



[BILLING CODE 1505-02-P]

OFFICE OF THE FEDERAL REGISTER

1 CFR Part 51

[Docket Number: OFR-2013-0001]

[RIN: 3095-AB78]

Incorporation by reference.

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

ACTION: Final rule.

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**SUMMARY:** In this document, we are revising our regulations on incorporation by reference to require that agencies seeking the Director of the Federal Register's approval of their incorporation by reference requests add more information regarding materials incorporated by reference to the preambles of their rulemaking documents. Specifically, agencies must set out, in the preambles of their proposed and final rules, a discussion of the actions they took to ensure the materials are reasonably available to interested parties and that they summarize the contents of the materials they wish to incorporate by reference.

**DATES:** This rule is effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may find information on this rulemaking docket at Federal eRulemaking Portal: <http://www.regulations.gov>. Docket materials are also available at the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC 20002, 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: Miriam Vincent, Staff Attorney, Office of the Federal Register, at [Fedreg.legal@nara.gov](mailto: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<sup>1</sup> (part 51). The petition specifically requested that we amend our regulations to: 1) define “reasonably available” and 2) include several requirements related to the statutory obligation that material incorporated by reference (IBR) be reasonably available. Our original request for comments had a 30-day comment period. After requests from several interested parties, we extended the comment period until June 1, 2012.<sup>2</sup>

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,<sup>3</sup> NARA then maintains this material as permanent Federal records.

We agreed that our regulations needed to be updated and published a proposed rule on October 2, 2013.<sup>4</sup> However, we stated that the petitioners’ proposed changes to our regulations go beyond our statutory authority. The petitioners contended that changes in technology, including our new website [www.federalregister.gov](http://www.federalregister.gov), along with electronic Freedom of Information Act<sup>5</sup> (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).<sup>6</sup> The petitioners argued that

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<sup>1</sup> 77 FR 11414 (February 27, 2012).

<sup>2</sup> 77 FR 16761 (March 22, 2012).

<sup>3</sup> <http://www.archives.gov/federal-register/cfr/ibr-locations.html> last visited August 11, 2014.

<sup>4</sup> 78 FR 60784 (October 2, 2013). We extended the comment period on this proposal until January 31, 2014. See, 78 FR 69006 (November 18, 2013) and 78 FR 69594 (November 20, 2013).

<sup>5</sup> Pub. L. 104-231 (1996).

<sup>6</sup> In fact, agencies were incorporating material by reference long before we were assigned the task of normalizing the process.

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 (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."<sup>7</sup> In addition, the petition argued that *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5<sup>th</sup> 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: 1) in the Federal Docket Management System (FDMS) in the docket for the proposal or interim rule; 2) on the agency's website or; 3) 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 the question of whether the material is available online. The petition would then revise § 51.9 to distinguish between required

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<sup>7</sup> NARA-12-0002-0002.

standards and those that 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 be hyperlinked.

The petitioners wanted 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 that 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*.<sup>8</sup> The petition suggested that the Director monitor proposed rules to ensure that 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 ensure that 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) (section 552(a)), mandates approval by the Director of 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.<sup>9</sup> 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

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<sup>8</sup> See also 44 U.S.C. 4101.

<sup>9</sup> See also 44 U.S.C. 4101.

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.<sup>10</sup>

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.<sup>11</sup> 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 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 our document announcing that we received a petition to revise our regulations in part 51, we specifically requested comments on nine issues.<sup>12</sup> We received comments on each of those issues and addressed them in our NPRM.<sup>13</sup>

In our NPRM, we stated our concerns regarding several of the petitioners' suggested revisions to our regulations. We stated that while OFR does have the authority to review NPRMs to ensure our publication requirements are met, a substantive review of IBR'd materials referenced in a proposed rule, as implied by the petition, is beyond our

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<sup>10</sup> 47 FR 34107 (August 6, 1982).

<sup>11</sup> 44 U.S.C. 1505 and 1510.

<sup>12</sup> 77 FR 11414 (February 27, 2012).

<sup>13</sup> 78 FR 60784 (October 2, 2013).

authority and resources. We also noted that the OFR has 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. These factors make review and approval at the proposed rule stage impractical.

In our discussion of the copyright issues raised by the petitioners and commenters, we noted that recent developments in Federal law, including the *Veeck* decision<sup>14</sup> and the amendments to FOIA, and the NTTAA have not eliminated the availability of copyright protection for privately developed codes and standards referenced in or incorporated into federal regulations. Therefore, we agreed with commenters who said that when the Federal government references copyrighted works, those works should not lose their copyright. However, we believed the responsible government agency should collaborate with the standards development organizations (SDOs) and other publishers of IBR'd materials, when necessary, to ensure that the public does have reasonable access to the referenced documents. Therefore, we proposed in the NPRM to require that agencies discuss how the IBR'd standards are reasonably available to commenters and to regulated entities. One way to make standards reasonably available, if they aren't already, is to work with copyright holders.

We also proposed to review agency NPRMs to ensure that the agency provides either: 1) an explanation of how it worked to make the proposed IBR'd material reasonably available to commenters or; 2) a summary of the proposed IBR'd material. We proposed that agencies include a discussion in their final rule preambles regarding the ways it worked to make the incorporated materials available to interested parties. We stated that this process would not unduly delay publication of agency NPRMs or Final Rules and did not go beyond OFR's statutory authority.

Several commenters were concerned that our NPRM didn't go far enough – specifically noting that the proposed rule wouldn't require agencies to provide free access to standards incorporated by reference into the CFR. The issue of “reasonable

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<sup>14</sup> *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5<sup>th</sup> Cir. 2002).

availability” continued to elicit comments related to the NPRM and we will discuss this issue, along with other comments, below.

Based on comments to our NPRM, we have modified the regulation text slightly so that we now 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: 1) discussions of how the materials are reasonably available and, if they aren’t, the actions the agency took to make the materials reasonably available to interested parties and; 2) 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 again alleged that the OFR does not have the proper authority to amend the regulations in 1 CFR part 51.<sup>15</sup> As we stated in the NPRM, we disagree with the commenter. Because section 552(a) specifically states that the Director will approve agency requests for IBR and that 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.<sup>16</sup> Even though this part was within the ACFR’s CFR chapter, the preamble to the document stated “the Director of the Federal Register hereby establishes standards and procedures governing his approval of instances of incorporation by reference.”<sup>17</sup> And, while these regulations appeared 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;<sup>18</sup> however the ACFR stated that the republication contained no substantive changes to the regulations.

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<sup>15</sup> OFR-2013-0001-0027.

<sup>16</sup> 32 FR 7899 (June 1, 1967).

<sup>17</sup> *Id.*

<sup>18</sup> 34 FR 19106 at 19115 (December 2, 1969).

In 1972, the ACFR proposed a major substantive revision of Chapter I.<sup>19</sup> 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 Administrative Committee.”<sup>20</sup> 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.<sup>21</sup> 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 37 FR 23602 and 23614, respectively. Thus, it is appropriate for the Director, not the ACFR, to issue the regulations found in 1 CFR part 51.

As for this commenter’s concerns regarding following the rulemaking requirements, we believe that we have followed the proper rulemaking procedures as we are required to do and that we have taken into consideration the impact of our revisions on both federal agencies and the public.

#### *Class of persons affected*

A few commenters suggested that we define “class of persons affected” to mean all interested parties. At least one commenter claimed that section 552(a)’s reference to “class of persons affected” is broader than just those who must comply with the regulation - that it includes anyone with a “stake in the content of the IBR materials.”<sup>22</sup> The commenter based this claim on the phrase in the undesignated paragraph, which provides that if the document doesn’t publish in the Federal Register and the person doesn’t have actual notice of the document that person may be “adversely affected” by the agency document. This commenter claimed that this provision, along with the provision in 5 U.S.C. § 702 (allowing persons who have been “adversely affected” by an agency action to seek judicial review), demonstrates that “class of persons affected,” as

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<sup>19</sup> 37 FR 6804 (April 4, 1972).

<sup>20</sup> *Id.*

<sup>21</sup> 37 FR 6817 (April 4 1972).

<sup>22</sup> OFR-2013-0001-0029 at page 13.

stated in the provision allowing IBR, should be read more broadly “to require availability to those simply ‘affected’ by the terms of the incorporated material.”<sup>23</sup>

However, the IBR provision contains a slight language change that modifies “affected” by adding the phrase “class of persons.” This addition could be read as an indication that the IBR material must be reasonably available to those who must directly comply with the regulation. Under the statute, it is acceptable to have material reasonably available beyond the class of persons affected but it is not required.

We continue to have concerns that any definition will fail because it is either too broad to be meaningful or too restrictive to capture a total class. Therefore we decline to define the phrase “class of persons affected.” Thus, 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.

#### *Reasonably Available*

Several commenters agreed with the petitioners that reasonably available means for free to anyone online, but they provided little or no additional comment on this point. Many of the SDOs supported our proposal and discussed how they are already providing access to their standards that have been IBR’d. One commenter who supported our NPRM noted that reasonably available was highly content-driven and felt the agency issuing the rule should ensure that the standards are reasonably available.<sup>24</sup> Another agreed with our proposal, stating that agency subject matter experts are suited to determine if a standard should be IBR’d.<sup>25</sup>

However, some commenters alleged that the only way for OFR to meet its statutory obligation was to deny IBR approval for all standards there were not available for free online. A couple of commenters modified their stance and claimed that OFR has a duty to deny IBR approval for all standards that were not available at no cost to all interested persons. Another suggested that, because of the internet, reasonably available “with respect to the law must now be understood to mean available with not more than

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<sup>23</sup> OFR-2013-0001-0029 at page 13.

<sup>24</sup> OFR-2013-0001-0030.

<sup>25</sup> OFR-2013-0001-0038.

the minimal cost or effort required to travel to a public or government depository library.”<sup>26</sup>

One commenter commented generally on the U.S. tradition to provide “inexpensive and widespread access to the law.”<sup>27</sup> This tradition is tied to the current Administration’s goal of transparency and accountability. This commenter further stated that the government’s decision to regulate by incorporating expensive standards into regulations is similar to charging filing fees and poll taxes and sends a damaging message to the public. Other commenters suggested that our proposal unlawfully delegates the reasonably available determination to agencies. At least one commenter stated that OFR is bound by statute to ensure that materials are reasonably available “regardless of the effect on the use of voluntary standards.”<sup>28</sup>

Two other commenters vehemently argued that in order to be reasonably available, IBR’d standards must be accessible to all interested parties.<sup>29</sup> Both suggested that it is not enough to have material available to be examined at the OFR. One commenter was concerned that our proposal merely asks agencies how they worked with SDOs and other publishers on the access issue.<sup>30</sup> This commenter went on to state that this requirement won’t provide more consistent availability of standards or ensure that the public has enough information to submit an effective comment. The commenter expressed concern that agencies may, in an effort to save money or time (negotiating with SDOs), decide that despite unsuccessful attempts to make a standard reasonably available, it would still request IBR approval, which we would grant. The commenter further stated “[a]t root then, access to all incorporated matter should be free, if the evils of ‘secret law’ OFR was established to resist are to be avoided.”<sup>31</sup>

These commenters appeared to have a fundamental issue with agencies’ ability to IBR materials into the CFR. We decline to address whether or not agencies should be allowed to IBR materials into the CFR. This is beyond our authority. In this rule, we balanced our statutory obligations regarding reasonable availability of the standards with:

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<sup>26</sup> OFR-2013-001-0029 at page 5.

<sup>27</sup> OFR-2013-0001-0036, see also OFR-2013-0001-0029.

<sup>28</sup> OFR-2013-0001-0037 at page 2.

<sup>29</sup> OFR-2013-001-0024 and OFR-2013-001-0029.

<sup>30</sup> OFR-2013-001-0029.

<sup>31</sup> OFR-2013-001-0029 at page 3.

1) U.S. copyright law, 2) U.S. international trade obligations, and 3) agencies' ability to substantively regulate under their authorizing statutes. To achieve this balance, this rule requires that agencies to discuss how IBR'd materials were made available to parties (and where those materials are located) and to provide a summary of those materials in the preambles of their rulemaking documents. These requirements oblige agencies to provide more information on how they made IBR'd material available and a summary of the material, so the readers can, if they like, find and review the standards. This rule continues to require that agencies provide the OFR with a copy of the standard and maintain a copy at the agency for public inspection; therefore we disagree that this rule is an unlawful delegation of authority to the agencies.

Another commenter adamantly stated that the Director of the Federal Register has the sole authority to set procedures for the approval of agency requests for IBR. This commenter stated that "reasonably available" is the sole statutory criterion for IBR approval so all other considerations must be considered secondarily.<sup>32</sup> This commenter went on to state that it is not enough that agencies are required to simply announce the location of IBR'd material.<sup>33</sup> The commenter added that our proposal won't work, because requiring a summary of the standards in the preamble does nothing for interested parties<sup>34</sup> "and would simply represent another wasteful check-off process in the Federal Register publication process."<sup>35</sup>

It is unfortunate that this commenter believed that the publication requirements of the ACFR and Director (found in 1 CFR chapters I and II) are just wasteful check-off processes. The FRA established the ACFR, in part to provide that there was consistency on how agency documents publish in the *Federal Register*. When this Act was amended in 1938 to create the CFR, it provided that the ACFR would issue regulations to carry out

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<sup>32</sup> OFR-2013-0001-0004.

<sup>33</sup> Id. At page 1. Citing Senator report No 88-1219 at 4 (1964) and the 1967 Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967).

<sup>34</sup> This commenter goes on to claim that OFR is wrong to assume that agencies would remove online access to IBR'd materials, while in the same comment, stating that the proposal provides agencies no practical incentive to make IBR'd materials reasonably available, implying that without OFR specifically requiring IBR'd materials be available for free online, agencies will do nothing to improve access to standards.

<sup>35</sup> OFR-2013-0001-0004 at page 4.

the codification of agency documents of general applicability and legal affect.<sup>36</sup> As discussed throughout this rule, the FOIA gave the Director the authority to approve agency requests to IBR materials into their regulations.<sup>37</sup> Both the ACFR and the Director have throughout the years worked hard to ensure that the publication requirements they issue provide the agencies and the public clarity, uniformity, and consistency to maintain an orderly publication system for federal agency documents and minimize busy work for the agencies.

With respect to this commenter's other issues concerning the Director's authority, as we stated in our NPRM, we are 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. There must be a balance between procedural requirements and agencies' substantive statutory authority and requirements. To achieve this balance, we are issuing rules that require agencies to discuss how IBR'd materials were made available to parties (including where those materials are located) and to summarize those materials in the preambles of their rulemaking documents. We added the summary requirement, not as a replacement for access to the IBR'd standard, but to give the public enough information to know if they need access to the standard. We believe the requirements set out in this rule provide flexibility needed for agencies to determine that IBR'd documents are reasonably available.

Some commenters made a distinction between reasonably available at different stages of rulemaking, suggesting that materials need to be more widely available at no cost during the comment period of a proposed rule.<sup>38</sup> These commenters' suggested that reasonably available would be more limited during the effective period of the rule, in part to ease the burden on OFR resources.<sup>39</sup> We disagree; distinguishing between the proposed rule and final rule stages of agency rulemakings will require development of a more elaborate approval process that will place additional burdens on agency and OFR

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<sup>36</sup> 44 U.S.C. 1510.

<sup>37</sup> 5 U.S.C. 552(a).

<sup>38</sup> OFR-2013-0001-0022 and OFR-2013-001-0007.

<sup>39</sup> OFR-2013-001-0007 at page 3.

staff. In the late 1970s we attempted a more complex approval process that was too difficult to maintain so we revised the IBR approval process in 1982.<sup>40</sup>

One commenter suggested that we provide a “safe harbor” by declaring that any standards provided for free online are deemed reasonably available by the Director.<sup>41</sup> This commenter would place the burden of proof on the agency to demonstrate that the materials were reasonably available if they were not available for free online. We decline to follow this suggestion; it creates an uncertainty in the law because no one knows whether an IBR is enforceable or not. It is not clear what would happen if the material was no longer available for free online and the agency didn’t certify that it was reasonably available. Under ACFR regulations, we cannot amend another agency’s CFR provisions, so at best we would need to add an editorial note after each CFR provision that included IBR’d material that was no longer approved. We would also need to monitor all IBR’s to ensure that some information regarding the status of IBR’d materials were maintained.

At least 2 commenters complained that the proposed rule didn’t address the reasonable availability of the standards once the final rules were codified in the CFR. One commenter stated that “the CFR has been transformed from a mechanism to inform citizens into a profit opportunity for a few private organizations.”<sup>42</sup> Another commenter suggested that agencies post the text of the standards on their websites to ensure that text of the IBR’d standards is available while the rule is codified in the CFR.<sup>43</sup> As an alternative, the commenter states that materials could be posted on SDOs websites so long as agencies certify, each year, that IBR’d materials are still on the SDOs website.

We note that even if agencies decide to repackage the text of standards they wish to IBR, they must ensure that this repackaged text meets the requirements in 51.7 and 51.9 or we will not approve the agency’s IBR request. As for the suggestion that agencies annually certify that IBR materials are reasonably available - we have already demonstrated that is not a viable option. From 1979 through 1982, we approved material IBR’d on a yearly basis, as part of a comprehensive review of all material IBR’d and a

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<sup>40</sup> 47 FR 34108 (August 6, 1982).

<sup>41</sup> OFR-2013-001-0007 at page 6.

<sup>42</sup> OFR-2013-0001-0012 at page 5.

<sup>43</sup> OFR-2013-0001-0024.

review of the overall approval process.<sup>44</sup> It soon became clear that a one-year review was neither practical nor efficient. We chose not to extend the program but to return to the original process. As we stated above, the orderly codification requirements of the FRA and the ACFR prohibit us from amending another agency's regulations so it is not clear how the expiration of an IBR approval would be identified in the CFR without undermining orderly codification and without returning to an approval system that has already failed.

### *Access*

Several commenters specifically discussed access as part of their comments addressing reasonably available. Many commenters agreed with the petitioners, stating that the law must be accessible and free to use, therefore IBR'd standards should also be freely available to anyone wishing to review them. One commenter stated that free access to IBR'd standards strengthens the capacity of public interest groups to engage in the rulemaking process and work on solutions to public policy issues.<sup>45</sup> Another stated that the public's right to access the content of regulations, including IBR'd material, is "a critical safeguard to agency capture and other government issues."<sup>46</sup> Other commenters generally agreed with our NPRM, stating that reasonable availability and transparency did not automatically mean free access<sup>47</sup> and supporting the idea that agencies need flexibility to work with the SDOs to provide access to standards.<sup>48</sup>

A number of SDOs commented specifically on access and discussed how they make their standards available online.<sup>49</sup> One stated that access should not require the loss of copyright protection.<sup>50</sup> One SDO board stated that they make standards available in the following ways: online sales; classes; limited-time, no-cost, no-print electronic access; membership in the organization, and the ability to request fee waivers.<sup>51</sup> Another standards organization stated that its standards are available through third party

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<sup>44</sup> 44 FR 18630, as corrected at 44 FR 19181.

<sup>45</sup> OFR-2013-0001-0031.

<sup>46</sup> OFR-2013-0001-0029 at page 11.

<sup>47</sup> OFR-2013-0001-0033.

<sup>48</sup> OFR-2013-0001-0020 and OFR-2013-0001-0018.

<sup>49</sup> See, OFR-2013-001-0017, OFR-2013-001-0020, OFR-2013-001-0027 and OFR-2013-001-0028.

<sup>50</sup> OFR-2013-0001-0018.

<sup>51</sup> OFR-2013-001-0023.

vendors.<sup>52</sup> It also stated that the headings and outlines of its standards are freely available and that it also provides read-only online access to its standards. Another also stated that it provides no-cost read-only online access to its standards and also provides scopes and summaries of each standard on its website.<sup>53</sup> One stated that access is important but shouldn't undermine or dismantle the public-private partnership that currently exists to create high-quality technical standards.<sup>54</sup> To support access and agency efforts to update standards referenced in regulations, it makes immediate past versions of its standards available for review in online in RealRead. Further, older standards can be purchased and it will work with agencies to expand its titles in RealRead.<sup>55</sup>

OFR applauds all the efforts of these private organizations to make their IBR'd standards available to the public. We encourage agencies and SDOs to continue to ensure access to IBR'd standards.

One commenter stated that summarizing the documents isn't enough; regulated entities must have access to the actual documents and these documents must be available free to the public in at least one location as long as the rule is effective. Since it is hard to access the copies at the National Archives, we require that agencies maintain a copy of the documents they IBR. We retained the requirements in this rule that agencies retain a copy of the IBR'd standard for inspection and provide the OFR a copy of IBR standards.

Another commenter believed that access to standards on SDOs websites is insufficient to meet the reasonably available requirement at any stage of the rulemaking process because the SDO can remove the standard or charge for access to it at any time.<sup>56</sup> In addition, this commenter believed that SDOs requirement that individuals sign a release to access the read-only standard may deter the public or small businesses from accessing standards. If the SDO does remove standards from its website, the only option, according to this commenter, is to travel to our offices in Washington DC to review them.

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<sup>52</sup> OFR-2013-001-0035.

<sup>53</sup> OFR-2013-001-0025.

<sup>54</sup> OFR-2013-0001-0028.

<sup>55</sup> *Id.*

<sup>56</sup> OFR-2013-0001-0036. The commenter also asserted that the SDO standards development processes doesn't balance all interests reliably so the public needs complete access to the standards to make sure the agencies are "acting appropriately in relying upon these standards." At page 5.

We have no authority to require SDOs to upload and maintain their standards on their websites, and while this is one way to demonstrate access, it is not the only way to show reasonable availability. To improve access to standards and provide the public more information on how to access the standards, this rule requires that agencies discuss how the standards were made available during the life-cycle of the rule. We also require that agencies provide a summary of the standard in the preamble to allow readers to make their determination on whether to access a standard to assist in drafting a comment on a particular rulemaking project. We disagree with the commenter's assertion that the only place interested parties can access standards, if they aren't available online, is at our office in Washington DC. As mentioned above, we kept the requirement that agencies retain a copy of the IBR'd standard for inspection and provide the OFR a copy of IBR'd standards. Further, material remains available through SDOs and usually, if a standard has been discontinued, through resellers.

Another commenter recommended that OFR adopt an IBR approval program based on contingent approvals. The commenter suggested that OFR's IBR approval be effective only as long as the standard is freely available. If the public can't access a standard for free, then the IBR approval "would evaporate."<sup>57</sup> The standard would not be legally IBR'd and would be unenforceable. The commenter stated that the statute doesn't prohibit an approval that would be revoked automatically and that revocation could be privately enforced by individuals using the Federal courts. The commenter asserted that these contingent approvals would not drain OFR resources because the revocation of the IBR approval would be automatic and immediate. It would provide an incentive for both the agencies and the SDOs to ensure continued free online access because standards that weren't freely available online would not be enforceable.

We disagree with these commenters' assertion that we can delegate our enforcement authority to private entities without "final reviewing authority over the private party's actions."<sup>58</sup> Even if we could, it would create uncertainty in the law because no one would know whether an IBR is effective and enforceable or not. There is no way we can track and review all Federal court cases for IBR'd material. We also can't

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<sup>57</sup> OFR-2013-0001-0004 at pages 4-5.

<sup>58</sup> National Park and Conservation Ass'n v. Stanton, 54 F.Supp2d 7, 18 (D.D.C. 1999).

resolve conflicts between Circuits. Finally, even with a definitive court decision, we couldn't amend another agency's regulations. So the system this commenter suggested is less transparent and accessible than the current IBR approval process.

### *Costs of Standards*

Several commenters discussed the costs of the standards in their comments on our NPRM.<sup>59</sup> Some raised concerns that SDOs were charging monopoly prices for standards<sup>60</sup> or using copyright as a device to make money and fund SDO operations<sup>61</sup>. Others were of the opinion that any charge for an IBR'd standard effectively hides the law behind a pay wall which is illegal and means the standard is not available<sup>62</sup>. At least one commenter stated that while there was a need to charge a reasonable fee to recover printing costs, this no longer applies where technology now enables the storage and retrieval of large amounts of data at virtually no cost.<sup>63</sup> This commenter suggested that giving the public free access to the standards would not “undermine incentives to participate in the voluntary standards development process.”<sup>64</sup>

As we stated in our NPRM, these materials may not be as easily accessible as the commenters 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.

A couple of commenters suggested that OFR needs to proceed with caution and consider the costs of IBR'd standards, including extra compliance costs for small

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<sup>59</sup> At least 2 comments stated that FOIA envisioned that IBR'd standards would be commercially available through a subscription service, not held for individual sale, suggesting that purchasing a subscription could be more affordable than purchasing each individual standard, see OFR-2013-001-0024 and OFR-2013-001-0029. We note that we received comments to our initial request for comments on the petition that suggested obtaining access to subscriptions services for certain IBR'd materials is not substantially cheaper and sets up other road blocks for entities wishing to purchase only one particular standard.

<sup>60</sup> OFR-2013-001-0012.

<sup>61</sup> OFR-2013-001-0019.

<sup>62</sup> See generally, OFR-2013-001-0024, OFR-2013-001-0036, OFR-2013-001-0029, OFR-2013-001-0004, OFR-2013-001-0021, and OFR-2013-001-0037.

<sup>63</sup> OFR-2013-001-0034.

<sup>64</sup> OFR-2013-001-0034.

businesses in highly regulated areas.<sup>65</sup> At least 2 commenters suggested that OFR must consider the cost of the standard and the price of access, including the cost of travel to Washington DC to examine the standard, when deciding whether to approve an agency request to IBR standards.<sup>66</sup>

Expanding on this idea, one commenter stated that OFR is allowing agencies to IBR standards that must be purchased, therefore OFR needs to make sure the regulatory requirements are set out in the rule in enough detail that people can understand those requirements.<sup>67</sup> This commenter also insisted that, as part of the approval process, agencies must state the cost of the standard before they receive approval and certify that if the price changes or if the standard isn't available the regulation is unenforceable to ensure the reasonable availability of the IBR's standard during the entire lifecycle of the rule<sup>68</sup>.

Another commenter stated generally that the cost of buying the standard is less than the cost of complying with the regulation.<sup>69</sup> One of these commenters stated that OFR needs to review the standards for costs to the affected industries and look for any potential conflicts in regulations along with formally defining "reasonably available."<sup>70</sup>

One commenter stated that free and online would compromise the ability of regulators to rely on voluntary consensus standards.<sup>71</sup> This commenter stated that revenue from sales, along with providing salaries, benefits facilities, global development and training, and also supports the broader mission of professional engineering societies and funds research for standards and technology. Finally, this commenter suggested that there may also be a potential downstream impact threatening billions of dollars in global trade and the development of internationally harmonized safety requirements.

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<sup>65</sup> OFR-2013-001-0019 and OFR-2013-001-00319. See also OFR-2013-001-0029, this commenter specifically referenced technical standards, saying they must be available to the public, and stating that the compliance obligations are same.

<sup>66</sup> OFR-2013-001-0021.

<sup>67</sup> OFR-2013-001-0029.

<sup>68</sup> *Id.*

<sup>69</sup> OFR-2013-001-0023.

<sup>70</sup> OFR-2013-001-0023.

<sup>71</sup> OFR-2013-001-0038.

Another commenter supported purchasing standards at the final rule stage.<sup>72</sup> This commenter expressed concern that organizations that rely on sales of standards may go out of business if they can't raise revenue from sales of standards. The commenter noted that corporate sponsors could be used to raise the revenue needed but that this might lead to standards that favored the corporate sponsor, whereas obtaining the revenue from the government could lead to the development of standards based on politics.

To address the concerns mentioned in comments from SDOs, one commenter stated that the SDOs whose business models are based on sales of their standards may have some negative economic impact in the short term.<sup>73</sup> This commenter saw no long term negative economic impact on the SDOs, because requiring the standards to be posted as read-only files still allows SDOs to sell hard copies as business will still need to highlight and annotate the standard.<sup>74</sup> Additionally, SDOs exist to fill a business needs that are separate from government regulation and these needs continue to exist even if read-only access is given to standards. In cases where the standard wasn't developed to become part of regulations, agencies should seek a license, although the commenter admitted that the licensing fees could be cost-prohibitive for small agencies.

While technological (and publication) costs continue to decrease, these commenters addressed only the cost of making something available online and did not address costs associated with creating the standard or providing free access to it. OFR staff do not have the experience to determine how costs factor into development of, or access to, a standard for a particular regulated entity or industry. Thus, this rule doesn't specifically address the costs associated with an IBR'd standard, which allows the agencies flexibility to address cost concerns when exercising their authority to issue regulations.

As we stated in our proposed rule, 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, the FOIA, nor the APA authorizes us to review proposed and final rulemaking actions for substance. We agree that agencies should consider many factors when engaging in

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<sup>72</sup> OFR-2013-001-0022.

<sup>73</sup> OFR-2013-001-0029.

<sup>74</sup> *Id.*

rulemaking, including assessing the cost of developing and accessing the standard. Thus, we are requiring agencies to explain why material is reasonably available and how to get it, and to summarize the pertinent parts of the standard in the preamble of both proposed and final rules.

*Other issues*

*a. Constitutional Issues.*

*b. Copyright Issues.*

*c. Outdated standards IBR'd into the CFR.*

*d. Incorporation of guidance documents and the use of safe harbors.*

*e. Indirect IBR'd standards.*

*f. Data and studies used to create standards.*

*g. Section-by-section analysis of the regulatory text.*

*a. Constitutional Issues*

A couple of commenters suggested that our proposal was Constitutionally suspect, claiming that it violates Due Process, Equal Protection, and First Amendment rights.<sup>75</sup> They claimed that the public's inability to access standards for free online creates due process concerns, because due process requires notice of obligations before the imposition of sanctions. Having to pay fees for standards creates obstacles and impacts notice, which in turn creates due process problems. They claimed there might be a First Amendment issue because the public can't discuss or criticize regulations if they don't know what they are. Finally they argued that equal protection and due process are jeopardized when some people can purchase the law and others can't. One commenter stated that access to the standards in Washington D.C. is not sufficient when the rule applies nationwide, because people have to travel to D.C. to view the standard and traveling costs money. Therefore, they argued, OFR needed to take those travel costs into account when approving agency requests to incorporate documents by reference into the CFR.

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<sup>75</sup> OFR-2013-0001-0029 and OFR-2013-0001-0036.

Constitutional issues were raised in earlier documents as well. Commenters to the request for comments on the petition argued that the government could simply exercise the Takings Clause of the 5<sup>th</sup> Amendment.<sup>76</sup>

While we don't speak for the Federal Government as a whole, we see no reason why the government would exercise the Takings Clause. However, we note that this rule continues to require that agencies provide us a copy of all documents they wish to IBR into the CFR. Agencies must also maintain at least one copy of all IBR'd standards for public inspection at their agency. They must also provide their contact information along with contact information for the OFR and the standards' publishers in the regulatory text. Anyone can contact any of these 3 groups with questions regarding access to the documents IBR'd by an agency into the CFR, so access is not restricted to the Office of the Federal Register in Washington, DC.

Further, nothing in this rule prevents the public from discussing or criticizing any Federal regulations. By requiring agencies to add to the preamble a discussion of how to examine or obtain copies of standards referenced in their rulemaking documents, along with summaries of those standards, we are ensuring that members of the public have more information for determining if the summary is sufficient or if they need (or just want) to contact the agencies with questions on how to access the IBR'd standards.

#### *b. Copyright Issues*

Several commenters claimed that once a standard is IBR'd into a regulation it becomes law and loses its copyright protection and, therefore, that IBR'd standards must be available for free online without any further discussion. Other commenters<sup>77</sup> stated that the public is the owner and author of the regulations and thus has the right to know the law, relying on the *Veeck* case.<sup>78</sup> At least one commenter stated that the law is in the public domain and therefore not "amenable to copyright."<sup>79</sup>

Several commenters appeared to argue that the *Veeck* case demonstrates that SDOs have survived and grown over the years despite not having copyright protection

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<sup>76</sup> 78 FR 60791 (October 2, 2013).

<sup>77</sup> OFR-2013-0001-0029.

<sup>78</sup> *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5<sup>th</sup> Cir. 2002).

<sup>79</sup> OFR-2013-0001-0012.

awarded by a court because SDOs still create and charge for standards even after the *Veeck* decision; that the complexity of the modern age requires that agencies standardize across the Federal government, thus compelling the use of standards; and that SDOs can annotate their standards and charge fees for those annotations. These commenters' conclusion seemed to be that SDOs will continue to create standards and push for their incorporation into Federal regulations. Therefore, OFR must require that only standards available for free online are eligible for IBR approval.

One commenter referenced the NTTAA<sup>80</sup> and stated that since this statute says agencies shouldn't use standards in a way inconsistent with applicable law, therefore if agencies can't use the standard without violating copyright law, then the agency shouldn't IBR that standard.<sup>81</sup>

As we stated in our NPRM, recent developments in Federal law, including the *Veeck* decision<sup>82</sup> and the amendments to FOIA, and the NTTAA have not eliminated the availability of copyright protection for privately developed codes and standards that are referenced in or incorporated into federal regulations. Therefore, we cannot issue regulations that could be interpreted as removing copyright protection from IBR'd standards. We recommend that the responsible government agency 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 final rule we require that agencies discuss how the IBR'd standards are reasonably available to commenters and to regulated entities. One way to make standards reasonably available, if they aren't already, is to work with copyright holders.

One commenter stated that since it is the text of standards that must be available (citing *Veeck* for the proposition that the law is not subject to copyright law), agencies should copy the text of IBR'd standards and place the text online. In a footnote, the commenter suggested that OFR require agencies to place the text of their "regulatory

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<sup>80</sup> 15 U.S.C. 3701 et seq.

<sup>81</sup> OFR-2013-0001-0004.

<sup>82</sup> One commenter stated that OFR needs to show that the 5<sup>th</sup> Circuit didn't consider specific arguments, and, that if we don't, we can't reject the decision of the court. See OFR-2013-0001-0021. We disagree.

obligations” in their online dockets. This way the “text of the legal obligation and not the standard as such” is available online for free.<sup>83</sup>

We leave it to the agencies to determine if they should follow this commenter’s suggestion. We do note that agencies requesting IBR approval must follow the requirements set out in part 51, including § 51.9, requiring very specific information about the standard, so that the standard and “regulatory obligations” can be clearly identified.

*c. Outdated standards IBR’d into the CFR*

A few commenters again 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. The orderly codification requirements of the FRA and the ACFR prohibit us from amending another agency’s regulations,<sup>84</sup> so we cannot take unilateral action. Further, we don’t have the authority to decide that a newer version of a particular standard serves the same purpose as an older version; that determination is solely for the agency. However, we continue to provide support and assistance to agencies that are implementing or updating regulations with IBR’d material. We contact agencies and let them know if we hear from someone that a standard is difficult to find. We also refer callers to our agency contacts.

One commenter stated that two-thirds of IBR’d standards were published in 1995 or earlier, thus, these standards are no longer available except at the National Archives and Records Administration.<sup>85</sup> The commenter suggested that to address this issue OFR needs to include a sunset provision in part 51 to limit the duration of an IBR approval or to require that agencies certify for each annual edition of the CFR that standards IBR’d are still available. From 1979 through 1982, we approved material IBR’d on a yearly basis, as part of a comprehensive review of all material IBR’d and a review of the overall approval process.<sup>86</sup> We initially established the annual review for only 3 years, but it

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<sup>83</sup> OFR-2013-001-0024 footnote 23 at page 8.

<sup>84</sup> 44 U.S.C. 1510 and 1 CFR part 21.

<sup>85</sup> OFR-2013-001-0024.

<sup>86</sup> 44 FR 18630, as corrected at 44 FR 19181.

soon became clear that a one-year review was neither practical nor efficient. We chose not to extend the program at the end of 3 years but to return instead to the original process.<sup>87</sup>

As we stated above, the orderly codification requirements of the FRA and the ACFR prohibit us from amending another agency's regulations<sup>88</sup> so it is not clear how the expiration of an IBR approval would be identified in the CFR without undermining orderly codification and without returning to an approval system that has already failed.

*d. Incorporation of guidance documents and the use of safe harbors*

While some of the commenters approved of our proposal and its rejection of the notion that IBR standards should be removed from regulations and incorporated into agency guidance,<sup>89</sup> one commenter modified the argument and suggested that OFR needs to adopt the formal stance that "incorporated standards do not create legal obligations, as such, rather identify appropriate means for achieving compliance with regulatory requirements that are independently and fully stated in public law."<sup>90</sup> This commenter suggested that adopting this proposition would bring our requirements in line with the European Union's stance on incorporation by reference. The commenter then went on to describe the way the EU countries develop standards and recommended that the US adopt that model of standards development. However, the OFR has no statutory authority to completely change the way standards are developed in the US. We continue to maintain that the explicit statutory language of section 552(a) applies when agencies request to IBR materials into the CFR. Therefore, we have no authority to approve IBRs of standards into agency guidance documents.

The commenter continued by stating that OFR cannot, in its regulations, allow materials that are copyrighted to become binding legal requirements through IBR. They also stated that OFR needs to accept the IBR of guidance documents that are not legally binding and limit the IBR'ing of required standards to ones that are available for free online.<sup>91</sup>

This commenter went on to state that section 552(a)(1) clearly allows for the IBR of guidance documents, stating that "part 51's refusal to consider these IBRs is

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<sup>87</sup> 47 FR 34108.

<sup>88</sup> OFR-2013-001-0024.

<sup>89</sup> OFR-2013-001-0030.

<sup>90</sup> OFR-2013-001-0024 at page 2.

<sup>91</sup> *Id.* at page 2, OFR-2013-001-0004

unprincipled and unjustified.”<sup>92</sup> This commenter then listed the merits of IBR’ing of guidance documents, for example, no copyright issues and ease for agencies to update the reference when the standards are updated.

Agencies are not required to request IBR approval for guidance documents referenced in their regulations. Currently, if materials that are published elsewhere are referenced as guidance documents in regulatory text or a CFR appendix, agencies are not required to submit an IBR request; they must simply add information on how to obtain the guidance material in the regulatory text. This requirement is less stringent than IBR approval and we see no reason to change our policy at this time. While this commenter is correct that in the past we have approved IBR in limited instances for guidance documents, there has never been a requirement in our regulations that guidance documents must obtain IBR approval; that is because not all agency guidance documents or the materials referenced in those documents are published or referenced in the *Federal Register*. Regardless, any requests for IBR must still meet the requirements of part 51 and any changes to the CFR or a CFR appendix must publish in the Rules and Regulations section of the *Federal Register*. That publication requirement will increase the time it takes to update IBR’d guidance documents and may not provide the flexibility to update guidance the commenter hoped for.

This commenter also suggested that we don’t understand the law and that we believe that guidance documents aren’t regulatory.<sup>93</sup> However, we do understand the concept that guidance documents are not requirements and if agencies try to enforce them as binding, private entities can sue the agency.

Both the FRA and the APA require that documents of general applicability and legal effect be published in the *Federal Register* and codified in the CFR. In general, agencies are not required to codify their guidance documents, policy letters, or directives in the CFR and thus, they might not be published in the *Federal Register*.<sup>94</sup> Nor are they

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<sup>92</sup> *Id.* at page 3.

<sup>93</sup> *Id.* at page 8.

<sup>94</sup> 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

required to formally request approval for standards referenced in the CFR that are not binding requirements. OFR has long interpreted section 552(a)'s use of the term "affected" to be related to binding requirements that have an effect on parties. Thus, we haven't required that references in the CFR to standards for guidance purposes go through IBR approval. We do not have the staff or other resources needed to approve IBR requests for documents that are guidance rather than documents that are requirements. As we mentioned above, agencies can already reference those documents in the CFR without going through the formal IBR review process. Thus, it is not clear why agencies would need IBR approval for these non-regulatory documents.

One commenter stated that there is no distinction between a regulatory standard and a safe harbor.<sup>95</sup> This commenter stated that a safe harbor in regulatory text will bind the agency to accept actions that are within the safe harbor as compliance. Thus, the safe harbor will dominate as the compliance method. Therefore, this commenter believed that all requirements suggested for IBR'd standards (most importantly that they must be available for free online) also apply to safe harbors. We agree that this is a concern, however we don't see that this specific issue is covered by part 51.

*e. Indirect IBR'd standards*

At least 4 commenters raised the issue that some of the IBR'd standards also reference other standards in their text. A couple of these comments suggested that the OFR deny IBR approval unless all standards are available for free online, including those referenced within the standard the agency is seeking IBR approval for. At least, one of the commenters stated that obtaining IBR'd material can cost several thousands of dollars a year.

As we stated in our proposed rule, 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

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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.

<sup>95</sup> OFR-2013-0001-0029.

any agency or SDO. We must assume that agencies have fully considered the impact of any document (including material IBR'd) that 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 that material also has other materials included; 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.

What these commenters suggested would require that OFR substantively review each standard IBR'd to determine if it references other standards and then determine if those standards are required to comply with the IBR'd standard and the agency's regulations. That is beyond the authority and subject matter expertise of this office and would increase the review time required to process IBR approval requests. Therefore, we continue our practice of reviewing approval requests only for standards directly IBR'd into the CFR.

*f. Data and studies used to create standards*

At least 2 commenters suggested that a condition of IBR approval must be that data and studies relied on to create the standard must be available for free online during the comment period of the NPRM, citing *Portland Cement Ass'n v. Ruckelshaus* 486 F.2d 375 (D.C. Cir 1973). They also stated that agencies should be required in their NPRM preambles to "include specification of the means by which would-be commenters can gain access to the studies and data on which the standard proposed to be incorporated is based" without incurring a significant fee.<sup>96</sup> They claimed that without this requirement interested persons cannot meaningfully comment on an agency's NPRM.

The APA, other statutory authorities, and case law have continually stood for the proposition that the publishing agencies, not the OFR, are responsible for ensuring that the public has appropriate information to provide comments on their proposed rules. The task of ensuring agencies provide access to data and to the studies that were used to

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<sup>96</sup> OFR-2013-0001-0024 and OFR-2013-0001-0029.

develop materials incorporated by reference is beyond our statutory authority and resources. Therefore, we decline to revise the regulations to require that the materials used to develop standards be available for free online.

*g. Section-by-section analysis of the regulatory text.*

Several commenters had comments on specific sections set out in our NPRM. We address those comments by section below.

*Section 51.1(b)*

Some commenters suggested that we add the E-FOIA and the E-Government Act<sup>97</sup> to our list of authorities in § 51.1(b), claiming that our refusal to do so “reveal[s] OFR’s regrettable indifference to the realities of the Information Age.”<sup>98</sup> It is not clear where these commenters would have us reference these statutes. Our statutory authority appropriately references section 552(a), which grants the Director the authority to approve agency requests for IBR into the CFR. If the commenters were focusing on the text of § 51.1(b), what they fail to take into account is that this section specifically lists authorities that directly relate to the requirement that certain documents be published in the *Federal Register*. Paragraph (b)(4) allows for us to review based on Acts other than the FRA that require publication in the *Federal Register*. Since this paragraph (b)(4) can be read broadly to include many different statutes, we do not believe we need to specifically reference these statutes.

*Section 51.1(e)*

One commenter stated that paragraph (e) of § 51.1 was confusing because it states that use of the phrase “incorporation by reference” by itself does not mean the Director has approved an agency request for incorporation by reference. The commenter suggested that this paragraph be removed.

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<sup>97</sup> Pub. L. 107-347 (2002).

<sup>98</sup> OFR-2013-0001-0029.

The CFR uses the phrase “incorporation by reference” throughout its titles even when this phrase does not mean incorporation by reference pursuant to section 552(a). For example, the Federal Acquisition regulations in Title 48 of the CFR and 40 CFR 1502.21 (which discusses incorporating materials by reference into agency environmental impact statements) both use the phrase “incorporation by reference” in ways unrelated to the use of the “incorporation by reference” described, in section 552(a). Paragraph (e) clarifies that if the Director’s approval language is not linked to the IBR reference in the CFR, that use of the term IBR has not been approved by the Director and may be unrelated to section 552(a) and the regulations found in part 51. Therefore, because this phrase is used in multiple ways in the CFR, we decline to remove paragraph (e) from § 51.1.

### *Section 51.5*

One commenter, when discussing §§ 51.3 and 51.5, stated that our proposal would reduce “reasonably available” to formality that doesn’t encourage agencies to comply with section 552(a) or with 5 U.S.C. 553. They argued that OFR is not paying enough attention to the public’s ability to comment on NPRMs (other commenters also suggested that the OFR should require rulemaking documents be understandable without the need for the reader to rely on the IBR’d material<sup>99</sup>). The commenter believed that a discussion of how the agency made the material reasonably available doesn’t go far enough. This commenter recommended that we change the text to require that agencies explain what they propose to require in their rulemaking. Along this same line, another commenter wanted a detailed abstract of the IBR’d materials.

It is the responsibility of the agency issuing the regulations to ensure that it complies with the requirements of the APA. Our intent with these changes is to provide the public more information regarding standards IBR’d, both how to access these standards and to get a summary of what the standard is about. The OFR can’t ensure that every agency complies with the requirements of the APA; we are not subject matter

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<sup>99</sup> See, OFR-2013-0001-00024 and OFR-2013-0001-00032. One commenter alleges that it is a “mere phantasm if the agency can meet the requirement by stating that a copy of the publication has been placed at the bottom of a locked filing cabinet...”, see OFR-2013-0001-0037. We can’t assume, as this commenter appears to do, that agencies will willfully obstruct access to the standards they’ve IBR’d.

experts in all areas of federal law so we can't make a determination on whether an agency's preamble provides enough information for the public to thoughtfully comment on agencies' proposals. This commenter's suggested language would require OFR to do a substantive review of all preambles in rulemakings where the agencies propose to IBR materials into their regulations. This is beyond our authority; we can't do it for documents without IBR and nothing in section 552(a) gives us special authority to perform substantive reviews of rulemaking documents with IBR.

One commenter expressed concerns that the requirement to summarize standards in preambles is not specific enough. This commenter wanted more specificity on what constitutes reasonable availability. The commenter said that requiring too much detail is a problem, because the summary doesn't replace the actual text of the standard and agencies shouldn't be placed in a position to argue or litigate whether there was enough detail in the summary. The summary should alert readers to go to the standard. We agree that this summary of the standard needs to give readers enough information to decide if they need to read the standard for more detail or not, thus we kept the regulatory text flexible to allow agencies to write these summaries in ways that best meet the needs of their readers.

Another commenter, while agreeing that "reasonably available" might not mean free online, stated that it does mean more than the agency simply having a copy available for examination in its Washington D.C. headquarters.<sup>100</sup> This commenter stated that the OFR needs to define reasonably available and let the public comment on that proposed definition. It also stated that OFR needs to provide agencies with guidance on how we expect them to comply with this requirements. This commenter further urged that OFR define "reasonably available" differently, depending on where in the rulemaking process the regulation is. Thus, this commenter recommended that "reasonably available" be defined at the proposed rule stage to mean the material proposed to be IBR'd be available to review for free online. At the final rule stage, and while the rule is effective "reasonably available" would mean that IBR'd material could be purchased from the publisher.

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<sup>100</sup> OFR-2013-0001-0022.

We decline to define “reasonably available.” Much like the request to define “class of persons affected,” we are concerned that any definition will fail because it is either too broad to be meaningful or too restrictive, impeding agencies’ ability to work with SDOs and other publishers to make the material available to wide audience either during the comment period of a proposed rule or while a regulation is in effect. The absence of a too-broad or too-narrow definition allows agencies to maintain flexibility in making IBR’d materials “reasonably available” during the life-cycle of a regulation and their regulatory programs on a case-by-case basis to respond to specific situations.

Another commenter stated that the proposed regulatory text in § 51.5 was too focused on the reasonable availability issue. This commenter claimed that the NPRM suggests that there are “varying degrees” of reasonable availability when in reality material is either reasonably available or it is not.<sup>101</sup> The commenter objected to the proposed language in § 51.5 because, the commenter claimed, that by requiring agencies to discuss how they worked with publishers to make material reasonably available, we are suggesting a link between reasonably available and free online. This commenter recommended changing the focus of the text from the reasonably available requirement to instead require that agencies discuss all the factors they considered, including availability, when proposing to IBR a standard. The commenter believed that this language better articulates federal policy.

Section 552(a) specifically mentions reasonable availability without addressing other factors agencies used to determine if they wished to request IBR approval for particular standards. Therefore, this section properly focuses on a discussion of how the materials are available. Nothing in this rule prohibits agencies from discussing, in their preambles, what factors they considered when determining if and what materials they would request approval for. Thus, we decline to revise this section to make this commenter’s suggested changes.

One commenter stated that using the term “or” instead of “and” in the proposed rule text violates the statute because the material must be made reasonably available under the statute.<sup>102</sup> The commenter continued, stating that it’s the Director who

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<sup>101</sup> OFR-2013-0001-0026.

<sup>102</sup> OFR-2013-0001-0021

determines reasonable availability and not the agencies. Therefore, the proposed language puts the reasonable availability determination on the wrong party. The commenter assumes agencies will develop different criteria for determining whether something is reasonably available. The NPRM stated that agencies might not be able to IBR SDO standards if we require that they be available for free; the commenter disagreed with this statement.

We disagree with the commenter's assessment of this proposal. The OFR (including the Director) does not have the subject matter expertise or the familiarity with the affected parties to make a case-by-case analysis of "reasonable availability." We must rely on the analysis of the agency. The revisions to this section now require that agencies provide at least part of that analysis instead of simply asserting that the material is "reasonably available." Nothing in the proposal removes the requirement that IBR'd materials be maintained at the agency and at the OFR. And, the summary provides information to people so they can determine if they want to review the IBR material at the agency or the OFR or elsewhere.

One commenter supported our revisions to § 51.5 because these requirements will bring attention to the availability issue and suggested that agencies will "proactively seek to improve the availability of IBR materials throughout the rulemaking process."<sup>103</sup> This commenter recommended that OFR strengthen this provision by removing the "or" and replacing it with an "and." This would require agencies to discuss both the substance of the standard and how they worked to make the standard reasonably available. This recommendation is also consistent with ACUS' recommendation 2011-5.<sup>104</sup>

We agree that this provision should be strengthened so we replaced the "or" with an "and." And, we have removed the requirement that the agency discuss, in the final rule, how the incorporated material was reasonably available at the proposed rule stage. We require, at both the proposed and final rule stages, that agencies include language in their rulemaking preambles that both discuss the availability of the standards and provide a summary of the standards themselves.

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<sup>103</sup> OFR-2013-001-0030.

<sup>104</sup> 77 FR 2257 (January 17, 2012).

### *Section 51.7*

At least 2 commenters suggested that we remove the requirement that standards be technical in nature to receive IBR approval in an attempt to limit the number of printed Federal Register and CFR pages.<sup>105</sup> One commenter also expressed a concern that by removing the requirement that IBR'd standards must be technical in nature, OFR is allowing agencies to remove essential requirements from the regulatory text so that the legal obligation is hidden within the IBR'd standard merely to save printed pages in the *Federal Register*. This commenter argued that agency regulations need to be sufficiently and adequately set out to allow the reader to know and be able to meet the regulatory obligations. This commenter claimed that OFR needs to add a provision to part 51 requiring that the IBR material be technical in nature and that it supplement the regulatory text, not be a substitute for it. The commenter also stated that OFR must review both the regulatory text and the standards to ensure the IBR material doesn't replace the requirements set out in regulatory text.

This commenter was, in effect, suggesting that OFR conduct a substantive review of both the regulatory text and the standards. A review of this nature would require a substantive review of agency regulations, something that is beyond our authority, so, while we clarified § 51.7(a)(2) to require that standards IBR'd be technical standards, we decline to make these suggested changes that would require us to review the materials to ensure that they didn't include regulatory obligations not set out in the regulatory text.

Another concern raised by some of the commenters was that completely removing the requirement that IBR standards be technical in nature “will spur further inappropriate incorporations by reference.”<sup>106</sup>

At least one other commenter specifically referenced § 51.7(a) and expressed concern that the proposal removed the requirement that IBR'd standards be technical in nature. The commenter stated that this requirement reduces the risk that agencies will IBR standards that are regulatory in nature. This commenter suggested that the requirement was the public-private equivalent of our prohibition on agencies IBR'ing their own publications.

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<sup>105</sup> OFR-2013-0001-0024 and OFR-2013-001-0029.

<sup>106</sup> OFR-2013-0001-0029.

We understand these concerns regarding the proposed language, so we modified the language in § 51.7(a)(2) to retain the original language of this paragraph, while modifying the structure to emphasize that standards cannot detract from the Federal Register publication system. So, much like our provision addressing agency-produced documents, these changes allow us the flexibility to work with agencies on the types of materials IBR'd.

There were a couple of commenters who specifically referenced proposed revisions to § 51.7, explaining what types of documents are eligible for IBR approval. One commenter objected to the language in § 51.7(a)(3) claiming that OFR does not need to include requirements for usability in the regulations because the requirements seem print-focused and are irrelevant in the age of the internet.

Despite the commenter's attempt to show that the OFR is out-of-touch with the information age, we still receive hard copies of the materials agencies IBR into the CFR. Thus, we decline to remove this paragraph entirely. We have modified the language slightly with the phrase "as applicable" to indicate to agencies that submit hard copies of their IBR'd material this requirement still applies. Further, the numbering and ordering requirement may still apply to electronic material. We are not unduly focused on print publications, but until no standards are available in print, we have to consider both print and electronic publications.

Finally, we restructured paragraph (a) into a more logical order.

### **Regulatory Analysis**

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below is a summary of our determinations with respect to this rulemaking proceeding.

#### *Executive Orders 12866 and 13563*

The rule was drafted in accordance with Executive Order 12866, section 1(b), "Principles of Regulation" and Executive Order 13563 "Improving Regulation and Regulatory Review". We sent the rule to OMB under section 6(a)(3)(E) of Executive

Order 12866 and it was determined to be a significant regulatory action as defined under section 3(f) of Executive Order 12866.

#### *Regulatory Flexibility Act*

This rule will not have a significant impact on small entities since it imposes requirements only on Federal agencies.<sup>107</sup> 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 rule 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 rule is not a major rule as defined by 5 U.S.C. 804(2). We will submit a rule report, including a copy of this rule, 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.

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<sup>107</sup> One commenter suggests that OFR needs to do a complete regulatory flexibility analysis on the issues surrounding IBR within the federal government, see OFR-2013-0001-0024 footnote 10 at page 4. Because the only new action in this rule is to require that agencies provide more information in their preambles regarding IBR'ing of standards we do not believe that it has a monetary impact on small businesses or increases their burden. Therefore, we decline to follow the commenter's suggestion.

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

## **PART 5—INCORPORATION BY REFERENCE**

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

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) For a proposed rule, the agency does not request formal approval but must:

(1) Discuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties; and

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

(b) For a final rule, the agency must request formal approval. The formal request package must:

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

(2) Discuss, in the preamble of the final rule, the ways that the materials it incorporates by reference are reasonably available to interested parties and how interested parties can obtain the materials;

(3) Summarize, in the preamble of the final rule, the material it incorporates by reference;

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

(5) Ensure that a copy of the incorporated material 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)(i) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material; and

(ii) Does not detract from the usefulness of the Federal Register publication system; and

(3) Is reasonably available to and usable by the class of persons affected. 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, as applicable.

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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.

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(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 Preamble requirements):

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: November 3, 2014.

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AMY P. BUNK

Acting Director, Office of the Federal Register

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