



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Regulation

Minutes

September 30, 2011

Members Attending

H. Russell Frisby, Jr. (Chair)
Megan Sperling
Cheryl Falvey (phone)

Susan Dudley
Richard Wiley (phone)
Philip Howard (phone)

Richard Osterman
Gillian Metzger (phone)
James Ming Chen (phone)

ACUS Staff Attending

Paul Verkuil
Conference Chairman
Michel McCarthy
Executive Director

Jonathan Siegel
Director of Research & Policy
Scott Rafferty
Deputy Director of Research & Policy

Shawne McGibbon
General Counsel
Roland Frye
Attorney Detailee

Reeve Bull
Staff Counsel

Invited Guests Attending

Paul Bardos (ACUS
Government Member)
Elizabeth Jacobs (SEC)
Sidney Rocke (FERC) (phone)

Wilbur Miller (FERC) (phone)
Uzma Wahhab (SEC)
Adam Schlosser (U.S. Chamber
of Commerce)

Peter Robbins (Department
of Commerce)
Andrew Glickman (SEC)

Initial Matters

The meeting commenced at 9:30 am at the Administrative Conference's office. The Committee approved the minutes from its May 31, 2011 meeting concerning the Science in the Administrative Process Project. Research and Policy Director Jonathan Siegel noted that the meeting would involve three components: (1) discussion of Executive Director Michael McCarthy's report and draft recommendations for the International Regulatory Cooperation ("IRC") project; (2) discussion of Professor Bernard Bell's initial research for the Government in the Sunshine Act project; and (3) a brief training session on a "virtual meeting" web forum program implemented by the Conference staff.



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General Discussion of International Regulatory Cooperation Project

Conference Chairman Paul Verkuil indicated that the IRC project is focused on updating Conference Recommendation 91-1, re-emphasizing the portions that remain relevant and updating the Recommendation to reflect increased globalization over the last 20 years. Mr. McCarthy provided a brief overview of his report. He noted that the relevant players in the international arena have changed over the last 20 years, particularly in light of the rise of Asian markets and the increased integration of the European Union. He indicated that he met with numerous agencies and business interests in preparing the report. He stated that the overall goal of the project was to achieve better coordination amongst international regulatory bodies and that the report contains various recommendations designed to overcome barriers to this process.

Committee Chair Russell Frisby opened the floor to discussion of global issues with respect to the report and recommendations. Uzma Wahhab, a public attendee from the Securities and Exchange Commission (“SEC”), noted that the report should distinguish between trade in goods and services and that agencies’ statutory missions are occasionally in tension with the goal of international regulatory harmonization. Mr. McCarthy stated that he would consider any suggested language the SEC may wish to propose to acknowledge those concerns. Elizabeth Jacobs, another public attendee from the SEC, suggested that the recommendation should emphasize that agencies must seek to establish high quality standards to minimize the risk of a “race to the bottom” in nations’ adopting low-quality but cost-effective standards. Public Member Susan Dudley suggested that the recommendation might use the term “cooperation” in lieu of “harmonization.” Public Member Philip Howard noted that US standards are not always superior and that the US could often benefit from considering other nations’ standards.

Ms. Jacobs asked Mr. McCarthy to clarify the report’s suggestion that agencies could improve the transparency of their interaction with foreign regulators. Mr. McCarthy noted that the report primarily aimed to reinforce worthwhile practices agencies have already undertaken, such as posting proposed recommendations at “Notify U.S.,” but stated that the business community had expressed interest in more robust notice of agency interactions with foreign counterparts. Ms. Jacobs suggested that the recommendation should avoid conveying the impression that agencies have failed to maintain a transparent system. Adam Schlosser, a public attendee from the U.S. Chamber of Commerce, noted that international regulatory cooperation is not a “zero sum game” and can create benefits for consumers, businesses, and regulators.

Discussion of Specific Recommendations in International Regulatory Cooperation Report

Recommendation 1 (agencies should identify foreign counterparts and explore opportunities for cooperating therewith): Government Member Richard Osterman suggested that the recommendation might say that agencies should “explore *opportunities for regulatory cooperation*” rather than “explore regulatory cooperation.” Ms. Jacobs recommended that the clause “when appropriate to further the agency’s regulatory mission or remove unnecessary



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barriers to trade” might be moved to earlier in the recommendation so as to ensure that agencies retain the discretion to determine if regulatory cooperation is appropriate in each instance.

Recommendation 2 (agencies should seek to expand their legal authority to permit international regulatory cooperation as appropriate): Mr. Osterman suggested that the sentence stating that agencies should determine whether “legal authorities constrain international cooperation” might be rephrased to state the agencies should determine if their statutory authority does not sufficiently permit international cooperation.

Recommendation 3 (agencies should exchange information and best practices with their foreign counterparts and strive to adopt common regulatory agendas where appropriate): On recommendation 3(b), which urges agencies to exchange information with foreign counterparts concerning existing and proposed foreign regulations, Ms. Jacobs recommended keeping the directive to agencies as generic as possible so as to preserve agency discretion in determining what sort of information is worthwhile to exchange. Mr. Osterman proposed that recommendation 3(b) be clarified to show that the flow of information is two-way: U.S. agencies will inform foreign regulators of U.S. regulations while receiving information about foreign regulations.

Recommendation 4 (agencies should divide responsibility for testing and research and development with trusted foreign counterparts): Ms. Jacobs stated that she would provide Mike with suggested language to make clear that the goal is not simply harmonization for its own sake; agencies should strive to ensure “high quality” regulations regardless of whether they accord with their international counterparts. Ms. Dudley noted that the goal, at least in the environmental regulatory context, should be agreement amongst regulators on the underlying risks; different nations can then set varying levels of regulation based on those risks.

Recommendation 5 (agencies should develop relationships with their overseas counterparts to assess whether they maintain appropriate standards of competence and reliability): Ms. Jacobs recommended re-phrasing the recommendation to state that different nations should exchange “best practices,” so as to avoid adopting a judgmental tone suggesting that domestic regulators should gauge the reliability of their foreign counterparts.

Recommendation 6 (agencies should exchange information with their foreign counterparts, with appropriate steps taken to protect non-public business information): Ms. Wahhab suggested that the SEC might provide suggested language to clarify the distinction between systematic and targeted exchanges of information.

Recommendation 7 (agencies should be transparent in their interactions with foreign counterparts and seek public input regarding those interactions): Ms. Dudley and Mr. Osterman recommended amending the language of the recommendation so as to clarify that U.S. regulators



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need not initiate a formal notice and comment period every time they contact their foreign counterparts.

Recommendation 8 (agencies should promote the principles underlying the U.S. approach to regulation to overseas counterparts): Ms. Jacobs suggested that the recommendation might include a footnote acknowledging efforts that have already been undertaken for coordinating international regulations under the auspices of the Organization for Economic Cooperation and Development.

Recommendation 9 (U.S. agencies should coordinate with other U.S. agencies in connection with their international regulatory cooperation efforts): Ms. Dudley praised recommendation 9, noting that coordination amongst domestic regulatory bodies is necessary to avoid tunnel vision. Ms. Jacobs and Ms. Wahhab stated that the SEC would provide suggested language to ensure the recommendation acknowledges that agencies with law enforcement capability might face certain constraints in carrying out the recommendation.

Recommendation 10 (the Executive Office of the President should create a high-level interagency working group dedicated to international regulatory cooperation): Mr. McCarthy noted that the recommendation proposes continued consideration of the best mechanism by which to create a high-level interagency working group dedicated to international regulatory cooperation. The committee raised no issues with the recommendation.

Recommendation 11 (agencies should acknowledge where foreign consultations influence their regulatory decisions): Mr. Osterman noted the similarity between recommendations 7 and 11, both of which deal with apprising affected domestic interests of agencies' international regulatory cooperation efforts, and suggested that the two might be combined.

Potential Additional Recommendations: Mr. Schlosser suggested that the final recommendation might include additional proposals related to ensuring that regulators communicate effectively with domestic stakeholders regarding their international regulatory cooperation efforts, that agencies promote the United States' approach to regulation overseas, and that international regulatory cooperation constitute a high political priority.

Discussion of Sunshine Act Project

Professor Bell gave a brief overview of the major provisions of the Government in the Sunshine Act and noted that some have expressed concerns regarding the occurrence of deliberations outside of formal meetings, rendering the formal meeting process a sort of "kabuki theatre." Messrs. Frisby and Wiley agreed with these concerns regarding abuse of the Sunshine Act's open meeting provisions. Mr. Bell then briefly described his survey methodology, noting that he had received 32 answers to an initial questionnaire circulated to agency general counsels and that he intends to circulate a second survey to board members and commissioners of



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agencies subject to the Sunshine Act. Mr. Siegel asked whether any committee members had specific reservations concerning the scope of the project, and no member raised any concern. Mr. Siegel noted that the Sunshine Act project is currently targeted to produce a recommendation for the June 2012 Plenary Session.

Training on “Virtual Meeting” Forum

Mr. Siegel stated that the Conference had adopted a web forum software to allow committee members to conduct “virtual meetings” and explained how such meetings could be conducted in accordance with the Federal Advisory Committee Act. Attorney Advisor Reeve Bull then provided a brief training session demonstrating how to register for the forum, log in, post comments, and respond to a poll.

The meeting concluded at 11:45 am.