STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

November 30, 1977

ATTORNEY GENERAL OPINION NO. 77-369

The Honorable Geneva Anderson
State Representative
3rd Floor - State Capitol Building
Topeka, Kansas 66612

Re: Department of Agriculture--Rules and Regulations--Incorporation by Reference

Synopsis: The Department of Agriculture may adopt by reference in regulations adopted by that agency rules or regulations promulgated by any federal agency, standards promulgated by a national trade, professional or like association, or similar material which is known and in existence at the time of adoption by reference, and which is identified in the adopting language by specific citation or reference thereto.

* * *

Dear Representative Anderson:

You inquire whether the Kansas Department of Agriculture is authorized in rules and regulations adopted by that department to incorporate therein by reference federal regulations or standards promulgated by national trade, professional and like associations.

It has long been the position of this office that any state officer or agency which is authorized by law to adopt rules and regulations may adopt therein by reference rules and regulations of any agency of the federal government, or standards or like matter promulgated by national associations and groups, with certain limitations.

In *State v. Crawford*, 104 Kan. 141 (1919), the defendant was charged with misdemeanors under a state statute which provided,

among other matters, that "[a]ll electrical matters shall be in accordance with the national electrical code." That code consisted of installation rules of the National Board of Fire Underwriters for electrical wiring and apparatus, having been originally drawn under the auspices of the National Conference on Standard Electrical Rules, which had since been disbanded and its work taken over by several associations. The code was revised every two years, through the cooperative labors of the several associations, such as the American Electric Railway Association and American Institute of Electrical Engineers, to name but two. The court held that the statutory adoption of the "national electrical code" was invalid as an abdication or unlawful delegation of legislative powers to private bodies. The court stated thus, in pertinent part:

> "In our commonwealth the power to make, amend, alter and repeal the laws is vested in the legislature. That body may not abdicate its functions nor delegate its powers to any other body, however learned, wise and farsighted the latter may be. . . .
>
> Some courts, including our own, have relaxed, or seemingly relaxed, the rigid enforcement of this principle in some instances, by giving countenance to legislation enacted to punish as misdemeanors or otherwise to penalize the breach of rules promulgated or to be promulgated afterwards by some subordinate official body created by the legislature. . . .
>
> But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this state or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, a situation would arise where owners of property with considerable persistence might learn what these code rules were and incur the expense of making their property conform thereto, only to find that the National Fire Protective Association had reconvened in Chicago,

> New York, or New Orleans, and had revised the code, and that the work and expense had to be undertaken anew. . . . Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these code rules are. . . . If the legislature desires to adopt a rule of the national electrical code as a law of this state, it should copy that rule and give it a title and an enacting clause and pass it through the senate and the house of representatives by a constitutional majority and give the governor a chance to approve or veto it, and then hand it over to the secretary of state for publication."

The court held the statute to be "void for uncertainty."

The decision is subject to varying constructions. It may be argued that it prohibits the adoption of any standards, under any circumstances, when promulgated by a private association. In my view, it does not. The constitutionally objectionable feature of the statute was that it adopted by reference a body of rules or standards which were subject to amendment or revision at any time by the promulgating associations, which amendments or revisions thereby became legally binding in this state, not through any action of the legislature, but through action of the private associations themselves. Thus, by adopting by reference the national electrical code as it may be from time to time amended and revised, the legislature had indeed delegated its legislative functions to the respective associations. The court noted a further objectional feature, that the referenced material was not in any official fashion available to the citizens of the state.

A legislative grant of authority to a public officer to promulgate rules and regulations is, itself, a delegation of legislative authority. Such a delegation is not an unlawful delegation, however, so long as the authorizing legislation prescribes sufficiently descriptive standards or guidelines to impose some practicably meaningful limitations on the exercise of that authority. In promulgating a rule or regulation which adopts by reference an existing body of regulations adopted by a federal agency, for example, or existing body of standards promulgated by a national trade association, the adopting official delegates no authority whatever, for the referenced material becomes legally applicable in this state only through the deliberate considered decision

of the adopting official or agency, in the exercise of the delegated legislative authority vested in that officer or agency, and not as the result of any action by the federal agency or voluntary association whatever. No state officer or agency may adopt by reference rules, regulations or standards as they may from time to time be amended or revised, thereby adopting by reference material which is not yet in existence, but which, as a result of its adoption by the federal agency or voluntary association becomes applicable in Kansas by operation of law. The Department of Agriculture, like any other state official or agency empowered to adopt rules and regulations may adopt only rules, regulations or standards which are known and in existence at the time of adoption by incorporation in a rule or regulation. No material may be adopted *in futuro*.

In *State v. Crawford, supra,* the court criticized the lack of any official access to the referenced code. It is not clear that that, in and of itself, poses a separate constitutional objection. Federal regulations are promulgated by publication in the Federal Register, which constitutes official notice to all persons. When published regulations are incorporated by reference to their publication in either the Federal Register or the Code of Federal Regulations, that reference is legally sufficient, in my judgment, to constitute official notification of the material thereby referenced. When standards of a national voluntary trade association, *e.g.*, are adopted by reference, it is highly desirable that the language of the adopting rule or regulation, or a footnote appended thereto, advise the reader that the referenced material is available from the adopting agency. This office has not imposed such a requirement in the past in reviewing the form and sufficiency of proposed regulations; however, future regulations will be considered with a view to requiring sufficient notice to the reader of the availability of any material referenced therein.

Yours truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj