

October 22, 2013

Anna Rutigliano Personal Comment

Office of the Federal Register. Docket Number OFR-13-0001. RIN 3095-AB 78.

Incorporation By Reference

On October 2, 2013, the Office of the Federal Register (OFR) published a Partial Grant of Petition and Notice of Proposed Rulemaking (NPRM) to address the Incorporation By Reference (IBR) standards. Incorporation By Reference, 78 Fed. Reg. 60784 (proposed February 13, 2012) (to be codified at 1 C.F.R. pt. 51). A petition was filed on February 13, 2012 to amend and update IBR standards. After reviewing the petition and public comments, OFR concluded that there was no authority to implement the proposed amendments. 78 Fed. Reg. at 60785. OFR published the current NPRM to suggest an alternative method for updating the IBR standards. *Id.* I support the OFR's proposed rule, but would encourage OFR to implement the amendments proposed in the original petition.

a. Background of IBR standards

The Freedom of Information Act (FOIA) states that “matters 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.” 5 U.S.C. § 552(a) (2013). This statutory authority is restated in 1 C.F.R. pt. 51, which sets forth requirements for documents to be incorporated by reference.

To obtain IBR approval, agencies must submit an IBR request. 78 Fed. Reg. at 60784. OFR keeps the materials in the OFR library, until they are scheduled to move to permanent Federal records in the National Archives and Records Administration (NARA). *Id.* The NPRM

addresses several proposals in the petition, including amending 1 C.F.R. pt. 51 to define “reasonably available” as requiring agencies to provide access to IBR materials for free on the internet. *Id.* at 60785. Further, these documents would be hyperlinked for easy access. *Id.* In response to these proposals, OFR agrees that the standards must be updated, but rejects the proposed amendments. Instead, OFR has proposed that in seeking an IBR request, the agency must stipulate in the preamble of the rulemaking documents “discussions of the actions the agency took to make the materials reasonably available to interested parties or; summaries of the content of the materials the agencies wish to IBR.” *Id.* I support this proposed rule because it will heighten the existing standard and result in increased transparency in the rulemaking record. However, I do not believe it extends far enough to ensure that IBR materials are “reasonably available.”

b. OFR sets forth several erroneous arguments against petitioner’s proposal

In rejecting the proposal, OFR stated that the lack of statutory authority to implement these changes. 78 Fed. Reg. at 60785. To support this, OFR claims that “[n]othing in the [APA], E-FOIA, or other statutes specifically address this issue.” *Id.* I disagree. 5 U.S.C. § 552(a) *does* specifically address the issue, by mandating that only IBR documents that are “reasonably available” will be deemed published in the Federal Register. (2013). Further, the agency is left to the discretion of the Director of Federal Register to approve IBR requests. *Id.* The statute has provided OFR the authority to determine when the information is “reasonably available.” OFR’s interpretation of this statute will be given deference. *See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). If statutory authority is an issue, I do not see a difference between a rule that requires free online access and a rule that requires a

statement in a preamble. OFR offers no support for the contention that it lacks statutory authority for the former rule, but not the latter rule.

OFR also took issue with the burden on the agency to monitor accessibility of the IBR'd materials. 78 Fed. Reg. at 60784. I agree that this would impose a heavy burden on OFR if required throughout the entire effective period of the rule. Thus, I would only require agencies to provide access to IBR materials during the comment period, such that interested persons are fully apprised of the rulemaking record. It is true that agencies may choose to circumvent this requirement by creating their own standards, rather than relying on voluntary consensus standards. *Id.* at 60785. However, OFR has not offered any support for this contention. For example, there is no indication that it is easier or less expensive to create standards rather than provide access to voluntary consensus standards. Thus it cannot be said with certainty that this would be a result of this proposed rule.

OFR also maintains that the current limitations already provide a safeguard for these concerns. 78 Fed. Reg. at 60785. There is an “implied presumption [] that material developed and published by a Federal agency is inappropriate for IBR by that agency, except in limited circumstances.” *Id.* This is to prevent the Federal Register and CFR from become a “mere index to material published elsewhere.” *Id.* While this is a valid statement, I believe that it actually cuts in favor of requiring online access to IBR materials. Requiring agencies to provide access to IBR standards will further safeguard the Federal Register and CFR from becoming a mere index for these materials.

c. The current requirements are insufficient to ensure that IBR materials are “reasonably available”

I do not believe that the “reasonably available” standard has meaning under the current regulation. I attempted to access IBR standards to test their availability. The NPRM provides a hyperlink to access IBR information. 78 Fed. Reg. at 60784 n. 3. (citing National Archives, <http://www.archives.gov/federal-register/cfr/ibr-locations.html> (last visited October 19, 2013)). Upon entering this site, a bold line of text at the top of the page reads: “This site does not link to or contain standards incorporated by reference into the CFR.” National Archives, <http://www.archives.gov/federal-register/cfr/ibr-locations.html>. The website then suggests contacting the agency who issued the IBR standard, and provides resources for free material. *Id.* The site also provides agency contact information to aid in the search. Next, the site provides a link to the National Institute of Standards and Technology (NIST) website, which houses a “Standards Incorporated by Reference (SIBR) Database.” *Id.* (citing <http://standards.gov/sibr/query/index.cfm?fuseaction=home.restrictedPage> (last visited October 19, 2013)). This link leads to a message that says “The page you have requested is restricted.” SIBR Database, <http://standards.gov/sibr/query/index.cfm?fuseaction=home.restrictedPage>. Alternatively, OFR offers “public inspection and limited photo-copying” of IBR documents. *See supra*, National Archives. To access these, one must submit a written request to physically inspect the material in the Washington, D.C. office. *Id.*

Another argument that OFR makes against the proposed rule is that the Federal Register itself is not universally free. 78 Fed. Reg. at 60786. A yearly subscription, including indexes, costs \$929.00. *Id.* However, I believe this is another statement that cuts in favor of requiring free access to IBR materials. If the IBR materials were free, the one-time payment of \$929.00 would seem more reasonable by reducing the burden to a fixed cost in return for access to all Federal Register materials.

Unfortunately, the Federal Register subscription is only the beginning. In the NPRM, OFR cites an example provided by a public comment. This comment pointed out an ASTM foundry standard, which cross-references 35 other consensus standards. 78 Fed. Reg. at 60795. Therefore, paying \$929.00 for a yearly Federal Register subscription is often only the starting point of the quest for information. To obtain a complete record, an interested party could be forced to pay to access to each document. This is an overwhelming burden to place on interested persons in rulemaking proceedings.

OFR responds to this concern by arguing that the current regulations only apply to approval of the primary standards. 78 Fed. Reg. at 60795. Further, there is no current mechanism for approving the extraneous standards. *Id.* That is precisely the point. OFR claims that the current limitations offer an adequate safeguard, while admitting that an IBR document that references 35 separate documents passes muster under these standards. This further evidences the need to restrict these limitations to require that IBR documents are “reasonably available.” A stricter rule would still only apply to approval of primary standards. OFR could simply refuse to approve a primary standard that incorporate 35 separate standards (unless of course they are available for free on the internet).

d. Conclusion

I support the adoption of OFR’s proposed rule to require agencies to provide a statement in the preamble to explain how IBR documents are “reasonably available.” This is a small step to heighten the IBR standard and increase agency transparency in rulemaking. However, I do not believe this will meet a “reasonably available” standard. Providing a summary of the materials is not an adequate substitute for the primary materials. An agency could unintentionally write a

biased summary that favors the agency's position. The writer could also misunderstand the organic materials and write a misleading summary. I would prefer affording the interested party an opportunity to read the primary source of the IBR standards.

I encourage OFR to go further than this proposed rule, and amend 1 C.F.R. pt. 51 to require free internet access to IBR materials to pass muster under the "reasonably available" standard. The current regulations do not ensure that IBR documents are reasonably available. To access IBR standards that are not provided on a free database, an interested party must pay fees or travel to Washington, D.C. to access these documents. These are not reasonable options.

As an alternative, OFR could consider a safe harbor provision. This provision could provide that all IBR documents that are provided on the internet for free will be deemed "reasonably available" by the Director of Federal Register. This would encourage agencies to provide free access to avoid a denial of an IBR request, or prevent future litigation. If an agency does not meet this safe harbor provision, I propose that the burden of proof would fall on the agency to show that the IBR materials are "reasonably available." This would necessarily include a requirement that an agency explain why the IBR resources could not be provided for free on the internet.

Respectfully Submitted,

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