



Incorporation by Reference Handbook

Chapter III

Office of the Federal Register
National Archives and Records Administration

III. IBR Material

A. What Is the Criteria for Approved IBR Material?⁵

The Director may approve an IBR request if the publication:

1. Is published data, criteria, standards, specifications, techniques, illustrations, or similar material;
2. Is reasonably available to and usable by the class of persons affected by the publication; and
3. Does not reduce the usefulness of the FR/CFR system;

The agency must show that the following assumptions regarding incorporating the material are correct:

1. Benefits the Federal Government and members of affected classes; and
2. Does not detract from the legal or practical attributes of the FR/CFR system.

The Director will approve agency-produced material for IBR only if the material:

1. Meets the requirements above and possesses other unique or highly unusual qualities; or
2. Is impossible or impractical to print in the FR/CFR system.

The Director will not approve an IBR of any of the following material:

- Material published previously in the *Federal Register* or the CFR; or
- Material published in the United States Code or as a Public Law.

Remember: Lack of approval or denial does not mean that you can reference the material and leave out the IBR approval language. If you want to require the material and the Director does not approve the IBR, you must include the material in full in your regulations.

B. What Format of IBR Material Do I Send for Approval?

Our regulations require that your agency makes material incorporated by reference available for examination by the public. We encourage your agency to establish a uniform means of storing and maintaining incorporated material within your agency, even if it is in a different format than you send to us.

You must provide IBR material in an accessible, read-only electronic format, typically as a PDF file. **We cannot accept:**

- A web link to material stored elsewhere or online in lieu of an actual file on our ftp server;
- Password-protected files or files that require ID verification;

⁵ [1 CFR part 51](#)

- Files that require proprietary software to open or use; or
- Material in hard copy.

If you have paper that you cannot convert to an electronic format, let us know as early in the process as possible so that we can discuss the situation.

To transmit electronic material, you must use our dedicated, secure ftp (nsftp) server. We will not accept electronic files via email or on disc. (See section VI.B.2 of this handbook for information on requesting an account for your agency.)

C. What Should My Agency Consider When Deciding to Use a Publication?

1. The factors specific to the rulemaking

Consider using a particular publication on a case-by-case basis. Agencies consider many factors, including how the use of the publication will affect the economy and existing laws. For more guidance, see [OMB Circular A-119](#) and [ACUS Recommendation 2011-5](#).

2. Which version of the publication to use

You determine which version of a publication to incorporate. We cannot advise you on which version to use. We know, from questions misdirected to our office, that the regulated public likely will have questions about why you chose a particular version. No matter which version of a publication you decide to incorporate, we recommend discussing why that particular version of a publication was chosen as part of the summary or general discussion of the IBR material in the preamble of the proposed (if applicable) and final rule.

3. How to balance procedural requirements and substantive statutory authority

1. When your agency proposes to incorporate material by reference, it must balance the following under the NTTAA:
 - a. Statutory obligations regarding reasonable availability of the material under FOIA;
 - b. U.S. copyright law;
 - c. U.S. international trade obligations; and
 - d. The ability to substantively regulate under its own authorizing statutes.
2. When your agency decides to incorporate material, the preamble of the rulemaking documents (proposed and final rules) must:
 - a. Discuss how the incorporated material is reasonably available to parties affected by the rulemaking;
 - b. Indicate where the incorporated material can be reviewed or obtained; and

- c. Summarize the individual publications.

4. How to draft a summary of an incorporated publication

The preamble requirements in [1 CFR part 51](#) ensure that readers can understand how the incorporated material fits into the regulation. The summary of each publication should give a non-expert enough information to decide if they need to read the publication itself, in addition to the preamble and regulatory text. If they decide they need to read the publication(s), that information (where to find and review the publication(s)) is also available in the preamble, with the assurance that the material is reasonably available. The summary must go beyond a restatement of the publication's title and summarize the content instead of merely describing to whom, how, or when the publication applies. A summary that only explains how this version of the publication differs from a previous version of the publication is not adequate.

5. How to draft the IBR section of the preamble

We will be able to review your request more quickly and efficiently if you draft the preamble so that this discussion (summary and availability) is under a specific heading.

Some headings that agencies are using include:

- Incorporation by reference
- Analysis under 1 CFR part 51
- NTTAA and 1 CFR part 51

You are not required to use a heading, but the summary and reasonably available analysis must be easily identifiable within your preamble.

D. What Is the “Reasonably Available” Requirement for IBR Material?

1. Material that is incorporated by reference must be “reasonably available” during the lifecycle of the relevant regulation and its regulatory program(s). This can pose a challenge for agencies, especially when the material is copyrighted. We interpret “reasonably available” in a flexible, case-by-case manner that takes specific situations into consideration. However, you must provide the basis for a finding of “reasonably available.”
2. When necessary, collaborate with the SDOs and other publishers of incorporated material to ensure that the public has reasonable access to the incorporated material (see [section III.E](#)).
3. Determine if and how the IBR material is available to both regulated and other interested and affected parties. If more than one publication meets your need, consider availability of the publications when determining which publication to incorporate.

E. How Can My Agency Make Incorporated Material Reasonably Available?

Some agencies have successfully worked with copyright owners to further the goals of both transparency and public-private collaboration. They have negotiated online, read-only access as an alternative to purchasing copies for publications being incorporated. One SDO voluntarily made its current standards freely available online. Other agencies have negotiated access for specific publications. ACUS recommends⁶ that agencies consider obtaining permission from the copyright holder to:

- Make the IBR material available in the agency's public electronic docket in a read-only format during the time that the rulemaking is under consideration; or
- Make the IBR material publicly available in read-only form on the copyright owner's website⁷.

Remember: Read-only access, on its own, may not meet the reasonably available requirement at the **final rule stage** of rulemaking since those who must comply with the regulations may need full access to an online version or their own copy of the material. Further, an inability of regulated parties to use the material (which may be different than simply reading or accessing it) throughout the life of the rulemaking could lead to enforcement issues. For example, your regulation may continue to be effective after its related docket has been archived following your records schedule. Therefore, you may not use evidence of the material in a Regulations.gov docket as the sole method to meet the reasonably available requirement.

F. Can My Agency Incorporate Web-based Material?

In some cases, the Director may approve web-based material; however:

1. Web-based material must meet all other IBR requirements.
2. When requesting approval for web-based material, you must clearly identify the material, including a version number (when applicable) and a date. You must also provide a read-only electronic copy for our records (see section III.B of this handbook).

The Director will not approve a third-party website (or page) or a website (or page) with dynamically-generated content. If you have questions about web-based material, contact us.

G. Can My Agency Incorporate Software Applications or Databases?

The Director will not approve software in application-form or a database. However, the Director may approve open-source code for applications or the data in a database as it exists on a specific date, if:

⁶ [ACUS Recommendation 2011-5](#).

⁷ An example is the [ANSI IBR Standards Portal](#).

1. The application code or data meets all other IBR requirements; and
2. You clearly identify the version and provide us a read-only electronic copy of the code or data.