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American Bar Association Resolution 112: Championing Public Access to the Law

By Nina A. Mendelson*

In August 2016, the American Bar Association House of Delegates reaffirmed the fundamental democratic principle of public access to the law. ABA Resolution 112 calls on Congress to enact legislation ensuring a basic level of public access, without charge, to all regulatory law. Such legislation would address serious current obstacles to the public's ability to see the law.

Generally, the United States has had a long tradition of meaningful access, without charge, to the text of our binding laws. Congress has provided free public access to federal statutes since the 1880's, and to federal regulations since the 1930's. These laws have been made available through a network of state and territorial libraries, and then in the Federal Depository Library System. Congress has further deepened the tradition by requiring that the Government Printing Office make available universal online access to statutes and regulations and then requiring online public access to other government documents and materials. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049; E-Government Act of 2002, Pub. L. No. 107-347 §§ 206(a)-(d), 207(f), 116 Stat. 2899.2918-19 (codified as amended at 44 U.S.C. § 3501 note (2006)).

For numerous federal rules, however, public access is far from

assured. To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into thousands of federal regulations, but only by reference. These standards are drafted by numerous organizations (so-called standards development organizations or SDOs), ranging from the American Petroleum Institute to the National Fire Protection Association and the Society of Automotive Engineers. The standards run the subject matter gamut, from toy, crib, and workplace safety standards to placement requirements for oil drilling platforms on the Outer Continental Shelf, to hearing aid and food additive standards. Agency use of incorporated-by-reference ("IBR") rules likely will only increase, owing to congressional and administrative policy encouraging agencies to utilize so-called consensus private rules, and because agencies save resources when these private organizations write the rules.

Although these standards, once incorporated, have the same force of law as any agency regulation, the text of incorporated material does not appear in the Federal Register or Code of Federal Regulations. The Office of the Federal Register approves all incorporations by reference, and the Freedom of Information Act calls for text that is incorporated by reference into the Federal Register to be "reasonably available" to affected persons. 5 U.S.C. § 552(a)(1).

Under the Office of the Federal Register's current approach, however, regulating agencies refer readers to the standards drafting organization. That organization controls access to the text, including deciding how and where to make it available and retaining the option to charge an access fee. While some standards

drafting organizations have elected to provide some availability without charge to the text of incorporated-by-reference standards, others charge significant access fees, ranging into the hundreds or even thousands of dollars per standard. And some standards, particularly older ones, are now simply unavailable altogether from the standards drafting organization. The only alternative generally is an in-person visit, during business hours, to the Office of the Federal Register reading room in Washington, D.C.

The result: in this age of open government, significant public regulations have become difficult to find and expensive to read. Both small businesses and individuals have filed public comments in a variety of settings explaining that the access charges, in particular, obstruct their access to the text of the law. The same difficulty plagues those who wish to file a public comment on a proposed IBR rule when an agency is considering whether to adopt it. The Administrative Procedure Act confers a right on all "interested persons" to comment on proposed rules. 5 U.S.C. § 553. But an individual cannot exercise her statutory right to comment on a proposed rule when she cannot see what is being proposed.

We take the principle of public access to the law to be fundamental in a democratic society, but it is worth reminding ourselves why it matters, and to whom. As a matter of fundamental due process, regulated entities must have fair warning of their legal obligations. Access charges can impede their access to the requirements. For example, the American Trucking Association has warned the Office of the Federal Register in public comments that purchasing these materials can be

* Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School. This article draws from Administrative Law Section public comments filed with federal agencies in 2012 and 2014, which I helped draft, as well as my 2014 article, *Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014).

“cost-prohibitive for small businesses, medium-sized businesses, and individuals.” Comments of American Trucking Association on National Archives and Records Administration/ Office of Federal Register Proposed Rule, June 1, 2012, at 3, available at www.regulations.gov.

But the need for access to the law’s text and notice of its requirements is not limited to those who must comply. The public must also be able to see the law. Congress enacts regulatory statutes specifically to guard wide swaths of the public, and the public accordingly has a direct interest in the content of rules. Consider consumers of food and toys, parents who wish to purchase infant carriers or strollers, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline. All are obviously affected by regulatory law, and are entitled to see it to understand how far their legal protections extend. The content of these standards can affect individual choices regarding which toys or infant carriers to use, where to live, and whether to file public comments with the regulating agency or write to one’s congressional representatives. In short, regulatory beneficiaries have a cognizable stake in these standards, and the content of the standards can affect their conduct. They therefore need meaningful access to the text as well.

And of course public access is critical to government accountability for lawmaking. Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving—or not serving—the public interest. As

President Obama stated in his 2009 Memorandum on Transparency and Open Government: “Transparency promotes accountability and provides information for citizens about what their Government is doing.” <http://www.archives.gov/cui/documents/2009-WH-memo-on-transparency-and-open-government.pdf>. This transparency, including public access to the content of regulations, is a critical safeguard against agency capture and other governance problems. Citizens cannot discuss, criticize, file public comments on rules, or vote based on the content of the law if they cannot afford to see the text. And as the 5th Circuit has pointed out, citizens need access to the law not only for purposes of accountability, but “to influence future legislation” and to educate others. *Veeck v. S. Building Code Cong. Int’l Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (en banc), cert. denied, 537 U.S. 1043 (2002).

Resolution 112 is a critical step in the right direction. It caps substantial efforts, since 2012, by the Section of Administrative Law & Regulatory Practice to urge agencies to ensure greater public access to the text of all regulatory law. After the Administrative Conference of the United States drew widespread attention to the incorporation-by-reference issue with a 2011 recommendation and report, the Section filed extensive public comments with the Office of the Federal Register in 2012 and 2014. The Section argued that the Office of the Federal Register should interpret its incorporation-by-reference approval authority to ensure that such material is made available to the public without charge.

Although the Office of the Federal Register’s revised rules require agencies to consider public-access concerns, the agency still failed to specify that public access without charge was necessary for the standard to be “reasonably available” and thus eligible for incorporation by reference.

When the Office of Management and Budget (OMB) then considered revisions to its Circular A-119, which encourages agencies to rely upon private standards, the Section again filed public comments. Circular A-119, as finally revised, did call on agencies to give greater attention to public access issues. Nonetheless, both agencies’ responses fell far short of assuring the public a meaningful ability to see the text of the law without charge. Indeed, even after these revisions, rulemaking agencies continued to propose to incorporate standards into federal regulations that would cost members of the public hundreds or thousands of dollars to access. These have included standards for fishing vessels, nuclear power plants, and the business practices for interstate natural gas pipelines.

Resolution 112, developed by a task force consisting of Section representatives as well as representatives of a broad cross-section of ABA entities, took a different approach. Resolution 112 calls for congressional action that would require each agency to provide online access without charge to any text that the agency proposes to or actually does incorporate by reference in federal regulations.

As Administrative Law Section Delegate Ron Levin has described, Resolution 112 contains multiple compromises. For example, under

the resolution's terms, an agency providing public access also would be required to obtain authorization for providing such access to any material that is copyright-protected. Moreover, the resolution calls only for a basic floor of public access. The agency would have to provide the public with, at a minimum, read-only online access to the text, though the agency would have the option to provide a greater level of public access. Finally, the resolution distinguishes between agency use of incorporated-by-reference material in rules proposed or finally issued after enactment of the recommended legislation, which could occur only if the agency provided the required public access and pre-existing

incorporated-by-reference rules. For incorporated-by-reference material in pre-existing rules, an agency would be required to develop a "reasonable plan and timeline" to provide public access conforming to the requirements for new rules or else to amend or repeal pre-existing rules to eliminate the incorporation by reference.

If Congress were to enact legislation along the lines of Resolution 112, the public should soon be able to read all incorporated-by-reference standards without charge. This would be a substantial improvement over the status quo. The access required would still be less than what the public has for the rest of federal law, which can be freely accessed and readily copied both online and in government

depository libraries. As others have argued, if Congress were to act to ensure greater levels of public access than what Resolution 112 provides, the public would gain in its ability to discuss, advocate from, and criticize the law.

Nonetheless, in enacting Resolution 112, the ABA House of Delegates has taken a firm stand for the fundamental democratic principle of public access to the law, especially by making clear the unacceptability of current agency approaches to public access. If Congress were to answer the ABA's call, it would represent a significant and meaningful advance in the public's right to see the law. ○