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INCORPORATION BY REFERENCE

OFR AND STANDARDS

- What does OFR require and why?
- What does OFR do with IBR material?
- What are options for, and alternatives to, IBR?

REQUIREMENTS FOR IBR MATERIAL

- ... 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. (FOIA, 5 U.S.C. §552(a)(1))
- The Director will formally approve the incorporation by reference of a publication in a final rule when ... [t]he publication is on file with the Office of the Federal Register. (1 CFR 51.3(b)(4))
- Under the Federal Records the published *Federal Register* document is a permanent Federal record; therefore, the material incorporated by reference, which is “deemed published in the Federal Register” is part of that permanent Federal record.

HANDLING OF IBR MATERIAL

- IBR material is classified as permanent Federal records so –
 - Stored on site/at Federal Records Center (paper) or on dedicated drive (electronic) while in custody of OFR
 - OFR does not provide copies of material or post material online in any format
 - Public can access records with oversight from OFR staff, by appointment
 - Appointments of limited duration
 - No access to photocopiers or scanners (paper)
 - No network access, open USB ports, or email/web clients (electronic)
 - Transferred to National Archives according to OFR records schedule

RESPONDING TO COPYRIGHT CONCERNS: REDUCING THE SCOPE OF THE IBR

CURRENT PRACTICE

- Centralized IBR section/paragraph is what is approved for IBR (based on required boilerplate language)
- Centralized IBR section/paragraph contains full description of IBR
- Full description of IBR matches the material on file at the OFR
- Single paragraph IBR permitted

POSSIBLE FUTURE PRACTICE

- Centralized IBR section/paragraph contains full description of IBR
- Full description of IBR matches the material on file at the OFR
- Regulatory section/paragraph, as listed in the centralized IBR section/paragraph, contains the individual provisions that are IBRed (OFR must change required boilerplate language)
- Single paragraph IBR no longer permitted

RESPONDING TO COPYRIGHT CONCERNS: ALTERNATIVES TO IBR

Use of an excerpt or portion of a standard with attribution and permission

- Agency reaches out to SDO and obtains permission to reproduce a small portion of the standard in a regulation

Agency prepares and maintains lists of recognized and acceptable standards by subject area.

- Standards not required but meet or comply with established regulations

Require compliance with a “nationally recognized standard” without necessarily specifying one.

- Typically used for established scientific process or when regulated parties are required to use something that complies with standard but aren't themselves required to comply

Codify the regulatory standard and then provide specific examples that meet the standard

- Could be only a single standard meeting the regulatory requirements

Provide alternate means of compliance

- Requires setting up a process by which regulated parties can request to use a specific standard as well as being able to evaluate any requested standards

Defer to private entity through established regulatory process

- Use private entities to manage compliance and definition of applicable standards. The private entities report to the creating agency and are subject to the rules and parameters set forth by the regulation that creates it.