



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Administration & Management

Minutes

October 28, 2011

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Members Attending

Paul Bardos (by phone) <i>Gov't Member, International Trade Commission</i>	Warren Belmar (phone) <i>Senior Fellow, Clean Economy Network Education Fund</i>	Amy P. Bunk <i>Liaison, Office of the Federal Register</i>
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John Cooney (Committee Chair) <i>Public Member, Venable LLP</i>	David Frederick <i>Public Member, Kellogg, Huber, Hansen, Todd, Evans &amp; Figel, PLLC</i>	William V. Luneburg (by phone) <i>Liaison, ABA Section of Administrative Law and Regulatory Practice</i>
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Carl Malamud (by phone) <i>Public Member, Public.Resource.Org</i>	Loren Smith <i>Senior Fellow, United States Court of Federal Claims</i>	Max Stier (by phone) <i>Public Member, Partnership for Public Service</i>
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James J. Tozzi  
*Public Member, Center for  
Regulatory Effectiveness*

ACUS Staff and Members of Other Committees Attending

Emily Bremer <i>In-House Researcher</i>	Remington Gregg <i>Office of Science and Technology Policy</i>	Scott Rafferty <i>Staff Counsel</i>
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Esa Sferra-Bonistalli <i>Coast Guard</i>	Jonathan R. Siegel <i>Director of Research &amp; Policy</i>	Paul R. Verkuil <i>Chairman</i>
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Invited Guests Attending

Maureen Brodhoff <i>National Fire Protection Association</i>	Scott Cooper <i>American National Standards Institute</i>	Brett Jortland (by phone) <i>Department of Transportation</i>
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Bruce Mahone <i>Society of Automotive Engineers</i>	Tim Mellon <i>Society of Automotive Engineers</i>	Robert Raines <i>American Society of Mechanical Engineers</i>
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John Cooney opened the meeting at 9:30 am. On motion by Jim Tozzi, seconded by David Fredericks, the minutes from the previous meeting, held on September 21, 2011, were approved.

The main agenda item for the meeting was the project on agency use of incorporation by reference of outside standards and other materials in rulemaking. Chairman Verkuil referred the Committee's attention to two new documents. First, the Conference received comments on the project from the openness community. Second, the White House issued a document addressing federal engagement in the standards process. Revisions to the draft recommendation recognize that copyright is beyond the Conference's control. But the staff made some active voice changes to emphasize the importance of transparency.

Mr. Siegel noted changes to the report, which the Committee is not called upon to adopt, as well as changes to the draft recommendation, which will become the work of the Committee. The draft recommendation modestly pushes agencies to work with standards bodies to give greater consideration to transparency. Based on the Committee's input, paragraph three was amended, but continues to respect copyright holders' intellectual property. There were also some changes in the remainder of the recommendation, involving updating and technical requirements, primarily to provide some clarification. In particular, paragraph 11(c) was amended to clarify that a statutory change may be particularly important for those agencies subject to hybrid rulemaking requirements.

Mr. Cooney turned the Committee's attention to the first issue, regarding public access to incorporated materials. Professor Luneberg noted that, given the problems of copyright, the recommendation may be asking agencies to do the impossible. At a minimum, part of the recommendation should encourage Congress to look at this area to see if agencies can make materials reasonably available in the status quo or if changes need to be made to facilitate that effort. Mr. Malamud agreed, stating that he would like to see the Conference take a much stronger position on public and government access to standards. Congress or the courts need to help resolve the ambiguity in the law and help agencies make materials more readily available.

Mr. Belmar was not sure what ambiguity is in the law. Copyright holders are entitled to sell their works. He asked whether the members wanted to recommend that Congress take that right away. Mr. Malamud thought the important thing was to acknowledge the importance of transparency. Professor Luneburg said that he did not mean the Conference should recommend taking away property rights. Rather, it should recommend that Congress take a look at this issue and determine how best to balance the conflicting interests.

Mr. Tozzi asked if the Conference generally makes recommendations on legislation. After he was assured by Conference staff that it often does so, he then stated that, while he is sympathetic to the point about public access, he does not think there is much ambiguity in



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copyright law. He asked whether the Conference would be recommending that Congress look at the issue, or whether something more was contemplated. Professor Luneberg would simply ask Congress to examine the conflict between copyright claims and the ability of agencies to involve the public and make the law reasonably available.

Mr. Cooper suggested that it is wrong to phrase this as an either/or question. The standard for incorporation is “reasonable availability,” and what that means today will likely be different from what it meant a decade or so ago. The standard accommodates efforts to improve access as technology evolves. That process is working, and it would be wrong to cut off the collaborative process, which is working. Mr. Mahone agreed. He endorsed the approach taken in Ms. Bremer’s report.

Ms. Bremer explained that, during the period between the meetings, the staff reached out to OMB. OMB emphasized that the issue here is more than just a conflict between copyright and access. There is a standards regime at issue here that provides significant benefits to both agencies and the public. Addressing the access issue thus raises a real potential for the Conference to unintentionally create problems in other areas. The Committee should keep in mind that it is a very complex issue.

Mr. Siegel observed that there is an inherent difficulty in wanting something to be free and wanting it to be developed by the private sector. As with pharmaceuticals, it would be nice if they were free, but then who would develop them? Also, Mr. Siegel would be reluctant to make a recommendation to Congress identifying a problem without offering a solution. Mr. Tozzi agreed. He thought the problem raised by the *Veck* decision (which held that a code authored by a private organization for the purpose of becoming law may not be copyrighted qua law once so adopted by a local government) was a trivial one, but there is an underlying policy issue. He agrees that it would not be an appropriate recommendation to tell Congress to look at the issue without offering a solution.

Mr. Cooney observed that there is not so much a conflict here as there are two values on the table—the benefit of the private development of standards and the need to provide maximum information to the public to make informed decisions in rulemaking. Some agencies have served both values by working with standard developers on case-by-case basis. The report reminds the agencies that they have substantial discretion to drive openness and to remind the standards bodies that there is an important public interest in access and transparency. What is different today is the introduction of the Internet, which has changed people’s expectations about access. We have identified a potential problem that can be addressed by agencies, but it’s not ripe for a recommendation to Congress. We haven’t yet demonstrated that there is an irreconcilable conflict, though perhaps it may become such a problem down the line.



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Mr. Cooney turned the Committee's attention to the manager's amendment. It was adopted with no objections. The Committee also discussed and adopted a change to paragraphs two and four to refer simply to "copyrighted material."

Mr. Cooney then asked the Committee to vote on adopting the first five recommendations, all of which address the public access issue. On a motion, the Committee voted to adopt paragraphs one through five on a vote of five to two.

Mr. Cooney then turned to the next section of the draft recommendation, which addresses the issue of updating incorporated regulations. Mr. Tozzi asked whether agencies already have the authority to do everything included in paragraph 11 of the recommendation. Mr. Siegel explained the recommendation is necessary primarily to streamline the process for hybrid rulemaking agencies, which typically cannot conduct direct final rulemaking. Ms. Bremer added that direct final rulemaking can be derailed by a single adverse comment. Thus, paragraph 11 is a useful change even for agencies that are already authorized to engage in direct final rulemaking.

Ms. Sferra-Bonistalli observed that in paragraph 11, subparts (a) and (d) do not add any new tools. She suggested that an agency could update a regulation in response to a petition simply by issuing either a notice of intent to grant the petition or a notice that the petition is available, followed by a comment period. This would fulfill the same purpose without it being considered a notice-and-comment rulemaking under the APA. Ms. Sferra-Bonistalli offered an amendment that would accomplish that goal. Following some additional discussion, the Committee came to a consensus that the change should be incorporated.

With regard to paragraph six, Professor Luneberg asked if it was possible to clarify what "access information" means. Mr. Siegel explained that "access information" is the required statement of where the public can get a copy of the incorporated materials. If the only change to a regulation is to update the identity or contact information of the publisher of the incorporated material, it can be done without going through notice and comment. Professor Luneberg suggested that a footnote would be a good way to clarify that. Mr. Cooney agreed and suggested the staff be tasked with drafting an appropriate footnote. There were no objections.

On paragraph eight, Professor Luneberg suggested that the reference to "regulations" is potentially confusing. In context, he suggested that what is really meant is "legislative rules." Mr. Cooney thought that was a good suggestion. Hearing no objection, he stated that the change would be assumed for purposes of voting.

On paragraph nine, Professor Luneberg suggested that if an agency is considering incorporating something that frequently changes, such that the agency will have to use enforcement discretion or issue equivalency determinations, perhaps it should not be incorporating by reference at all. Could we work in a suggestion to that effect? Mr. Siegel



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suggested that one way to implement that would be to add a sentence at the end of the paragraph urging agencies to consider the costs to regulated entities and to the agency of updating the reference in the future. Judge Smith agreed and suggested this could be captured by “fairness.” Chairman Verkuil observed that the updating problem arises after the decision to incorporate has already been made, and this section of the recommendation is intended to address that aspect of the problem. Professor Luneburg suggested that perhaps a cautionary note could be added to the preamble. Mr. Cooney thought that was a reasonable solution. Following some further discussion, implementing that solution was delegated to the committee on style.

On a motion, the Committee unanimously voted to adopt paragraphs six through 11 as amended by the discussion.

Mr. Cooney moved the Committee’s discussion to the final recommendations on procedural and drafting issues. Ms. Bunk expressed some concern with the “take advantage” language in paragraph 12. She noted that there are only three people at Office of the Federal Register (OFR) in charge of approving all incorporations by reference. When agencies don’t follow the procedures in the Document Drafting Handbook (DDH), it really slows down the review process. She suggested that the recommendation be modified to urge agencies to follow the procedures in the DDH.

In paragraph 13, Ms. Bunk noted that, unfortunately, many agencies don’t realize OFR has regulations governing incorporation by reference. She suggested that “regulations and” be added between “OFR” and “policy.” Judge Smith suggested that the committee should clarify that the DDH is policy. The committee agreed to refer to “regulations, the DDH, and policy.”

On paragraph 14, Ms. Bunk noted that OFR has a pilot program for electronic submission, but has had some problems with agency personnel who are not computer-savvy. She suggested it might not be possible to move entirely to electronic submission. Ms. Bremer suggested that changing “transition to an” to “expanding its.” Ms. Bunk agreed that would work. Mr. Fredericks suggested replacing “including by transitioning to” with “through.” After clarifying that this language would permit the option of non-electronic submission, the members agreed the approach was preferable.

Ms. Sferra-Bonistalli commented that paragraph 16 was a bit too limiting because agencies sometimes want to incorporate non-mandatory language from international standards or agreements. She suggested replacing the last sentence with, “take care to specify in the regulation which portions of the incorporated standard are considered mandatory after incorporation by reference.” Mr. Frederick observed that this was an important point because international standards are often phrased in non-mandatory language, but incorporating them may be necessary for a variety of reasons.



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On paragraph 17, Ms. Sferra-Bonistalli expressed concern that it could cause confusion to incorporate a secondary standard by reference. She suggested eliminating the last sentence. If the concern is public availability, incorporation is not necessarily the best way to address it. Ms. Bunk requested that the paragraph be amended to remove the suggestion that OFR clarify its position on secondary references. Mr. Frederick registered discomfort with the idea that a secondary reference can become mandatory. Ms. Brodoff explained that secondary references are often critical to the operation of a standard. After some further discussion, the Committee came to a consensus that the paragraph should be revised to urge agencies to consider the legal effect and availability of secondary references.

On a motion, the Committee unanimously adopted the recommendations as amended by the discussion. The Committee then agreed to delegate to Mr. Cooney the authority to make stylistic and technical changes to finalize the recommendation for the Council's review.

Mr. Cooney adjourned the committee at 11:15 am.