

Speech to the Administrative Codes and Registers (ACR) Section of the National Association of Secretaries of State (NASS)

2014 Annual Winter Meeting

Thanks for the opportunity to speak today to the Administrative Codes and Registers Section. We often work in the same space; the standards and codes that are created by private sector standards bodies –what we call SDO’s – or standards developing organizations—are often found to be useful to the work of USG agencies, state agencies and local units of government. When that is the case, they are often incorporated by reference (an IBR), in statutes or regulations.

We talk about public-private partnerships a lot – it even has its own acronym – PPP. Sometimes PPP’s are aspirational goals, when difficult public policy problems need both government and industry working together to find practicable solutions. And with difficult policy problems the solution-seeking is a forced march that requires the input and involvement of many groups.

As one example, the movement of domestic manufacture into the global marketplace has made it more difficult to oversee the health and safety mandates of government agencies. When the lead-in-toys issue came up five years ago, we worked with the Consumer Products Safety Commission – and toy manufacturers and retailers and consumer organizations – and were able to put together a program of accredited third-party testing and inspections of factories in China that helped the CPSC successfully get on top of the problem. We are currently working with the FDA on testing and inspection of imported food products. And – in a new global initiative – working with manufacturers, retailers and consumer organizations – we are developing a new global standard – under the auspices of ISO – on worker safety. Factories should not collapse, fire doors should not be locked, and worker safety – or the lack thereof – should not be a way to lower costs and become a competitive advantage in global supply chains. And a global standard will be just that; it will work for global supply chains no matter where they may lead, Bangladesh, Cambodia, Guatemala or wherever.

All these cases are examples of PPP. It takes a consensus effort from both the public and private side to find practicable solutions. In the case of the lead in toys issue for example, China would not allow USG inspectors into Chinese factories. But China is a strong supporter of ISO and they would allow third-party inspections – accredited under ISO standards – of their factories. As well, in our discussions on toy safety, consumer organizations insisted that the standard used as the baseline for toy safety should be F963 – which was developed by an ANSI member, ASTM International. The consumer groups not only liked the standard, they wanted to make sure that all toys imported into the United States would have to meet the F963 standard. Congress

agreed and the F963 standard was specifically identified in the Consumer Product Safety Improvement Act, and so – full circle – was incorporated by reference by the Congress.

So, how does the U.S. standardization system work? And why is the concept of PPP so important to the success of that system?

In the U.S., our standardization system is led by the private sector, with hundreds of individual standards developing organizations, or SDOs, working in different technical areas and industry sectors. It is a consensus-based and market-driven process that is open to participation by all affected stakeholders.

This is why one of the great strengths of the U.S. approach to standards and conformance is the “public-private partnership”. To U.S. stakeholders in government and industry, the term PPP describes the long-standing, effective, and cooperative working relationship between the public and private sectors.

Our national standardization system and its public-private partnership are reflected in the *National Technology Transfer and Advancement Act of 1995* (NTTAA), and the associated OMB Circular A-119. The NTTAA directs agencies to consider the use of private-sector-developed standards in lieu of government-unique standards whenever possible.

For a standard to be incorporated by reference or “IBR-ed,” the agency must determine that the standard is “reasonably available” to the class of persons affected by the anticipated regulation. In this case, “reasonably available” simply means that the standard is accessible to any potential user. It does not require that the standard be available without a fee.

This issue of how to define “reasonable availability” has been under scrutiny recently. Professor Peter Strauss of Columbia University last year petitioned NARA, the National Archives and Records Administration, to address how the “*Federal Register*” should require agencies to ensure public access to IBR standards in regulations.

After soliciting and then publishing comments on this petition in October 2013, NARA’s Office of the Federal Register, OFR, concluded that “reasonably available” continues to mean just that, and it does not mean “for free.” OFR relied in large part on a comprehensive analysis of the issue conducted by ACUS, the Administrative Conference of the United States, in December 2011.

ANSI and the broader standardization community support that conclusion. The funding for standards has to come from somewhere. Increasing participation fees to offset lost sales revenue would disenfranchise consumers, small businesses, and local governments. Those with the money would have all the influence.

As well, standards must be maintained and the publication kept up to date. This requires ongoing development, revision maintenance, and administrative costs. The government and taxpayers benefit from the current system by not paying for these recurring development and administrative costs.

If things change and standards must be made freely available, the ramifications will be widespread. If SDOs cannot afford to stay in business, safety standards would not be updated, with the potential for dangerous consequences. And standards for new technologies would go unwritten, affecting U.S. competitiveness and innovation. The government would have to step up, take over what is now a market-driven system, and somehow find the money, time, and expertise – for every single technology and industry area.

And finally, decisions made about our national standardization system and our priorities for action reach far beyond our borders, especially when it comes to the continued success of our products, services, and workforce on the global stage. Any decisions or actions that would fundamentally undermine this system will cause the U.S. to lose this competitive advantage to other countries that would be quick to seize the opportunity. Additionally, significant changes to the system would compromise the role that standards play in protecting health, safety, and the environment.

With that said, the standardization community recognizes the issue, and has taken action. Many SDOs make standards available for free or at a discount to consumers, policymakers, and small businesses. And some SDOs make certain standards and codes available online on a read-only basis.

For its part, ANSI has launched an online IBR Portal for the benefit of the user community, including consumers. The portal provides a voluntary, centralized infrastructure that can help the hundreds of SDOs in this country make their IBR-ed standards available in read-only format, should they wish to participate.

We launched the portal in October 2013 with 15 participating SDOs, both domestic and international. Seven of these SDOs have agreed to have their documents hosted directly by

ANSI, including ISO and IEC. The remaining eight SDOs have already developed their own web-viewing mechanisms, and have agreed to allow ANSI to link to those websites.

IBR standards that are hosted on the ANSI portal are available at no cost as read-only files, with no rights to download or reproduce. And while we say “read-only,” we are actually talking about multiple dimensions of protection, including:

- Print restrictions – Blocking users from being able to print the documents
- Text copy prevention – No content will be able to be copied
- Screenshot prevention – Screen prints will be disabled
- Machine limits – Documents cannot be copied to a different computer or network
- And a watermark, containing text provided by each SDO, will be added to the documents.

Users are also required to accept an End-User License Agreement of terms and conditions.

It’s important to note that not all IBR-ed standards are included in the portal. Some SDOs have chosen to make their standards available exclusively on their own sites. Others have decided not to make their IBR-ed standards available on a read-only basis, but they provide reasonable access through some other means.

We hope that once the portal is launched, and SDOs see its value and effectiveness, more and more will sign on to be included – even those outside the community of ANSI-accredited standards developers.

On January 14, ANSI’s General Counsel Patty Griffin testified before the subcommittee with jurisdiction over copyright of the House Judiciary Committee on the subject of IBR standards. The House Judiciary Committee is planning to hold a series of oversight hearings on the subject of the Copyright Act, starting with the first section – scope of copyright – and going through each part of the Act in order, section by section. In the end, changes may be suggested to the Act and legislation may be drafted to respond to those suggested changes. We will certainly be following these developments very closely.

The standardization community believes – as OMB, NARA, OFR, and ACUS believe – that the development of complex, highly specialized, technical standards requires a massive investment of time, labor, expertise, and money. Federal agencies continue to incorporate privately developed standards, eliminating costs of developing government-unique standards.

Standards development in this country is one of the earliest and most successful examples of the public-private partnership, which has benefitted our nation tremendously on many fronts – competitiveness, public safety, successfully commercializing American innovations globally, and much more.

As you see, the incorporation by reference issue is an important part of the concept of public-private partnerships, I am very pleased that the ACR has felt that the issue deserved your attention, and I would be pleased to answer any questions.