Recommendation 91-1

Federal Agency Cooperation with Foreign Government Regulators

(Adopted June 13, 1991)

If American administrative agencies could ever afford to engage in regulatory activities without regard to the policies and practices of administrative agencies abroad, the character and pace of world developments suggest that that era has come to a close. The substantive problems facing agencies have parallels, to a greater or lesser extent, in the problems facing those agencies' counterparts in foreign countries. The policies and procedures developed by governments abroad are likely to be of interest and benefit to American regulators, and those developed here may be of utility abroad.

The case for international regulatory cooperation does not, however, rest entirely on the exchange of information about the current regulatory landscape. As the experience of certain agencies engaged in international regulatory dialogue demonstrates, there still remain regulatory problems to be identified and solutions, both to new and existing problems, to be found. Particularly in areas of fast-changing technology or fast-evolving standards and expectations, regulatory bodies may find that they actually need, or can profitably share, the resources of other governments in addressing common problems of regulation and enforcement. In their continuous efforts at improving their performance, agencies have become increasingly aware that contemporary regulation often entails a powerful research and development burden whose sharing may be in all regulators' best interests.

Regulatory cooperation with foreign counterparts will also produce advantages for regulated interests and for those affected by those interests. Regulated entities generally prefer an orderly regulatory environment, and more particularly one marked by a high degree of commonality among the standards imposed by public authorities in the various markets they serve. Costs of compliance are most obvious when different countries impose mutually inconsistent standards on business products or practices, particularly where the latter by their nature are international in scope. However, even where national standards are not mutually inconsistent, or business products or practices are not inherently international in scope, the cumulative effect of differences in regulatory standards may impose substantial and, in some cases, unjustified burdens. In addition, consumers and other affected persons have an interest in the maintenance of reasonably common protective standards. The internationalization of business has put the need for this kind of environment on an international scale. It accordingly

points in the direction of greater and more deliberate intergovernmentalism in regulatory matters than one generally associates with American administrative processes.

American agencies generally have not developed consistent practices in their efforts at international regulatory cooperation. Such cooperation may, in fact, take a wide variety of forms, from the casual and unsystematic sharing of information at one extreme, to a firm commitment to concerted regulatory action at the other. In between fall a number of different patterns, such as regular consultations, reciprocal participation in foreign agency rulemaking, and various forms of joint study, research and rule development. Since harmonization does not necessarily entail uniformity, but simply a net reduction in regulatory inconsistencies and differences, even harmonization is a matter of degree.

As the following recommendation seeks to make clear, agencies are not all similarly situated with respect to the opportunities for, and advantages of, regulatory cooperation. The functions and regulatory objectives of a particular agency, its past experience in such cooperation, and the feasibility of reliance on a foreign counterpart's technical administrative, or regulatory resources are among the factors determining whether, to what extent, and in what form that agency should engage in such cooperation and pursue regulatory harmonization. Moreover, an agency is likely to be more comfortable in initially experimenting with international cooperation on a limited basis by selected means rather than in developing at once a comprehensive, systematic program of cooperation. Nevertheless, agencies may usefully consider this recommendation, which is based in part on the practice and experience of one agency, the Federal Aviation Administration, that has consciously engaged in forms of concerted activity with counterpart agencies abroad. This case study is of particular interest because the FAA's practice of intergovernmentalism includes, but also goes beyond cooperation in rulemaking as such to include a certain amount of cooperation in more routine aspects of administration. While this recommendation does not address international assistance in enforcement as such, it recognizes that an increased commonality of substantive standards does tend to increase opportunities for mutual assistance in the enforcement realm.

Of course, care should be taken that the spirit of compromise and mutual consideration that ought to characterize intergovernmental activities not adversely affect the integrity of the regulatory process. It is important that agencies observe the procedural statutes under which they ordinarily operate, and their processes remain open to public scrutiny and participation. Nor will it do, either in reality or in appearance, for the regulatory standards an agency ultimately adopts to be the product, pure and simple, of intergovernmental negotiations.

American agencies and their foreign counterparts work under statutory mandates, which must remain the touchstone so far as the substance of regulatory action is concerned. The zone of compromise within which an agency may then operate in the interest of collegiality with decisionmakers of other nations is necessarily uncertain but necessarily limited. Within that zone, however, international regulatory cooperation has a significant, possibly even a leading, role to play.

Recommendation

1. Each agency should inform itself of the existence of foreign (including regional and international) regulatory bodies[1] whose activities may relate to the mission of that agency.

2. Each agency should determine whether and to what extent regulatory cooperation with one or more foreign regulatory bodies is appropriate. Desirable forms of cooperation may include the simple exchange of information, coordination of regulatory objectives, consultation in advance of rulemaking, and reciprocal participation in rulemaking processes. Apart from general considerations of cost and staffing, factors to be considered in deciding the importance and intensity of the cooperative effort to be made, the forms of cooperation to adopt, and the geographic range of foreign regulatory bodies with which to cooperate, include:

a. The extent to which the participating regulatory agencies share common regulatory objectives;

b. The importance of commonality, and therefore international harmonization,[2] in the development of regulatory policy in the particular field;

c. The extent to which the capabilities of foreign regulatory bodies justify the agency's reliance on their technical, regulatory and administrative resources;

d. The opportunities that international regulatory cooperation presents for improvement in the enforcement and administration of the agency's program (as, for example, through mutual

[1] Throughout this recommendation, the term "foreign regulatory bodies" includes, where appropriate, also regional and international regulatory bodies.

[2] Harmonization does not necessarily imply regulatory uniformity. It implies a reduction in the differences (including but not limited to inconsistencies) among the regulatory standards of different jurisdictions.

recognition of tests, inspections and certifications or through mutual assistance in information gathering and other forms of assistance);

e. The presence of existing bilateral or multilateral international frameworks for addressing common regulatory concerns;

f. The receptivity of a given foreign regulatory body to meaningful participation by American regulatory and private interests in its policymaking processes; and

g. In appropriate consultation with the Department of State, the foreign policy of the United States.

3. Even when an agency concludes that the factors set out in paragraph 2 do not counsel substantial regulatory cooperation with foreign governments, it should nevertheless explore the possibilities of international cooperation in enforcement, including mutual assistance in information gathering and, where appropriate, reliance upon foreign tests, inspections, and certifications.

4. When an agency concludes it has a pronounced interest in cooperation with foreign regulatory bodies, it should consider adopting various modes of cooperation with those agencies, including:

a. The establishment of common regulatory agendas;

b. The systematic exchange of information about present and proposed foreign regulation;

c. Concerted efforts to reduce differences between the agency's rules and those adopted by foreign government regulators where those differences are not justified;

d. The creation of joint technical or working groups to conduct joint research and development and to identify common solutions to regulatory problems (for example, through parallel notices of proposed rulemaking);

e. The establishment of joint administrative teams to draft common procedures and enforcement policies;

f. The mutual recognition of foreign agency tests, inspections and certifications, to the extent that the American agency is satisfied that foreign regulatory bodies have sufficient expertise and employ comparable, standards; and

g. The holding of periodic bilateral or multilateral meetings to assess the effectiveness of past cooperative efforts and to chart future ones.

5. a. When engaging in international regulatory cooperation, an agency should ensure that it does so in a manner consistent with national statutes and international engagements.

b. An agency engaging in international regulatory cooperation should also be alert to the possibility that foreign regulatory bodies may have different regulatory objectives, particularly where a government-owned or controlled enterprise is involved.

6. To promote acceptance of and compliance with the measures that result from its cooperation with foreign regulatory bodies, an agency should enlist the support and participation of other affected agencies, regulated interests, public interest groups, and other affected domestic interests, as follows:

a. Where appropriate, agencies should, so far as considerations of time and international relations permit, afford affected private and public interests timely notice of any formal system of collaboration with foreign regulatory bodies that exists and an opportunity where reasonable to participate and comment on decisionmaking under such system.

b. The agency should, where appropriate, also encourage the establishment of working relations between domestic interests and their foreign counterparts, including manufacturers, other trade and industry interests, and consumer and other public interest groups.

c. The agency should assemble an interagency advisory group, consisting of the Department of State and other affected agencies such as the Departments of Commerce and Defense and the U.S. Trade Representative's Office, if one does not exist. Each member agency of an advisory group should, without prejudice to its independent decisionmaking, both inform that group about the nature and extent of its concerted activities with foreign regulatory bodies relevant to the purposes of the group and seek that group's advice. In addition, the Chairman of the Administrative Conference should convene a meeting of the heads of interested agencies to discuss the need for establishing a permanent, government-wide mechanism for organizing, promoting, and monitoring international regulatory cooperation on the part of American agencies.

7. Agencies should, consistent with their statutory mandate and the public interest, give sympathetic consideration to petitions by private and public interest groups for proposed

rulemaking that contemplate the reduction of differences between agency rules and the rules adopted by foreign government regulators, where those differences are not justified.

8. a. Once an agency has a program of international regulatory cooperation with a foreign regulatory body, it should routinely advise that body before initiating proposed rulemaking, and should seek to engage that body's participation in the rulemaking process.

b. Conversely, the agency should see to it that it is informed of initiatives by those foreign regulatory bodies and ensure that its views are considered by those bodies early in the conduct of their rulemaking procedures.

c. Where, following joint rule development efforts, an agency ultimately proposes a rule that differs from the rule proposed by the foreign counterpart, it should specify the difference in its notice of proposed rulemaking and request that it be specified in any corresponding foreign notice.

9. An agency should adopt reasonable measures to facilitate communication of views by foreign regulatory bodies on proposed rules.

10. While international consultations of the sort described in this recommendation do not appear to necessitate any radical departure from an agency's ordinary practices in compliance with applicable procedural statutes,[3] an agency engaged in such consultations should make reasonable efforts to ensure that affected interests are aware of them. For example, when an agency substantially relies on those consultations in its rulemaking (or where foreign government rules, practices or views have otherwise substantially influenced the agency's proposals), it should describe both the fact and the substance of those consultations in its notices of proposed rulemaking, rulemaking records and statements of basis and purpose under the Administrative Procedure Act. Where the objective of harmonizing American and foreign agency rules has had a significant influence on the shape of the rule, that fact also should be acknowledged.

[3] See, e.g., *Federal Communications Commission v. ITT World Communications, Inc*., 466 U.S. 463 (1984) (international consultative processes leading to informal policy understandings are not covered by Government in the Sunshine Act); *Public Citizen v. United States Department of Justice*, 109 S. Ct. 2558 (1989); *Food Chemical News v. Young*, 900 F. 2d 328 (D.C. Cir. 1990); *Center for Auto Safety v. Federal Highway Administration*, No. C.A. 89-1045 (D.D.C. Oct. 12, 1990) (groups not formed by the Executive Branch are not "utilized" committees within the meaning of FACA).

11. An agency that engages in systematic exchanges of information and consultation with foreign regulatory bodies should seek to ensure that domestic interests do not suffer competitive disadvantage from the release of valuable information by those bodies to foreign private interests. This may require the agency to seek agreement with its foreign counterparts concerning the conditions under which information will be disclosed.

12. While harmonization of standards with foreign regulatory bodies may be a legitimate objective of any agency whose activities affect transnational interests or transactions (and therefore may appropriately influence the rulemaking outcome), it should be pursued within the overall framework of the agency's statutory mandate and with due regard for the interests that Congress intended the agency to promote. Accordingly, agencies should ensure that any accord informally reached through international regulatory cooperation is genuinely subject to reexamination and reconsideration in the course of the rulemaking process.

Citations:

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