

Comments to the Laws and Regulations Committee on Item MOS-7
Changes to Method of Sale Regulation
June 27, 2018
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This item makes specific substantive changes to the Method of Sale Regulation. I have steadfastly opposed this item in all of its various forms over the last few years using an array of arguments. However, I notice that none of those arguments have been acknowledged or responded to in the Committee Report. I believe my arguments are reasoned and based on principle. I respectfully request that the Committee recognize this opposition and provide responses to the following questions in its report, before we vote on this item.

Question 1. What is the compelling reason why this has to be done now? The justification in the report says what is being done but fails to provide any explanation of why it's necessary. What major issue, event, or problem are we seeking to resolve? I'm at a complete loss to find any justification for the changes proposed to this regulation. I can't name a single unit of measure used in commerce in the US (i.e. method of sale) that is not traceable to NIST. (see also question 3 below) While I can agree that the current regulation does not say that specifically, I question why it is necessary to say something that is obvious to everyone. If it ain't broke, don't fix it. Please explain what is broken.

Question 2. What statutory authority is being used to authorize this action? I have claimed that the proper section to cite is Uniform Weights and Measures Law (UWML) Section 12(n). In order to promulgate regulations this section requires the determination that an existing method of sale fail to provide for value comparisons or cause consumer confusion. It does not provide blanket authority to promulgate rules. There is no existing method of sale being considered here and no determination as required in the section has been made. This specific section of law supersedes the general provisions to make regulations in Section 12(b). Further, it cannot be claimed that this is editorial as it adds specific and comprehensive requirements to the section that were not there before.

Question 3. Under what authority does the NCWM presume to give NIST powers not granted by the US Congress and what does the presence of a unit of measure in the Federal Register have to do with legality of units of measure in Commerce? The core of the proposal makes it a requirement that any unit of measure used in commerce; 1) "Is recognized and defined by NIST as legal for use in commerce" and 2) "has been published in the Federal Register." I reviewed the organic act and find no such authority granted to NIST by Congress (see 15 USC 271-278). If NIST actually had that power, what role would the NCWM have? We would not even have a Method of Sale Regulation and we would not be discussing this item. What this proposal represents is a role reversal, giving NIST the power to set method of sale and NCWM becomes solely an advisor. Legally it's the other way around and NIST has not regulatory authority. It is the states have the authority to define legal units used in commerce, and they do this under the authority in UWML Section 12(n). Further, any list of units maintained by NIST is not the result of their anticipation that a unit is going to be required, rather they react to the marketplace, just as Section 12(n) requires the W&M community to react to the marketplace. The issue for me is that the units of measure are an evolutionary process. We start with seven base units and technically that is all we ever need. Science, industry and the marketplace all create unique names for combinations of units, like Joules, Watts, BTU's etc to meet specific needs. The same is true of methods of sale, like the hundredweight(milk) and the bushel(weight of grains). We, as arbitrators have to observe and react rather than anticipate and act.

As to the Federal Register piece of the proposal, I am totally at a loss to understand how this fits into this process and, if we were discussing merits of the proposal, how does this help prospective buyers and

sellers? Do we anticipate they will search through millions of pages? I wasn't aware the NIST made a point of publishing its unit equivalents list in the Federal Register as a matter of course.

Question 4. What are the positions of the stakeholders on this issue? Frankly, we don't know. No person has spoken to this item and identified themselves as a stakeholder. We can't even identify the potential stakeholders because the issue does not yet exist. We should not presume to anticipate the needs of the future marketplace, and certainly with only input from W&M officials without input from buyers or sellers. The NCMW prides itself on setting consensus standards. If this item is passed without engaging stakeholders, we lose our claim of being a consensus standard setting organization.