



National Institute of BUILDING SCIENCES

1090 Vermont Avenue, NW, Suite 700
Washington, DC 20005-4950
(202) 289-7800 phone
(202) 289-1092 fax
www.nibs.org

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Dear ABA Delegates:

As you may already know, the American Bar Association (ABA) will be considering a resolution at its upcoming meeting in August to advocate the free availability of copyrighted codes and standards incorporated by reference in legislation and regulation. As you consider your position on this important and wide-reaching issue, the National Institute of Building Sciences, which was established by the U.S. Congress to work with both the public and private sectors to advance building science and the design, construction and operations of buildings to meet national goals of health, safety and welfare (P.L. 93-383; 12 USC 1701j-2), offers the following comments for your consideration.

The advancement of building science and the improvement of our nation's built environment both rely on a combination of government regulations along with codes, standards and guidance developed in the private sector (with input from government).

As recognized in long-standing precedent set by the National Technology Transfer and Advancement Act (NTTAA, P.L. 104-113), Office of Management and Budget (OMB) Circular A-119 and the recent rules established by the Office of the Federal Register (OFR), the development of codes and standards in the United States is an inherently private sector-driven activity. The organizations that administer the development of codes and standards, collectively known as standards developing organizations (SDOs), have implemented requirements to assure that the resultant documents represent the public interest. These requirements include achievement of consensus, openness and due process. Following this rigorous process often requires an SDO to incur considerable up-front expense that is typically only recouped through the sales of the resultant document.

Should the ABA's suggested resolution be adopted and the ensuing advocacy effort successful, these private sector-developed standards would be subject to new requirements due to their incorporation by reference in legislation and regulation, and the ability for SDOs to recoup development costs would change considerably. The result would be that private sector organizations may no longer be able to invest in the development process, leaving existing standards to remain stagnant (and thus inhibiting innovation) and shifting the responsibility of developing future standards to the government (with government bearing the expense and abandoning the long history of private sector standards development in the United States).

In the U.S. construction industry alone, there are hundreds of codes and standards that impact everything from seismic requirements and wind loads to water use and life safety. The SDOs that develop these standards have thousands of members, employees and volunteers, many of whom are subject matter experts with decades of experience in their related content, that

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participate in the process to incorporate best practices and lessons learned to improve the standards. Each industry, from aeronautics and agricultural to electronics and telecommunications, has a similar structure and industry participation to address their specific needs. Such standards improve safety, drive innovation and improve commerce, both domestically and around the world.

Today, the cost of standards development in the United States is born by those who are ultimately impacted by the standards (whether through participation in the development process or by purchase of the resultant document). Some SDOs have elected to provide their standards for free for various reasons (to encourage development of a specific market, to spur uptake within an industry or because of a perceived obligation to a particular community). However, that decision is up to the individual organization due to its ownership of the intellectual property. Many SDOs are introducing new revenue models where standards are available in electronic format from the cloud on any connected device. By making such information free online, the ABA resolution would hamper cost recovery through such mechanisms. The development of codes and standards comes at a considerable expense and that expense must be covered by some means.

ABA's proposed resolution attempts to mitigate any copyright concerns through encouraging government agencies to negotiate licenses with SDOs. If such an approach is undertaken, each individual government agency would be responsible for bearing the cost associated with such a license. In a fiscal environment where government agencies already are struggling with tight budgets, it appears unwise to add an additional budget item when the current private sector methods are adequate. Shifting the financial and/or process burden to government agencies would result in the entire burden of the standards development process being born by tax payers while the current system relies on those most impacted by the standards to bear the cost of their development. This in turn would require agencies to hire new staff and implement contracting mechanisms to negotiate with SDOs on appropriate compensation for standards development and dissemination. Further, the burden of requiring individual agencies to negotiate and administer licenses and parse out the relevant sections of a standard would likely hinder the use of such standards and fly in the face of the precedents established by the NTTAA, OMB and OFR.

The National Institute of Building Sciences is extremely concerned that the ABA is advocating a one-size fits all legislative vehicle that will alter the long-standing tradition of private sector developed standards in the United States, and the result could reduce safety, increase costs and add an undue burden to the government and tax payers.

In lieu of ABA moving forward with the resolution, we instead suggest this alternative: focus on engaging in a meaningful dialogue with the SDO community to help address the changing nature of access to copyrighted materials through the internet and other electronic sources, and, after taking the long-term goals and impacts into consideration, identify a mutually acceptable path forward.

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We at the Institute would be happy to assist, whether helping to coordinate a meeting with construction-related SDOs, providing additional information or participating in any ensuing ABA discussions on the subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry L. Green". The signature is fluid and cursive, with the first name "Henry" and last name "Green" clearly distinguishable.

Henry L. Green, Hon. AIA
President