

AGENDA
ICSP Meeting
Tuesday, July 19, 2011
1:30 p.m. – 4:15 p.m.

Access Board Conference Facility
1331 F Street, N.W. Washington, DC, Suite 800

Participants:

David Alderman, NIST
*Kathy Baden, GSA
Paul Bolon, DOL/OSHA
Emily S. Bremer, ACUS
David Capozzi, ACCESS
Lisa Carnahan, NIST
Michael Case, NRC
*Colin Church, CPSC
Mary Jo DiBernardo, NIST
Mary Donaldson, NIST
Richard Ewell, DOL/OSHA
Michael Fitzmaurice, HHS
Gordon Gillerman, NIST
William Hamilton, DOL/OSHA
Patricia Harris, NIST
Carol Herman, FDA
Heidi Hijikata, ITA
Ajit Jilla, NIST

Tim Klein, DOT
Andrew Levinson, DOL/OSHA
* Laura McCarthy, NARA
Mary McKiel, EPA
*Erin Morris, USDA
Carol Moyer, NRC
Oksana Pozda, GPO
Erik Puskar, NIST
Nathalie Rioux, NIST
Patrick Roach, FTC
Mary Saunders, NIST
Greg Saunders, DoD
Peter Shebell, DHS
Alain Sheer, FTC
*James Sorace, HHS
Debra Stoe, DOJ
Trudie Williams, DoD
*Sam Wong, TRES

* Via conference call

1:30 Welcome and Introductions

**Mary Saunders, ICSP Chair,
National Institute of Standards
and Technology (NIST)**

**1:40 Update - NSTC Subcommittee on
Standards Proposed Next Steps**

Mary Saunders

The National Science and Technology Council's Subcommittee on Standards (SOS) met on June 30, 2011. Patrick Gallagher, Under Secretary of Commerce for Standards and Technology and Director of NIST, chaired the meeting which was attended by 15 agencies and Aneesh Chopra, US Chief Technology Officer. Dr. Gallagher presented the following two document deliverables for consideration:

- Principles background document - describes the current system including principles behind federal engagement in standards and their legal and regulatory underpinnings along with four case studies outlining the Federal government's involvement in

standards development in the national priority areas of cybersecurity, smart grid, public safety communications and health information technology.

- Draft policy memo – to be issued jointly by Office of Information and Regulatory Affairs (OIRA) and the Office of Science and Technology Policy (OSTP). This memo will encapsulate a set of operating principles for agencies engaging with the private sector in standards development in national priority areas. It will build on the OMB Circular A-119 and statutory underpinnings for governmental engagement in the standards system.

The SOS concluded that the policy memo was valuable and recommended that staff level comments be gathered. This memo will provide high level policy guidance for implementation within agencies according to their core missions and activities. The goal is for the Federal government to issue a strategic statement noting that standardization is important, the U.S. system is robust and flexible, and agencies work with the private sector in many ways to achieve national policy goals while staying consistent with global trade agreements. The memo will outline how a national priority is identified and clarify when federal coordination or leadership may be appropriate. The SOS suggested that the principles document could be summarized into a concise context document outlining the steps of how the policy memo was developed.

Several issues identified in the RFI comments may fall to the ICSP to address such as providing access to standards referenced in regulations; addressing outdated references to standards in regulations; and clarifying roles and responsibilities.

ICSP could also consider further building and developing the case studies. These are important in terms of providing a ‘lessons learned’ approach to explaining federal engagement in standards. The GMF project to develop brief presentation materials describing each agency’s approach to the use of standards was suggested as an additional element.

The next step in the SOS process is to present a revised version of policy memo to the Federal CTO. In addition, [Ajit Jilla](#) requested agencies to check whether their principals participate in the SOS, and if not, to inform him of the best contact.

The work of the SOS is indirectly related to other policy memos recently released – two cited are the May 2011 memo on export and trade promotion and public participation in rulemaking (a [restatement of Executive Order 13563 and the Trade Agreements Act](#)), and the March 2011 Memo on [Principles for Regulation and Oversight of Emerging Technologies](#). Other recent parallel activities by OMB include a memo addressing the Regulatory Flexibility Act and the activities of agencies, under the direction of OMB, to provide plans for reviewing regulations on a priority basis.

As a follow on to the anticipated policy memo, NIST may expand its current training offerings to include executive level briefings designed to provide an overview of strategic standards related topics at a high level. It is anticipated that the briefings will be about two hours or less. NIST can provide a short description of its proposed executive training to all interested agencies.

The ICSP discussed how to define a “government employee” with regards to representing federal (and specifically regulatory) agencies on standards developing committees. In some instances, DOT uses “special government employees” when there is no expertise in house to represent the agency on standards committees. FDA hires visiting scientists and staff fellows with needed expertise; they are technically not governmental employees. DoD uses contractors with technical expertise to expedite standards development but they don’t “represent” the government. DoD cautions against having the ICSP develop a position paper defining “government employee” but would welcome guidance on key areas to consider. In addition, the employee distinction could be included in standards training, leaving the issue of representation to policymakers. It was suggested that NIST staff could poll agencies to gather and share what each is doing. This may help clarify roles, articulate the different levels of standardization and provide examples of what to consider in selecting staff to work on specific committees.

2:15 ACUS Standards Incorporated by Reference Project

Emily Bremer, Administrative Conference of the United States
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The Administrative Conference of the United States ([ACUS](http://www.acus.gov)), a recently reauthorized non-regulatory federal agency, consists of a staff of 13 and a board of 101 administrative law experts. Sixty are from federal agencies and 40 are from the private sector. The board’s mission is to study problems in federal law, policies or procedures and make recommendations. Ms. Bremer is preparing a [report on voluntary standards and publications incorporated by reference](#) in federal regulations.

Three main areas of interest in Bremer’s report are:

- Examining the evolution of procedures guided by federal regulatory policies on how agencies post in the Federal Register.
- Updating standards that have been incorporated by reference - agencies differ in approaches to updating standards referenced in their regulations.
- Accessing standards and materials incorporated by reference – agencies use various ways to make standards incorporated in their regulations available to the public.

Her research includes review of legal and policy documents as well as interviews with key participants in the standards processes within federal agencies and SDOs. She is finding that agencies have different approaches to resolving issues related to incorporation by reference. Agencies appear to work independently – and there may be fundamental reasons why one agency

may select a particular approach. The draft report is expected by the end of September for presentation to the ACUS Committee on Administration and Management which will provide recommendations for vote by the full Conference in December. ACUS will then publicize the final recommendations.

A discussion developed regarding access to standards and how standards should be paid for especially in the situation where there is significant federal involvement in the standards process. Each agency must make their own cost benefit analysis to answer the question of whether it is better to develop and maintain standards and offer them freely, or arrive at a solution with relevant SDOs to keep access affordable. The question of access is more noticeable when the complexity of a standard requires an expensive solution. ACUS's report may develop a set of principles to guide agencies on making decisions regarding incorporation of copyrighted standards by reference. For example, in 1979, ACUS issued Recommendation 78-4 [Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulations](#). The OMB Circular A-119 was issued shortly after these recommendations were issued. Other guidance may exist. The Office of Federal Register has a [chapter on incorporation by reference](#) in its document drafting handbook that may be updated. OSHA has a special project on VCS updates. Its Standards Improvement Project identifies and issues revisions to regulations with outdated references. More than 500 VCS are referenced throughout all OSHA's regulations.

ACUS is looking at various approaches that agencies are using to respond quickly to changes in standards incorporated by reference both in regulations and statutes as well as considering proposing statutory changes that would allow for a more expedited process to bring a rule up to date. In some cases a standard may change radically from one edition to the next due to new thinking, and utilizing the full rulemaking process is beneficial; however this approach may be excessive if minor changes are made to a standard because of better technical knowledge. Some agencies have been able to use direct final rulemaking as a means of incorporating updated versions of standards into regulation, which works well if there are not any objections. OSHA issues "*de minimis*" violations to manage the use of updated standards by regulated entities (when the out of date standard is still required by regulation). The Coast Guard uses an "equivalency determination" which permits a determination of compliance when using an updated standard. This is allowed by statute. EPA, with more than 500 standards incorporated by reference, has success in direct final rulemaking. EPA encourages SDOs to alert EPA when a standard is updated to make it easier to go back to implement direct and final rulemaking – easier than reopening a regulation.

ACUS noted that some agencies with staff on standards committees keep agency management informed of relevant changes to standards which allows agencies to respond more rapidly in implementing updates to regulations. For agencies to model this approach it may require a restructuring of internal agency standards coordination processes. Even without agency staff on a committee, agencies may set up ways to monitor standards developments by working with the

administrative staff at an SDO or through agency libraries who can track changes to relevant standards.

**2:45 Organizing an Effective Agency Standards
Coordination Network**

**Peter Shebell, Department of
Homeland Security**

Attachments:

- [DHS: Developing a Standards Infrastructure](#) (ppt)
- [Memo](#) and [guidance](#) used in 2010 NTTAA reporting request (pdf)
- [DHS: Guidance on Participation in the Development and Use of Non-Government Standards](#) (pdf) (*DHS will send around a parallel draft internal guidance document on conformity assessment for comments later this year.*)

Mr. Shebell provided an overview of DHS's standards coordination function which resides within the Science and Technology Directorate's Test & Evaluation and Standards Office. The office provides coordination and support to standards related interests within the individual agencies of DHS and with other federal agencies. Standards coordination has become a way to bring together the disparate agencies of DHS. The DHS Standards Council is modeled after the ICSP, has members from each agency of DHS and meets four times per year. The office also coordinates DHS's annual NTTAA report. DHS's approach is to send an annual questionnaire as a memo from the Undersecretary of S&T, which provides visibility to the request. Along with the annual questions, it includes specific guidance on what to report (and not to report). Input to the annual report is also used to develop an annual DHS standards report.

DHS provides success stories for the NTTAA annual report. Their FFRDC (federally funded research and development center) occasionally conducts studies to measure effectiveness of their standards programs.

A discussion developed on coordination with the [Interagency Board \(IAB\)](#) concerning [equipment standardization and interoperability](#) with regards to consensus standards because some procurement standards intersect with regulations put out by OSHA and EPA. It may be useful for ACUS to be aware of the work of IAB.

**3:15 IP Holdup in Standards Setting – Overview
of FTC Activity**

**Pat Roach, Federal Trade
Commission**

The Federal Trade Commission (FTC) reported on its recent '[Workshop on Intellectual Property Rights In Standard Setting: Tools to Prevent Patent Hold-up](#)'. The FTC, a five member commission, enforces federal consumer protection and market competition laws. The work is carried out by the Bureau of [Consumer Protection](#), [Competition](#) and [Economics](#), and is supported by the Anti-trust division of the Department of Justice. Delays may occur during the standards setting process as a result of one or more patents incorporated in a standard. Patents assign exclusive rights to one party unless others obtain a license from that party. The goal of

having a broad use of a standard may be at odds with the exclusivity goal of a patent holder. The FTC enforcement activities are directed to situations where deception favoring patent holders or license holders occurs during the standards setting process. SDO procedures require a transparent process, yet some patent holders practice deception by not revealing their patents in open discussion (*ex ante*) before their patent becomes incorporated into a standard. After the standard is adopted, the patent holder holds an unfair advantage since it is virtually impossible for the user of the standard to switch or change to anything else to get around the patent. One example cited was a memory chip used in PCs. In this specific case, the patent holder, working on the standards committee, communicated back to his company during the standards development process to change language in their patent application to clarify their claim. In another example involving a standard for summertime gas in California, the patent holder claimed the standard was clear of patent problems; when the standard was issued, they revealed their patent and claimed royalties on the order of \$400 million per year.

The FTC is examining ways to help prevent this holdup. The workshop laid out discussions among private sector participants including SDOs, the telecommunications and the IT industries on how they shape their internal rules:

1. Patent disclosure rules – examines how an SDO finds out that there is a patent contained in a standard, the responsibilities of affected parties, who discloses and when, and whether corporations are required to review their full (maybe millions) patent portfolio whenever a new idea is brought forward in a working group.
2. After the disclosure of a patent in a standard, what are *ex-ante* terms, royalties, fees and conditions for licensing? Does this approach allow for a better decision regarding whether to adopt the technology in the standard or not? NIST has commissioned an *ex-ante* study (Jorge Contreras, American University Law School) to assess what happens if this approach is adopted.
3. Use of the RAND or FRAND licensing permits – allows the patent holder to promise they will license on reasonable (or free) and non-discriminatory terms – yet the meaning of the terms have yet to be determined.

Discussion evolved around when a federal agency, who may be a patent holder for a technology, participates in a standard developing committee. Usually federal agencies want their technologies broadly used so this might not be an issue unless private entities jointly hold a claim to the patent, or when the agency licenses its patent to a private entity. For the most part, the FTC has not focused on this issue, but instead is looking at situations where the company may hold large portfolios requiring much legal review, thus holding up the development of a standard. License renegotiation caused by IP acquisitions may further complicate participation in standards developing committees, for example when a private company acquires a broad portfolio which includes a great volume of patents.

The FTC report does not yet have a release date, and the FTC clarified that it is working on behalf of the end consumer (product purchaser).

3:45 Other Business/Around the Table

All

DOT – interoperable public safety communications is a current concern, with activity on the Hill regarding spectrum laws, NTIA and interoperability of standards in federal regulations.

DoD – the Defense Standardization Program holds its [2011 Standardization Conference](#) in Hollywood, FL during last week of August – 500 participants and covering a range of topics.

FDA – dealing with interoperability issues with regards to numerous SDOs working on standards in medical devices and communications. It will hold a meeting with affected parties to try to resolve.

EPA – reports on a study they commissioned with the National Academy of Sciences relative to sustainability and similar issues, which will be completed this summer. Results from the study will help to set a platform to facilitate improved communications and cooperation between offices within the agency.

ACUS – is participating in another project about [international regulatory cooperation](#). More information will soon be available on the website.

4:15 Wrap Up and Adjourn

Mary Saunders

The next ICSP meeting will be held jointly with the GMF during World Standards Week on October 13th at the Newseum, Knight Conference Center, 555 Pennsylvania Avenue, NW, 6th Street Entrance, The Freedom Forum Entrance, Washington DC 20001.