

bottom line, but it cannot rationally be ascribed to the business model for sustaining fresh standards development.

Commercial advantage also inheres in standards generated by businesses that profit from compliance determinations. On the Comm2000 website where Underwriters Laboratories offers its standards for sale, its Standard for Manual Signaling Boxes for Fire Alarm Systems, 52 pages long in all, costs \$502 in hard-copy and \$402 for a use-restricted pdf version; \$998 (\$798) purchases a three year subscription that includes revisions, interpretations, etc. However, the text of this standard incorporates by reference five other UL standards, whose purchase would add five times these amounts (as each of these referenced standards is identically priced). And even this would not complete the picture; one of these five referenced standards (746C, Standard for Polymeric Materials—Use in Electrical Equipment Evaluations) itself references 27 unique others, whose individual prices are often hundreds of dollars higher—for a total cost well in excess of \$10,000. Standards in the libraries of professional engineering SDOs are more likely to sell in the \$50 range. Comments in the FDMS dockets tend to assert that all standards are sold at reasonable prices, without giving concrete details. Neither OFR nor the incorporating agency exercises control over the reasonableness of price at the moment of incorporation. And, once incorporation has occurred, any opportunity for price control by the OFR or the incorporating agency vanishes. Of course, if standards were treated merely as guidance, not law, market forces would operate as one control; and agencies could more freely remove a standard from its compliance guidance if persuaded its price had become unreasonable—either in general, or in its application to vulnerable small businesses.

This last point suggests the appropriateness of turning to what is arguably the most objectionable feature of the statute that is the subject of this workshop: it applies equally to standards treated as guidance identifying a satisfactory but not mandatory means of complying with an independently stated regulatory obligation, and to standards incorporated in a manner that makes them the law itself—mandatory obligations in and of themselves. In my judgment, these two situations are quite different, both in law and in their implications for agency efficiency and effective regulation.

SDO standards converted into law—a mandatory obligation—by the manner of their incorporation suffer all the possible deficits mentioned above.

They end the competition among American voluntary consensus standard-setters that is identified by many as a particular strength of our system in relation to others.

Correspondingly, they confer monopoly pricing power on the SDO whose standard has been converted from a voluntary consensus standard into an involuntary, mandatory obligation.

They significantly limit agency capacity to respond to new developments, since changing a mandatory standard set by rule will require fresh rulemaking, with its procedural costs and obstacles. That this occurs in practice may be seen in the simple fact that over half of incorporated standards are more than seventeen years old—some, indeed, no longer “available” in any form, reasonably or not.

The income streams resulting from law-forced purchases of mandatory but outdated standards may be convenient for the SDOs receiving them, but bear no relationship either to sound industrial practice (adherence to the contemporary standard should be preferable) or to the SDO business model for sup-

porting the continuing development of standards.

Law is not subject to copyright. The Copyright Office knows this; it has been hornbook American law from the inception. The arguments here are most eloquently made in the FDMS docket comments of the ABA Section of Administrative Law and Regulatory Practice, and would be tedious to repeat at length. Moreover, this proposition is wholly independent of the policy concerns SDOs raise to argue that it should not be the case. It simply is the case and the consequence is that if an agency has converted a voluntary consensus standard into a legal obligation, it cannot fail to inform the public what is its legal obligation. (SDOs should perhaps for this reason resist agencies’ conversion of voluntary standards into legal obligations; and the question whether the agency must compensate the SDO for doing so is an open one. Some argue that the benefit to the SDO from the imprimatur of incorporation will exceed any detriment to its bottom line—incorporations typically involves only part of the standard involved, and most businesses will wish to purchase the standards in their full, convenient form. Moreover, incorporated standards make up only a fraction of an SDO’s armamentarium.) When Minnesota enacted the Uniform Commercial Code, the ALI (its drafter) retained its copyright for purposes of selling the UCC as such, but Minnesota was obliged to make its new code public, and was not obliged to pay ALI when it did so.

When an agency proposes incorporation by reference that will create legal obligations, it is strongly arguable that it must at that time make the standard proposed to be incorporated available to commenters in the rulemaking process. Contemporary administrative law caselaw and Executive Order 12,866 each impose transparency standards more demanding than might appear from the simple text of 5 U.S.C. §553. One cannot comment on a standard whose content is unknown. As the Pipeline Safety Trust observed in its FDMS comments, “incorporating standards by reference, the way it is done now, has turned notice and comment rulemaking into a caricature of what it was intended to be.”

Since agency guidance of means by which one might successfully comply with independently stated regulatory obligations is not law, an agency’s identification of a standard as one such means leaves interested parties an option whether to refer to the standard or not. It creates no legal obligation to reveal the contents of the standard used as guidance, and the SDO’s copyright is secure. It is of course also possible that there will be other identifiable means of regulatory compliance—the reputed strength of the American SDO process—so that recognition of the SDO’s copyright in relation to the guidance given creates no monopoly power.

Use of standards as guidance also permits ready upgrading of the guidance as soon as standards are revised; the troubling problem of outdated standards enduring as legal obligations (because fresh rulemaking has not been undertaken) need not arise.

It is, then, regrettable that the statute you are discussing draws no distinction between incorporation by reference as mandatory obligation, and its use to provide guidance. The most useful result of your workshop, in my judgment, would be to push hard for the recognition of this distinction—by interpretation of your statutory obligations, if that seems possible, or by working for amendment. But I can find no fault with, and much reason to support, the obligation PHMSA has been placed under to assure free public access, both at the stage of proposal and at

the stage of adoption, to standards whose incorporation by reference is used to create legal obligations. The effect of that use of incorporation is to transfer lawmaking into private hands that operate in secret; and “delegations of public power to private hands [undermine] the capacity to govern.”

Respectfully submitted,

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Betts Professor of Law.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. PETRI) that the House suspend the rules and pass the bill, H.R. 2576.

The question was taken.

The SPEAKER pro tempore. In the opinion of the Chair, two-thirds being in the affirmative, the ayes have it.

Mr. PETRI. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX, further proceedings on this motion will be postponed.

RECESS

The SPEAKER pro tempore. Pursuant to clause 12(a) of rule I, the Chair declares the House in recess until approximately 6:30 p.m. today.

Accordingly (at 5 o’clock and 37 minutes p.m.), the House stood in recess.

□ 1830

AFTER RECESS

The recess having expired, the House was called to order by the Speaker pro tempore (Mr. HULTGREN) at 6 o’clock and 30 minutes p.m.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX, proceedings will resume on motions to suspend the rules previously postponed.

Votes will be taken in the following order:

H.R. 2576, by the yeas and nays;

H.R. 1848, by the yeas and nays;

H.R. 2611, by the yeas and nays.

The first electronic vote will be conducted as a 15-minute vote. Remaining electronic votes will be conducted as 5-minute votes.

AVAILABILITY OF PIPELINE SAFETY REGULATORY DOCUMENTS

The SPEAKER pro tempore. The unfinished business is the vote on the motion to suspend the rules and pass the bill (H.R. 2576) to amend title 49, United States Code, to modify requirements relating to the availability of pipeline safety regulatory documents, and for other purposes, on which the yeas and nays were ordered.

The Clerk read the title of the bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr.