



National Association of Home Builders

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Office of the Federal Register
National Archives and records Administration
8601 Adelphi Road
College Park, MD

**RE: Office of the Federal Register, Docket No. OFR-13-0001, RIN 3095-AB78;
Proposed Rule: Incorporation by Reference.**

Dear Office of the Federal Register:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am pleased to submit these comments on the Office of the Federal Register's (OFR) notice of proposed rulemaking on Incorporation By Reference that was published in the *Federal Register* on October 2, 2013 (*78 Federal Register 60784-60798*). As an affected stakeholder in various regulatory activities, NAHB is interested in ensuring that the regulated community is not disadvantaged when agencies incorporate documents by reference in proposed and final rules.

NAHB is a Washington-based trade association involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 800 state and local home builders associations around the country and NAHB's builder members will construct about 80 percent of the new housing units completed in 2014. Further, because more than 95 percent of NAHB members meet the federal definition of a "small entity," as defined by the U.S. Small Business Administration, it is all the more important that federal regulations that impact the construction industry be readily available, understandable, and reasonable.

While NAHB does not oppose incorporating documents by reference, NAHB is concerned that without clear rules, the OFR may allow federal agencies to incorporate by reference ("IBR"¹) materials in a manner that negatively impacts regulated industries. Furthermore, NAHB is concerned with the proposed approach and regulatory language used. To assist the reader, NAHB has divided its comments according to the Code of Federal Regulation (CFR) changes that the OFR has proposed.

¹ Also "incorporation by reference."

Section 51.3

CFR section 51.1(e) provides that “[p]ublication in the **Federal Register** of a document containing an incorporation by reference *does not* of itself constitute an approval of the incorporation by reference by the Director.”² In sections 51.3(a) and (b) the OFR proposes that the Director will informally and formally “approve” an IBR’d publication when certain requirements are met. Furthermore, sections 51.3(a)(2) and 51.3(c) explain that if those requirements are not met, the Director will return the document or disapprove the incorporation by reference. Thus, the changes made to section 51.3 conflict with section 51.1(e) because a document published in the Federal Register that contains an IBR must now be approved by the Director. In other words, pursuant to the changes made to section 51.3, a publication in the Federal Register that contains an IBR has been approved by the Director. NAHB suggests that the OFR change 1 C.F.R. section 51.1(e) to explain that documents containing IBR’d material (published in the Federal Register) have been approved by the OFR.

Section 51.5

In section 51.5(a) the OFR requires that when an agency is proposing a rule it must explain how the agency has made the documents it wishes to IBR “reasonably available” to interested parties. The OFR should define the term “reasonable available.”

In the preamble, the OFR includes a discussion of “reasonably available,” yet does not provide any definition of the phrase. This vacuum can only lead to confusion. NAHB agrees that “reasonably available” does not necessarily mean free and obtained on the internet at all times. However, the term cannot only denote that the agency has a copy available at its headquarters in Washington D.C. for viewing.

One purpose of requiring proposed rules to be printed in the Federal Register is to ensure that the regulated community can provide meaningful comments to the proposing agency.³ This allows the proposing agency to understand the full range of impacts generated by its regulation. It is safe to say that a majority of parties interested in any regulation cannot take time off from work and expend capital traveling to Washington D.C. to review documents that are IBR’d.⁴ It is also safe to presume that most parties that wish to comment on a proposed regulation can access a computer.

NAHB recommends that the OFR: i) define the term “reasonably available;” ii) allow the public to comment on its definition; and iii) provide guidance to the agencies on how it expects them to comply with its definition. The OFR should consider that the definition of “reasonably available” may be different depending on whether an agency is proposing a rule or publishing a final version. NAHB suggests that the OFR’s definition address the following:

- A document that is IBR’d in a proposed rule/regulation/policy/etc. must be available on the internet or be made available to any person requesting the document.

² 1 C.F.R. § 51.1(e) (emphasis added).

³ *E.g. Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 246 (D.C. Cir. 2008) (“[P] precedents have required agencies to disclose, in time to allow for meaningful comment, technical data or studies on which they relied in formulating proposed rules.”).

⁴ This leads to agencies developing rules without understanding how such rules impact both the regulated and non-regulated communities.

At the proposal stage, all documents upon which an agency relies must be freely available to ensure that the public can meaningfully comment. It is unfair to require the public to purchase documents that are IBR'd in order to determine the impact of the proposed rule. Furthermore, the time that is required to obtain a document that has been IBR'd reduces the time a commenter has to provide his or her input, which could effectively negate the whole purpose of the commenting exercise.

As the OFR recognizes, technology exists to limit printing and downloading of documents. Thus, an agency that wishes to IBR a document should be able to place it on the internet (during the comment period) in such a manner that those who wish to review it are able to, without having the ability to download or print the document. This approach will likely require that the agency come to an agreement with the source of the document. However, the source should be amenable to such an arrangement because if the rule becomes final, the agency has created a market for the IBR'd document.

- It is acceptable to IBR a document in a final rule that must be purchased from a governmental or non-governmental vendor.

In many instances, agencies incorporate standards that must be purchased from either governmental or non-governmental organizations. NAHB supports this model because the negative consequences of the alternatives far outweigh the benefits. First, if agencies are required to provide standards that are IBR'd for free on the internet, organizations that rely on the sale of those materials are put between a rock and a hard place. If such organizations cannot raise other revenue, they may go out of business. The government would then be forced to develop its own standards. This outcome obliterates the purpose of the government incorporating non-governmental standards and could result in the creation of standards that are based more on politics than science and practicality. In the alternative, standard organizations could raise revenue from corporate sponsors, but this model could lead to biased standards that benefit the sponsors. Finally, the standard development organizations could seek revenue from the federal government. Again, however, that model fails to benefit from the expertise of the standards development organization and leads to the development of standards based on politics.

Therefore, NAHB does not oppose agencies incorporating standards by reference in final rules, even when such standards must be purchased.

- A document that is IBR'd cannot contain other documents that are IBR'd.

There are numerous examples of documents that incorporate tens, if not hundreds, of other documents. Should an agency IBR one of these documents, the regulated public may be forced to obtain numerous other documents to provide meaningful comments to the agency or to comply with a regulation. Such tiered or layered IBR'd documents can be costly to the regulated public because, though the agency incorporates only one document, the public is forced to purchase all of the documents which that one document incorporates. In addition, layered IBR'd documents allow agencies to play "hide the ball." A few pages of regulatory text can generate thousands of pages of documents that are IBR'd—pages with which the regulated community must comply, but for which they were not provided an appropriate opportunity to participate.

- A document that is IBR'd must be available free to the public in at least one location for the life time of the document that incorporates it.

The OFR explains that any document IBR is retained by the OFR until it is sent to the National Archives and Records Administration (NARA). NAHB suggests that when defining "reasonably available," the OFR require agencies to maintain a copy of each document IBR'd and provide the public have free access to those copies. At times it is difficult to obtain copies of documents from NARA. Therefore, NAHB believes that if an agency wishes to IBR a document, it is incumbent upon that agency to maintain a copy as long as it is in use.

Furthermore, section 51.5(a) requires agencies that IBR materials to explain how those materials are made available to "interested parties." In section 51.7, however, the proposed rule provides that a publication is only eligible for IBR if it is available to, and usable by, "the class of persons affected by the publication." Yet, the OFR declines to define either "interested parties" or "class of persons affected by the publication." The use of these differing terms suggests that they have different meanings. This, in turn, implies that the OFR has an idea of what each of these term means. NAHB, therefore, recommends that the OFR provide the public with its interpretation of both "interested parties" and "class of persons affected by the publication." Furthermore, the public must be allowed to comment on these definitions before they become final.

Finally, section 51.5(a) allows an agency to "summarize" material it wishes to IBR as an alternative to making such material reasonably available. This is unacceptable and the OFR should not allow this alternative. Materials that are capable of being IBR'd are varied. They may be extremely detailed and technical, and (as recognized by the OFR) they may be quite long. A summary of a document to be IBR'd, however, will often omit the information that is most important to the person who is commenting on the proposal. Furthermore, in many instances the document that is IBR'd will be the enforceable portion of the regulation. In those instances, the regulated community must have access to the actual document (not a summary) so that it may fully understand and explain the proposal's impact.

NAHB appreciates the opportunity to provide comments on this important undertaking and believes that with NAHB's recommended changes, OFR's policy on IBR will be readily available, understandable, and reasonable. If you have any questions or would like to discuss any of NAHB's recommendations, please do not hesitate to contact me at (202) 266-8538.

Sincerely,



Susan Asmus
Senior Vice President
National Association of Home Builders