

Fact Sheet:

Incorporation by Reference

This fact sheet will help you understand how **Incorporation by Reference** works as a regulatory tool, how it could be used in our seed regulatory system, and what this could mean for farmers.

The Canadian Food Inspection Agency (CFIA) is currently leading a **Seed Regulatory Modernization** process that could bring in major changes to our system. Incorporation by Reference (IBR) is being proposed as a way to allow faster changes to the seed regulations in future. However, this increased speed can come at the cost of transparency and public accountability. To better assess implications of IBR, we need to see how it relates to the broader role and purpose of regulations.



What is a Regulation?

Regulations are a form of law. They are the rules used to carry out the intent of Acts (laws or statutes) passed by Parliament. Regulations are legal tools that put legislation into action, and are part of the democratic framework that governs people and businesses in Canada. Acts delegate the authority to make regulations to the Governor in Council (the Governor General acting on the advice of Cabinet), a specific Minister or an administrative agency. This way, the Act creates the framework for putting the Act's purpose into effect through regulations. The wording of regulations often includes definitions, specifications, exemptions, penalties and other details that define how the law is to be applied.

Before a regulation can come into force it must be published in the *Canada Gazette*, the official newspaper of the Government of Canada. When a new regulation or a change to an existing regulation is proposed, the wording is published in the *Canada Gazette - Part I* along with the reasons for it and an analysis of its impact. The public has the opportunity to send in comments on it during a defined public comment period. The body responsible for the regulation will then take public comments into consideration when writing up a final version of the regulation for approval by the authority named in the enabling Act. After it is approved, the new or revised regulation takes effect when it is published in the *Canada Gazette - Part II*. Then it is added to the Regulations published on the Government of Canada website.

What is Incorporation by Reference?

When the *Agricultural Growth Act* was passed in 2014, it changed several agricultural laws -- including the *Seeds Act* -- to allow regulations to be incorporated by reference. Instead of putting the wording of the rule in the text of the regulation, the regulation would simply "refer" to another document that was created outside Canada's processes for developing regulations. An IBR document could be incorporated as it was worded on a specific date, or as it might be changed from time to time by the body responsible for the document. Any changes to the IBR documents would not have to be approved by whoever the Act authorises to approve changes to its Regulations, such as the Cabinet. Documents incorporated by reference have the force of law: it is illegal for people and businesses to disobey them. IBR documents must be "accessible" to the public, but there is no standard way for people to find them. IBR documents are not published on the *Canada Gazette*.

Who holds the pen?

Documents that are incorporated by reference may be "internal" or "external". Internal documents are created and managed within the Canadian government. External documents belong to an outside organization or agency. A key difference between internal and external documents is "who holds the pen" – who has the authority to change the wording of a document, and thus the rules.

In the Seed Regulatory Modernization process, IBR is being considered for several elements of our seed regulations. If the CFIA holds the pen, the document would be internal, and any changes to incorporated documents would need to go through a process that has been developed by our government. If a third party, such as Seeds Canada, hold the pen then the document would be external; in the context of the Seeds Regulations, this would be an unacceptable conflict of interest as it would allow an association of seed corporations to design the rules that govern their activities in Canada for their own private benefit at the expense of farmers and the general public.

Yet, even if the CFIA holds the pen, proposed changes to IBR documents would not be published in the *Canada Gazette*. It would be up to the CFIA to notify stakeholders and seek their input. In a number of past CFIA consultations related to seed, farmers have not been considered “stakeholders”. The IBR process has even shorter timelines, and because participation requires significant resources and expertise, it could easily be influenced by companies interested in promoting rules to help them increase their market share, reduce costs and charge higher prices for their products.

What are the risks of IBR?

It is faster, less transparent and less rigorous to change IBR documents than to change actual regulations. When the *Agricultural Growth Act* was introduced in 2014, the National Farmers Union opposed IBR because allowing the incorporated document to be changed by a third party would result in Canadian individuals and businesses being governed by rules that could be changed without the knowledge or approval of the body delegated by Parliament to authorise the regulations.

The corporate seed lobby understands this, and would like wider application of IBR in order to make it easier to change seed regulations in the future. In their 2018 *White Paper*, Seed Synergy (the biotech and pesticide lobby group CropLife along with the groups that later formed Seeds Canada) stated that using IBR to make changes to the Seeds Regulations was one of their goals. They said “a document that sets out detailed technical seed quality requirements could be established and maintained by industry and incorporated into the Seeds Regulations by reference, avoiding the need for a lengthy and costly federal regulatory process every time minor adjustments are needed.” And, it further recommended “All seed certification requirements should be removed from the Seeds Regulations and managed via incorporation by reference.” This scenario would give self-interested seed companies the power to weaken or remove the standards that transparently provide the quality control and testing data that farmers rely upon to make informed decisions to produce crops successfully in our growing conditions.

IBR reduces the transparency of our regulatory system, and holds the risk that the corporate sector will have undue influence over making the rules. The need for speed in order to change seed regulations is questionable, since seed is a fundamental element of agriculture and changes to how seed is governed will have wide-reaching and long-lasting impacts.

The CFIA’s Seed Regulatory Modernization process will have several opportunities for farmers to make their views known. Let’s make sure that they know we want to ensure future regulatory changes will have the benefit of careful, deliberate thought, transparency, and the widely inclusive process that is available through the Canada Gazette process, to ensure the rules that govern seed are truly in the public interest.

Questions?

Please do not hesitate to reach out for more information about Canada’s seed regulations.

Visit <https://www.nfu.ca/campaigns/save-our-seed/>

Email nfu@nfu.ca with “Seed Regulations” in the subject line.

