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TESTIMONY

Statement of

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Chairman Babin, Ranking Member Bera, and other distinguished members of the subcommittee, thank you for the opportunity to appear before you today, in this hearing on regulating space, to testify on regulatory organizational frameworks that currently exist in federal law, with a focus on those organizational frameworks that involve participation by private entities.

This testimony begins with a discussion of traditional regulatory frameworks in which regulatory power is delegated, by statute, to federal government entities. Selected regulatory organizational models that involve quasi-governmental or non-governmental entities are then discussed, including government corporations, non-governmental standards-setting, non-governmental entities with a federal charter, and self-regulatory organizations. Examples of such entities are provided.[1]

Traditional Governmental Regulatory Frameworks

The most prominent means by which the federal government controls the conduct of private entities is through a congressional delegation of regulatory power to a federal agency.[2] Such delegations are often[3] accompanied by the authority to implement the delegation through rulemaking.[4] The agency, in an exercise of the power provided to it by Congress, then issues rules (pursuant to certain required procedures) that are consistent with the statutory delegation and have the force and effect of law.[5] In addition to the power to implement a statutory grant of authority through rulemaking, Congress will often provide the federal agency with the authority to enforce the agency's own regulations.[6] The agency, through enforcement actions and adjudications, may then impose penalties on members of the public for noncompliance with agency regulations.[7]

In other instances, rather than providing an agency with the authority to issue general regulations, Congress has given a federal agency the authority to control private entity conduct through the provision of individual licenses. Licenses are generally provided for a specified term, subject to renewal by the agency, and will typically require the licensee to comply with either statutorily or administratively established conditions in order to maintain the license.[8] The regulatory and licensing models are not

[1] For purposes of this testimony, quasi-governmental entities are those entities that feature characteristics of both governmental and private control, while non-governmental entities are those which, while perhaps sanctioned by the federal government in some way, are not controlled by federal authority.

[2] *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[3] Delegations to agencies can also be implied based on the nature and ambiguity of the statutory text. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.").

[4] *See e.g.*, 26 U.S.C. § 7805 (providing the Secretary of the Treasury with the authority to "prescribe all needful rules and regulations ..."); 33 U.S.C. § 1607 (authorizing the promulgation of "such reasonable rules and regulations as are necessary to implement the provisions of this Act"); 42 U.S.C. § 3614a (authorizing the Secretary of Housing and Urban Development to "make rules ... to carry out this subchapter").

[5] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979) ("In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites.").

[6] *See, e.g.*, 8 U.S.C. § 1103 ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act ...."); 25 U.S.C. § 282 ("The Secretary of the Interior is authorized to make and enforce such rules and regulations as may be necessary to carry out" the referenced chapter).

[7] *See, e.g.*, 15 U.S.C. § 45 (providing the Federal Trade Commission with authority to "prevent ... unfair methods of competition ... or deceptive acts or practices in or affecting commerce"); 49 U.S.C. § 20111(a)(1) (providing the Secretary of Transportation the "exclusive authority to impose and compromise a civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary").

[8] *See, e.g.*, 51 U.S.C. § 50904 (providing for the licensing of commercial space launch activities by the Department of Transportation).

mutually exclusive, but instead are often complementary. Congress may, for example, provide an agency with both general regulatory authority and more individualized licensing authority. For example, the Nuclear Regulatory Commission has been delegated the general authority both to issue regulations ensuring the safe operation of nuclear facilities and use of nuclear materials and to provide private entities with individual licenses to operate nuclear reactors or to possess nuclear materials.[9]

Congress may also delegate regulatory authority over a single topic to multiple agencies. In such a case, a lead agency may be provided regulatory authority that must be exercised in "consultation" with other agencies.[10] The lead agency in this arrangement is not bound by comments received through the consultation process. For example, the Administrator of the Environmental Protection Agency is required to "solicit the views" of the Secretaries of Agriculture and Health and Human Services before issuing regulations pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act.[11] In contrast, Congress may delegate authority to multiple agencies to issue rules and regulations jointly after reaching consensus. For example, various provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act require various agencies to issue joint or coordinated rules.[12]

It should be noted that even when rulemaking authority is provided to a federal agency, participation by private entities and the general public in the rulemaking process can be significant. For example, most agency rules are issued pursuant to the notice and comment rulemaking procedures established under the Administrative Procedure Act (APA).[13] These procedures require agencies to publish a proposed rule in the *Federal Register* and provide the general public with a meaningful opportunity to comment on the regulation.[14] The agency is further required to respond to significant comments it receives.[15] Thus, private parties are permitted an opportunity to participate in, and at times influence, the promulgation of federal rules by federal agencies.

Regulatory Models Involving Quasi-Governmental or Non-Governmental Entities

Government Corporations

A government corporation is an entity of the federal government established by Congress in corporate form. In general, such entities are intended to perform a public purpose and are given this form to provide the flexibility necessary to carry out that purpose.[16] They often provide a market-oriented product or service, have the power to use and reuse revenues and to own assets, are intended to produce revenue that

[9] *See* 42 U.S.C. § 2201(b) (rulemaking); 42 U.S.C. §§ 2232-2237 (licensing).

[10] *See* 40 U.S.C. § 1315(c) ("The Secretary [of Homeland Security], in consultation with the Administrator of General Services, may prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property.")

[11] 7 U.S.C. § 136s.

[12] *See, e.g.*, 12 U.S.C. § 1851(b)(2) (requiring coordinated rulemaking issued by various banking regulators); 15 U.S.C. § 8302 (requiring joint rulemaking issued by Commodity Futures Trading Commission and the Securities and Exchange Commission).

[13] 5 U.S.C. § 553.

[14] *Id.* § 553(b)-(c).

[15] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir, 1973) ("[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern.").

[16] For a broader discussion of government corporations see CRS Report RL30365, *Federal Government Corporations: An Overview*, by Kevin Kosar.

meets or approximates their expenditures, and have the power to sue and be sued.[17] Each government corporation is either wholly owned by the government or of mixed ownership.

In some cases, government corporations engage in regulatory activities pertaining to the products or services they provide and the constituencies they serve. One example of a mixed ownership government corporation that operates in this manner is the Federal Deposit Insurance Corporation (FDIC).[18] Mixed ownership means that the corporation is owned both by the government and other parties. The FDIC insures bank and thrift deposits, examines state-chartered commercial and savings banks that are not members of the Federal Reserve System, and disposes of the assets and liabilities of failed banks.[19] In the course of carrying out these responsibilities, the FDIC exercises significant authority over certain private sector activities. It

> approves or disapproves of mergers, consolidations, and acquisitions ...; approves or disapproves of proposals by banks to establish and operate a new branch, close an existing branch, or move its main office from one location to another; and approves or disapproves of requests to engage as principal in activities and investments that are not permissible for a national bank.[20]

Over time, the FDIC has promulgated a number of regulations related to these functions.[21]

Non-Governmental Standards Setting

Federal agencies may incorporate standards developed by non-governmental entities, thereby forming a quasi-governmental regulatory mechanism. Private standard-setting entities establish voluntary consensus standards through an established process that seeks to give voice to divergent viewpoints.[22] In many cases, federal agencies then promulgate regulations in which these standards are incorporated by reference.[23] The standards set by these private entities generally lack the force of law until implemented by a government actor. The types of non-governmental organizations that get involved in standard-setting include testing laboratories (e.g., Underwriters' Laboratories), professional societies (e.g., American Society for Mechanical Engineers), membership organizations (e.g., American Society for Testing and Materials), and independent committees affiliated with trade associations or other sector-specific organizations.[24]

Congress has mandated the practice, by federal regulators, of incorporating privately developed standards under certain circumstances, both with regard to specific agencies and more generally. One example of an

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[17] *See, e.g.*, 16 U.S.C. § 831c(b) (providing that the Tennessee Valley Authority may "sue and be sued in its corporate name."); 22 U.S.C. § 2199(d) (providing that the Overseas Private Investment Corporation is authorized "to sue and be sued in its corporate name.").

[18] 31 U.S.C. § 9101(2)(B) (defining the FDIC as a "mixed-ownership Government corporation" rather than a "wholly owned Government corporation").

[19] OFFICE OF THE FED. REGISTER, UNITED STATES GOVERNMENT MANUAL 360 (2013) ("Federal Deposit Insurance Corporation").

[20] *Id.*

[21] *See* 12 C.F.R. Parts 323-391 (FDIC Regulations and Statements of General Policy).

[22] A standard setting organization is a "voluntary membership organizations whose participants develop 'technical specifications to ensure that products from different manufacturers are compatible with each other,' address certain threshold safety concerns, or serve other beneficial functions." SD3, LLC v. Black & Decker Inc., 801 F.3d 412, 435 (4th Cir. 2015). For a discussion of agency adoption of privately developed standards see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 638-43 (2000).

[23] *See, e.g.*, 6 C.F.R. § 37.19 (incorporating a standard by reference for the machine readable portion of the REAL ID driver's license or identification card); 7 C.F.R. § 1755.505(f)(6) (incorporating the ANSI/NFPA 70-1999, NEC® standard by reference).

[24] *See* Robert W. Hamilton, *Prospects for the Nongovernmental Development of Regulatory Standards*, 32 AM. U. L. REV. 455, 461 (1983).

agency-specific mandate to use voluntary consensus standards pertains to the Occupational Safety and Health Administration (OSHA) at the Department of Labor. OSHA's enabling legislation provides that:

> the Secretary [of Labor] shall ... by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.[25]

Another law speaks to the issue more generally. Section 12(d) of the National Technology Transfer and Advancement Act,[26] as amended, provides that "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments."[27] In order to do so, they shall "consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards."[28] The law provides for an exception if compliance is "inconsistent with applicable law or otherwise impractical."[29]

Standard-setting and standard adoption practices are the subject of guidance from both governmental and nongovernmental authorities. The Office of Management and Budget (OMB) provides guidance to executive branch agencies in this area through OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and Conformity Assessment Activities," which address applicable statutes, executive orders, and other relevant authorities.[30] On the nongovernmental side, the American National Standards Institute (ANSI), a private not-for-profit organization, serves as "administrator and coordinator of the United States private sector voluntary standardization system."[31] It does this by accrediting the procedures of standards-developing organizations.

Non-Governmental Entity with a Federal Charter

Another quasi-governmental model entails the establishment of a federally chartered corporation with congressionally sanctioned, exclusive jurisdiction over activity in a specific quarter of American life. In general, whereas the government corporations discussed above generally are viewed as entities of the federal government, the federally chartered organizations discussed here are not. In contrast to regulation through a government corporation, Congress generally does not vest federally chartered organizations with specific statutory regulatory authorities or mandates. Rather, the entity has been charged with

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[25] The Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6, 84 Stat. 1593.

[26] Pub. L. No. 104-113, 110 Stat. 783 (1996) (codified as amended at 15 U.S.C. § 272 note).

[27] Technical standards are "performance-based or design-specific technical specifications and related management systems practices." Pub. L. No. 104-113, § 12(d)(5), 110 Stat. 783 (1996) (codified as amended at 15 U.S.C. § 272 note.).

[28] Id. at § 12(d)(2).

[29] In such a case "a Federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies if the head of each such agency or department transmits to the Office of Management and Budget an explanation of the reasons for using such standards." Pub. L. No. 104-113, § 12(d)(3), as amended. (Codified as amended at 15 U.S.C. § 272 note.).

[30] U.S. EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. AND BUDGET, *OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/revised_circular_a-119_as_of_1_22.pdf.

[31] *See Introduction to ANSI,* ANSI, https://ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 (last visited Nov. 9, 2016).

operating in the given arena consistent with private arrangements, existing statutes, and other legal authorities.

One notable example of this kind of mechanism is the United States Olympic Committee (USOC), which is a federally chartered corporation with circumscribed jurisdiction. In 1950, an existing organization, the United States Olympic Association, was established by law as a federal corporation.[32] Among other effects, this charter empowered the organization "to exercise exclusive jurisdiction, either directly or through its constituent members or committees, over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games, including the representation of the United States in such games, and over the organization of the Olympic Games and the Pan-American Games when celebrated in the United States."[33]

As amended and codified, the organization's enabling statute arguably broadens the scope of its reach by authorizing it to recognize subordinate entities that govern particular sports. It states, "[f]or any sport which is included on the program of the Olympic Games, the Paralympic Games, or the Pan-American Games, the corporation [USOC] is authorized to recognize as a national governing body ... or as a paralympic sports organization ... an amateur sports organization which files an application and is eligible for such recognition."[34]

The history of the United States Anti-Doping Agency (USADA) illustrates a different path by which an organization and its authority over private actors might be statutorily recognized. USADA was created in 2000 "as a result of the recommendations made by the United States Olympic Committee's Select Task Force on Externalization in order to bring credibility and independence to the anti-doping [efforts] in the U.S."[35] In 2006, a provision of the Office of National Drug Control Policy Reauthorization Act established that the USADA was designated as "the independent anti-doping organization for the amateur athletic competitions recognized by the United States Olympic Committee."[36]

Self-Regulatory Organizations

A self-regulatory organization (SRO) is another regulatory model that is characterized by significant private involvement. Although there is no formal definition of what constitutes an SRO, these organizations are generally viewed as private entities formed by members of an industry in an effort to "self-regulate," either because traditional governmental regulation is impractical or because the industry wishes to deter governmental regulation by demonstrating that the industry can effectively supervise itself.[37]

SROs generally take two forms: either the organization is truly private, with no involvement from the federal government, or the SRO is imbued with some federal powers and maintains a relationship with the government, generally through a supervising agency. An example of a purely private SRO is the International Association of Antarctica Tour Operators (IAATO).[38] That organization was formed in 1991 by private tour operators as a means of ensuring safe and environmentally appropriate travel to the

[32] Pub. L. No. 81-805, 64 Stat. 899 (1950) (codified as amended at 36 U.S.C. §§ 220501-220529).

[33] *Id.* at § 3(3). This statute, as amended and codified, now also includes such jurisdiction with regard to Paralympic Games. *See* 36 U.S.C. § 220503(3)-(4).

[34] 36 U.S.C. § 220521(a).

[35] *Independence and History*, U.S. ANTI-DOPING AGENCY available at http://www.usada.org/about/independence-history/ (last visited Nov. 9, 2016).

[36] Pub. L. No. 109-469, title VII, 120 Stat. 3533 (2006).

[37] For a broader discussion of the role of SROs *see*, Freeman, *supra* note 22, at 644-52.

[38] *What is IIATO?*, INT'L ASS'N OF ANTARCTICA TOUR OPERATORS, http://iaato.org/what-is-iaato (last visited Nov. 9, 2016).

Antarctic. Members of the organization, which currently includes all companies providing commercial passenger vessel tours of the Antarctic, must "meet all of the association's standard operating procedures and established procedures and guidelines designed to promote safe and responsible operations in Antarctica."[39] Membership in the organization is voluntary, and the IAATO has been delegated no governmental authority by the United States government.

Other SROs are more significantly intertwined with the federal government. The Financial Industry Regulatory Authority (FINRA), the self-regulatory body for broker-dealers, is such an example.[40] FINRA was not created by federal law, but federal law does require individual broker-dealers to register with FINRA and comply with its rules.[41] The Securities and Exchange Commission (SEC), however, plays a significant role in supervising and overseeing FINRA's promulgation and enforcement of rules.[42] For example the agency may "abrogate, add to, and delete from" any FINRA rule and can "relieve" the organization of its enforcement powers.[43] Thus, although FINRA has effectively been provided with regulatory and enforcement authority, the SRO exercises those powers under the supervision of the SEC.[44]

This concludes my statement for this hearing on regulating space, in which I testified on regulatory organizational frameworks that currently exist in federal law, with a focus on those organizational frameworks that involve participation by private entities. I will respond to any questions you might have at the appropriate time.

[39] *Frequently Asked Questions*, INT'L ASS'N OF ANTARCTICA TOUR OPERATORS, http://iaato.org/frequently-asked-questions (last visited Nov. 9, 2016).

[40] *About FINRA*, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/about (last visited Nov. 9, 2016).

[41] 15 U.S.C. § 780(b)(8).

[42] *Id.* § 78o.

[43] *Id.* § 78s.

[44] *See* Sorrell v. SEC, 679 F.2d 1323 (9th Cir. 1982) (rejecting claim that delegation to National Association of Securities Dealers (FINRA predecessor) was unconstitutional).