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PHMSA Workshop in Incorporation by Reference

Gentlefolk:

I appreciate the opportunity to file these comments in support of your workshop. If I may very briefly summarize their gist, there are three important propositions I would impress on you:

- A sharp distinction should be drawn between Standards Development Organization (SDO) standards that are genuinely "technical" in character and those that, like the API standards on public hazard warnings, have a policy character that draws their force from normative conclusions, not technical expertise, and may serve to promote industrial interests.

- It is important to distinguish as well between SDOs that are professionally centered and broadly representative of the areas for which they develop standards, and those that, like API, are industrial associations or, like Underwriters Laboratories, businesses with an economic stake in the use of their standards beyond supporting standards development and publication – as by providing necessary testing or certification services.

- Finally, and perhaps most importantly, one should distinguish between standards that are converted into legal obligations by the fact of their incorporation, and standards that are simply identified in guidance or regulations as one means, but not the exclusive and necessary means, by which independently stated regulatory requirements can be met. While the statute your workshop is concerned with addresses guidance documents as well as legal obligations, the rationale for requiring free public access to the former is much weaker. Once agency action has made conformity to a standard mandatory, it is no longer a *voluntary* consensus standard. Law is not properly subject to copyright; but guidance is not law. Perhaps ways can be found to achieve the effect of guidance yet that will not require SDOs to surrender their understandable interest in finding financial support for their standards-development activities through the sale of copyright-protected standards serving that role, and thus remaining *voluntary* consensus standards..

The problem of incorporation by reference of standards development organization voluntary standards into federal regulatory materials has attracted significant attention in recent months. It was the subject of a major study by the Administrative Conference of the United States, resulting in recommendations[1] drawing on an extensive study made by Emily Bremer, a staff attorney.[2] Subsequently, on behalf of myself and others, I filed a petition for rulemaking on the subject with the Office of Federal Register. When OFR published this petition in the Federal Register with requests for comments, an FDMS docket of more than 160 items resulted.[3] Subsequently, OMB held a workshop with NIST and sought commentary on possible revision of its circular A-119; an FDMS docket of more than 60 items resulted.[4] A major new book thoroughly explores the practice of standard-setting, with emphasis on implications for international trade but attention as well to the ways in which American practice differs from that of European nations.[5]

From all these materials, a number of propositions fairly clearly emerge:

- The creation of voluntary consensus standards had its origin in considerations quite independent of governmental regulation, and they remain a necessary element of today's market economies, permitting market participants to deal confidently with one another. They are extremely valuable for this reason. This reality is dominant, and is independent of governmental use of standards for regulatory purposes. Indeed, it appears that the great bulk of voluntary consensus standards are *not* incorporated into law, as such, and for them no issue whatever of inhibition on copyright arises. To the extent SDO viability depends on the sale of these standards, it remains untroubled. The SDO commentary in the two FDMS dockets just mentioned consistently obscures this reality. It is written as if *every* standard SDOs produce is threatened by the proposition that those *that are incorporated as law* should be publicly available to those affected.

- By influencing the markets for affected goods, those who participate in the setting of standards, may gain significant competitive advantages over those who do not. This is particularly true for non-consensus standards and for industry-centered, corporate-membership standards-generating organizations like the American Petroleum Institute, whose membership is more than 500 oil and natural gas companies. Industrial standard-setters like API may be contrasted to, say, ASME – which has 125,000 members and *no* corporate members – or the many other SDOs having tens of thousands of individual, professional members. For the latter, the issue of possibly gaining a competitive advantage is rarely present. It is more likely that the interests of small businesses that will need to adhere to the standards adopted will be represented and heard. Gaining competitive advantage may also be the result for an individual business, such as Underwriters

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[1] http://www.acus.gov/acus-recommendations/incorporation-by-reference/

[2] http://www.acus.gov/wp-content/uploads/downloads/2011/10/Revised-Draft-IBR-Report-10-19-11.pdf

[3] FDMS Docket NARA 2012-0002.

[4] FDMS Docket OMB 2012-0003

[5] Tim Bűthe and Walter Mattli, The New Global Rulers: The Privatization of Regulation in the World Economy (Princeton 2011).

Laboratories, whose testing and certifying subsidiaries may profit from the conversion of UL's preferred standards into legal obligations.[6]

- European standards organizations are typically organized along hierarchical lines, both national (the British Standards Institute) and European (CEN, CENELEC), so that on any given matter, only one standard will emerge. Their processes for generating standards involve wide participation by all interested groups – even to the extent that the participation of socially important but resource-poor groups may be subsidized.[7] European technical standards are typically framed as independent of the regulations to which they relate, and are not in themselves legally binding. Since they only serve to define one assured method for establishing regulatory compliance, not an exclusive method, they merely create a presumption that one complying with them has complied with the substantive norms of the regulation.[8] Although showing that one has met the standard is usually the more efficient path to demonstrating regulatory compliance, citizens remain free to prove their compliance in a different way.

- The pattern of standard setting in the United States is "decentralized and characterized by extensive competition among many standard-setting bodies, operating with little government oversight and no public financial support. ... [It] comprises some 300 trade associations, 130 professional and scientific societies, 40 general membership organizations, and at least 150 consortia which together have set more than 50,000 standards. ... Spurred by competition, these organizations have developed numerous standards of the highest technical quality, but the fragmentation also ... results in conflicting standards and hence poor interoperability ...

  "The shift of rulemaking to the international level turns this fragmentation into a problem for the effectiveness of American interests in the global market place. Coordination and cooperation do not arise spontaneously among competing standard-setters, and ...[there is] a long tradition of keeping government at arms' length. ... In the absence of government control or any other central monitoring and coordinating agent, the American system for product standardization is characterized by extreme pluralism and contestation. ... ANSI remains a weak institution, even though it formally is the sole representative of U.S. interests in international standards organizations. ... Private U.S. standards organizations, which derive 50 to 80 percent of their income from the sale of their proprietary standards documents ... fear that a more centralized

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[6] One wonders if there is not a connection to the UL CEO's reported annual salary, which is in excess of $2,000,000,FDMS NARA-2012-0002-0082, p. 4.

[7] Id. at 155-57.

[8] See the remarks of a representative of the British Standards Institute at the OMB-NIST workshop on OMB A-119, May 15, 2012, repeated in its comments filed in the FDMS docket resulting from the associated OMB Federal Register notice, OMB-2012-0003-0063. Correspondingly, Bűthe and Mattli report, "Regulations that use international standards are rebuttably presumed to be consistent with the country's WTO obligations, whereas the use of a standard that differs from the pertinent international standard may be challenged [before the WTO] as an unnecessary non-tariff barrier to trade," with its legitimacy having then to be demonstrated. ... At 137.

system would rob them of these revenues and eclipse their power and autonomy. ... "[9] Rather than reach out to community interests, as European standards organizations do "as a prerequisite for genuine openness and due process. ... most American standards organizations contend that willingness to pay is the best measure of interest in the process and see no need for financial assistance,"[10] and in some contexts the sum that must be paid – even by federal agencies wishing to participate – is quite high.[11] Some American standard-setters, the American Petroleum Institute, for example, clearly present themselves as industry representatives. This is not too problematic for standards that serve only to govern technical issues important to relations among industrial participants needing a confident basis for their dealing. Yet acceptance of industry representatives as standard-setters is questionable in matters that are not technical in nature and also involve public interests, such as pipeline hazard warnings[12] or impositions on small businesses who are the necessary customers of the industry.[13]

- Competition benefits the users of standards only if adherence to them is not mandatory. One way in which a standards organization can defeat its competitors under the American system, and obtain a monopoly over standards (and their sale) is by having them incorporated by reference, not as *one* means for regulatory compliance (as in Europe) but as binding law, that *must* be complied with and can result in sanctions if departed from. With that monopoly, too, the standards organization acquires the power to charge a non-market price. The legislation that is the subject of this hearing resulted from the exercise of just that power. One of the comments in response to our petition to the Office of Federal Register for rulemaking reports that another standards association was charging two-and-a-half times as much for a standard that had been incorporated as law, as for its subsequent standard on the same matter, that had not yet been substituted for the first by amendatory rulemaking.[14] Over half the incorporated standards in the

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[9] Büthe and Mattli, 149-51. Within these pages, the authors give as an example six standards *each* of which purports to define the necessary qualities of copper-silicon rod stock.

[10] Id. at 157.

[11] Comments of Neil Eisner, Department of Transportation, at the OMB-NIST workshop, supra.

[12] See the comments of the Pipeline Safety Trust in the OFR FDMS docket, NARA-12-0002-0092; so also "A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe," referred to as having been developed by the Pipeline Research Council Int'l, "a community of the world's leading pipeline companies." If it seems that this is an example of a simply technical standard of little interest to the broader community, consider the self-interest of the industry concerned, and the possibility that this standard would be incorporated by reference for use in nuclear power plant licensing.

[13] Comments filed by organizations representing small businesses (truckers, airplane repair services, toy makers, etc.) in the OFR docket strongly suggest that when legally-binding standards are set and priced by an organization dominated by the larger factors of an industry, supplying goods that must be used, small businesses suffer; this difficulty is magnified when the standard-setting is not done consensually.

[14] Thus, Carl Malamud reports in the OFR FDMS docket, NARA-12-0002–106, that the American Herbal Products Association boasts of a standard that was made the "law of the land" by incorporation, 21 CFR 101.4(h) and charges $250 for a PDF of that incorporated standard (first edition, 1992). It is, formatted to prevent printing, transfer or sale. It is striking that the AHA charges only $99.99 for its up-to-date 2d edition of the same standard, without imposing the same restrictions on its use; the newer edition has not been incorporated by reference, and so must be priced

CFR predate 1995. Since SDOs uniformly update their standards on a relatively short cycle, most if not all of these earlier, still incorporated standards will presumptively have been replaced by the issuing SDO. Yet, if they are still law, they remain mandatory. Sale of outdated but still compulsory standards may improve the SDO's 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.[15] 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.

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to attract interest, not at a level relying upon mandatory need for the information it contains.

[15] http://www.comm-2000.com/productdetails.aspx?sendingPageType=BigBrowser&CatalogID=Standards&ProductID=UL38_8_S_20080704%28ULStandards2%29 (visited July 10, 2012). See also n. 6 above. API standards seem to show similar issues. Compare NARA-2012-0002-0092, discussing "A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe," developed by the Pipeline Research Council Int'l, "a community of the world's leading pipeline companies," and on sale for $995.

- 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 supporting the continuing development of standards.

- Law is not subject to copyright. The Copyright Office knows this;[16] 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,[17] 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.[18]

- 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

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[16] U.S. Copyright Office, Compendium II of Copyright Office Practices §206.01: "Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy."

[17] NARA-2012-0002–157.

[18] The argument to be found in some FDMS comments from legislative history of 5 U.S.C. 552(a) remarking that reliance could be placed on commercial publishing houses, such as CCH or West, to make the incorporated matter available to the public, is misplaced. CCH and West operate in a market, their prices controlled by competition. One cannot take from these passages any implication that Congress intended to confer monopoly pricing power on the generators of the incorporated standards.

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.[19] 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."[20]

- 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."[21]

Respectfully submitted,

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[19] On this, see the comments of the National Tank Truck Carriers Association, NARA-2012-0002-0145, and consider also PHMSA's use of "A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe," Pipeline Research Council Int'l, "a community of the world's leading pipeline companies." NARA-2012-0002-0092. What should be the judicial reaction on review if the Nuclear Regulatory Commission had proposed and then effected the incorporation by reference of this standard, available from the Council for $995, and – to protect the Council's copyright – had refused to reveal its contents to inquiring citizen groups fearing its insufficiency and so wishing to comment in its rulemaking?

[20] NARA-2012-0002-0092, p. 3.

[21] Paul Verkuil, **Outsourcing Sovereignty** (Cambridge U Press 2007).