

Legal Implications of Voluntary Consensus Standards

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NTTAA & OMB A-119

- U.S. Congress enacted National Technology Transfer and Advancement Act of 1995 (NTTAA) - Pub. L. 104-113 – encourages formal adoption of national consensus standards by American regulatory agencies (e.g., OSHA, MSHA, EPA).
- Section 12(d) of the Act is primarily limited to “technical standards” but was implemented by OMB Circular A-119, with expanded scope.

OMB Circular A-119

- OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities* (Feb. 10, 1998):
 - If an applicable voluntary consensus standard exists in an area where the agency seeks to regulate, the agency should use this as the basis for a proposed rule rather than starting from scratch or adopting a differing approach
- Circular requires that “[a]ll federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical.”

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OMB Circular A-119

- "Voluntary consensus standards bodies" are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures.
- A voluntary consensus standards body is defined by the following attributes:
 - (i) Openness.
 - (ii) Balance of interest.
 - (iii) Due process.
 - (vi) An appeals process.

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What Is “Consensus”?

- OMB A-119 defines as:
 - General agreement, but not necessarily unanimity
 - Includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and
 - The consensus body members are given an opportunity to change their votes after reviewing the comments

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Agency Involvement

- A-119 requires agencies to consult “with voluntary consensus standards bodies, both domestic and international, and [to] participate with such bodies in the development of voluntary standards when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budget resources.”
- Agency support may include 1) direct financial support; 2) administrative support; 3) technical support; 4) joint planning with voluntary consensus standards bodies to promote the identification and development of needed standards; and 5) participation of agency personnel.

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Consensus Standard Advantages

- National consensus standards have fewer procedural burdens than traditional governmental rulemaking model;
- The consensus method provides for a balance between competing interests;
- The voluntary nature of consensus standards enables users to adapt provisions to meet unusual circumstances; and
- Standards can be developed at a lower cost to the government and general public.

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Governmental Use of VCS

- Once adopted by agency through formal rulemaking (incorporation by reference), VCS have force of law. However, text of VCS does NOT appear in the Code of Federal Regulations.
 - Most consensus standards that are incorporated are outdated ... but only the “adopted” version is enforceable and this may offer defense to citations
 - Downside is difficulty in locating the actual adopted version ... may not be available at local MSHA/OSHA offices or libraries

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Governmental Use of VCS

- Many MSHA and OSHA standards were derived from ANSI standards of 1960s.
 - Both OSHA and MSHA currently incorporate by reference scores of VCS ... federal govt overall has over 9,500 VCS incorporated by reference!
 - These standards are not published in the CFR and cannot be posted on agency websites because of copyright ... but copies are to be available at agency area/field offices

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Governmental Use of VCS

- OSH Act defines "National consensus" standards as those emanating from a nationally recognized standard producing organization. 29 U.S.C. § 652(9).
- When adopting a consensus standard, both MSHA and OSHA must incorporate by reference a specific version (year and number) of a VCS through notice-and-comment rulemaking.
- OSHA has engaged in updates through direct final rules –
 - Agency cannot simply adopt consensus standards, but must first examine whether they meet the statutory criteria for any binding rules under Mine Act or OSH Act – e.g., reduction of a “significant risk” – before incorporation.

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Governmental Use of VCS

- OSHA's "General Duty Clause" (Section 5(a)(1) of OSH Act) requires employers to protect against known hazards – agency may use ANSI, ASTM, NFPA and other VCS to show industry knowledge in such enforcement actions.
 - OSHA FOM also states that involvement of employer or its trade association in VCS committees imputes knowledge to employer
- OSHA and MSHA both use "backdoor" methods to interpret subjective standards (or where consensus standards – ANSI, ASTM, NFPA etc. -- are referenced in manufacturer's manuals)

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General Duty Clause – OSH Act

SEC. 5. Duties

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees ...

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GDC: Employer Recognition

- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition.
- Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the OSHA inspection.
- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements, prior accidents/incidents, near misses, injury and illness reports, or workers' compensation data.
- Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard.
- An employer's own corrective actions may serve as the basis for establishing employer recognition if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

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GDC: Industry Recognition

- Industry recognition of a hazard can be established in several ways:
 - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
 - Manufacturers' warnings on equipment or in literature;
 - Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;
 - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
 - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred;
 - If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National FireProtection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition.

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Legal Implications of VCS

- Consensus standards often used by American courts to establish industry norms for “best practices” or to define standard of care legally.
- When violated, may support awards for personal injuries.
 - E.g., *Hansen v. Abrasive Engineering & Manufacturing, Inc.*, 831 P.2d 693 (Ct. App. Ore. 1992) (recognizing ANSI standard to set manufacturer’s duty of care)

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Legal Implications of VCS

- Standards development organizations are sometimes named as defendants in tort actions under theories including:
 - Negligent undertaking theory (Good Samaritan Doctrine)
 - Conspiracy/anti-trust
 - Fraud
 - Negligent misrepresentation
 - Product defamation

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Legal Implications of VCS

- Section 324A of the Restatement of Torts: One [SDO] who undertakes gratuitously or for consideration to render services to another [a seller] which he should recognize as necessary for the protection of a third person [complainant] is subject to liability to the third person [complainant] for physical harm resulting from his [SDO's] failure to exercise reasonable care to protect his undertaking, if . . .
 - (a) his [SDO] failure to exercise reasonable care increases the risk of harm, or
 - (b) he [SDO] has undertaken to perform a duty owed by the other [seller] to a third person [complainant], or
 - (c) the harm is suffered because of reliance of the other [seller] or the third person [complainant] upon the undertaking [of the SDO].

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Which Standards Are Recognized?

OSHA and MSHA have adopted standards by standards development organizations including:

- American National Standards Institute (“ANSI”)
- American Society of Mechanical Engineers International (“ASME”)
- American Society of Testing and Materials (“ASTM”)
- National Bureau of Standards/NIST
- National Electrical Code, or “NEC”
- National Fire Protection Association International (“NFPA”)
- Society of Automotive Engineers (“SAE”)

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What About ACGIH?

- American Conference of Governmental Industrial Hygienists (“ACGIH”) is not “consensus” organization under definition in NTTAA or OMB A-119 because it lacks transparent process and opportunity for public participation
- Currently, OSHA and MSHA both adopt some ACGIH TLVs in air contaminant standards and/or through hazard communication standards .
 - Current “TLV” books have disclaimer that values are not intended to be used for regulatory enforcement purposes.

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Potential Problems of VCS

- Advisory provisions (“should”) of voluntary consensus standards may be incorporated as mandatory provisions (“shall”) of government regulations.
- Because standards incorporate specific versions, these eventually become outdated and require additional rulemaking by adopting agency to continue reflecting “best practices” in safety, health and environmental protection.
- Although process is open to public, many (esp. small businesses) are unaware of activities and are “unrepresented.”
 - Secretariats for many standards under development include ASSE, AIHA, and specialized trade organizations
 - Potential for domination by those with special interests – public can comment but committee reviews comments and votes on adoption.

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IBR Legal Issues

- *Veeck v. Southern Building Code Congress Int'l* (5th Cir 2002) – addressed IBR and copyright issues ... claimed “the law” cannot be copyrighted.
- Agencies are obligated to respect copyright.
- SDOs rely on publication revenue to offset standards development costs
 - Some SDOs now making “read only” copies of IBR standards available on the internet.
 - Agencies looking at how to provide meaningful access to technical standards.

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Incorporation by Reference (IBR) & ACUS

- Administrative Conference of the United States (ACUS) advises federal govt on rulemaking and administrative law issues
- Under APA, 5 USC 552, published regulations must be codified in CFR and material in Federal Register must be “reasonably available” to affected persons.
 - Term is not defined in statute or OFR regulations
- Office of Federal Register approves IBR

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OFR Petition for Rulemaking on IBR

- Petition for Rulemaking filed by ACUS member with OFR to clarify that any VCS that are IBR must be available for free.
- OFR issued final rule 11/7/2014, emphasizing that promulgating agencies have the primary obligation to ensure that incorporated materials are reasonably available to the public.
- OFR urges agencies to work with copyright holders when necessary to achieve this goal.

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OFR Final Rule

- Going forward, agencies will be required to include in the preamble of their rulemaking documents:
 - (1) a discussion of how they have worked to make the incorporated materials reasonable available to interested parties; and
 - (2) a summary of the incorporated material.
- OFR declined to take an approach that would encourage agencies to address the public access issue by confining incorporations by reference to non-binding guidance documents.
- The final rule also retains the requirement that material incorporated by reference be technical in nature.

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Congressional Interest in IBR

- Congress included Sec. 24 in Pipeline Safety Act of 2011 prohibiting PHMSA from IBR any documents unless they are available to public free of charge on the internet.
- Other congressional committees looking at copyright issues ... to be continued!

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Examples of Key ANSI Standards

- **ANSI A10.40** – Ergonomics/Construction
- **ANSI A10.8**: Safety Requirements for Scaffolding
- **ANSI A10.12**: Safety Requirements for Excavation
- **ANSI A10.14**: Ladder Systems
- **ANSI A10.15**: Safety Requirements for Dredging
- **ANSI A10.16**: Safety Requirements for Tunnels, Shafts & Caissons
- **ANSI A10.17**: Safe Operating Practices for Hot Mix Asphalt Construction
- **ANSI A10.18**: Safety Requirements for Temporary Roof & Floor Holes, Wall Openings, Stairways & Other Unprotected Edges in Construction & Demolition Operations
- **ANSI A10.32**: Fall Protection Systems
- **ANSI A10.33**: Safety & Health Program Requirements for Multi-Employer Projects
- **ANSI A10.39**: Construction Safety & Health Audit Program
- **ANSI Z10** – Safety and Health Management Programs
- **ANSI Z15** – Motor Vehicle Fleet Safety
- **ANSI Z117** – Confined Spaces (2003 version)
- **ANSI Z244** Lockout/Tagout
- **ANSI Z359** Fall Protection
- **ANSI Z400.1** – MSDS preparation guidelines
- **ANSI Z490** Safety, Health and Environmental Training

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Key ASTM/NFPA Standards

ASTM E34 Committee (Occupational S&H Standards)

- E1132 offers “best practices” for general industry crystalline silica
 - New construction/silica standard under development
 - Ergonomics standard
 - E34 developing template to establish occupational exposure guidelines (OEGs) in future VCS
- NOTE: D22 Committee addresses sampling/analysis for workplace environments

NFPA

- NFPA 70E – electrical standards (parts recently adopted by OSHA and addresses arc flash, PPE issues etc.)
- NFPA 101 – Life Safety Code

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Conclusion

- As a matter of policy, the federal safety and health agencies take advantage of transparent VCS and use them prudently.
- Government standard developers must be mindful of the fact that consensus standards were not written to address every foreseeable circumstance and that they were not created to have the binding force of law.
- Agencies should follow the definitions set forth in OMB A-119 when considering consensus standard utilization in guidance or regulatory action.

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Conclusion

- Employers must be knowledgeable about VCS affecting their industry sector because of the potential legal ramifications of “willful ignorance.”
- Modern legal trend is toward greater admissibility of VCS in tort cases on the issue of negligence. 58 ALR3d at 154-155.
 - This reflects the view that consensus standards carry the approval of a significant segment of an industry, and are sufficiently trustworthy to justify an exemption to the hearsay rule.
- Because OSHA/MSHA standards may be outdated, use of VCS can help company safety programs move BEYOND compliance and better protect workers.

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Conclusion

- Employers who wish to move “beyond compliance” must have full knowledge of VCS that are incorporated into mandatory standards and also new standards under development
- Employers should consider participating in ANSI, ASTM, NFPA committees involving their industry sectors so they can provide meaningful input into standards development process.

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Conclusion

Links for more information:

ASSE: www.asse.org

ANSI: www.ansi.org

ASTM: www.astm.org

NFPA: www.nfpa.org

ACGIH: www.acgih.org

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Questions???

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