

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### **Origins and Historical Development**

In 1934, the Supreme Court agreed to hear the case of Panama Refining Co. v. Ryan, 293 U.S. 388 (1934), in which the federal government was trying to enforce an agency regulation against the refining company. The government later realized that there had been a technical, though inadvertent, revocation of the very regulation in question. Needless to say, the government was very embarrassed by this turn of events, and on July 26, 1935, Congress passed the Federal Register Act (FRA) (44 USC 1501-1511), requiring regulations to be published in the Federal Register (FR). The first FR was published March 14, 1936. The FRA originally provided for the compilation of all existing regulations, but this was not as efficient in keeping track of the regulations as people had hoped, so in 1937, the FRA was amended to provide for the codification instead of the compilation.

A codification board was established, and it decided the overall structure of the new Code of Federal Regulations (CFR), and assigned the various agencies their own titles. The first codification was published June 1, 1938, with a new codification scheduled for 1943. The codification board was abolished on July 1, 1939 by Presidential Reorganization plan No. II, section 202 (14 FR 2732). This edition published the regulations from the first two years of the Federal Register, as well as everything from January 1 through June 1, 1938. Also included were regulations that were deposited with the OFR by agencies but never published in the FR. Also, it is important to note that there are two different bound editions of the Federal Register for 1936-1938. The source note page numbers in the 1938 CFR refer to the rebound edition not the original FR page numbers in the historic set. Supplements to the 1938 edition were published, starting with the end of 1938. A one volume supplement was published at the end of that year, covering June 2 through December 31. 2 volumes were published in 1939, and 4 each in 1940 and 1941. Due to World War II, there was no supplement published in 1942, and on December 10 of that year, Congress provided for a cumulative supplement to be compiled as of June 1, 1943 and postponed the second edition of the CFR until after the war. This cumulative supplement codified only the Federal agency rules and regulations, published from June 1, 1938 to June 1, 1943, that were in force and effect on and after June 1, 1943, so it was an adjunct to the 1938 edition, not a replacement to it. 10 volumes were published and individually indexed. Supplements were again published, with 2 volumes covering June through December, 1943, 3 volumes for 1944, 4 volumes for 1945, 6 volumes for 1946, and 5 volumes for 1947. None were published for 1948, because preparations were being made for the second edition of the CFR to replace the 1938 codification and the 1943 update. The Administrative Procedure Act (APA) was passed in 1946 (5 USC 552, 553).

On November 12, 1947 the Administrative Committee of the Federal Register terminated wartime suspension of the CFR effective December 31, 1948. Executive Order No. 9930 paved the way for the 1949 edition of the CFR. 1947 was also the year the OFR began to differentiate between rules and proposed rules, making it easier to use the FR.

The second edition was published January 1, 1949, and was composed essentially of regulations still in effect from the 1938 edition, from the supplements, and from the daily Federal Register of 1948. There were also a few regulations that had, for one reason or another, never been published in the Federal Register. There were four bases for selection: (1) applicability to the general public or members of a class of the general public, (2) rules designed to implement law or policy or describe procedure or practice requirements, (3) rules promulgated by a Federal administrative agency, and (4) effective on or after January 1, 1949.

This edition also contained a Codification Guide, the predecessor to the List of Sections Affected (LSA). However, this was just a listing of any and all sections affected in any way, without giving any information as to how the section was affected. This edition also contained a pocket, located in the back cover, for the "pocket supplements," the counterpart to the U.S.C. pocket parts. The Codification Guide was printed at the end of each pocket supplement. These supplements were cumulative from year to year, but the Codification Guide itself was reprinted year by year rather than consolidated. These supplements to the CFR were published through 1969. This way, people saw what section was affected in what year, rather than a period of years. A Table of Changes in name and assignments of titles and chapters was printed in the supplement as a finding aid for the first time in 1949. Before, any change in name or assignment may or may not have received a brief mention in the Federal Register.

Before the 1949 edition, there was no CFR citation included with the published regulation in the Federal Register. In order to find out when a rule appeared before 1949, it is necessary to go through the supplements, year by year, to see when it first appeared.

In 1953, Congress amended the FRA to provide for more frequent codifications. At this point, some Titles were updated yearly, while others were updated less frequently, but at least once every five years, according to need. In 1963, the OFR discontinued publishing individual indexes to the Titles and converted the general index to a more general guide of subject areas regulated.

In the 1964 index, the Codification Guide began to give more detail as to how the sections were affected, and in 1965, rather abruptly, the name was changed to its current name, the List of Sections Affected (LSA). On Wednesday, January 6, 1965, the Codification Guide can be found in the back of the FR. On Thursday, January 7, 1965, it had become the List of Parts Affected (LPA), quite literally overnight. The LPA is listed in the FR, giving only page numbers for the affected parts for the month, while the LSA (first published at the end of January, 1965) is published monthly, giving greater detail. Also in January, the agencies began submitting preambles for their rules and proposed rules, explaining at least some of the reasoning behind the regulation. Before 1965, in order to find out why something was changed or added, it is necessary to contact the issuing agency and see if they have kept their original dockets.

As was mentioned earlier, 1969 was the last year a supplement to the CFR was published. In 1970, the OFR began a yearly revision of all Titles. It soon became apparent, however, that it was unmanageable to revise every Title at the same time every year, so beginning October 1, 1972, the OFR divided the Titles into quarters. Each Title is revised once a year, with the first quarter revised in January, the second in April, the third in July, and the fourth in October. May 1, 1971, the FR format was changed again with the addition of the Highlights section before the table of contents. This section was part of the FR until February 19, 1982. A similar section, Selected Subjects was included from May 5, 1982 until May 30, 1986.

## **The CFR Index**

In 1975, the OFR created indexes for Titles 13, 22, and 45, as examples, in order to encourage agencies to create their own indexes as supplements to the CFR general index. A few agencies created indexes. Agency indexes are not published in the Federal Register. An agency submits its index and the OFR publishes it as a finding aid in the back of the CFR. There is a list of agency prepared indexes in the back of the CFR Index. It is the agency's responsibility to update its index. If the OFR discovers an index is outdated, the OFR will notify the agency that the index will be removed. March 7, 1977 was the date the Thesaurus of Indexing Terms first appeared, in an effort to facilitate the use of the CFR and Federal Register.

In spite of the efforts of the OFR, it was still difficult to do research, and in 1978, a Maryland lawyer filed suit against the OFR. Cervase v. the Office of the Federal Register, et al. 580 F2d. 1166 (3d cir. 1978) was actually decided on jurisdictional grounds and not on the merits. The District court granted a summary judgment motion by the OFR, and the Court of Appeals reversed, requiring a trial. The plaintiff argued that the current CFR Index was inadequate and a violation of due process because it was "nearly impossible" to find any regulation. I have found no reference to an actual appearance on the merits, but a motion to dismiss was granted in 1979 because of the publication of an improved index that year.

## **Additional Topics**

There have been a few "quirks" over the years, in addition to the ones mentioned above.

The 1938 and 1949 codifications contain some regulations that were filed with, but never published in, the Federal Register. There is an occasional note that the material was only filed by the agencies. Therefore, in some cases, it will be impossible to get an FR citation.

Another significant departure from current procedure is in the case of documents "filed with the original." These documents were informational, not regulatory, and were never published in the Federal Register. They were filed for public inspection with the

original rule, proposed rule, or notice. Originally, these documents were permanently preserved. Throughout the Federal Register there remain a few notes and footnotes referring the reader to a document “filed with the original.” This practice continued until 1980. That year, with the creation of a disposition schedule set up by the OFR and by the Washington National Records Center, NARA, the OFR realized that these documents would be destroyed and stopped accepting them. These documents have been destroyed by the Records Center under the disposition schedule. Rules are kept 15 years, Proposed Rules 5 years, and Notices only 1 year, so everything should have been destroyed by the end of 1995. If a rule in the CFR refers a user to “see document filed with the Federal Register [or OFR],” the only research method would be to go to the agency’s Records Management office to see if they still have a copy. The OFR does not.

## **Public Land Orders**

Until February 26, 1996, Public Land Orders (PLO’s) were published in the rules section of the Federal Register and listed by number, date, and title in a 200 page table appendix in 43 CFR. The index in the 1995 CFR covers land orders from 1942-1995. It first appeared in the 1975 CFR and was not published in the Federal Register. These PLO’s are not codified, just listed in the tables. Originally, all PLO’s were done by executive order, and as long as they had general applicability, they were published by the OFR and appeared in 3 CFR. In 1942, the Secretary of the Interior was given authority to generate the PLO’s and they were published first in the notices section of the Federal Register as proposed withdrawals of land and then in the rules section as numbered PLO’s, (once the OFR differentiated between these categories in 1947). The Bureau of Land Management just removed the table at 61 FR 2137 (January 25, 1996) effective February 26, 1996 because it was not statutorily required and because they said the table was “of extremely limited utility.” This action removed approximately 200 CFR pages. In the future, you must use the annual Federal Register Index to locate PLO’s issued within any subsequent given year. PLO’s will be published in the notices section of the FR after February 26, 1996.

## **The Codification of Presidential Proclamations and Executive Orders**

In 1967, an editorial codification of Executive Orders (EO’s) and proclamations was published with a full index. The last update to the Codification of Presidential Proclamations and Executive Orders covered the period 1945-1989. After that year, due to funding constraints, the OFR was unable to publish any more codifications. The OFR has continued to maintain an informal system of note cards that provide updated codification information. We are in the process of creating a computer version of the note cards and hope to make it available on the NARA gopher in the near future. Currently, you would need to use the table in the back of each title 3 volume called table 4, which is the list of Presidential Documents Affected during that year to update the codification information.

## Slip Laws

Legislation is first published as a slip law, which is a pamphlet reprint of the laws as enacted by Congress and signed by the President. After a law is signed by the President, it goes to the executive clerk's office. The OFR receives laws, EO's and proclamations from the clerk. Generally, we receive a law the same day it is signed, but when the President is out-of-town, there can be a lag. After the OFR receives a law, it takes 13 days during non-adjournment to make a normal law (under 100 pages) available from the Government Printing Office (GPO), and 28 days during adjournment. The difference is that we get a high volume of laws, all at once, when the Congress adjourns.

During the time we have a law, we assign it a public law number, insert a legislative history, insert marginal notes and legal citations, and paginate the law. Public law numbers run in sequence starting over at the beginning of each Congress. For example, P.L. 104-7 is the seventh public law enacted in the 104th Congress.

The legislative history is found at the end of the slip law. We create such a history for each piece of legislation using the Congressional Record. Although a lot of proposed legislation does not go anywhere, this process works well and we have a law's legislative history ready when we receive the law. This history includes the committee report number, and the name of the committee in each house, as well as the date of consideration and passage in each house, with reference to the Congressional Record by volume, year, and date. We give cites to the companion bill, but not all the information on the companion bill. We started to include citations to Presidential signing statements about 15 years ago.

The marginal notes act as guides to lead the reader into the text. The notes do not repeat the center headings, so use both the notes and center headings as guides. The notes are later used in the statutes subject index that appears in the back of each volume of the Statutes at Large. Note that the subject index only lists the first page of the law - users should then thumb through the law looking for the center heading and side notes with the term you are looking for. The legal citation may appear in the text, if the drafter inserted one, or we will place one in the margin. These citations refer to already existing U.S.C. cites. Future code classifications also appear in the margins any time new material is added to the code. The law revision council of the House of Representatives codifies the slip laws into the code. We are able to get the future code classification from the law revision council in time to include it in the slip law. Finally, we paginate the law, giving it a permanent statutory citation.

## Unified Agenda

The Unified Agenda is published twice each year in April and October. Each agency describes regulatory actions under development as required by EO 12866 (revoked old 12291) and the Regulatory Flexibility Act. The agenda is published in one to three very large books in that day's FR. Each Agency's agenda is listed in the Table of Contents for that FR issue under the agency's name and in the Proposed Rule category. You can monitor developing regulations by using the Agenda. Each agenda begins with a preamble and its own table of contents, followed by descriptions of each regulatory action. In each

agenda item, the agency lists 1) the title of the regulation, 2) the significance (such as the agency considers the regulation a priority), 3) the legal authority, 4) the CFR citation, 5) the legal deadline, 6) an abstract (a brief description of the rule's subject matter), and 7) a timetable for issuance, whether it affects a substantial number of small entries under the Regulatory Flexibility Act, and an agency contact person who is familiar with the rule. The Agenda contains a Subject Index to help readers locate entries from various agencies that may affect a particular area of interest.

A RIN (Regulation Identifier Number) is assigned by the Regulatory Information Service Center to identify each regulatory action listed in the Agenda. The Office of Management and Budget (OMB) has asked that all regulatory documents published in the FR include RIN's in their headings. This is to help link documents in the FR with corresponding entries in the Unified Agenda of Federal Regulations. This will be useful in tracking the history of regulations.

### **Privacy Act Issuances Compilation**

The Privacy Act Issuances Compilation is a biennial compilation. It sets out a description of the systems of records maintained on individuals by Federal agencies published in the FR as required by the Privacy Act of 1974. It also contains the rules of each agency which set out procedures that agencies will follow in helping individuals who request information about their records.

The Privacy Act of 1974 (5 U.S.C. 552a) provided for the publication of the systems of records maintained on individuals by Federal agencies. The first edition was published in 1975 under the title of Privacy Act Digest. Not all systems were covered and not as much detail was given as in later editions. The 1991 edition was the last printed edition. The 1993 edition appeared CD-Rom. The format for the 1995 edition has not been decided.

### **Sunshine Act Meetings**

Sunshine Act Meeting notices are published under the Government in the Sunshine Act, and first appeared March 24, 1977. They announce meetings of agencies headed by a collegial body, a majority of whose members are appointed by the President with the advice and consent of the Senate. Each notice has a set format and gives the time, date, place, and subject matter of the meeting. The name of an agency contact is listed and whether the meeting is open or closed to the public. About 50 Federal agencies are subject to the Act - including the major independent regulatory commissions as ICC, SEC, FTC, and FCC. Sunshine Act Meeting Notices are published on a two day, expedited schedule.

## **Incorporation by Reference (IBR)**

IBR allows Federal agencies to comply with the requirement to publish regulations in the FR by referring to materials already published elsewhere. This way, regulations are not cluttered with universally available standards. The legal effect is that the material is treated as if it were published in the FR. Like other properly issued regulations, it has the force and effect of law. IBR material must have the approval of the Director of the FR (5 U.S.C. 552(a)) and (1 CFR part 51).

Some examples of materials that are incorporated are independent private sector standards such as ANSI (American National Standards Institute) and ASTM (American Society for Testing Materials). These are already published elsewhere and are readily available to the public. It is the agency's responsibility to give the addresses for purchase and inspection. All IBR's since 1982 are available for inspection in our library. From the 1960s through approximately 1980, the director of the OFR approved IBRs without requiring agencies to provide us with a copy for our library. We therefore have some and not others for this period. In 1980, all new IBR requests had to include a copy of the material for our library. In 1980, agencies with incorporations already in place were told that they must provide us with a copy of the material or have their incorporation approval revoked. By 1982, we had a complete set of current IBR materials.

Each CFR volume that includes an IBR contains a finding aid table in the back of the volume that lists each standard, the address of the publisher and all the section citations where the standard is cited in the regulations. This table is provided for informational purposes and may not be all inclusive.

## **The United States Government Manual**

The Manual was begun in 1934 as a loose leaf service. It increased in size, scope, and value, becoming a bound volume in 1939. During World War II, the Manual editions varied from one to three per year. It is presently published as an annual volume by the OFR.

The Manual was originated in the US Information Service (National Emergency Council) in 1934. That Service became a Division of the Office of Government Reports in 1939. In 1942, the Office of Government Reports became the Division of Public Inquiries within the Bureau of Special Services in the Office of War Information. In 1945, the Bureau of Special Services was placed in the Bureau of the Budget as the Government Information Service. The Office of Government Reports was reestablished in 1946 and liquidated in 1948. The Manual function, however, was continued, and was transferred to the OFR.

During World War II, the Office of War Information employed several thousand people, who prepared and distributed propaganda materials to further the war effort. It also served as a central information depot relating to all activities of the government. Many specialists handled the thousands of inquiries about governmental functions.

This inquiry service was widely publicized and used to the highest degree. The Office filled a definite need for propaganda and information during a period of emergency. The only surviving element of this office is the US Government Organization Manual.

**Addenda**

Functions relating the United States Statutes at Large, Constitutional amendments, and the Electoral College were transferred to the General Services Administration from the State Department by Reorganization Plan No. 20 of 1950, and were then assigned to the Office of the Federal Register.

The Weekly Compilation of Presidential documents was authorized in the FR on July 31, 1965, and the first compilation was published two days later on August 2, 1965.