



# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Committee on Administration & Management

Minutes

September 21, 2011

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### Members Attending

John Cooney (Committee Chair)	Amy P. Bunk Warren Belmar (phone)	James J. Tozzi
Paul Bardos	William V. Luneburg (phone)	

### ACUS Staff and Members of Other Committees Attending

Paul R. Verkuil <i>Chairman</i>	Jonathan R. Siegel <i>Director of Research &amp; Policy</i>	Scott Rafferty <i>Staff Counsel</i>
Emily Bremer <i>Project Advisor</i>	Esa Sferra-Bonistalli <i>Coast Guard</i>	Jill Wright <i>HHS/OIG</i>

### Invited Guests Attending

Scott Cooper, ANSI	Bruce Mahone, SAE	Jeff Grove, ASTM
Greg Cade, NFPA	Sarah Bardos	David Miller, API

Chairman Cooney opened the meeting at 2:00 PM. On motion by Paul Bardos, the minutes were approved.

Chairman Cooney introduced the report current consensus and problems encountered, including techniques. The Committee consented to the participation by representatives of the standards development organizations.

Mr. Siegel introduced the consultant report, prepared by Ms. Bremer, and noted its relationship to a prior recommendation (78-4) regarding the use of private standards in health and safety regulations. Ms. Bremer noted that the scope of her report omitted how agencies can participate in standards development and did not address procurement issues or the topics of two current projects that relate to standards - international coordination and third-party certification.

The study identified benefits from using private standards - improved cost-effectiveness, better utilization of private sector expertise, and lesser burdens of regulation. Chairman Cooney asked the "wicked question": How do we reconcile these benefits with the competing goal of affording public appropriate access in the rulemaking process.

Jim Tozzi asked how the recommendations differ from what is already in A-119. He suggested that it was undesirable for an agency to have to purchase standards.



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Ms. Bremer stated that has included all best practices that she discovered, and believes that she presents a broadly representative sample.

Prof. Luneberg asked if it was a violation of copyright law for an agency to adopt a private standard verbatim. Ms. Bremer said yes. Ms. Bunk noted that OFR has told agency general counsels that adoption of copyrighted material may also violate the Federal Register Act. Prof. Luneberg said that it was a strange result that an agency delegated regulatory authority by Congress would be restricted from using the best standard. He asked how much an agency can change without violating copyright.

Mr. Tozzi pointed out that A-119 was concerned that agencies were duplicating work already done by credible voluntary standards setting organizations. When copyright came up, OMB wanted to keep these bodies viable, but OMB's biggest concern was getting the agency to use private standards, not copyright. Some organizations do not rely on any publication revenues that result from federal adoption, but for others the dependence is huge. Mr. Tozzi said that before internet, many standards were hard to find. In past 5-10 years, the internet has changed expectations. OMB still would not want to pay, but public now would change the gravity of the debate.

Bruce Mahone at SAE discussed the reform of military specifications. 20 years ago, the Defense Department decided to move to private sector standards, divesting 1000s of standards. SAE now maintains 1700 milspecs reviewing on 5-year cycle. Better documents, but the government does have to buy to cover administrative costs. He thought Mr. Bremer's report was moderate.

Jeff Grove of ASTM said private standard setting was effective because SDOs already have dynamic, robust programs to keep standards up to date. ASTM works on case-by-case basis to provide reasonable access.

Greg Cade said that NFPA uses "Real-Read" software. 60% of users have dot-gov addresses. NFPA uses copyright used to control content and to avoid unauthorized modification.

Scott Cooper emphasized that copyright needs to be preserved. Consistent with the public good, we should look for new methods for dissemination, but first we should do no harm. ANSI as federation does not develop standards, but coordinates with others. Now, the United States is gold standard, with our approach to standards development providing the best practice for the rest of the world.

Mr. Siegel noted that internal discussions had probed the tension between protection of copyright and public access. He wanted to make sure the Committee sufficiently airs the issues of public access. He asked committee member Carl Malamud to comment.



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Mr. Malamud said that he was not convinced that SDOs were injured by public access. They should not be wed to a model of distribution from 1970s. Public access does not necessarily reduce revenues. EDGAR increased revenues by offering opportunities to add value. Standards are often developed with intent to become law, so it is not a taking.

Mr. Luneberg suggested that copyright fees are icing on the cake, where the real benefit to the SDOs is federal adoption. He suggested different sets of SDO business models. Those who develop military specifications under contract or are trade associations might not have a revenue problem. But there is also a third set of SDOs whose entire revenues may be based on standards.

Chairman Verkuil raised the issue of compliance with consensus requirement of A119, such as due process. Mr. Grove confirmed that ASTM was an accredited consensus organization. There was discussion as to the extent that OMB monitors the consensus requirements. Mr. Tozzi observed that there used to be three appeals processes for those excluded from development – ANSI, NIST, and finally OMB. The occasional complaints of exclusion used to torment Mr. Tozzi when he headed OIRA. He felt that compliance with the requirements of openness and inclusiveness was still an issue.

Mr. Malamud said that the suggestion that \$60 for a standard is reasonable made his hair stand on end, in part because there are hundreds of standards. When the government applies seal of approval, it creates a license to make money through conferences, not just subscriptions. Public has great desire to read documents. ACUS, as a body of the United States government, should not in business of worrying about these revenue streams.

Chair Cooney said that the agency can always pull the plug. Mr. Tozzi noted that it is a bad day for an agency with OMB if it withdraws a private standard.

Mr. Cooper of ANSI observed that there was no monopoly. Agencies have multiple paths to standards. If an SDO resists, others will fill void.

Ms. Bremer observed that the American standards system is unique; not until late 1970s did government agencies start using private standards.

Mr. Mahone observed that there were many standards groups. SAE strong in aerospace, which has 150 other SDOs. In every area, there are other groups if government gets fed up. SAE likes Ms. Bremer's report very much, because it emphasizes case-by-case consideration. The public can have the access they need, so it is good to have this discussion.

Mr. Tozzi remembered serving on an ANSI committee, and pointed out no one gets paid.

At 3:15, Chair Cooney moved the discussion onto updating. Ms. Bremer noted that agencies are not allowed to do dynamic incorporations. Updating is particularly challenging for hybrid rulemaking agencies. OSHA, for example, has crane standards dating from 1960s. Some



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agencies were not aware of direct final rulemaking, which only applies if informal rulemaking is authorized. For agencies directed to use hybrid rulemaking procedures, such as OSHA and CPSC, a statutory option for updating is needed.

Chair Cooney recognized Mr. Cooper. OSHA deserves discussion. When OSHA fails to recognize personal safety standard, OSHA cites people at the workplace – even though the employer can't buy equipment that conforms to the old standards and even though the new standard is more protective. Hardhats have a 1987 version in the regulations. Federal contractors, in particular, do not want “de minimus violation” on their records. Ms. Bremer responded that OSHA is not like the Coast Guard, because it cites violations instead of authorizing people. Chair Cooney endorsed the statutory recommendation, because costs savings could be significant.

David Miller of API noted PHSMSA has a standards conference to involve all SDOs into standards plan. This helped the agency to determine how best to incorporate those changes into their plan.

Ms. Sferra-Bonistalli asked if the SDO process could be deemed to satisfy the notice-and-comment, allowing the agency to go straight to an effective rule. Ms. Bremer observed that this proposal was interesting, but that public notice has value in a process involves direct agency consideration.

Chairman Verkuil suggested that an open SDO process can operate coterminously with rulemaking, with the agency notifying the public of its opportunity to participate. Mr. Cade agreed that agencies can give public notice of the development process. Ms. Sferra-Bonistalli noted that one key piece is waiting to end of SDO process before exercising its discretion on whether to incorporate.

Mr. Miller suggested that API's schedule was published in the Federal Register. Ms. Bunk clarified that, while agencies may announce their participation in SDO processes, OFR prohibits agencies from publishing press releases. On occasion, a sponsoring agency such NIST can publish a Federal Register notice stating the meeting dates of the SDO process.

At 3:35, Chair Cooney asked the Committee to focus on procedural and drafting issues. Under 552(a)(1) and Part 51, agencies must give advance notice. Ms. Bremer said that some agencies were surprised when they learned that OFR required 20 days notice in advance of publication. Under OFR regulations, agencies must have a Federal Register liaison, but this official may not have specific expertise or be an attorney. Program staff do not always know about publication procedures.

Mr. Tozzi observed that A-119 does not address OFR requirements, such as “reasonable access.” Still, he warned: “Don't get OFR mad at you.” Ms. Bunk explained that OFR always



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acts within 20 days, but often the agency does not file complete package or has secondary-reference problems.

Mr. Siegel stated that, based on today's discussion, he expects to call further on selected members of the committee who have been active in today's discussion. The next committee meeting would be the last available, since the council meets on November 9.

Chairman Verkuil observed that the recommendation still needed a preamble, which frequently contains justification, which can be more important than specific recommendations.

Chair Cooney adjourned the meeting at 3:47 PM.