



Committee on Regulation

Minutes

October 25, 2011

Members Attending

Megan Sperling

Patti Goldman (phone)

Jonathan Rose (phone)

Philip Howard (phone)

Richard Osterman (phone)

Susan Dudley (phone)

ACUS Staff Attending

Paul R. Verkuil

Chairman

Jeffrey S. Lubbers

Special Counsel

Jonathan R. Siegel

Director of Research & Policy

Reeve T. Bull

Staff Counsel

Michael T. McCarthy

Executive Director

Invited Guests Attending

Peter Robbins (Department of
Commerce)

Adam Schlosser (US Chamber
of Commerce)

Elizabeth Jacobs (SEC)

Adrienne Joves (CFTC)

Uzma Wahhab (SEC)

Wilbur Miller (FERC)
(phone)

Initial Matters

The meeting commenced at 2:00 pm. Administrative Conference Chairman Paul Verkuil, who chaired the meeting on behalf of Russell Frisby who was not able to attend, opened the meeting. Staff Counsel Reeve Bull offered an amendment to the minutes from the September 30 meeting on behalf Public Member Susan Dudley, which involved removing language suggesting that international regulatory cooperation could produce a “race to the bottom.” The Committee approved the minutes as revised by Ms. Dudley’s amendment.

Administrative Conference Director of Research & Policy Jonathan Siegel noted that an online web forum for discussing the Science in the Administrative Process project would become available on November 2 and that the Conference staff would shortly circulate Professor Wendy Wagner’s revised outline for that project and the instructions for accessing the web forum to committee members.

General Discussion of International Regulatory Cooperation (“IRC”) Project

Executive Director Michael McCarthy provided an overview of the draft recommendation for the IRC project, generally summarizing the revisions implemented based upon the input from the September 30 meeting and from other comments received. Chairman Verkuil noted that ASTM International and the United States Chamber of Commerce had



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

submitted comments on the project and that the committee would consider those comments as it proceeded through the individual recommendations. He then opened the floor for general comments on the recommendation.

Government Member Megan Sperling stated that many of the individual recommendations should apply differently (or not at all) to independent agencies and that the draft should clarify where that is the case. Public Member Philip Howard noted that the recommendations largely consisted of “best practices” and that all agencies (independent or otherwise) should consider pursuing those practices. Public attendee Elizabeth Jacobs (Securities & Exchange Commission) noted that the recommendation includes the phrase “as appropriate” in multiple locations to ensure that it does not impose a “one-size-fits-all” approach, which should perhaps assuage some of the concerns regarding independent agencies’ compliance with the recommendation. Administrative Conference Special Counsel Jeff Lubbers expressed opposition to the idea of exempting independent agencies from the recommendation, noting that representatives from the Federal Trade Commission, an independent agency, have emphasized the need for international cooperation and that other independent agencies likely face similar issues. Chairman Verkuil suggested that the committee might note specific considerations for independent agencies while considering the various recommendations.

Public Member Patti Goldman suggested that the draft preamble and recommendations generally tend to place the goal of reducing trade barriers on par with agencies’ individual missions, which she finds inappropriate inasmuch as furthering the agency mission should always constitute the predominant consideration. Mr. Siegel noted that the committee had already adopted a number of revisions to address that concern, such as inserting language to indicate that international cooperation should only be pursued to the extent it is consistent with the agency’s mission. Mr. McCarthy noted that agency officials contacted in his research suggested that regulatory cooperation generally does not create a “race to the bottom”; if anything, other nations are more likely to adopt US standards where they are more protective than US agencies are to adopt less stringent standards from other nations. Ms. Goldman indicated that adding language to the effect that an agency’s mission is always the predominant consideration would alleviate many of her concerns.

Discussion of Individual Recommendations

Recommendation 1 (agencies should consider regulatory cooperation with relevant foreign authorities to remove unjustified barriers to trade): The committee determined to add language to the last sentence of recommendation 1 clarifying that agencies should pursue regulatory cooperation to remove unjustified trade barriers only where doing so would advance such agencies’ mission. Mr. McCarthy proposed defining “foreign authorities” to include, inter alia, foreign governments, regional and international authorities, and standard-setting organizations in a footnote and using the term “foreign authorities” throughout the



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

recommendation whenever referring to all such entities. The committee agreed with this revision.

Recommendation 2 (agencies should determine the extent of their authority to pursue international cooperation and request additional authority for doing so as appropriate): The committee decided to include language indicating that agencies “could also consider” the World Trade Organization Agreement on Technical Barriers to Trade, other relevant treaties, and guidance from the Office of Management and Budget when assessing the extent of their authority to pursue regulatory cooperation rather than specifically directing agencies to review those sources of law. The committee also agreed on language clarifying that agencies should only pursue international regulatory cooperation when it furthers their agency mandates rather than pursuing such cooperation regardless of whether it advances such mandates.

Recommendation 3 (when they possess the authority to do so, agencies should pursue various modes of cooperation with foreign authorities): The committee agreed to language that clarified that agencies should only pursue international regulatory cooperation where doing so “would further their mission.”

Recommendation 4 (agencies should divide responsibility for tests, inspections, certifications, and research and development with trusted overseas counterparts): The committee agreed upon language that indicated that the foreign authorities with which United States agencies divide responsibility should maintain standards and practices “that are no less effective than United States equivalents.” The committee also placed the various examples of activities agencies may wish to undertake in this respect into a bulleted list and clarified that the recommendation proposes only that agencies “should consider” such activities rather than affirmatively directing them to do so. Finally, the committee agreed to add language indicating that agencies should publish cost savings and regulatory benefits arising from such mutual arrangements in addition to simply documenting them.

Recommendation 5 (agencies should develop relationships with foreign counterparts to ensure that they maintain high quality standards): The committee adopted language parallel to that implemented in recommendation 4 deleting any reference to “high quality and appropriate” standards and instead indicating that agencies should identify foreign authorities that maintain standards and practices “that are no less effective than United States equivalents.”

Recommendation 6 (agencies should exchange useful information with overseas counterparts, provided that they first reach appropriate agreements to protect sensitive information): The committee decided to strike any language indicating that agencies should exchange information so as to promote “better *data-driven* decisionmaking,” instead referring only to promoting “better decisionmaking” generally. The committee considered but ultimately decided against changing the word “must” to “should” in the sentence indicating that agencies



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

must reach appropriate agreements to protect sensitive information prior to exchanging such information with foreign authorities.

Recommendation 7 (agencies should apprise the public of their interactions with foreign authorities and receive public input relevant to such interactions): The committee agreed to strike a sentence indicating that agency interactions with foreign counterparts should be transparent in order to eliminate the implication that agencies must notify the public every time they interact with a foreign authority. It also added language clarifying that agencies should consider petitions for reducing differences between United States regulations and those of other nations only when it *further*s their statutory mandate rather than merely *being consistent with* that mandate.

Recommendation 8 (agencies should promote the principles undergirding the United States regulatory system to overseas counterparts): The committee agreed to amend the language of recommendation 8 to clarify that the enumerated list of principles underlying the United States regulatory system was non-exhaustive and that agencies should promote the principles in that list only “as appropriate.” The committee also adopted additional clarifying language, such as adding the word “public” prior to “participation” and changing a reference to “consensus-based *decisionmaking*” to “consensus-based *standard setting*.”

Recommendation 9 (agencies should consult with other domestic agencies with interests that may be affected by interactions with foreign authorities): The committee agreed to add language clarifying that agencies need not “consult” with other agencies but rather need only “share information” with each other and that such information sharing should only be pursued “as appropriate” so as to avoid an information overload. The committee also agreed to place references to two provisions of law dealing with the authority of specific agencies, 22 C.F.R. § 181.4 (requiring agencies to consult with the Office of Information and Regulatory Affairs prior to entering into an international agreement requiring significant regulatory action) and 19 U.S.C. § 2541 (giving the Office of the United States Trade Representative responsibility for establishing mutual agreements for standards related activities), in a footnote.

Recommendation 10 (the Executive Office of the President should create a high-level interagency working group dealing with international regulatory cooperation, and the Chairman of the Administrative Conference should convene a meeting to decide on the best organization for that group): The committee agreed to delete any reference to a meeting convened by the Chairman of the Administrative Conference to determine the optimal organization of the proposed interagency working group. The committee also agreed to adopt language setting forth the mission of the working group, which is “to provide government-wide leadership on, and to evaluate and promote, international regulatory cooperation.”



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Discussion of Preamble and Concluding Remarks

Mr. Lubbers recommended that the preamble clarify that this recommendation supersedes Conference Recommendation 91-1, to which the committee assented. Public attendee Adrienne Joves (Commodity Futures Trading Commission) recommend that language in the preamble stating that coordination amongst domestic agencies is particularly problematic for independent agencies be deleted, to which the committee agreed. The committee decided to soften language suggesting that agencies believe that current law places constraints on information sharing and that inter-agency coordination is difficult, noting that only “some” agencies encounter those issues. The committee agreed to transpose two paragraphs in the preamble so as to place discussion of agencies’ successes in pursuing international regulatory cooperation prior to discussion of the challenges associated with such cooperation (rather than vice versa). Finally, the committee agreed to add language listing potential types of regulatory cooperation to the paragraph examining agencies’ successes in pursuing such activities.

Chairman Verkuil stated that the Conference staff would implement the changes approved at the meeting and then circulate a revised draft recommendation to committee members for their approval. The meeting concluded at 4:40 pm.