October 8, 2013

Office of the Federal Register, 1 CFR part 51, Incorporation by Reference
RIN 3095-AB78, Docket # OFR-13-0001
Comment on Partial Grant of Petition/Notice of Proposed Rulemaking: 78 Fed. Reg. 60784

> "For the purpose of this paragraph, matter ~~reasonably available to the class of persons affected thereby~~ is deemed published in the Federal Register when incorporated by reference therein ~~with the approval of the Director of the Federal Register~~."

Unfortunately, the above sentence reflects the aspirational statutory amendment that the Office of the Federal Register (OFR) effectively proposes to implement in its changes to 1 CFR part 51. As indicated, the actual (without strikethroughs) statutory language in the Freedom of Information Act, 5 U.S.C. 552(a), includes some crucial but heretofore unrealized limitations on regulatory incorporations by reference. Most notably:

1) **Regulatory material that is incorporated by reference must be "reasonably available" to affected persons, and that criterion must have real meaning.**

As explained in a Congressional committee report discussing one of the earliest proposals to allow incorporation by reference, the term necessarily requires consideration of the "availability of the incorporated material *to the public*," because "it is not intended that only a few persons having a special working knowledge of an agency's activities be aware of the location *and scope* of these materials. *Any member of the public* must be able to familiarize himself with the [incorporated] items…." S. Rep. No. 88-1219 at 4 (1964) (emphases added).

(Note that 5 U.S.C. 552(a) also begins by proclaiming that agencies must "make available *to the public* information," before requiring agencies to publish certain information "*for the guidance of the public*." With that in mind, it is clear that Congress was thinking broadly when it enacted language referring to the "persons affected" by incorporations by reference.)

It was never intended to be sufficient for agencies to simply announce "the location" of their incorporated material. Rather, they must also provide sufficient information regarding the "scope of these materials" for the informational benefit of "the public." With respect to the standard of sufficiency for information regarding the scope of this incorporated material, the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) explained that "material incorporated must be set forth substantially in its entirety . . . and not merely summarized or printed as a synopsis." Thus, it was never sufficient to simply summarize incorporated material. Rather, the public should be able to access the substantial entirety of that material. And allowing the public to access legally-binding material only after they pay a rent-seeking Standards Developing Organization hundreds or thousands of dollars is obviously not equivalent to ensuring that the material is "reasonably available" to the public, just like the public sale of a Gutenberg Bible hardly makes it "reasonably available" to your average interested member of the public.

2) **The Director of the Federal Register has *sole* authority to approve incorporations by reference, which necessarily entails setting effective standards for what material is "reasonably available" to affected entities.**

When this limitation was introduced in a later bill that was ultimately enacted as the Freedom of Information Act, the relevant committee report explained that "Permission to incorporate material in the Federal Register by reference would have to be granted by the Director of the Federal Register, *instead of* permitting each agency head to decide what should be published." H. Rep. No. 89-1497 at 7 (1966) (emphasis added). Thus, the Director of OFR has final authority over incorporations by reference, and must not shirk this duty or push it off onto others' shoulders.

It is most emphatically *not* the responsibility of OMB, or ACUS, or the Standards Development Organizations, or the regulatory agencies themselves to set policies for incorporations by reference. All of them can make recommendations, but in the end, it is not their call. Instead, as OFR has always recognized, its Director has the statutory responsibility to set Executive Branch policy for incorporations by reference and has the sole authority to "establish standards and procedures governing his approval of incorporations by reference." 32 Fed. Reg. 7899 (1967).

Given these basic limits, let us consider the points raised in OFR's Federal Register Notice.

Statutory Authority

At 78 Fed. Reg. 60785, the OFR first attempted to avoid recognition of the central principle noted above. After accurately reporting that the petition for rulemaking requested that OFR require that legally-binding material incorporated into the Code of Federal Regulations be available for free online and requested that OFR review non-binding material incorporated into agency guidance, OFR asserted that "these requirements go beyond our statutory authority."

First, OFR complained that "Nothing in the Administrative Procedure Act, E-FOIA, or other statutes specifically address this issue." But this is simply incorrect. While no statutes *specifically* mandate these requested policies, as OFR later notes on the same page, "the Freedom of Information Act, at 5 U.S.C. 552(a), mandates approval by the Director of material proposed for IBR to safeguard the Federal Register system." More specifically, the statute gives statutory authority to OFR to approve incorporations of material if that material is "reasonably available" to affected persons. OFR could certainly point to this authority as a statutory basis for finding that incorporated material is only "reasonably available" in the modern Internet era if it is available for free online.

Second, OFR predicted that "If we required that all material 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 N[ational Technology Transfer and Advancement Act] and the OMB Circular A-119." Even if this were true, this point has *nothing to do* with OFR's statutory authority to enact the requested changes. Moreover, it has nothing to do with OFR's mission to act as the "official legal information service of the United States government . . . [and] provide Federal Register publications and services to the public." *See* http://www.ofr.gov/AboutUs.aspx.

In addition, there is plenty of reason to doubt the assertion that this petition would totally undermine regulation as we know it. It would not prohibit agencies from *using* voluntary consensus standards, which is the central requirement of section 12(d) of NTTAA (which, like OMB Circular A-119, is not focused on the availability of standards, and which OFR is not responsible for implementing.) As the petitioner has pointed out, the agencies could and perhaps should continue to "use" these standards in their *guidance*, consistent with Circular A-119, in order to provide detailed illustrative examples of some permissible ways to follow the agencies' legally-binding regulations. Furthermore, section 12(d)(3) contains an important statutory limitation, which states that agencies should not use standards in ways that are "inconsistent with applicable law." 5 U.S.C. 552(a)'s "reasonably available" criterion is a particularly crucial applicable law that should place some limits on agencies' use of pay-to-play standards in binding regulations. Such limits would be perfectly consistent with the NTTAA and Circular A-119.

A Mere Index

Throughout the Federal Register Notice, starting at 78 Fed. Reg. 60785, OFR announced its worry that "the Federal Register and CFR could become a mere index to material published elsewhere." If so, it is difficult to see how OFR squares this concern with its policies permitting essentially unrestricted use of incorporation by reference in agency regulations. After all, when an agency issues a regulation requiring stakeholders to follow standard X, it has essentially used the Federal Register and Code of Federal Regulations as an index for material published elsewhere—behind the paywalls of the Standards Development Organization that created X.

No Standards / Role of OFR

At 78 Fed. Reg. 60785, OFR warned of "a system where the only determining factor for using a standard is whether it is available for free online." There is no case where this would be the only factor. Agencies would always need to determine the substantive necessity of using a standard. But whether certain material is "reasonably available" (e.g., in that it is free online) *is* the *sole statutory* criterion for incorporations by reference. By law, all other considerations must be secondary to this question. OFR has simply shirked its duty by refusing to craft any meaningful policies that would implement this one statutory criterion.

Contrary to its assertion, OFR must do more than just "maintain orderly codification of agency documents of general applicability and legal effect." While 44 U.S.C. 1510 establishes that duty, 44 U.S.C. 1502 charges "the Office of the Federal Register . . . with the prompt and uniform printing and distribution of the documents required or authorized to be published by section 1505 of this title" and section 1505(a)(3) directs the Federal Register publication of other "documents or classes of documents that may be required so to be published by Act of Congress." In turn, 5 U.S.C. 552, another "Act of Congress," requires the publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" with the exception of "matter reasonably available to the class of persons affected thereby . . . when incorporated by reference . . . with the approval of the Director of the Federal Register." By law, OFR is therefore responsible for the orderly publication of all required documents in the Federal Register and for establishing the standards for the one exception to those publication requirements, incorporation by reference. As noted above, Congress never intended to give the agencies *carte blanche* authority to use incorporation by reference without OFR oversight.

While OFR correctly noted that "only the agency that issues the regulations codified in a CFR chapter can amend those regulations," and that OFR "could not remove the regulations," that is beside the point. Under 5 U.S.C. 552(a), OFR unambiguously *can* deny agencies the ability to effectively incorporate certain material into regulations if that material is not reasonably available to the public, because OFR can and must withhold its approval of the proposed incorporation in those circumstances.

Resources and Enforcement of OFR Requirements: Why Not Contingent Approvals?

At 78 Fed. Reg. 60785, OFR complained that the petitioner "would simply add requirements that could not be adequately enforced and thus likely wouldn't be complied with by agencies." It is a bit surprising to see this degree of cynicism in the Federal Register. For almost 90 years, the Supreme Court has recognized that there must be a "presumption of regularity [that] supports the official acts of public officers" such that "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). Apparently, OFR openly disagrees with this presumption that as a general matter, agencies will follow the law in good faith. By the same token, since OFR supposedly has so few resources to "enforce" agencies' compliance with its regulations, why doesn't it respond to the petition by simply revoking 1 CFR part 51 (and its other regulations) in its entirety, and creating a more transparently *laissez-faire* environment in which publication decisions will solely depend on the arbitrary whims of each agency? More likely, OFR simply seeks to use this position as a cynical rationalization for its apparent refusal to uphold the statutory limit on incorporating material that is not reasonably available.

In fact, the new "requirements" proposed by OFR aren't even paper tigers – they're paper mice. Agencies seeking to incorporate outside standards into their legally-binding regulations would need to "discuss" the ways in which they "*worked to* make the materials . . . reasonably available to interested parties." In other words, an agency seeking to incorporate a $1000/copy standard would write a few sentences explaining to OFR that "We asked the SDO to make it freely available to our stakeholders, but they said no. Looks like they'll still have to pay $1000. Sorry. We tried." That would apparently suffice under the proposed rules. And such halfhearted attempts (after predictable resistance from the SDO) would be the typical result. This would do *absolutely nothing* for the "interested parties" that OFR professes to care about, and would simply represent another wasteful check-off process in the Federal Register publication process.

Similarly, the proposed "summaries of the content of the materials the agencies wish to IBR" would be just as useless. Nobody would ever advise a regulated party to rely on a *summary* of a regulatory requirement (especially a very technical requirement) when acting—they would all still be practically forced to buy a full copy of the incorporated material at monopoly prices. Likewise, any interested party considering a proposed rule would need to see the full copy in order to effectively exercise their statutory right to give fully-informed comments on the rule under 5 U.S.C. 553(b). These halfhearted proposals hardly represent "good governance" at work.

The proposals are all the more frustrating when one considers that a less wasteful, less-resource-intensive option is still on the table. Namely, if OFR is honestly worried about the burden of policing ongoing compliance with the "reasonably available" criterion, it should simply mandate that its statutorily-required IBR approvals are *contingent upon* the material's ongoing public

availability. In other words, OFR's approval could be effective for only so long as the material is freely available. Once the public can no longer freely access the material, OFR's approval would evaporate, and thus the material would no longer be legally incorporated by reference and would be unenforceable as a matter of law (against parties without actual notice of the material) under 5 U.S.C. 552(a). *See, e.g., PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (improperly-incorporated materials are "without legal effect"); *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977) (documents are "not enforceable" and "not a validly issued part" of an agency's regulations when "the procedural requisites for incorporation by reference" have not "been complied with"). There is no statutory prohibition on such contingent approvals, which would operate automatically and could be privately enforced through the judicial system by interested parties that lack access to newly-non-public material. This would not drain OFR resources, and would effectively incentivize the agencies and SDOs to ensure the continued public availability of incorporated materials, because they would have an obvious interest in ensuring the continued legal enforceability of those materials.

Reasonable Availability: Voluntary Compliance and Costs

The contingent approval approach would be much more effective than the equally-hands-off approach advocated by OFR at 78 Fed. Reg. 60786, under which stakeholders who "are subject to enforcement actions that rely on standards IBR'd into the regulations . . . 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." There is no practical incentive for the agencies to actually "ensure" this access (and few tools to guarantee it). Likewise, at 78 Fed. Reg. 60789, OFR dreams a kumbaya vision in which "agencies and SDOs do work together to choose the best solution" for making materials available. But as is currently the case, many stakeholders would still find themselves stuck in an unfair world of "pay-to-play" regulation, and could not really rely on the agencies for full access to the binding standards governing their activities. At any rate, the approval of incorporations and the determination of what is "reasonably available" is *OFR's* responsibility by law. It is not a football to be punted away to the individual agencies.

Somewhat inexplicably, at 78 Fed. Reg. 60786, OFR also attempted to defend the current reality that many interested stakeholders are unable to afford access to incorporated materials governing their activity by pointing out that "The daily Federal Register is not universally free," because the physical print copies cost $929/year, although the online Federal Register is free. "While the Superintendant of Documents has chosen not to charge for electronic access to the daily Federal Register, this [authority to charge for paper copies] 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 [Federal Register Act] and [Administrative Procedure Act]." But this doesn't follow. Just because the Executive Branch *could* (but doesn't) charge a "reasonable fee" for access to the Federal Register under 44 U.S.C. 4102 does not necessarily bless OFR's decision to give SDOs (acting through the agencies and ultimately OFR) free rein to charge *whatever they want* (i.e., more than "reasonable" fees) through monopoly pricing schemes for full access to private standards that agencies incorporate into binding law. Simply put, there's nothing "reasonable" about allowing agencies to adopt legal standards that cost interested stakeholders hundreds or thousands of dollars to review. That approach goes *well* beyond simply allowing the *government* to recoup *its* costs of providing Federal Register access.

In fact, it seems that the government doesn't even get a penny from the SDOs' sales of their incorporated standards. This policy has nothing to do with recovering the government's costs.

Moving to 78 Fed. Reg. 60787, the fact that Congress has specifically authorized one agency—the Consumer Product Safety Commission—to incorporate private standards into its regulations does not imply a broad Congressional intent to encourage or implement such schemes across-the-board, in all agencies. If anything, it may suggest the opposite approach, for Congress clearly knows how to mandate incorporation of these private standards (as it did for the CPSC), but has failed to do so in most cases.

***Portland Cement* Doctrine: Availability of IBR Materials in Proposed Rules**

OFR's cramped interpretation of the *Portland Cement* doctrine in administrative law is also quite frustrating. At 78 Fed. Reg. 60787, OFR implied that the doctrine's application is limited to blocking "the government [from] . . . prohibiting access to the materials" that it relies upon in its proposed rules. However, the *Portland Cement* doctrine isn't limited to cases where agencies effectively *prohibit* access to regulatory materials. For example, as the D.C. Circuit more recently noted, "It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule *must be made available* during the rulemaking in order to afford interested persons meaningful notice and an opportunity to comment" on the rule. *Am. Radio Relay League v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). Applying that holding to cases involving incorporation by reference, it therefore isn't sufficient to simply *identify* the studies or standards underlying a rule without also providing public access to them so that they are "available during the rulemaking" to all "interested persons."

Persons Affected / Agency Flexibility

At 78 Fed. Reg. 60788, OFR announced that it did not want to define the "persons affected" by incorporation by reference through regulation because it wanted to allow "agencies [to] 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." First, of course, it is not OFR's mission to maintain agencies' regulatory flexibility. Per its own website, OFR is supposed to be devoted to distributing "legal information" and "publications and services to the public." An effective method of doing that would be to adopt the petition's recommendations and incentivize agencies to use more freely-available information in their binding regulations. But second and more importantly, OFR's newly-proposed 1 CFR 51.5(a)(1) and (b)(2) already (correctly) recognize that incorporated materials should be available to all "*interested parties*" who would like to comment on the materials, petition for their amendment, or simply follow their requirements. All of these "interested parties" are thus the "persons affected" by agencies' incorporations by reference. OFR should make this definition more explicit in 1 CFR part 51.

SDO Regulation / Copyright

At 78 Fed. Reg. 60789, OFR explained that "Even if all SDOs were non-profit organizations, we don't have the authority to require that they give away assets, products, or services." That much is true. But the point is irrelevant. The petition does not demand that OFR regulate the SDOs in any way. Instead, it requests that OFR regulate the *agencies* who unfairly seek to incorporate costly standards (developed by SDOs) into their binding regulations. OFR clearly has that authority under 5 U.S.C. 552(a). The agencies could then make informed decisions on how best

to "use" those standards under the NTTAA, and would perhaps be encouraged to incorporate more standards in optional guidance documents rather than in legally-binding regulations.

OFR also worried at 78 Fed. Reg. 60790 that it could be placed "in the middle of a contentious fight over copyright limitations." But as noted earlier, section 12(d)(3) of the NTTAA provides that agencies should not "use" standards in ways that are "inconsistent with applicable law." If an agency cannot make a standard available without violating copyright, then the NTTAA does not require the agency to use that standard. Likewise, the petition would not require that the agencies violate copyrights. As I understand it, the petition's position would simply require that any standards incorporated into binding law be publicly available to all interested parties. If a standard cannot be made publicly available because of copyrights, then it should not be incorporated into law. (Perhaps it could be incorporated into a guidance document.) Moreover, the petitioner has made a strong argument that materials incorporated into law lose their copyrighted status. It appears that this claim will be explicitly tested in a pending federal lawsuit, *ASTM v. Public.Resource.Org, Inc*., No. 1:13-cv-01215 (D.D.C., filed Aug. 6, 2013). OFR should watch this lawsuit before finalizing its rules if it's still scared of the copyright issue.

OFR/OMB/Agency Authority Redux

At 78 Fed. Reg. 60791, OFR asserted that it "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." This is another version of the punt-and-retreat strategy asserted earlier in the Federal Register Notice. But OFR cannot avoid the plain language of 5 U.S.C. 552(a), which makes it—not OMB or the regulatory agencies—responsible for approving incorporations by reference under *its* policies. *See, e.g., Appalachian Power Co*., 566 F.2d at 455-57 (before regulatory material can be incorporated by reference, "the director's approval" must be obtained by following procedures in "the regulations of the Office of the Federal Register"). OMB may set government-wide NTTAA policies, but it is not responsible for setting incorporation by reference policy. *See also* 78 Fed. Reg. 60794 (recognizing that "Under statute, only the Director can approve agency requests to IBR material into the CFR [and] OMB may suggest ways to make the process more streamlined but it cannot change the regulations regarding IBR in 1 CFR part 51"). Likewise, as noted earlier, Congress has recognized since 1966 that "Permission to incorporate material in the Federal Register by reference would have to be granted by the Director of the Federal Register, instead of [by] each agency head…." H. Rep. No. 89-1497 at 7 (1966).

OFR needs to stop running from this issue and honestly deal with it in a straightforward manner. It should not weakly "suggest[] . . . in a blog post that . . . agencies . . . pay special attention to any IBR'd materials" in their regulations, or feebly implore agencies to "be mindful" of the requirement that that incorporated materials be reasonably available." *See* 78 Fed. Reg. 60792. The officials at OFR are professionals with a statutory duty to set effective policy in this area, guided by the statutory criteria of reasonable availability and public information. According to NARA's own website, http://www.archives.gov/federal-register/cfr/ibr-locations.html, "Congress *gave complete authority to the Director of the Federal Register to determine whether a proposed incorporation serves the public interest*." I couldn't put it any better myself. OFR can and must finally resolve this issue, with binding regulations in 1 CFR part 51.

Guidance vs. Regulations

At 78 Fed. Reg. 60793, OFR argued against the petitioner's suggestion that agencies transition toward incorporating costly materials into guidance documents rather than binding regulations, because "guidance documents, policy letters, or directives . . . may not be published in the Federal Register," so "some of the transparency [would be] gone." But 5 U.S.C. 552(a)(1)(D) clearly requires the separate, current Federal Register publication of any "statements of general policy or interpretations of general applicability formulated and adopted by the agency"—e.g., guidance documents. While this publication doesn't always happen, *see, e.g., Evading Public and Congressional Review of Agency Policy Statements* (2013 draft about agencies' failure to publish policy statements) at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320133, as noted earlier OFR must assume that agencies will follow the law and will publish guidance containing incorporations by reference. After all, the sole purpose of guidance is for agencies to announce their regulatory positions to the world, and Federal Register publication ensures the largest possible audience for those positions, so that "the public [has] adequate knowledge of the document[s]."

Moreover, if OFR is worried that agencies will incorporate materials into "agency-issued guidance and policy statements [that] become binding as a practical matter," it should understand that: (1) by definition, guidance is *not* binding, and (2) if an agency attempts to issue binding policy through guidance, stakeholders can go to court to reverse the agency and require notice-and-comment. *See, e.g., Iowa League of Cities v. EPA,* No. 11-3412 (8th Cir. Mar. 25, 2013); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). So OFR would not need to "check each agency's web site for documents that should be published in the Federal Register" because private enforcement through the courts can effectively enforce these laws. Thus, once again, OFR must trust that the agencies will generally follow the law and respect the guidance vs. regulations dichotomy.

Finally, OFR asserted its belief that "agencies [only] 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." But this betrays OFR's failure to understand agencies' work. *Many* agency guidance documents incorporate private standards as examples of ways to satisfy binding regulatory requirements. For example, see http://www.nrc.gov/reading-rm/doc-collections/reg-guides/power-reactors/rg/01-037/01-037.pdf, NRC Regulatory Guide 1.37, "Quality Assurance Requirements for Cleaning the Fluid Systems and Associated Components of Water-Cooled Nuclear Power Plants" (2007), which "endorses ASME NQA-1-1994, Part II, Subpart 2.1 as a generally acceptable standard" for "complying with the pertinent QA requirements of Appendix B to 10 CFR Part 50." Agencies primarily choose to incorporate material because it is a convenient referencing tool in both regulations and guidance documents, and allows them to avoid the work of copying often-voluminous standards.

Indirectly Incorporated Standards

This is another critical issue in which OFR has irresponsibly failed to take a clear position. If an agency regulation incorporates the ASTM foundry standard, which itself incorporates 35 other standards, *see* 78 Fed. Reg. 60795, has the agency also effectively incorporated (portions of] those 35 other standards as binding legal requirements? There would certainly seem to be a plausible argument for that position, which would *exponentially* increase the cost of following,

commenting on, and petitioning to change that regulation. OFR once shirked its duty by declaring that "Determining that an agency intends to require some type of compliance with documents referenced in third-party standards is outside our jurisdiction," and simply "assum[ing] that agencies have fully considered the impact" of this issue. That is a dangerous assumption, particularly for those interested individuals who must then pay for 36 standards. Agencies shouldn't be determining what is reasonably available to the public—that is OFR's job.

Offer to Bring High-Speed Copier to Scan IBR Material

At 78 Fed. Reg. 60796, OFR interestingly suggested that it was required to refuse a commenter's request to bring a high-speed copier to privately copy and scan incorporated material that was available for public inspection at OFR's headquarters. First, OFR pointed out that the Antideficiency Act, 31 U.S.C. 1342, prevented it from accepting "voluntary services." However, as GAO explained in B-204326 (1982), the Antideficiency Act distinguishes between "voluntary" services, which are prohibited, and "gratuitous" services, which are permitted. Gratuitous services include volunteer activities that are not directed or controlled by an agency, provided that the offeror willingly offers in advance to perform without compensation. *See also* 6 Op. Off. Legal Counsel 160, 162 (1982) (same). In this case, a volunteer's offer to independently copy and scan incorporated materials at OFR headquarters for the public's benefit (and not as an OFR employee) should fit easily under the gratuitous service exception to the Antideficiency Act.

However, OFR also objected to this offer because "ethics rules prevent [OFR] from accepting gifts." 78 Fed. Reg. 60796. But the federal ethics rules at 5 C.F.R. part 2635, subpart B, apply to outside gifts to *individual employees* rather than services performed at/for *agencies*. While individual employees cannot accept many personal gifts, this should not prohibit OFR as an institution from allowing an outside party to set up a copier/scanner at its headquarters, which is not really a "gift" in any case.

Congressional Review

Lastly, if OFR is as short of resources as it repeatedly claimed in its Federal Register Notice, it should not waste time submitting its Notice for congressional review under 5 U.S.C. Chapter 8. *See* 78 Fed. Reg. 60797 (explaining that OFR will submit the Notice for congressional review). The Congressional Review Act does not apply to proposed rules like those described in this Notice. It applies only to final "rules," 5 U.S.C. 801(a)(1)(A), which by definition does not include *proposed* rules. *See* 5 U.S.C. 804(3), 5 U.S.C. 551(4), OFR's *Guide to the Rulemaking Process* at: https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (explaining that "Under the Small Business Regulatory Enforcement Fairness Act [also known as the Congressional Review Act], *new final rules* must be sent to Congress…."). On the other hand, given the general lack of compliance with the CRA, *see* 62 Admin. L. Rev. 907 (2010), I do congratulate OFR for at least some paying attention to the law!

At any rate, given that my earlier comments on the petition were swept under the rug, I do not expect these additional comments to receive much (if any) response, either. But in the faint chance that anyone is actually paying attention, please consider them for what they are worth.

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