ANSI
American National
Standards Institute
1655 15th ST., N.W., SUITE 300, WASHINGTON, D.C. 20005-5794
TEL. 202.639.4090
FAX. 202.628.1886

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December 15, 1994

TO: ANSI Government Member Council

FROM: Colin Church, Chair

RE: Minutes of the GMC Meeting of October 20, 1994

Attached are the minutes of the ANSI Government Member Council meeting of October 20, 1994.

Please note that the next meeting of the GMC will be held on **Tuesday, January 31, 1995**, from 10:00 a.m. until noon, in Washington, D.C. An agenda and additional information will be distributed in advance of that meeting.

I look forward to seeing you in 1995.

ANSI
American National
Standards Institute
1819 L ST., N.W., SUITE 300 WASHINGTON, D.C. 20005-5794
TEL. 202.639.4090
FAX. 202.628.1886

MINUTES

ANSI Government Member Council

Meeting of October 20, 1994

1.0 Call to Order and Introductions

GMC Chairman Colin Church of the U.S. Consumer Product Safety Commission called the meeting to order. He thanked Peter Heydemann and Belinda Collins for hosting the meeting at the National Institute of Standards and Technology (NIST). Members of the ANSI Government Member Council (GMC) then introduced themselves. The minutes of the August 2, 1994, meeting of the GMC were approved without amendment.

2.0 Dr. Peter Heydemann, Director, Technology Services, NIST

Dr. Heydemann said that NIST management have begun to work more closely with ANSI during the past six months, and that NIST recognizes the need to support U.S. industry in global markets. He said that NIST will be providing increasing assistance to industry.

3.0 Dr. Belinda Collins, Director, Standards Services, NIST

The next meeting of the Interagency Committee on Standards Policy (ICSP) will be on December 6, 1994. NIST hopes to revitalize the ICSP so that it will be a body that can address cross-agency standards and standards policy issues. Dr. Collins suggested that the ICSP might form subgroups to focus on specific issues such as laboratory accreditation, ISO 9000, and labeling. A list of ICSP membership is attached to these minutes.

NIST, ANSI, and the Americal Council of Independent Laboratories (ACIL) have convened a working group to look at issues on laboratory accreditation.

The National Standards System Network (NSSN) project is up and running, the cooperative agreement between ANSI and NIST having been signed on August 18, 1994.

NIST hopes to send a standards person to Mexico within the next year, as well as to Brussels, Saudi Arabia, and Argentina. NIST will be looking to the private sector for training and information for their international standards experts.

4.0 Conformity Assessment - Consumer Interest Council Activity

Colin Church noted that Rick James has been hired as ANSI's Director of Conformity Assessment. A letter announcing the appointment is attached.

The Consumer Interest Council is discussing the question of how to get more people to use the good standards that are being produced within the national voluntary consensus standards system.

5.0 International Activities

5.1 Richard Meier of the Office of the U.S. Trade Representative (USTR) reported on the recent meetings of the NAFTA implementation group (government) and the North American Trilateral Standardization Forum (private sector) in Mexico City. There followed considerable discussion about the importance of labeling issues to the trilateral participants.

5.2 The next round of mutual recognition agreement discussions will be held in Brussels in late November.

5.3 George Willingmyre of ANSI said that the recent North Americal Trilateral Standardization Forum meetings in Mexico were very successful. He recognized the important contributions made to several members of the GMC.

5.4 Preparatory meetings were held on October 14th for the U.S./European discussions to be held in Brussels November 17-18. Approximately forty people from the U.S. will attend the Brussels meeting.

5.5 ANSI has requested NVCASE approval and will ask to be recognized for accrediting activities covered by several directives.

5.6 The Administrative Conference of the U.S. recently issued a report which Mr. Willingmyre believes will be as significant to regulatory agencies as the OMB Circular A-119 is to procurement agencies. A copy of the related *Federal Register* notice is enclosed with these minutes; copies of the accompanying report are available upon request from the ANSI Washington office.

6.0 Reports on Ongoing Activities

6.1 John Godfrey's report on the status of the National Research Council's study on standards was distributed. A copy is attached to these minutes.

6.2 Mary Saunders of NIST reported on the ANSI Board of Directors' discussion of the Consensus Management Group's report and ANSI's draft strategic plan.

6.3 Mary McKiel reported on her recent meeting with the ANSI Company Member Council Executive Committee (CMCEC) to discuss their suggested "Points of Agreement."

6.54 Rocky Arnold of the Department of Energy (DOE) reported on the activities of the ANSI Executive Standards Board.

7.0 World Standards Day and CEO Roundtable

Belinda Collins described World Standards Day activities, particularly the CEO Roundtable, as "a smashing success."

8.0 House Science Committee Hearings on Standards

Jane Schweiker of ANSI provided a report on the September 22 hearings on standards held by the Subcommittee on Technology, Environment, and Aviation of the House Committee on Science, Space, and Technology.

9.0 ANSI Awards

Information on the ANSI awards program will be forthcoming at a later date. Mr. Church encouraged the GMC to nominate people from the GMC at the appropriate time.

10.0 Announcements and Other Business

10.1 Mary McKiel announced that, under the Environmental Technology Initiative, EPA has approved a grant to ANSI to do outreach to small and mid-sized businesses and consumer groups to increase their awareness of international environmental standardization activities. The grant will provide for the production of written materials and workshops.

10.2 The results of the election of GMC officers for 1995 are as follows: Colin Church, CPSC, to be chairman; Greg Saunders, DOD, to be vice chairman; Kathy Baden, General Services Administration, to be on the ANSI Board of Directors; Linda Horton, Food and Drug Administration, to fill the Board vacancy created by the retirement of Phil White.

10.3 Earl Barbely of the Department of State gave an update on the ETSI intellectual property rights issue. The next plenipotentiary meeting of the ITU will be hosted by the United States in 1998.

10.4 The International Electrotechnical Commission (IEC) is hoping to hold its next meeting in the United States.

10.5 Walter Leight described the International Trade Administration's Special American Business Internship Training Program (SABIT), a cooperative project under which NIST and ANSI will provide training to technical experts from the Newly Independent States on the U.S. voluntary consensus standards system.

10.6 Mary McKiel said that EPA, in accordance with an Executive Order, soon will issue guidelines on environmentally preferable products.

11.0 Selection of Date and Place for Next Meetings

The next two meetings of the ANSI Government Member Council will be as follows:

Tuesday, January 31, 1995 - Department of Energy

Tuesday, April 11, 1995 - Department of State

Both meetings are scheduled to be held from 10:00 a.m. until noon.

12.0 Adjournment

The meeting adjourned at noon.

Respectfully submitted,

Jane W. Schweiker
Secretary to the
ANSI Government Member Council

Attachments

- ICSP List
- Administrative Conference Notice
- National Research Council Status Report

ANSI Government Member Council Meeting
Thursday, October 20, 1994

10:00 A.M. - NOON

10th Floor Conference Room
Administrative Building
National Institute of Standards & Technology
Gaithersburg, MD

1. M.R. Altman
FDA/CDRH
Phone: (301) 594-4762, X 1113
Fax: (301) 594-4793

2. Rocky Arnold
Department of Energy
Phone: (301) 903-5773
Fax: (301) 903-7063

Kathy Baden
GSA/FCRE
Phone: (703) 308-4176
Fax: (703) 305-6731

4. Earl S. Barbely
Department of State
Phone: (202) 647-2592
Fax: (202) 647-7407

5. Colin Church
CPSC
Phone: (301) 504-0554, Ext. 2229
Fax: (301) 504-0124

6. Belinda Collins. Ph.D.
NIST
Phone: (301) 975-4000
Fax: (301) 963-2871

7. Peter Heydemann, Ph.D.
NIST
Phone: (301) 975-4500
Fax: (301) 975-2183

8. Linda Horton
Food & Drug Administration
Phone: (301) 443-2831
Fax: (301) 443-6906

9. Walter Leight
NIST
Phone: (301) 975-4000
Fax: (301) 963-2871

10. Pierre Lundy
Veteran's Affairs
Phone: (202) 273-6102
Fax: (202) 273-6225

11. Jim McCue
FDA - CDRH
Phone: (301) 594-4765. X 137
Fax: (301) 594-4793

12. Mary McKiel
EPA
Phone: (202) 260-3584
Fax: (202) 260-0178

13. Richard Meier
USTR
Phone: (202) 395-6843
Fax: (202) 395-5674

14. John Miller
GSA-FSS
Phone: (703) 305-6930
Fax: (703) 305-6716

15. Stan Phillips
PHS - Agency for Health Care
Policy & Research
Phone: (301) 594-1483
Fax: (301) 594-2333

16. Richard Rounsevelle
U.S. Coast Guard (G-NAB-6)
Phone: (301) 267-0984
Fax: (202) 267-4423

17. Mary Saunders
NIST
Phone: (301) 975-2396
Fax: (301) 963-2871

18. Jane Schweiker
ANSI
Phone: (202) 639-4197
Fax: (202) 628-1886

19. George Willingmyre
ANSI
Phone: (202) 639-4196
Fax: (202) 628-1886

20. Lynne E. Yedinak, C.H.E.
USDA, AMS, FV, FQAS
Phone: (202) 690-4941
Fax: (202) 690-0102

November 9, 1994

REPRESENTATIVES OF THE INTERAGENCY COMMITTEE ON STANDARDS POLICY

Agency Member	Representative
Agriculture, Department of (USDA)	Mr. Wardell C. Townsand, Jr. Assistant Secretary of Administration U.S. Department of Agriculture Room 240-W 14th and Independence Avenue, SW Washington, DC 20250 Phone: (202) 720-3291 Fax: (202) 720-2191 e-mail:
Commerce, Department of (DOC)	Dr. Belinda L. Collins Director, Office of Standards Services U. S. Department of Commerce National Institute of Standards and Technology Bldg. 417, Room 106 Gaithersburg, MD 20899 Phone: (301) 975-4000 Fax: (301) 963-2871 e-mail: bcollins@micf.nist.gov
ısumer Affairs, Office of (OCA)	Mr. Howard Seltzer Director for Policy & Education Development U.S. Office of Consumer Affairs 750 17th Street NW, 6th Floor Washington, DC 20006 Phone: (202) 395-7920 Fax: (202) 395-7901 e-mail:
Consumer Product Safety Comm. (CPSC)	Mr. Colin B. Church Commission's Voluntary Standards and International Activities Coordinator U.S. Consumer Product Safety Commission-OEX Washington, DC 20207 Phone: (301) 504-0554, ext. 2229 Fax: (301) 504-0121 e-mail:
Defense, Department of (DOD)	Mr. Walter B. Bergmann, II Director, Manufacturing Modernization Attn: OASD (ES) IA Room 3B253, Pentagon Washington, DC 20301-3300 Phone: (703) 697-0957 Fax: (703) 693-6990 e-mail: bergmanb@acq.osd.mil

Education, Department of (DOEd.)	Mr. Paul Planchor National Center for Education Statistics U. S. Department of Education 555 New Jersey Avenue, NW Washington, DC 20208 Phone: (202) 219-1614 Fax: (202) 219-1728 e-mail: paul_plancho@Ed.gov
Energy, Department of (DOE)	Dr. Neal Goldenberg Director, Office of Nuclear Safety Policy and Standards (NE-70) Department of Energy 19901 Germantown Road Germantown, MD 20875 Phone: (301) 903-3465 Fax: (301) 903-6172 e-mail:
Environmental Protection Agency (EPA)	Mr. John (Jack) C. Puzak Acting Deputy Director, Office of Modeling, Monitoring Systems and Quality Assurance Environmental Protection Agency, RD-680 Washington, DC 20460 Phone: (202) 260-5767 Fax: (202) 260-0929 e-mail: Jack Puzak@epamail.epa.gov
Federal Communications Commission (FCC)	Mr. Richard M. Smith Chief, Office of Engineering and Technology Federal Communications Commission 2025 M Street, N.W., MS 1300 Washington, DC 20554 Phone: (202) 632-7060 Fax: (202) 632-0199 e-mail:
Federal Emergency Management Agency (FEMA)	Mr. John L. Matticks Deputy Associate Director Operations Support Directorate Federal Emergency Management Agency 500 C Street, SW, Room 238 Washington, DC 20472 Phone: (202) 646-2768 Fax: (202) 646-4655 e-mail:
Federal Trade Commission (FTC)	Mr. Michael C. McCarey Associate Director for the Bureau of Consumer Protection Federal Trade Commission 6th & Pennsylvania Avenue, N.W., Room 200 Washington, DC 20580 Phone: (202) 326-3303 Fax: (202) 326-2050 e-mail:

General Services Administration (GSA)

Mr. William N. Gormley
Assistant Commissioner
Office of Commodity Management
Federal Supply Service
General Services Administration
Washington, DC 20406
Phone: (703) 305-7901
Fax: (703) 305-6851
e-mail:

Government Printing Office, U.S. (GPO)

Mr. George J. Collins
Manager, Quality Control and Technical Department
U.S. Government Printing Office
Washington, DC 20401
Phone: (202) 512-0766
Fax: (202) 512-0015
e-mail:

Health and Human Services, Department of (HHS)
Food and Drug Administration

Ms. Linda R. Horton
Director, International Policy Staff
Food and Drug Administration, HF-23, HHS
5600 Fishers Lane
Rockville, MD 20857
Phone: (301) 443-2831
Fax: (301) 443-6906
e-mail:

Housing and Urban Development, Department of (HUD)

Dr. Jack Sommer
Senior Advisor for Science, Technology
and Urban Policy
Department of Housing and Urban Development
451 7th Street, S.W., Room 8130
Washington, DC 20410
Phone: (202) 708-4230
Fax: (202) 619-8000
e-mail:

Interior, Department of (DOI)

Dr. Debra S. Knopman
Deputy Assistant Secretary
Water and Science
Department of the Interior
1849 C Street, N.W.
Mail Stop - 4429
Washington, DC 20240
Phone: (202) 208-4811
Fax: (202) 371-2815
e-mail:

International Trade Commission (ITC)

Mr. Lorin L. Goodrich
Director, Office of Administration
U.S. International Trade Commission
Room 212
500 E Street, S.W.
Washington, DC 20436
Phone: (202) 205-3131
Fax: (202) 205-2034
e-mail:

Justice, Department of (DOJ)	Mr. Roger M. Cooper Deputy Assistant Attorney General for Information Resource Management Justice Management Division Department of Justice Room 1121 10th and Constitution Avenue, NW Washington, DC 20530 Phone: (202) 514-0507 Fax: (202) 514-1225 e-mail:
Labor, Department of (DOL)	Ms. Cynthia Metzler Assistant Secretary for Administration and Management Department of Labor Room S2514 200 Constitution Avenue, N.W. Washington, DC 20210 Phone: (202) 219-9086 Fax: (202) 219-8822 e-mail:
National Aeronautics and Space Administration (NASA)	Mr. J. Wayne Littles Chief Engineer (Acting) National Aeronautics and Space Administration Headquarters Washington, DC 20546-0001 Phone: (202) 358-1823 Fax: (202) 358-2810 e-mail: wlittles@admingw.hq,nasa.gov
National Archives and Records Administration (ARCHIVES)	Dr. Lewis Bellardo Acting Deputy Assistant Archivist Office of the National Archives (NN) Room 3400 National Archives at College Park 8601 Adelphi Road College Park, MD 20740-6001 Phone: (202) 501-5300 Fax: (202) 219-1543 e-mail: LBellardo@nara.gov
National Communications System (NCS)	Dr. Dennis Bodson Assistant Manager for Technology and Standards Office of the Manager National Communications System 701 South Court House Road Arlington, VA 22204-2198 Phone: (703) 692-2124 Fax: (703) 746-4960 e-mail:

National Science Foundation (NSF)

Dr. William S. Butcher
Senior Engineering Advisor
National Science Foundation
Office of the Assistant Director for Engineering
Room 505
Arlington, VA 22230
Phone: (703) 306-1302
Fax: (703) 306-0289
e-mail: wbutcher@nsf.gov

Nuclear Regulatory Commission (NRC)

Mr. John W. Craig
Deputy Director, Division of Engineering
Office of Nuclear Regulatory Research
U. S. Nuclear Regulatory Commission
Mail Stop T-10D-20
Washington, DC 20555
Phone: (301) 415-6982
Fax: (301) 415-5074
e-mail: JWC1@nrc.gov

Postal Service, U.S. (USPS)

Mr. Myles A. Jackson
Manager, Configuration Management
United States Postal Service
Engineering Research and Development
Merrifield, VA 22082-8101
Phone: (703) 280-7281
Fax: (703) 280-8414
e-mail:

Small Business Administration (SBA)

Mr. Samuel A. Gentile, Jr.
Deputy to the Associate Deputy Administrator
for Economic Development
Small Business Administration
Office of Economic Development
409 Third Street, S.W., Suite 8200
Washington, DC 20416
Phone: (202) 205-6657
Fax: (202) 205-7230
e-mail:

State, Department of (STATE)

Mr. Earl S. Barbely
Director for Telecommunications and
Information Standards
Department of State, Room 2529
Washington, DC 20520
Phone: (202) 647-0197
Fax: (202) 647-7407
e-mail:

Trade Representative, U.S. (USTR)

Mr. Richard Meier
Deputy Asst. U.S. Trade Representative
for GATT Affairs
U.S. Trade Representative
Washington, DC 20506
Phone: (202) 395-6843
Fax: (202) 395-3911
e-mail:

Transportation, Department of (DOT)	Mr. Arnold L. Levine Director, Office of International Transportation and Trade (P-20) Department of Transportation 400 Seventh Street, S.W. Washington, DC 20590 Phone: (202) 366-4368 Fax: (202) 366-7417 e-mail:
Treasury, Department of (TREASURY)	Dr. Wushow (Bill) Chou Deputy Assistant Secretary for Information Systems U. S. Department of Treasury 1500 Pennsylvania Avenue, N.W. Room 2464 Washington, DC 20220 Phone: (202) 622-1200 Fax: (202) 622-2224 e-mail:
U.S. Agency for International Development (USAID)	Mr. Thomas E. Huggard Director, Office of Administrative Services U.S. Agency for International Development M/FA/AS Room 1600A SA-14 Washington, DC 20523-1408 Phone: 703-875-1531 Fax: 703-875-1243 e-mail:
erans Affairs, Department of (VA)	Mr. Gary J. Krump Deputy Assistant Secretary for Acquisition and Materiel Management (90) Department of Veterans Affairs 810 Vermont Avenue, N.W. Washington, DC 20420 Phone: (202) 273-6029 Fax: (202) 273-6163 e-mail:
Liaison	
Management and Budget, Office of (OMB)	Mr. Bruce McConnell Chief, Information Policy Branch Office of Information and Regulatory Affairs NEOB, Room 10236 Office of Management and Budget Washington, DC 20503 Phone: (202) 395-3785 Fax: (202) 395-5167 e-mail: bruce.mcconnel@eop.sprint.com

Ms. Virginia A. Huth
Policy Analyst, Information Policy Branch
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10236
Washington, DC 20503
Phone: (202) 395-3785
Fax: (202) 395-5167
e-mail: huth_v@a1.eop.gov

Executive Secretary

National Institute of Standards
and Technology (NIST)

Mr. Patrick W. Cooke
Standards Code and Information Program
Office of Standards Services
National Institute of Standards & Technology, DOC
Bldg. 417, Room 107
Gaithersburg, MD 20899
Phone: (301) 975-4033
Fax: (301) 963-2871
e-mail: cooke@micf.nist.gov

ices

Federal Register

Vol. 59, No. 167

Tuesday, August 30, 1994

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States (ACUS) adopted two recommendations and one formal statement at its Fiftieth Plenary n. The recommendations concern of audited self-regulation as a atory technique and procedures for civil forfeiture of property or other assets. The statement presents the views of the Conference on the Social Security Administration's proposal to reengineer the disability benefits process.

FOR FURTHER INFORMATION: Renée Barnow, 202–254–7020.

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 591–596. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). At its Fiftieth Plenary Session, held June 16, 1994, the Assembly of the Administrative Conference of the United States adopted two recommendations and a formal statement.

Recommendation 94–1, The Use of ted Self-Regulation as a Regulatory ique, suggests that when certain quisites and safeguards are present, Congress and federal agencies should consider the possibility of delegating regulatory power to a private self-regulatory organization. The recommendation emphasizes the necessity of ensuring the effectiveness and the fairness of the process, and identifies standards for determining whether such a delegation may be appropriate.

Recommendation 94–2, Reforming the Government's Procedure for Civil Forfeiture, suggests improvements in this process. The United States Government has in recent years made increasing use of its power to confiscate the property or assets of persons involved in illegal activities through civil forfeitures. Notice of an impending administrative forfeiture is sent to the last known address of the owner and is published in newspapers. This system has been criticized as unduly expensive and ineffective. The recommendation suggests that the establishment of a centrally maintained Civil Forfeiture Registry, which would be published and made widely available, would not only provide better and more reliable notice, it would provide a better overview of the entire forfeiture process, thus improving public and congressional oversight. The recommendation also proposes that Congress impose a statutory 60-day time limit on the agency to provide notice in the Civil Forfeiture Registry and to send written notice of a seizure to the last known address of the owner or interest holder in the property.

Statement No. 17, Comments on the Social Security Administration's Proposal on Reengineering the SSA Disability Process, constitutes the formal comments from the Administrative Conference to the Social Security Administration on SSA's proposal. The Conference generally supported the proposed changes to SSA's procedures, which would reduce the number of administrative stages from four to two, while offering claimants increased opportunity for face-to-face interaction with agency staff.

The full texts of the recommendation and statement are set out in the Appendix below. The recommendations will be transmitted to the affected agencies and to appropriate committees of the United States Congress. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by the affected agencies or by Congress.

Recommendations and statements of the Administrative Conference are published in full text in the **Federal Register.** In past years Conference recommendations and statements of continuing interest were also published in full text in the Code of Federal Regulations (1 CFR Parts 305 and 310). Budget constraints have required a suspension of this practice in 1994. However, a complete listing of past recommendations and statements is published in the Code of Federal Regulations. Copies of all past Conference recommendations and statements, and the research reports on which they are based, may be obtained from the Office of the Chairman of the Administrative Conference. Requests for single copies of such documents will be filled without charge to the extent that supplies on hand permit (see 1 CFR § 304.2).

The transcript of the Plenary Session is available for public inspection at the Conference's offices at Suite 500, 2120 L Street, NW, Washington, DC.

Dated: August 22, 1994.

Jeffrey S. Lubbers,

Research Director.

Appendix Recommendations of the Administrative Conference of the United States

The following recommendations were adopted by the Assembly of the Administrative Conference on June 16, 1994:

Recommendation 94–1, The Use of Audited Self-Regulation as a Regulatory Technique

Audited self-regulation is defined as congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency. This self-regulatory organization is often an association of regulated entities formed for the explicit purpose of self-regulation. Audited self-regulation is an alternative for Congress to consider in legislating any regulatory program. Properly implemented and monitored, a program of audited self-regulation may effectively advance the statutory objectives consistent with the

ıblic interest and the interests of the regulated entities.

In certain circumstances, this approach may result in better regulation because the agency's statute and rules are supplemented and enforced by those entities directly involved in the regulated activity, which may have more detailed knowledge of the operational or technical aspects of that activity. The regulatory program also may be more effective because it can be tailored to the individual industry or group. In addition, the agency's regulatory enforcement costs may be reduced by this approach, although such cost reductions should be considered only if they can be achieved without eroding the effectiveness of enforcement.

On the other hand, audited self-regulation may present the significant risks of uneven enforcement, capture of the regulators by the regulated industry, and creating barriers to entry or competition. Where the potential for institutional self-interest is too great, self-regulation is undesirable. Other risks can be lessened by requiring the self-regulatory organization to establish and follow procedures similar to those that would be applicable if the self-regulatory organization were an agency.[1] For these procedures to work, effective interest groups must exist, and must have access to the agency, to raise concerns about the conduct of the self-regulatory organization. And of course, the agency itself must vigilantly oversee the activities of the self-regulatory organization and of the regulated entities themselves.

A survey of agency experience with audited self-regulation[2] reveals several common elements typically present in effective programs: (1) Industry members are organized, expert, and motivated to comply; (2) the regulatory program requires individualized application of clear rules which can be objectively applied; and (3) the agency itself has sufficient expertise to audit the self-regulatory activity effectively. The survey also revealed that audited self-regulation programs that were terminated or not implemented lacked at least one of these elements.

In those cases where the prerequisites and safeguards discussed above are present, Congress and the agencies should consider audited self-regulation as a regulatory technique.[3]

Recommendation

1. Congress and agencies should consider audited self-regulation as a regulatory technique when designing, revising, or reevaluating regulatory programs, but only where it can be effective, as specified in Paragraph 2 below, and only where it can operate fairly, as specified in Paragraph 3 below. Audited self-regulation is defined as congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency.

2. *Effectiveness.* Audited self-regulation can be effective if it meets the following requirements.

a. The substantive standards, whether imposed by statute, regulation, or otherwise, are clearly stated and are capable of objective application, even if judgments must be made in applying them.

b. A self-regulatory organization with the ability and incentive to implement these substantive standards in cooperation with the agency exists or can be created.

i. *Ability.* The organization must have the expertise, experience, authority, and commitment to design, implement, and evaluate effective compliance measures. It must also, by itself or in combination with other self-regulatory organizations, have jurisdiction over all regulated entities.

ii. *Incentive.* The organization must be motivated to undertake effective and fair self-regulation consistent with the public interest, as that interest has been articulated by Congress and the agency. This motivation can be provided by, among other things: (A) the members' common incentives; (B) effective monitoring by groups that may be harmed by noncompliance; (C) potential legal liability of the self-regulated entities or the self-regulatory organization; or (D) the potential for direct government regulation.

c. The agency responsible for implementation and oversight must have the ability and incentive to implement the substantive standards through a self-regulatory program.

i. *Ability.* The agency must have (A) statutory authority, including at least the powers specified in Paragraph 2(d) below; (B) sufficient substantive expertise; (C) knowledge of organizational behavior and internal control procedures of the self-regulatory organization and its members; and (D) sufficient resources, including effective auditing capability to monitor compliance.

ii. *Incentive.* The agency must have the incentive to implement the self-regulatory program effectively. Effective implementation requires that the agency be committed to achieving the objectives of the statutory scheme through the self-regulatory program. It also requires that the agency consider the rights and needs of the intended beneficiaries of the regulatory program, who may be harmed by noncompliance, as well as the rights and needs of the regulated entities.

d. The self-regulatory program is expressly authorized by legislation that includes:

i. an explicit statement of the scope of permitted delegation to the self-regulatory organization;

ii. authority for the agency (A) independently to enforce the law, agency regulations, and rules of the self-regulatory organization relevant to the program; (B) to enforce the organic requirements of the self-regulatory organization against the organization, and require that the organization in turn enforce its own rules against its members; (C) to review all rules and enforcement actions of the self-regulatory organization relevant to the program; and (D) to amend, repeal or supplement the rules of the self-regulatory organization or require the self-regulatory organization to do so; and

iii. a requirement that the agency, in promulgating its own rules or reviewing the rules of the self-regulatory organization, examine the effects of those rules on competition.

3. *Fairness.* Audited self-regulation can operate fairly only if the procedures of the self-regulatory organization ensure that the decisionmaker is properly informed and unbiased. Procedures for adjudication and for establishing rules of general applicability should conform generally to those that would be followed if the proceeding were conducted by the agency. In addition to the agency's plenary review authority referred to in Paragraph 2(d)(ii)(C), the agency should provide parties with a right of appeal.

[1] Such procedures generally provide for public participation and require all points of view to be taken into account and addressed. For example, rulemaking ordinarily should provide notice and opportunity for comment to all affected parties, and adjudications should be open to the public and include notice and hearing safeguards.

[2] Audited self-regulation has been used in diverse programs, including quality of medical care under government insurance programs, stock exchange and commodities regulation and trading, agricultural marketing agreements, and certification of medical testing laboratories.

[3] Note, for example, that Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735, 51,736 (October 4, 1993) states that, to the extent permitted by law, agencies should identify and assess alternative forms of regulation.

4. *Access to records and proceedings of the self-regulatory organization.* Congress and the agency should provide public access to records of the self-regulatory organization relating to the organization's regulatory activities, to the extent such records would be available under the Freedom of Information Act if the self-regulatory organization were an agency. Congress and the agency also should consider whether to require any nonadjudicatory proceeding of the organization to be open to the public.

5. *Alternative dispute resolution.* The rules of the self-regulatory organization should provide for use of informal and consensual procedures to resolve disputes where appropriate.[4]

Recommendation 94–2, Reforming the Government's Procedure for Civil Forfeiture

The United States Government has in recent years made increasing use of its power to confiscate the property or assets of persons involved in illegal activities through the civil forfeiture process.

The law classifies forfeitures as criminal or civil according to the procedure by which the government perfects its title in the confiscated property. Criminal forfeiture follows as a consequence of criminal *conviction* of the property owner. The government cannot obtain clear title until a post-trial proceeding is held. Civil forfeiture is accomplished by civil proceedings, *in rem*, against the property itself. Civil forfeiture has numerous advantages over criminal forfeiture in that the property itself is the "defendant" in the suit, and the property may be forfeited even if the owner is dead or has fled the United States.

Over a hundred statutes authorize civil forfeiture, with most involving drug, racketeering, money laundering, or immigration violation.

A civil forfeiture begins with a "seizure" of a privately-owned property by the investigative/prosecutorial government agency. Constitutionally, the agency must meet the probable cause test showing that there are reasonable grounds for belief that the property has been used in the commission, or constitutes proceeds, of the crime.

Civil forfeiture proceedings are of two types. Congress has provided for *administrative* forfeiture in cases where the property is cash, the value of the property is under $500,000 or is a boat, plane or car used to carry or store drugs, or if the seizure goes uncontested. Notice of an impending administrative forfeiture is sent to the last known address of the owner and is published in newspapers.

A *Judicial* forfeiture proceeding is required when a claimant contests the seizure, when the property seized is real estate, and when the value of the seized property (other than cash) is over $500,000. If the case proceeds, it does so in federal district court where there is a right to a jury trial.

This recommendation addresses a few procedural issues regarding civil forfeiture.[5] Many other issues, both procedural and substantive, have been raised by courts and by critics of the forfeiture process.[6] There is a fundamental issue about the fairness and effectiveness of the entire administrative civil seizure/forfeiture process. It currently involves an extremely informal administrative process and, for the small proportion of judicial forfeiture cases that are taken that far, a trial in the federal district court.

After forfeiture, an owner may petition for remission (return) or mitigation (partial return) of the property. Of course, in many instances, especially those involving cash, no one claims ownership. According to federal common law, the authority to grant remission or mitigation is totally at the discretion of the seizing agency. A decision on the merits for remission or mitigation is non-reviewable by the judiciary.[7]

Notice. The current system of using newspaper notices of the proposed forfeiture action along with a letter to the last known address of the owner has been criticized as unduly expensive[8] and ineffective. The establishment of a centrally maintained Civil Forfeiture Registry, which would be published and made widely available, would not only provide better and more reliable notice, it would provide a better overview of the entire forfeiture process, thus improving public and congressional oversight.

Time Limits. At present, federal statutes provide no time limit on the agency to provide notice to the owner of the seized property. Unlike the requirements imposed on a person contesting the seizure to file a claim to the property, deadlines have not been similarly imposed on the agency within which it must commence a forfeiture action in district court. Current Department of Justice policy is to send a notice of seizure to each person known to have an ownership or possessory interest in the seized article within 60 days of the seizure. The notice triggers the running of the time specified by the enabling statute (usually 30 days) within which a person may file a claim to the property (thus converting an administrative forfeiture into a judicial one).

Congress should provide a statutory 60-day time limit on the agency to provide notice in the Civil Forfeiture Registry and to send written notice of a seizure to the last known address of the owner or interest holder in the property. Granting extensions or waivers of the 60-day notice requirement should be within the discretion of a federal judge or magistrate, upon a showing by the government of good cause. Failure to meet the filing time limit (absent a waiver or extension) should result in a return of the property pending further forfeiture proceeding.

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[4] The Administrative Conference has repeatedly encouraged agencies to use alternative dispute resolution and negotiated rulemaking techniques in appropriate circumstances. The same factors supporting those recommendations suggest the value of informal and consensual processes in the context of self-regulatory organizations. *See, e.g.*, Recommendations 82–4 and 86–3.

[5] This recommendation only applies to seizures by agencies acting under the authority of statutory administrative forfeiture provisions. It does not apply to agency seizures of property under the authority of regulatory statutes that do not have administrative forfeiture provisions, or to seizures of property that by its nature is violative of the law, such as seizures under the Federal Food, Drug, and Cosmetic Act.

[6] Federal adoption of state forfeiture actions is one issue which has received recent scrutiny. Under the Comprehensive Crime Control Act of 1984, forfeited assets (property, or money derived from its sale) are allocated exclusively for law enforcement purposes rather than to the general Treasury. Additionally, the Department of Justice and the Customs Bureau gained authority to transfer forfeited property and cash to state and local agencies that directly participate in law enforcement efforts leading to seizures and forfeitures. This has led some officials in six states which require forfeited property to revert to the general state treasury, to ask federal officials to adopt state cases and convert them into federal forfeitures. The Department of Justice asset sharing program shared over $736 million in cash and $90 million in property with state and local agencies from the state of the program in fiscal year 1986 through fiscal year 1991. In *Harmelin* v. *Michigan*, the Supreme Court noted:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

501 U.S. 957, _____ 111 S. Ct. 2680, 2693, n.9 (1991).

[7] Historically, the federal government has provided for administrative relief from forfeiture in cases where the party's conduct was undertaken "without willful negligence" or an intent to commit the offense. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689–90 n.27 (1974), quoting 19 U.S.C. § 1618.

[8] The Department of Justice estimates that the government spends over $55 million annually on newspaper notices.

NATIONAL ACADEMY OF SCIENCES / NATIONAL ACADEMY OF ENGINEERING
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Board on Science, Technology and Economic Policy
2101 Constitution Avenue, NAS 301
Washington, D.C. 20418

Tel: (202) 334-2455
Fax: (202) 334-2290

DATE: October 19, 1994 **Pages including cover:** 1

TO: Jane Schweiker **Fax number:** (202)628-1886

FROM: John Godfrey

SUBJECT: Status, International Standards. Conformity Assessment, and U.S. Trade Policy Project

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I am sorry that neither John Wilson nor I will be able to accept your invitation to attend the ANSI Government Members Council meeting tomorrow. I would like to update you on the status of the report, in case you should want to inform the GMC.

We are working hard to finalize the report for review. We are hopeful and optimistic that we will remain on target for public release of the report early in the first quarter of 1995.

We believe the report provides the most comprehensive, up-to-date analysis of the link between standards, product testing and certification, and domestic and international economic performance yet produced in the United States.

The report includes recommendations to Congress and top Executive Branch officials for increasing the efficiency of conformity assessment, streamlining standards development, and promoting the success of U.S. exports in world markets. It examines the role of public and private participants in standards development and conformity assessment, including NIST and the interagency processes outlined in OMB Circular A-119. It reviews developments in the European Union and presents analysis of the new standards agreements in the Uruguay Round of the GATT and World Trade Organization. The report also provides an agenda for the Office of the U.S. Trade Representative in designing post-Uruguay Round policies on standards and conformity assessment.

We will certainly continue to keep in contact with you and George Willingmyre. We will provide specific information about publication of the report, including events associated with its release, as soon as it becomes available.