ORAL ARGUMENT NOT YET SCHEDULED
No. 23-1311

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC.RESOURCE.ORG, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

ADDENDUM TO BRIEF OF *AMICI CURIAE* ON BEHALF OF AMERICAN NATIONAL STANDARDS INSTITUTE AND 16 STANDARDS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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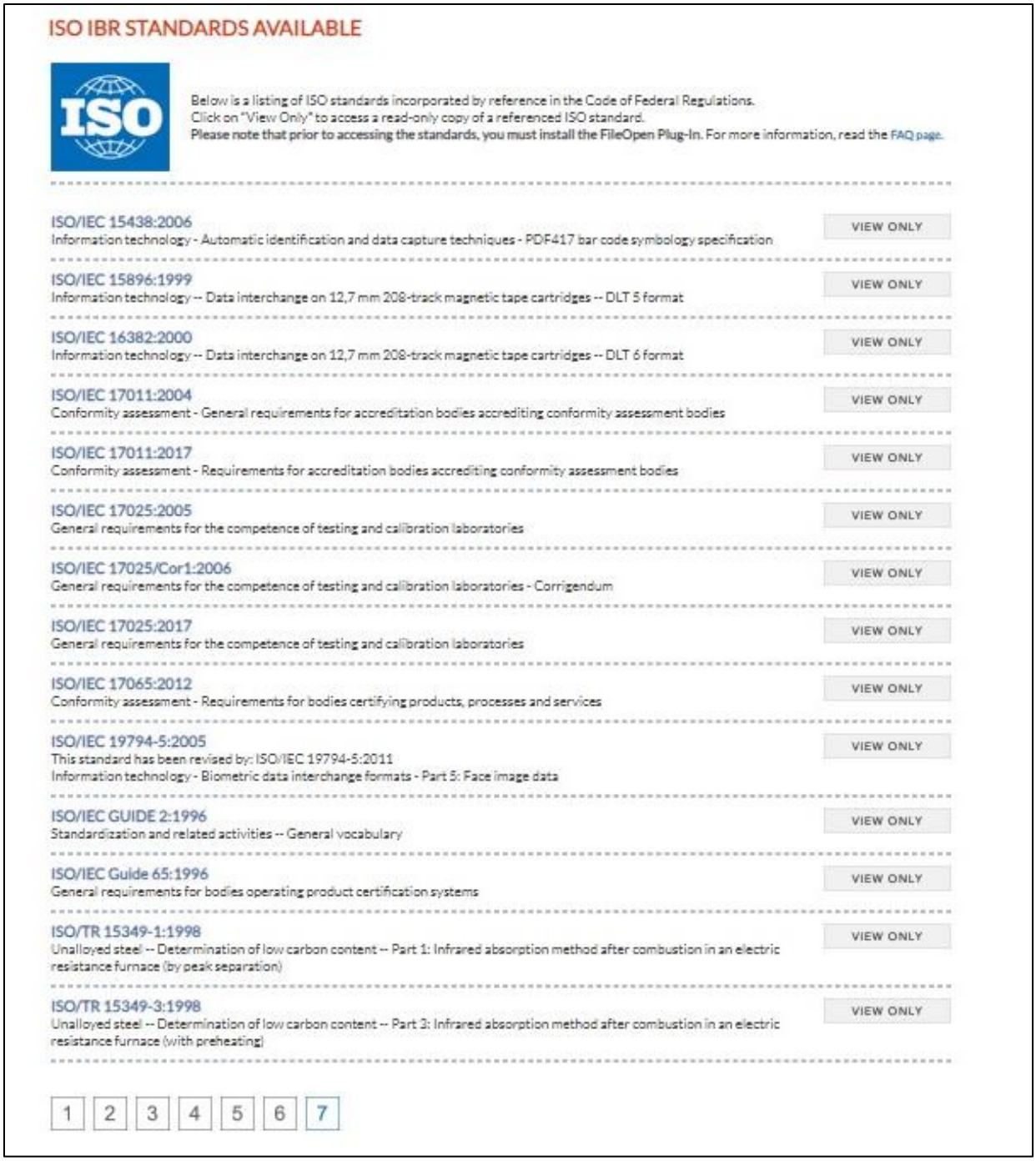

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ISO/TR 15349-3:1998 Unalloyed steel -- Determination of low carbon content -- Part 3: Infrared absorption method after combustion in an electric resistance furnace (with preheating)	VIEW ONLY

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A LIST OF ALL DEVELOPERS REPRESENTED ON THE ANSI IBR PORTAL IS PROVIDED BELOW:

IBR Standards Hosted By ANSI

- IEC, the International Electrotechnical Commission
- ISO, the International Organization for Standardization
- AHAM, the Association of Home Appliance Manufacturers
- AMCA, the Air Movement and Control Association International Inc.
- AMPP, Association for Materials Protection and Performance
- ASA, the Acoustical Society of America
- AWS, the American Welding Society
- BSI, the British Standards Institution
- HFES, the Human Factors and Ergonomics Society
- ISA, the International Society of Automation
- MSS, the Manufacturers Standardization Society of the Valve and Fittings Industry
- NEMA, the National Electrical Manufacturers Association

IBR Standards Hosted by SDOs

- AHRI, the Air-Conditioning, Heating, and Refrigeration Institute
- AISC, the American Institute of Steel Construction
- APA-The Engineered Wood Association
- API, the American Petroleum Institute
- ASHRAE, the American Society of Heating, Refrigerating and Air Conditioning Engineers
- AWWA, the American Water Works Association
- CPLSO
- CSA Group
- IAPMO, the International Association of Plumbing and Mechanical Officials
- ICC, the International Code Council
- IEEE, the Institute of Electrical and Electronics Engineers
- IKECA, the International Kitchen Exhaust Cleaning Association
- NFPA, the National Fire Protection Association
- NFRC, the National Fenestration Rating Council
- SJI, the Steel Joist Institute
- UL, Underwriters Laboratories, Inc.

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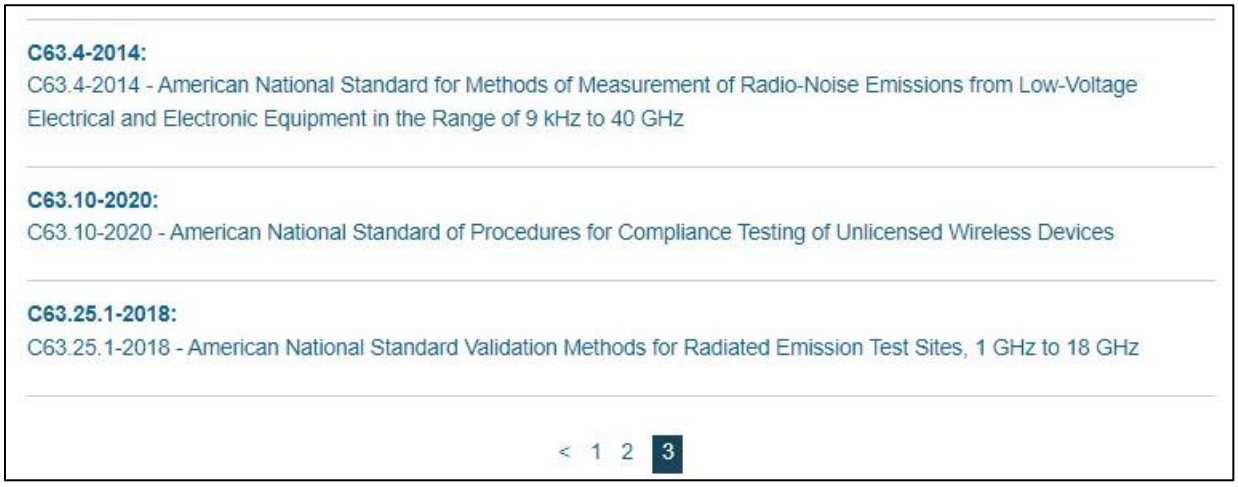

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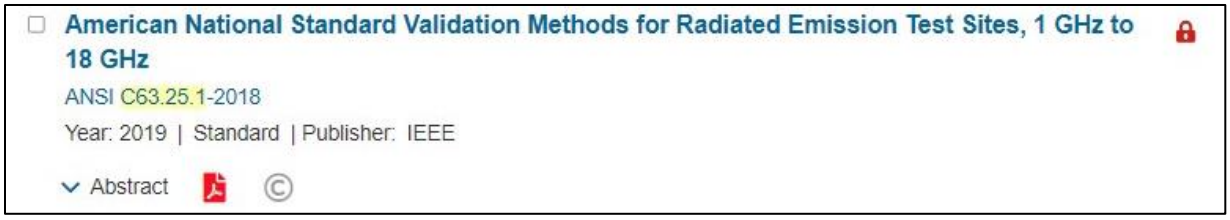

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ANSI/C63.10:2020. *IEEE Xplore*, IEEE, https://ieeexplore.ieee.org/search/searchresult.jsp?newsearch=true&queryText=ANSI%20C63.10 (screenshot captured on May 10, 2024).

ANSI/C63.4a:2017. *IEEE Xplore*, IEEE, https://ieeexplore.ieee.org/search/searchresult.jsp?newsearch=true&queryText=ANSI%20C63.4a (screenshot captured on May 10, 2024).

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

OMB Circular A–119; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

AGENCY: Office of Management and Budget, EOP.

ACTION: Final Revision of Circular A–119.

SUMMARY: The Office of Management and Budget (OMB) has revised Circular A–119 on federal use and development of voluntary standards. OMB has revised this Circular in order to make the terminology of the Circular consistent with the National Technology Transfer and Advancement Act of 1995, to issue guidance to the agencies on making their reports to OMB, to direct the Secretary of Commerce to issue policy guidance for conformity assessment, and to make changes for clarity.

DATES: Effective February 19, 1998.

ADDRESSES: Direct any comments or inquiries to the Office of Information and Regulatory Affairs, Office of Management and Budget, NEOB Room 10236, Washington, D.C. 20503. Available at http://www.whitehouse.gov/WH/EOP/omb or at (202) 395–7332.

FOR FURTHER INFORMATION CONTACT: Virginia Huth (202) 395–3785.

SUPPLEMENTARY INFORMATION:

I. Existing OMB Circular A–119

Standards developed by voluntary consensus standards bodies are often appropriate for use in achieving federal policy objectives and in conducting federal activities, including procurement and regulation. The policies of OMB Circular A–119 are intended to: (1) Encourage federal agencies to benefit from the expertise of the private sector; (2) promote federal agency participation in such bodies to ensure creation of standards that are useable by federal agencies; and (3) reduce reliance on government-unique standards where an existing voluntary standard would suffice.

OMB Circular A–119 was last revised on October 20, 1993. This revision stated that the policy of the federal government, in its procurement and regulatory activities, is to: (1) '[r]ely on voluntary standards, both domestic and international, whenever feasible and consistent with law and regulation;'' (2) ''[p]articipate in voluntary standards bodies when such participation is in the public interest and is compatible with agencies' missions, authorities, priorities, and budget resources;'' and (3) ''[c]oordinate agency participation in voluntary standards bodies so that * * * the most effective use is made of agency resources * * * and [that] the views expressed by such representatives are in the public interest and * * * do not conflict with the interests and established views of the agencies.'' [See section 6 entitled ''Policy'].

II. Authority

Authority for this Circular is based on 31 U.S.C. 1111, which gives OMB broad authority to establish policies for the improved management of the Executive Branch.

In February 1996, Section 12(d) of Public Law 104–113, the ''National Technology Transfer and Advancement Act of 1995,'' (or ''the Act'') was passed by the Congress in order to establish the policies of the existing OMB Circular A–119 in law. [See 142 Cong. Rec. H1264–1267 (daily ed. February 27, 1996) (statement of Rep. Morella); 142 Cong. Rec. S1078–1082 (daily ed. February 7, 1996) (statement of Sen. Rockefeller); 141 Cong. Rec. H14333–34 (daily ed. December 12, 1995) (statements of Reps. Brown and Morella)]. The purposes of Section 12(d) of the Act are: (1) To direct ''federal agencies to focus upon increasing their use of [voluntary consensus] standards whenever possible,'' thus, reducing federal procurement and operating costs; and (2) to authorize the National Institute of Standards and Technology (NIST) as the ''federal coordinator for government entities responsible for the development of technical standards and conformity assessment activities,'' thus eliminating ''unnecessary duplication of conformity assessment activities.'' [See Cong. Rec. H1262 (daily ed. February 27, 1996) (statements of Rep. Morella)].

The Act gives the agencies discretion to use other standards in lieu of voluntary consensus standards where use of the latter would be ''inconsistent with applicable law or otherwise impractical.'' However, in such cases, the head of an agency or department must send to OMB, through NIST, ''an explanation of the reasons for using such standards.'' The Act states that beginning with fiscal year 1997, OMB will transmit to Congress and its committees an annual report summarizing all explanations received in the preceding year.

III. Notice and Request for Comments on Proposed Revision of OMB Circular A–119

On December 27, 1996, OMB published a ''Notice and Request for Comments on Proposed Revision of OMB Circular A–119'' (61 FR 68312). The purpose of the proposed revision was to provide policy guidance to the agencies, to provide instructions on the new reporting requirements, to conform the Circular's terminology to the Act, and to improve the Circular's clarity and effectiveness.

On February 10, 1997, OMB conducted a public meeting to receive comments and answer questions.

In response to the proposed revision, OMB received comments from over 50 sources, including voluntary consensus standards bodies or standards development organizations (SDOs), industry organizations, private companies, federal agencies, and individuals.

IV. Discussion of Significant Comments and Changes

Although some commentators were critical of specific aspects of the proposed revision, the majority of commentators expressed support for the overall policies of the Circular and the approaches taken. The more substantive comments are summarized below, along with OMB's response.

The Circular has also been converted into ''Plain English'' format. Specifically, the following changes were made. We placed definitions where the term is first used; replaced the term ''must'' with ''shall'' where the intent was to establish a requirement; created a question and answer format using ''you'' and ''I'; and added a Table of Contents.

We replaced proposed sections 6, 7 and 10 (''Policy,'' ''Guidance,'' and ''Conformity Assessment'') with sections 6, 7, and 8, which reorganized the material. We reorganized the definitions for ''standard,'' ''technical standard,'' and ''voluntary consensus standard.'' We reorganized proposed section 8 on ''Procedures'' into sections 9, 10, 11, 12. For clarity, we have referenced provisions by their location both in the proposed Circular and in the final Circular.

Proposed Section 1—Purpose. Final Section 1

1. Several commentators suggested that this section should be modified to make clear that the primary purpose of

the revision of the Circular is to interpret the provisions of section 12(d) of Pub. L. 104–113 so that federal agencies can properly implement the statutory requirements. We revised the wording of this section to reflect this suggestion.

Proposed Section 2—Rescissions. Final Section 1

2. We moved this section to Final Section 1.

Proposed Section 3—Background. Final Section 2

3. Several commentators suggested substituting ''use'' for ''adoption'' in this section to conform to the new set of definitions. We agree, and we modified the final Circular.

Proposed Section 4—Applicability. Final Section 5

4. Several commentators found this section unclear. One commentator suggested deleting ''international standardization agreements,'' suggesting this section could be interpreted as conflicting with proposed section 7a(1) which encouraged consideration of international standards developed by voluntary consensus standards. We agree, and we modified the final Circular.

Proposed Section 5a—Definition of Agency. Final Section 5

5. A commentator suggested defining the term ''agency mission.'' Upon consideration, we have decided that this term is sufficiently well understood as to not require further elaboration; it refers to the particular statutes and programs implemented by the agencies, which vary from one agency to the next. Thus, we did not add a definition.

6. A commentator questioned whether federal contractors are intended to be included within the definition of ''agency.'' Federal contractors do not fall within the definition of ''agency.'' However, if a federal contractor participates in a voluntary consensus standards body on behalf of an agency (i.e., as an agency representative or liaison), then the contractor must comply with the ''participation'' policies in section 7 of this Circular (i.e., it may not dominate the proceedings of a voluntary consensus standards body.).

Proposed Section 5b—Conformity Assessment. Final Section 8

7. In response to the large number of commentators with concerns over the definition of conformity assessment, we have decided to not define the term in this Circular but to defer to NIST when it issues its guidance on the subject. The Circular's policy statement on conformity assessment is limited to the statutory language.

Proposed Section 5c—Definition of Impractical. Final Section 6a(2)

8. A commentator suggested that if an agency determines the use of a standard is impractical, the agency must develop an explanation of the reasons for impracticality and the steps necessary to overcome the use of the impractical reason. We decided that no change is necessary. The Act and the Circular already require agencies to provide an ''explanation of the reasons.'' Requiring agencies to describe the steps necessary ''to overcome the use of the impractical reason'' is unnecessarily burdensome and not required by the Act.

9. A commentator suggested that the definition of ''impractical'' is too broad and proposed deleting words such as ''infeasible'' or ''inadequate.'' We have decided that the definition is appropriate, because things that are infeasible or inadequate are commonly considered to be impractical. Thus, we made no change.

10. A commentator suggested eliminating the phrase ''unnecessarily duplicative'' because it is unlikely that a voluntary consensus standard that was considered ''impractical'' would also be ''unnecessarily duplicative.'' We agree, and the final Circular is modified accordingly.

11. A few commentators suggested adding ''ineffectual'' to the definition. A few other commentators suggested adding the phrase ''too costly or burdensome to the agency or regulated community.'' Another commentator suggested the same phrase but substituted the term ''affected'' for ''regulated.'' We have decided that concerns for regulatory cost and burden fall under the term ''inefficient'' contained in this definition. Thus, we made no change.

12. A few commentators suggested deleting the term ''demonstrably'' as it implies a greater level of proof than that required in the Act. Upon consideration, we have decided that the term ''demonstrably'' is unnecessary, as the Act already requires an explanation, and it may be reasonably inferred that an explanation can be demonstrated. Thus, we deleted the term.

Proposed Section 5d—Definition of Performance Standard. Final Section 3c

13. A commentator suggested deleting the ''and'' in the definition. We have decided that this suggestion would distort the meaning. Therefore, no change is made.

14. A few commentators suggested substituting the term ''prescriptive'' for ''design'' because of the multiple connotations associated with the term ''design.'' In addition, several commentators suggested related clarifying language. We agree, and we modified the final Circular.

Proposed Section 5f—Definition of Standard. Final Section 3

15. Several commentators suggested overall clarification of this section, while other commentators endorsed the proposed section. One commentator suggested that ''clarification is necessary to distinguish the appropriate use of different types of standards for different purposes (i.e., acquisition, procurement, regulatory).'' This commentator proposed that, ''For example, regulatory Agencies should only rely upon national voluntary consensus standards (as defined in Section 5j) for use as technical criteria in regulations but a federal agency may want to use industry-developed standards (without a full consensus process) for certain acquisition purposes if there are no comparable consensus standards.'' We do not agree with this proposal. The same general principles apply in the procurement context as in the regulatory context.

16. A commentator suggested that the definition of ''standard'' be limited to ensure that agencies are only required to consider adopting voluntary ''technical'' standards. The final Circular clarifies this by clearly equating ''standard'' with ''technical standard.''

17. One commentator recommended adding to the definition of ''standard'' an exclusion for State and local statutes, codes, and ordinances, because agency contracts often require contractors to meet State and local building codes, which contain technical standards which may not be consensus-based. For example, the Department of Energy builds facilities that must be compliant with local building codes, which may be more strict than nationally accepted codes. It is not the intent of this policy to preclude agencies from complying with State and local statutes, codes, and ordinances. No change is necessary, because the Act already states that, ''If compliance * * * is inconsistent with applicable law * * * a Federal agency may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies.''

Proposed Section 5f—Definition of Standard. Final Section 4

18. Several commentators had concerns with this section, believing that the final sentence in the proposed

version might imply that other-than-consensus standards may qualify as consensus processes. This is not the case. We have clarified this point through the reorganization of final sections 3 and 4 and through minor clarifying language. In addition, we note that the subject of the Circular is ''voluntary consensus standards,'' which are a subset of ''standards.'' Consistent with the 1993 version, the final Circular defines ''standard'' generally to describe all the different types of standards, whether or not they are consensus-based, or industry- or company-based. Accordingly, we have inserted the phrase ''government-unique'' in final section 4b(2) in order to provide a complete picture of the different sources of standards, while also adding a reference to ''company standards'' in final section 4b(1), previously found in the definition of ''standard.''

Proposed Section 5g—Definition of Technical Standard. Final Section 3a

19. Several commentators suggested combining this term with the definition of standard. We agree, and the terms have been merged.

20. Another commentator suggested adding the phrase ''and related management practices'' because this phrase appears in Section 12(d)(4) of the Act. We agree, and we modified the final Circular.

Proposed Section 5h—Definition of Use. Final Section 6a(1)

21. Several commentators suggested that limiting an agency's use to the latest edition of a voluntary consensus standard was unnecessarily restrictive. We agree, and we modified the final Circular.

Proposed Section 5i—Definition of Voluntary Consensus Standards. Final Section 4

22. Several commentators objected to the phrase regarding making ''intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties.'' Several commentators also supported this language. This section does not limit the ability of copyright holders to receive reasonable and fair royalties. Accordingly, we made no change.

Proposed Section 5j—Voluntary Consensus Standards Bodies. Final Section 4a(1)

23. Several commentators proposed that the words ''but not necessarily unanimity'' be inserted for clarification. We agree, and we modified the final Circular.

24. A commentator suggested deleting the examples of voluntary consensus standards bodies. We agree that the examples were unnecessary and confusing, and we modified the final Circular.

25. A few commentators suggested that the Circular acknowledge the American National Standards Institute (ANSI) as the means of identifying voluntary consensus standards bodies. Since the purpose of the Circular is to provide general principles, rather than make determinations about specific organizations or guides, these determinations will be made by agencies in their implementation of the Act. Thus, we made no change.

26. A commentator suggested that the definition be modified so ''that only those organizations that permit an acceptable level of participation and approval by U.S. interests can be considered to qualify.'' We have decided that no change is necessary, because the requirements of consensus—openness, balance of interests, and due process—likewise apply to international organizations.

27. The same commentator suggested adding the phrase ''the absence of sustained opposition'' to the definition of ''consensus.'' Although we did not make this change, we added other language that improves the definition.

28. Several commentators proposed that the Circular further clarify aspects of this section, including further definitions of ''balance of interest,'' ''openness,'' and ''due process.'' We have decided that the definition provided is sufficient at this time, and no change is made.

29. Several commentators proposed that this definition should be ''clarified to state the Federal agencies considering the use of voluntary consensus standards, not the organizations themselves, are to decide whether particular organizations qualify as voluntary consensus standards bodies by meeting the operational requirements set out in the definition.'' For purposes of complying with the policies of this Circular, agencies may determine, according to criteria enumerated in final section 4, whether a standards body qualifies. However, it is the domain of the private sector to accredit voluntary consensus standards organizations, and accordingly, we have inserted clarifying language in final section 6l.

Proposed Section 6a. Final Section 6c

30. A commentator proposed deleting in section 6a ''procurement guidelines'' suggesting it was confusing and inappropriate to mandate use of voluntary consensus standards for ''procurement guidelines or procedures.'' We have decided to delete the reference to ''procurement guidelines.'' The Circular says nothing about ''procurement procedures.''

31. The same commentator suggested adding in section 6a ''monitoring objectives'' as part of an agency's regulatory authorities and responsibilities. We have decided that, under the Act and the Circular, agencies already have sufficient discretion regarding the use and non-use of standards relating to such authorities and responsibilities. Thus, we have made no change.

Proposed Section 6a. Final Section 6f

32. Some commentators expressed concern that once a standard was determined to be a voluntary consensus standard, an agency might incorporate such standard into a regulation without performing the proper regulatory analysis. To address this concern, another commentator suggested adding language referencing ''The Principles of Regulation'' enumerated in Section 1(b) of Executive Order 12866. We agree, and we modified the final Circular.

Proposed Section 6b. Final Section 7

33. In the proposed revision of the Circular, sections 6b and 7b(2) were strengthened by adding language that directed agency representatives to refrain from actively participating in voluntary consensus standards bodies or their committees when participating did not relate to the mission of the agency.

Several commentators were not satisfied with these changes and remain concerned that an agency member might dominate a voluntary consensus standards body as a result of the agency member chairing and/or providing funding to such body, thus making the process not truly consensus. These commentators urged additional limitations on agency participation in voluntary consensus standards bodies, including: Prohibiting federal agency representatives from chairing committees or voting (or if chairing a committee, then denying them the authority to select committee members); having only an advisory role; participating only if directly related to an agency's mission or statutory authority; and participating only if there is an opportunity for a third party challenge to the participation through a public hearing.

On the other hand, most commentators supported the proposed changes and agreed that federal participation in voluntary consensus

standards bodies should not be further limited, because federal participation benefited both the government and the private sector. These commentators noted that agencies must be involved in the standards development process to provide a true consensus and to help support the creation of standards for agency use. These purposes are consistent with the intent of the Act.

In the final Circular, we have added language to clarify the authorities in the Circular. We have also strengthened the final Circular by adding language in final section 7f that directs agency employees to avoid the practice or the appearance of undue influence relating to their agency representation in voluntary consensus standards activities. We would also like to underscore the importance of close cooperation with the private sector, including standards accreditors, in ensuring that federal participation is fair and appropriate.

With respect to imposing specific limitations on agency participation in such bodies, which would result in unequal participation relative to other members, we have decided that such limitations would (1) not further the purposes of the Act and (2) could interfere with the internal operations of voluntary consensus standards organizations.

First, the Act requires agencies to consult with voluntary consensus standards bodies and to participate with such bodies in the development of technical standards ''when such participation is in the public interest and is compatible with agency and departmental missions, authorities, and budget resources.'' The legislative history indicates that one of the purposes of the Act is to promote federal participation. [See 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella.)] Moreover, neither the Act nor its legislative history indicate that federal agency representatives are to have less than full and equal representation in such bodies. Given the explicit requirement to consult and participate and no concomitant statement as to any limitation on this participation, we believe the Act was intended to promote full and equal participation in voluntary consensus standards bodies by federal agencies.

Second, although an agency is ultimately responsible for ensuring that its members are not participating in voluntary consensus standards bodies in a manner inconsistent with the Circular and the Act, it would be inappropriate for the federal government to direct the internal operations of private sector voluntary consensus standards bodies or standards development organizations (SDOs) by proscribing the activities of any of its members. The membership of an SDO is free to choose a chair, to establish voting procedures, and to accept funding as deemed appropriate. We expect that the SDO itself or a related parent or accrediting organization would act to ensure that the organization's proceedings remain fair and balanced. An SDO has a vested interest in ensuring that its consensus procedures and policies are followed in order to maintain its credibility.

Proposed Section 6b. Final Sections 7e, 7f, and 7h

34. Other commentators were concerned that an agency representative could participate in the proceedings of a voluntary consensus standards body for which the agency has no mission-related or statutorily-based rationale to become involved. For example, a situation might exist in which a technical standard developed by the private sector could be so widely adopted as to result in the emergence of a de facto regulatory standard, albeit one endorsed by the private sector rather than by the government. For example, a construction standard for buildings could become so widely accepted in the private sector that the result is that the construction community acts as if it is regulated by such standards. The commentator suggested that if an agency were to participate in the development of such a technical standard, in an area for which it has no specific statutory authority to regulate, that agency could be perceived as attempting to regulate the private sector ''through the back door.'' A perception of such activity, whether or not based in fact, would be detrimental to the interests of the federal government, and agencies should avoid such involvement.

In response to this concern, we feel that changes initiated in the proposed revision and continued in the final Circular sufficiently strengthened the Circular in this regard. In particular, section 7 expressly limits agency support (e.g., funding, participation, etc.) to ''that which clearly furthers agency and departmental missions, authorities, priorities, and budget resources.'' Moreover, this language is consistent with the Act. Thus, if an agency has no mission-related or statutory-related purpose in participation, then its participation would be contrary to the Circular.

An agency is ultimately responsible for ensuring that its employees are not participating in such bodies in a manner inconsistent with the Act or this Circular. Agencies should monitor their participation in voluntary consensus standards bodies to prevent situations in which the agency could dominate proceedings or have the appearance of impropriety.

Agencies should also work closely with private sector oversight organizations to ensure that no abuses occur. Comments provided by ANSI described the extensive oversight mechanisms it maintains in order to ensure that such abuses do not occur. We encourage this kind of active oversight on the part of the private sector, and we hope to promote cooperation between the agencies and the private sector to ensure that federal participation remains fair and equal.

Proposed Section 7—Policy Guidelines. Final Section 6c

35. A few commentators inquired whether the Circular applies to ''regulatory standards.'' In response, the final Circular distinguishes between a ''technical standard,'' which may be referenced in a regulation, and a ''regulatory standard,'' which establishes overall regulatory goals or outcomes. The Act and the Circular apply to the former, but not to the latter. As described in the legislative history, technical standards pertain to ''products and processes, such as the size, strength, or technical performance of a product, process or material'' and as such may be incorporated into a regulation. [See 142 Cong. Rec. S1080 (daily ed. February 7, 1996) (Statement of Sen. Rockefeller.)] Neither the Act nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements.

Proposed Section 7. Final Section 6g

36. A commentator inquired whether the use of non-voluntary consensus standards meant use of any standards developed outside the voluntary consensus process, or just use of government-unique standards. The intent of the Circular over the years has been to discourage the government's reliance on government-unique standards and to encourage agencies to instead rely on voluntary consensus standards. It is has not been the intent of the Circular to create the basis for discrimination among standards developed in the private sector, whether consensus-based or, alternatively, industry-based or company-based. Accordingly, we added language to clarify this point.

Proposed Section 7. Final Section 6f

37. One commentator inquired how OMB planned to carry out the ''full

account'' of the impact of this policy on the economy, applicable federal laws, policies, and national objectives. This language is from the current Circular and refers to the considerations agencies should make when considering using a standard. No change is necessary.

Proposed Section 7. Final Section 17

38. Several commentators noted that the proposed revision eliminated language from the current Circular which stated that its provisions ''are intended for internal management purposes only and are not intended to (1) create delay in the administrative process, (2) provide new grounds for judicial review, or (3) create legal rights enforceable against agencies or their officers.'' We have decided that, while some sections of the Circular incorporate statutory requirements, other sections remain internal Executive Branch management policy. Accordingly, we have retained the language, with minor revisions.

Proposed Section 7a

39. One commentator inquired as to whether the use of a voluntary consensus standard by one agency would mandate that another agency must use such standard. Implementation of the policies of the Circular are on an agency by agency basis, and in fact, on a case by case basis. Agencies may have different needs and requirements, and the use of a voluntary consensus standard by one agency does not require that another agency must use the same standard. Each agency has the authority to decide whether, for a program, use of a voluntary consensus standard would be contrary to law or otherwise impractical.

40. Another comment suggested that the Circular did not contain sufficient assurance that the standards chosen would be true consensus standards. We have expanded the guidance in the Circular to address this concern by first expanding the definition of ''consensus'' in final section 4a(1)(v). Second, we have described in final section 6l how agencies may identify voluntary consensus standards. Third, we have developed reporting procedures that allow for public comment.

Proposed Section 7a(1). Final Section 6h

41. Several commentators suggested that ''international voluntary consensus standards body'' be defined in proposed section 5. We have decided that this definition is not necessary, as the term ''international'' is sufficiently well understood in the standards community, and the term ''voluntary consensus standards body'' has already been defined. Moreover, the distinction between ''international standards'' and ''domestic standards'' is not relevant to the essential policies of the Circular, and this point is clarified in this section.

42. Several commentators also noted that two trade agreements (''TBT'' and the ''Procurement Code'') of the World Trade Organization were mentioned but inquired as to why other international agreements like the World Trade Organization Agreement on Sanitary and Phytosanitary Measures or the North American Free Trade Agreement were not mentioned. We did not intend this list to be exhaustive. Therefore, we deleted this phrase to emphasize the main point of this section.

43. Several commentators questioned why the Circular included language that standards developed by international voluntary consensus standards bodies ''should be considered in procurement and regulatory applications.'' We recognize that both domestic and international voluntary consensus standards may exist, sometimes in harmony, sometimes in competition. This language, which is unchanged from the current version of the Circular, states only that such international standards should be ''considered,'' not that they are mandated or that they should be given any preference. In addition, some confusion has emerged based on a perceived conflict between the commitments of the United States with respect to international treaties and this Circular. No part of this Circular is intended to preempt international treaties. Nor is this Circular intended to create the basis for discrimination between an international and a domestic voluntary consensus standard. However, wherever possible, agencies should consider the use of international voluntary consensus standards.

Proposed Section 7a(2). Final Section 6i

44. One commentator suggested that the Circular promote the concept of performance-based requirements when regulating the conduct of work for safety or health reasons (e.g., safety standards). Where performance standards can be used in lieu of other types of standards (or technical standards), the Circular already accomplishes this by stating in final section 6i that ''preference should be given to standards based on performance criteria.''

Proposed Section 7a(3). Final Section 6j

45. One commentator suggested using stronger language to protect the rights of copyright holders when referenced in a regulation. Others thought the language too strong. We have decided that the language is just right.

Proposed Section 7a(4). Final Section 6k, 7j

46. One commentator suggested that legal obligations that supersede the Circular and cost and time burdens need to be emphasized as factors supporting agencies' developing and using their own government-unique standards. Another commentator suggested that untimeliness or unavailability of voluntary consensus standards development should be a reasonable justification for creation of a government standard. On the first point, these specific changes are not necessary, because the Act and the Circular already state that agencies may choose their own standard ''where inconsistent with applicable law or otherwise impractical.'' On the second point, we did clarify the language in final sections 6k and 7j.

47. Another commentator suggested that the Circular should define in this section factors that are considered to be ''impractical.'' See comments on proposed section 5c. We made no change.

Proposed Section 7a(5). Final Section 6l.

48. This section is intended to give agencies guidance on where they may go to identify voluntary consensus standards. One commentator proposed language to indicate that, in addition to NIST, voluntary consensus standards may also be identified through other federal agencies. Another commentator proposed language that such standards may also be identified through standards publishing companies. We agree, and the Circular is changed.

Proposed Section 7b

49. Other commentators proposed that **Federal Register** notices be published whenever a federal employee is to participate in a voluntary consensus standards body. We have decided that this would be overly burdensome for the agencies and would provide comparatively little benefit for the public. Moreover, each agency is already required in section 15b(5) to publish a directory of federal participants in standards organizations. We made no change.

Proposed Section 7b(2). Final Section 7d

50. Some commentators noted that the current Circular's language, which states that agency employees who ''at government expense'' participate in voluntary consensus standards bodies shall do so as specifically authorized agency representatives, has been deleted

from the proposed revision. These commentators opposed this deletion. This phrase has been reinstated. Federal employees who are representing their agency must do so at federal expense. (On the other hand, employees are free to maintain personal memberships in outside organizations, unless the employee's agency has a requirement for prior approval.) We expect that, as a general rule, federal participation in committees will not be a problem, while participation at higher levels, such as officers or as directors on boards, will require additional scrutiny. Employees should consult with their agency ethics officer to identify what restrictions may apply.

Proposed Section 7b(2). Final Section 7

51. Several commentators suggested changing the language in this section from ''permitting agency participation when relating to agency mission,'' to ''permitting agency participation when compatible with agency and departmental missions, authorities, priorities, and budget resources,'' as stated in the Act. We have decided to accept this suggestion, and the Circular is changed.

Proposed Section 7b(4). Final Sections 7d, 7g

52. One commentator suggested that the Circular should prohibit agency employees from serving as chairs or board members of voluntary consensus standards bodies. We have not amended the Circular to prohibit agency employees from serving as chairs or board members of voluntary consensus standards bodies. However, we have modified final section 7g to clarify that agency employees, whether or not in a position of leadership in a voluntary consensus standards body, must avoid the practice or appearance of undue influence relating to the agency's representation and activities in the voluntary consensus standards bodies. In addition, we added language in final section 7d to remind agencies to involve their agency ethics officers, as appropriate, prior to authorizing support for or participation in a voluntary consensus standards body.

Proposed Section 7b(5). Final Section 7h

53. One commentator suggested changing the word ''should'' to ''shall'' regarding keeping the number of individual agency participants to a minimum. We decided that this change is unnecessary and made no change.

Proposed Section 7b(6)

54. A few commentators suggested requiring that the amount of federal support should be made public or at least made known to the supported committee of the voluntary consensus standards body or SDO. We have decided that this is unnecessary because we expect that the amount of federal support will already be known to a committee receiving the funds.

Proposed Section 7b(7). Final Section 7g

55. A commentator suggested either deleting ''and administrative policies'' or inserting ''internal'' before ''administrative policies'' to clarify that the prohibition is intended to apply to the internal management of a voluntary consensus standard body. This phrase is parenthetical to the words ''internal management;'' thus, the suggested revision is unnecessary.

Proposed Section 7b(8). Final Section 7i

56. One commentator questioned the relationship of the Circular to the Federal Advisory Committee Act (FACA). Federal participation in standards activities would not ordinarily be subject to FACA, because FACA applies to circumstances in which private individuals would be advising the government. The private sector members of standards organizations are not advising the government, but are developing standards. Nevertheless, issues may arise in which agencies should be aware of FACA.

Proposed Section 7b. Final Sections 7e, 7f

57. Several commentators, fearing agency dominance, criticized the proposed revision of the Circular for promoting increased agency participation. We have decided that the revisions to the Circular are balanced, in that they encourage agency participation while also discouraging agency dominance. Moreover, legislative history states, ''In fact, it is my hope that this section will help convince the Federal Government to participate more fully in these organizations' standards developing activities.'' [See 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella.)]

Proposed 7c (4). Final Section 15b

58. A commentator suggested changing ''standards developing groups'' to ''voluntary consensus standards bodies'' for consistency. We agree, and we modified the final Circular.

Proposed 7c(6). Final Section 15b(7)

59. The current and proposed versions of the Circular required agencies to review their existing standards every five years and to replace through applicable procedures such standards that can be replaced with voluntary consensus standards. Several commentators suggested adding language that either requires agencies to review standards referenced in regulations on an annual basis or an ongoing basis. Other commentators proposed extending the review period to ten years (in order to mirror the review cycle of the Regulatory Flexibility Act) or to eliminate the review entirely because it was burdensome.

We decided to change this requirement to one in which agencies are responsible for ''establishing a process for ongoing review of the agency's use of standards for purposes of updating such use.'' We decided that this approach will encourage agencies to review the large numbers of regulations which may reference obsolete and out-dated standards in a timely manner. Agencies are encouraged to undertake a review of their uses of obsolete or government-unique standards as soon as practicable.

60. A commentator proposed language to require agencies to respond to requests from voluntary consensus standards bodies to replace existing federal standards, specifications, or regulations with voluntary consensus standards. This change is not necessary, because the Circular already requires agencies to establish a process for reviewing standards. (See comment 59.) We made no change.

Proposed Section 8. Final Section 11

61. Several commentators suggested eliminating the requirement in the proposed Circular for an analysis of the use and non-use of voluntary consensus standards in both the Notice of Proposed Rulemaking (NPRM) and the final rule in order to simplify and clarify Federal Register notices. As an alternative, these commentators proposed including such analysis in a separate document that accompanies the NPRM and the subsequent final rule.

We have decided that, rather than simplifying the rulemaking process, this change would make it more difficult for the public to comment on the rule and would complicate the process by adding another source of information in a separate location. However, we did make some minor changes to this section to clarify that agencies are not expected to provide an extensive report with each NPRM, Interim Final Rulemaking, or Final Rule. The section was also modified to improve the ability of agencies to identify voluntary consensus standards that could be used in their regulations, to ensure public

notice, and to minimize burden. First, the notice required in the NPRM may merely contain/include (1) a few sentences to identify the proposed standard, if any; and, if applicable, (2) a simple explanation of why the agency proposes to use a government-unique standard in lieu of a voluntary consensus standard. This step places the public on notice and gives them an opportunity to comment formally. Second, we expect that the majority of rulemakings will not reference standards at all. In these cases, the agency is not required to make a statement or to file a report. In those instances where an agency proposes a government-unique standard, the public, through the public comment process, will have an opportunity to identify a voluntary consensus standard (when the agency was not aware of it) or to argue that the agency should have used the voluntary consensus standard (when the agency had identified one, but rejected it).

62. Several commentators suggested adding a new section entitled ''Sufficiency of Agency Search.'' The purpose of this new section would be to limit an agency's obligation to search for existing voluntary consensus standards under the requirements of this section. We have decided that this section is unnecessary in light of the requirements elsewhere in the Circular for identifying voluntary consensus standards. Accordingly, we made no change.

63. One commentator suggested that agencies be required to fully investigate and review the intent and capabilities of a standard before making a decision to use a particular voluntary consensus standard. We have decided that the effort an agency would have to undertake to conduct its own scientific review of a voluntary, consensus standard is unnecessary, as SDOs adhere to lengthy and complex procedures which already closely scrutinize the uses and capabilities of a standard. However, in adopting a standard for use, whether in procurement or in regulation, agencies are already required to undertake the review under the Act and the Circular, as well as the review and analysis, described in other sources, such as the Federal Acquisition Regulation or the Executive Order 12866 on Regulatory Planning and Review. Accordingly, we made no change.

64. A few commentators suggested that the Circular should ensure prompt notification to interested parties when voluntary consensus standards activities are about to begin and should encourage greater public participation in such activities. Another commentator noted a lack of clear procedures on how voluntary consensus standards bodies handle public comments and whether those comments are available to interested persons or organizations. OMB has determined that these responsibilities fall within the jurisdiction of voluntary consensus standards bodies and are outside the scope of the Act and the Circular. Accordingly, we made no change.

Proposed Section 8. Final Sections 6g and 12c

65. A few commentators requested clarification on the use of ''commercial-off-the-shelf'' (''COTS'') products as they relate to voluntary consensus standards. In response, we have clarified final section 6g to state that this policy does not establish preferences between products developed in the private sector. Final section 12c clarified that there is no reporting requirement for such products.

Proposed Section 9—Responsibilities. Final Sections 13, 14, 15

66. Several commentators proposed that OMB have more defined oversight responsibility in determining whether an agency's participation in a voluntary consensus standards body is consistent with the Circular. We did not make this change. Agency Standards Executives, with the advice of the Chair of the ICSP, are responsible for ensuring that agencies are in compliance with the requirements of this Circular.

With respect to the issue of ''agency dominance'' of SDOs, we expect that SDOs will likewise ensure that members abide by their rules of conduct and participation, working closely with Standards Executives where necessary and appropriate. We inserted minor clarifying language in new sections 13, 14, and 15.

Proposed 9b(2). Final Section 14c

67. A commentator suggested broadening the category of agencies that must designate a standards executive, from designating those agencies with a ''significant interest'' in the use of standards, to those agencies having either ''regulatory or procurement'' responsibilities. We decided that this proposed change was vague and would only confuse the scope of the Circular. Accordingly, we made no change.

Proposed Section 10. Final Sections 9 and 10

68. One commentator expressed concern that the reporting requirements would require agencies to report reliance on commercial-off-the-shelf (COTS) products as a decision not to rely on voluntary consensus standards. The Act and the Circular do not limit agencies' abilities to purchase COTS or other products or services containing private sector standards. The Circular specifically excludes reporting of COTS procurements in final section 12, and final sections 9a and 12 require agencies to report only when an agency uses a government-unique standard in lieu of an existing voluntary consensus standard. Accordingly, we made no change.

Proposed 10b —Agency Reports on Standards Policy Activities. Final Section 9b

69. One commentator suggested that agencies also report the identity of standards development bodies whose standards the agency relies on and the identities of all the standards developed or used by such bodies. We have decided that it would be unnecessary, duplicative, and burdensome to require agencies to identify this level of detail in the annual report. The identity of individual standards developed by a standards body may be obtained either through the standards body or through a standards publishing company. In addition, agencies are already required to provide in their annual report, under section 9b(1), the number of voluntary consensus standards bodies in which an agency participates. Moreover, each agency is required under section 15b(5) to identify the standards bodies in which it is involved. Accordingly, we made no change.

Proposed 10b(3). Final Section 9b

70. A commentator suggested that agencies should be required to identify federal regulations and procurement specifications in which the standards were ''withdrawn'' and replaced with voluntary consensus standards. We have decided that this requirement is unnecessary, because information is already provided in the annual report described in final section 9b(3). Accordingly, we made no change.

Proposed Section 11—Conformity Assessment. Final Section 8

71. A commentator expressed concern that the coordination by the National Institute of Standards and Technology (NIST) of standards activities between the public and private sector will undermine the coordination that ANSI has performed for many years for the private sector.

In addition, the commentator expressed concern that NIST's involvement in such coordination will undermine the United States' ability to

compete internationally as two organizations are coordinating standards developing activities instead of one. The Act states that NIST is to ''coordinate Federal, State, and local technical standards activities and conformity assessment activities with private sector technical standards activities and conformity assessment activities.'' This language makes clear that NIST will have responsibility for coordinating only the public sector and for working with the private sector. In addition, ANSI's role is affirmed in the Memorandum Of Understanding (MOU) issued on July 24, 1995, between NIST and ANSI. The MOU states ''[t]his MOU is intended to facilitate and strengthen the influence of ANSI and the entire U.S. standards community at the international level * * * and ensure that ANSI's representation of U.S. interests is respected by the other players on the international scene.'' Thus, we made no change.

Accordingly, OMB Circular A–119 is revised as set forth below.

Sally Katzen,

Administrator, Office of Information and Regulatory Affairs.

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

Washington, D.C. 20503

February 10, 1998.

Circular No. A–119

Revised

Memorandum for Heads of Executive Departments and Agencies

Subject: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

Revised OMB Circular A–119 establishes policies on Federal use and development of voluntary consensus standards and on conformity assessment activities. Pub. L. 104–113, the ''National Technology Transfer and Advancement Act of 1995,'' codified existing policies in A–119, established reporting requirements, and authorized the National Institute of Standards and Technology to coordinate conformity assessment activities of the agencies. OMB is issuing this revision of the Circular in order to make the terminology of the Circular consistent with the National Technology Transfer and Advancement Act of 1995, to issue guidance to the agencies on making their reports to OMB, to direct the Secretary of Commerce to issue policy guidance for conformity assessment, and to make changes for clarity.

Franklin D. Raines,

Director.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

Washington, D.C. 20503

February 10, 1998.

Circular No. A–119

Revised

To the Heads of Executive Departments and Establishments

Subject: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities

TABLE OF CONTENTS

Background

1. What Is The Purpose Of This Circular?

This Circular establishes policies to improve the internal management of the Executive Branch. Consistent with Section 12(d) of Pub. L. 104–113, the ''National Technology Transfer and Advancement Act of 1995'' (hereinafter ''the Act''), this Circular directs agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical. It also provides guidance for agencies participating in voluntary consensus standards bodies and describes procedures for satisfying

the reporting requirements in the Act. The policies in this Circular are intended to reduce to a minimum the reliance by agencies on government-unique standards. These policies do not create the bases for discrimination in agency procurement or regulatory activities among standards developed in the private sector, whether or not they are developed by voluntary consensus standards bodies. Consistent with Section 12(b) of the Act, this Circular directs the Secretary of Commerce to issue guidance to the agencies in order to coordinate conformity assessment activities. This Circular replaces OMB Circular No. A–119, dated October 20, 1993.

2. What Are The Goals Of The Government In Using Voluntary Consensus Standards?

Many voluntary consensus standards are appropriate or adaptable for the Government's purposes. The use of such standards, whenever practicable and appropriate, is intended to achieve the following goals:

a. Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation.

b. Provide incentives and opportunities to establish standards that serve national needs.

c. Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards.

d. Further the policy of reliance upon the private sector to supply Government needs for goods and services.

Definitions of Standards

3. What Is A Standard?

a. The term *standard*, or *technical standard* as cited in the Act, includes all of the following:

(1) Common and repeated use of rules, conditions, guidelines or characteristics for products or related processes and production methods, and related management systems practices.

(2) The definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, designs, or operations; measurement of quality and quantity in describing materials, processes, products, systems, services, or practices; test methods and sampling procedures; or descriptions of fit and measurements of size or strength.

b. The term *standard* does not include the following:

(1) Professional standards of personal conduct.

(2) Institutional codes of ethics.

c. *Performance standard* is a standard as defined above that states requirements in terms of required results with criteria for verifying compliance but without stating the methods for achieving required results. A performance standard may define the functional requirements for the item, operational requirements, and/or interface and interchangeability characteristics. A performance standard may be viewed in juxtaposition to a prescriptive standard which may specify design requirements, such as materials to be used, how a requirement is to be achieved, or how an item is to be fabricated or constructed.

d. *Non-government standard* is a standard as defined above that is in the form of a standardization document developed by a private sector association, organization or technical society which plans, develops, establishes or coordinates standards, specifications, handbooks, or related documents.

4. What Are Voluntary, Consensus Standards?

a. For purposes of this policy, *voluntary consensus standards* are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, ''technical standards that are developed or adopted by voluntary consensus standard bodies'' is an equivalent term.

(1) *Voluntary consensus standards bodies* are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, ''voluntary, private sector, consensus standards bodies,'' as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:

(i) Openness.

(ii) Balance of interest.

(iii) Due process.

(vi) An appeals process.

(v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.

b. Other types of standards, which are distinct from voluntary consensus standards, are the following:

(1) ''Non-consensus standards,'' ''Industry standards,'' ''Company standards,'' or ''de facto standards,'' which are developed in the private sector but not in the full consensus process.

(2) ''Government-unique standards,'' which are developed by the government for its own uses.

(3) Standards mandated by law, such as those contained in the United States Pharmacopeia and the National Formulary, as referenced in 21 U.S.C. 351.

Policy

5. Who Does This Policy Apply To?

This Circular applies to all agencies and agency employees who use standards and participate in voluntary consensus standards activities, domestic and international, except for activities carried out pursuant to treaties. ''Agency'' means any executive department, independent commission, board, bureau, office, agency, Government-owned or controlled corporation or other establishment of the Federal Government. It also includes any regulatory commission or board, except for independent regulatory commissions insofar as they are subject to separate statutory requirements regarding the use of voluntary consensus standards. It does not include the legislative or judicial branches of the Federal Government.

6. What Is The Policy For Federal Use Of Standards?

All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical. In these circumstances, your agency must submit a report describing the reason(s) for its use of government-unique standards in lieu of voluntary consensus standards to the Office of Management and Budget (OMB) through the National Institute of Standards and Technology (NIST).

a. When must my agency use voluntary consensus standards?

Your agency must use voluntary consensus standards, both domestic and international, in its regulatory and procurement activities in lieu of government-unique standards, unless use of such standards would be

inconsistent with applicable law or otherwise impractical. In all cases, your agency has the discretion to decline to use existing voluntary consensus standards if your agency determines that such standards are inconsistent with applicable law or otherwise impractical.

(1) ''Use'' means incorporation of a standard in whole, in part, or by reference for procurement purposes, and the inclusion of a standard in whole, in part, or by reference in regulation(s).

(2) ''Impractical'' includes circumstances in which such use would fail to serve the agency's program needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard.

b. What must my agency do when such use is determined by my agency to be inconsistent with applicable law or otherwise impractical?

The head of your agency must transmit to the Office of Management and Budget (OMB), through the National Institute of Standards and Technology (NIST), an explanation of the reason(s) for using government-unique standards in lieu of voluntary consensus standards. For more information on reporting, see section 9.

c. How does this policy affect my agency's regulatory authorities and responsibilities?

This policy does not preempt or restrict agencies' authorities and responsibilities to make regulatory decisions authorized by statute. Such regulatory authorities and responsibilities include determining the level of acceptable risk; setting the level of protection; and balancing risk, cost, and availability of technology in establishing regulatory standards. However, to determine whether established regulatory limits or targets have been met, agencies should use voluntary consensus standards for test methods, sampling procedures, or protocols.

d. How does this policy affect my agency's procurement authority?

This policy does not preempt or restrict agencies' authorities and responsibilities to identify the capabilities that they need to obtain through procurements. Rather, this policy limits an agency's authority to pursue an identified capability through reliance on a government-unique standard when a voluntary consensus standard exists (see Section 6a).

e. What are the goals of agency use of voluntary consensus standards?

Agencies should recognize the positive contribution of standards development and related activities. When properly conducted, standards development can increase productivity and efficiency in Government and industry, expand opportunities for international trade, conserve resources, improve health and safety, and protect the environment.

f. What considerations should my agency make when it is considering using a standard?

When considering using a standard, your agency should take full account of the effect of using the standard on the economy, and of applicable federal laws and policies, including laws and regulations relating to antitrust, national security, small business, product safety, environment, metrication, technology development, and conflicts of interest. Your agency should also recognize that use of standards, if improperly conducted, can suppress free and fair competition; impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety. If your agency is proposing to incorporate a standard into a proposed or final rulemaking, your agency must comply with the ''Principles of Regulation'' (enumerated in Section 1(b)) and with the other analytical requirements of Executive Order 12866, ''Regulatory Planning and Review.''

g. Does this policy establish a preference between consensus and non-consensus standards that are developed in the private sector?

This policy does not establish a preference among standards developed in the private sector. Specifically, agencies that promulgate regulations referencing non-consensus standards developed in the private sector are not required to report on these actions, and agencies that procure products or services based on non-consensus standards are not required to report on such procurements. For example, this policy allows agencies to select a non-consensus standard developed in the private sector as a means of establishing testing methods in a regulation and to choose among commercial-off-the-shelf products, regardless of whether the underlying standards are developed by voluntary consensus standards bodies or not.

h. Does this policy establish a preference between domestic and international voluntary consensus standards?

This policy does not establish a preference between domestic and international voluntary consensus standards. However, in the interests of promoting trade and implementing the provisions of international treaty agreements, your agency should consider international standards in procurement and regulatory applications.

i. Should my agency give preference to performance standards?

In using voluntary consensus standards, your agency should give preference to performance standards when such standards may reasonably be used in lieu of prescriptive standards.

j. How should my agency reference voluntary consensus standards?

Your agency should reference voluntary consensus standards, along with sources of availability, in appropriate publications, regulatory orders, and related internal documents. In regulations, the reference must include the date of issuance. For all other uses, your agency must determine the most appropriate form of reference, which may exclude the date of issuance as long as users are elsewhere directed to the latest issue. If a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations.

k. What if no voluntary consensus standard exists?

In cases where no voluntary consensus standards exist, an agency may use government-unique standards (in addition to other standards, see Section 6g) and is not required to file a report on its use of government-unique standards. As explained above (see Section 6a), an agency may use government-unique standards in lieu of voluntary consensus standards if the use of such standards would be inconsistent with applicable law or otherwise impractical; in such cases, the agency must file a report under Section 9a regarding its use of government-unique standards.

l. How may my agency identify voluntary consensus standards?

Your agency may identify voluntary consensus standards through databases of standards maintained by the National Institute of Standards and Technology (NIST), or by other organizations including voluntary consensus standards bodies, other federal agencies, or standards publishing companies.

7. What Is The Policy For Federal Participation In Voluntary Consensus Standards Bodies?

Agencies must consult with voluntary consensus standards bodies, both domestic and international, and must participate with such bodies in the development of voluntary consensus standards when consultation and participation is in the public interest

and is compatible with their missions, authorities, priorities, and budget resources.

a. What are the purposes of agency participation?

Agency representatives should participate in voluntary consensus standards activities in order to accomplish the following purposes:

(1) Eliminate the necessity for development or maintenance of separate Government-unique standards.

(2) Further such national goals and objectives as increased use of the metric system of measurement; use of environmentally sound and energy efficient materials, products, systems, services, or practices; and improvement of public health and safety.

b. What are the general principles that apply to agency support?

Agency support provided to a voluntary consensus standards activity must be limited to that which clearly furthers agency and departmental missions, authorities, priorities, and is consistent with budget resources. Agency support must not be contingent upon the outcome of the standards activity. Normally, the total amount of federal support should be no greater than that of other participants in that activity, except when it is in the direct and predominant interest of the Government to develop or revise a standard, and its timely development or revision appears unlikely in the absence of such support.

c. What forms of support may my agency provide?

The form of agency support, may include the following:

(1) Direct financial support; e.g., grants, memberships, and contracts.

(2) Administrative support; e.g., travel costs, hosting of meetings, and secretarial functions.

(3) Technical support; e.g., cooperative testing for standards evaluation and participation of agency personnel in the activities of voluntary consensus standards bodies.

(4) Joint planning with voluntary consensus standards bodies to promote the identification and development of needed standards.

(5) Participation of agency personnel.

d. Must agency participants be authorized?

Agency employees who, at Government expense, participate in standards activities of voluntary consensus standards bodies on behalf of the agency must do so as specifically authorized agency representatives. Agency support for, and participation by agency personnel in, voluntary consensus standards bodies must be in compliance with applicable laws and regulations. For example, agency support is subject to legal and budgetary authority and availability of funds. Similarly, participation by agency employees (whether or not on behalf of the agency) in the activities of voluntary consensus standards bodies is subject to the laws and regulations that apply to participation by federal employees in the activities of outside organizations. While we anticipate that participation in a committee that is developing a standard would generally not raise significant issues, participation as an officer, director, or trustee of an organization would raise more significant issues. An agency should involve its agency ethics officer, as appropriate, before authorizing support for or participation in a voluntary consensus standards body.

e. Does agency participation indicate endorsement of any decisions reached by voluntary consensus standards bodies?

Agency participation in voluntary consensus standards bodies does not necessarily connote agency agreement with, or endorsement of, decisions reached by such organizations.

f. Do agency representatives participate equally with other members?

Agency representatives serving as members of voluntary consensus standards bodies should participate actively and on an equal basis with other members, consistent with the procedures of those bodies, particularly in matters such as establishing priorities, developing procedures for preparing, reviewing, and approving standards, and developing or adopting new standards. Active participation includes full involvement in discussions and technical debates, registering of opinions and, if selected, serving as chairpersons or in other official capacities. Agency representatives may vote, in accordance with the procedures of the voluntary consensus standards body, at each stage of the standards development process unless prohibited from doing so by law or their agencies.

g. Are there any limitations on participation by agency representatives?

In order to maintain the independence of voluntary consensus standards bodies, agency representatives must refrain from involvement in the internal management of such organizations (e.g., selection of salaried officers and employees, establishment of staff salaries, and administrative policies). Agency representatives must not dominate such bodies, and in any case are bound by voluntary consensus standards bodies' rules and procedures, including those regarding domination of proceedings by any individual. Regardless, such agency employees must avoid the practice or the appearance of undue influence relating to their agency representation and activities in voluntary consensus standards bodies.

h. Are there any limits on the number of federal participants in voluntary consensus standards bodies?

The number of individual agency participants in a given voluntary standards activity should be kept to the minimum required for effective representation of the various program, technical, or other concerns of federal agencies.

i. Is there anything else agency representatives should know?

This Circular does not provide guidance concerning the internal operating procedures that may be applicable to voluntary consensus standards bodies because of their relationships to agencies under this Circular. Agencies should, however, carefully consider what laws or rules may apply in a particular instance because of these relationships. For example, these relationships may involve the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), or a provision of an authorizing statute for a particular agency.

j. What if a voluntary consensus standards body is likely to develop an acceptable, needed standard in a timely fashion?

If a voluntary consensus standards body is in the process of developing or adopting a voluntary consensus standard that would likely be lawful and practical for an agency to use, and would likely be developed or adopted on a timely basis, an agency should not be developing its own government-unique standard and instead should be participating in the activities of the voluntary consensus standards body.

8. What Is The Policy On Conformity Assessment?

Section 12(b) of the Act requires NIST to coordinate Federal, State, and local standards activities and conformity assessment activities with private sector standards activities and conformity assessment activities, with the goal of eliminating unnecessary duplication and complexity in the development and promulgation of conformity assessment requirements and measures. To ensure effective coordination, the Secretary of Commerce must issue guidance to the agencies.

Management and Reporting of Standards Use

9. What Is My Agency Required to Report?

a. As required by the Act, your agency must report to NIST, no later than December 31 of each year, the decisions by your agency in the previous fiscal year to use government-unique standards in lieu of voluntary consensus standards. If no voluntary consensus standard exists, your agency does not need to report its use of government-unique standards. (In addition, an agency is not required to report on its use of other standards. See Section 6g.) Your agency must include an explanation of the reason(s) why use of such voluntary consensus standard would be inconsistent with applicable law or otherwise impractical, as described in Sections 11b(2), 12a(3), and 12b(2) of this Circular. Your agency must report in accordance with format instructions issued by NIST.

b. Your agency must report to NIST, no later than December 31 of each year, information on the nature and extent of agency participation in the development and use of voluntary consensus standards from the previous fiscal year. Your agency must report in accordance with format instructions issued by NIST. Such reporting must include the following:

(1) The number of voluntary consensus standards bodies in which there is agency participation, as well as the number of agency employees participating.

(2) The number of voluntary consensus standards the agency has used since the last report, based on the procedures set forth in sections 11 and 12 of this Circular.

(3) Identification of voluntary consensus standards that have been substituted for government-unique standards as a result of an agency review under section 15b(7) of this Circular.

(4) An evaluation of the effectiveness of this policy and recommendations for any changes.

c. No later than the following January 31, NIST must transmit to OMB a summary report of the information received.

10. How Does My Agency Manage And Report Its Development and Use Of Standards?

Your agency must establish a process to identify, manage, and review your agency's development and use of standards. At minimum, your agency must have the ability to (1) report to OMB through NIST on the agency's use of government-unique standards in lieu of voluntary consensus standards, along with an explanation of the reasons for such non-usage, as described in section 9a, and (2) report on your agency's participation in the development and use of voluntary consensus standards, as described in section 9b. This policy establishes two ways, category based reporting and transaction based reporting, for agencies to manage and report their use of standards. Your agency must report all uses of standards in one or both ways.

11. What Are The Procedures For Reporting My Agency's Use Of Standards In Regulations?

Your agency should use transaction based reporting if your agency issues regulations that use or reference standards. If your agency is issuing or revising a regulation that contains a standard, your agency must follow these procedures:

a. Publish a request for comment within the preamble of a Notice of Proposed Rulemaking (NPRM) or Interim Final Rule (IFR). Such request must provide the appropriate information, as follows:

(1) When your agency is proposing to use a voluntary consensus standard, provide a statement which identifies such standard.

(2) When your agency is proposing to use a government-unique standard in lieu of a voluntary consensus standard, provide a statement which identifies such standards and provides a preliminary explanation for the proposed use of a government-unique standard in lieu of a voluntary consensus standard.

(3) When your agency is proposing to use a government-unique standard, and no voluntary consensus standard has been identified, a statement to that effect and an invitation to identify any such standard and to explain why such standard should be used.

b. Publish a discussion in the preamble of a Final Rulemaking that restates the statement in the NPRM or IFR, acknowledges and summarizes any comments received and responds to them, and explains the agency's final decision. This discussion must provide the appropriate information, as follows:

(1) When a voluntary consensus standard is being used, provide a statement that identifies such standard and any alternative voluntary consensus standards which have been identified.

(2) When a government-unique standard is being used in lieu of a voluntary consensus standard, provide a statement that identifies the standards and explains why using the voluntary consensus standard would be inconsistent with applicable law or otherwise impractical. Such explanation must be transmitted in accordance with the requirements of Section 9a.

(3) When a government-unique standard is being used, and no voluntary consensus standard has been identified, provide a statement to that effect.

12. What Are The Procedures For Reporting My Agency's Use Of Standards In Procurements?

To identify, manage, and review the standards used in your agency's procurements, your agency must either report on a categorical basis or on a transaction basis.

a. How does my agency report the use of standards in procurements on a categorical basis?

Your agency must report on a category basis when your agency identifies, manages, and reviews the use of standards by group or category. Category based reporting is especially useful when your agency either conducts large procurements or large numbers of procurements using government-unique standards, or is involved in long-term procurement contracts which require replacement parts based on government-unique standards. To report use of government-unique standards on a categorical basis, your agency must:

(1) Maintain a centralized standards management system that identifies how your agency uses both government-unique and voluntary consensus standards.

(2) Systematically review your agency's use of government-unique standards for conversion to voluntary consensus standards.

(3) Maintain records on the groups or categories in which your agency uses government-unique standards in lieu of voluntary consensus standards, including an explanation of the reasons for such use, which must be transmitted according to Section 9a.

(4) Enable potential offerors to suggest voluntary consensus standards that can replace government-unique standards.

b. How does my agency report the use of standards in procurements on a transaction basis?

Your agency should report on a transaction basis when your agency identifies, manages, and reviews the use of standards on a transaction basis rather than a category basis. Transaction based reporting is especially useful when your agency conducts procurement mostly through commercial products and services, but is occasionally involved in a procurement involving government-unique standards. To report use of government-unique standards on a transaction basis, your agency must follow the following procedures:

(1) In each solicitation which references government-unique standards, the solicitation must:

(i) Identify such standards.

(ii) Provide potential offerors an opportunity to suggest alternative voluntary consensus standards that meet the agency's requirements.

(2) If such suggestions are made and the agency decides to use government-unique standards in lieu of voluntary consensus standards, the agency must explain in its report to OMB as described in Section 9a why using such voluntary consensus standards is inconsistent with applicable law or otherwise impractical.

c. For those solicitations that are for commercial-off-the-shelf products (COTS), or for products or services that rely on voluntary consensus standards or non-consensus standards developed in the private sector, or for products that otherwise do not rely on government-unique standards, the requirements in this section do not apply.

Agency Responsibilities

13. What Are The Responsibilities Of The Secretary Of Commerce?

The Secretary of Commerce:

a. Coordinates and fosters executive branch implementation of this Circular and, as appropriate, provides administrative guidance to assist agencies in implementing this Circular including guidance on identifying voluntary consensus standards bodies and voluntary consensus standards.

b. Sponsors and supports the Interagency Committee on Standards Policy (ICSP), chaired by the National Institute of Standards and Technology, which considers agency views and advises the Secretary and agency heads on the Circular.

c. Reports to the Director of OMB concerning the implementation of the policy provisions of this Circular.

d. Establishes procedures for agencies to use when developing directories described in Section 15b(5) and establish procedures to make these directories available to the public.

e. Issues guidance to the agencies to improve coordination on conformity assessment in accordance with section 8.

14. What Are The Responsibilities Of The Heads Of Agencies?

The Heads of Agencies:

a. Implement the policies of this Circular in accordance with procedures described.

b. Ensure agency compliance with the policies of the Circular.

c. In the case of an agency with significant interest in the use of standards, designate a senior level official as the Standards Executive who will be responsible for the agency's implementation of this Circular and who will represent the agency on the ICSP.

d. Transmit the annual report prepared by the Agency Standards Executive as described in Sections 9 and 15b(6).

15. What Are The Responsibilities Of Agency Standards Executives?

An Agency Standards Executive:

a. Promotes the following goals:

(1) Effective use of agency resources and participation.

(2) The development of agency positions that are in the public interest and that do not conflict with each other.

(3) The development of agency positions that are consistent with administration policy.

(4) The development of agency technical and policy positions that are clearly defined and known in advance to all federal participants on a given committee.

b. Coordinates his or her agency's participation in voluntary consensus standards bodies by:

(1) Establishing procedures to ensure that agency representatives who participate in voluntary consensus standards bodies will, to the extent possible, ascertain the views of the agency on matters of paramount interest and will, at a minimum, express views that are not inconsistent or in conflict with established agency views.

(2) To the extent possible, ensuring that the agency's participation in voluntary consensus standards bodies is consistent with agency missions, authorities, priorities, and budget resources.

(3) Ensuring, when two or more agencies participate in a given voluntary consensus standards activity, that they coordinate their views on matters of paramount importance so as to present, whenever feasible, a single, unified position and, where not feasible, a mutual recognition of differences.

(4) Cooperating with the Secretary in carrying out his or her responsibilities under this Circular.

(5) Consulting with the Secretary, as necessary, in the development and issuance of internal agency procedures and guidance implementing this Circular, including the development and implementation of an agency-wide directory identifying agency employees participating in voluntary consensus standards bodies and the identification of voluntary consensus standards bodies.

(6) Preparing, as described in Section 9, a report on uses of government-unique standards in lieu of voluntary consensus standards and a report on the status of agency standards policy activities.

(7) Establishing a process for ongoing review of the agency's use of standards for purposes of updating such use.

(8) Coordinating with appropriate agency offices (e.g., budget and legal offices) to ensure that effective processes exist for the review of proposed agency support for, and participation in, voluntary consensus standards bodies, so that agency support and participation will comply with applicable laws and regulations.

Supplementary Information

16. When Will This Circular Be Reviewed?

This Circular will be reviewed for effectiveness by the OMB three years from the date of issuance.

17. What Is The Legal Effect Of This Circular?

Authority for this Circular is based on 31 U.S.C. 1111, which gives OMB broad authority to establish policies for the improved management of the Executive Branch. This Circular is intended to implement Section 12(d) of Public Law 104–113 and to establish policies that will improve the internal management of the Executive Branch. This Circular is not intended to create delay in the administrative process, provide new grounds for judicial review, or create new rights or benefits, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, or its officers or employees.

18. Do You Have Further Questions?

For information concerning this Circular, contact the Office of Management and Budget, Office of Information and Regulatory Affairs: Telephone 202/395–3785.

[FR Doc. 98–4177 Filed 2–18–98; 8:45 am]
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Proposed Rules

Federal Register
Vol. 77, No. 38
Monday, February 27, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Office of the Federal Register

1 CFR Part 51

[NARA 12–0002]

Incorporation by Reference

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

ACTION: Announcement of a petition for rulemaking and request for comments.

SUMMARY: On February 13, 2012, the Office of the Federal Register (OFR or we) received a petition to amend our regulations governing the approval of agency requests to incorporate material by reference into the Code of Federal Regulations. We've set out the petition in this document. We would like comments on the broad issues raised by this petition.

DATES: Comments must be received on or before March 28, 2012.

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

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

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

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

SUPPLEMENTARY INFORMATION: We received a petition to revise our regulations at 1 CFR part 51 on February 13, 2012. The petition is set out below. It specifically requests that we amend our regulations to define ''reasonably available'' and to include several requirements related to the statutory obligation that material incorporated by reference (IBR) be reasonably available. The petition does not specifically request that we define ''class of persons affected''; however, it assumes that this term encompasses anyone who is interested in reviewing the material agencies want to IBR into their regulations. The petitioners did include specific regulatory changes, as an example of what our regulations could look like. They are not asking for adoption of this exact language, however, so we are not including that text here.

We are requesting comments on the following issues:

1. Does ''reasonably available''
   a. Mean that the material should be available:
      i. For free and
      ii. To anyone online?
   b. Create a digital divide by excluding people without Internet access?
2. Does ''class of persons affected'' need to be defined? If so, how should it be defined?
3. Should agencies bear the cost of making the material available for free online?
4. How would this impact agencies budget and infrastructure, for example?
5. How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final rule stage of the rulemaking?
6. Should OFR have the authority to deny IBR approval requests if the material is not available online for free?
7. The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (January 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?
8. Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability?
9. How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?

Dated: February 21, 2012.

Michael L. White,

Acting Director, Office of the Federal Register.

Peter L. Strauss
Betts Professor of Law
435 West 116th Street
New York, N.Y. 10027
February 10, 2012

Office of the Federal Register (NF)
The National Archives and Records Administration
8601 Adelphi Road College Park,
MD 20740–6001

Gentlefolk,

Pursuant to 5 U.S.C. 553(e), we hereby petition for amendment of 1 CFR part 51, ''Incorporation by Reference'' to reflect the changed circumstances brought about by the information age. While it is only necessary to be an interested person to file such a petition, the undersigned include scholars of administrative law with particular, continuing interests in the avoidance of secret law and the development of the government's law-related Internet activities, the President of Public Resource.Org (an NGO dedicated to the creation of a free web-based database of privately developed standards treated as mandatory by governmental authorities), and practitioners of administrative law.

1 CFR part 51 is your implementation of your responsibilities under 5 U.S.C. 552(a)(1), which provides in relevant part

(1) Each agency shall separately state and currently publish in the **Federal Register** for the guidance of the public—

(D) 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; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the **Federal Register** and not so published. 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.

As the statute states, and 1 CFR 51.3 recognizes, each incorporation by reference must be actively and individually approved by the Director of the Federal Register, after stated requirements have been met. As 1 CFR 51.1(b) recognizes, it is for the Director to ''interpret and apply the language of action 552(a)''; the whole of the regulation is, in effect, an interpretation of what it means for matter incorporated by reference to be ''reasonably available.'' However, this regulation has not been amended in any respect since its appearance Aug. 6, 1982 at 47 FR 34108. Subsequent statutory and social developments have transformed what it might mean for matter to be ''reasonably available,'' and this petition seeks the redefinition of ''reasonably available'' in the light of those changes. In the pre-digital world, it may have seemed reasonable to require persons wishing to know the law governing their activities to pay private standard-setting organizations for access to standards made mandatory by government regulations incorporating those standards by reference. These standards were sometimes voluminous, could be presented only in print, and could be made available to concerned parties only at some expense to the provider. Developments in both law and technology over the last two decades have undermined that rationale, however, transforming what it should mean for these standards to be ''reasonably available.''

In particular, when section 552(a)(1) was enacted and at the time 1 CFR part 51 was adopted, substantive rules of general applicability, statements of general policy or interpretations of general applicability, as well, could be made available to the public only in printed form. Since the ''published data, criteria, standards, specifications, techniques, illustrations, or similar material'' made eligible for incorporation by reference in § 51.7(a)(2) were often voluminous in character, permitting their incorporation by reference would ''[s]ubstantially reduce[] the volume of material published in the **Federal Register**.'' § 51.7(a)(3). That effect was the primary impetus for permitting incorporation by reference. Again, this effect has been eliminated by the implementation of agency electronic reading rooms, under which unlimited volumes of materials may be stored or hyperlinked, and made readily searchable by common web-based tools.

Section 51.7(a)(4) of your regulations, defining eligibility for incorporation, today makes no effort to define ''reasonable availability.'' Although it conditions eligibility on whether the material to be incorporated ''[i]s reasonably available to and usable by the class of persons affected by the publication,'' it goes on to define *only* ''usability,'' and it does that for the pre-Internet age, in terms that plainly envision only *print* publication. Another element of your regulation, § 51.1(c)(1), provides that the terms of reference for the Director's determinations are whether incorporation ''is intended to benefit both the Federal Government and the members of the class affected.'' Although we understand that respect for standards organizations' copyrights may influence the Director's determination that incorporated material is ''reasonably available,'' this language invokes that interest only indirectly. In the Internet age, that interest needs to be directly considered, in relation to the need of the regulated and citizens alike to know standards that may be proposed, or are later adopted, to governing their conduct. The possibility of protecting copyright owners' financial interests in most uses of their standards by technical means (such as limited electronic access) is an appropriate element here, as is creating standards for ''reasonable availability'' that will maximize agency incentives to bargain hard over such licensing payments as might be appropriate.

With the Electronic Freedom of Information Act of 1996, the Government Paperwork Elimination Act of 2000, and the E-Government Act of 2002, public availability of government records has moved decisively from print media to electronic reading rooms. Indeed, the **Federal Register** no longer needs to be printed, especially given **Federal Register** 2.0, and in any event reducing the volume of material in print in it is no longer an important consideration. While the CFR will doubtless remain *in print,* nonetheless the availability of materials incorporated by reference on government (or private) Web sites renders any concern about its volume also irrelevant to deciding whether material is ''reasonably available.'' Any agency publishing material to its electronic Web site, whether or not it is in print, will have made that material ''reasonably available.'' Indeed the obligations of E–FOIA for guidance material under 5 U.S.C. 552(a)(2) make this clear. Absent actual notice, agencies may not cite guidance materials adversely to private parties unless they have been posted in the agency's electronic library—and there is no ''reasonably available'' qualification to this obligation, only the possibility of redaction for privacy protection.

These enactments and their impact are nowhere referenced or considered in part 51—as they could not have been when it was last considered, in 1982. They make plain the necessity that the Director reconsider the now antiquated regulations implementing 5 U.S.C. 552(a)(1) and its criterion of reasonable availability, and in doing so assure Americans of ready access to the law that controls their conduct.

A recent action by the Administrative Conference of the United States failed directly to address the Director's responsibility for shaping and administering the criterion of reasonable availability. However, the recommendation and its supporting report strongly suggest factors that should enter in:

(1) Section 51 currently applies only to the publication of a final rule. However, notices of proposed rulemaking will often propose incorporation by reference, and public availability of materials is of special importance during the rulemaking stage to effectuate the APA's commitment (strongly reinforced by caselaw requiring agencies to reveal important data on which they may rely) to a meaningful public comment opportunity. The ready availability of materials proposed to be incorporated by reference, whether in FDMS, on an agency Web site, or on the Web site of a copyright holder (who may appropriately limit access to the comment period, and provide it only in read-only form), is essential to any ultimate determination that material that would otherwise be required to be placed in the body of a final rule is ''reasonably available'' to the concerned public and hence may be incorporated by reference. Here, particularly, the interests of a wide range of interests—citizens, local governments, small businesses—may be implicated. Agencies seeking approval for incorporations by reference of voluntary consensus standards that are referred to in their notices of proposed rulemaking should be required to demonstrate the steps that they have taken to enable comment on those standards, as one element of reasonable availability.

(2) The National Technology Transfer Act of 1995 and the implementing OMB Circular A–119 properly distinguish, as the literature does, between regulations affirmatively requiring a specified course of conduct, and standards that serve to indicate one means by which those requirements may be satisfied. The policy favoring incorporation by reference of voluntary consensus standards embodied in the NTTA and Circular A–119 is limited to ''standards'' in the latter sense. Yet the Report to ACUS details settings in which material incorporated by reference is *itself* taken as setting mandatory obligations. For example, OSHA treats as a violation of its regulations *any* departure from the form of warning placards detailed in certain standards it has incorporated by reference; it is merely a ''minor'' violation if, in departing from those forms, an employer has used warning placards suggested by subsequent voluntary consensus standards that OSHA has not yet incorporated by reference. ''Reasonable availability'' of *mandatory* standards in the age of the Internet requires their ready accessability in agency electronic reading rooms or, at the very least, in linked Web sites of standards organizations that provide at least free read-only access to those with a need to know the law governing their conduct or otherwise affecting them.

(3) When agencies use incorporation by reference to create *mandatory* standards, the legality of charging the public for access to material incorporated by reference by the voluntary standards organizations that may have developed them, under copyright, is in serious doubt. *Veeck* v. *S. Bldg. Code Cong. Int'l,* 293 F.3d 791 (5th Cir. 2002). Free availability to the affected public of incorporated materials is of particular importance, as already suggested, when those materials create mandatory obligations whose violation could have adverse consequences, whether directly or on others whose interests may be affected by the behavior it controls. Measures such as the Unfunded Mandates Reform Act make plain that Congress has set its face against agency actions that export costs to others arguably unable to bear them. And in the age of information, secret law, that the public must pay for to know, is unacceptable. Today, binding law cannot be regarded as ''reasonably available'' if it

cannot freely be found in or through an agency's electronic library. Perhaps this would require agencies to pay license fees for their use of such standards—and if so, they would then have proper bargaining incentives to keep those fees low.

Even should the Director disagree with this proposition—erroneously in our view—he should then make the level and distribution of costs for access to materials incorporated by reference a necessary element of the determination whether they are reasonably available. Since having the Internet eliminates any concern about having to print excessive materials, protecting copyright interests is the only possible rationale for permitting incorporation by reference of materials members of the public might be required to pay to see. The criterion for reasonable availability, as § 51.1(c)(1) recognizes, is whether incorporation by reference ''is intended to benefit both the Federal Government and the members of the class affected.'' Without doubt, the Government's interests are served by the work of voluntary standards organizations, yet the net benefits to the Federal Government of permitting incorporation by reference have been greatly reduced by today's possibilities for electronic publication. Benefit to the members of the class affected requires ready accessibility, whether by the presence of this material in agency electronic reading rooms or its accessibility on standards organization Web sites. Those benefits are reduced if they must be paid for—and high fees, particularly for local governments, small businesses and concerned citizens that may have a strong interest to know the governing law, will eliminate them. Any agency today proposing to export the costs of learning the law to those affected by it should, at the very least, be required to demonstrate its efforts to contain those costs (especially for small businesses, local governments, citizens, etc.) as a necessary element of demonstrating reasonable availability.

For your convenience in understanding the changes sought by this petition, we set out in the pages following 1 CFR part 51 as it might appear if they were effected. For convenience, added language is italicized, and deleted language struck out. It is important to understand, however, that we are not asking for adoption of this exact language. Indeed, the bracketed language in § 51.7(a)(3)(i(C)) is language we would prefer not appear in the regulation, but reflects the maximum recognition of voluntary standards organizations' authority to charge the public for access to incorporated materials we would regard as tolerable. What is essential is that you now reconsider the antiquated provisions of this regulation in light of the changes wrought by the Information Age and federal statutes and policies building on it.

As coordinator of this petition, Peter L. Strauss avers that each of the persons below has authorized him to include their name on this petition, with affiliations given for purposes of personal identification only.

Respectfully submitted,

Peter L. Strauss
Betts Professor of Law
Columbia Law School

William R. Andersen
Judson Falknor Professor of Law Emeritus
University of Washington School of Law

Dominique Custos
Judge John D. Wessel Distinguished Professor of Law
Loyola University New Orleans College of Law

Cynthia Farina
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Joshua Schwartz
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George Washington University Law School

Peter Shane
Davis and Davis Professor of Law
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Sidney A. Shapiro
University Chair in Law, Wake Forest University
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Lea B. Vaughn
Professor of Law
University of Washington School of Law

cc: Hon. Susan Collins, Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

Hon. Patrick D. Gallagher, Director
National Institute of Science and Technology

Hon. John P. Holdren, Director
Office of Science and Technology Policy

Hon. Joseph Lieberman, Chair
Committee on Homeland Security and Governmental Affairs
United States Senate

Ms. Maria Pallante
Register of Copyrights
Library of Congress

Hon. Cass Sunstein, Director
Office of Information and Regulatory Analysis

Hon. Stephen Van Roekel,
Federal Chief Information Officer

Hon. Paul Verkuil, Chair
Administrative Conference of the United States

[FR Doc. 2012–4399 Filed 2–24–12; 8:45 am]
BILLING CODE 1505–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0183; Directorate Identifier 2011–NM–131–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This proposed AD was prompted by reports from the manufacturer that center overhead stowage (COS) boxes could fall from their supports under forward load levels less than the 9G forward load requirements as defined by Federal Aviation Regulations. This proposed AD would require modifying COS boxes by installing new brackets, stiffeners, and hardware as needed. We are proposing this AD to prevent detachment of COS boxes at forward load levels less than 9G during an emergency landing, which would cause injury to passengers and/or crew and could impede subsequent rapid evacuation.

DATES: We must receive comments on this proposed AD by April 12, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–

Proposed Rules

Federal Register
Vol. 78, No. 191
Wednesday, October 2, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF THE FEDERAL REGISTER

1 CFR Part 51

[Docket Number: OFR–13–0001]

RIN 3095–AB78

Incorporation By Reference

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

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

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

DATES: Comments must be received on or before December 31, 2013.

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

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

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

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

SUPPLEMENTARY INFORMATION: The Office of the Federal Register (OFR or we) published a request for comments on a petition to revise our regulations at 1 CFR part 51.[1] The petition specifically requested that we amend our regulations to define ''reasonably available'' and to include several requirements related to the statutory obligation that material incorporated by reference (IBR) be reasonably available. Our original request for comments had a 30 day comment period. Since we received requests from several interested parties to extend the comment period, we extended the comment period until June 1, 2012.[2]

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

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

The petition further suggested that our regulations need to apply at the proposed rule stage of agency rulemaking projects and that the National Technology Transfer and Advancement Act of 1995 (NTTAA) and the Office of Management and Budget's (OMB) Circular A–119 distinguish between regulations that require use of a particular standard and those that ''serve to indicate that one of the ways in which a regulation can be met is through use of a particular standard favoring the use of standards as non-binding ways to meet compliance.'' [4] In addition, the petition argued that *Veeck* v. *S. Bldg. Code Cong. Int'l,* 293 F.3d 791 (5th Cir. 2002) casts doubt on the legality of charging for standards IBR'd. Finally, the petition stated that in the electronic age the benefits to the federal government are diminished by electronic publication as are the benefits to the members of the class affected if they have to pay high fees to access the standards. Thus, agencies should at least be required to demonstrate how they tried to contain those costs.

The petitioners proposed regulation text to enact their suggested revisions to part 51. The petitioners' regulation text would require agencies to demonstrate that material proposed to be IBR'd in the regulation text was available throughout the comment period: in the Federal Docket Management System (FDMS) in the docket for the proposal or interim rule; on the agency's Web site; or readable free of charge on the Web site of the voluntary standards organization that created it during the comment

[1] 77 FR 11414 (February 27, 2012).
[2] 77 FR 16761 (March 22, 2012).
[3] *http://www.archives.gov/federal-register/cfr/ibr-locations.html* last visited March 26, 2013.
[4] NARA–12–0002–0002.

period of a proposed rule or interim rule. The petition suggested revising 51.7—''What publications are eligible''—to limit IBR eligibility only to standards that are available online for free by adding a new (c)(3) that would ban any standard not available for free from being IBR'd. It also appeared to revise 51.7(a)(2) to include documents that would otherwise be considered guidance documents. And, it would revise 51.7(b) to limit our review of agency created materials to whether the material is available online. The petition would then revise 51.9 to distinguish between required standards and those that could be used to show compliance with a regulatory requirement. Finally, the petition would add a requirement that, in the electronic version of a regulation, any material IBR'd into that regulation would be hyperlinked.

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

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

As for the petition's limitation on agency-created material, the Freedom of Information Act (FOIA), at 5 U.S.C. 552(a), mandates approval by the Director of material proposed for IBR to safeguard the **Federal Register** system. Thus, OFR regulations contain a provision that material IBR'd must not detract from the legal and practical attributes of that system.[6] An implied presumption is that material developed and published by a Federal agency is inappropriate for IBR by that agency, except in limited circumstances. Otherwise, the **Federal Register** and CFR could become a mere index to material published elsewhere. This runs counter to the central publication system for Federal regulations envisioned by Congress when it enacted the FRA and the APA.[7]

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

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

Discussion of Comments

Authority of the Director To Issue Regulations Regarding IBR

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

We disagree with the commenter's analysis of these provisions. While the FRA does require publication of those documents, the FOIA does not require that documents IBR'd be published in the **Federal Register**. Section 552(a) states that persons cannot be adversely affected by documents that did not publish in the **Federal Register** but were required to be published unless the person has actual notice of the document. This section goes on to make an exception for documents IBR'd if they are reasonably available to the class of persons affected by the matter and approved by the Director. Under this section, once these criteria are met, material approved for IBR is ''deemed published in the **Federal Register**.'' Thus, persons affected by the regulation must comply with material IBR'd in the regulation even though the IBR'd document is not set out in the regulatory text. Because section 552(a) specifically states that the Director will approve agency requests for IBR and material IBR'd is not set out in regulatory text, the Director has the sole authority to issue regulations governing the IBR-approval request procedures. We have maintained this position since the IBR regulations were first issued in the 1960's.

The regulations on the IBR approval process were first issued by the Director in 1967 and found at 1 CFR part 20.[10] Even though this part was within the ACFR's CFR chapter, the preamble of the document states ''the Director of the Federal Register hereby establishes standards and procedures governing his approval of instances of incorporation

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

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

[7] 47 FR 34107 (August 6, 1982).

[8] 44 U.S.C. 1505 and 1510.

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

[10] 32 FR 7899 (June 1, 1967).

by reference.'' [11] And, while these regulations appear in the ACFR's CFR chapter, this final rule was issued and signed solely by the Director. These regulations were later republished, along with the entire text of Chapter I, by the ACFR in 1969; [12] however the ACFR stated that the republication contained no substantive changes to the regulations. In 1972, the ACFR proposed a major substantive revision of Chapter I.[13] In that proposed rule, the ACFR proposed removing the IBR regulations from Chapter I because ''part 20 . . . is a regulation of the Director of the Federal Register rather than the Administrative Committee.'' [14] In that same issue of the **Federal Register**, the Director issued a proposed rule proposing to establish a new Chapter II in Title 1 of the CFR that governed IBR approval procedures.[15] These proposals were not challenged on this issue, so the final rules removing regulations from the ACFR chapter and establishing a new chapter for the Director were published on November 4, 1972 at 23602 and 23614, respectively.

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

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

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

The commenters who were against defining reasonably available expressed concerns that current technology might make it easier to publish material online but did not change intellectual property rights or the substantial costs associated with developing standards. Several standards development organizations (SDOs), along with others, commented that ''reasonably available'' means that these materials are made available through a variety of means that may include appropriate compensation to the developer of the standard.

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

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

One comment stated that charging a fee for access to material IBR'd prevents the poor from knowing the law. It stated that standards should cost the same amount as the **Federal Register,** which it said is free. It went on to state that having the material available for inspection at the agency or OFR imposed insurmountable barriers on the poor who live far from the District of Columbia. It also argued that 29 U.S.C. 794 requires agencies to make electronic materials accessible to those with disabilities, so not providing IBR'd materials for free online was inconsistent with the Rehabilitation Act.[16] Finally, this comment suggested that if the material were not free, OFR would need to set a dollar figure for the materials that ensured they were available to everyone, including the poor.

The daily **Federal Register** is not universally free. Section 1506(5) of the FRA authorizes the ACFR to set subscription rates for the **Federal Register** and other publications. Currently, a complete yearly subscription, that includes indexes, is $929.00. While GPO does not charge for online access to the **Federal Register** or to other federal government publications, including the CFR, Congress authorized the Superintendent of Documents to charge for online access to GPO publications. 44 U.S.C. 4101 requires the Superintendent of Documents, under the direction of the Public Printer, to maintain an electronic directory of Federal information and provide a system of electronic access to Federal publications, including the Congressional Record and the **Federal Register,** distributed by the Government Printing Office.[17] Section 4102 allows the Superintendent of Documents to ''charge reasonable fee for use of the directory and the system of access provided under section 4101.'' Paragraph (b) of this section states that the fees charged must be set to recover ''the incremental cost of dissemination of the information'' with the exception of the depository libraries, for electronic access to federal electronic information, including the **Federal Register**.[18] While the Superintendent of Documents has chosen not to charge for electronic access to the daily **Federal Register,** this section does indicate that the Congress understands that there are costs to posting and archiving materials online and that recovering these costs is not contrary to other Federal laws, including the FRA and the APA.[19]

[11] *Id.*

[12] 34 FR 19106 at 19115, December 2, 1969.

[13] 37 FR 6804 (April 4, 1972).

[14] *Id.*

[15] 37 FR 6817 (April 4, 1972).

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

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

GOVERNMENT PRINTING OFFICE ELECTRONIC INFORMATION ACCESS ENHANCEMENT ACT OF 1993

Mr. FORD.

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

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

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

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

[18] See, 44 U.S.C. 4102(b).

[19] One commenter also contends that charging for access would violate the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.). Both of those statutes require that agencies mitigate the effect of regulations on small

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

One commenter also cited various Supreme Court and other lower Federal courts to further support their claim that IBR'd materials should be free online [22] by suggesting charging for access to these materials violates the APA. This commenter claimed that requiring interested parties to pay for materials an agency proposes to IBR in a notice of proposed rulemaking (NPRM) denies commenters the ability to fully participate in the rulemaking process because they can't learn the content of the standards without paying a fee. Further, this commenter claimed that because the APA allows interested parties to petition the government to amend regulations the IBR materials must remain free online while the regulation is effective. Thus, the APA requires that any material IBR'd must be available for free to be considered ''reasonably available.'' However, the cases that the commenter cited to support this claim, both civil and criminal, dealt with instances where the government proactively prevented access, in some instances by denying access to court hearings and, in another, by not disclosing scientific data relied on during a rulemaking, for example. IBR can be distinguished from these cases because the government is not prohibiting access to the materials. These materials may not be as easily accessible as the commenter would like, but they are described in the regulatory text in sufficient detail so that a member of the public can identify the standard IBR'd into the regulation. OFR regulations also require that agencies include publisher information and agency contact information so that anyone wishing to locate a standard has contact information for the both the standard's publisher and the agency IBRing the standard.

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

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

Our proposed revisions to the IBR approval regulations would maintain the current process of agencies maintaining a copy for public inspection and providing a copy of the standard to the OFR, while adding the requirement that agencies set out, in the preamble of the proposed and final rules, how they addressed access issues and made the material reasonably available. This prevents a digital divide by providing interested commenters the information to contact the agency directly to find out how to access the standard, whether it is online or accessible at an agency's facility close to the commenter.

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

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

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

Another commenter stated that ''affected persons'' in § 552(a) of the APA includes more persons than those who are the direct subject of the regulation. To support this claim, the commenter referenced 5 U.S.C. 702 (the APA's judicial review provision) [23] to allege that § 552(a)'s reasonably available provision is broader than § 702 and includes anyone who may have a stake in agency action. Thus, the class of persons affected extends beyond those who must comply with the regulation.

Two commenters suggested definitions. One of these commenters suggested that ''class of persons affected,'' ''means a business entity, organization, group, or individual who either: (i) Would be required to comply with the standard after, or if, it is IBR'd; (ii) would be benefitted from the standard's IBR'd into a federal regulation; (iii) needs to review and/or analyze the materials proposed to be IBR'd and/or being relied upon by a Federal agency in a regulatory proceeding, including (but not limited to) a proposed rulemaking, agency guidance, or similar agency

businesses but do not suggest that agencies can only issue regulations with no cost to small businesses. Similarly, the goal of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, is to prevent the Federal government from imposing a financial burden on state, local, and tribal governments. It does not suggest that agencies can only issue regulations without a cost of compliance.

[20] Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90).

[21] For example, 15 U.S.C. 2056b.

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

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

publication.'' [24] The other suggested a 2-prong definition so that during the NPRM stage of the rulemaking ''class of persons affected'' would include anyone who wants to comment on the proposal, but during the final rule stage of the rulemaking the definition would refer primarily to ''those who have a need to know the standards to which their conduct will be held.'' [25]

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

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

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

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

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

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

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

A common theme throughout the comments from industry groups and individuals was the idea that SDOs would be willing to negotiate with the government for a bulk discount for licensing. However, the SDO comments noted that the licensing fee would still be substantial and would necessarily result in increased budgets and increased strain on taxpayers. Another common theme throughout these comments was the idea that the SDOs derive significant, sometimes intangible, benefits from having their work IBR'd into a regulation and those benefits more than offset the cost of developing the standards themselves. Some of these benefits include increased name-recognition and trust, increased revenue from additional training opportunities, and an increase in the demand for standards. We don't have the knowledge or expertise to have an opinion on this issue but believe that agencies and SDOs will continue to work together on this issue.

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

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

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

One interest group felt that our question automatically assumed that the cost to an agency would be significant. It argued that SDOs would be able to make standards available like a digital lending library which would mitigate the costs. They offered an example of the American Petroleum Institute (API)

[24] See NARA–12–0002–0122.

[25] See NARA–12–0002–0009.

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

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

making certain standards freely available in response to the 2010 oil spill in the Gulf of Mexico (Gulf oil spill).[28]

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

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

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

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

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

Many SDOs are non-profit organizations, but not all are. Even if all SDOs were non-profit organizations, we don't have the authority to require that they give away assets, products, or services. Further, most SDOs develop standards in response to industry or member needs; they are not employed by the Federal government and very few, if any, draft standards at the direction of the Federal government, and even then, only in very limited and specific circumstances.

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

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

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

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

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

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

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

Several other commenters noted that the budgetary impact should be irrelevant. If an agency chooses to use a standard, then it has to meet all of its legal and financial responsibilities. Another commenter added that if an agency didn't want to IBR material, it could simply republish the material in the regulation in the **Federal Register.**

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

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

Several commenters suggested that OFR review at the proposed rule stage would create substantial delays in the already long agency informal rulemaking process. Some suggested that OFR does not have the authority to review proposed rules because we are not subject matter experts in the areas regulated by other federal agencies. One commenter stated that if OFR were to circumvent the development of rules by

[28] See NARA–12–0002–0092.

[29] NARA–12–0002–0123.

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

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

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

agencies with the statutory expertise and obligation, OFR would essentially drive the development of those rules which is not part of its mission. Another suggested that OFR review of NPRMs would also create a disincentive for agencies to use voluntary consensus standards. Other commenters suggested that our review of NPRMs was unnecessary because the SDOs use consensus development platforms that allow resolution of stakeholder concerns.

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

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

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

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

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

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

Other commenters were concerned that if we restricted agencies to this requirement, we would be put in the ''untenable position of supervising Federal standards policy.'' [34] They also noted that this could place OFR in the middle of a contentious fight over copyright limitations. We agree.[35] As discussed elsewhere, our authority is limited to procedural and publication issues. We do not have the authority to direct another agency on substantive rulemaking issues, including IBR. Our proposed regulatory changes would require agencies to describe how the IBR'd material is reasonably available, with free and online being but one option.

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

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

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

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

The ACUS Recommendations didn't suggest that we develop policy for the Federal government regarding IBR. As

[33] As noted elsewhere, the Federal Register Act gives sole approval authority to the Director of the Federal Register.

[34] NARA–12–0002–0123.

[35] We discuss copyright concerns in more detail in section 10.

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

the name indicates, these are actions or considerations that agencies are recommended to think about when determining what, if any, material would be needed for IBR. We see no problem with updating our DDH with some of the recommendations to give agencies another resource or reminder on IBR best practices and procedures.

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

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

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

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

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

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

To the extent that one commenter suggested that we completely abandon our current regulations we disagree. Our current regulations, while issued 30 years ago, provide the foundations for transparency by requiring detailed information for the standard, including the title, date, revision, and publisher, be set out in the regulatory text. Without this basic information set out in the regulatory text no one could be sure which standard was actually IBR'd in a regulation. It wouldn't matter what standards were available online if it weren't clear which standard was IBR'd. Simply updating regulations by some type of administrative notice and then adding an editorial note to the CFR would not provide a means of orderly codification as required by the FRA and 1 CFR chapter 1. Therefore, we decline to propose this suggestion as a means of updating IBR references. Instead, our NPRM adds a requirement that agencies provide an explanation in the preambles of both their proposed and final rules that discusses how the IBR materials were made reasonably available (which could have been a summary of the IBR'd material in the NPRM) along with complying with the current regulations set out in part 51. This added requirement will not greatly increase the burden on OFR resources while providing interested parties more information on how agencies are working to ensure the IBR'd materials are reasonably available.

10. Other Issues

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

a. Constitutional Issues

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

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

b. Copyright Issues

Several commenters claim that once a standard is IBR'd into a regulation it becomes law and loses its copyright protection.[40] Therefore, IBR'd standards must be available for free online. Other commenters, including the petitioners, don't go quite so far. Instead they claim that when agencies IBR copyrighted material into their regulations, the 5th Circuit's decision casts doubt on the legality of charging the public for access to that IBR'd material, see *Veeck* v. *Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002).[41]

In *Veeck,* the court held that *in some instances* model building codes developed by an organization adopted

[37] See NARA–12–0002–0118.

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

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

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

[41] *Veeck* v. *Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002).

by government entities into regulations may become law, and to the extent that the building code becomes law it enters the public domain. Federal law still provides exclusive ownership rights for copyright holders [42] and provides that Federal agencies can be held liable for copyright infringement.[43] Additionally, both the NTTAA and OMB Circular A–119 require that federal agencies ''observe and protect'' the rights of copyright holders when IBRing into law voluntary consensus standards.[44]

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

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

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

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

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

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

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

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

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

c. Outdated Standards IBR'd Into the CFR

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

In the past few years, we have reviewed a number of agency IBR approval requests that seek to retain, expand, or create IBRs using very old standards of questionable availability. In some cases, there may be no appropriate alternative or recent standards and agencies may have no choice but to rely on older material for IBR.

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

In January of 2011, President Obama issued Executive Order 13563, ''Improving Regulation and Regulatory Review,'' dated January 18, 2011,[47] which was closely followed by OMB Memorandum M–11–10, ''Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies.'' After these documents were issued, the legal staff of the OFR wrote a blog post discussing section 6 of Executive Order 13563. This section instructs agencies to conduct periodic, retrospective review and analysis of existing regulations with an eye toward determining which, if any, ''may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them . . . so as to make the agency's regulatory program more effective and less burdensome in achieving regulatory objectives.'' OMB Memorandum M–11–10 reiterates and expands on this, stating that ''[w]hile systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate. . .''. We suggested in our blog post that agencies use this regulatory review to pay special attention to any IBR'd materials cited in those regulations. Agencies should be mindful of the requirement that such materials be ''reasonably available to and useable by the class of persons affected by the publication'' [48] and that IBR approval is ''limited to the edition of the publication that is approved.'' [49] We further stated in this blog post that it is incumbent on agencies to periodically

[42] 17 U.S.C. 106.
[43] 28 U.S.C. 1498(b).
[44] OMB Circular A–119.
[45] See NARA–12–0002–0118.
[46] See NARA–12–002–0147.
[47] 76 FR 3821; January 21, 2011.
[48] See 1 CFR 51.7(a)(4).
[49] (see 1 CFR 51.1(f)).

review materials approved for IBR in their regulations and update them as appropriate. All IBR'd materials must be ''reasonably available'' to the regulated parties no matter their age or source. If this becomes a problem using the contact information included in the CFR, agencies are required to update the regulations with current, complete contact information or to arrange for—and publish—instructions for alternative means of availability if necessary.[50]

Another commenter listed agency regulations, some of which IBR standards others do not. This commenter then states that the average age of a standard IBR'd into the CFR is 24 years old. This, he claims, is ''in part . . . due to the antiquated practices of the **Federal Register**.'' [51] He continues by stating that at least part of the problem is that the OFR has not implemented an ACUS recommendation from 1979 that suggested OFR issue a rule establishing a procedure for Federal agencies to use a joint rule to update particular standards into their regulations.[52] According to the commenter, this procedure would allow any agency with a superseded standard to participate. The procedure would also allow for each agency to make its own decisions on how to use a particular standard.

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

The statute allows agencies to IBR standards with the approval of the Director. The OFR interprets this language to require that agencies make a request to the Director. There is no prohibition on agencies issuing a joint final rule to revise their regulations to update IBR'd materials within their own regulations, if they choose to work together as the Recommendation suggests.

d. Standards Should Be Used as Guidance Not Requirements

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

1. Lessening burdens on the OFR. Guidance is not required to be published in the **Federal Register** so we don't have to review them.

2. Making it easier to update standards. Agencies wouldn't have to go through a rulemaking each time the SDO issued a new version of a standard.

Another commenter recommended that OMB Circular A–119 should discuss the distinction between rules and ''regulatory guidance.'' The commenter wanted OMB to encourage agencies to withdraw standards IBR'd in the CFR in favor of IBRing these standards into agency directives and interpretations, which the commenter claims are ''equally authoritative, but changeable by notice.'' [55] The commenter suggests that by doing this the public develops an awareness of the standard while SDOs copyrights are protected.

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

[50] See *https://www.federalregister.gov/blog/2011/02/executive-order-13563-and-incorporation-by-reference*, last visited on March 15, 2013.

[51] See comment NARA–12–0002–0118.

[52] See ACUS Recommendation 78–4 (44 FR 1357, January 5, 1979).

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

[54] See NARA–12–0002–0149.

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

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

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

[58] See NARA–12–0002–0162.

agencies would need IBR approval for these non-regulatory documents.

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

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

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

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

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

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

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

e. Concerns Regarding the Misuse of the IBR Process

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

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

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

FOIA and the regulations in 1 CFR part 51 do not limit IBR approval to only technical standards. We don't have the resources to determine what types of standards are appropriate for an agency to IBR. We assume that agencies have fully considered the impact of any documents they wish to IBR, including whether they are in fact delegating their rulemaking authority to a third-party. We do not review material submitted for IBR to determine if it is technical in nature or is a performance-based requirement; we leave that determination to the agency subject matter experts. We review the IBR'd material to ensure it meets the requirements set out in part 51.

f. Indirect IBR'd Standards

At least 3 commenters raised the issue that some of the IBR'd standards also reference other standards in their text. These commenters stated that obtaining IBR'd material can cost several thousands of dollars a year. One

[59] See NARA–12–0002–0118.

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

commenter uses, as an example, the ASTM foundry standard, which the commenter said cross-references 35 other consensus standards.[61] These commenters mentioned that these costs may be cumulative, as companies or individuals must purchase multiple layers of IBR'd documents. In sum, these commenters seemed to suggest that OFR mandate that the primary IBR material and all tiered IBR material be placed online to greatly reduce the cost of access to IBR'd standards and expand the number of people who can view the IBR'd standards.

Our regulations have never contained any provision to allow for IBR of anything but the primary standards and, as a practical matter, we have no mechanism for approving anything but those primary standards. The OFR is a procedural agency and we do not have subject matter or policy jurisdiction over any agency or SDO. We must assume that agencies have fully considered the impact of any document, and, by extension, material IBR'd, they publish in the **Federal Register**. In many instances, agencies reference third-party standards in their NPRMs, so both the general public and the regulated public can review and comment on those standards before they are formally IBR'd in the CFR. We do not review material submitted for IBR to determine if it also has other materials IBR'd; we look only at the criteria set out in our regulations. Determining that an agency intends to require some type of compliance with documents referenced in third-party standards is outside our jurisdiction; similarly, we cannot determine whether or not the subject matter of a third-party standard is appropriate for any given agency.

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

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

[61] See NARA–12–0002–0147.

g. International Stance—Trade Imbalance, Export Administration Regulations, International Traffic in Arms Regulations

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

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

One commenter voiced a concern that placing export-controlled information in the public domain could happen if we adopted the changes suggested in the petition. This commenter then stated that this type of information is subject to the Export Administration Regulations (EAR) or controlled by the International Traffic in Arms Regulations (ITAR). The Department of Commerce and the Department of State have the authority over these types of controlled information. This commenter then recommends that any revisions to part 51 include the following language: ''Nothing herein requires or authorizes the release to the public either directly or through incorporation by reference of any information subject to the export control restrictions as promulgated by the U.S. Department of State or the U.S. Department of Commerce.'' [63] Because we are not proposing to require agencies to post all materials IBR'd online, we decline to propose adding the commenter's suggested language to part 51.

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

h. OFR Mission

One commenter suggested that OFR needs to focus on a new mission related to IBR and provided the following suggestions related to public domain and privately created documents. In regard to public domain documents, this commenter appeared to recommend that we encourage agencies to IBR agency guidance and other agency documents into guidance documents, preambles, and notice documents.[64] This commenter also seemed to suggest that these types of documents be IBR'd into the CFR; for example, an agency would IBR the preamble of a NPRM into the final rule. Thus, he would have us do away with the current prohibition found in 1 CFR 51.7(c)(1) that prohibits agencies from IBR'ing material that published in the **Federal Register**. He suggested that this would ensure that we maintain archival records of important preambles and agency guidance. However, this misses the point of IBR and of its requirements. Any document that published in the **Federal Register** is automatically part of the Federal record, with its own permanent citation,[65] so IBRing a preamble, for example, would only create a more-complicated citation system with no apparent benefit.

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

[63] See NARA–12–0002–0134.

[64] See NARA–12–002–0118. This commenter also suggests that the Director IBR the OFR's Document Drafting Handbook into part 51.

[65] See 44 U.S.C. 1507.

[66] 47 FR 34107 (August 6, 1982).

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

We are not the Government Printing Office, whose mission is to help agencies publish and post online agency documents. Our mission is to publish the documents Congress required to be published in the FRA.[67] As for the commenter's suggestion that the current part 51 is burdensome and prohibits agencies from effectively using the Internet, we disagree. The current part 51 provides basic procedural requirements that ensure agencies are referencing IBR'd materials so that it is clear which documents are IBR'd into the CFR. Our requirements also provide that agencies include direct contact information in the regulatory text so that the reader does not have to search for agency and publisher contact information elsewhere. Our regulations allow agencies the flexibility to work with SDOs and other publishers to post the material online or provide other means of access to the materials IBR'd into the CFR.

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

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

i. Miscellaneous Suggestions

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

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

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

One commenter expressed frustration with private corporations and government corruption. Others objected to the idea that regulations could become law without allowing citizens access. One commenter asserted that agencies should not publish regulations individually, that there needed to be a central repository that published regulations which would be available online. He also recommended an elaborate file-naming convention for all regulations and NPRMs, not just those containing IBR material.[71] One submitter provided a copy of OSHA's acceptance of Industrial Consensus Standards from the General Agreement on Tariffs and Trade (GATT), but without explaining its relevance to the petition.[72]

We also received recommendations to:

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

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

One commenter requested that OFR conduct an audit of all IBR'd standards. We decline. The last audit our office undertook lasted several years, with many more staff and many fewer IBR'd standards, and was done shortly after the Director became the sole person authorized to approve IBR requests. This commenter also requested permission to install a high speed copier in our office which non-OFR employees would use to copy and scan IBR'd material. The Antideficiency Act, 31 U.S.C. 1342, prevents us from accepting voluntary services and ethics rules prevent us from accepting gifts. Finally this commenter requested that NARA systematically archive all ANSI standards, even those not IBR'd, to ensure continuing access to these standards. Although we are an office within NARA, we are only involved in archiving records as a client—that is, we send our material for archiving according to our records schedule just like any other Federal agency. We don't

[67] See 44 U.S.C. 1505 and 1510.

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

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

[70] See, for example, NARA–12–0002–0063 and 0067.

[71] Since this describes fairly well the **Federal Register** system, as established in 1935, we agree with the comment regarding centralization of regulations. However, changing how documents are named is outside the scope of this petition.

[72] We do discuss international issues elsewhere in section 10, including the GATT.

[73] Online standards are, by definition, already online, so we see no need to also host them through our domains.

[74] 1 CFR 17.2(a).

[75] *Kennecott Utah Copper Corp.* v. *U.S. Dept. of Interior,* 88 F.3d 1191 (D.C. Cir. 1996).

have the authority to speak on behalf of NARA. In addition, ANSI is not a government agency so OFR has no authority to archive all of its standards.

Regulatory Analysis

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

Executive Order 12866

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

Regulatory Flexibility Act

This NPRM will not have a significant impact on small entities since it imposes requirements only on Federal agencies. Members of the public can access **Federal Register** publications for free through the Government Printing Office's Web site. Accordingly, the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

Federalism

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

Congressional Review

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

List of Subjects in 1 CFR Part 51

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

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

PART 51—INCORPORATION BY REFERENCE

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

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

■ 2. Revise § 51.3 to read as follows:

§ 51.3 When will the Director approve a publication?

(a)(1) The Director will informally approve the proposed incorporation by reference of a publication when the preamble of a proposed rule meets the requirements of this part (See § 51.5(a)).

(2) If the preamble of a proposed rule does not meet the requirements of this part, the Director will return the document to the agency (See 1 CFR 2.4).

(b) The Director will formally approve the incorporation by reference of a publication in a final rule when the following requirements are met:

(1) The publication is eligible for incorporation by reference (See § 51.7).

(2) The preamble meets the requirements of this part (See § 51.5(b)(2)).

(3) The language of incorporation meets the requirements of this part (See § 51.9).

(4) The publication is on file with the Office of the Federal Register.

(5) The Director has received a written request from the agency to approve the incorporation by reference of the publication.

(c) The Director will notify the agency of the approval or disapproval of an incorporation by reference in a final rule within 20 working days after the agency has met all the requirements for requesting approvals (See § 51.5).

■ 3. Revise § 51.5 to read as follows:

§ 51.5 How does an agency request approval?

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

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

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

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

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

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

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

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

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

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

§ 51.7 What publications are eligible?

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

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

(2) Either:

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

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

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

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

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

* * * * *

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

§ 51.9 What is the proper language of incorporation?

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

* * * * *

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

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

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

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

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

Dated: September 30, 2013.

Charles A. Barth,

Director, Office of the Federal Register.

[FR Doc. 2013–24217 Filed 9–30–13; 4:15 pm]

BILLING CODE 1505–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0363; Directorate Identifier 2013–NM–031–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for all Airbus Model A330–200, –300 and –200 Freighter series airplanes, and Model A340–200, –300, –500, and –600 series airplanes. The NPRM proposed to require, for certain airplanes, revising the airplane flight manual (AFM) to advise the flight crew of emergency procedures for addressing Angle of Attack (AOA) sensor blockage. The NPRM also proposed to mandate replacing the AOA sensor conic plates with AOA sensor flat plates, which is a terminating action for the AFM revision. The NPRM was prompted by a report that an airplane equipped with AOA sensors installed with conic plates recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. For certain airplanes, this action revises the NPRM by adding a modification of the installation of certain AOA sensor flat plates. We are proposing this AD to prevent reduced control of the airplane. Since these actions impose an additional burden over that proposed in the NPRM, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: We must receive comments on this proposed AD by November 18, 2013.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com; Internet http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the MCAI, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–1138; fax: 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0363; Directorate Identifier 2013–NM–031–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We proposed to amend 14 CFR part 39 with an earlier NPRM for the specified products, which was published in the **Federal Register** on May 3, 2013 (78 FR 25902). The earlier NPRM proposed to require actions intended to address the unsafe condition for the products listed above.

Actions Since Previous NPRM Was Issued

Since the NPRM (78 FR 25902, May 3, 2013) was issued, Airbus has issued revised service information, identified below, due to an error in the Accomplishment Instructions in the original service information for the installation. For airplanes on which the installation in the original service information was done, the revised service information adds a modification of that installation of the two AOA sensor flat plates on the right-hand side of the fuselage. The modification ensures that both plates are flush with the fuselage.

Revised Service Information

- Airbus Mandatory Service Bulletin A330–34–3293, Revision 01, including Appendix 01, dated June 12, 2013.
- Airbus Mandatory Service Bulletin A340–34–4273, Revision 01, including Appendix 01, dated June 12, 2013.
- Airbus Mandatory Service Bulletin A340–34–5093, Revision 01, including Appendix 01, dated June 12, 2013.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Comments

We gave the public the opportunity to comment on the NPRM (78 FR 25902, May 3, 2013). The following presents the comments received on the NPRM and the FAA's response to each comment.

Airbus asked that we replace the original issues of the service information specified in the earlier NPRM (Airbus Mandatory Service Bulletin A330–34–3293, dated January 31, 2013; and Airbus Mandatory Service Bulletins A340–34–4273 and A340–34–5093, both dated January 30, 2013). Airbus stated that revised service information was issued to correct an error in the Accomplishment Instructions of the original issues of the service information, as specified under

Rules and Regulations

Federal Register
Vol. 79, No. 216
Friday, November 7, 2014

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.

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 January 6, 2015.

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,* or 202–741–6030.

SUPPLEMENTARY INFORMATION: The Office of the Federal Register (OFR or we) published a request for comments on a petition to revise our regulations at 1 CFR part 51 [1] (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.[2]

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

We agreed that our regulations needed to be updated and published a proposed rule on October 2, 2013.[4] 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 Web site *www.federalregister.gov,* along with electronic Freedom of Information Act [5] (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).[6] The petitioners argued that with the advent of the Internet and online access our print-focused regulations are out of date and obsolete. The petition then stated that statutory authority and social development since our current regulations were first issued require that material IBR'd into the CFR be available online and free of charge.

The petition further suggested that our regulations need to apply at the proposed rule stage of agency rulemaking projects and that the National Technology Transfer and Advancement Act of 1995 (NTTAA) and the Office of Management and Budget's (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.'' [7] In addition, the petition argued that *Veeck* v. *S. Bldg. Code Cong. Int'l,* 293 F.3d 791 (5th Cir. 2002) casts doubt on the legality of charging for standards IBR'd. Finally, the petition stated that in the electronic age the benefits to the federal government are diminished by electronic publication as are the benefits to the members of the class affected if they have to pay high fees to access the standards. Thus, agencies should at least be required to demonstrate how they tried to contain those costs.

The petitioners proposed regulation text to enact their suggested revisions to part 51. The petitioners' regulation text would require agencies to demonstrate that material proposed to be IBR'd in the regulation text was available throughout the comment period: (1) In the Federal Docket Management System (FDMS) in the docket for the proposal or interim rule; (2) on the agency's Web site or; (3) readable free of charge on the Web site 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

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

[2] 77 FR 16761 (March 22, 2012).

[3] *http://www.archives.gov/federal-register/cfr/ibr-locations.html* last visited August 11, 2014.

[4] 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).

[5] Public Law 104–231 (1996).

[6] In fact, agencies were incorporating material by reference long before we were assigned the task of normalizing the process.

[7] 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**.[8] 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.[9] An implied presumption is that material developed and published by a Federal agency is inappropriate for IBR by that agency, except in limited circumstances. Otherwise, the **Federal Register** and CFR could become a mere index to material published elsewhere. This runs counter to the central publication system for Federal regulations envisioned by Congress when it enacted the FRA and the APA.[10]

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.[11] 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.[12] We received comments on each of those issues and addressed them in our NPRM.[13]

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

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

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

[10] 47 FR 34107 (August 6, 1982).

[11] 44 U.S.C. 1505 and 1510.

[12] 77 FR 11414 (February 27, 2012).

[13] 78 FR 60784 (October 2, 2013).

[14] *Veeck* v. *Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002).

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.[15] 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.[16] 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.'' [17] 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; [18] however the ACFR stated that the republication contained no substantive changes to the regulations. In 1972, the ACFR proposed a major substantive revision of Chapter I.[19] 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.'' [20] 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.[21] 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.'' [22] 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 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.'' [23]

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.[24] Another agreed with our proposal, stating that agency subject matter experts are suited to determine if a standard should be IBR'd.[25]

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 the minimal cost or effort required to travel to a public or government depository library.'' [26]

One commenter commented generally on the U.S. tradition to provide ''inexpensive and widespread access to the law.'' [27] 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.'' [28]

Two other commenters vehemently argued that in order to be reasonably

[15] OFR–2013–0001–0027.
[16] 32 FR 7899 (June 1, 1967).
[17] *Id.*
[18] 34 FR 19106 at 19115 (December 2, 1969).
[19] 37 FR 6804 (April 4, 1972).
[20] *Id.*
[21] 37 FR 6817 (April 4 1972).
[22] OFR–2013–0001–0029 at page 13.
[23] OFR–2013–0001–0029 at page 13.
[24] OFR–2013–0001–0030.
[25] OFR–2013–0001–0038.
[26] OFR–2013–001–0029 at page 5.
[27] OFR–2013–0001–0036, see also OFR–2013–0001–0029.
[28] OFR–2013–0001–0037 at page 2.

available, IBR'd standards must be accessible to all interested parties.[29] 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.[30] 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.'' [31]

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: (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.[32] This commenter went on to state that it is not enough that agencies are required to simply announce the location of IBR'd material.[33] The commenter added that our proposal won't work, because requiring a summary of the standards in the preamble does nothing for interested parties [34] ''and would simply represent another wasteful check-off process in the **Federal Register** publication process.'' [35]

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 the codification of agency documents of general applicability and legal affect.[36] As discussed throughout this rule, the FOIA gave the Director the authority to approve agency requests to IBR materials into their regulations.[37] 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.[38] 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.[39] 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 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.[40]

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.[41] 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

[29] OFR–2013–001–0024 and OFR–2013–001–0029.

[30] OFR–2013–001–0029.

[31] OFR–2013–001–0029 at page 3.

[32] OFR–2013–0001–0004.

[33] 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).

[34] 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.

[35] OFR–2013–0001–0004 at page 4.

[36] 44 U.S.C. 1510.

[37] 5 U.S.C. 552(a).

[38] OFR–2013–0001–0022 and OFR–2013–001–0007.

[39] OFR–2013–001–0007 at page 3.

[40] 47 FR 34108 (August 6, 1982).

[41] OFR–2013–001–0007 at page 6.

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.'' [42] Another commenter suggested that agencies post the text of the standards on their Web sites to ensure that text of the IBR'd standards is available while the rule is codified in the CFR.[43] As an alternative, the commenter states that materials could be posted on SDOs Web sites so long as agencies certify, each year, that IBR'd materials are still on the SDOs Web site.

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 review of the overall approval process.[44] 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.[45] 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.'' [46] Other commenters generally agreed with our NPRM, stating that reasonable availability and transparency did not automatically mean free access [47] and supporting the idea that agencies need flexibility to work with the SDOs to provide access to standards.[48]

A number of SDOs commented specifically on access and discussed how they make their standards available online.[49] One stated that access should not require the loss of copyright protection.[50] 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.[51] Another standards organization stated that its standards are available through third party vendors.[52] 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 Web site.[53] 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.[54] 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.[55]

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 Web sites 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.[56] 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 Web site, the only option, according to this commenter, is to travel to our offices in Washington, DC to review them.

We have no authority to require SDOs to upload and maintain their standards on their Web sites, 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

[42] OFR–2013–0001–0012 at page 5.
[43] OFR–2013–0001–0024.
[44] 44 FR 18630, as corrected at 44 FR 19181.
[45] OFR–2013–0001–0031.
[46] OFR–2013–0001–0029 at page 11.
[47] OFR–2013–0001–0033.
[48] OFR–2013–0001–0020 and OFR–2013–0001–0018.
[49] See, OFR–2013–001–0017, OFR–2013–001–0020, OFR–2013–001–0027 and OFR–2013–001–0028.
[50] OFR–2013–0001–0018.
[51] OFR–2013–001–0023.
[52] OFR–2013–001–0035.
[53] OFR–2013–001–0025.
[54] OFR–2013–0001–0028.
[55] *Id.*
[56] 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.

evaporate.'' [57] 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.'' [58] 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 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.[59] Some raised concerns that SDOs were charging monopoly prices for standards [60] or using copyright as a device to make money and fund SDO operations.[61] 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.[62] 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.[63] This commenter suggested that giving the public free access to the standards would not ''undermine incentives to participate in the voluntary standards development process.'' [64]

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 businesses in highly regulated areas.[65] 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.[66]

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.[67] 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.[68]

Another commenter stated generally that the cost of buying the standard is less than the cost of complying with the regulation.[69] 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.'' [70]

One commenter stated that free and online would compromise the ability of regulators to rely on voluntary consensus standards.[71] 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.

Another commenter supported purchasing standards at the final rule stage.[72] 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.[73] 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.[74] 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

[57] OFR–2013–0001–0004 at pages 4–5.

[58] *National Park and Conservation Ass'n* v. *Stanton,* 54 F.Supp2d 7, 18 (D.D.C. 1999).

[59] 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.

[60] OFR–2013–001–0012.

[61] OFR–2013–001–0019.

[62] 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.

[63] OFR–2013–001–0034.

[64] OFR–2013–001–0034.

[65] 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.

[66] OFR–2013–001–0021.

[67] OFR–2013–001–0029.

[68] *Id.*

[69] OFR–2013–001–0023.

[70] OFR–2013–001–0023.

[71] OFR–2013–001–0038.

[72] OFR–2013–001–0022.

[73] OFR–2013–001–0029.

[74] *Id.*

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 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.[75] 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, DC is not sufficient when the rule applies nationwide, because people have to travel to DC 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.

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 5th Amendment.[76]

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[77] 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.[78] At least one commenter stated that the law is in the public domain and therefore not ''amenable to copyright.''[79]

Several commenters appeared to argue that the *Veeck* case demonstrates that SDOs have survived and grown over the years despite not having copyright protection 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[80] 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.[81]

As we stated in our NPRM, recent developments in Federal law, including the *Veeck* decision[82] 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

[75] OFR–2013–0001–0029 and OFR–2013–0001–0036.

[76] 78 FR 60791 (October 2, 2013).

[77] OFR–2013–0001–0029.

[78] *Veeck* v. *Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002).

[79] OFR–2013–0001–0012.

[80] 15 U.S.C. 3701 et seq.

[81] OFR–2013–0001–0004.

[82] One commenter stated that OFR needs to show that the 5th 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.

text online. In a footnote, the commenter suggested that OFR require agencies to place the text of their ''regulatory obligations'' in their online dockets. This way the ''text of the legal obligation and not the standard as such'' is available online for free.[83]

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,[84] 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.[85] 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.[86] We initially established the annual review for only 3 years, but it soon became clear that a one-year review was neither practical nor efficient. We chose not extend the program at the end of 3 years but to return instead to the original process.[87]

As we stated above, the orderly codification requirements of the FRA and the ACFR prohibit us from amending another agency's regulations[88] 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,[89] 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.'' [90] 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 U.S. adopt that model of standards development. However, the OFR has no statutory authority to completely change the way standards are developed in the U.S. 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.[91]

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 unprincipled and unjustified.'' [92] 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.[93] 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**.[94] Nor

[83] OFR–2013–001–0024 footnote 23 at page 8.
[84] 44 U.S.C. 1510 and 1 CFR part 21.
[85] OFR–2013–001–0024.
[86] 44 FR 18630, as corrected at 44 FR 19181.
[87] 47 FR 34108.
[88] OFR–2013–001–0024.
[89] OFR–2013–001–0030.
[90] OFR–2013–001–0024 at page 2.
[91] *Id.* at page 2, OFR–2013–001–0004.
[92] *Id.* at page 3.
[93] *Id.* at page 8.
[94] ACUS Recommendation 76–2 (41 FR 29653, July 19, 1976) recommends that agencies publish their statements of general policy and interpretations of general applicability in the **Federal Register** citing 5 U.S.C. 522(a)(1)(D). This recommendation further recommends that when these documents are of continuing interest to the public they should be ''preserved'' in the CFR. 41 FR 29654. The recommendation also suggests that agencies preserve their statements of basis and purpose related to a rule by having them published in the CFR at least once in the CFR edition for the year rule is originally codified. Many agencies have

are they 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, 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.[95] 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 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 (DC 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.[96] 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 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[97] 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.''[98] 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.

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

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.

[95] OFR–2013–0001–0029.

[96] OFR–2013–0001–0024 and OFR–2013–0001–0029.

[97] Public Law 107–347 (2002).

[98] OFR–2013–0001–0029.

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 [99]). 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 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, DC headquarters.[100] 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.

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.[101] 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.[102] The commenter continued, stating that it's the Director who 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

[99] 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.

[100] OFR–2013–0001–0022.

[101] OFR–2013–0001–0026.

[102] OFR–2013–0001–0021.

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.'' [103] 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.[104]

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.

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.[105] 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.'' [106]

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.

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.[107] Members of the public can access **Federal Register** publications for free through the Government Printing Office's Web site. 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

[103] OFR–2013–001–0030.

[104] 77 FR 2257 (January 17, 2012).

[105] OFR–2013–0001–0024 and OFR–2013–001–0029.

[106] OFR–2013–0001–0029.

[107] 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.

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.

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 51—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.

* * * * *

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

§ 51.9 What is the proper language of incorporation?

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

* * * * *

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

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

Amy P. Bunk,

Acting Director, Office of the Federal Register.

[FR Doc. 2014–26445 Filed 11–6–14; 8:45 am]

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 843

RIN 3206–AM99

Federal Employees' Retirement System; Present Value Conversion Factors for Spouses of Deceased Separated Employees

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is adopting its proposed rule to revise the table of reduction factors for early commencing dates of survivor annuities for spouses of separated employees who die before the date on which they would be eligible for unreduced deferred annuities, and to revise the annuity factor for spouses of deceased employees who die in service when those spouses elect to receive the basic employee death benefit in 36 installments under the Federal Employees' Retirement System (FERS) Act of 1986. These rules are necessary to ensure that the tables conform to the economic and demographic assumptions adopted by the Board of

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, I caused the foregoing ADDENDUM TO BRIEF to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

Dated May 20, 2024

/s/ Creighton R. Magid

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On behalf of Amici Curiae American National Standards Institute and 16 *Standards Organizations and as Counsel for IEEE*