



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance Minutes of Meeting – September 20, 2012

Committee Members

Miriam Nisbet, Committee Chair
Jody Freeman (by telephone)
Remington Gregg (by telephone)
John Kamensky
Suzanne Orenstein (by telephone)
Alasdair Roberts (by telephone)
Chris Schroeder (by telephone)

Member Representatives

Chris Oehrle (on behalf of Daniel Elliot)

Consultant

Lesley McAllister (by video Skype)

Administrative Conference Staff

Paul Verkuil
Gretchen Jacobs
David Pritzker
Jeffrey Lubbers (ACUS Special Counsel)

Public

Gordon Gillerman, National Institute of Standards and Technology (NIST)
Larnell Simpson, American Association for Laboratory Accreditation (A2LA)
Rebecca Orban, United States Coast Guard

Meeting Opening

Committee Chairman Miriam Nisbet opened the meeting at 3:00 p.m. in the conference room of the Administrative Conference, and asked all attendees to introduce themselves. The purpose of the meeting was to discuss a draft report on “Third-Party Programs to Assess Regulatory Compliance” by Professor Lesley K. McAllister of the University of San Diego School of Law and to consider possible recommendations on that subject.

Conference Chairman Paul Verkuil urged members and others present to consider and submit to the Conference nominations for the second annual Walter Gellhorn Innovation Award, which was created by the Conference to recognize the best model practice that can be adopted government-wide. Mr. Verkuil also noted that the project on the committee’s agenda at this meeting is a step in the direction of public-private partnership that President Obama emphasized in connection with re-establishment of the Conference in 2010. He urged the committee to complete its work on the current project in time for consideration at the fall plenary session in December.

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

Mr. Lubbers, who had previously served as the Conference’s Research Director, pointed out that the current project is a good follow-on to Recommendation 94-1, The Use of Audited Self-Regulation as a Regulatory Technique. He said the current project was an expansion of that idea and commented on how use of such programs has evolved since 1994.

Ms. Nisbet then called on Professor McAllister to summarize her research and findings.

Professor McAllister discussed the scope and context of the project. She explained the existing state of third-party programs to assess regulatory compliance and the steps she took to prepare the draft report.



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Professor Lubbers asked Professor McAllister whether she would advise including possible recommendations to Congress. She indicated that she considered that possibility, but decided to focus more on agency processes and less on Congressional implications. They discussed this point further with Jody Freeman and referenced certain D.C. Circuit cases that might implicate sub-delegation of agency authority.

Ms. Nisbet asked Professor McAllister if Congress has ever held oversight hearings in response to concerns with third-party delegation. Professor McAllister indicated there were Government Accountability Office and Inspector General reports that might be critical of how the agencies have carried it out, but there were no overt Congressional attempts to rein in these programs.

Mr. Kamensky commented that the present draft recommendations read like a report and could benefit from simplification to make the text more a statement of principles rather than an explanatory document. He also expressed appreciation for NIST's comments on the draft and a discussion of those comment ensued with Mr. Gillerman. Chairman Verkuil suggested modifying the draft to clarify that the Conference is not indicating support for delegation of agency enforcement power to private third parties. Ms. Nisbet agreed.

Mr. Simpson described his organization's perception of third-party programs and stated that third-party organizations do not have an oversight role, but rather an implementing and auditing role with respect to an agency that has the oversight role.

Mr. Kamensky commented on section B.3(a) (page 9) of the draft recommendation regarding public notice and public input into the procedures. He questioned whether the intention was to incorporate procedures under the Administrative Procedure Act (APA) into standard setting and Professor Lubbers indicated he also felt that the current language was ambiguous. Professor McAllister explained that her intention was to urge that when an agency establishes a third-party program, it should provide for public comment, not that the third-party's implementation of the program should be subject to the APA. Ms. Nisbet commented that the recommendation does permit the public to see the outcome of the third-party's assessment.

Mr. Schroeder stated that the default rule of a public-private partnership should not weaken the public access requirements; that the third-party's public access rules in such a partnership should be the same as if the government agency were regulating directly. The committee discussed this concern and generally agreed that third-party programs should not reduce the amount of transparency which would otherwise occur in a government program.

A broader discussion on third-party accountability standards ensued, including the relation of confidential information to public access to third-party assessments.

Mr. Simpson and Professor McAllister discussed specific industry accreditations and how they might be more generally incorporated into the report.

The committee discussed the different types of programs described in the report and how they should be categorized. There was a committee preference to identify broadly applicable general principles that could be stated in the draft recommendation as guidance to agencies considering whether to establish a third-party program and to agencies that had either decided or were directed by statute or other provision of law to do so.



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The committee then discussed several individual sections of the draft recommendation. Significant comments included the following.

In the preamble, the committee discussed which agencies the recommendations should be addressed to and how it could be clarified. Mr. Gillerman noted the role of NIST and commented on coordination among the federal agencies on how to create such third-party programs. He offered to provide additional language on NIST's services and clarification of terminology.

Discussion of section A.2 (Consult Available Resources) addressed appropriate advice to agencies on evaluating the comparative advantages of third-party programs with direct government compliance assessment. There were suggestions to focus on advantages and disadvantages rather than costs and benefits of different procedural choices. Professor McAllister and committee members discussed the implications of the phrasing at length. They agreed on language to the satisfaction of agency representatives and agreed to work on other changes following the meeting.

Regarding section A.3 (Compare a Third-Party Approach with Direct Governmental Compliance Assessment), the committee members and other attendees discussed their experiences with fee setting and Professor McAllister indicated she would reword it in the next draft. A discussion on conformity assessments followed.

The committee discussed including examples and how examples could be better worded to give agencies clarification, but there was agreement that such examples would be best in the preamble rather than the text of the recommendation sections. The committee generally felt the recommendations contained too much detail and could be stated in a cleaner fashion.

The committee asked Professor McAllister to include a glossary of acronyms or abbreviations with the report.

Closing Remarks

It was agreed that the Conference staff would work with Professor McAllister to redraft a proposed recommendation document to reflect the discussion at this meeting, and would circulate the result to the committee members for their comments. Committee Chairman Nisbet noted that the committee would meet next on Monday, October 15, from 2:00 p.m. to 4:30 p.m. The meeting concluded at 5:25p.m.