



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## **Committee on Collaborative Governance Minutes of Meeting – October 15, 2012**

### **Committee Members**

Miriam Nisbet, Committee Chair  
Daniel Cohen (by telephone)  
Daniel Elliott (by telephone)  
Philip Harter (by telephone)  
John Kamensky  
Nina Olson  
Patrick Patterson

### **Consultant**

Lesley McAllister (by video Skype)

### **Administrative Conference Staff**

Paul Verkuil  
Matthew Wiener  
Gretchen Jacobs  
David Pritzker  
Jeffrey Lubbers (ACUS Special Counsel)  
(by telephone)  
Matthew Bisanz

### **Public**

Scott Cooper (ANSI)  
Lisa Gentry (OSHA)  
Gordon Gillerman (NIST)  
Eamon Monahan (EPA)  
Kevin Robinson (OSHA)  
David Rostker (SBA)  
Eric San Juan (IRS)  
Jon Silberman (EPA)

### **Meeting Opening**

Committee Chair Miriam Nisbet opened the meeting at 2:05 p.m. in the conference room of the Administrative Conference and asked all attendees to introduce themselves. The purpose of the meeting was to continue discussion of a draft recommendation on “Third-Party Programs to Assess Regulatory Compliance,” which is based on research and a report by Professor Lesley McAllister of the University of San Diego School of Law.

Ms. Nisbet reported that, following the last meeting, Professor McAllister worked with the ACUS staff to revise the draft recommendation to reflect the committee’s discussion. Also, all public comments received were distributed to committee members and posted on the Administrative Conference’s website. She noted the short timeframe to submit the committee’s final product to the Council in time for the plenary session.

### **Discussion of the Project on Third-Party Programs to Assess Regulatory Compliance**

Professor McAllister summarized the changes to the draft recommendation. The new version clarifies the scope of the project and the recommendation. It is organized to make clear the applicability whether the third-party program is mandated by Congress or created by the agency. Also, the explanatory portions previously in the recommendatory sections were either moved to the preamble or deleted.

Mr. Kamensky observed that the revisions were a real improvement. Ms. Olson stated that she felt the report insufficiently addressed the inherently governmental nature of certain functions, such as

taxpayer audits. Therefore, she thought it should include a part describing when, absent a statutory mandate, outside compliance programs could be permitted. She said this should at least be addressed, even if it is only mentioned as not being analyzed by the report. Professor McAllister said she could add the point in the framing language. Ms. Olson also advised adding something regarding agencies with strong privacy statutes such as IRS or SSA. The committee agreed to insert language in the preamble to reflect these concerns.

Mr. Cohen asked about the comments submitted by Scott Rafferty. Professor McAllister said that some aspects of his comments could be addressed in the preamble, though some of what he advised was beyond the scope of the study and some of the research he suggested might be limited by the lack of transparency in the private sector. She stated the primary focus of her report was how governmental programs operate and it would be too ambitious to address the private sector programs.

Professor Lubbers, who had previously served as the Conference's Research Director, suggested making reference in the preamble to the Conference's past efforts in related areas. He cited, in particular, Recommendation 94-1, The Use of Audited Self-Regulation as a Regulatory Technique; Recommendation 89-1, Peer Review and Sanctions in the Medicare Program; and Recommendation 78-4, Federal Agency Interaction with Private Standard-Setting Organizations.

Mr. Rostker and Professor Lubbers discussed how to frame the allocation of costs to the government and the private sector. Generally, the committee thought the recommendation should refer to some type of cost-shifting concern without over-emphasizing this as a reason for adopting a third-party program.

Mr. Gillerman commented that most people would read only the preamble and recommendations but not the full report. He thought that the scope of the research and the recommendation needed to be stated clearly in the preamble and it should mention first-party certification as another approach that is used in many areas. He explained that in a first-party program, the originator self-certifies that it is in conformance with the legal requirements. Discussion ensued on how to express the idea of self-declaration. Mr. Rostker asked whether financial statement attestation was a form of first-party certification. Mr. Cooper commented that it could be tied to something such as section 5 of the FTC Act's requirement to have support for statements. Ms. Nisbet agreed to amending the preamble to reflect this discussion.

The committee then discussed Section A of the recommendation, which addresses considerations for an agency when deciding whether to develop a third-party program. There was some concern about the wording of the advice to consult various resources. To avoid seeming to be preferential to certain private organizations, it was agreed to have more general references to the types of organizations to be consulted.

In discussion of Section A.2 concerning comparison of regulatory approaches, Professor Lubbers suggested a reference to the effectiveness in practice of a third-party program, not just its technical effectiveness. Mr. Rostker suggested adding language relating to enhancing or limiting competition through the number of accrediting bodies in the program. The committee agreed on language to incorporate both suggestions.

In Section B.5 concerning the use of existing conformity assessment standards, it was agreed to reword references to reasonable availability to the public of such standards and to insert a cross-reference to

Conference Recommendation 2011-5, Incorporation by Reference, so as to be consistent with the prior recommendation.

Mr. Patterson observed that the titles of the recommendation and the underlying report used slightly different terminology. The committee agreed to make them the same.

In discussion of Section B.6 concerning access to information by both the government and the public, Mr. Rostker suggested acknowledging that when the government adopts a private sector program, it should not require the program to make all of its information public. He thought this would serve as a disincentive to the creation of private programs. Ms. Olson's concern was that a government agency should not get an end-run around transparency by using a third-party program. In the ensuing discussion, the committee agreed on wording that information about the compliance of regulated entities should be available to the public comparable to what would be available in the absence of a third-party program.

Ms. Nisbet reviewed the timeline for revising the draft recommendation to reflect the views expressed at this meeting. The committee agreed to submitting the revised draft to the Council for inclusion in the agenda of the December plenary session.

The meeting was adjourned at 3:45 p.m.