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Before

**The Committee on Homeland Security, Subcommittee on Cybersecurity,
Infrastructure Protection, and Security Technologies**

House of Representatives

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Hearing on Draft Legislative Proposal on Cybersecurity

Introduction

Chairman Lungren and Ranking Member Clarke, and Members of Subcommittee—on behalf of the Congressional Research Service, I would like to thank you for this opportunity to appear before you today.

CRS was asked to examine draft legislation that would amend the Homeland Security Act of 2002 (6 U.S.C. 101 et seq.; HSA) for multiple purposes.¹ In particular, CRS was asked to provide its observations on Section 3 of the draft legislation, which would amend Title II of HSA to establish a National Information Sharing Organization (NISO).

Per your request, this written statement focuses solely upon the organizational structure of the NISO.² It first describes the organizational attributes of NISO as proposed in draft legislation, and then provides observations on NISO as a type of quasi governmental entity.

Organizational Attributes of the Proposed NISO

The draft legislation would establish NISO as a “not-for-profit organization for sharing cyber threat information and exchanging technical assistance, advice, and support and developing and disseminating necessary information security technology.” The draft further defines the NISO’s purpose as serving as

a national clearinghouse for the exchange of cyber threat information so that the owners and operators of networks or systems in the private sector, educational institutions, State, tribal, and local governments, entities operating critical infrastructure, and the Federal Government have access to timely and actionable information in order to protect their networks or systems as effectively as possible.

The NISO would have a 15-person Board of Directors that would be appointed by the Secretary of the Department of Homeland Security. Board members would include a representative from the Department of Homeland Security, four persons from federal agencies with “significant responsibility for cybersecurity,” and 10 individuals from the private sector. These latter appointees would include two representatives from the “privacy and civil liberties community,” and eight representatives of critical infrastructure stakeholders, including: banking and finance, communications, defense industrial base, energy (electricity, oil, and natural gas), healthcare, and information technology. Each Board member would serve three-year terms, and private sector members would be replaced through elections held by the NISO.³

The Board would be empowered to incorporate the NISO, to choose its own chairperson and co-chairperson, and to devise all bylaws and rules for the operation of NISO. The draft bill does not address explicate whether NISO Board Members would be fulltime employees or what their compensation would be.

¹ The draft legislation supplied by the Committee is dated November 2, 2011 (1:58 p.m.).

² Thus, no analysis is provided of the role the NISO would play in the realm of cybersecurity policy or how NISO would integrate or coordinate with existing cybersecurity authorities.

³ The initial private sector Board members would serve one-year terms, and then would be replaced through elections. Whether said members would be permitted to seek re-election is not addressed by the legislation.

The draft legislation would limit the federal government’s contribution to 15% of NISO’s annual operating costs.

Observations

NISO: A Governmental, Private Sector, or Quasi Governmental Entity?

According to the discussion draft, the NISO would appear to meet CRS’s definition of a quasi governmental entity: a government-established organization that combines the legal characteristics of both the governmental and private sectors.⁴ As **Table 1** indicates, the NISO would have attributes that are governmental, private sector, and hybrid (both governmental and private sector).

Table 1. Attributes of the Proposed NISO

Governmental Attributes	Private Sector Attributes	Hybrid Attributes
Authorized by federal statute.	Board members would incorporate the NISO by filing incorporation papers with a non-federal authority (e.g., a state or District of Columbia).	The Board of Directors is comprised of 10 private sector representatives and 5 federal agency representatives.
Required to serve purposes set by federal statute.	The NISO would have the authority to establish its own operating procedures and mission statement.	NISO would be funded by both the federal government and the private sector.
Secretary of Homeland Security appoints the Board of Directors.	The NISO is explicitly exempted from the Freedom of Information (Act 5 U.S.C. 552).	NISO membership is partially set by statute, and partially devised by NISO’s Board of Directors.

When Congress creates quasi governmental entities, it tends to do so on an ad hoc basis. That is, each quasi governmental entity is crafted by a separate statute, and that statute is sculpted according to a variety of policy and political considerations. That caveat noted, CRS previously has identified a number of types of quasi governmental entities.⁵ The entities for each of these types share basic organizational attributes (e.g., GSEs are for-profit), and these quasi governmental types are listed in **Table 2**.

⁴ Generally, see CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by Kevin R. Kosar.

⁵ CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by Kevin R. Kosar.

Table 2. Types of Quasi Governmental Entities Identified by CRS

Type	Example
Quasi Official Agencies	State Justice Institute
Government-Sponsored Enterprises	Fannie Mae
Federally Funded Research and Development Centers	Sandia National Laboratories
Agency-Related Nonprofit Organizations	(See below)
>Adjunct Organizations Under the Control of a Department or Agency	National Pork Board
>Organizations Independent of, But Dependent Upon, Agencies	Henry M. Jackson Foundation
>Nonprofit Organizations Affiliated with Departments or Agencies	National Park Foundation
Venture Capital Funds	In-Q-Tel
Congressionally Chartered Nonprofit Organizations	American Legion
Instrumentalities of Indeterminate Character	U.S. Investigation Services

Source: CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*.

As presently proposed, the NISO could be characterized as an agency-related nonprofit organization. NISO would be a nonprofit organization and it would have an affiliation with the Department of Homeland Security by virtue of the Secretary’s role in selecting a minority of NISO’s board members.

However, NISO organizationally would not fit neatly into any of the subtypes of agency-related nonprofit organizations above. Rather, it would possess characteristics associated with all three subtypes. Like the National Pork Board and other agricultural check-off entities, it would charge its members fees. As with the Henry M. Jackson Foundation, the NISO would undertake a research agenda that is broadly defined in statute. And like the National Park Foundation, the NISO would be affiliated with a federal agency and have federal representatives on its board.⁶

One particularly notable aspect of the NISO as currently proposed is that it would charter itself. Typically, quasi governmental entities are chartered via federal statute; the law itself incorporates the entity. Such charters typically set forth the corporation’s: (1) name; (2) purpose(s); (3) duration of existence (limited or in perpetuity); (4) governance structure (e.g., executives, board members, etc.); (5) powers; and (6) the schema for federal oversight (e.g., annual reporting).⁷

In the limited time available, CRS could locate only one recent precedent for self-chartering—the Semiconductor Manufacturing Technology (SEMATECH) consortium—an entity established by Congress in 1987 (P.L. 100-180, Part F; 101 Stat. 1068).⁸

⁶ A board comprised of representatives of both the government and private sector is not unusual for quasi governmental entities. The American National Red Cross, which chartered a century ago, is a well known example. Federal representation on the board of the Red Cross was changed most recently in 2007. P.L. 110-26 authorizes the President to appoint one board member and to name the chairman of the board. CRS Report RL33910, *The Charter of the American National Red Cross: Current Issues and Proposed Changes*, by Kevin R. Kosar.

⁷ CRS Report RS22230, *Congressional or Federal Charters: Overview and Current Issues*, by Kevin R. Kosar, p. 1.

⁸ A copy of SEMATECH’s legislation is attached to this memorandum.

Congress established SEMATECH in response to the United States growing dependency upon Japan for semiconductors.⁹ Viewing this as a national security vulnerability, SEMATECH was a quasi governmental entity comprised of more than a dozen major domestic semiconductor manufacturers, such as AT&T Microelectronics and Intel.¹⁰ SEMATECH was a research and development enterprise whose purposes were to “encourage the semiconductor industry in the United States—(A) to conduct research on advanced semiconductor manufacturing techniques; and (B) to develop techniques to use manufacturing expertise for the manufacture of a variety of semiconductor products.” SEMATECH was affiliated with the Department of Defense (DoD) but was led and staffed by the private sector stakeholders (not government appointees and employees).

The costs of SEMATECH were shared between the federal government and the private sector—the federal government funded SEMATECH via grants authorized by the Secretary of Defense, and SEMATECH charged its members annual dues.

While NISO and SEMATECH share some organizational attributes, there are at least two considerable differences (**Table 3**). First, SEMATECH’s legislation required the DoD and SEMATECH operate under a memorandum of understanding (MOU) that provided the DoD with certain authorities over SEMATECH, such as the authority to participate in the development of SEMATECH’s annual operating plan. Additionally, SEMATECH’s statute created an Advisory Council on Federal Participation in SEMATECH. This twelve-person panel was comprised of both federal stakeholders and presidential appointees from the private sector.¹¹ The panel advised “Sematech and the Secretary of Defense on appropriate technology goals for the research and development activities of Sematech and a plan to achieve those goals,” and conducted annual reviews of its progress.¹² The draft legislation for the NISO does not include similar provisions.

Table 3. Comparison of Selected NISO and SEMATECH Organizational Attributes

Similarities	Differences
Self-chartering	MOU between SEMATECH and DoD
Affiliated with a federal agency	Advisory Council on Federal Participation in SEMATECH
Funded by the federal government and private sector	
Private sector leadership and employees	

⁹ CRS Report 92-749 SPR, *SEMATECH: Issues in Evaluation and Assessment*, by Glenn J. McLoughlin. (Archived report available from the author of this report.)

¹⁰ CRS Report 91-831 SPR, *SEMATECH Facts*, by Glenn J. McLoughlin. (Archived report available from the author of this report.) SEMATECH also had an adjunct organization, SEMI/SEMATECH, comprised of approximately 130 U.S. equipment suppliers and materials suppliers.

¹¹ The members were: the Under Secretary of Defense for Acquisition, who served as chair; the Director of Energy Research of the Department of Energy; the Director of the National Science Foundation; the Under Secretary of Commerce for Economic Affairs; the Chairman of the Federal Laboratory Consortium for Technology Transfer; and seven presidential appointees who were to include four members “who are eminent individuals in the semiconductor industry and related industries;” two members “who are eminent individuals in the fields of technology and defense;” and one member “who represents small businesses.”

¹² Additionally, SEMATECH’s legislation required annual independent audits of SEMATECH and Comptroller General review of these audits. SEMATECH had to submit its audits to Congress and the DoD Secretary. No reporting or audit requirements are including in the draft legislation for the NISO.

Quasi Governmental Entities: Rationales, Accountability, and NISO

Benefits and History

Congress has been establishing quasi governmental entities since the nation's founding. For example, Congress chartered the first bank of the United States in 1791 (1 Stat. 192, Section 3) to stabilize the nation's currency and provide a safe depository for funds and serve as a source of credit. The bank was a hybrid entity—it was capitalized through a stock offering, and both the federal government and private investors purchased shares. The bank's debt was the nation's debt. Private shareholders elected most Board members, and the Treasury Department was authorized to inspect the bank's accounts.

The creation of federal quasi governmental entities has increased since the 1960s. Many arguments have been advanced to support the creation of these hybrid organizations. However, the current popularity of the quasi government option may be traced to the following impetuses:

1. the desire to avoid creating another federal “bureaucracy;”
2. the current controls on the federal budget process that encourage federal agencies to rely less on annual appropriations;
3. the desire to make government operate more like a private sector organization; and
4. the belief that management flexibility requires entity-specific laws and regulations, and thus exemption from government-wide management statutes (e.g., Administrative Procedure Act; 5 U.S.C. 551 et seq.)¹³

Many quasi governmental entities exist, and many have been considered to be successful. The National Park Foundation, for example, annually raises significant private support for the nation's public parks.¹⁴

Cost

With quasi governmental entities there also may come a cost—reduced accountability to federal governmental direction.¹⁵

An organization's institutional structure can affect its accountability to Congress and the President. In simplest terms, the more tightly yoked to legislative and executive branch authorities an organization is, the more responsive to those authorities the organization can be expected to be. Hence, if organizations are considered as existing on a spectrum—with a wholly governmental agency on one end and a wholly private firm on the other—the former would tend to be the most accountable and responsive to federal direction, while the latter the least.

¹³ CRS Report RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, by Kevin R. Kosar, p. 1. On the federal government's management laws, see CRS Report RL30795, *General Management Laws: A Compendium*, Clinton T. Brass, Coordinator.

¹⁴ National Park Foundation, *2011 Annual Report*, at <http://www.nationalparks.org/files/about/financials/annual-report-2011.pdf>.

¹⁵ Jonathan G.S. Koppell, *The Politics of Quasi Government: Hybrid Organizations and the Control of Public Policy* (New York: Cambridge University Press, 2003); and Ronald C. Moe, “The Emerging Federal Quasi Government: Issues of Management and Accountability,” *Public Administration Review*, vol. 61, iss. 3, May/June 2001, pp. 290-312.

This organizational responsiveness to federal direction comes through a number of means, including: (1) federal involvement in the appointment of the organization’s leadership; (2) the organization’s location within or outside the government; (3) requirements for annual auditing and reports to federal authorities (Congress, the President, and agency heads); and (4) the organization’s reliance on appropriated funding.¹⁶

Assessed on these criteria, NISO might be expected to behave independently of the federal government (**Table 4**).

Table 4. Organizational Accountability and NISO

	NISO
Federal appointees	Minority; 5 of 15 directors would be federal representatives; the board would choose its chair and co-chair, who cannot be federal representatives
Location within or outside the government	Private sector; not explicitly placed within a federal agency or branch of government
Annual auditing and reporting requirements	None
Reliance on appropriated funding	Low federal contribution (not more than 15% of annual operating costs)

Organizational accountability to overseers, it has been noted, is not an unalloyed good. A frequent criticism of federal governmental entities (such as agencies) is that they are too responsive to diverse federal oversight authorities. Their efforts to satisfy the demands of diverse stakeholders may result in underperformance of an agency’s general or national policy objectives.¹⁷ As noted above, one of the arguments for establishing a quasi governmental entity is the intention that it operate less like a governmental entity and more like a private firm.¹⁸

Additionally, an aspect of organizational accountability is predictability, that is, that the entity created will behave as its creators expect. When Congress establishes an entity, governmental or quasi governmental, it inevitably includes in the statutes the “purposes” of the organization and provides the organizations with authorities to attain its purposes. In public administration parlance, there is a principal-agent relationship, wherein Congress (the principal) has established an agent (the entity) to execute the law. Quasi governmental entities sometimes behave unpredictably should they be established with starkly competing organizational imperatives. Governmental entities are to pursue policy objectives (e.g., national defense, poverty reduction, etc.); private firms pursue private objectives (e.g., profit, financial self-perpetuation, etc.) Arguably, the government-sponsored enterprises, Fannie Mae and Freddie Mac, serve as examples of the

¹⁶ An organization that is required to be self-financing will have a strong incentive to act in its own self-interest, possibly at the cost of fully pursuing its statutorily-prescribed goals or complying with government-prescribed operational rules.

¹⁷ For example, Congress established Base Realignment Commissions in order to close unneeded DoD facilities. CRS Report 97-305, *Military Base Closures: A Historical Review from 1988 to 1995*, by David E. Lockwood and George Siehl.

¹⁸ The presumption is that a private firm will perform more optimally than a governmental one.

unpredictability of entities driven by competing governmental (diverse housing policy goals) and private sector imperatives (maximizing private shareholder value).¹⁹

Whether NISO would face strongly competing organizational imperatives is unclear.²⁰ Unlike the GSEs, the NISO would be a not-for-profit organization and would not have stockholders. Its objective is a collective good—improving security against cyber threats, an end which each stakeholder has an interest in but cannot attain alone. NISO’s board would have both governmental and private sector representatives, whose interests may or may not coalesce.²¹

The legal framework within which organizations operate can greatly influence their behavior by setting incentives and expectations for operations.²² Quasi governmental entities sometimes behave unpredictably due to their ambiguous legal nature. When Congress establishes a fully governmental entity, such as an agency, many of entity’s attributes are set by default. That is, absent statutory provisions exempting the agency from federal laws and regulations, the agency is subject to them.²³ The federal government-wide management laws are many, and include statutes such as the aforementioned Administrative Procedures Act, the various civil service employment and compensation statutes (5 U.S.C. 101 et seq.), and the Lobbying with Appropriated Monies Act (18 U.S.C. 1913).²⁴ Government agencies’ actions also are bound by various constitutional limitations. Oppositely, when a private individual or group establishes a corporation, this private entity will not be subject to the general management laws that are applicable to federal agencies.

¹⁹ These GSEs’ statutes contain five different public policy objectives. CRS Report R40800, *GSEs and the Government’s Role in Housing Finance: Issues for the 112th Congress*, pp. 2-3. See also Koppell, *The Politics of the Quasi Government*, chapter 5; and Congressional Budget Office, *Controlling the Risks of Government-Sponsored Enterprises* (Washington: GPO, 1991), chapter 1.

²⁰ As NISO resembles SEMATECH, Congress may find value in reviewing the performance of SEMATECH.

²¹ Determining the alignment of interests among the board’s governmental and private sector board interest goes beyond the scope of this memorandum and would involve cybersecurity policy and other considerations.

²² Thomas H. Stanton, “Assessing Institutional Development: The Legal Framework That Shapes Public Institutions,” in Robert Picciotto and Ray C. Rist, eds., *Evaluating Country Development Policies and Programs: New Approaches for a New Agenda* (Jossey-Bass, 1995), pp. 55-68.

²³ Ronald C. Moe, “The Importance of Public Law: New and Old Paradigms of Government Management,” in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Law and Administration* (Jossey-Bass, 1997), p. 46. To be clear Congress may exempt a governmental or quasi governmental entity from coverage by a particular government management statute. For example, in 1995 the Supreme Court considered the issue of distinguishing between a governmental and private corporation. The National Railroad Passenger Corporation (AMTRAK) established by Congress (45 U.S.C. 451), and enumerated under 31 U.S.C. 9101 as a “mixed-ownership corporation” (e.g., it was owned by both the private and governmental shareholders), was sued by Michael Lebron for rejecting, on political grounds, an advertising sign he had contracted with them to display. Lebron claimed that his First Amendment rights had been abridged by AMTRAK because it is a government corporation, and therefore an agency of the United States. AMTRAK argued, on the other hand, that its legislation stated that it “will not be an agency or establishment of the United States Government” and thus is not subject to constitutional provisions governing freedom of speech. The Court decided that, although Congress can determine AMTRAK’s governmental status for purposes within Congress’s control (e.g., whether it is subject to statutes such as the Administrative Procedure Act), Congress cannot make the final determination of AMTRAK’s status as a government entity for purposes of determining constitutional rights of citizens affected by its actions. *Michael A. Lebron v. National Railroad Passenger Corporation*; 513 U.S. 374 (1995). The AMTRAK Reform and Accountability Act of 1997 (P.L. 105-134; 111 Stat. 2570) removed AMTRAK from the GCCA list of mixed-ownership government corporations.

²⁴ CRS Report RL30795, *General Management Laws: A Compendium*.

The United States, then, “has two distinctive forms of law: public law, which governs the activities of governmental bodies in their capacities as agents of the sovereign... and private law, which governs the relations of private parties with one another.”²⁵ Thus, when Congress creates quasi governmental entities that are not clearly governmental nor private sector, confusion may result as to which laws apply to the quasi governmental entity.²⁶ To cite just four examples, quasi governmental entities have found themselves in legal disputes involving questions as to which courts may hear suits against them, which government-wide management laws apply to them, to what extent they need to respect a private citizen’s First Amendment rights, and the constitutionality of prohibiting the removal of their directors except for cause.²⁷

It is difficult to anticipate how predictably the proposed NISO would behave due to its ambiguous nature. The draft legislation for NISO does not explicitly state whether it is a governmental entity or a private sector entity. By virtue of the provision that the entity should charter itself (presumably under state law), it might be assumed that it is intended to be private. The legislation also exempts the NISO from the anti-trust provisions of the Clayton Act (15 U.S.C. 12), a statute which apply to private sector firms.

However, the draft legislation also would make non-applicable to NISO two government management statutes, the Freedom of Information Act (5 U.S.C. 552) and the Federal Advisory Committee Act (5 U.S.C. Appendix). Furthermore, as NISO would be designed to serve as an “information-sharing” venue regarding cybersecurity issues, the draft legislation does provide for the protection of this information. It would forbid “any officer or employee of the United States or any federal agency” from knowingly disclosing information regarding a cyber threat. Violators could be removed from their positions, fined, and imprisoned. Whether such information protections would apply to all NISO directors and employees is unclear.

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²⁵ Moe, “The Importance of Public Law: New and Old Paradigms of Government Management,” p. 42.

²⁶ Statutes establishing quasi governmental entities often include provisions exempting the entity from a particular government management law. SEMATECH, for example, was exempted from the Freedom of Information Act (5 U.S.C. 552). Yet, this effort at clarification may lead federal overseers to question whether the statute’s silence regarding other government management laws implies that they are applicable to the entity. Currently, Congress is considering whether the Freedom of Information act ought to apply to the GSEs Fannie Mae and Freddie Mac since they are in federal receivership and effectively government-owned. See CRS Report R42080, *Fannie Mae, Freddie Mac, and FOIA: Information Access Policy for the Government-Sponsored Enterprises*, by Wendy Ginsberg and Eric Weiss.

²⁷ Respectively, see Michael T. Maloan, “Federal Jurisdiction and Practice: The American National Red Cross and the Interpretation of ‘Sue and Be Sued’ Clauses,” *Oklahoma Law Review*, vol. 45, 1992, pp. 739-760; *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424 (D.C. Cir 1997); *Michael A. Lebron v. National Railroad Passenger Corporation* (513 U.S. 374 (1995)); and *Free Enterprise Fund, et al. v. Public Company Accounting Oversight Board, et al.*, 561 U.S. ___, 130 S.Ct. 3138, 177 L.ed.2d 706 (2010).