BILLING CODE 1505-02-P

OFFICE OF THE FEDERAL REGISTER

1 CFR Part 51

Docket Number: OFR-13-0001

RIN: 3095-AB78

Incorporation By Reference.

AGENCY: Office of the Federal Register, National Archives and Records Administration.

ACTION: Partial grant of petition, notice of proposed rulemaking.

SUMMARY: On February 13, 2012, the Office of the Federal Register received a petition to amend our regulations governing the approval of agency requests to incorporate material by reference into the Code of Federal Regulations. We agree with the petitioners that our regulations need to be updated, however the petitioners proposed changes to our regulations that go beyond our statutory authority. In this document, we propose that agencies seeking the Director's approval of their incorporation by reference requests add more information regarding materials incorporated by reference to the preambles of their rulemaking documents. We propose that they set out in the preambles a discussion of the actions they took to ensure the materials are reasonably available to interested parties or summarize the contents of the materials they wish to incorporate by reference.

DATES: Comments must be received on or before [insert date 90 days after publication in the Federal Register].

ADDRESSES: You may submit comments, identified using the subject line of this document, by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: Fedreg.legal@nara.gov. Include the subject line of this document in the subject line of the message.
- Mail: the Office of the Federal Register (NF), The National Archives and Records Administration, 8601 Adelphi Road, College Park, MD.
- Hand Delivery / Courier: Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, DC 20001.

Docket materials are available at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, DC 20001, 202-741-6030. Please contact the persons listed in the FOR FURTHER INFORMATION CONTACT section to schedule your inspection of docket materials. The Office of the Federal Register's official hours of business are Monday through Friday, 8:45 a.m. to 5:15 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Amy Bunk, Director of Legal Affairs and Policy, or Miriam Vincent, Staff Attorney, Office of the Federal Register, at Fedreg.legal@nara.gov, or 202-741-6030.

SUPPLEMENTARY INFORMATION:

The Office of the Federal Register (OFR or we) published a request for comments on a petition to revise our regulations at 1 CFR part 51[1]. The petition specifically requested that we amend our regulations to define "reasonably available" and to include several requirements related to the statutory obligation that material incorporated by

[1] 77 FR 11414 (February 27, 2012).

reference (IBR) be reasonably available. Our original request for comments had a 30 day comment period. Since we received requests from several interested parties to extend the comment period, we extended the comment period until June 1, 2012.[2]

Our current regulations require that agencies provide us with the materials they wish to IBR. Once we approve an IBR request, we maintain the IBR'd materials in our library until they are accessioned to the National Archives and Records Administration (NARA) under our records schedule[3]. NARA then maintains this material as permanent Federal records.

We agree with the petitioners that our regulations need to be updated, however the petitioners proposed changes to our regulations that go beyond our statutory authority. The petitioners contended that changes in technology, including our new website www.federalregister.gov, along with electronic Freedom of Information Act (E-FOIA) reading rooms, have made the print publication of the *Federal Register* unnecessary. They also suggested that the primary, original reason for allowing IBR was to limit the amount of material published in the *Federal Register* and Code of Federal Regulations (CFR). The petitioners argued that with the advent of the Internet and online access our print-focused regulations are out of date and obsolete. The petition then stated that statutory authority and social development since our current regulations were first issued require that material IBR'd into the CFR be available online and free of charge.

The petition further suggested that our regulations need to apply at the proposed rule stage of agency rulemaking projects and that the National Technology Transfer and Advancement Act of 1995 (NTTAA) and the Office of Management and Budget's

[2] 77 FR 16761 (March 22, 2012).
[3] http://www.archives.gov/federal-register/cfr/ibr-locations.html last visited March 26, 2013.

(OMB) Circular A-119 distinguish between regulations that require use of a particular standard and those that "serve to indicate that one of the ways in which a regulation can be met is through use of a particular standard favoring the use of standards as non-binding ways to meet compliance."[4] In addition, the petition argued that *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5th Cir. 2002) casts doubt on the legality of charging for standards IBR'd. Finally, the petition stated that in the electronic age the benefits to the federal government are diminished by electronic publication as are the benefits to the members of the class affected if they have to pay high fees to access the standards. Thus, agencies should at least be required to demonstrate how they tried to contain those costs.

The petitioners proposed regulation text to enact their suggested revisions to part 51. The petitioners' regulation text would require agencies to demonstrate that material proposed to be IBR'd in the regulation text was available throughout the comment period: in the Federal Docket Management System (FDMS) in the docket for the proposal or interim rule; on the agency's website; or readable free of charge on the website of the voluntary standards organization that created it during the comment period of a proposed rule or interim rule. The petition suggested revising 51.7 – "What publications are eligible" -- to limit IBR eligibility only to standards that are available online for free by adding a new (c)(3) that would ban any standard not available for free from being IBR'd. It also appeared to revise 51.7(a)(2) to include documents that would otherwise be considered guidance documents. And, it would revise 51.7(b) to limit our review of agency created materials to whether the material is available online. The petition would then revise 51.9 to distinguish between required standards and those that

[4] NARA-12-0002-0002.

could be used to show compliance with a regulatory requirement. Finally, the petition would add a requirement that, in the electronic version of a regulation, any material IBR'd into that regulation would be hyperlinked.

The petitioners want us to require that: 1) all material IBR'd into the CFR be available for free online; and 2) the Director of the Federal Register (the Director) include a review of all documents agencies list in their guidance, in addition to their regulations, as part of the IBR approval process. We find these requirements go beyond our statutory authority. Nothing in the Administrative Procedure Act (APA) (5 U.S.C. chapter 5), E-FOIA, or other statutes specifically address this issue. If we required that all materials IBR'd into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards, which is contrary to the NTTAA and the OMB Circular A-119.

Further, the petition didn't address the Federal Register Act (FRA) (44 U.S.C. chapter 15), which still requires print publication of both the *Federal Register* and the CFR, or 44 U.S.C. 4102, which allows the Superintendent of Documents to charge a reasonable fee for online access to the Federal electronic information, including the *Federal Register*.[5] The petition suggested that the Director monitor proposed rules to ensure the material proposed to be IBR'd is available during the comment period of a proposed rule. Then, once a rule is effective, we monitor the agency to make sure the IBR'd materials remain available online. This requirement that OFR continue monitoring agency rules is well beyond the current resources available to this office.

As for the petition's limitation on agency-created material, the Freedom of Information Act (FOIA), at 5 U.S.C. 552(a), mandates approval by the Director of

[5] See also 44 U.S.C. 4101.

material proposed for IBR to safeguard the Federal Register system. Thus, OFR regulations contain a provision that material IBR'd must not detract from the legal and practical attributes of that system.[6] An implied presumption is that material developed and published by a Federal agency is inappropriate for IBR by that agency, except in limited circumstances. Otherwise, the *Federal Register* and CFR could become a mere index to material published elsewhere. This runs counter to the central publication system for Federal regulations envisioned by Congress when it enacted the FRA and the APA.[7]

Finally, the petition didn't address the enforcement of these provisions. Agencies have the expertise on the substantive matters addressed by the regulations. To remove or suspend the regulations because the IBR'd material is no longer available online would create a system where the only determining factor for using a standard is whether it is available for free online. This would minimize and undermine the role of the Federal agencies who are the substantive subject matter experts and who are better suited to determine what standard should be IBR'd into the CFR based on their statutory requirements, the entities they regulate, and the needs of the general public. Additionally, the OFR's mission under the FRA is to maintain orderly codification of agency documents of general applicability and legal effect.[8] As set out in the FRA and the implementing regulations of the Administrative Committee of the Federal Register (ACFR) (found in 1 CFR chapter I), only the agency that issues the regulations codified in a CFR chapter can amend those regulations. If an agency took the IBR'd material offline, OFR could only add an editorial note to the CFR explaining that the IBR'd material was no longer available online without charge. We could not remove the

[6] See also 44 U.S.C. 4101.
[7] 47 FR 34107 (August 6, 1982).
[8] 44 U.S.C. 1505 and 1510.

regulations or deny agencies the ability to issue or revise other regulations. Revising our regulations as proposed by the petition would simply add requirements that could not be adequately enforced and thus, likely wouldn't be complied with by agencies.

In this proposed rule, we are proposing to require that if agencies seek the Director's approval of an IBR request, they must set out the following information in the preambles of their rulemaking documents: discussions of the actions the agency took to make the materials reasonably available to interested parties or; summaries of the content of the materials the agencies wish to IBR.

Discussion of Comments

Authority of the Director to issue regulations regarding IBR.

One commenter suggested that the OFR does not have the proper authority to amend the regulations in 1 CFR part 51. The commenter argued that because the FRA creates the ACFR and grants it rulemaking authority to issue regulations to carry out the FRA, it is the ACFR and not the Director who has the authority to amend these regulations.[9] The commenter made this claim relying on §1505(a)(3), which requires publication of documents or classes of documents that Congress requires be published in the *Federal Register*.

We disagree with the commenter's analysis of these provisions. While the FRA does require publication of those documents, the FOIA does not require that documents IBR'd be published in the *Federal Register*. Section 552(a) states that persons cannot be adversely affected by documents that did not publish in the *Federal Register* but were required to be published unless the person has actual notice of the document. This

[9] See, 44 U.S.C. 1506.

section goes on to make an exception for documents IBR'd if they are reasonably available to the class of persons affected by the matter and approved by the Director. Under this section, once these criteria are met, material approved for IBR is "deemed published in the *Federal Register*." Thus, persons affected by the regulation must comply with material IBR'd in the regulation even though the IBR'd document is not set out in the regulatory text. Because section 552(a) specifically states that the Director will approve agency requests for IBR and material IBR'd is not set out in regulatory text, the Director has the sole authority to issue regulations governing the IBR-approval request procedures. We have maintained this position since the IBR regulations were first issued in the 1960's.

The regulations on the IBR approval process were first issued by the Director in 1967 and found at 1 CFR part 20.[10] Even though this part was within the ACFR's CFR chapter, the preamble of the document states "the Director of the Federal Register hereby establishes standards and procedures governing his approval of instances of incorporation by reference."[11] And, while these regulations appear in the ACFR's CFR chapter, this final rule was issued and signed solely by the Director. These regulations were later republished, along with the entire text of Chapter I, by the ACFR in 1969;[12] however the ACFR stated that the republication contained no substantive changes to the regulations. In 1972, the ACFR proposed a major substantive revision of Chapter I.[13] In that proposed rule, the ACFR proposed removing the IBR regulations from Chapter I because "part 20… is a regulation of the Director of the Federal Register rather than the

[10] 32 FR 7899 (June 1, 1967).
[11] *Id*.
[12] 34 FR 19106 at 19115, December 2, 1969.
[13] 37 FR 6804 (April 4, 1972).

Administrative Committee."[14] In that same issue of the *Federal Register*, the Director issued a proposed rule proposing to establish a new Chapter II in Title 1 of the CFR that governed IBR approval procedures.[15] These proposals were not challenged on this issue, so the final rules removing regulations from the ACFR chapter and establishing a new chapter for the Director were published on November 4, 1972 at 23602 and 23614, respectively.

We specifically requested comments on nine issues; we will address the comments we received to each question.

1. Does "reasonably available" a. mean that the material should be available: i. for free and ii. to anyone online?

A majority of the commenters agreed that reasonably available means for free to anyone online but provided no additional comment on this. Several of these commenters seemed to agree with the general principle of access (as stated in the procedural requirements set out in various Federal statutes), specifically that any interested persons should be able to participate in informal notice and comment rulemaking by commenting on the standards an agency intends to IBR into its regulations, but didn't provide more specific details. Many commenters also agreed with the petitioners' contention that changes in technology and decreased costs of publication have made the print publication of the *Federal Register* unnecessary.

The commenters who were against defining reasonably available expressed concerns that current technology might make it easier to publish material online but did not change intellectual property rights or the substantial costs associated with

[14] *Id.*
[15] 37 FR 6817 (April 4 1972).

developing standards. Several standards development organizations (SDOs), along with others, commented that "reasonably available' means that these materials are made available through a variety of means that may include appropriate compensation to the developer of the standard.

Another commenter agreed with the petitioners because its members are subject to enforcement actions that rely on standards IBR'd into the regulations. These standards play a critical role in its members' obligations because the standards define when members may face fines or disqualification. Thus, it is critical that they have access to the standards in part so that they can better comply with the regulations and can provide some oversight of the SDOs making these organizations more accountable for the standards.

While we understand the concerns of this commenter regarding possible enforcement actions, we do not believe that there is one solution to the access issue. Regulated entities, who may face enforcement actions that lead to the loss of a license, and their trade associations should work directly with the agencies issuing regulations to ensure that all regulated entities and their representatives have access to the content of materials IBR'd. OFR staff do not have the experience to determine how access works best for a particular regulated entity or industry.

One comment stated that charging a fee for access to material IBR'd prevents the poor from knowing the law. It stated that standards should cost the same amount as the *Federal Register,* which it said is free. It went on to state that having the material available for inspection at the agency or OFR imposed insurmountable barriers on the poor who live far from the District of Columbia. It also argued that 29 U.S.C. § 794

requires agencies to make electronic materials accessible to those with disabilities, so not providing IBR'd materials for free online was inconsistent with the Rehabilitation Act.[16] Finally, this comment suggested that if the material were not free, OFR would need to set a dollar figure for the materials that ensured they were available to everyone, including the poor.

The daily *Federal Register* is not universally free. Section 1506(5) of the FRA authorizes the ACFR to set subscription rates for the *Federal Register* and other publications. Currently, a complete yearly subscription, that includes indexes, is $ 929.00. While GPO does not charge for online access to the *Federal Register* or to other federal government publications, including the CFR, Congress authorized the Superintendent of Documents to charge for online access to GPO publications. 44 U.S.C. 4101 requires the Superintendent of Documents, under the direction of the Public Printer, to maintain an electronic directory of Federal information and provide a system of electronic access to Federal publications, including the Congressional Record and the *Federal Register*, distributed by the Government Printing Office.[17]

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[16] The Rehabilitation Act "mandates only that services provided non-handicapped individuals not be denied [to a disabled person] because of he is handicapped." Lincoln Cercpac v. Health and Hospitals Corp., 920 F. Supp. 488, 496 (S.D.N.Y. 1996), citing Flight v. Gloeckler, et. al., 68 F.3d 61, 63, (2d Cir.1995) and Rothschild v. Grottenthaler, 907 F.2d 286, 289–90 (2d Cir.1990).

[17] See H.R. Rep. No. 108 May 25, 1993, H.R. REP. 103-108

GOVERNMENT PRINTING OFFICE ELECTRONIC INFORMATION ACCESS ENHANCEMENT ACT OF 1993

Mr. FORD.

Mr. President, I am pleased today to introduce with the senior Senator from Alaska <Mr. STEVENS> the Government Printing Office Electronic Information Access Enhancement Act of 1993. This legislation will greatly enhance free public access to Federal electronic information.

The bill requires the Superintendent of Documents at the Government Printing Office to provide an online CONGRESSIONAL RECORD and Federal Register free to depository libraries and at the incremental costs of distribution to other users. The bill allows other documents distributed by the Superintendent of Documents to be added online as practicable and permits agencies to voluntarily disseminate their electronic publications through the same system.

I believe this bill goes a long way toward ensuring that taxpayers have affordable and timely access to the Federal information which they have paid to generate.

1993 WL 67458, 139 Cong. Rec. S2779-02, 1993 WL 67458.

Section 4102 allows the Superintendent of Documents to "charge reasonable fee for use of the directory and the system of access provided under section 4101." Paragraph (b) of this section states that the fees charged must be set to recover "the incremental cost of dissemination of the information" with the exception of the depository libraries, for electronic access to federal electronic information, including the *Federal Register*.[18] While the Superintendent of Documents has chosen not to charge for electronic access to the daily *Federal Register,* this section 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, including the FRA and the APA. [19]

Congress required that within one year of enactment (January 2013) the Pipeline and Hazardous Materials Safety Administration (PHMSA) no longer IBR voluntary consensus standards into its regulations unless those standards have been made available free of charge to the public on the Internet.[20] Congress has not extended this requirement to all materials IBR'd by any Federal agency into their regulations. In fact, Congress has instructed the Consumer Product Safety Commission to use specific ASTM standards, which are not available for free.[21]. Thus, we disagree with the petitioners and the commenters who argue that Federal law requires that all IBR'd standards must be available for free online. By placing the requirement on PHMSA

[18] See, 44 U.S.C. 4102(b).
[19] One commenter also contends that charging for access would violate the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.). Both of those statutes require that agencies mitigate the effect of regulations on small businesses but do not suggest that agencies can only issue regulations with no cost to small businesses. Similarly, the goal of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, is to prevent the Federal government from imposing a financial burden on state, local, and tribal governments. It does not suggest that agencies can only issue regulations without a cost of compliance.
[20] Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112-90).
[21] For example, 15 U.S.C § 2056b.

not to IBR standards that are not available free of charge on the Internet (and on CPSC to IBR standards that are not available free of charge), Congress rightfully places the burden on the subject matter expert to work with the SDOs to provide access to the standards these subject matter experts believe need to be IBR'd.

One commenter also cited various Supreme Court and other lowe r Federal courts to further support their claim that IBR'd materials should be free online[22] by suggesting charging for access to these materials violates the APA. This commenter claimed that requiring interested parties to pay for materials an agency proposes to IBR in a notice of proposed rulemaking (NPRM) denies commenters the ability to fully participate in the rulemaking process because they can't learn the content of the standards without paying a fee. Further, this commenter claimed that because the APA allows interested parties to petition the government to amend regulations the IBR materials must remain free online while the regulation is effective. Thus, the APA requires that any material IBR'd must be available for free to be considered "reasonably available." However, the cases that the commenter cited to support this claim, both civil and criminal, dealt with instances where the government proactively prevented access, in some instances by denying access to court hearings and, in another, by not disclosing scientific data relied on during a rulemaking, for example. IBR can be distinguished from these cases because the government is not prohibiting access to the materials. These materials may not be as easily accessible as the

[22] See, for example *Portland Cement v. Rukelshaus*, 486 F.2d 375 (D.C. Cir 1973) and *United States v. Nova Scotia Food Products Corp.,* 568 F.2d 240 (2d Cir. 1977). In all of these cases, the government actively banned persons from a court proceeding or withheld information from the docket of an agency rulemaking. In these instances, the government actively prohibited access to a hearing or to information. This can be distinguished from IBR in that the government does disclose the relevant information regarding the standard it just may not provide free access to it.

commenter would like, but they are described in the regulatory text in sufficient detail so that a member of the public can identify the standard IBR'd into the regulation. OFR regulations also require that agencies include publisher information and agency contact information so that anyone wishing to locate a standard has contact information for the both the standard's publisher and the agency IBRing the standard.

b. create a digital divide by excluding people without Internet access?

Almost all commenters stated that no digital divide would be created because people without Internet access could go to a public library to access the standards online. Some commenters suggested that requiring print copies be available in libraries and other facilities would solve the digital divide problem. A couple of commenters stated that there was no digital divide because at least 60% of Americans have Internet access. A few commenters suggested that a digital divide was not the problem -- our outdated regulations and the fact that some of the material is only available at the OFR was the real issue. One commenter suggested that a digital divide would be created if online access to standards was in a read-only format because someone reading the material at the library couldn't print the standard to review at home or ask someone to bring it to their home so they could examine the standard if they couldn't get to a library.

Our proposed revisions to the IBR approval regulations would maintain the current process of agencies maintaining a copy for public inspection and providing a copy of the standard to the OFR, while adding the requirement that agencies set out, in the preamble of the proposed and final rules, how they addressed access issues and made the material reasonably available. This prevents a digital divide by providing

interested commenters the information to contact the agency directly to find out how to access the standard, whether it is online or accessible at an agency's facility close to the commenter.

2. Does "class of persons affected" need to be defined? If so, how should it be defined?

Whether or not commenters agreed with the petitioner, most believed that "class of persons affected" did not need to be defined. Some felt that the term included "everyone" or "anyone interested." One group said it didn't need to be defined because it includes anyone who has standing to challenge the rule or intervene in a rulemaking proceeding. Most commenters stated that "class of persons affected" didn't need to be defined because it can change depending on the specific rulemaking and agencies involved, thus a definition will fail because it is either too broad to be meaningful or too restricted to capture a total class.

Some commenters suggested that various entities were within the class, for example: consumer groups because they play an important role in ensuring that the standards are sufficiently protective of the consumer health and welfare; and SDOs because they are impacted when an agency IBRs their standards.

Another commenter stated that "affected persons" in § 552(a) of the APA includes more persons than those who are the direct subject of the regulation. To support this claim, the commenter referenced 5 U.S.C. 702 (the APA's judicial review provision)[23] to allege that § 552(a)'s reasonably available provision is broader

[23] The commenter also cites *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987) and *Thompson v. North American Stainless,* 131 U.S. 863 (2011). These Supreme Court cases dealt with who is within the zone of interest under federal banking laws and Title VII of the U.S. Code.

than § 702 and includes anyone who may have a stake in agency action. Thus, the class of persons affected extends beyond those who must comply with the regulation.

Two commenters suggested definitions. One of these commenters suggested that "class of persons affected," "means a business entity, organization, group, or individual who either: (i) would be required to comply with the standard after, or if, it is IBR'd; (ii) would be benefitted from the standard's IBR'd into a federal regulation; (iii) needs to review and/or analyze the materials proposed to be IBR'd and/or being relied upon by a Federal agency in a regulatory proceeding, including (but not limited to) a proposed rulemaking, agency guidance, or similar agency publication."[24] The other suggested a 2-prong definition so that during the NPRM stage of the rulemaking "class of persons affected" would include anyone who wants to comment on the proposal, but during the final rule stage of the rulemaking the definition would refer primarily to "those who have a need to know the standards to which their conduct will be held."[25]

We did not propose a definition in this NPRM because we share the concerns of the commenter who worried that defining this phrase would create differentiation and may encourage the formation of a complicated secondary bureaucracy. We are also concerned that any definition will fail because it is either too broad to be meaningful or too restricted to capture a total class. Thus, we are not proposing a definition so that agencies maintain the flexibility to determine who is within the class of persons affected by a regulation or regulatory program on a case-by-case basis to respond to specific situations.

[24] See NARA-12-0002-0122.
[25] See NARA-12-0002-0009.

3. Should agencies bear the cost of making the material available for free online?

When an SDO creates a standard, it expends resources which are separate from the actual expense of publication and distribution. We lack the knowledge and expertise to understand all of the costs involved with standard development, but we do acknowledge that those costs exist. The SDO can bear the cost of making its standard available for free, the agency can bear the cost by compensating the SDO for the lost sales, or industry and individuals can bear the cost by purchasing copies of the standard.

Many commenters addressed this issue solely from a technology stand-point. They argued that agencies already have scanners, servers, and websites, so scanning, storing, and posting files online would result in a negligible cost. Other commenters suggested that this was a tangential issue and that there were other options available to recover the costs, but didn't elaborate on those other options. It's arguably true that the technological (and publication) costs are continually decreasing, but these comments addressed only the cost of making something available online and did not address costs associated with making the standard available for free.

Other commenters suggested some complex ways for the agencies or the SDOs to recoup the cost of making the standards free online, including creating a new tax on SDOs whose standards are purchased in order to comply with regulations, and having SDOs design a per-use fee, in addition to royalties, so that individuals could pay a small fee to just access a standard but would have to pay royalties to actually use it. Amending the tax code and creating a new business model for SDOs are beyond the scope of the petition and outside our regulatory authority.

Most individuals (those not responding on behalf of an SDO, industry, or trade group) felt that agencies should bear the cost. One person felt that agencies should bear the cost of making standards free and online because if standards are not free, our government is not transparent. Others felt that this was a basic role of government and noted that we already pay taxes, implying that citizens shouldn't have to also pay for standards. One commenter asserted that interested persons with legitimate interest can't afford the cost of purchasing access, so agencies should provide free access, in the interests of reducing costs and burdens.

Transparency does not automatically mean free access. It is the long-standing policy of the Federal government to recoup its costs. OMB Circular A-25 was first issued in 1959 and then revised in 1993. Among its stated objectives is to "allow the private sector to compete with the Government without disadvantage in supplying comparable services, resources, or goods where appropriate." It also notes that "a user charge… will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public."[26] An implied intent is to reduce the costs and burdens on taxpayers by not making them pay extra for something they don't need.

A common theme throughout the comments from industry groups and individuals was the idea that SDOs would be willing to negotiate with the government for a bulk discount for licensing. However, the SDO comments noted that the licensing fee would still be substantial and would necessarily result in increased budgets and increased strain on taxpayers. Another common theme throughout these comments was the idea that the SDOs derive significant, sometimes intangible, benefits from

[26] http://www.whitehouse.gov/omb/circulars_a025#5 last visited June 7, 2013.

having their work IBR'd into a regulation and those benefits more than offset the cost of developing the standards themselves. Some of these benefits include increased name-recognition and trust, increased revenue from additional training opportunities, and an increase in the demand for standards. We don't have the knowledge or expertise to have an opinion on this issue but believe that agencies and SDOs will continue to work together on this issue.

Several individuals and trade groups felt that if agencies had to bear the cost, that would "maximize incentives to bargain over licensing agreements" and encourage "judicious use" of an agency's rulemaking authority to ease the burden on small businesses.[27] However, agencies are already directed to take into account the impact a rulemaking will have on small businesses, including an assessment of the costs involved, by various Federal statutes and Executive Orders. After making that assessment, agencies must then determine which standard, if any, is required.

The OFR is a procedural agency. We do not have the subject matter expertise (technical or legal) to tell another agency how they can best reach a rulemaking decision. Further, we do not have that authority. Neither the FRA nor the FOIA authorizes us to review proposed and final rulemaking actions for substance. We agree that agencies should consider many factors when engaging in rulemaking, including assessing the cost and availability of standards. So, we are proposing to require agencies to either explain why material is reasonably available and how to get it or to summarize the pertinent parts of the standard in the preamble of both proposed and final rules.

[27] See, for example, NARA-12-0002-0098.

Several SDOs commented that if the standards had to be freely available, then the government should bear the cost, but implied that industry and individuals should continue to bear the cost as needed. They noted that they would lose more than just the sales revenue from the standards if they had to bear the cost, including potential reduced value of membership and potential degradation to the value of standards and publications. Further, without compensation, creation of new standards would stop because the costs of procuring them for free would be prohibitively high resulting in an unsustainable business model.

One interest group felt that our question automatically assumed that the cost to an agency would be significant. It argued that SDOs would be able to make standards available like a digital lending library which would mitigate the costs. They offered an example of the American Petroleum Institute (API) making certain standards freely available in response to the 2010 oil spill in the Gulf of Mexico (Gulf oil spill).[28]

We note that API did not offer to make all of its IBRed standards available. So, we cannot infer that API is making this a general practice or that we can apply this situation generally across all SDOs. And, as several other commenters noted, shifting the cost burden to agencies would result in the entire burden of the standards development process being borne by taxpayers. We can take this example, however, as evidence that agencies and SDOs do work together to choose the best solution for a particular situation.

One group asserted that since the Federal government bears the cost of making all Federal regulations available for free online, it should also make all IBR'd standards

[28] See NARA-12-0002-0092.

free and online. However, as we've discussed elsewhere in this petition, the Government Printing Office has the authority to charge for online access and it already charges for subscriptions to the paper *Federal Register* and CFR, so the Federal government does not have an obligation to bear the cost of making all regulations available for free online.

Several commenters suggested that we allow agencies to limit free Internet access only to parties that would suffer an undue burden if they were required to pay the going rate for private standards. These suggestions are impractical. They could create differentiation and encourage the formation of a complicated secondary bureaucracy, which we have touched on already.

As discussed, the OFR is a procedural agency and we publish documents from hundreds of Federal agencies. We would have neither the technological resources nor the staff to make sure agencies were making such a distinction, nor are we in the position to continually monitor outside websites. We wouldn't take steps to prevent such a determination, but have no authority to require it or enforce such a requirement.

One individual suggested that since standards organizations are non-profit entities they should provide their standards for free. Another asserted that the SDOs were already rewarded for their work since they draft standards on behalf of government or industry. One person implied that the government was already paying the SDOs to develop the standards.

Many SDOs are non-profit organizations, but not all are. Even if all SDOs were non-profit organizations, we don't have the authority to require that they give away

assets, products, or services. Further, most SDOs develop standards in response to industry or member needs; they are not employed by the Federal government and very few, if any, draft standards at the direction of the Federal government, and even then, only in very limited and specific circumstances.

One SDO noted that the current Federal policy reflects a decision that regulated industry and individuals should bear costs of standards and that businesses are the intended users of certain standards. It added that most businesses already accept the cost of certain standards as a "recognized, accepted, and tax-deductible cost of doing business." The SDO added that since the cost to business is not exorbitant but the cost would be "exorbitant" to the Federal government, "imposing cost to taxpayers would be misguided."[29]

We choose to leave the burden on the agencies and their subject matter experts to work with the SDOs to provide access to the standards these subject matter experts believe need to be IBR'd. They continue to have the burden, but they also continue to have the flexibility to come up with the best solution for a particular situation.

One industry group asserted that agencies should bear the cost, but that the cost would not be significant because the Federal government could exercise its right under the Takings Clause of the Fifth Amendment for any copyrighted material it wished to use. This comment is outside the scope of this petition for rulemaking, as we discuss in section 10.

[29] NARA-12-0002-0123.

4. How would this impact agencies' budget and infrastructure, for example?

Several individuals replied that there would be minimal or no impact since all agencies should already have a web presence and document management systems.[30] Other commenters concluded that there was no evidence that agencies would have increased expense when providing standards for free online.

Many more commenters (individuals, industry groups, and SDOs) all agreed that there would be a significant impact to an agency's budget. One individual noted that the costs could be "enormous and threaten the viability of regulatory programs."[31] If agencies chose not to use SDO material, they could revert to developing government-unique standards. Several other commenters disputed that option, noting that forcing an agency to hire subject matter experts and develop the expertise it lacks runs counter to OMB Circular A-119. Further, agencies might need additional IT support staff, contract management staff, and administrative staff to meet the new demands for access.

It seems clear that, if agencies must bear the burden to make material free online, and since most material is not currently free, then agency budgets would have to increase to make the material free. It is unclear if, or how, agency infrastructure would be impacted or how much budgets would need to increase.

Several other commenters noted that the budgetary impact should be irrelevant. If an agency chooses to use a standard, then it has to meet all of its legal and financial

[30] Again, these commenters focused only on the costs involved with posting a document and not with making it free.
[31] Again, these commenters focused only on the costs involved with posting a document and not with making it free.

responsibilities. Another commenter added that if an agency didn't want to IBR material, it could simply republish the material in the regulation in the *Federal Register*.

While we agree that it should be an agency decision to use or not to use a standard, based on a variety of factors, agencies cannot simply republish material. The *Federal Register* and CFR have substantial limitations on what can be published. For example, we cannot publish in color, so any standard that relies on color could not be published, regardless of the copyright status.[32] Also, 1 CFR 51.7(c) states that material published in the *Federal Register* cannot be IBR'd. So if one agency chose to republish material rather than IBR it, no other agency would be able to IBR that material.

5. How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final rule stage of the rulemaking?

Several commenters suggested that OFR review at the proposed rule stage would create substantial delays in the already long agency informal rulemaking process. Some suggested that OFR does not have the authority to review proposed rules because we are not subject matter experts in the areas regulated by other federal agencies. One commenter stated that if OFR were to circumvent the development of rules by agencies with the statutory expertise and obligation, OFR would essentially drive the development of those rules which is not part of its mission. Another suggested that OFR review of NPRMs would also create a disincentive for agencies to use voluntary consensus standards. Other commenters suggested that our review

[32] See, for example 1 CFR 51.7(b).

of NPRMs was unnecessary because the SDOs use consensus development platforms that allow resolution of stakeholder concerns.

Another commenter stated that while OFR is already required to review IBR requests at the NPRM stage under 5 U.S.C. § 552(a)(1)(E), we need to issue clear rules so that IBR review would not delay publication of the NRPM and so that agencies will see a reduced risk that their request will be denied.

We received a comment that stated OFR review at the NPRM stage may be constructive if it were limited to ensuring the availability of documents for public comment. Another stated that without adequate IBR review, agencies that failed to ensure that IBR'd standards were reasonably available were likely to face noncompliance and costly litigation. We agree with these comments. Even though a substantive review of IBR'd materials referenced in a proposed rule is beyond our authority and resources, OFR does have the authority to review NPRMs to ensure our publication requirements are met. We have not reviewed IBR'd material in NPRMs for approval because agencies may decide to request approval for different standards at the final rule stage based on changed circumstances, including public comments on the NPRM, requiring a new approval at the final rule stage. Or, agencies could decide to withdraw the NPRM. In this document, we propose to review agency NPRMs to ensure that the agency provides either: an explanation of how it worked to make the proposed IBR'd material reasonably available to commenters or; a summary of the proposed IBR'd material. This would not unduly delay publication of agency NPRMs and does not go beyond OFR's statutory authority.

At least two commenters suggested that the petition does not require or suggest review at the NPRM stage. These commenters asserted that this review isn't needed because their NPRM text requires agencies to demonstrate in their draft final rules that the IBR'd standard was available online during the comment period. Further, agencies would know that they can only expect approval if commenters had access to the proposed IBR'd material during the comment period. Thus, the burden on OFR would be reduced because we would not have to continue with case-by-case determinations of "reasonable availability." Another commenter suggested OFR should automatically grant approval when proposed IBR'd materials are posted on websites that archive and authenticate, so there should be no delay in approval.

These suggestions imply that OFR should rubber stamp agency IBR approval requests as long as the agency states it provided the materials online. We can only carry out the intent of the petition if we review the NPRMs to make sure the proposed IBR'd materials are available online for free or verify that the proposed IBR'd material is actually online during the comment period. To adequately ensure that the proposed IBR'd proposed materials are online during the comment period, OFR would need to verify that fact during the comment period to effectively enforce this requirement. Adding a requirement that agencies need to make proposed IBR'd materials available online during the NPRM stage will not ensure that agencies actually follow that requirement; we need to have some way to verify compliance. Thus, in this NPRM, we are proposing to review agency NPRMs to ensure that the agency provides an explanation of how it worked to make the material it proposes to

IBR reasonably available to commenters or to provide a summary of the proposed IBR'd material.

6. Should OFR have the authority to deny IBR approval requests if the material is not available online for free?

Of the commenters who felt that we should redefine "reasonably available" as meaning free and online, most agreed that we should also then deny requests if the IBR'd material is not available online for free. At least one group felt that we shouldn't deny a request but that instead we should negotiate an agreement between the agency and the SDO that would make the standard available for free and online. And, one commenter felt that OMB should also have the authority to deny requests if IBR'd material was not free and online.[33] One commenter felt that we should refuse to publish final rules that didn't have a link to the online IBR'd material. Another implied that if an agency established good cause for using a standard that wasn't free and online, we couldn't deny the request for IBR approval.

Other commenters were concerned that if we restricted agencies to this requirement, we would be put in the "untenable position of supervising Federal standards policy."[34] They also noted that this could place OFR in the middle of a contentious fight over copyright limitations. We agree.[35] As discussed elsewhere, our authority is limited to procedural and publication issues. We do not have the authority to direct another agency on substantive rulemaking issues, including IBR. Our

[33] As noted elsewhere, the Federal Register Act gives sole approval authority to the Director of the Federal Register.
[34] NARA-12-0002-0123.
[35] We discuss copyright concerns in more detail in section 10.

proposed regulatory changes would require agencies to describe how the IBR'd material is reasonably available, with free and online being but one option.

Several commenters recommended we adopt new and very complex regulatory schemes so that we wouldn't immediately deny IBR'd material that wasn't free and online but that we would make sure it eventually became available, even if not free and online.[36]

Not only would some of these new duties be outside the scope of our statutory authority, we do not have the resources or the expertise to implement and carry out these schemes.

7. The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?

Some commenters felt that we shouldn't update either our guidance or our regulations. Of the commenters who argued that we should use our regulations to require that IBR'd material be available for free and online, about half saw no point in also updating our guidance and the other half didn't object. A small number of commenters asserted that we should not update our Document Drafting Handbook (DDH) because it's not a policy document and we don't set Federal government policy.

[36] One plan would require that we oversee negotiations between the agency and SDO and make sure that the SDO was negotiating in good faith. Then, if the material could still not be made available online for free, we would create and maintain a fair use library of material that we had not approved for IBR but that the agency wanted to enforce through actual notice. Under a second plan, we would first just recommend that agencies use material that is free and online, then we would give priority review to requests to IBR material that was free and online, and finally, after 10 years, we would deny any request to incorporate material that wasn't freely available online.

The ACUS Recommendations didn't suggest that we develop policy for the Federal government regarding IBR. As the name indicates, these are actions or considerations that agencies are recommended to think about when determining what, if any, material would be needed for IBR. We see no problem with updating our DDH with some of the recommendations to give agencies another resource or reminder on IBR best practices and procedures.

8. Given that the petition raises policy rather than procedural issues, would OMB be better placed to determine reasonable availability?

Some commenters felt that we need to define "reasonable availability" and that OMB should have no role in this process, citing the FOIA. Others thought that we should work in concert with OMB to determine "reasonable availability." A third group asserted that OMB should set policy, noting that it already has in OMB Circular A-119.

As we've already discussed, requiring that agencies only use material that is free and online could effectively bar them from using material their subject matter experts have decided is the best option. So, that change would have significant and immediate policy implications. In response to question 7, commenters already noted that OFR does not set policy for the Federal government. In fact, OMB has the role of policy-maker. We have neither the authority nor the expertise to determine what material is appropriate to IBR into a rulemaking. OMB and the other agencies should work together to set policy that best meets their needs.

9. How would an extended IBR review period at both the NPRM and final rule stages impact agencies?

Many commenters raised the same issues in response to question 9 as they did in their responses to question 5. Some concluded there would be no impact since we would not need additional time to review either NPRMs or final rules because the IBR'd material is either available or it's not. Others suggested that our review would slow the process of a rulemaking, which would have detrimental effect and add levels of unnecessary complication. Some suggested that an extended IBR review period would diminish many of the benefits associated with the use of standards that are IBR'd. One commenter stated that OFR review would have a chilling effect on agencies' willingness to IBR voluntary standards in support of regulatory actions, which would undermine Federal law and policy, set forth in the NTTAA and OMB Circular A-119.

Another commenter believed that OFR approval of IBRs should be expeditious and involve limited review. This commenter recommended that where there is an approved method for public access, OFR review should normally occur in 3 days not 20 and that agencies should be allowed to state that all future editions are IBR'd with some type of administrative approval. This commenter further stated that "because the FRA is nothing more than a reporting statute, the Director should delay or reject an agency filing only to promote clarity, authenticity, and – in the case of IBR – public availability."[37] Therefore, according to this commenter OFR should summarily approve IBR requests of materials that are posted on archival websites.

To the extent that one commenter suggested that we completely abandon our current regulations we disagree. Our current regulations, while issued 30 years ago,

[37] See NARA-12-0002-0118.

provide the foundations for transparency by requiring detailed information for the standard, including the title, date, revision, and publisher, be set out in the regulatory text. Without this basic information set out in the regulatory text no one could be sure which standard was actually IBR'd in a regulation. It wouldn't matter what standards were available online if it weren't clear which standard was IBR'd. Simply updating regulations by some type of administrative notice and then adding an editorial note to the CFR would not provide a means of orderly codification as required by the FRA and 1 CFR chapter 1. Therefore, we decline to propose this suggestion as a means of updating IBR references. Instead, our NPRM adds a requirement that agencies provide an explanation in the preambles of both their proposed and final rules that discusses how the IBR materials were made reasonably available (which could have been a summary of the IBR'd material in the NPRM) along with complying with the current regulations set out in part 51. This added requirement will not greatly increase the burden on OFR resources while providing interested parties more information on how agencies are working to ensure the IBR'd materials are reasonably available.

10. Other issues.

a. Constitutional Issues.
b. Copyright Issues.
c. Outdated standards IBR'd into the CFR.
d. Standards should be used as guidance not requirements.
e. Concerns regarding the misuse of the IBR process.
f. Indirect IBR of standards.
g. International stance – trade imbalance, Export Administration Regulations, International Traffic in Arms Regulations.
h. OFR mission.
i. Miscellaneous suggestions.

a. Constitutional Issues

Several commenters argued that the government could simply exercise the Takings Clause of the 5th Amendment. We are not experts in how the Federal government would exercise the Takings Clause. However, there is nothing ever "simple" about the process.[38] We will leave it up to the agencies to decide the best course of action for their situation and not try to substitute our judgment for theirs.

Another commenter questioned the constitutionality of the current system, arguing that forcing the public to pay for standards effectively limits access and thus restricts public participation in government. Most of the cases cited, however, dealt with the government or the courts preventing public access.[39] Given the Government Printing Office's statutory authority to charge for the *Federal Register* and CFR, we find this argument unpersuasive.

b. Copyright Issues

Several commenters claim that once a standard is IBR'd into a regulation it becomes law and loses its copyright protection.[40] Therefore, IBR'd standards must be available for free online. Other commenters, including the petitioners, don't go quite so far. Instead they claim that when agencies IBR copyrighted material into their regulations, the 5th Circuit's decision casts doubt on the legality of charging the

[38] Inquiry as to whether a governmental action is an unconstitutional taking, by its nature, does not lend itself to any set formula, and a determination of whether justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons, is essentially ad hoc and fact intensive 10 A.L.R. Fed. 2d 231 (Originally published in 2006).

[39] *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (US 1982) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); see also *Press Enterprise v. Superior Court*, 478 U.S. 1 (1986). Cf. *In re Gitto Global Corp*., 422 F.3d 1 (1st Cir. 2005); *Leigh v. Salazar*, 677F.3d 892 (9th Cir.2012). The commenter also references Cf. *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-68 (1966), overturning poll taxes.

[40] Citing *Banks v. Manchester*, 128 U.S. 244, (1888).

public for access to that IBR'd material , see *Veeck v. Southern Building Code Congress International, Inc*., 293 F.3d 791 (5th Cir. 2002).[41]

In *Veeck*, the court held that *in some instances* model building codes developed by an organization adopted by government entities into regulations may become law, and to the extent that the building code becomes law it enters the public domain. Federal law still provides exclusive ownership rights for copyright holders[42] and provides that Federal agencies can be held liable for copyright infringement.[43] Additionally, both the NTTAA and OMB Circular A-119 require that federal agencies "observe and protect" the rights of copyright holders when IBRing into law voluntary consensus standards.[44]

Recent developments in Federal law, including the *Veeck* decision and the amendments to FOIA have not expressly overruled U.S. copyright law or the NTTAA, therefore, we agree with the commenters who said that when the Federal government references copyrighted works, those works should not lose their copyright. However, the responsible government agency should collaborate with the SDOs and other publishers of IBR'd materials to ensure that the public does have reasonable access to the referenced documents. Therefore, in this NPRM we propose to require that agencies discuss how they have worked with copyright holders to make the IBR'd standards reasonably available to commenters and to regulated entities.

[41] *Veeck v. Southern Building Code Congress International, Inc*., 293 F.3d 791 (5th Cir. 2002).
[42] 17 U.S.C. 106.
[43] 28 U.S.C. 1498(b).
[44] OMB Circular A-119.

Another commenter suggested that OFR loan out electronic versions of copyrighted standards much like a library. Unfortunately, this goes beyond our statutory authority and agency's resources.

One commenter stated that the OFR should work with agencies to take a collaborative approach to copyright, not one based solely on entitlement, to promote the consensus standard system. This commenter recommended a five-category approach to collaboration.[45]

1. Free, but copyrighted - the material would be marked as copyrighted but would be available free and online.

2. Extraneous – OFR would work with agencies to remove extraneous IBRs from the CFR.

3. Generally approved limitations – OFR would allow agencies to make further accommodations to standards developed by voluntary consensus organizations, such as read-only online access to IBR'd standards. (Here the commenter sets out several conditions both agencies and SDOs would need to meet to get IBR approval.)

4. Good Cause – OFR should approve additional restrictions access if the SDO shows good cause based on its business structure.

5. Agency Necessity – if a SDO refuses to collaborate with an agency without showing good cause or if the agency argues there is no alternative than using a highly restrictive standard, the OFR may not be able to require electronic public access. So OFR would encourage agencies to work with NIST to find an alternative standard.

[45] See NARA-12-0002-0118.

We decline to take this commenters approach and note that we do not have the resources to establish such a complicated regulatory scheme for IBR approval. This plan would also increase the time needed to approve agency IBR requests, unnecessarily duplicate agencies' attempts to make standards available, and add delays to an already complicated rulemaking system.

c. Outdated standards IBR'd into the CFR

A few commenters mentioned that some of the standards IBR'd into the CFR were outdated or expressed concern that agencies were failing to update the IBR references in the CFR. One commenter suggested that greater public access to IBR'd standards might alert policy and industry communities to the fact that Federal regulations reference outdated private standards and need to be updated to improve public safety. Another commenter stated that some standards are out of date or out of print and are not easily available. This commenter noted that some OSHA IBR'd materials date from the 1950s.[46] This commenter expressed concern that the current version of a standard may contain valuable information even though the historical version is still IBR'd in the Federal regulation text. This commenter suggested that sales of historical documents are not related to support of the current version and should be free for the agency and the SDO and that SDOs should charge only for the current version. The commenter didn't want a situation where an employer must buy two versions of the same standard.

In the past few years, we have reviewed a number of agency IBR approval requests that seek to retain, expand, or create IBRs using very old standards of questionable availability. In some cases, there may be no appropriate alternative or

[46] See NARA-12-002-0147.

recent standards and agencies may have no choice but to rely on older material for IBR.

To address this issue, we required that agencies provide additional contact information for older standards that are not readily available from their original publishers. Examples of regulations that include modified availability arrangements for old, difficult to obtain IBR'd documents include National Archives and Records Administration (NARA) regulations at 36 CFR Part 1234 (74 FR 51004, October 2, 2009), Department of Energy (DOE) regulations at 10 CFR Part 430 (74 FR 54445, October 22, 2009), and OSHA regulations at 29 CFR Part 1926 (75 FR 47906, August 9, 2010). While we don't agree with the petitioners that we have the statutory authority to require that these agencies post these IBR materials online, we do require that they provide a way for interested parties to contact the agencies directly to work out an arrangement so that the IBR'd materials could be examined at an agency location more convenient to the requester.

In January of 2011, President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review," dated January 18, 2011,[47] which was closely followed by OMB Memorandum M-11-10, "Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies." After these documents were issued, the legal staff of the OFR wrote a blog post discussing section 6 of Executive Order 13563. This section instructs agencies to conduct periodic, retrospective review and analysis of existing regulations with an eye toward determining which, if any, "may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them … so as

[47] 76 FR 3821; January 21, 2011.

to make the agency's regulatory program more effective and less burdensome in achieving regulatory objectives." OMB Memorandum M-11-10 reiterates and expands on this, stating that "[w]hile systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate …". We suggested in our blog post that agencies use this regulatory review to pay special attention to any IBR'd materials cited in those regulations. Agencies should be mindful of the requirement that such materials be "reasonably available to and useable by the class of persons affected by the publication"[48] and that IBR approval is "limited to the edition of the publication that is approved."[49] We further stated in this blog post that it is incumbent on agencies to periodically review materials approved for IBR in their regulations and update them as appropriate. All IBR'd materials must be "reasonably available" to the regulated parties no matter their age or source. If this becomes a problem using the contact information included in the CFR, agencies are required to update the regulations with current, complete contact information or to arrange for—and publish—instructions for alternative means of availability if necessary.[50]

Another commenter listed agency regulations, some of which IBR standards others do not. This commenter then states that the average age of a standard IBR'd into the CFR is 24 years old. This, he claims, is "in part … due to the antiquated

[48] See 1 CFR 51.7(a)(4).
[49] (see 1 CFR 51.1(f)).
[50] See https://www.federalregister.gov/blog/2011/02/executive-order-13563-and-incorporation-by-reference, last visited on March 15, 2013.

practices of the Federal Register."[51] He continues by stating that at least part of the problem is that the OFR has not implemented an ACUS recommendation from 1979 that suggested OFR issue a rule establishing a procedure for Federal agencies to use a joint rule to update particular standards into their regulations.[52] According to the commenter, this procedure would allow any agency with a superseded standard to participate. The procedure would also allow for each agency to make its own decisions on how to use a particular standard.

Forcing all agencies that wish to IBR a particular standard to work together to issue a joint rule would not automatically shorten the time it takes for agencies to complete rulemaking projects. Coordinating among agencies is not always easy given their differing statutory authority and missions. ACUS Recommendation 78-4 suggests that when a standard is IBR'd by two or more agencies, the OFR should coordinate the publication of a joint rule to update the standard. The Recommendation suggests that OFR should prepare a NPRM that would publish under the name of each agency. However, ACFR regulations require each agency to publish their own regulations, so the OFR could not prepare such a document.[53]

The statute allows agencies to IBR standards with the approval of the Director. The OFR interprets this language to require that agencies make a request to the Director. There is no prohibition on agencies issuing a joint final rule to revise their

[51] See comment NARA-12-0002-0118.
[52] See ACUS Recommendation 78-4 (44 FR 1357, January 5, 1979).
[53] See 1 CFR 21.21. While outside the scope of the petition, the commenter also states the OFR unreasonably limits agencies use of cross-referencing other agencies regulations in the CFR. The Federal Register Act requires orderly codification (44 U.S.C. 1510) and gives the ACFR the authority to issue regulations that ensure the orderly codification of agency rules and regulations. The ACFR's regulation on cross-referencing is found at 1 CFR 21.21. Paragraph (c) of this section requires that each agency set out its own regulations in the CFR in full text. It limits the use of cross-referencing to particular situations set out in this section. Orderly codification cannot be carried out without some boundaries and restrictions. We have found that many times cross references are not updated and thus are not useful.

regulations to update IBR'd materials within their own regulations, if they choose to work together as the Recommendation suggests.

d. Standards should be used as guidance not requirements

A couple of commenters suggested that SDO standards should be used in agency guidance materials instead of in regulations. If agencies did that, the public would not be required to comply with those standards and they wouldn't need to be posted online for free as discussed in the petition. According to these commenters, this is a better solution to IBR because the public can decide if purchasing the standard would help them comply with the regulation. It would also ensure that SDOs are compensated for their work, while creating a market incentive for them to keep their prices reasonable in relation to the alternative standards. SDO standards would be supportive of compliance and would not become the law. At least one commenter suggested "the NTTAA and [OMB] Circular A-119 make a distinction between regulations affirmatively requiring a specified course of conduct and standards that serve to indicate but one means by which those requirements may be satisfied."[54] This commenter states that the benefits of using standards as guidance include:

1. Lessening burdens on the OFR. Guidance is not required to be published in the Federal Register so we don't have to review them.
2. Making it easier to update standards. Agencies wouldn't have to go through a rulemaking each time the SDO issued a new version of a standard.

Another commenter recommended that OMB Circular A-119 should discuss the distinction between rules and "regulatory guidance." The commenter wanted OMB to encourage agencies to withdraw standards IBR'd in the CFR in favor of IBRing

[54] See NARA-12-0002-0149.

these standards into agency directives and interpretations, which the commenter claims are "equally authoritative, but changeable by notice."[55] The commenter suggests that by doing this the public develops an awareness of the standard while SDOs copyrights are protected.

The FRA and the APA[56] require that documents of general applicability and legal effect be published in the *Federal Register* and codified in the CFR. Thus, what these commenters suggest could jeopardize agencies' enforcement of requirements needed to maintain the health and safety of the public by removing them from the CFR. In addition, agencies are not generally required to codify their guidance documents, policy letters, or directives in the CFR and thus, they may not be published in the *Federal Register*.[57] So, if standards are only referenced in guidance, some of the transparency is gone because there would be no uniformity as to how the standard is referenced in the guidance document. In many instances, agency-issued guidance and policy statements become binding as a practical matter.[58] But, because these documents might not be published in the *Federal Register* and are not codified, it's not clear how moving an IBR from regulation text to documents that are more difficult to locate provides the public with adequate knowledge of the document. If

[55] See NARA-12-0002-0118. This commenter also suggests that OFR should allow agencies to IBR agency documents into Federal Register notice documents provided the agency provides an authenticated version of its document for Federal Register custody. As we discussed earlier, we discourage agencies from IBR'ing agency-created materials so that a shadow publication system is not established and the transparency of a centralized publication system established under the FRA is maintained.

[56] 44 U.S.C. 1505, 1510 and 5 U.S.C. 553, respectively.

[57] ACUS Recommendation 76-2 (41 FR 29653, July 19, 1976) recommends that agencies publish their statements of general policy and interpretations of general applicability in the Federal Register citing 5 U.S.C. 522(a)(1)(D). This recommendation further recommends that when these documents are of continuing interest to the public they should be "preserved" in the CFR. 41 FR 29654. The recommendation also suggests that agencies preserve their statements of basis and purpose related to a rule by having them published in the CFR at least once in the CFR edition for the year rule is originally codified. Many agencies have not followed this recommendation, most likely because some of the material is published in the United States Government Manual or they find the cost prohibitive.

[58] See NARA-12-0002-0162.

the documents are not submitted for publication in the *Federal Register*, then the OFR legal staff can't review them. We do not have the staff or other resources needed to check each agency's website for documents that should be published in the *Federal Register*. Also, it is not clear why agencies would need IBR approval for these non-regulatory documents.

This commenter also stated that "[t]o the extent standards remain in the codified rules, OMB should streamline the process of incorporating new editions."[59] It's not clear what the commenter is referring to with this statement. If this commenter wanted OMB to suggest ways agencies can work through their internal and OMB clearance processes to make that process more streamlined, then we agree. OMB should work with agencies to improve and expedite the clearance process. If the commenter is suggesting that OMB change the way IBR approval process works, we disagree with the commenter. Under statute, only the Director can approve agency requests to IBR material into the CFR, OMB may suggest ways to make the process more streamlined but it cannot change the regulations regarding IBR in 1 CFR part 51.

Other commenters offered similar suggestions to "improve" the IBR process. One suggestion would be to allow agencies to simply file an updated standard with the OFR. We would file it and the agency would not have to go through the rulemaking process to update its standards. Then, we would periodically annotate the CFR with editorial notes stating that the standard that is codified is no longer applicable. One commenter suggested that if an agency were required by Congress to update the standard, the agency could simply link to that annotation.

[59] See NARA-12-0002-0118.

Going back to the FRA, the APA, 1 CFR chapters I and II, and the general principles of transparency already discussed, these suggestions are untenable. Notice, whether actual or constructive, is one of the main pillars of our Federal regulatory process. If an agency has given notice, through a final rule codified in the CFR, that a specific standard is required, it can't require something else. And since we don't consider annotations to the CFR part of the regulation, any editor's note we added would be unenforceable. But, we couldn't add such a note because we have no authority to substantively change another agency's regulations.

Another commenter suggested that agencies should be able to remove lengthy "enforcement policies" from the CFR and then IBR them. As we've already discussed, however, this would create a shadow system of regulations.

Several other commenters appeared to suggest that we allow and approve material to be IBR'd into preambles, guidance documents, informal procedures, and Notice documents. One theory appears to be that if agencies could IBR material into documents that were not in the CFR, it would be much easier and faster for them to update the standards with new versions. But, as we've already discussed, agencies IBR material in order to enforce compliance with that material. Only material in the CFR can be enforced, so IBR'ing material into documents that aren't enforceable won't meet agency needs. Agencies are already allowed to reference outside material in those documents, so adding a layer of review and approval, while significantly taxing our resources, would not make the IBR process quicker and simpler; it would have the exact opposite effect.

A second theory for expanding IBR to more than final rules seems to be to ensure that the public has access to all material they need to be able to comment on an agency NPRM, even if the agency never intends to IBR the document at a final rule stage. While the OFR endorses this idea, the agency docket is the appropriate (and current) place for this material. 5 U.S.C. §552(a) clearly discusses IBR in the context of final rules and the requirements that are part of final rules. It is not concerned with ensuring adequate opportunity to comment. Other parts of the APA put that burden on the issuing agency, not on us, see 5 U.S.C. §553.

A commenter was concerned that we would approve an IBR with a general reference to the Internet, rather than a specific instance, since websites and domains can easily change. However, the Director does not approve any "general references," whether online or not. He approves specific editions or versions of specific standards. We strongly encourage agencies to include website addresses where the standard can be obtained, but even if that addresses changes, it won't affect the validity of the IBR approval.

e. Concerns regarding the misuse of the IBR process

Several commenters expressed a general concern that allowing agencies to IBR material into the CFR circumvented the requirements of notice and comment rulemaking. One commenter claimed it is inappropriate to IBR consensus standards that have not gone through an economic analysis and an opportunity for broad public comment. The primary concern of this comment is that voluntary consensus organizations don't take into account the economic impact of their consensus standards. Since many standards offer a very complex and stringent protocol that

industry can choose to adopt to enhance safety, these standards are not a replacement for a rulemaking because they don't account for the economic impact of the protocols.

As previously stated, we are not subject matter experts in the many subject areas in which agencies request IBR approval of standards into their regulations; we are not able to determine how a standard was developed or if there are alternative standards the agency could IBR instead. We believe it is up to the agency to determine these questions and examine the economic impact on regulated entities during the rulemaking process. We propose that agencies seeking the Director's approval of their IBR requests include in the preambles of their rulemaking documents a discussion of the actions the agency took to ensure the materials were reasonably available to interested parties or summaries of the contents of the materials the agencies are seeking to IBR.

At least 2 commenters raised concerns about the IBR of API's RP/1162 entitled *Public Awareness*.[60] They claim that IBR'ing this standard was a misuse of the IBR process because this standard is not technical in nature. These commenters assert that the NTTAA and OMB Circular A-119 envision that IBR will be limited to technical standards or specifications. They suggest that by IBR'ing this standard on developing a public awareness program to increase public awareness of pipeline operations and safety issues, the agency effectively transferred its authority to issue regulations to the private organization.

FOIA and the regulations in 1 CFR part 51 do not limit IBR approval to only technical standards. We don't have the resources to determine what types of

[60] See NARA-12-0002-0077 and NARA-12-0002-0092.

standards are appropriate for an agency to IBR. We assume that agencies have fully considered the impact of any documents they wish to IBR, including whether they are in fact delegating their rulemaking authority to a third-party. We do not review material submitted for IBR to determine if it is technical in nature or is a performance-based requirement; we leave that determination to the agency subject matter experts. We review the IBR'd material to ensure it meets the requirements set out in part 51.

f. Indirect IBR'd standards

At least 3 commenters raised the issue that some of the IBR'd standards also reference other standards in their text. These commenters stated that obtaining IBR'd material can cost several thousands of dollars a year. One commenter uses, as an example, the ASTM foundry standard, which the commenter said cross-references 35 other consensus standards.[61] These commenters mentioned that these costs may be cumulative, as companies or individuals must purchase multiple layers of IBR'd documents. In sum, these commenters seemed to suggest that OFR mandate that the primary IBR material and all tiered IBR material be placed online to greatly reduce the cost of access to IBR'd standards and expand the number of people who can view the IBR'd standards.

Our regulations have never contained any provision to allow for IBR of anything but the primary standards and, as a practical matter, we have no mechanism for approving anything but those primary standards. The OFR is a procedural agency and we do not have subject matter or policy jurisdiction over any agency or SDO. We must assume that agencies have fully considered the impact of any document,

[61] See NARA-12-0002-0147.

and, by extension, material IBR'd, they publish in the *Federal Register*. In many instances, agencies reference third-party standards in their NPRMs, so both the general public and the regulated public can review and comment on those standards before they are formally IBR'd in the CFR. We do not review material submitted for IBR to determine if it also has other materials IBR'd; we look only at the criteria set out in our regulations. Determining that an agency intends to require some type of compliance with documents referenced in third-party standards is outside our jurisdiction; similarly, we cannot determine whether or not the subject matter of a third-party standard is appropriate for any given agency.

We do recommend to agencies that they carefully consider what standards they wish to IBR and the impact of that standard on the regulated entities. If asked, we would suggest that the agency review the second tier standards to determine if it wished to IBR any of those standards. If the agency decides to IBR any second tier standards we will work with the agency on its IBR approval request for those standards. The agency could opt to discuss those "second tier" standards in the preamble.

One commenter stated that we shouldn't reject or delay IBR approval based on secondary references within a standard. For the reasons stated above we don't do this now and our NPRM does not suggest that we begin doing this.

g. International stance – trade imbalance, Export Administration Regulations, International Traffic in Arms Regulations.

Several commenters expressed concern that granting the petition would create unnecessary problems under U.S. international obligations. These commenters stated

that the U.S. standards development system is independent of government control and offers a level of assurance to the world that IBR'd standards are not crafted to establish or encourage trade barriers. They were concerned that any revisions to our regulations could fundamentally undermine this system and would cause the U.S. to lose this competitive advantage. It might also compromise the role that standards play in protecting health, safety, and the environment. These commenters also expressed concern that if the U.S. were to lose its competitive advantage, other countries would be quick to seize the opportunity.

We understand that the U.S. is a party to international agreements under which it is obligated to use relevant international standards in Federal regulations.[62] We strongly recommend that agencies work with the United States Trade Representative, and the Departments of State and Commerce to make sure their regulations meet U.S. international obligations. In part, this is why we decline to grant the petitions request to completely revise our regulations. Instead, we are proposing to revise our regulations to require that agencies discuss in the preambles of their rulemaking documents how the IBR'd materials were made reasonably available under Federal law and policy, including any international obligations if applicable.

One commenter voiced a concern that placing export-controlled information in the public domain could happen if we adopted the changes suggested in the petition. This commenter then stated that this type of information is subject to the Export Administration Regulations (EAR) or controlled by the International Traffic in Arms Regulations (ITAR). The Department of Commerce and the Department of State have the authority over these types of controlled information. This commenter then

[62] See for example, the World Trade Organization Agreement on Technical Barriers to Trade, Article 2.4.

recommends that any revisions to part 51 include the following language: "Nothing herein requires or authorizes the release to the public either directly or through incorporation by reference of any information subject to the export control restrictions as promulgated by the U.S. Department of State or the U.S. Department of Commerce."[63] Because we are not proposing to require agencies to post all materials IBR'd online, we decline to propose adding the commenter's suggested language to part 51.

h. OFR mission

One commenter suggested that OFR needs to focus on a new mission related to IBR and provided the following suggestions related to public domain and privately created documents. In regard to public domain documents, this commenter appeared to recommend that we encourage agencies to IBR agency guidance and other agency documents into guidance documents, preambles, and notice documents.[64] This commenter also seemed to suggest that these types of documents be IBR'd into the CFR; for example, an agency would IBR the preamble of a NPRM into the final rule. Thus, he would have us do away with the current prohibition found in 1 CFR 51.7(c)(1) that prohibits agencies from IBR'ing material that published in the *Federal Register*. He suggested that this would ensure that we maintain archival records of important preambles and agency guidance. However, this misses the point of IBR and of its requirements. Any document that published in the *Federal Register* is automatically part of the Federal record, with its own permanent citation,[65] so IBRing

[63] See NARA-12-0002-0134.
[64] See NARA-12-002-0118. This commenter also suggests that the Director IBR the OFR's Document Drafting Handbook into part 51.
[65] See 44 U.S.C. 1507.

a preamble, for example, would only create a more-complicated citation system with no apparent benefit.

As previously discussed, there is an implied presumption that material developed and published by a Federal agency is inappropriate for IBR by that agency, except in limited circumstances. Otherwise, the *Federal Register* and CFR could become a mere index to material published elsewhere. This runs counter to the central publication system for Federal regulations envisioned by Congress in the FRA and the APA.[66] We do not have the resources to review and approve IBR references in non-regulatory text including guidance documents, preambles, and notice documents. Our focus with IBR approval continues to be placed on CFR regulatory text when agencies wish to require the use of materials not published in the *Federal Register*.

As for privately created materials, this commenter wanted us to focus on helping agencies publish and archive legal materials in secure, electronic formats. This commenter believed 1 CFR part 51 is unnecessarily burdensome and prohibits agencies from using many of the efficient tools the Internet makes available.

We are not the Government Printing Office, whose mission is to help agencies publish and post online agency documents. Our mission is to publish the documents Congress required to be published in the FRA.[67] As for the commenter's suggestion that the current part 51 is burdensome and prohibits agencies from effectively using the Internet, we disagree. The current part 51 provides basic procedural requirements that ensure agencies are referencing IBR'd materials so that it is clear which documents are IBR'd into the CFR. Our requirements also provide that agencies

[66] 47 FR 34107 (August 6, 1982).
[67] See 44 U.S.C. 1505 and 1510.

include direct contact information in the regulatory text so that the reader does not have to search for agency and publisher contact information elsewhere. Our regulations allow agencies the flexibility to work with SDOs and other publishers to post the material online or provide other means of access to the materials IBR'd into the CFR.

Finally, this commenter wanted us to work with NIST to create a database with the IBR'd standards. He felt OFR's record schedule for IBR'd materials is burdensome because we accession some material to NARA while it's still IBR'd in current regulations. To correct this, the commenter seemed to suggest the OFR maintain digital scans of all IBR'd material and provide a high quality searchable web site that links to the CFR and the IBR'd material. This commenter also suggested that we remove contact information from the CFR and maintain it only in this database.

We are happy to work with NIST so that its database of IBR'd standards on www.standards.gov is current. Since the NIST database only tracks consensus standards, we will continue to maintain our finding aid of IBR'd materials on the eCFR (www.ecfr.gov) to assist people looking for other types of documents that have been IBR'd. As discussed in detail previously, we disagree with the suggestion that Federal law and current technology require that copyright protections no longer apply to materials that have been IBR'd so decline to create a site that provides digital scans of IBR'd materials.[68] Finally, we believe that the contact information for OFR,

[68] Within the past few years, we've begun allowing agencies to submit all electronic IBR approval requests. When agencies choose this request process, they provide us with electronic copies of the materials they wish to IBR. Because we have limited server space, we have a record schedule for these documents as well, so we will still need to research where the IBR'd materials are stored. Thus, having digital copies of documents does not solve the perceived problem.

agencies, and publishers of IBR'd materials is important and needs to remain in the CFR.

i. Miscellaneous suggestions

One commenter requested that we require agencies to make all outside materials they relied on in drafting the rulemaking documents available online for free. We have statutory authority only with regard to material IBR'd, not to all other material referenced. While we encourage agencies to make that material available, but we cannot require them to do so.[69]

One commenter recommended that we eliminate IBR entirely and make agencies issue performance-based, rather than standards-based regulations. This is well outside our statutory authority. Agencies currently choose whether performance-based or prescriptive regulations, or a hybrid of both, is best for each specific rulemaking, and whether any part of the performance or prescriptive requirements are best found in existing standards. We do not have the authority or the expertise to substitute our judgment for theirs.

Another commenter also raised the issue of conformity assessment. [70] However, that too is outside the scope of our authority, our expertise, and this petition.

One commenter expressed frustration with private corporations and government corruption. Others objected to the idea that regulations could become law without allowing citizens access. One commenter asserted that agencies should not publish regulations individually, that there needed to be a central repository that published regulations which would be available online. He also recommended an elaborate file-

[69] As noted in section 1, however, agencies are already required to disclose scientific data that they've relied on for rulemaking. *United States v. Nova Scotia Food Products Corp*., 568 F.2d 240 (2d Cir. 1977).
[70] See, for example, NARA-12-0002-0063 and 0067.

naming convention for all regulations and NPRMs, not just those containing IBR material.[71] One submitter provided a copy of OSHA's acceptance of Industrial Consensus Standards from the General Agreement on Tariffs and Trade (GATT), but without explaining its relevance to the petition.[72]

We also received recommendations to:

- Create a government SDO and to nationalize existing standards
- Change the existing SDO model
- Make all standards open-source
- Host all online standards[73]
- Revise the tax code
- Amend HR 2854
- Make all agency drafts publically available
- Have Federal agencies use objective criteria to evaluate the potential IBR of voluntary non-consensus standards
- Analyze how other Federal agencies compile data and meta-data

The OFR has no authority to create agencies, change how SDOs operate, or amend existing statutes. Further, we cannot make agency drafts publically available. The ACFR regulations,[74] which were upheld by a Federal court[75], specifically state that we hold all documents in confidence until they are placed on public inspection and filed for publication Finally, we cannot implement changes in other agencies.

One commenter requested that OFR conduct an audit of all IBR'd standards. We decline. The last audit our office undertook lasted several years, with many more staff and many fewer IBR'd standards, and was done shortly after the Director became the sole person authorized to approve IBR requests. This commenter also

[71] Since this describes fairly well the Federal Register system, as established in 1935, we agree with the comment regarding centralization of regulations. However, changing how documents are named is outside the scope of this petition.
[72] We do discuss international issues elsewhere in section 10, including the GATT.
[73] Online standards are, by definition, already online, so we see no need to also host them through our domains.
[74] 1 CFR 17.2(a).
[75] Kenn*ecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191 (D.C. Cir. 1996).

requested permission to install a high speed copier in our office which non-OFR employees would use to copy and scan IBR'd material. The Antideficiency Act, 31 U.S.C. 1342, prevents us from accepting voluntary services and ethics rules prevent us from accepting gifts. Finally this commenter requested that NARA systematically archive all ANSI standards, even those not IBR'd, to ensure continuing access to these standards. Although we are an office within NARA, we are only involved in archiving records as a client – that is, we send our material for archiving according to our records schedule just like any other Federal agency. We don't have the authority to speak on behalf of NARA. In addition, ANSI is not a government agency so OFR has no authority to archive all of its standards.

Regulatory Analysis

The Director developed this NPRM after considering numerous statutes and Executive Orders related to rulemaking. Below is a summary of his determinations with respect to this rulemaking proceeding.

Executive Order 12866

The NPRM has been drafted in accordance with Executive Order 12866, section 1(b), "Principles of Regulation." The Director has determined that this NPRM is a significant regulatory action as defined under section 3(f) of Executive Order 12866. The proposed rule has been submitted to OMB under section 6(a)(3)(E) of Executive Order 12866.

Regulatory Flexibility Act

This NPRM will not have a significant impact on small entities since it imposes requirements only on Federal agencies. Members of the public can access Federal

Register publications for free through the Government Printing Office's website. Accordingly, the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

Federalism

This NPRM has no Federalism implications under Executive Order 13132. It does not impose compliance costs on state or local governments or preempt state law.

Congressional Review

This NPRM is not a major rule as defined by 5 U.S.C. 804(2). The Director will submit a rule report, including a copy of this NPRM, to each House of the Congress and to the Comptroller General of the United States as required under the congressional review provisions of the Small Business Regulatory Enforcement Fairness Act of 1986.

List of Subjects in 1 CFR Part 51

Administrative practice and procedure, Code of Federal Regulations, Federal Register, Incorporation by reference.

For the reasons discussed in the preamble, under the authority at 5 U.S.C. 552(a), the Director of the Federal Register, proposes to amend chapter II of title 1 of the Code of Federal Regulations as set forth below:

PART 51—INCORPORATION BY REFERENCE

1. The authority citation for part 51 continues to read:

Authority: 5 U.S.C. 552(a).

2. Revise § 51.3 to read as follows:

§ 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).

3. Revise § 51.5 to read as follows:

§ 51.5 How does an agency request approval?

(a) In a proposed rule, the agency does not request formal approval but must either:

(1) Discuss the ways in which it worked to make the materials it proposes to incorporate by reference reasonably available to interested parties in the preamble of the proposed rule, or

(2) Summarize the material it proposes to incorporate by reference in the preamble of the proposed rule.

(b) In a final rule, the agency must request formal approval by:

(1) Making a written request for approval at least 20 working days before the agency intends to submit the final rule document for publication;

(2) Discussing, in the preamble, the ways in which it worked to make the materials it incorporates by reference reasonably available to interested parties and how interested parties can obtain the materials;

(3) Sending a copy of the final rule document that uses the proper language of incorporation with the written request (See § 51.9); and

(4) Ensuring that a copy of the publication is on file at the Office of the Federal Register.

(c) Agencies may consult with the Office of the Federal Register at any time with respect to the requirements of this part.

4. In § 51.7, revise paragraph (a) to read as follows:

§ 51.7 What publications are eligible?

(a) A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it—

(1) Conforms to the policy stated in § 51.1;

(2) Either:

(i) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material; or

(ii) Substantially reduces the volume of material published in the Federal Register; and

(3) Is reasonably available to and usable by the class of persons affected by the publication. In determining whether a publication is usable, the Director will consider—

(i) The completeness and ease of handling of the publication; and

(ii) Whether it is bound, numbered, and organized.

* * * * *

5. In § 51.9, revise paragraphs (a) and (c) to read as follows:

§ 51.9 What is the proper language of incorporation?

(a) The language incorporating a publication by reference must be precise, complete, and clearly state that the incorporation by reference is intended and completed by the final rule document in which it appears.

* * * * *

(c) If the Director approves a publication for incorporation by reference in a final rule, the agency must include —

(1) The following language under the DATES caption of the preamble to the final rule document (See 1 CFR 18.12):

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of _____.

(2) The preamble requirements set out in § 51.5(b).

(3) The term "incorporation by reference" in the list of index terms (See 1 CFR 18.20 Identification of subjects in agency regulations).

Dated: September 30, 2013

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CHARLES A. BARTH
Director, Office of the Federal Register

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