Interview with Office of Information and Regulatory Affairs Administrator Shelanski

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New Comprehensive Infrastructure Permitting Legislation

ABA Adopts Incorporation by Reference Resolution

Administering Sex

Case for FDA as an Independent Agency
Upcoming Section Events

FALL SECTION COUNCIL MEETING

Annual Section Dinner & Awards
Friday, October 28, 2016
American University Washington College of Law
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Council Meeting
Saturday, October 29, 2016
American University Washington College of Law
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ADMINISTRATIVE LAW CONFERENCE
Thursday, December 8, 2016–Friday, December 9, 2016
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12TH ANNUAL HOMELAND SECURITY LAW INSTITUTE
Dates & Location TBD

ANNUAL SECTION COUNCIL MEETING,
MEMBERSHIP MEETING & ELECTIONS & SECTION DINNER
Saturday, August 12, 2017 | ABA Annual Meeting | New York, NY
T
his issue of the Administrative & Regulatory Law News (ARLN) arrives at transition points in the leadership in the Section of Administrative Law and Regulatory Practice, the ARLN, and the Presidential Administration. Reflecting on the Section’s recent accomplishments at this time of new beginnings suggests cause for optimism about the potential for our initiatives to continue to have a positive impact on administrative law for the benefit of the public and the legal profession. I hope this accounting of selected Section activities and future plans demonstrates how the participation of newly engaged members and longstanding stalwarts is essential to the vitality and quality of our work on behalf of the legal profession.

The Section’s success in securing the adoption of Resolution 112 by the ABA House of Delegates (HOD) is a signature achievement. Resolution 112 proposes legislation to expand public access to proprietary standards incorporated by reference into agency regulations. Section Delegate Ronald M. Levin’s remarks in introducing the Resolution at the HOD session, published in this ARLN issue, explain the Resolution, the process by which the Resolution was initially developed, and the manner in which the Section actively worked to secure co-sponsorships and endorsements for the proposal from several Sections and other ABA entities. Ron’s description demonstrates the level of expertise and practical experience, the quality of analysis, and the quantity of work invested to bring an idea from the concept stage to formally adopted ABA policy.

In a companion article, Nina Mendelson provides a thorough discussion of what is at stake for the public and regulated entities in fulfilling the obligation to make the law available on a no-cost basis. Nina’s work on the Resolution began during her recent term on the Council. While the Resolution falls short of making materials created by standards development organizations incorporated by reference in rulemakings and regulations completely available to the public, she acknowledges that if enacted into law, the policy embodied in the Resolution increases the level of accessibility of these materials.

Former Section Chair James W. Conrad, Jr., wrote after the HOD action to remind me that in his first Chair’s message four years ago, he recounted how the Section received “praise and heat for the principled but slightly radical position” the Section took in comments to the Office of the Federal Register (OFR) that privately generated standards should be available for free. Success has many parents and, while this ARLN issue features contributions from Ron and Nina, other Section leaders also played a significant role. Former Section Chair Peter Strauss first drew public attention to the issue and set forth the legal theories underlying free public access in the rulemaking petition to the OFR in 2012. Section Delegate Russell Frisby skilfully managed a contentious debate in the HOD where some criticized the Resolution for being insufficiently radical and others argued that the Resolution would undermine the ability of the government to rely on standards development organizations.

As Jamie observed in his message to me, adoption of the Resolution as ABA policy is not the end of the road. The Section’s Legislation Committee, which he co-chairs with Paul Noe, and the ABA’s Government Affairs Office must now go to work to persuade the Congress of the merits of the approach. Even in this divisive time in the political culture, perhaps the principle of open access to the law will inspire a bipartisan spirit to overcome legislative inertia.

My predecessor, Jeffery Rosen, was well-equipped to direct the Section in accomplishing an ambitious agenda as he was a member of the Section’s most recent Strategic Planning committee and has been focused laser-like on hitting the marks set forth in the plan. Among the activities identified in the Strategic Plan were expanded programming on administrative law topics, improving the resources available through the Section’s website, action ideas for new publications and energizing existing publications, and integrating the Committees more effectively into Council and other Section Activities. That the Section made notable progress in each of these areas as well as others is a testament to the prodigious energy and talent for organization Jeff brought to the Chair’s position. Jeff paved a well-marked path, but also set a high bar, for his successors.

Regarding a longstanding Section programming ambition, Jeff reinstituted the “great debates” tradition with a discussion of “Chevron Bias and the Administrative State” in which Columbia Law Professor Philip Hamburger and Georgetown Law Professor David Vladeck debated whether the Chevron doctrine caused courts to abdicate their constitutional responsibility to decide cases. The Honorable A. Raymond Randolph, Senior Judge on the U.S. Court of Appeals for the D.C. Circuit moderated.

With Jeff’s leadership and the assistance of Section Secretary Linda Jellum, the Section presented a program in conjunction with the Annual Meeting of the Association of American Law Schools in New York City in January. Outgoing Section Council member Jack Beermann organized a lively panel on “Regulating the Sharing Economy: Uber and Beyond” in which former Section Chair Randy
May participated. The Section’s program, co-sponsored
with the Hoover Institute, on the “60th Anniversary of
the Second Hoover Commission: Lessons for Regulatory
Reform” is another example of Jeff’s efforts to collabo­
rate with other organizations that share an interest in
administrative law. In addition to their intrinsic merits, the
programs reflected the Section’s ability to engage scholars
and practitioners in exploring topics from multiple
perspectives—a hallmark of the Section’s approach.

The Section has tried to infuse Council meetings
with this spirit of outreach and collaboration by asking
Committee Chairs to report and by continuing the
practice of inviting scholars, agency officials, and judges to
speak informally about topics of current or perennial inter­
est. I was pleased to be able to invite my college classmate,
Felicia Marcus who is the Chair of the California State
Water Resources Board to speak with the Council at its
recent Annual Meeting in San Francisco. She explained
her agency’s role in devising and implementing policies on
allocation of water in an era of scarcity. As an administra­
tor, Marcus has a reputation for trying to make processes
responsive and sensible—goals that the drafters of the
APA perhaps had in mind in establishing the rules for
administrative agencies. All Section members are welcome
to attend Council meetings, to participate in policy deliber­
ations, and to learn from the insights of the speakers who
address the meetings.

This account highlights only a few of the Section’s initiatives last year. While pursuing these new activities, the Section offered the typical programs with a level of excellence consistent with the Section’s reputation. The 2015 Fall Conference, chaired by Carole Anne Siciliano and Andrew Emery, the 12th Annual Administrative Law and Regulatory Practice Institute, led by Section Vice Chair John Cooney, and the 11th Annual Homeland Security Law Institute led by founding Co-Chair Joe D. Whitley and several capable vice chairs, all offered the usual high quality of presentations and substantive coverage for which the Section is known. Because of Jeff Rosen’s work with the website, information about these programs and recordings of some are available to Section members—thus extending the audience beyond the limitations of geography and the capacity of our conference venues.

This issue of ARLN marks an important transition
in the editorship of the newsletter. By recognizing the
individuals responsible, I have tried to emphasize how the
Section’s programs and activities would not be possible
without the consistent and extensive engagement of Section members who do the work. Bill Jordan’s leadership of the
Publications Committee, the authors of the annual Developments chapters, Bill Funk’s work on compiling

important D.C. Circuit decisions for the electronic newsletter, are all examples of roles requiring expertise
and time.

Nowhere is this level of effort more demanding than
producing the ARLN. This issue is the last which will
bear the imprint of Cynthia A. Drew who has served as Editor-in-Chief of the ARLN since 2013. In many
organizations, publishing what is essentially a quarterly magazine would constitute a full-time job. Cynthia, like her predecessors, has worn the responsibility through
career changes and geographic relocations, with her role as the editor-in-chief of the ARLN a constant. Cynthia
came to the role as a former member of the Council and also served as Secretary of the Section. I have a
particular memory of the tribute she organized for her Northwestern Law School administrative law professor,
Victor Rosenblum, at a Section function during one of the
ABA Annual Meetings in Chicago. During her tenure as EIC, Cynthia expanded outreach to recruit new authors
for substantive articles, and kept readers up-to-date with the regular features reporting news from the Supreme
Court, the Circuits, the states, and ACUS, and identifying interesting legal scholarship. Publications such as ARLN
are a prime member benefit and crucial to maintaining the purpose and vitality of the Section.

In recognition of her extraordinary service to the
Section, particularly as EIC of the ARLN, Last Retiring
Chair Jeff Rosen selected Cynthia to receive the Section’s Volunteer of the Year Award presented at the Section’s Fall Dinner on Friday, October 28, 2016. Please join me in thanking Cynthia for her tremendous contribution to the Section. In my next Chair’s Comment, I will focus on the other award recipients and speakers at Council events.

I am pleased to introduce David Rubenstein,
Professor of Law and Director of the Center for Law and
Government, Washburn University School of Law, as Cynthia’s successor. For the last year, David has prepared for the new role by serving as Managing Editor, and
he will bring deep experience as a practitioner and the
perspective of a widely-cited scholar to the role of EIC.
David joined the academy after two clerkships, including
one with The Honorable Sonia Sotomayor when she was
a judge on the United States Court of Appeals for the
Second Circuit, practice with King & Spalding’s New
York office, and three years in the United States Attorney’s Office for the Southern District of New York where he
specialized in immigration law. His recent scholarship has
appeared in prominent law reviews including Michigan Law

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The Role of the Office of Information and Regulatory Affairs: A Discussion with Administrator Howard Shelanski

Editor’s Note: The following is an edited transcript of an interview by Immediate Past Section Chair, Jeffrey Rosen, of OIRA Administrator Howard Shelanski, at the 12th Annual Administrative Law & Regulatory Practice Institute, March 2016.

Rosen: The rules that you review come from literally dozens of agencies right?

Administrator Shelanski: They do.

They do not include the statutorily independent agencies. But all Executive Branch departments and agencies have their rules come through OIRA.

Rosen: Could you just say a few words about how OIRA is organized to be able to review the rules from different agencies?

Administrator Shelanski: Yes. We are organized by subject matter. We have a number of branches. So for example, we have a natural resources and environment branch; a food, health and labor branch; a statistics and science policy branch; an information policy branch; and a transportation and security branch. Each branch has a branch chief and then a number of desk officers who develop expertise in the particular agencies and their portfolios. As a general matter the staff are very nimble. We are able to move people across portfolios as we need; they are good general analysts. But we also have a number of people with really strong expertise. And among the staff we have very few lawyers. We have chemical engineers, economists, a bio-statistician, toxicologists and lots of people with just really strong analytic training from various programs.

Rosen: At this point, you are almost 3 years into your tenure, and I wondered if you have had any thoughts (even though you are not at the end by any means), on the things you would regard as accomplishments that you would like to share with us at this juncture, even though you may reflect differently a year from now.

Administrator Shelanski: Thanks, I am sure I will reflect when I have the time to actually have a few peaceful days sometime after January 20, 2017. But, even now I think there are a number of things I am really pleased with. Just in terms of the flow and complexity of the rules that have come through OIRA, I think we have had a very challenging 3 years, and I have been pleased with how the staff has worked through these rules very carefully, very methodically. Just maintaining a good, steady regular process through this period is something that I have been pleased that we have been able to do, particularly

* Howard Shelanski is the current Administrator of the Office of Information and Regulatory Affairs (OIRA). President Obama nominated him to the post in April 2013 and Mr. Shelanski took office following his confirmation by the U.S. Senate in June 2013. Mr. Shelanski was previously the Director of the Bureau of Economics at the Federal Trade Commission (FTC), and he has also served as Chief Economist of the Federal Communications Commission and as a Senior Economist for the President’s Council of Economic Advisers. He has been a member of the faculties of Georgetown University (since 2011) and the University of California at Berkeley (1997-2009), where his teaching and research focused on regulation and antitrust policy. Before beginning his academic and government career Mr. Shelanski practiced law and served as a law clerk to Justice Antonin Scalia of the United States Supreme Court, to Judge Louis H. Pollak of the U.S. District Court in Philadelphia, and to Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit. Mr. Shelanski received a B.A. from Haverford College, and a J.D. and Ph.D. from the University of California at Berkeley.
because we have had some additional tasks come our way that have really grown into full-fledged work streams over the past 3 years. One involves the retrospective review of regulations. The President issued an Executive Order in 2011 that kicked off a process that had existed to some extent before, but not systematically and not with a presidential imprint, to really get agencies to routinize and institutionalize the practice of looking back at their rules. I take some pride in the fact that in the past 3 years the work that agencies have done, the past 4 years beginning with the really good foundation that my predecessor Cass Sunstein put in place for this process, $28 billion in savings through reform, repeal and pruning of existing rules on the books. That is $28 billion over those years in reduction of unnecessary regulatory costs. And that’s a number that has been vetted by some external sources that have said it looks like a pretty sound number. So that’s an accomplishment I am proud of.

I think another thing that we have done has been to increase the success of international regulatory cooperation. We have regulatory cooperation councils in place with Canada and with Mexico. We have closed out our first work plans with each of those countries. These are obviously important trading partners where regulatory tensions and contradictions can be difficult and costly. I think we have had real successes with Canada and our new 5 year plan is one that I am very excited about because it goes beyond simple regulatory harmonization to some joint planning on critical areas of regulation. And I was recently in Mexico for the High Level Economic Dialogue (HLED) meetings where we have kicked off, I think, some very important partnerships and regulatory cooperation in the energy sector and are re-engaging on our regulatory cooperation councils in some other sectors that have already delivered some real results in nanotechnology, food safety and other areas.

Rosen: One of the questions we got from a member of the audience was whether there are elements of EO 12866, such as the $100 million threshold, that you think need updating?

Administrator Shelanski: That’s a good question. On the whole, I have not felt during my tenure that this is a threshold that is really in need of updating. And the order does grant us the flexibility to take in for review and weigh in on rules that will have particular targeted impacts. After all, $100 million is still a reasonable amount of economic activity to be affecting. So I have not been chomping at the bit to have that threshold raised.

Rosen: I’ve mostly been asking you about the last 3 years; now I want to ask you a little bit about this year and what is upcoming. Can you share with us the things that you are planning or are focusing on during the current year?

Administrator Shelanski: We have a number of important projects for the coming year. We are continuing to try to make another big push on our retrospective review efforts. And I have discussed publicly before some of the things that we are looking at surrounding the regulation of scientific research and research undertaken by universities by federal grantees. This is an area that I am very interested in, it is an area that a lot of stakeholders are interested in. We have some regulatory activity that plugs very directly into this; for example, the Common Rule that I hope will soon come to us for a final review. But there are other areas of regulation that universities and research institutions have come and told us are overlapping or burdensome. That is a longer term project that I am interested in taking a close look at in the time that remains. And we have some other initiatives there as well.

Probably the biggest thing that is on my plate for the coming year is to make sure that we have an orderly march to the end of the administration and an orderly transition to the new administration, whatever it may be. One of the really great things about the United States compared to some other places is that presidential transitions really do tend to move very smoothly. There is good and sincere interaction when there are hand-offs, whether or not it is to the same party. And I want to make sure that the rulemaking that has taken place toward the end meets the standards that apply at any other time during the administration and that we leave the new administration with an orderly queue of rules under review. So we want to leave a good basket of things done and in the works. And I also want to leave the office in really good shape in other respects. Our people are our most important assets. I could go on for hours about the remarkable things that our branch chiefs and our staff right down to the newest members accomplish, and about the quality of character and the work ethic that they bring to the office. I want to make sure that the office is strong and in good shape for whoever succeeds me. And in the short time that we have left, I actually have a calendar that has deliverables for each week right up to the end.

Rosen: I remember from my own time in 2008 there was a memo from the then Chief of Staff Josh Bolten to agencies that went out in May and said, for what we regard as normally a process, that proposed rules had to be in by June and final rules by November in the final year. And in December 2015, you sent out a memorandum of your own and I wondered to what extent you were thinking of what had been done in the Bolten memo, or maybe if there were differences you had in mind.

Administrator Shelanski: That’s a great question, thank you Jeff. The Bolten memo was helpful precedent for us because it was something that I could point to and say look, it is really time for us to do something similar and I had
a lot of support for that in the administration. We have gone through a pretty intensive prioritization process with the agencies. We don’t set or choose their priorities—what we ask them to do is to choose their priorities, to vet them with the relevant policy offices that have interests and equities, and then to come to us with their proposed lists and timelines. The task now is for agencies to stick with those priorities as we move forward so that we help ensure getting the key things done that the various agency heads wish to accomplish. So my memo was designed to make clear that we are going to maintain our regular process at OIRA. If you get us a rule late, and we can’t finish review by the end of the administration, then that rule will carry over into a review period that extends into the next administration. We’re not going to be taking shortcuts, and so the agencies need to plan accordingly. So I asked them to please get their priority rules to us by the summer, because if one starts backing up from the holiday season, one gets very quickly to 90 days and some of these rules could take a lot more than 90 days given their complexity. So whether they are proposed rules that will be finalized in the next administration, or final rules that the agencies hope to complete in this administration, I want their priority policies to us in the summer so we have time to put them through a full and thorough review.

Rosen: Are there suggestions that you have for agencies on how best to anticipate and get that done the way you would like?

Administrator Shelanski: We have been working with agencies and actually have a system in place. We track the agencies’ progress on the rules that they have identified as priorities. Again not because they are OIRA’s priorities, but because we are going to be the last stop before the rule goes back to the agency for publication, and we want to make sure that we are going to have the time to do a good review. So we actually have an ongoing consultation process on their workflow.

Rosen: Last September, EO 13707 regarding behavioral economics was issued, and I wanted to ask you what impact that EO has had on rulemaking and what role or impact you anticipate it having in the future.

Administrator Shelanski: The behavioral sciences team which is led out of the Office of Science and Technology Policy is really a terrific group. And right now, I would say they don’t have a lot to do directly with the regulatory review process. What they have been very helpful with is assisting with the development of some information collection pilots in information collection by providing an understanding of how people respond to different kinds of questions, including the particular framing of a question. So they provide a lot of good insight that supports the development of data collections. And they have also started to look at specific rules, not so much during the review process, but working with agencies to understand how a rule might actually influence behavior. I think over time the behavioral sciences team can provide some very good insights. If one thinks about regulation that is incentive-based, as opposed to simply putting in place mandates, if one thinks about regulation that is flexible and induces more efficient behavior, better innovation, I think the behavioral sciences team can provide a lot of useful insights. It’s been a good partnership so far. And I think over time it can continue to be something that is very helpful in modernizing and revising the way we do regulation.

Rosen: With regard to cost-benefit analysis, can you describe for folks here what role it plays in the universe of 600 plus rules per year that you review?

Administrator Shelanski: Cost-benefit analysis is, I think, often misunderstood. To be sure there are a lot of rules where we do not get a regulatory impact analysis, but we still look hard to see if the rule has potentially more efficient alternatives and try to get agencies to identify the costs that their rule is likely to impose. When agencies perform a full cost-benefit analysis—a regulatory impact analysis—we are at times accused of not allowing rules to go forward if the quantified benefits don’t exceed the quantified costs. That’s untrue. Cost benefit analysis is as much an art as a science. We quantify everything that we can. But it’s important to note that the executive orders refer to a rule as being cost-justified; it doesn’t say that there have to be quantified net benefits. And there is a real difference there. Congress might require us to do something that can only be done at cost. Positive train control comes to mind. There are things that Congress requires that are going to be enormously costly, and no matter how much analysis you do, you are not going to get a quantifiable net benefit. So what we look to see is if whether the required objective is being achieved as efficiently as possible;
whether additional costs or unnecessary costs have been eliminated from the system. But typically we do try to look for rules to produce quantifiable net benefits. Our cost-benefit accounting, and this is just quantifiable benefits, through the first six years of the administration shows $215 billion in net benefits. If we look just at FY2014 going back to the final 2015 report that we released [in March 2016], we are looking at costs in the $3.5–4.5 billion and benefits in the $10–20 billion. Now, you will notice that the cost range is much narrower than the benefits range, and I think this says a lot about the role of cost-benefit analysis. Costs tend to be more easily quantifiable because we have lots of people very eager to give us data on what a rule is going to cost them. Benefits are hard because we are often talking about certain kinds of estimates like value of statistical life or willingness to pay or dignitary and distributional values and real counterfactuals. And when you look at the risk analysis, which often tend to have very broad ranges in the effectiveness of the rules, the harms that will be reduced, the benefits can cover a very large range and can be very diffuse. So we tend to have fairly narrow cost ranges that are fairly solid, and quite broad benefits ranges, and what we look for when we review rules is to make sure that a positive outcome is somewhere in the benefits range.

Rosen: Well in that part let me say, we are fortunate today in that we have 3 former OIRA Administrators who are going to speak at some point today: Susan Dudley, Sally Katzen and Chris DeMuth. We are very grateful for your being here today. And we hope that when the time comes, when you are a former Administrator, we can invite you again.

Administrator Shelanski: I would love to do that.

Rosen: So let me express our thanks for your being here and welcome our audience’s applause for your sharing these views with us.

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*Editors Rebecca H. Gordon & Thomas M. Susman*

With this guide, you will have the knowledge and expertise of some of the best and brightest legal minds in Washington, DC at your fingertips. This comprehensive go-to resource will guide you through the suite of laws that impact federal government relations professionals; provide practical examples of how to be compliant; and cover all of the major federal statutes and regulations that govern the practice of federal government relations work.

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Ed. Note: On August 9, 2016, the ABA House of Delegates adopted Resolution 112, sponsored by the Administrative Law Section and co-sponsored by five other Sections. The resolution proposes legislation that would expand public access to material that has been incorporated by reference into federal regulations. Section Delegate Ronald Levin made the following remarks as he presented the resolution to the House:

Madam Chair, I move adoption of Resolution 112 and ask for a second.

Members of the House, this resolution is cosponsored by six Sections: Administrative Law, Civil Rights, Intellectual Property, Public Utilities, Real Property, and Science & Technology. It has also been endorsed by other entities, including the Business Law Section, the National Conference of the Administrative Law Judiciary, and the Minority Caucus. I am not aware of any ABA entity that opposes it on the merits.

I imagine many of you find the subject matter unfamiliar and perplexing. To guide you through it, I will first explain why we are proposing the resolution, then how we created it, and then what it provides.

I urge your support for the resolution, because it strikes a balance between the right to know the law and the interests of copyright holders.

“The resolution strikes a balance between the right to know the law and the interests of copyright holders.”

require. It will also enable citizens to find out, without a charge, what proposed regulations would require, so that they can comment on those regulations to the agency that intends to adopt them.

You may think that they have these rights now, and in most situations that would be true—but not when the regulation or proposed regulation incorporates by reference provisions in a code written by a private organization. These groups are known as standards development organizations or SDOs. In those situations, the government doesn’t publish the legal requirement, so you can find out what it is only from the SDO and only on terms that the SDO decides. The SDO may, for example, require you to buy the standard, at a price of $40, or $70, or hundreds of dollars, or thousands of dollars. Some small businesses may be governed by dozens of these codes, so the total cost can really become unaffordable.

Or consider an environmental group or a community group that is concerned about some local condition and wants to know whether a proposed regulation or existing regulation adequately protects public safety. It may not be able to afford to find out, because the incorporated language is not in the public domain.

This situation is antithetical to fair notice and due process, and it is antithetical to the ability of citizens to hold government accountable, not to mention the ability of lawyers to do their jobs for their clients. Resolution 112 offers a carefully designed and balanced solution to these problems.

It is balanced because of the open and inclusive manner in which ABA entities worked together to produce it. Many of you will recall that six months ago I stood in the well of this House and announced that I would withdraw a prior resolution dealing with incorporation by reference, Resolution 106A. Instead, I said, a task force would be formed, and input from everyone would be welcome.

Well, the task force was formed, with me as chair, and every interested Section and Division was invited to send representatives. We wound up with fifteen members, who brought a wide variety of perspectives to the table. We had a former chairman of the American National Standards Institute (ANSI), the umbrella group for SDOs, and we had the general counsel of a major SDO. Another member was the current general counsel of ANSI, who disagreed with the task force’s ultimate recommendation but certainly gave us her organization’s viewpoint.

We also had the executive director of The Authors Guild, who helped us understand copyright issues. And on the other hand, we also had several members who were strong supporters of broad public access to the law.

This group worked intensively for more than two months to hammer out a compromise position. All members of the task force were encouraged to consult with interested members

* William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis. For the text of Resolution 112 and its supporting report, see https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_annual_112.docx.
of their entities during this process, and I know consultations did occur. We spent many hours on debate, editing, and mutual accommodation. Ultimately, this process resulted in the balanced and broad-based resolution that is now before you.

So let’s talk about the substance of the resolution. The task force began by completely abandoning the prior resolution, 106A. Not a single provision in the old resolution remains in the new one. Resolution 106A revolved around competing ideas about what incorporated material is “reasonably available” within the meaning of the Administrative Procedure Act and about copyright issues that are currently in litigation. We knew we would not reach agreement on those issues, so we put them aside and replaced them with an entirely new legislative proposal. It has five key elements that I would like to highlight for you.

First, when an agency issues a proposed or final regulation, it would be required to post the incorporated portion online, accessible without charge. (This would apply to new regulations—not existing ones, which I’ll discuss later.) This online posting would directly solve the problem of people not being able to find out what those regulations or proposed regulations require.

Second, as I just mentioned, the access requirement would apply only to the incorporated portion of the standard, not to the entire standard. For this reason, an SDO would still be able to sell copies of the standard to customers who want the whole thing, and this would help defray the expenses of creating the standard. Now, bear in mind that, by one estimate, only 2-4% of private standards have provisions that are incorporated by reference into federal regulations in the first place. So, obviously, many businesses want to own copies of voluntary industry standards for reasons that go beyond their incorporation into federal law. Those reasons would help maintain the customer base for SDOs with regard to full versions of standards that are partially incorporated into regulations.

Third, the required public access could be limited to a read-only format. Now, all of you know that when you work with a document, especially a highly technical one, you want to be able to mark it up, highlight it, print it, or copy and paste portions of it into another document. Anyone who wants to be able to do any of those things with a standard would still have reasons to want to buy a copy, even if all or part of it is available online in a read-only format as a result of the incorporation by reference. This fact too would help maintain a market for the SDO.

Fourth, any material that is subject to copyright protection could be incorporated only if the agency obtains authorization from the SDO to allow the public access. This means that the plan involves no compulsory licensing and no stripping away of copyright protection. The SDO would still own the copyright. It could, for example, bring suit against third-party infringers to the same extent as it can today. In practice, the agency and SDO would have strong incentives to come to terms on an authorization agreement, in order to maintain existing public-private partnerships, but it would be their choice.

The resolution would leave it to the two parties to work out what the terms would be in any particular case. The agency and SDO could agree on a payment from the government to the SDO. There would be nothing odd about this, because government spends money now to make its laws available to the public, from publishing the U.S. Code to maintaining websites. But again, this payment would happen only if the agency and SDO mutually agree on it.

Fifth, the mandates in the resolution would apply only to future regulations. With regard to existing regulations, the resolution urges Congress to require agencies to study those regulations and formulate plans for achieving public access.

“Legal requirements should be accessible to all citizens, with or without deep pockets, as a democratic society should rightly expect.”

Check the list of Administrative Law publications at www.americanbar.org/groups/administrative_law/publications to be sure.
on similar terms. But that’s all it requires—to produce plans. What they would then do with the plans would be up to them. Hopefully some agencies would proceed to convert existing rules to online public access, by conducting new rulemaking proceedings, if their resources permit. But Resolution 112 itself would not require the agencies to take any tangible action with respect to existing regulations. So, the resolution is not retroactive.

Now, if you put these five elements together, I think you can see why six Sections have joined forces to co-sponsor Resolution 112. Some members of the task force would individually have preferred more public access, and some would individually have preferred a better deal for SDOs. But they supported the compromise. This is what we in the ABA do so often and to such good effect when we address challenging problems.

Basically, Resolution 112 tries hard to hold down costs for SDOs, but it also makes an important contribution towards a fundamental goal: to ensure that law should not be secret, and that the ability to find out what it says or what is proposed should not depend on terms dictated by a private entity with a self-interest of its own. Rather, legal requirements should be accessible to all citizens, with or without deep pockets, as a democratic society should rightly expect.

For these reasons, I urge you to approve Resolution 112.

ABA RESOLUTION 112

RESOLVED. That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

(a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public.

(b) If the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.

(c) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.

(d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

(a) identify all privately drafted standards and other content previously incorporated by reference into that agency’s regulations;

(b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and

(c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.
American Bar Association Resolution 112: Championing Public Access to the Law

By Nina A. Mendelson*

In August 2016, the American Bar Association House of Delegates reaffirmed the fundamental democratic principle of public access to the law. ABA Resolution 112 calls on Congress to enact legislation ensuring a basic level of public access, without charge, to all regulatory law. Such legislation would address serious current obstacles to the public’s ability to see the law.

Generally, the United States has had a long tradition of meaningful access, without charge, to the text of our binding laws. Congress has provided free public access to federal statutes since the 1880’s, and to federal regulations since the 1930’s. These laws have been made available through a network of state and territorial libraries, and then in the Federal Depository Library System. Congress has further deepened the tradition by requiring that the Government Printing Office make available universal online access to statutes and regulations and then requiring online public access to other government documents and materials. See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049; E-Government Act of 2002, Pub. L. No. 107-347 §§ 206(a)-(d), 207(f), 116 Stat. 2899.2918-19 (codified as amended at 44 U.S.C. § 3501 note (2006)).

For numerous federal rules, however, public access is far from assured. To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into thousands of federal regulations, but only by reference. These standards are drafted by numerous organizations (so-called standards development organizations or SDOs), ranging from the American Petroleum Institute to the National Fire Protection Association and the Society of Automotive Engineers. The standards run the subject matter gamut, from toy, crib, and workplace safety standards to placement requirements for oil drilling platforms on the Outer Continental Shelf, to hearing aid and food additive standards.

Agency use of incorporated-by-reference (“IBR”) rules likely will only increase, owing to congressional and administrative policy encouraging agencies to utilize so-called consensus private rules, and because agencies save resources when these private organizations write the rules.

Although these standards, once incorporated, have the same force of law as any agency regulation, the text of incorporated material does not appear in the Federal Register or Code of Federal Regulations. The Office of the Federal Register approves all incorporations by reference, and the Freedom of Information Act calls for text that is incorporated by reference into the Federal Register to be “reasonably available” to affected persons. 5 U.S.C. § 552(a)(1).

Under the Office of the Federal Register’s current approach, however, regulating agencies refer readers to the standards drafting organization. That organization controls access to the text, including deciding how and where to make it available and retaining the option to charge an access fee. While some standards drafting organizations have elected to provide some availability without charge to the text of incorporated-by-reference standards, others charge significant access fees, ranging into the hundreds or even thousands of dollars per standard. And some standards, particularly older ones, are now simply unavailable altogether from the standards drafting organization. The only alternative generally is an in-person visit, during business hours, to the Office of the Federal Register reading room in Washington, D.C.

The result: in this age of open government, significant public regulations have become difficult to find and expensive to read. Both small businesses and individuals have filed public comments in a variety of settings explaining that the access charges, in particular, obstruct their access to the text of the law. The same difficulty plagues those who wish to file a public comment on a proposed IBR rule when an agency is considering whether to adopt it. The Administrative Procedure Act confers a right on all “interested persons” to comment on proposed rules. 5 U.S.C. § 553. But an individual cannot exercise her statutory right to comment on a proposed rule when she cannot see what is being proposed.

We take the principle of public access to the law to be fundamental in a democratic society, but it is worth reminding ourselves why it matters, and to whom. As a matter of fundamental due process, regulated entities must have fair warning of their legal obligations. Access charges can impede their access to the requirements. For example, the American Trucking Association has warned the Office of the Federal Register in public comments that purchasing these materials can be

* Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School. This article draws from Administrative Law Section public comments filed with federal agencies in 2012 and 2014, which I helped draft, as well as my 2014 article, Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards, 112 Mich. L. Rev. 737 (2014).

But the need for access to the law’s text and notice of its requirements is not limited to those who must comply. The public must also be able to see the law. Congress enacts regulatory statutes specifically to guard wide swaths of the public, and the public accordingly has a direct interest in the content of rules. Consider consumers of food and toys, parents who wish to purchase infant carriers or strollers, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline. All are obviously affected by regulatory law, and are entitled to see it to understand how far their legal protections extend. The content of these standards can affect individual choices regarding which toys or infant carriers to use, where to live, and whether to file public comments with the regulating agency or write to one’s congressional representatives. In short, regulatory beneficiaries have a cognizable stake in these standards, and the content of the standards can affect their conduct. They therefore need meaningful access to the text as well.

And of course public access is critical to government accountability for lawmaking. Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving—or not serving—the public interest. As President Obama stated in his 2009 Memorandum on Transparency and Open Government: “Transparency promotes accountability and provides information for citizens about what their Government is doing.”

Although the Office of the Federal Register’s revised rules require agencies to consider public-access concerns, the agency still failed to specify that public access without charge was necessary for the standard to be “reasonably available” and thus eligible for incorporation by reference.

When the Office of Management and Budget (OMB) then considered revisions to its Circular A-119, which encourages agencies to rely upon private standards, the Section again filed public comments. Circular A-9, as finally revised, did call on agencies to give greater attention to public access issues. Nonetheless, both agencies’ responses fell far short of assuring the public a meaningful ability to see the text of the law without charge. Indeed, even after these revisions, rulemaking agencies continued to propose to incorporate standards into federal regulations that would cost members of the public hundreds or thousands of dollars to access. These have included standards for fishing vessels, nuclear power plants, and the business practices for interstate natural gas pipelines.

Resolution 112, developed by a task force consisting of Section representatives as well as representatives of a broad cross-section of ABA entities, took a different approach. Resolution 112 calls for congressional action that would require each agency to provide online access without charge to any text that the agency proposes to actually does incorporate by reference in federal regulations.

As Administrative Law Section Delegate Ron Levin has described, Resolution 112 contains multiple compromises. For example, under

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the resolution’s terms, an agency providing public access also would be required to obtain authorization for providing such access to any material that is copyright-protected. Moreover, the resolution calls only for a basic floor of public access. The agency would have to provide the public with, at a minimum, read-only online access to the text, though the agency would have the option to provide a greater level of public access. Finally, the resolution distinguishes between agency use of incorporated-by-reference material in rules proposed or finally issued after enactment of the recommended legislation, which could occur only if the agency provided the required public access and pre-existing incorporated-by-reference rules. For incorporated-by-reference material in pre-existing rules, an agency would be required to develop a “reasonable plan and timeline” to provide public access conforming to the requirements for new rules or else to amend or repeal pre-existing rules to eliminate the incorporation by reference.

If Congress were to enact legislation along the lines of Resolution 112, the public should soon be able to read all incorporated-by-reference standards without charge. This would be a substantial improvement over the status quo. The access required would still be less than what the public has for the rest of federal law, which can be freely accessed and readily copied both online and in government depository libraries. As others have argued, if Congress were to act to ensure greater levels of public access than what Resolution 112 provides, the public would gain in its ability to discuss, advocate from, and criticize the law.

Nonetheless, in enacting Resolution 112, the ABA House of Delegates has taken a firm stand for the fundamental democratic principle of public access to the law, especially by making clear the unacceptability of current agency approaches to public access. If Congress were to answer the ABA’s call, it would represent a significant and meaningful advance in the public’s right to see the law. ☑

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Recent years have seen a growing movement to do something about the delays and uncertainties inherent in the process of obtaining federal approvals for transmission lines, pipelines and other major infrastructure projects. Business groups have documented the problem in a series of reports. E.g., Business Roundtable, Permitting Jobs and Business Investment (Apr. 2012). The President’s Business Council highlighted the issue in 2011, prompting the Obama Administration to launch an interagency initiative to modernize infrastructure permitting, including an online Federal Infrastructure Permitting Dashboard. See https://www.permits.performance.gov.

But this issue is not just about helping business. How fast our nation moves to renewable power generation will depend crucially on how quickly we can site solar and wind farms and build new transmission lines to move the power they generate to where it’s needed. Several environmental groups and unions recognized this and joined to support a bill that ultimately became Title 41 of the five-year transportation bill enacted in December 2015 (and thus is referred to as “FAST-41”). See 42 U.S.C. §§ 4321-4335, that:

- is likely to cost more than $200 million (and is not subject to some sort of abbreviated review process);
- involves approvals from two or more agencies; or
- is sufficiently large and complex to benefit from the bill, in the view of the Interagency Council (discussed below).

Transportation and water resources projects are excluded because they are already subject to similar laws. Effective March 3, 2016, the Act applied to pending covered projects. It also applies to any new covered project for which a “notice of initiation” (discussed below) is filed.

Interagency Council

FAST-41 creates a Federal Permitting Improvement Steering Council chaired by a presidentially-appointed Executive Director. The Council comprises agency representatives from 13 federal agencies with authority to approve some aspect of a covered project, plus the Office of Management & Budget (OMB), the Council of Environmental Quality (CEQ), and any other agency that the Executive Director invites to join.

The heads of Council member agencies must designate (1) a deputy secretary or higher-level official to represent the agency on the Council and (2) someone who reports to one of these officials to be the agency’s Chief Environmental Review and Permitting Officer (CERPO). CERPOs have principal responsibility for their agencies’ compliance with FAST-41.

By June 2016, the Executive Director, in consultation with the Council, was required to develop an inventory of covered projects and categorize the projects. Moreover, for each category, they were required to identify the most commonly-involved federal approvals and agencies, and to designate a “facilitating agency” that will handle project submissions. This information was to be published on the Permitting Dashboard (discussed below).

By December 2016, the Executive Director and Council are to develop generic performance schedules for
each category of project that sets default milestones for conducting reviews based on the most efficient process. FAST-41 establishes a ratchet mechanism whereby these schedules are to take no longer than the average time to complete reviews in that category, based on the previous 2 years’ experience. The schedules are to be updated every two years. No decision involved in a review or approval can take longer than 180 days after the agency possesses all the information it needs to make the decision.

Also by December 2016, and at least annually thereafter, the Council is to issue recommendations on best practices for early stakeholder engagement, performance metrics, improving coordination among agencies, and other aspects of improving permitting performance.

Permitting Dashboard

The “Permitting Dashboard” is the principal accountability mechanism under FAST-41. The Dashboard is currently housed in the Department of Transportation (DOT) and will be administered by the Executive Director and the General Services Administration. For covered projects, the Dashboard must contain the following information:

- The application and supporting documents, or information on how the public can obtain that information. Documents that are not available by hyperlink must be directly available. This “docket” feature is a major advance over current practice, where review documents are often difficult to obtain.
- A description of any federal agency action materially affecting the project, and any significant documents supporting that decision.
- A description of the status of any litigation directly related to the project.
- The timetable established for that project.

These materials must be posted on the Dashboard within 5 business days after the relevant agency receives them.

DOT and the Army are also instructed to use “best efforts” to enable the Dashboard to contain information regarding transportation and water resources projects excluded from FAST-41 that require an EIS and are expected to cost more than $200 million.

Particular Projects

Notice of initiation/lead agency

The process established by FAST-41 is initiated when the project sponsor submits a notice of initiation to the Executive Director and the facilitating agency for that project category. The notice is not a complete application, but rather a summary that describes: the proposed project’s purposes and objectives; any environmental, cultural, and historic resources; the project sponsor’s technical and financial resources; federal financing, environmental reviews, and authorizations anticipated to be required; and why the proposed project meets the definition of a covered project.

The lead agency for a given project is the lead agency established under existing NEPA practice; i.e., “the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.” 40 C.F.R. § 1508.16. If no lead agency has been established, the facilitating agency is to act in that role. If, on request of a project sponsor or participating agency, the Executive Director concludes that a project belongs to a different category, he or she can designate a different lead agency. Disputes over lead or facilitating agency designations are to be resolved by CEQ. Within two weeks after a notice of initiation is submitted, the lead agency must add the project to the Dashboard.

Involvement of coordinating and participating agencies

Within 45 days of adding a project to the Dashboard, the lead agency must invite all agencies and governmental entities likely to have financing, environmental review, authorization, or other project responsibilities to become “participating” or “cooperating” agencies. (“Cooperating” agencies is a NEPA term that refers to agencies that have either jurisdiction over a project or special expertise with respect to any environmental impact involved. Id. § 1508.5. “Participating agencies” are any other agencies participating in a review or authorization for a project.) Agencies will be assigned these roles unless they affirmatively opt out by a date certain. Agencies can opt back in on a showing of changed circumstances.

Early consultation

The lead agency must provide an expeditious process for early consultation between project sponsors and cooperating and participating agencies. In particular, within 60 days of adding a project to the Dashboard, the lead agency must invite the sponsor regarding: the availability of information and tools to facilitate early planning efforts; key issues of concern to each agency and to the public; and issues that must be addressed before an environmental review or authorization can be completed.

Coordinated Project Plans (and timetables)

The lead agency must issue a Coordinated Project Plan within 60 days of adding a project to the Dashboard. The plan must include:

- a list of all agencies participating in the review, and their roles;
- a project-specific timetable derived from the performance schedule previously established for that category of projects;
- a discussion of potential avoidance, minimization and
mitigation strategies, if required by law and known; and
• a plan and schedule for public outreach.

The project timetable must include intermediate and final deadlines for all required reviews—including, to the maximum extent practicable, any state reviews. Each cooperating agency must concur in the timetable, subject to dispute resolution by OMB. The lead agency may thereafter amend the timetable, after consultation with the project sponsor and participating agencies, only if the cooperating agencies agree.

An extension of greater than 30 days requires approval by the Executive Director, after consultation with the project sponsor. An extension that, together with any prior extensions, would extend the final completion date by more than 50% of the originally-approved length requires OMB approval. OMB then has 5 days to notify Congress of the extension and its justification. The lead agency must provide Congress annual progress reports. A final approval date cannot be extended within 30 days of the date.

If an agency concludes that it cannot meet a deadline contained within an approved project timetable, it must publish that fact on the Dashboard, along with a proposed alternative deadline. It then must finalize that alternative date, in consultation with the Executive Director, and post monthly status updates on the Dashboard.

Extensions of final project approval dates by the Executive Director are not judicially reviewable, nor is any decision by OMB under the Act.

Coordination of reviews
To the maximum extent practicable, agencies are to conduct review and approval processes concurrently, and in conjunction with reviews and approvals being conducted by other cooperating or participating agencies (unless they determine that it “would impair the ability of the agency to carry out [its] statutory obligations…”). 42 U.S.C. § 4370m-4(a)(1).

Agencies are to work cooperatively. As early as practicable, they must communicate to the project sponsor any issues of concern that could substantially delay or prevent them from completing a required review or approval. And, as soon as possible (but no later than beginning the scoping process under NEPA), the lead agency must engage participating agencies and the public to determine the range of reasonable alternatives to be considered under NEPA. This exercise must be completed by the end of the scoping process. As early as practicable, the lead agency must share relevant information with the project sponsor and other agencies. The lead agency also may develop its preferred alternative to a greater level of detail than others so long as it does not prevent itself from choosing impartially from among alternatives or prevent the public from commenting on them.

Public comment periods on a draft EIS must last at least 45 days but cannot exceed 60 days. All other NEPA-related comment periods are capped at 45 days. In either case, the lead agency can extend the cap for good cause or if the project sponsor consents.

State Involvement
State, tribal and local agencies often have review or approval responsibilities for major infrastructure projects under their own legal authorities. FAST-41 authorizes federal agencies to adopt, or incorporate by reference, analysis and documentation developed by a state agency reviewing the covered project, so long as the lead agency concludes that they were prepared under processes substantially equivalent to those under NEPA. If things have changed significantly since the state work was done, the lead agency can require the analysis to be supplemented, after a minimum 45-day comment period.

Also, states commonly are authorized by federal agencies to administer federal programs; in particular, EPA has authorized most states to administer environmental permitting programs. Accordingly, FAST-41 allows states to opt into the process on a project-by-project basis, with all relevant state agencies bound to participate in any such case. The lead agency is required to coordinate with participating state, tribal and local agencies, and to embody that coordination in a memorandum of understanding, to the maximum extent practicable.

Whenever the Council issues the best practice recommendations referenced above, federal agencies (like EPA) that have authorized states to administer agency programs have 2 years to conduct a process, with public participation, to formulate recommendations for such states to implement those best practices in their delegated programs.

Finally, FAST-41 authorizes groups of three or more contiguous states to form interstate compacts establishing regional infrastructure development agencies to facilitate authorization and review of covered projects under state law (including laws exercising delegated permitting authority).

Judicial Review
Several provisions of FAST-41 limit judicial review, thus reducing the chance (and associated uncertainty) that agency approvals may be derailed through subsequent litigation.

Statute of limitations
Because NEPA does not contain a statute of limitations, challenges based on it are governed by the general, six-year limitation on claims against the federal government. See 28 U.S.C. § 2401(a). FAST-41 cuts this to two years for covered projects. (If a supplemental EIS is prepared based on information obtained after the close of the comment period, it is subject to its own 2-year limitation.)
Prudential standing
FAST-41 also narrows the range of persons with standing to challenge a final project approval on NEPA grounds by borrowing prudential limits established by courts considering challenges to regulations. Under FAST-41, judicial challenges may only be brought by persons who filed a comment during the review. Moreover, that person or someone else must have filed a sufficiently detailed comment to put the lead agency on notice of the relevant issue, unless the agency did not provide a reasonable opportunity for comment on that issue.

Standard for injunction
In some cases, courts considering injunctive actions against infrastructure projects have refused to consider economic impacts like job losses to be irreparable. FAST-41 corrects that by requiring courts in such actions to consider the potential effects on public health, safety, and the environment, and the potential for an order or injunction to have significant “negative effects on jobs” (presumably including jobs to be created by the project). Further, reviewing courts are instructed to not presume that the foregoing harms are reparable. 42 U.S.C. § 4370m-6(b).

Reports
Congress will be well-informed about the implementation of FAST-41. As of April 15, 2016, and for nine years afterward, the Executive Director must report on progress under the Act during the previous fiscal year, including the performance of each participating and lead agency in implementing the Council’s best practices and meeting project performance schedules. By December 2018, GAO must report on the same topics. In addition, GAO must report on whether FAST-41’s provisions could be adapted to streamline review and approval processes for smaller projects.

Funding
The most recent omnibus spending bill includes $2.5 million for DOT to administer the Administration’s Interagency Infrastructure Permitting Improvement Center (IIPIC), which currently administers the Dashboard. See H.R. 2029, div. L, tit. I (2015). The bill allows other agencies to transfer funds to DOT for IIPIC activities; indeed, it allows other agencies to use the “tools and analysis” developed by the IIPIC only to the extent they have provided it with such funding.

Now Comes the Hard Part
FAST-41 is not the first time that people have tried to “fix NEPA.” While FAST-41 represents a congressional mandate, people still have to implement it—and that’s the hard part. A potentially apocryphal story has President Kennedy telling a supplicant: “I agree with you. We’ll see if I can get the government to go along.” The new Executive Director and his or her staff (if any) will face a similar difficulty.

Congress established an ambitious timetable for starting the new program. It applies to any covered project for which a notice of initiation has been filed after enactment, and in March 2016 started applying to all currently pending covered projects. On April 15, the Executive Director was to have filed the first annual implementation progress report, which does not appear to have happened. That is likely because it took the President until July to appoint someone to that position (Richard Kidd IV, most recently a Department of Defense official). The initial list of covered projects was posted on September 22, 2016. See https://www.permits.performance.gov/about/news/executive-director-announces-fast-41-covered-projects. An “interim” notice of initiation form, see https://www.permits.performance.gov/tools/interim-notice-initiation-instructions, is currently pending Paperwork Reduction Act clearance, see 81 Fed. Reg. 52692 (Aug. 9, 2016).

More generally, it is difficult to overstated the operational challenges facing this and future administrations under the new law. The simple logistics of setting up systems to gather needed information are daunting enough. Even more difficult will be persuading hundreds of career staff, in over a dozen agencies, that this time, we really mean it: these processes are going to move faster and in a more coordinated fashion. Changing culture at multiple agencies simultaneously will require charm, persistence and, above all, clear direction and attention from the White House. The next 18 months will largely determine whether FAST-41 will accomplish its proponents’ goals.
Sex and administrative law are not words that are traditionally uttered in the same breath. Yet, recently, administrative law scholars and courts have increasingly focused on precisely this relationship. The past decade has seen a transformation of the way sex discrimination, sexual violence, sexual harassment, and just plain sex is legally regulated in the United States. Increasingly, administrative agencies are defining what sex is permissible, requiring educational institutions to adopt particular policies on sex, and specifying how sex deviates from those norms is investigated and adjudicated. Today, sex is a domain of the federal bureaucracy. The question is what role traditional administrative law principles will play in the administration of sex.

From Here (Sex Discrimination) to There (Sex)

The story of how administrative agencies came to be the chief arbiters of acceptable sexual conduct is part law and part politics. Title IX of the Education Amendments of 1972 states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2012) (listing exceptions as well). The Supreme Court has described Title IX as “conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (also discussing Title VI of the Civil Rights Act).

Title IX authorizes federal agencies to implement the anti-discrimination mandate by regulating funding recipients, and by terminating funding for the failure to comply with the agencies’ regulations. Over the course of several decades the legal and social understanding of what it means to “discriminate on the basis of sex” evolved rather dramatically through a process of judicial and agency interpretation. In the 1980s, courts and agencies administering anti-discrimination policies recognized “sexual harassment” as a form of sex discrimination. The Department of Education’s Office of Civil Rights (OCR) is the lead agency for Title IX regulations. In 1997, OCR promulgated its “Sexual Harassment Guidance” explaining that sexual harassment of students is a form of sex discrimination, and that “[s]chools are required by Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.” Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,038 (Mar. 13, 1997) [hereinafter Sexual Harassment Guidance 1997]. The 1997 Guidance explained:

[A] school’s failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Id. at 12,040. OCR issued a Revised Sexual Harassment Guidance in 2001, which affirmed that schools must “end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.” See Office for Civil Rights, U.S. Dep’t of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties iii (2001) [hereinafter Revised Sexual Harassment Guidance], https://perma.cc/CEL8-6Y5D. But “[a]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations.” Id. at 12.

The concept of a “hostile environment” that the school had a responsibility to correct, then, enabled Title IX—a command to schools not to discriminate—to reach not only the conduct of the school and its agents, but student conduct as well. The school would be discriminating on the basis of sex if a student’s acts were severe enough to create a hostile environment and the school did not have effective policies and grievance procedures in place to discover and correct the problem. Then in 2011, OCR issued a Dear Colleague Letter (DCL) that introduced the term “sexual violence” and stated that “the requirements of Title IX pertaining to sexual harassment also cover sexual violence.” Letter from RusslynnAli, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t
of Educ., to Colleague 1–2 (Apr. 4, 2011), [hereinafter Ali, Dear Colleague Letter], https://perma.cc/7LMK-6U8H. This DCL focused on student conduct and explained that it was “schools’ responsibility to take immediate and effective steps to end sexual harassment and sexual violence.” Id. at 2.

For example: “the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred.” Id. at 10. The DCL stated that any disciplinary or other procedures to resolve complaints “must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.” The DCL made explicit, for the first time, that a school’s discipline process for sexual assault is regulated by OCR’s interpretations of Title IX. Sexual violence is a form of sexual harassment, which is a form of sex discrimination, which is prohibited by Title IX. The federal prohibition on sex discrimination means that schools must prevent and adequately respond to any allegation of sexual assault.

To this point, of course, we have said nothing about administering sex. The bureaucratic regulation of sexual violence, sexual harassment, and sex discrimination sounds like a rather different proposition from the bureaucratic regulation of sex itself. But as with most things in administrative law, the devil is in the details of regulatory interpretation.

The 2011 DCL defines sexual harassment as “unwelcome conduct of a sexual nature” (verbal or nonverbal) and states that “[s]exual violence is a form of sexual harassment prohibited by Title IX.” Id. at 3. The 2001 Guidance explained, “[c]onduct is unwelcome if the student did not request or invite it and regarded the conduct as undesirable or offensive.” Revised Sexual Harassment Guidance, supra, at 7-8 (quoting Does v. Covington Cnty. Sch. Bd. of Educ., 930 F. Supp. 554, 569 (M.D. Ala. 1996)). The unwelcome conduct “creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.” Ali, Dear Colleague Letter, supra, at 3. The 2011 DCL explained that “a single or isolated incident of sexual harassment [e.g., sexual assault] may create a hostile environment if the incident is sufficiently severe.” Id.

Would a verbal or nonverbal act that is seeking explicit agreement to have sex not be “unwelcome conduct of a sexual nature,” if a person to whom that act is directed “did not request or invite it” and “regarded the conduct as undesirable”? See Harvard Univ., Sexual and Gender-Based Harassment Policy: Policy Statement 2 (July 1, 2014), http://media.thecrimson.com/extras/2014/sexual-harassment-policy.pdf; accord Revised Sexual Harassment Guidance, supra, at 8. This may seem far-fetched because it is hard to imagine that one such act could create a hostile environment and therefore constitute sexual harassment and therefore discrimination. But in a letter to the University of Montana regarding a Resolution Agreement to resolve an OCR Title IX investigation, OCR wrote that rather than limit sexual harassment claims to unwelcome conduct of a sexual nature that creates a hostile environment, the university should define sexual harassment “more broadly” as:

[any unwelcome conduct of a sexual nature. Defining “sexual harassment” as “a hostile environment” leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.

Letter from Anurima Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, U.S. Dep’t of Just., & Gary Jackson, Reg’l Dir., Office of Civil Rights, Seattle Office, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf. Absent a requirement of either severity or pervasiveness, the conduct that schools must prohibit, prevent, and discipline is simply conduct of a sexual nature that is unrequested and regarded as undesirable.

Similarly, although OCR made clear that a school’s obligation to prevent and respond to sexual harassment includes an obligation to prevent or respond to sexual violence, which itself includes by virtue of OCR definition “sexual assault,” that term is not defined in Title IX regulations or guidance. As criminal law evolved over the past decades, the crime of rape was increasingly called sexual assault, but sexual assault also became an umbrella term that would cover nonpenetrative, nonforcible, and nonconsensual acts, in addition to the paradigmatic sexual violation of forcible rape. Last year, the Department of Justice defined the term as “any type of sexual contact or behavior that occurs without the explicit consent of the recipient.” Sexual Assault, u.s.deP’t Just., http://www.justice.gov/ovw/sexual-assault (last updated Apr. 2, 2015). That is, sexual conduct...
without explicit consent is sexual assault; sexual conduct with consent is just sex.

Given that schools must adequately prevent and discipline sexual assault or risk being defunded by the federal government, the meaning of consent is obviously key. To this point, however, the federal bureaucracy has required schools to publish the applicable definition of consent, but has elected not to provide a definition. That means schools have been left to their own devices, often producing definitions of consent that would seem to render the vast majority of actual sexual conduct illegal. For example, “[a]nything less than voluntary, sober, enthusiastic, verbal, noncoerced, continual, active, and honest consent is Sexual Assault.”

The definitions are not hypothetical. Crossing the consent line is supposed to trigger investigation and adjudication, as required by the federal bureaucracy. Someone who has unenthusiastic sex or sex while tipsy is being sexually assaulted, according to the operative definitions of consent being published in many schools’ Annual Security Reports mandated by other federal laws like the Clery Act. 20 U.S.C. § 1092(f).

Because defining consent to include enthusiasm and other markers of desire diverges rather starkly from anything familiar to criminal law or even tort law, these transformations have required active educational campaigns on campus. Some schools supply some suggested phrases that students could use in the midst of a sexual encounter in order to “Make Consent Sexy” or “Make Consent Fun.” Or, as one school put it: “Consent is not only necessary, but also foreplay.”

The idea seems to be that if everyone has great sex, sexual violence will somehow be stopped. We are skeptical that this program of good sex education does much to stop genuine sexual violence. But regardless, to say that schools failing to teach their students about how to have great sex have “discriminated on the basis of sex” is quite a regulatory distance traveled.

Sexual norms change and colleges have always been at the forefront of that change. What is different this time around is that the shift in norms is being engineered by the federal bureaucracy, pursuant to a statute that prohibits discrimination “on the basis of sex.” Cf. 20 U.S.C. § 1681(a). No longer is the federal bureaucracy simply monitoring whether schools are engaging in discriminatory acts. Rather, the federal bureaucracy’s apparent task is now overseeing what sexual conduct is permitted, and how schools may or must lawfully prevent, respond, and discipline sexual misconduct. Indeed, OCR says that compliance with Title IX requires schools to put in place measures that “may bring potentially problematic conduct to the school’s attention before it becomes serious enough to create a hostile environment.”

Administrative Law of Sex

OCR’s 1997 and 2001 Guidance memos on Title IX and sexual harassment were published after notice and comment, but the 2011 DCL was not. Instead, OCR stated its views in the 2011 DCL about what Title IX required, and then launched dozens of investigations of schools for failure to comply with the 2011 DCL’s requirements. OCR publicly threatened to terminate federal funding to schools unless they adopted policies and procedures that complied, and then entered into negotiated settlement agreements with individual schools. Most schools reached resolution agreements in which they agreed to rewrite sexual conduct policies and disciplinary procedures consistent with OCR requirements, thereby avoiding a formal finding of noncompliance. A handful did not. OCR, for example,
entered a formal finding of noncompliance for Harvard Law School.

By its own terms, the DCL is a nonbinding document that cannot impose any new legal obligation. And as such, it might be exempt from the APA’s notice-and-comment requirements as either an interpretative rule or a statement of agency policy. Yet, the DCL contains interpretations that do not appear elsewhere in federal law, and, in enforcement investigations and proceedings, OCR has expressly relied on the DCL. Under the legislative rule doctrine, an agency’s declaration that a policy is nonbinding is not definitive. Courts will deem the policy a legislative rule if the agency treats the policy as binding, either internally or as applied to regulated parties. It may not be lawfully enforced absent notice and comment. Given that OCR has reached resolution agreements with dozens of schools it investigated for deviating from interpretations of Title IX newly announced in the DCL, we are hard-pressed to imagine a good argument that the DCL does not contain binding requirements.

Nevertheless, the parade of schools challenging OCR’s actions and interpretations has yet to commence. Before 2016, not a single institution of higher education—of which there are more than 3000—had filed a procedural or substantive challenge to the 2011 DCL. This should not be surprising. First, imagine the public relations nightmare that would be almost certain to arise if a school sued OCR to slow the implementation of policies against sexual violence. Second, and more to the point, schools—the directly regulated parties—do not really suffer harm as a result of procedurally defective, poorly reasoned, biased, or even unconstitutional policies. School bureaucracies, under the oversight of the federal bureaucracy, simply administer sexual conduct policies and discipline. No matter what conduct is prohibited, no matter what procedures are required, and no matter how many students are or are not disciplined, it is not schools that are injured. Rather, it is students, whose conduct is subject to investigation and discipline using these procedures, who suffer injury as a result.

Lawsuits against schools brought by students disciplined using the allegedly unfair procedures articulated in the DCL are working their way through the courts. But until this year, no suit was against the Department of Education or challenged the DCL using administrative law. Three lawsuits in federal court have now done so. In one brought by a student, the government’s position was that the student lacked standing because the harm was caused by an independent third party—the directly regulated school—and the DCL contains no new or binding requirements. If the government prevails, it will have essentially insulated itself from either public participation or judicial review. A school would have standing but no incentive to sue. Students would have incentive to sue, but no standing. As long as the government keeps using “nonbinding” guidance documents to generate changes in conduct, it will be free to do as it chooses.

At least some of us administrative lawyers believe that process matters. One element of the DCL that even the Department of Education agrees is non-discretionary is the use of the “preponderance of the evidence” standard for the adjudication of sexual misconduct cases. After the Department of Education took comments on the very same issue when implementing provisions of the Violence Against Women Act, the Department abandoned the proposed requirement and decided not to require any particular evidentiary standard. In a procedural challenge to agency action, it is virtually unheard of to have actual evidence rather than speculation, about what would have happened had the agency used different procedures. But that appears to be precisely the case here, making it clear that the procedural defect was hardly inconsequential.

**Conclusion**

Between 1972 and today, a statutory ban on discrimination was transformed into a bureaucratic structure consisting of policies, procedures, and organizational forms that regulate sexual conduct. The public debate about Title IX and sexual assault on college campuses gives the impression that the target of this bureaucracy is sexual violence: that is, rape and sexual assault. Within the bureaucracy, however, the concepts of sexual violence and harassment have expanded to encompass, for example, unrequested conduct of a sexual nature that is regarded by someone as undesirable. The broader the class of conduct that is regulated in the name of regulating sexual violence as a form of sex discrimination, the larger the footprint of the growing sex bureaucracy.**

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The Integrity of Private Third-Party Compliance Monitoring

By Jodi L. Short and Michael W. Toffel

Government agencies are increasingly turning to private, third-party monitors to inspect and assess regulated entities’ compliance with law. Third-party monitors are used to certify compliance with federal standards and other requirements in a wide array of domains, including food safety, pollution control, product safety, medical devices, and financial accounting. For example, third-party monitors assess the compliance of food production facilities with Food and Drug Administration regulations, of children’s products with Consumer Product Safety Commission product safety rules, of telecommunication products with Federal Communications Commission regulations, and of registered securities issuers with accounting and internal controls requirements. Several federal agencies rely on third-party monitors to assess adherence to agencies’ voluntary product labeling standards, including the Department of Agriculture’s National Organic Program, the Environmental Protection Agency’s National Organic Program, the Environmental Protection Agency (EPA) and Department of Energy’s Energy Star Program, and the EPA’s WaterSense Program. Many agencies are considering how they might deploy third-party monitoring to enhance their inspection regimes. See David Markell & Robert Glicksman, A Holistic Look at Agency Enforcement, 93 n.c. L. Rev. 1 (2014).

The integrity of these regulatory regimes rests on the validity of the information third-party monitors provide to regulators. The challenge in designing third-party monitoring regimes is that profit-driven private monitors, typically selected and paid by the firms subject to monitoring, have incentives to downplay problems they observe in order to satisfy and retain their clients. This article discusses the most important factors that can affect the integrity of third-party monitoring and highlights key policy implications for regulators designing third-party monitoring regimes.

Risks to the Integrity of Private Third-Party Monitoring Regimes

Research demonstrates that third-party monitors are strongly influenced by their relationships with the firms they monitor and by economic incentives. A well-designed third-party monitoring program should address several sources of bias shown to influence the likelihood that third-party monitors will accurately and comprehensively identify violations and deficiencies. Below, we focus on five factors associated with auditor leniency.

Finding #1: Third-Party Monitors Tend to Be More Lenient When Monitored Firms Pay Them Directly.

Studies across a range of policy domains have found that third-party monitors face substantial conflicts of interest between attracting and retaining clients and accurately reporting their clients’ regulatory compliance. Several studies of pollution-control programs have shown that third-party monitors that exhibit leniency are more likely to retain clients. For instance, when private-sector automobile emissions testing stations conduct smog checks and fail vehicles, those vehicle owners are significantly less likely to continue doing business with those stations. See, e.g., Victor Bennett, Lamar Pierce, Jason Snyder, & Michael Toffel, Customer-Driven Misconduct: How Competition Corrupts Business Practices, 59 Mgmt. Sci. 1725 (2013).

An analysis of a pollution-control program that required regulated firms to submit annual pollution readings taken by third-party monitors found that monitors selected and paid by monitored firms frequently reported false pollution readings to regulators. See Esther Duflo, Michael Greenstone, Rohini Pande & Nicholas Ryan, Truth-Telling by Third-Party Auditors and the Response of Polluting Firms: Experimental Evidence from India, 128 Q. J. Econ., 1499 (2013). In contrast, these monitors reported substantially higher pollution levels, verified to be more accurate in follow-up inspections by regulators, once monitored firms were no longer allowed to select and pay their own auditors, but instead were required to pay into a central government fund that, in turn, assigned and paid the monitors. Similarly, a study of social auditors monitoring supply chains on behalf of global brands concluded that these third-party monitors find and cite fewer violations when they are paid by the audited suppliers than when they are paid by the brand. See Jodi Short, Michael Toffel, & Andrea Hugill, Monitoring Global Supply Chains, 37 Strategic Management Journ. 1878 (2016).

Research has likewise demonstrated that conflicts of interest arising from client payment arrangements shade the assessments of third-party monitors in financial regulation. Several studies have found that credit rating agencies, whose ratings are relied upon by...
investors and regulators to assess the risks associated with certain securities, issue more favorable ratings when they are paid by the issuers of those securities rather than by investors. See, e.g., John Jiang, Mary Harris Stanford, & Yuan Xie, Does it Matter Who Pays for Bond Ratings? Historical Evidence, 105 J. fin. Econ. 607 (2012). There is also evidence that stock analysts rate stocks more favorably when they receive commissions from the issuers or traders of those securities. Tellingly, research has shown that these third-party financial monitors exhibit more bias when more money is at stake: the less important the client is to the monitor’s bottom line, the more accurate the monitor’s assessment. See Matthias Efing & Harald Hau, Structured Debt Ratings: Evidence on Conflicts of Interest, 116 J. Fin. Econ. 46 (2015).

Finding #2: Third-Party Monitors Tend to Be More Lenient When Monitoring Firms That Are Prospective Customers for the Monitor’s Non-Audit Product Lines.

In addition to the direct conflicts of interest created when monitors are selected and paid by monitored entities, research documents erosion in monitoring integrity due to indirect economic incentives created by monitors’ desire to pursue other types of business opportunities with monitored entities. For example, private smog check facilities in New York State that faced profitable opportunities to sell other services to car owners (that is, to “cross-sell”) were more likely to falsely pass cars than stations facing fewer competitors. See Bennett et al., supra. Studies have similarly shown that the quality of credit ratings has declined in markets where credit rating agencies face more competition, and that financial statement auditing quality is worse when accountants operate in more competitive markets. Many studies have observed that competition among monitors allows audited firms to opinion shop for more favorable results. See, e.g., Nathan Newton, Julie Persellin, Dechun Wang, & Michael Wilkins, Internal Control Opinion Shopping and Audit Market Competition, 91 Acc. Rev. 603 (2016).

Finding #3: Third-Party Monitors Tend to Be More Lenient When They Face More Competition.

Competition forces monitors to differentiate themselves to capture market share. Research has shown that one way third-party monitors compete for business from those seeking audits is by offering greater leniency. For instance, smog check stations that faced more local competition were more likely to falsely pass cars than stations facing fewer competitors. See Bennett et al., supra. Studies have similarly shown that the quality of credit ratings has declined in markets where credit rating agencies face more competition, and that financial statement auditing quality is worse when accountants operate in more competitive markets. Many studies have observed that competition among monitors allows audited firms to opinion shop for more favorable results. See, e.g., Nathan Newton, Julie Persellin, Dechun Wang, & Michael Wilkins, Internal Control Opinion Shopping and Audit Market Competition, 91 Acc. Rev. 603 (2016).

Finding #4: Third-Party Monitors Tend to Be More Lenient When Monitoring Firms with Whom They Have Longstanding Relationships.

Experimental research has demonstrated that cognitive biases and social pressures dissuaded monitors from reporting wrongdoing at firms with whom they have longstanding relationships, and some archival studies have suggested that monitors’ familiarity with the firms they audit can embolden managers at those firms to pressure or bribe monitors to report good results. See, e.g., Bryan Church, J. Gregory Jenkins, Susan McCracken, Pamela Roush, & Jonathan Stanley, Auditor Independence in Fact: Research, Regulatory, and Practice Implications Drawn from Experimental and Archival Research, 29 Acc. Horizons 217 (2015); Fahad Khalil & Jacques Lawarêe, Incentives for Corruptible Auditors in the Absence of Commitment, 54 J. Indus. Econ. 269 (2006). Recent research confirms that cozy relationships with clients can compromise the integrity of audit results, finding that supply chain monitors detect and report fewer violations at entities they have previously audited. See Short et al., supra. Research on credit rating agencies documents similar biases arising out of close relationships with the firms they monitor. Credit rating analysts have been shown to become more optimistic and less accurate after rating a firm for three years. Another study demonstrates that credit rating agencies’ “ratings teams,” which interact directly with clients, are less accurate in evaluating offerings than their “surveillance teams,” which do not interact directly with clients. John M. Griffin & Dragon Youngjun Tang, Did Credit Rating Agencies Make Unbiased Assumptions on CDOs? 101 Admin. & Regulatory Law News 125 (2011). Similar concerns have been found regarding longstanding relationships between regulated entities and individual government inspectors. See Jeffrey Macher, John Mayo, & Jack Nickerson, Regulator Heterogeneity and Endogenous Efforts to Close the Information Asymmetry Gap: Evidence from FDA Regulation, 54 J.L. & Econ. 25 (2011).

Finding #5: Third-Party Monitors with Less Training Tend to Be More Lenient.

Research suggests that the integrity and validity of audit findings can be enhanced by training monitors to conduct third-party assessments. For instance, a study of third-party supply chain monitors found that, despite other potential biases, monitors are more effective when they receive more training in how to detect
Policy Implications

This body of research suggests a number of policy implications for regulators seeking to bolster the validity of third-party monitoring regimes.

Policy Implication #1:
Third-Party Monitoring Bias Can Be Mitigated by Policies That Prevent Monitors from Being Paid Directly by or Selected by Monitored Firms.

For instance, qualified monitors could be assigned by regulators or at random rather than be selected by monitored firms, and could be paid through a common fund to which all monitored entities would be required to contribute. Such policy innovations have been shown to substantially enhance the accuracy of environmental audits. See Duflo et al., supra.

Policy Implication #2:
Third-Party Monitoring Bias Can Be Mitigated by Policies That Limit Monitors’ Cross Selling of Other Services to the Entities They Monitor.

The Sarbanes-Oxley Act, for instance, substantially restricts financial auditors’ ability to sell non-audit accounting and consulting services to their audit clients. Pub. L. No. 107-204, § 201. In structuring their vehicle tailpipe emissions testing markets, several states and Washington D.C. require that vehicle inspections be conducted at testing-only providers. Similarly, EPA regulations prohibit test laboratories from selling both design services and testing/certification services to wood stove manufacturers within a five-year period. See 40 C.F.R. § 60.535(a)(2)(vii) (2015).

Policy Implication #3:

Concerns arising out of longstanding monitor–client relationships can be addressed through rotation requirements, which impose term limits that require clients to change third-party monitors periodically to reduce the cognitive constraints and relational incentives that can bias their assessments. For instance, the European Union recently passed audit reform policies that will require public companies, banks, and insurance companies to change their financial auditors at least every ten years, following a similar proposal by the U.S. Public Company Accounting Oversight Board (PCAOB), see Concept Release on Auditor Independence and Audit Firm Rotation, Release No. 2011–006 (2011). California’s greenhouse gas emissions verification program adopts a different approach to address the potential for bias in longstanding relationships between third-party monitors and their clients. Although it does not mandate monitor rotation, it requires firms that have been audited by the same monitor for more than five years to submit a conflict-of-interest mitigation plan to the regulator for approval. See Cal. Code of Reg., Title 17, §95979.

Policy Implication #4:
Third-Party Monitoring Bias Can Be Mitigated by Requirements That Auditors Receive Training Designed to Promote Objectivity, Competency, and Consistency.

Regulators may be able to mitigate bias and enhance the validity of third-party monitoring regimes by requiring that monitors meet specified training requirements. Regulators can also promote monitor competence and professionalism by requiring that monitors be accredited by internationally recognized standard-setting bodies. For example, the International Organization for Standardization (ISO) relies on a network of national accreditation bodies. For example, the International Organization for Standardization (ISO) relies on a network of national accreditation bodies to ensure that third-party monitors certifying adherence to its environmental and quality management system standards are sufficiently trained. Along the same lines, the Food and Drug Administration recently adopted a rule requiring that food safety auditors be accredited through an agency-approved process. See Accreditation of Third-Party Certification Bodies to Conduct Food Safety Audits and to Issue Certifications, 80 Fed. Reg. 74569 (adopted Jan. 27, 2015).

Policy Implication #5:
Third-Party Monitoring Bias Can Be Mitigated by Policies That Build Redundancy into Monitoring Regimes.

The accuracy of third-party monitors’ assessments has been shown to increase when different monitors, who have different sets of interests and incentives, independently monitor the same firms. See Alexander Ljungqvist, Felicia Marston, Laura Starks, Kelsey Wei, & Hong Yan, Conflicts of Interest in Sell-Side Research and the Moderating Role of Institutional Investors, 85 J. fin. Econ. 420 (2007). Thus, a monitoring regime that incorporates spot checks against which monitors’ results can be compared is likely to encourage greater accuracy. Some regulators also directly monitor the processes and performance of their third-party monitors. The PCAOB, for instance, annually inspects large accounting firms and reports defects to those firms, which must remedy them or face public disclosure of the defect report. Sarbanes-Oxley Act, Pub. L. No. 107-204, § 104(g)(2).

Policy Implication #6:
Third-Party Monitoring Bias Can Be Mitigated by Policies That Require Transparency in Monitoring Regimes.

Disclosure of information about various aspects of the monitoring process, including monitor selection and monitoring results, can also enhance the integrity of third-party
inspection regimes. For instance, disclosures about the financial arrangements monitors have with monitored firms, including both audit and non-audit fees, may be useful in identifying and mitigating biases that can arise from these arrangements. Moreover, requiring third-party monitors to submit their findings directly to the regulator, without advance review (even informally) by the monitored firm, could enhance the validity of monitoring by reducing opportunities for monitored firms to pressure monitors to soften their findings.

In addition, regulators may be able to promote greater accuracy by disclosing information about auditor performance. Publicly recognizing and rewarding monitors for their accuracy has been shown to prompt monitors to be more accurate going forward in order to maintain their reputations and the resulting benefits they receive from the accolade. See Lily Fang & Ayako Yasuda, The Effectiveness of Reputation as a Disciplinary Mechanism in Sell-Side Research, 22 Rev. of fin. Stud. 3735 (2009). Policy makers could publish similar lists across a wide array of monitoring domains.

**Policy Implication #7: Monitoring Bias Can Be Mitigated by Policies That Impose Liability in Monitoring Regimes.**

Another way to mitigate monitoring bias resulting from the incentives associated with business relationships is to create a set of countervailing incentives encouraging monitor independence. In Australia, for example, credit rating agencies can be held liable for basing their ratings on faulty assumptions and not altering ratings after discovering errors upon which they were issued. Some regulatory regimes and common law doctrines impose legal liability on third-party monitors for failing to identify and report legal violations at the firms they monitor. For example, the New York State Department of Financial Services has levied sanctions against financial auditors who improperly modified reports submitted to regulators after appeasing client requests to remove potentially damaging findings. Financial auditors can face sanctions under the Sarbanes-Oxley Act for failing to properly identify and correct accounting problems at audited firms. Food safety auditors have faced negligence suits for certifying the compliance of food producers whose products caused foodborne illnesses. See Lytton & McAllister, supra.

**Conclusion**

A growing body of research examines factors that risk undermining the integrity of private, third-party monitors that are inspecting and assessing entities’ compliance with laws, regulations, standards, and other rules. This article highlights a number of opportunities for policy makers to better ensure that third-party monitors are themselves properly monitored to bolster the accuracy of their assessments of a wide range of regulated activities.
The Case for the Food and Drug Administration as an Independent Agency

By Ralph S. Tyler*

At the Aspen Institute’s Ideas Festival in June 2016, six former Commissioners of the Food and Drug Administration (FDA), who served under Presidents of both parties, voiced strong unanimous support for the idea that FDA should be an independent agency, and not, as it is now, a subordinate “operating division” of the Department of Health and Human Services (HHS). The tenure of these former commissioners spanned that of Frank Young (1984–1989) to Margaret Hamburg (2009–2015). Each had confronted different major issues, but their shared conclusion was that the present structure does not best serve the country’s public health needs. Professor David Carpenter, who has extensively studied the FDA, is among those who support the agency’s independence.

The incoming national administration and Congress should heed this latest call and act.

HHS is a cabinet level department under which sits various operating divisions, each of substantial size. These operating divisions include, among others, FDA (regulating food, both human and animal, drugs, medical devices, biologics, dietary supplements, and tobacco), Centers for Medicare and Medicaid Services, National Institutes of Health (medical research), and Centers for Disease Control (public health research, education, and data collection).

The scale, diversity, and technical complexity of the activities undertaken by the parts of HHS are remarkable. HHS lacks staff with expertise and knowledge comparable to the expertise of the staff of the divisions it is charged with overseeing. Nevertheless, given the structural relationship between HHS and its operating divisions, HHS exercises an aggressive gatekeeper function over the FDA. By statute, the HHS Secretary holds decision making authority and thus HHS occupies the superior bureaucratic position.

With the Senate’s consent, the President appoints FDA Commissioners of accomplishment and distinction, typically scientists or medical doctors. This would suggest that FDA Commissioners operate with significant autonomy. But the truth is otherwise.

The White House’s Office of Management and Budget (OMB), through its Office of Information and Regulatory Affairs, exercises powerful oversight, if not literally veto authority, with respect to agency regulations and policies. This authority is set forth in Executive Order 12866 issued in 1993 by President Clinton and followed by his successors. See 58 Fed. Reg. 51735 (Oct. 4, 1993). The White House thus operates as a significant check on a FDA Commissioner’s policy initiatives. The point for present purposes is that FDA’s location within HHS means that a FDA Commissioner’s path to the White House is impeded, not direct; absent extraordinary circumstances, the Commissioner must go through HHS. FDA matters do not, and as a practical matter cannot, reach OMB without first passing through HHS’s thick filter. Before the FDA Commissioner can get to the White House with a proposed regulation, for example, the Commissioner’s proposal is subjected to HHS scrutiny, review, and often extensive modification. The HHS staff exercising this review lack the technical and scientific qualifications of the Commissioner and the FDA staff who studied, drafted, and reviewed the comments on the proposal.

The rationale for why FDA should be independent is, in part, that FDA’s core mission is fundamentally different from that of other parts of HHS and, indeed, is fundamentally different from the principal activities of most agencies of the federal government. FDA’s most important functions involve market access, product review, approval, and removal. Before a new drug can lawfully reach the marketplace in the United States, FDA must approve it. FDA is responsible for assuring the safety of the vast majority of the nation’s food supply. For the past few years, FDA also has been our nation’s tobacco regulator, charged with reducing tobacco smoking and its associated health risks and costs. Each one of these areas of responsibility—and, of course, there are many other examples—would alone be a very substantial policy and operational undertaking. The totality of FDA’s areas of responsibility encompasses a wide swath of the economy and present FDA, on a daily basis, with enormous operational tasks and challenges.

In contrast to FDA, the activities of most of the domestic policy agencies of the federal government, including most of the components of HHS, involve setting and enforcing rules and policy and, in some instances, distributing funds to the states, to local governments, or others in the form of grants, direct payments, or otherwise. While FDA performs all of these functions, FDA also has direct hands-on operational responsibilities. FDA determines whether products upon which every American depends every day may enter or remain on the market. FDA’s operational functions range from inspecting tons of seafood
and produce at the border to inspecting overseas and domestic pharmaceutical manufacturing facilities. Performance of these functions is not improved by layering on people in the bureaucratic chain who are not deeply informed on the underlying science, data, or operational challenges. It makes little sense for HHS, overwhelmingly an operational agency, to have oversight authority over FDA when, at its core, it is an operational agency.

A persistent concern about FDA by companies and industries subject to FDA’s regulatory jurisdiction is that FDA takes too long to make decisions. Industry rightly complains, for example, that it takes too long for FDA to issue guidance documents and regulations. There are many causes for this delay and FDA is not entirely without fault. FDA should improve its internal review process to make it less cumbersome and multilayered. What is certain, however, is that eliminating the HHS review layer would be a step in the right direction. Again, every FDA policy proposal of any significance must be reviewed and cleared by HHS before the proposal can be forwarded to OMB where the review process then repeats itself.

Another persistent complaint about FDA, both from industry and from consumer advocacy groups, is the lack of transparency of FDA’s decision making process. This, too, is an area in which the agency could improve; it should be both more timely and forthcoming in its decisions and reasoning. The goal of greater FDA transparency argues for removing the mostly hidden hand of HHS in directing or shaping FDA’s decisions.

The question is whether HHS review sufficiently improves the regulatory product to warrant the associated costs. The bipartisan group of former Commissioners unanimously recommended making FDA an independent agency. Their recommendation reflects their shared view that the HHS layer adds delay, at times injects politics, and does not add value. If the HHS layer were eliminated, ample checks on the FDA would still remain. Among other things, OMB would retain its authority to review proposed and final regulations and final FDA decisions would remain subject to judicial review.

In matters of public policy involving science, health, and safety, the goal is for governmental decisions to be determined by reasoned scientific judgment based upon the best understanding of the known facts, uninfluenced by politics or other extraneous considerations. Because no governmental structure is absolutely immune from politics, that lofty goal will not always be met. Still, the government can be structured in ways to better further that goal. The current FDA/HHS structure, by contrast, tilts in the opposite direction. The present structure separates those with the specialized knowledge necessary to make the proper scientific decision (FDA) from those with the power to make the decision or, at least, to impact the decision (HHS). This structure facilitates politicization by granting a large degree of decision making authority to people whose primary policy perspective is non-scientific.

The most prominent recent case where the Secretary of HHS injected herself to overrule the FDA Commissioner on a matter of science involves the so-called Plan B “morning after” oral contraceptive pill. FDA had concluded that the pill was safe and effective and should be available without a prescription for young women/girls below the age of 17. The HHS Secretary, who was not qualified to second guess this judgment as a matter of science, despite her claims to the contrary, responded to the social, political, and public relations sensitivities of the issue and overruled that FDA decision. The current structure allowed this outcome because the HHS Secretary, not the FDA Commissioner, held (and holds today) the ultimate power to decide.

As the former FDA Commissioners discussed when they met at the Aspen Institute, there are a number of possible models for an “independent FDA.” These models range from the Federal Reserve degree of independence to a cabinet level agency that is not part of a cabinet department (such as the Environmental Protection Agency). The irreducible minimum feature of independence requires unburdening FDA from having HHS sit atop FDA.

Achieving any reorganization of the federal government, even a relatively modest one, is not a task for the timid. The forces of inertia and self-justification are powerful and never easily overcome. In the end, though, there is a persuasive case for change to establish an independent FDA. Doing so would strengthen FDA and enable it to better serve the American people. The need for change plainly exists and is arguably growing as FDA’s responsibilities continue to expand. The issue is not whether there is a need, but whether there is the will to change. FDA’s former Commissioners have extended their records of service to the agency they each headed by urging that we and Congress find that will.
E-Cigarettes: Prevention Is Not Enough

By Craig Oren*

Two years ago, I argued in these pages that regulation of e-cigarettes ought to be preventative—that the Food & Drug Administration (FDA) should regulate under the Tobacco Control Act of 2009 even if it is not certain that e-cigarettes present a risk to public health. See Oren, E-Cigarettes: The Importance of a Preventative Approach, ADMINISTRATIVE & REGULATORY LAW NEWS, at pp. 4-6 (Fall 2014). The FDA has since promulgated a finding that “deems” e-cigarettes and miscellaneous tobacco goods (such as cigars) to be “tobacco products,” and has established rules (such as a ban on sales to minors and a requirement for a warning label) controlling the making and marketing of these products in many of the same ways that cigarettes are regulated. See 81 Fed. Reg. 28974 (May 10, 2016).

The results make clear that, while a preventive philosophy is necessary to sound regulation, it is not sufficient. Rather, considerable judgment is required to decide what precisely to prevent and what restrictions should be imposed in the name of prevention.

The process of promulgating the finding and the requirements is typical of modern rulemaking on important topics. It took the FDA two years to get from proposal to promulgation. See 79 Fed. Reg. 23142 (Apr. 25, 2014). This is not surprising; the FDA was faced with 135,000 comments. In response, the agency classified the comments into a little more than 300 categories, indicating the complexity of the issues. The FDA’s explanation of its final rule covers over a hundred pages in the Federal Register. And of course this is not the end of the process. Judicial challenges claim that the rules violate the Tobacco Control Act, the Constitution, and the Administrative Procedure Act. See, e.g., Right to be Smoke-Free v. FDA, No. 1:16-cv-01210 (D.D.C. June 20, 2016).

In addition, the e-cigarette industry has been lobbying Congress to intervene. See Eric Lipton, Tobacco Industry Works to Block Rules on E-Cigarettes, n.y. times (Sept. 3, 2016).

The key questions are twofold: First, was the FDA appropriately protective? Second, did the FDA adopt the right strategies in seeking to be protective? The first difficulty is to gauge how serious the e-cigarette problem is. There are signs that the e-cigarette boom discussed in my last article is ending. Many smokers apparently do not get the same satisfaction from “vaping” e-cigarettes that they do from using traditional tobacco products. See Susan Adams, Can E-Cigarettes Survive the War Against Vaping, FORBES (May 5, 2016). Reports that e-cigarettes sometimes explode have hardly helped. See 81 Fed. Reg. at 29035. Retail sales of e-cigarettes have dropped over the past year, and one e-cigarette manufacturer reported flat revenue. See Adams, supra. On the other hand, e-cigarette use among high school students jumped 800%—a nine-fold increase—between 2011 and 2014 to the point where one out of eight students use the product. See 81 Fed. Reg. at 28984.

Current evidence indicates that vaping e-cigarettes poses a lesser risk to health than using other tobacco products. See Id. at 28981. Britain’s public health department believes that e-cigarettes are 95% less harmful than traditional cigarettes. See https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review. That is because e-cigarettes do not contain the tar that “combusted” products do, and thus do not cause cancer. Still, e-cigarettes contain nicotine, which is a threat to fetuses in gestation. See 81 Fed. Reg. at 28981. And nicotine is addictive, creating the possibility that e-cigarettes may be a gateway to the use of riskier products. See id. at 28986. This is particularly a problem with young people, who are more susceptible than adults to nicotine addiction. See id. at 29024. Moreover, the vapor exhaled by e-cigarette users contains trace amounts of toxic products, although in amounts smaller than found in tobacco smoke. In sum, to quote a recent headline in the New York Times, “E-Cigarettes Are Safer, But Not Exactly Safe.” Aaron Carrol, ny times (May 10, 2016).

Yet there is considerable evidence that users and potential users, particularly the young, do not understand that e-cigarettes pose risks. See 81 Fed. Reg. at 28981.

We do not know what further research will show about e-cigarettes’ effects. Thus a policy of prevention seems appropriate. But not all agree that the FDA carried prevention far enough. Public health groups are distressed by the FDA’s refusal to restrict the use of flavoring (such as chocolate or bubble gum flavoring) in e-cigarettes and other products covered by the new rules. These groups note that flavoring tobacco products makes their use more attractive to adolescents.

As is required by executive order, the FDA sent its final rules for final review to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. According to the Campaign for Tobacco-Free Kids, the FDA rules, as sent to OIRA, sharply regulated flavors in the products covered by the rule, and contained seventeen pages of preamble language justifying its action. But OIRA objected, and the restrictive regulations were removed from the final rule. See http://www.tobaccofreekids.org/press_releases/post/2016_05_31_whitehouse. OIRA, as is customary,
has not made its objections public. The FDA explained the removal of the ban on the grounds that there is evidence—very limited, the FDA agreed—that flavors in e-cigarettes help cigarette users to quit smoking. See 81 Fed. Reg. at 28977.

This explanation, evidently forced by OIRA, creates a contradiction in the FDA’s rule because it is in tension with the FDA’s refusal to treat e-cigarettes as smoking cessation aids. See id. at 29028. Some scientists believe that e-cigarettes are useful in helping smokers quit. Yet, it is not clear whether this is the case. One study showed that e-cigarettes are 60% more effective than a nicotine patch or gum in helping smokers to stop; on the other hand, using e-cigarettes is only 20% effective in ending smoking. See http://www.webmd.com/smoking-cessation/news/20140520/can-e-cigarettes-help-you-quit-smoking.

The FDA finds the evidence on e-cigarettes’ capacity to help smokers quit is very mixed and uncertain. One study shows that e-cigarette use actually hinders smokers in quitting because it does not wean them from nicotine. See http://www.cbsnews.com/news/e-cigarettes-dont-help-smokers-quit-study.

The FDA therefore refuses to classify e-cigarettes as smoking cessation devices, unlike, say, the nicotine patch. This path, I suggested in my 2014 article, was appropriate; as with the nicotine patch and gum, the burden ought to be on the e-cigarette industry to show that its product really does reduce smoking. At the same time, the current crop of smoking-cessation products is not effective for the vast majority of those who try them, see http://www.tobaccofree.org/quitlinks.htm, and so, perhaps, a more relaxed approach to e-cigarettes would be appropriate to aid smoking cessation. The FDA’s rules, though, seem to treat e-cigarettes as smoking cessation devices for one purpose but not for another.

The FDA also needed to address the key issue of what constitutes prevention. While the use of e-cigarettes has increased dramatically among adolescents, the rate of smoking in this group has decreased—perhaps indicating that e-cigarettes are not the gateway to smoking that the FDA fears. See http://www.cdc.gov/media/releases/2014/p0612-yrbs.html. Indeed, some have suggested that discouraging the use of e-cigarettes would only serve to increase the smoking rate among nicotine-craving adolescents, and so regulation is counterproductive because e-cigarettes pose a lesser risk. See http://www.irvinetimes.com/news/14345934.E-cigarettes_face_restrictions_for_public_use_from_Welsh_Assembly_vote/?ref=mr&lp=16.

The “gateway” controversy illustrates another important issue in administering a policy of prevention. As noted in my previous article, society tends to put the burden of proof for showing safety on the advocates for a new product, like e-cigarettes, even when the new product is alleged to actually increase safety. In effect, we prefer the risk we know to the one we do not. Yet it is not obvious exactly how high the burden should be. In assessing arguments that e-cigarettes add to safety, the FDA must decide how much evidence is needed to rebut its preventive assumptions.

This has long been an issue at the Environmental Protection Agency (EPA), which must decide how much of a risk is posed by a cancer-causing substance. EPA has long used protective “default” assumptions in the absence of contrary data. For instance, if there is no information to the contrary, EPA assumes that a substance that causes cancer in rodents also does so in humans. In this way, EPA gives a margin of protection, which is appropriate where public health is concerned. But how much evidence should be required to rebut the default assumption when EPA is assessing the risk from a specific substance? The agency has not been able to come up with a general approach to this question, and instead takes a largely ad hoc approach. See National Research Council, Science and Decisions, 190-91 (2009).

The FDA is faced with the same kind of problem. In the absence of evidence to the contrary, the FDA assumes that, because e-cigarettes contain nicotine, discouraging their use helps protect public health. But how much of a showing should be needed to convince the agency to depart from this assumption? There is no precise formula to gauge this; the agency must exercise discretion.

Thus, we can see that a preventive policy toward e-cigarettes necessitates important judgments by FDA. The concept of prevention may be a good guide to what the agency should do. But it is not determinative of the issues. More than philosophy is needed. Rather, careful study of the scientific record and good judgment about how to handle uncertainties are needed.

There is an additional difficulty that cannot be answered just by invoking the concept of prevention: It is not easy to decide what steps should be taken to prevent a public health problem. Small e-cigarette manufacturers and vape shops (specialty stores that sell e-cigarettes and accessories) have filed suit to have the new rules set aside. The challengers agree that steps to try to stop use by minors are appropriate. But they assert that the FDA used a “one-size-fits-all” approach that equates e-cigarettes with more dangerous products, and that the FDA rules actually put a disproportionate burden on e-cigarettes as compared to cigarettes.

The Tobacco Control Act requires that cigarettes not on the market in 2007 go through a pre-market review process to show that marketing the product would be beneficial to public health. The FDA rules apply this requirement to e-cigarettes, giving their manufacturers two years to submit the necessary applications, and another year to obtain approval. While there is an exemption for products substantially equivalent to those on the market in 2007, e-cigarette makers say these products are so new that this path is of limited use.
Instead, many current e-cigarette manufacturers will have to go through a lengthy and expensive process of generating an application for each product. This would require much information (including, the industry fears, submission of clinical studies about each new product, even though such studies about e-cigarettes are practically nonexistent). Moreover, each vape shop is defined as a “manufacturer,” meaning that shops that mix and bottle their own products will have to go through pre-marketing review for those products or cease mixing and bottling, thus destroying much of the point of vape shops. While the FDA rules do contain some relief for small manufacturers, and promise guidance on how e-cigarette makers may satisfy pre-marketing review, see 81 Fed. Reg. at 28997, the e-cigarette industry believes this is not enough to prevent its products from being driven from the market.

The FDA defends the pre-marketing review requirement as necessary to protect legitimate manufacturers from unfair competition, and to protect public health from dangerous products. These concerns are of course reasonable. In fact, some health and medical organizations, joined by some Democratic members of Congress, believe the FDA did not go far enough. But, unless the FDA shows considerable flexibility, the result of the requirements could be a boon for the big tobacco companies and large players in the e-cigarette industry—which can afford to go through the pre-marketing process and could therefore come to dominate the e-cigarette market. Indeed, the big tobacco companies favored treating e-cigarettes like other tobacco products, even though e-cigarettes appear less dangerous. According to the authors of one recent article, this illustrates what is called the “Bootlegger and Baptist” theory (named for those who combined to seek Sunday closings of liquor stores) under which public interest groups, such as anti-smoking advocates, often find themselves in coalition with major players in the regulated industry who desire to stifle innovation and competition. See Jonathan Adler, Andrew Morriss, Roger Meiners, & Bruce Yandle, Baptists, Bootleggers and Electronic Cigarettes, 33 Yale J. Reg 313 (2016).

Thus, there remains substantial dispute over the FDA’s regulations. Calls for prevention, while important, leave open substantial questions about how much evidence of a problem is needed and about what the appropriate response is to that problem. These issues are agonizingly difficult for any agency. The future of e-cigarettes and their regulation remains to be seen.
in the final quarter of the 2015 October Term, the Supreme Court issued several decisions of significance to administrative law on topics ranging from notice-and-comment procedures to affirmative action and veterans preferences in government contracting. In addition to these decisions, it also granted certiorari in administrative law cases relating to the President’s appointment power, citizenship of foreign-born children, disability, immigration, redistricting, the scope of federal jurisdiction, and statutory standing.

DECISIONS

Notice and Comment Procedures

In Encino Motorcars v. Navarro, 136 S. Ct. 2117 (2016), the Court considered whether so-called service advisors—employees who sell service at automobile dealerships—are entitled to increased compensation for overtime work under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. That Act requires overtime compensation for employees of automobile dealerships, but it excludes “any salesman...primarily engaged in selling or servicing automobiles.” Id. § 213(b)(10)(A). The Act also authorizes the Department of Labor to promulgate regulations to implement this requirement.

Over the years, the Department took varying positions on whether service advisors fell within the exemption. In 1970, the Department interpreted “salesman” to exclude service advisors. In 1978, the Department switched positions, concluding that salesman did include service advisors. In 2011, after conducting notice-and-comment rulemaking, the Department switched positions again, concluding that “salesman” does not include service advisors.

Invoking this 2011 rule, service advisors working for Encino Motorcars sued Encino, alleging that it had violated the FLSA by not paying them overtime. The district court dismissed the claim, concluding that service advisors fall with the statutory exemption for overtime compensation. The Ninth Circuit disagreed, reasoning that the Department’s 2011 interpretation that service advisors do not fall within the exemption was entitled to Chevron deference.

By a 7-2 vote, the Supreme Court vacated. In an opinion by Justice Kennedy, the Court concluded that the Department’s interpretation was not entitled to Chevron deference. It explained that, for an interpretation rendered in an agency regulation to receive Chevron deference, the agency must “follow the correct procedures in issuing the regulation.” And, the Court concluded, the Department did not follow the correct procedures in promulgating the 2011 rule. As the Court stated, when promulgating a rule through notice and comment, an agency must give “adequate reasons” justifying the rule it adopts. Moreover, when the new rule deviates from an existing policy, that justification must provide “good reasons for the new policy.” According to the Court, the Department failed to provide an adequate justification for its 2011 regulation, stating that the Department “offered barely any explanation.” The Court accordingly remanded for the lower courts to interpret § 213(b)(10)(A)’s exemption without giving Chevron deference to the Department’s interpretation. 136 S. Ct. at 2124-27.

Justice Ginsburg, joined by Justice Sotomayor, concurred to stress that “nothing in [the] opinion disturbs well-established law.” Id. at 2127-29.

Justice Thomas, joined by Justice Alito, dissented. Although he agreed that the Department’s interpretation was not entitled to Chevron deference, he disagreed with the Court’s decision to remand. Instead, he would have held that service advisors fall within § 213(b)(10)(A)’s exemption. Id. at 2129-39.

Affirmative Action

In Fisher v. University of Texas, 136 S. Ct. 2198 (2016), the Court once again addressed the constitutionality of the University of Texas’s affirmative action program for undergraduate admissions. Under Texas law, up to 75% of admitted undergraduates consists of students who graduate from a Texas high school in the top 10% of their class. The remaining 25% are admitted based on a holistic assessment of the applicant’s academic qualifications and personal achievements. The latter assessment includes, among other things, the applicant’s leadership experience; work experience; community service; extracurricular activities; and other aspects of the applicant’s background, including the applicant’s socioeconomic status, native language, and race. Race therefore may be considered in the admission process, but it is only one consideration among many aspects of the applicant’s personal history and achievements. Id. at 2206-07.

In 2008, Abigail Fisher applied for admission to the University. Because she was not in the top 10% of her class, she was evaluated under the holistic review process. After the University denied her application, Fisher filed suit, claiming that the consideration of race in the holistic review process violated the Equal Protection Clause of the Fourteenth Amendment. The district court entered summary judgment for the University, and the Fifth Circuit affirmed.

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A divided Supreme Court affirmed. In an opinion by Justice Kennedy, the Court began by reiterating that affirmative action programs must satisfy “strict scrutiny.” As the Court put it, for an affirmative action to be constitutional, a university must demonstrate that the consideration of race “is necessary to meet [a] compelling interest.” Applying that standard, the Court concluded that the University’s program is constitutional. The Court held that the University had identified a compelling interest in obtaining “the educational benefits that flow from student body diversity.” Those benefits included the destruction of stereotypes, the promotion of cross-racial understanding, and the preparation of students for working in a diverse society. Id. at 2210-11.

The Court also determined that considering race was necessary to achieve these goals. It explained that the University decided to consider race only after conducting studies that revealed its previous race-neutral policies resulted in inadequate diversity. The Court rejected the argument that the program was unnecessary because it had failed to achieve meaningful diversity, noting that the enrollment of racial minorities had increased significantly at the school. The Court also rejected the argument that other, race-neutral programs would have achieved the same level of student diversity. It explained that the alternatives proposed by Fisher, such as intensifying outreach programs to racial minorities and giving greater weight to the socioeconomic status of applicants, had been tried by the University and had not achieved significant results. Id. at 2211-14.

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented. He argued that the University had failed to adequately specify the interests that its use of race and ethnicity is supposed to serve. Id. at 2216.

Justice Thomas also filed a separate dissent, arguing that the Equal Protection Clause should be read to categorically prohibit a state from considering race in higher education admissions. Id. at 2215.

**Immigration**

One of the most potentially significant cases last Term was United States v. Texas, 136 S. Ct. 2271 (2016), which raised a challenge to a Department of Homeland Security (DHS) program deferring removal actions against a number of undocumented immigrants.

In 2014, the DHS issued a memorandum to implement the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA). DAPA allows certain undocumented immigrants to apply for a temporary reprieve from removal and the opportunity to work in the country for three years. Approximately 4.3 million out of the approximately 11.3 million undocumented immigrants in the United States are eligible to remain in the country under DAPA. Texas, along with twenty-five other states, challenged DAPA, arguing that DHS was obligated to engage in notice and comment to promulgate the program.

The district court preliminarily enjoined DAPA, holding that Texas had standing to challenge DAPA because it resulted in Texas having to provide benefits to otherwise ineligible immigrants. The district court also agreed with Texas that DAPA violated the Administrative Procedure Act. The Fifth Circuit affirmed.

Despite the significance of the case (or perhaps because of it), the Court affirmed without opinion by an equally divided vote. The Court thus remanded for the district court to consider whether to issue a permanent injunction, and subsequently denied the Administration’s request for a rehearing upon Justice Scalia’s replacement on the Court.

**Statutory Interpretation**

The Court this quarter decided three cases involving statutory interpretation—one about the Bankruptcy Act, one on the Patent Act, and one involving preferences for military veterans.

**Bankruptcy Act**

The Court’s decision in Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016), brought into sharp focus the looming financial crisis in Puerto Rico. The specific question at issue was whether Puerto Rico is treated as a “State” under Chapter 9 of the Bankruptcy Code, and if so, to what extent. The case arose because Puerto Rico’s electricity, sewage and water, and highway and transportation utilities are in massive debt. Puerto Rico adopted bankruptcy legislation in an attempt to help these utilities maneuver out of their dilemma.

Chapter 9 of the federal Bankruptcy Code allows municipalities, which includes utilities, to file for bankruptcy under that chapter. In order to do so, however, municipalities must be authorized “by State law” to be a debtor under Chapter 9. A provision of the Bankruptcy Code states that the “term ‘State’ includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under Chapter 9 of this title.” The question for the Court was whether this provision prevented Puerto Rico from authorizing municipalities to file for Chapter 9 bankruptcy.

The Court, in an opinion by Justice Thomas, ruled that the plain language of this definition removed Puerto Rico from the list of jurisdictional bodies that may authorize municipalities to file for Chapter 9 bankruptcy. That language, the Court said, could not be clearer. It was unambiguous on its face, and its use of the term “who may be a debtor” made it absolutely certain that Congress was
referring to the “gateway” provision, under which states must first authorize municipalities to file under Chapter 9. The heading of that provision is “Who may be a debtor.” Accordingly, because Puerto Rico lacks power to authorize municipalities to file for Chapter 9 bankruptcy, the Bankruptcy Code also forbade the statutory bankruptcy relief Puerto Rico had enacted. The Bankruptcy Code includes a preemption provision, and that provision applies to Puerto Rico. In reaching that conclusion, the Court rejected arguments that Puerto Rico could be treated as not a state for one purpose under Chapter 9 (authorizing municipalities to file) but as a state for other purposes (preemption). Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that the Court improperly interpreted the statute. Justice Alito did not participate in the case.

**Patent Act**

At issue in *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), was the scope of the U.S. Patent and Trademark Office’s (PTO) authority under the Leahy-Smith America Invests Act, 35 U.S.C. §§ 100 et seq. That Act instituted a procedure for third parties to challenge patents after they have been issued—so-called “inter partes review.” The PTO promulgated regulations governing such reviews, including a provision that patent claims be construed to their “broadest reasonable construction” when challenged in inter partes proceedings. 37 C.F.R. § 42.100(b).

*Cuozzo* involved the PTO’s handling of an inter partes review of a speedometer technology that uses GPS information to tell drivers when they are exceeding the limit. The technology company Garmin challenged one claim in the patent, but the PTO extended the scope of the proceeding to two other claims in the patent on the grounds that all three claims were inextricably linked. The patent holder, Cuozzo Speed Technologies, then challenged the PTO’s review in court.

The first question before the Court was whether Cuozzo could challenge the PTO’s unilateral expansion of the scope of its inter partes review in its case. The Court said yes. The Court hinged its analysis on § 314(d) of the statute, which reads: “No Appeal.—The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and non-appealable.” This provision, the Court said, limited the agency’s ability to challenge not only whether the agency institutes an inter partes review but also how broadly it does so. In other words, the breadth of the provision gives the agency discretion to determine how to review such claims. This was the case even though there is a general, strong presumption in favor of judicial review; the language of § 314(d) overcomes that presumption. The Court did, however, limit the reach of its holding. It said that its reading of § 314(d) does not extend to constitutional challenges to agency action, nor to challenges not closely linked to the validity of patents.

The Court also ruled in favor of the agency on the second issue presented by the case, specifically, whether the PTO could impose the “broadest reasonable construction” standard in inter partes review cases. Cuozzo argued the PTO should not be allowed to do so because courts apply a different, narrower “ordinary meaning” standard. The Court rejected this claim. Nothing in the provision giving the PTO authority to make rules under the statute constrained the PTO in that way. Rather, that provision simply said that the agency may issue “regulation… establishing and governing inter partes review under this chapter.” 35 U.S.C § 316(4). That provision left enough ambiguity that the PTO was entitled to step-two *Chevron* deference, particularly because “the purpose” of an inter partes review proceeding “is not quite the same as the purpose of district court litigation” over patents. 136 S. Ct. at 2144.

Justice Alito, joined by Justice Sotomayor, concurred in part and dissented in part. He argued that § 314(d) should be read to foreclose interlocutory challenges to the PTO’s decision whether to proceed in the first instance with inter partes review, but not to bar an attack on the scope of that review following final agency action.

**Veterans Preferences**

Statutory construction was also at issue in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). The question was whether a statutory directive to consider at least two veteran-owned companies to fulfill government services contracts was generally mandatory, or is mandatory only until the Department of Veteran Affairs meets its annual target for contracting with veteran-owned companies. In *Kingdomware*, the Department had contracted with a non-veteran-owned company without first assessing the availability of affordable services from a veterans-owned company. In a unanimous opinion authored by Justice Thomas, the Court held the Department’s decision violated the statute.

The Court had little difficulty construing the law as mandatory. The provision at issue, part of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127, 8128, states that the Department “shall award” contracts by restricting competition if at least two veteran-owned businesses can submit offers “at a fair and reasonable price that offers the best value to the United States.” Id. § 8127(d). This provision later came to be known as the “Rule of Two.”
The Rule of Two, the Court held, is mandatory because the term “shall” imposes an affirmative obligation on the Department, unlike the word “may,” which leaves discretion to the agency. The mandatory nature of this term is generally known, and it was reinforced in this statute by two specific exceptions granted by Congress. Those exceptions, which relate to contracts of certain sizes and conditions, would not be necessary if the Rule of Two were not generally mandatory.

The government sought to defend its reading of the statute by suggesting that the Rule of Two applies only as long as it is needed to meet the goals the Department must set for contracting with veteran-owned businesses. This, it said, was buttressed by the statute’s prefatory clause, which says that the law was adopted “for the purposes of” meeting these annual contracting goals. The Court disagreed. According to the Court, reading purpose clauses in this way risks gutting the substance of laws. And, the Court said, that is exactly what would happen here: “The clause announces an objective that Congress hoped that the Department would achieve and charges the Secretary with setting annual benchmarks, but it does not change the plain meaning of the operative clause.” 136 S. Ct. at 1978.

Certiorari Grants

The Court has granted review in a number of cases presenting significant issues of administrative law. These cases raise issues relating to the President’s appointment power, citizenship law, disability law, immigration law, redistricting, federal jurisdiction, and statutory standing.

Presidential Appointment Power

The Court will again review the President’s appointment power in National Labor Relations Board v. SW General, No. 15-1251. The Federal Vacancy Reform Act defines who may temporarily fill in an acting capacity for vacant positions in the Executive Branch. The Act provides that, when a position requiring confirmation by the Senate becomes vacant, the first assistant under that position shall perform that position’s functions. 5 U.S.C. § 3345(a)(1). But the Act creates several exceptions. First, it provides that the President may direct a person who already serves in a position requiring Senate confirmation to perform the duties of the vacant position. Id. § 3345(a)(2). Second, the President may direct a person to perform the duties of the vacant position if that person has served for at least 90 days in the preceding year in a “senior position” in the agency in which the vacancy occurred. Id. § 3345(a)(3). The Act then places a restriction on the President’s power to direct someone other than the first assistant to fill the vacant position. It provides that a person may not serve as an acting officer if (1) he has been nominated to the office and (2) during the year preceding the vacancy, he did not serve as first assistant to the vacant office for at least 90 days. Id. § 3345(b)(1). The question for the Court is whether this limitation applies only to first assistants who take office under subsection (a)(1), or whether it also applies to officials who assume acting responsibilities under subsections (a)(2) and (a)(3).

Citizenship

In Lynch v. Morales-Santana, No. 15-1191, the Court will consider a challenge to a federal law dictating when a foreign-born person is a citizen of the United States. Under federal law in effect in the 1960s and 1970s, if a U.S. citizen had a child abroad with a non-U.S. citizen, the child would be a U.S. citizen only if the citizen-parent had been physically present in the United States for a particular time before the child was born. But the physical-presence requirement differed depending on whether the parents were married. If the parents were married, the citizen-parent had to be physically present in the United States for 10 years, at least 5 years of which were after the parent turned 14. 8 U.S.C. § 1401. If the parents were unwed, the child would be a citizen only if the mother was a citizen and she had resided in the United States continuously for at least one year. Id. § 1409. The principal question in Morales-Santana is whether this difference violates the Fifth Amendment’s guarantee of equal protection.

Disability Law

The Court granted review in two cases involving discrimination against disabled individuals. At issue in Ivy v. Morath, No. 15-486, is the scope of liability under federal disability laws. Several disabled individuals claimed that they were denied access to a driver-education program managed by the Texas Education Agency but administered by a private company. They sued the Texas agency under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. The ADA prohibits public programs from discriminating against people because of their disability. 42 U.S.C. § 12132. The Rehabilitation Act prohibits anyone receiving federal funds from discriminating against disabled people. 29 U.S.C. § 794. The question in Ivy is whether the Texas Agency, a public entity that receives federal funding, is liable under these laws even though its program is administered through a private entity.

The other case is Fry v. Napoleon Community Schools, No. 15-497. Under the Individuals with Disabilities Education Act (IDEA), school districts receiving federal funding must provide services to meet the needs of disabled students. Parents who are dissatisfied with these services may...
sue the school district, but they must first exhaust their administrative remedies through a local agency. Stacy and Brent Fry sued the Napoleon school district for money damages, alleging that the district refused to allow their daughter to bring a service dog to school. They did not bring suit under the IDEA, however. Instead, they brought suit under the ADA and the Rehabilitation Act. The question in Fry is whether the IDEA’s exhaustion requirement applies to these claims.

**Immigration Law**

In *Jennings v. Rodriguez*, No. 15-1204, the Court will consider the power of the United States to detain, without bond, certain aliens during removal proceedings. Under federal law, certain aliens seeking admission to the country, as well as certain terrorist and criminal aliens, must be detained, without a bond hearing, during proceedings to remove them from the country. Other aliens, however, may be released on bond during removal proceedings if they do not present a flight risk or danger to the community. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that aliens subject to a final removal order could be detained without bond, but only for a “reasonable” time, with six months being “presumptively reasonable.” The principal question is whether, given *Zadvydas*, aliens who are detained without bond during removal proceedings must be afforded bond hearings with possibility of release after six months of detention.

**Redistricting**

The Court will hear yet another redistricting claim in *McCrory v. Harris*, No. 15-1262. In 2011, North Carolina drew new congressional districts. Several citizens filed suits claiming that two of the districts—Congressional District 1 and Congressional District 12—constituted racial gerrymanders in violation of the Equal Protection Clause. A three-judge district court held that both districts were unconstitutional. It concluded that North Carolina had used racial quotas in drawing those districts and that the use of race in drawing those district did not pass strict scrutiny. The Supreme Court will consider whether those rulings were correct.

**Federal Jurisdiction**

In *Lightfoot v. Cendant Mortgage Corporation*, No. 14-1055, the Court will consider the ability of federal courts to hear claims where Fannie Mae is a party. Under 12 U.S.C. § 1723a(a), Fannie May has the power “to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal.” In *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), the Supreme Court interpreted similar language to extend federal jurisdiction over all claims brought by or against the Red Cross. The questions presented in *Lightfoot* are whether § 1723a(a) should be interpreted the same way and whether *Red Cross* should be reconsidered.

**Statutory Standing**

At issue in *America Corp. v. City of Miami*, No. 15-1111, is who may bring actions under the Fair Housing Act. That Act prohibits racial discrimination in lending, and it authorizes any “aggrieved person” to sue for a violation of the Act. 42 U.S.C. § 3613(a)(1)(A). Invoking this provision, the City of Miami sought to recover damages from Bank of America based on the theory that the bank steered minorities towards predatory lenders. This practice resulted in many minorities defaulting on their loans, which in turn deprived Miami of tax revenue and required the city to spend more on public services because of the resulting blight. The Eleventh Circuit concluded that Miami was an “aggrieved person” under the Act because it established that it suffered injury-in-fact satisfying Article III standing. The Court will consider whether that determination was correct. It will also consider whether Bank of America proximately caused Miami’s loss of money.

**MAKE YOUR OPINION COUNT**

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.
7th Circuit upholds energy efficiency standards, allows consideration of the “Social Cost of Carbon”

The Energy Policy and Conservation Act requires the Department of Energy (DOE) to impose mandatory energy conservation standards on specific types of equipment and appliances. These standards must be “designed to achieve the maximum improvement in energy efficiency” and be “technologically feasible and economically justified.” 42 U.S.C. § 6295(o)(2)(A). In Zero Zone, Inc. v. U.S. Department of Energy, 2016 WL 4177217 (7th Cir. 2016), the Seventh Circuit recently upheld new DOE standards governing commercial refrigeration equipment (CRE).

This rulemaking was a complex enterprise, requiring consideration and development of standards for 49 classes of commercial refrigeration equipment. These types of equipment vary from grocery store open or closed bins for frozen vegetables and ice cream to refrigeration equipment for restaurants and other enterprises. The development of these types of standards may well be the reason that open displays of frozen items are disappearing from grocery stores, replaced by closed glass doors. To address the wide range of different types of equipment, DOE developed models of hypothetical representative units with which to determine the effects of more efficient lighting, compressors, and insulation. The CRE industry challenged both the agency’s engineering analyses and its economic analysis.

The court began by articulating the arbitrary and capricious standard of review, noting that it must “give great deference to an agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise,” but that it may not “simply rubber-stamp[] agency fact-finding.” Applying these principles throughout its opinion, the court found that the agency had adequately explained itself in connection with each industry challenge.

Several challenges are worthy of particular attention. First, the industry complained that DOE “failed to provide a meaningful opportunity for notice and comment of an ‘engineering spreadsheet’ that compiled all the data that was used in DOE’s analysis.” DOE had earlier provided various technical reports, and two weeks before publishing the notice of proposed rulemaking it published a more complete engineering analysis including all of the relevant data. DOE did not, however, provide the engineering spreadsheet that it had used in its own analysis. After receiving questions about the spreadsheet, DOE ultimately published it more than a month before the deadline for public comments. Although several members of the public commented on the spreadsheet, the industry challenger argued that the spreadsheet had not been provided early enough and did not include certain information.

This argument implicated the principles of Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), and various decisions in other circuits requiring that agencies release technical studies and data relied upon in proposed rules. The Seventh Circuit had never articulated such a requirement, but it found no need to address the question here. Although the spreadsheet had not been available until shortly before the end of the comment period, all of the relevant information had been available. The spreadsheet had “simply organized this information in a different manner.” Moreover, other members of the public had been able to provide meaningful commentary on the spreadsheet.

The court also rejected an argument that DOE was obligated to provide the spreadsheet in the form in which it could be manipulated by the manufacturers by inserting their own information to see what results would be produced. This misconstrued the purpose of the spreadsheet, which was to “calculate the efficiency level of one specific hypothetical ‘representative unit,’ of a specific size, for each class of refrigeration equipment.” Moreover, the manufacturers could have undertaken their own comparisons of the spreadsheet results for various types of refrigeration products.

The CRE industry also challenged DOE’s modeling of compressors, which the agency undertook “despite the unavailability of data on some high-efficiency compressors.” Relying upon its own research and consultation with others, DOE initially estimated that high-efficiency compressors can achieve a 10% increase in efficiency. Responses to the notice of proposed rulemaking ultimately convinced DOE to require only a 2% improvement. In particular, a major supplier of this type of equipment with significant institutional expertise commented that “it would be reasonable to assume...a 1% to 2% efficiency improvement.” Noting that its role was only to require “that the agency acknowledge factual uncertainties and identify the considerations it found persuasive,” the court upheld the agency’s choice.

The court’s consideration of DOE’s engineering analyses continued in this vein, with recognition, for example, that DOE could appropriately conclude that “the industry may have to settle for a less-than-optimum situation to achieve the necessary conservation goals.” In each case, the court found that the agency had adequately explained itself.

In response to the statutory requirement that the efficiency standards be “economically justified,” DOE
had identified five different “trial standard levels” and had determined which would be economically feasible. After initially proposing that the benefits of the second-highest level of standards would outweigh the costs, DOE concluded after comments that the third-highest level would be more appropriate, producing substantial net benefits to consumers that far exceeded costs.

The industry argued that DOE had ignored principles of price elasticity by assuming that price increases resulting from the standards would not affect purchases of this equipment. Once again, the court concluded that the agency had adequately explained itself. DOE had made a “reasoned prediction” that “restaurants and other businesses will purchase CRE regardless of its price,” and that any reliance upon cheap or refurbished equipment “would not be so significant as to change” the outcomes of its analysis.

Perhaps most noteworthy, the court upheld DOE’s consideration of the “Social Cost of Carbon” (SCC) in its analysis of environmental benefits. The SCC is “an estimate of the monetized damages associated with an incremental increase in carbon emissions any given year.” The court had “no doubt that Congress intended that DOE have the authority under the EPCA to consider the reduction in [SCC].” Industry challenged DOE’s calculation of “the present value of the costs of standards to consumers and manufacturers over a 30-year period,” while “the SCC values reflect the present value of future climate related impacts well beyond 2001.” The court disagreed, noting that DOE ultimately compared “the cost of achieving emissions reductions in each year of the analysis, with the carbon reduction value of the emissions reductions in those same years.” Thus, all of the comparisons were within the same time frame.

5th Circuit upholds agency interpretation of its own regulation but finds notice of that position inadequate to support a violation citation

Wal-Mart Distribution Center #6016 v. OSHA, 819 F.3d 200 (5th Cir. 2016), illustrates the interplay between the substantial deference given to agency interpretations of their own regulations and the due process requirement for adequate notice before one may be punished for a violation of a regulation. The regulation in question, 29 C.F.R. § 1910.132(d)(1), provides that an “employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).”

In 2006, Wal-Mart performed the required hazard assessment of its Searcy, Arkansas, distribution facility. In January 2008, OSHA audited that assessment as part of Wal-Mart’s application to enter a Voluntary Protection Program (VPP). During that audit, Wal-Mart explained that its distribution facilities were all the same, such that the company intended to apply its Searcy, Arkansas, hazard assessment to all of its other distribution centers.

In February 2008, OSHA inspected the company’s distribution center in New Braunfels, Texas. Because Wal-Mart had not conducted a hazard assessment for that facility, the inspector cited the company for a violation. The Administrative Law Judge (ALJ) concluded that OSHA had reasonably interpreted its regulation to require a hazard assessment of each facility and rejected Wal-Mart’s “cookie-cutter” argument that an assessment of one facility could be applied to all of them. The ALJ noted that Wal-Mart’s approach “failed to confirm the uniformity of workplace conditions.” The Commission affirmed 2-1 because Wal-Mart had not had someone personally confirm that the conditions at the second facility were identical to those of the first. The Commission also rejected Wal-Mart’s argument of inadequate notice.

The Fifth Circuit upheld OSHA’s interpretation of its regulation, citing Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144, 156 (1991), for the proposition that courts are to “review the Secretary’s interpretation to assure that it is consistent with the regulatory language and is otherwise reasonable.” After performing a fairly standard interpretive analysis, including consideration of the regulatory preamble and other relevant material, the court found the regulation ambiguous. It then upheld OSHA’s interpretation as reasonable, at least to the extent that it required an employer to confirm that workplaces are indeed identical before a hazard assessment for one workplace can qualify as the hazard assessment for another location.”

Although the agency had prevailed on its interpretation, the question remained whether Wal-Mart had adequate notice of the meaning of the regulations as applied to its facilities. “The touchstone for sufficiency of notice under the due process clause is reasonableness.” In this case, OSHA had audited Wal-Mart’s Searcy, Arkansas hazard assessment in connection with the company’s application to be designated as an OSHA VPP workplace. “To establish a lack of fair notice, [the employer] must show that, through the VPP, it had a fair expectation that OSHA had found its procedure satisfactory.” Because “Wal-Mart notified OSHA during the VPP audit of its Searcy location that it was using the Searcy hazard assessment as the assessment for its other distribution centers,” and since OSHA later recognized the Searcy location as achieving the VPP status, Wal-Mart had “a fair expectation that OSHA had found its procedure satisfactory.” A “reasonable employer in Wal-Mart’s position would not have known that its practices were in violation of” the regulation.
This case should not be taken to mean that a company can escape liability whenever a regulation is ambiguous. Indeed, it was entirely reasonable for the Commission to conclude that an employer must at least confirm that workplaces are identical before applying one hazard assessment to another workplace. The proposition seems inescapable. Thus, had that been the only issue, the citation probably would have been sustained. Wal-Mart benefited from the particular characteristics of the VPP and the fact that it had mentioned its cookie-cutter approach in connection with seeking VPP status. On the facts of this case, the question is whether a reasonable employer would have known that its practices were in violation of an ambiguous regulation. Substantial deference to the agency as to the interpretation itself does not help the agency as to the notice argument, but the mere fact of some ambiguity does not dictate that the agency should lose.

**D.C. Circuit splits in upholding FCC “net neutrality” rules**

In a monumental decision (85 pages on Westlaw), a majority of a D.C. Circuit panel upheld recent Federal Communications Commission (FCC) rules designed to create “net neutrality.” United States Telecom Association v. FCC, 2016 WL 3251234 (D.C. Cir. 2016). Judge Williams dissented as to several issues, including particularly the applicability of FCC v. Fox Television Stations, Inc., 556 U.S. 502, (2009), principles governing arbitrary and capricious review of an agency’s change of position.

The FCC’s concern with net neutrality arose from the fact that broadband service providers were in a position to favor content that they or affiliated companies might have developed or to charge fees to assure faster transmission of content provided by others. This danger of discrimination against unaffiliated content providers and of creating “fast and slow lanes” on the Internet prompted the FCC (after unsuccessful previous efforts) to change the characterization of broadband service from “information service” to “communications service,” thereby subjecting broadband service to regulation as a common carrier. Essentially, the agency relied upon consumer perceptions that broadband functions primarily as an information transmission service comparable to telephone service, despite the fact that broadband companies provide other services such as email and cloud storage. The agency also banned blocking and throttling of content provided by others and the practice of paid prioritization to achieve preferred status from a broadband service provider.

Two aspects of this decision are particularly worthy of consideration beyond the particulars of these rules. First, the court rejected challenges to the adequacy of notice in the Notice of Proposed Rule Making (NPRM). Second, the majority upheld the agency’s recharacterization of broadband as telecommunications service after years of having treated it as information service.

As to the notice challenges, the industry argued that the agency had not explained in the NPRM that it would rely on consumer perceptions or that it would rely on a statutory “telecommunications management exception” in promulgating the rule. These arguments failed, in part, because the agency had expressly sought comments on the broad issue of whether it “should revisit the Commission’s classification of broadband Internet access and service as an information service.” More specifically, the argument failed because the Supreme Court, in an earlier related decision, National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 990 (2005), had “explained that classification under the Communications Act turns on ‘what the consumer perceives to be the finished product.’” As to the telecommunications management exception, Brand X “made clear that to reclassify broadband as a telecommunications service, the Commission would need to conclude that the telecommunications component of broadband was ‘functionally separate from’ the information services component.”

Perhaps more important, the Brand X dissent had noted that the Commission could reclassify broadband as telecommunications service “by determining that certain information services fit within the telecommunications management exception.” Thus, the Supreme Court had determined that these issues would inherently be part of any FCC consideration of classifying broadband as a telecommunications service.

The industry also argued that the FCC had not given adequate notice that would apply new rules to interconnection arrangements because the agency had not said that it might act under Title II of the statute. But by asking “whether the Commission should expand its reach beyond ‘a broadband provider’s use of its own network,’” and “focusing on the threat that broadband providers might block [competitor] access to end-users,” the NPRM had allowed interested parties to comment meaningfully on the issues at hand.

As to a final notice issue, the court avoided deciding about the adequacy of notice by applying the “rule of prejudicial error.” The fact that many letters submitted to the Commission identified the particular issue and that many comments specifically addressed the issue suggested actual notice and prevented any determination that interested parties had been prejudiced by not being aware of and able to present those very arguments.

The majority found necessary statutory authority without disagreement from Judge Williams, but the opinions clashed on the question of whether the agency
had met the requirements of *FCC v. Fox Television Stations, Inc.* with respect to policy change of this nature. Noting that the agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one,” the majority rejected a concern that the rules would undermine investment in broadband, accepting the FCC’s explanation that Internet traffic under net neutrality was likely to grow substantially in the coming years, thereby driving any necessary investment, a so-called “virtuous cycle.” The majority emphasized that such predictive judgments are subject to “particularly deferential review as long as they are reasonable.”

Judge Williams disagreed in part because the agency had failed to make “a finding of market power or at least a consideration of competitive conditions.” The majority responded that nothing in the statute required such a finding. Judge Williams emphasized that where, as here, an agency relies on a change in circumstances, *Fox* requires the agency to give particular attention to reliance interests that may have arisen under the agency position. The majority rejected this argument. First, the FCC had “concluded that changed financial circumstances were not critical to its classification decision.” Second, the FCC had expressly considered the claims of reliance and found that “the regulatory status of broadband Internet access service appears to have at most an indirect effect (along with many other factors) and investment.”

### 5th Circuit splits in holding EEOC guidance document subject to judicial review

In November 2015, the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), held over a vigorous dissent that a Department of Homeland Security Memo, Deferred Action for Parents of Americans (DAPA) constituted final agency action subject to judicial review under the Administrative Procedure Act. An equally divided Supreme Court affirmed without opinion or precedential effect. See 136 S. Ct. 2271 (2016). In July 2016, another Fifth Circuit panel followed suit, finding an Equal Employment Opportunity Commission (EEOC) informal guidance document sufficiently final and otherwise qualified for judicial review. *Texas v. EEOC*, 2016 WL 3524242 (5th Cir. 2016). Again, a dissent forcefully argued the contrary. These disputes set the stage for Supreme Court guidance on these issues once the Court is able to muster a majority.

The more recent decision involved an Enforcement Guidance document issued in a highly unusual context. Title VII of the Civil Rights Act of 1964 prohibits employers from “fail[ing] or refus[ing] to hire…any individual…because of…race, color, religion, sex, or national origin.” Although Congress authorized the EEOC to bring Title VII enforcement actions against private employers, it withheld authority to act against the states. Instead, the EEOC may investigate alleged state discrimination, but it must refer any potential enforcement decision and action to the Attorney General.

In this context, the EEOC issued Enforcement Guidance concerning the hiring of persons with criminal backgrounds. The agency asserted that categorical bans on hiring felons violate Title VII when they disproportionately affect blacks and Hispanics and the employer “does not demonstrate the policy or practice is job related… and consistent with business necessity.” The guidance stated various criteria for making these determinations. It also identified two “safe harbors” in which the agency “believes employers will consistently meet the ‘job related and consistent with business necessity’ defense.”

Texas, an employer with many categorical criminal record hiring bans, challenged the Enforcement Guidance. The district court dismissed for lack of standing, ripeness, and final agency action.

As to standing, the majority held that Texas was clearly an “object” of the Enforcement Guidance, and that as a state it was “entitled to special solicitude in our standing analysis.” The Enforcement Guidance imposed an “increased regulatory burden.” The state, which asserted that the Guidance preempted state law, would have to “undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations stemming from the Enforcement Guidance’s standards overrides the State’s interest in not hiring felons for certain jobs.” And the EEOC position created pressure to change relevant state laws. Such pressure “constitutes an injury” for the purpose of state standing analysis.

By contrast, the dissent found “the want of an adversarial engagement here is palpable,” thus undermining both ripeness and standing. The dissent saw no injury because the EEOC may only refer a Texas matter to the Attorney General, and “the Attorney General has no obligation to adhere to the Guidance.” Even if the Attorney General takes enforcement action, the Guidance is not binding, due only *Skidmore* deference at most. So it does not preempt Texas law.

The majority did not specifically grapple with ripeness. The dissent, however, argued that this challenge was not “fit for judicial decision” under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), because the issues “would be significantly aided ‘by further factual development.’” This was an “abstract challenge that is unmoored from a specific” provision or practice of exclusion for criminal records. Moreover, it was “uncertain whether the
The statutory mission of the Administrative Conference is to study and make recommendations to improve “the efficiency, adequacy, and fairness of the administrative procedure used by federal agencies in carrying out administrative programs.” 5 U.S.C. § 594. While much of the Administrative Conference’s work involves highlighting best practices and procedures, the agency’s statutory charge includes the examination of problems that plague the administrative state in the hope that closer scrutiny and discussion will spark solutions. One such perennial problem is “regulatory capture”—the idea that agencies may act at the behest of private parties rather than in the public interest. Although most acknowledge that regulatory capture exists, there is little consensus among academics and policymakers about its scope and how to confront it.

In an effort to explore the concept in a more rigorous way, the Administrative Conference hosted a bipartisan forum to explore the latest thought on special interest influence and the administrative state. On March 3, 2016, Senators Sheldon Whitehouse (D-RI), Mike Lee (R-UT), and Elizabeth Warren (D-MA), along with leading experts from government, the federal bench, and the academy, gathered to explore the concept of regulatory capture and to discuss plausible solutions and preventative measures.

Senator Sheldon Whitehouse opened the forum by explaining why capture is worthy of sustained attention. The Senator has long decried the evils of regulatory capture, having written and spoken extensively on the topic and introduced several bills designed to combat capture. In his remarks, Senator Whitehouse noted that special-interest influence threatens democratic government, economic vitality, and health and safety standards. Stressing the need for both Congress and the executive branch to actively tackle capture, the Senator discussed his proposal for a type of roving inspector general office empowered to investigate evidence of regulatory capture in various government agencies.

Following Senator Whitehouse, Senator Mike Lee remarked upon the emerging consensus that regulatory capture is “one of the most pressing political, economic, and moral issues of our time.” The Senator noted that political theorists have long recognized the risk of capture, pointing to the discussion of factions in Federalist 10. Now, as then, institutional design offers a remedy. Echoing the insights of Federalist 10, Senator Lee suggested that capture might be mitigated by promoting a more effective separation of powers between the branches of government. In particular, he proposed an enhanced role for Congress in monitoring agency rulemaking.

The panels that followed covered capture in enforcement and rulemaking contexts. As a starting position, they utilized the definition of capture in Daniel Carpenter and David Moss’s book—namely, as action by industry or other special interests to influence public policy in a manner derogating from the public interest. See Carpenter & Moss, Preventing Regulatory Capture (2013).

The first panel, “Agency Enforcement and Evidence of Capture,” discussed capture in light of the 2008 financial crisis. The speakers discussed whether prosecutions, or the lack thereof, are proof of capture or instead reflect a variety of factors, such as the revolving door, the dearth of the specialized expertise required to prosecute such complex cases, or concerns that prosecuting major corporations might harm the economy. Ronald Cass, Administrative Conference Council member, deftly moderated the ensuing discussion. Judge Jed Rakoff of the Southern District of New York reminded the audience that, while many high level executives were prosecuted after the Savings and Loan crisis of the 1980s, not one executive has been prosecuted in the wake of the 2008 financial crisis. Brandon Garrett of the University of Virginia School of Law and author of too big to Jail (2014), noted that, while individual wrongdoers generally escape prosecution, companies are charged but then negotiate deferred or non-prosecution agreements requiring heavy fines. These fines burden shareholders, and whether these agreements hold companies fully accountable remains to be seen. Gretchen Morgenson of The New York Times critiqued the Securities and Exchange Commission’s generous grants of waivers and the justifications the agency offers for its waivers.

The second panel explored the latest scholarly work on regulatory capture in the rulemaking context. Are certain types of rules less vulnerable to capture? Neomi Rao of
News from ACUS

George Mason School of Law explained her theory that congressional delegations to executive branch agencies give individual legislators excessive influence over agencies. Sidney Shapiro of Wake Forest University School of Law argued that capture can spur deregulation in addition to steering regulations in a direction that is favorable to industry. Daniel Carpenter of Harvard University stressed the need for agreed upon standards for measuring capture as a crucial first step in addressing the problem. Mark Calabria of the Cato Institute identified some weapons to combat capture, including diffusion of power and heightened transparency. (The discussion was so lively that the panel reconvened after the remarks of the closing speaker, Senator Elizabeth Warren.)

Senator Warren chronicled the multifarious ways industry groups delay and shape the rulemaking process, from expert public comments to numerous ex parte contacts. She offered several potential solutions, including pushing for shorter, clearer rules; proposing that the standing doctrine might be reformed to permit members of the public to challenge agency inaction or excessively weak rules in federal court; and suggesting that agencies experiment with public interest advocates in the rulemaking process.

If conversation leads to enlightenment, as the eighteenth century philosophers would attest, this forum contributed to the formulation of a bipartisan consensus on one of the most ubiquitous and poorly understood of all governmental maladies.

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Guidance will ever be enforced against” Texas. This situation was much closer to Toilet Goods Association v. Gardner, 387 U.S. 158 (1967), a companion to Abbott Laboratories, in which a new agency requirement could not be challenged until an actual attempt at enforcement created a possible hardship and refined the facts for judicial consideration.

The majority held the Enforcement Guidance constituted “final agency action,” as required by § 704 of the Administrative Procedure Act, because the Guidance met a “flexible and pragmatic” understanding of the requirement that the Guidance determined rights or obligations or resulted in legal consequences. The majority emphasized that the Guidance bound EEOC staff to the two safe harbors, and that compliance with either would prevent an enforcement action. According to the majority, the fact that an employer could “rely on…a safe harbor by which to shape their actions” rendered the Guidance “binding as a practical matter.” The majority also particularly relied upon the recent U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807 (2016), in which the Supreme Court held that a Corps Jurisdictional Determination for a particular piece of property triggered “legal consequences” supporting review.

The dissent rejected reliance on Hawkes essentially because the action there involved a specific party, unlike here, and “a negative [Jurisdictional Determination] is a legally binding promise that carries weighty consequences for the affected party,” while this “Guidance does not carry any consequences for any party” (emphasis original). Moreover, Congress decided that the Attorney General, not the EEOC, should “determine whether and how to act against a state employer.” Thus, judicial interference prior to Attorney General action “interferes with the discretion of one of the highest ranking members of the Executive Branch,” and it distorts EEOC decisions about the allocation of resources otherwise “designated for enforcement actions against private employers.”

This and similar decisions threaten to rigidify the regulatory process. They are likely to deter agencies from communicating their views to regulated communities, much to the detriment of both sides. We need doctrines that will allow review of informal statements when it is truly justified, without so threatening agencies with review that they retreat to increasingly expensive, cumbersome, and opaque formal processes and communications.
Inside the Agency Class Action

Michael Sant’Ambrogio & Adam S. Zimmerman*

Federal agencies in the United States hear almost twice as many cases each year as all the federal courts. But agencies routinely avoid using tools that courts rely on to efficiently resolve large groups of claims: class actions and other complex litigation procedures. While nearly 40 percent of all cases in federal court now proceed in some form of organized litigation, most agencies and specialized courts rarely use class actions or otherwise coordinate multiparty disputes. As a result, across the administrative state, cases often languish for years without remedy—delaying justice for plaintiffs ranging from veterans seeking compensation for medical care, to coal miners suffering from “black lung” disease, to students duped by fraudulent private universities.

A handful of federal administrative programs, however, have quietly bucked this trend—employing class action rules, collective claims handling and even the kinds of “trials by statistics” embraced by innovative federal judges around the United States. The Equal Employment Opportunity Commission (EEOC) created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve “pattern and practice” claims of discrimination by federal employees before federal administrative judges (AJs). The National Vaccine Injury Compensation Program (NVICP) uses “Omnibus Proceedings,” which resemble federal multidistrict litigation, to pool together common claims that allege a vaccine injured large groups of children. And facing a backlog of hundreds of thousands of claims, the Office of Medicare Hearings and Appeals (OMHA) recently instituted a new “Statistical Sampling Initiative,” which simultaneously will resolve hundreds of common medical claims by statistically extrapolating the results of a few hearing outcomes.

Based on our prior work proposing that agencies use class action-like procedures in their own hearings, Michael Sant’Ambrogio & Adam Zimmerman, The Agency Class Action, 112 Colo. L. Rev. 1992 (2012), the Administrative Conference of the United States (ACUS) invited us to study these and other uses of aggregation by federal administrative programs. Relying on unusual access to agency policymakers, staff and adjudicators, we took a unique look “inside” administrative tribunals that use mass adjudication in areas as diverse as employment discrimination, mass torts, and health care. Overall, we found that even though most agencies enjoy substantial authority to adopt class actions and other complex procedures, very few use them. But when adopted carefully, these collective procedures offer agencies sensible tools to respond to rising case volumes while promoting legal access.

Aggregation in Federal Agencies and Article I Courts

Federal courts have long enjoyed authority to aggregate large groups of similar cases in one of two ways. First, courts may formally aggregate claims by, for example, permitting one party to represent many others in a single lawsuit. Second, courts may informally aggregate claims. In informal aggregation, different claimants with very similar claims each retain separate counsel and advance their own lawsuits, but in front of the same adjudicator or on the same docket in an effort to expedite cases, conserve resources, and assure consistent outcomes.

Agencies generally enjoy even more authority than federal courts to aggregate common cases, formally and informally. Agencies are not constrained by Article III “standing” requirements or the Rules Enabling Act, which limit the ways federal courts use class actions and other complex procedures. And, formally speaking, many agencies have recognized that they possess such power. We identified more than fifty administrative agencies and Article I courts with rules permitting some form of aggregation. Some have adopted formal class action rules that resemble Rule 23 of the Federal Rules of Civil Procedure. But most merely permit the consolidation of cases or claims with common questions of law or fact. The number of rules permitting some form of aggregation was surprising given how little attention has been devoted to aggregation by administrative programs.

Nevertheless, we found that very few agencies or Article I courts used their class action or consolidation rule frequently, if at all. The absence of aggregate practice makes the administrative courts that do aggregate worthy of careful study. The procedures employed by the EEOC, the NVICP, and OMHA illustrate a range of techniques that can be used to resolve large groups of cases in administrative programs, some challenges regarding aggregation, and lessons for the future.

* Michael Sant’Ambrosio is Associate Professor of Law and Associate Dean for Research, Michigan State College of Law. Adam Zimmerman is Professor of Law, Loyola Law School, Los Angeles. This essay draws extensively from their article, Inside the Agency Class Action, 116 Yale L.J. (forthcoming 2017), and their Report and Recommendations to the Administrative Conference of the United States, adopted in 81 Fed. Reg. 40259 (Jun. 21, 2016).
Enhancing Efficiency, Consistency, and Access to Justice

Like Article III courts, the EEOC, the NVICP, and OMHA have used aggregate adjudication to pool information about common and recurring problems, as well as to eliminate the duplicative expenditure of time and money associated with individualized adjudication. The efficiencies afforded by aggregation can be especially helpful in the administration and review of large benefit programs, such as the NVICP and OMHA, where appellants continually file cases involving similar legal and factual issues.

For example, when over 5,000 parents claimed that a vaccine additive caused autism in children, the NVICP used a national Autism Omnibus Proceeding to pool all the individual claims that raised the same highly contested scientific questions. Similarly, although OMHA’s statistical sampling initiative is in its early stages, it will permit OMHA to resolve thousands of similar claims in only a handful of proceedings. Indeed, medical providers are urging OMHA to expand opportunities to aggregate and settle large numbers of claims.

Aggregate procedures can also improve uniform and consistent application of the law, particularly in cases seeking indivisible relief, like injunctions or declaratory relief. The EEOC, for example, has long claimed its class action procedure helps it consistently resolve “pattern and practice” claims of discrimination by federal employees. The EEOC deems the process indispensable in light of the volume of claims it processes each year and the potential for inconsistent judgments. OMHA adjudicators have similarly observed that aggregate procedures have been vital to ensuring that hospitals and medical suppliers with hundreds of similar claims are reimbursed consistently.

Finally, aggregation has improved access to legal and expert assistance by parties with limited resources, so that individuals can pursue claims that otherwise would be difficult to bring on their own. For example, the NVICP’s omnibus proceedings allow any party alleging a vaccine-related injury to benefit from the record developed in test cases and hearings by the most qualified experts and experienced legal counsel.

Addressing Concerns of Efficiency, Legitimacy, and Accuracy in Aggregate Agency Adjudication

Notwithstanding the foregoing benefits, aggregate agency adjudication also raises challenges and costs of its own by: (1) stretching adjudicators’ capacity to administer justice to many people; (2) undermining the perceived “legitimacy” of a process without individual hearings; and (3) increasing the consequences of error.

Each program we studied attempted to address these concerns. OMHA has cautiously piloted its statistical sampling program to avoid replacing old backlogs with new ones. The NVICP has assigned novel factual or scientific questions to multiple adjudicators—thereby allowing those issues to “mature” before centralizing claims before a single decisionmaker. In some cases, the NVICP has relied on panels of adjudicators to reduce concerns with having one decisionmaker decide thousands of cases. Both EEOC AJs and special masters in the NVICP ensure that the lawyers in aggregated proceedings are sufficiently skilled to represent large groups of people and that individuals voluntarily participate in the process. Finally, OMHA has developed guidance to standardize its use of statistical evidence.

Recommendations to Policymakers

Agencies considering class actions or other complex procedures can learn from the experience of the EEOC, NVICP and OMHA. This summer, we proposed a series of recommendations to federal agencies on the use of aggregation, which ACUS adopted at their June 2016 plenary session. The full set of recommendations adopted by ACUS can be found at Aggregation of Similar Claims in Agency Adjudication, 81 Fed. Reg. 119, 40259-61 (June 21, 2016). They include the following:

First, agencies should determine whether they have a sufficient number of common claims to justify adopting rules governing aggregation. This may require developing an information infrastructure to identify and track cases with similar issues; encouraging adjudicators to identify related claims and common issues of fact or law; and asking parties to identify related claims ripe for aggregation. Many Article III courts regularly use such practices to identify and sensibly handle large numbers of common claims.

Second, agencies can borrow threshold rules from complex litigation in federal courts to sort the cases suitable for class treatment from those that are not. Doing so may help ensure that aggregate adjudication complements, and does not conflict with, other forms of agency decisionmaking.

As our study has illustrated, agencies may aggregate claims in many different ways—from relying on representatives in a formal class action in a single proceeding to informally coordinating many different individual cases in front of the same adjudicator.

Like federal courts, agencies should consider a number of factors to determine whether formal or informal aggregation is “superior” to individual adjudication, including: (1) whether the number of cases or claims are sufficiently numerous to justify formal aggregation; (2) the comparative benefits of individual or collective control over the shape of the litigation; (3) the progress of any existing individual litigation; (4) whether the novelty or complexity of the issues would benefit from the input of different adjudicators; and (5) whether aggregating cases is manageable and materially advances the resolution of those cases.

In addition, agencies should consider factors that account for agencies’ limited resources and unique policymaking functions, like whether an agency can borrow adjudicators from other agencies or whether the agency can accomplish similar goals
through other tools such as informal rulemaking. Nevertheless, aggregate adjudication may be particularly useful when the relief sought is (1) retroactive, (2) responds to backlogs of already filed claims, (3) involves discrete problems, and (4) sophisticated counsel may be hard to come by absent a multi-party proceeding.

Third, agencies should ensure that any aggregation proceedings are transparent and legitimate. To do so, they should develop written aggregation policies and make them publicly available. Agencies should also encourage participation and ensure parties’ interests are adequately represented in formal adjudications. They can also assign experienced adjudicators to aggregate proceedings and consider using multiple adjudicators to address concerns with having a single person decide large numbers of claims.

Finally, agencies should consider how to use aggregation to enhance agency control of policymaking more broadly. Aggregate adjudication provides agencies with an opportunity to pool information about important questions of law and policy, with assistance from the agency’s most experienced adjudicators and the benefit of a fully developed record and counsel. Large cases also give agencies an opportunity to see problems that might escape their attention in scattered, individual trials. At a minimum, agencies should publish the outcomes of aggregated proceedings and consider whether to codify the decisions in such cases into more generally applicable rules.

Conclusions
Our look “inside” the way agencies use class actions and other complex procedures offers important lessons for an often-overlooked bottleneck in ordinary citizens’ access to justice: the thousands of cases stuck in administrative courts. As it happens, these lessons are particularly timely because agency aggregation appears to be on the rise. Just this past year: (1) plaintiffs petitioned the Federal Maritime Commission to hear a multi-billion dollar antitrust class action involving price fixing; (2) the federal government conceded for the first time that a veterans court could hear class action claims by veterans in “appropriate cases”; (3) the Department of Education proposed a process modeled on the federal court class actions for students seeking loan forgiveness from predatory colleges that commit fraud; and (4) a prominent federal judge recommended that Federal Trade Commission consider aggregating thousands of consumer and municipal false-advertising claims.

Courts and commentators frequently worry that class actions and other complex procedures encourage free-form policymaking; create unaccountable “private attorney generals” who interfere with public enforcement; and stretch the limits of adjudication. However, agency adjudicators face their own legitimacy crisis when they cannot aggregate and actively manage cases. Far from undermining legitimate decisionmaking, our study suggests that group procedures can form an integral part of public regulation and the adjudicatory process itself.

Alternative Dispute Resolution in State & Local Governments, Analysis & Case Studies

Editors Otto J. Hetzel & Steven Gonzales

In recent years, alternative dispute resolution (ADR) has overtaken trial litigation as an cheaper and less complicated method of resolving disputes. This is especially true in government disputes, where the financial burden of litigation falls to the taxpayer. Many overburdened state and local governments have been turning to ADR to alleviate the both the strain on the taxpayers and the overburdened court system. For any lawyer in this field, understanding ADR isn’t enough. One must understand the specific needs of state and local governments in order to succeed. This valuable guide, edited by Otto J. Hetzel and Professor Steven Gonzales, collects the thoughts and experiences of eight different ADR experts to analyze the history, usage, and future of state and local government ADR. This important information will position you for this groundbreaking change in government litigation, and help you serve your clients to the best of your abilities. Topics include:

- An overview of ADR
- An analysis of ADR options in various jurisdictions
- The role of legal counsel in mediation
- Effective mediation techniques
- Evidentiary issues in mediation
- Preparation of clients for ADR
- The use of ADR techniques in government decisionmaking

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The courts' strict approach to error holds some appeal: to attenuate the possibility of holding agency errors harmless. The conventional remedy is to invalidate the action and remand to the agency. Only rarely will the courts enter a civil fine. When a court determines that an agency action violates the Administrative Procedure Act, the remedy is district court review of the agency action. Most agencies, agency formats, and subject matters as to judicial review of agency statutory interpretations. Based on prior empirical studies of judicial deference at the Supreme Court, however, the findings suggest that there may be a Chevron Supreme and a Chevron Regular: Whereas Chevron may not have much of an effect on agency outcomes at the Supreme Court, Chevron deference seems to matter in the circuit courts. That there is a Chevron Supreme and a Chevron Regular may suggest that, in Chevron, the Supreme Court has an effective tool to supervise lower courts' review of agency statutory interpretations.

Nicholas Bagley, Remedial Restraint in Administrative Law, Colum. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833274. When a court determines that an agency action violates the Administrative Procedure Act, the conventional remedy is to invalidate the action and remand to the agency. Only rarely will the courts entertain the possibility of holding agency errors harmless. The courts' strict approach to error holds some appeal: better a hard rule that encourages procedural fastidiousness than a remedial standard that might tempt agencies to cut corners. But the benefits of this rule-bound approach are more elusive, and the costs much larger, than is commonly assumed. Across a wide range of cases, the reflexive invalidation of agency action appears wildly excessive. Although the adoption of a context-sensitive remedial standard would increase decision costs and generate inconsistency, this article argues that the exercise of remedial restraint in appropriate cases may prove superior to a clumsy approach that treats every transgression as worthy of equal sanction.

Kent H. Barnett & Christopher J. Walker, Chevron in the Circuit Courts, 115 Mich. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848. This article presents findings from the most comprehensive empirical study to date on how the federal courts of appeals have applied Chevron deference—the doctrine under which courts defer to a federal agency’s reasonable interpretation of an ambiguous statute that it administers. Based on 1561 agency interpretations the circuit courts reviewed from 2003 through 2013, the authors found that the circuit courts overall upheld 71% of interpretations and applied Chevron deference 75% of the time. But there was nearly a twenty-five percentage-point difference in agency-win rates when the circuit courts applied Chevron deference than when they did not. Among many other findings, the study reveals important differences across circuits, agencies, agency formats, and subject matters as to judicial review of agency statutory interpretations.

Aaron Nielson, Beyond Seminole Rock, Geo. L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821341. Seminole Rock deference—which requires courts to defer to an agency’s interpretation of its own ambiguous regulations—may not have much of an effect on agency outcomes at the Supreme Court, Chevron deference seems to matter in the circuit courts. That there is a Chevron Supreme and a Chevron Regular may suggest that, in Chevron, the Supreme Court has an effective tool to supervise lower courts’ review of agency statutory interpretations.

Aaron Nielson, Beyond Seminole Rock, Geo. L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821341. Seminole Rock deference—which requires courts to defer to an agency’s interpretation of its own ambiguous regulations—may not have much of an effect on agency outcomes at the Supreme Court, Chevron deference seems to matter in the circuit courts. That there is a Chevron Supreme and a Chevron Regular may suggest that, in Chevron, the Supreme Court has an effective tool to supervise lower courts’ review of agency statutory interpretations.

What has been overlooked, however, is that overruling Seminole Rock would have unintended consequences. This is so because another case, Chenery II, enables agencies to put parties in a similar bind simply by not promulgating rules at all. Under Chenery II, an agency has discretion whether to promulgate industry-wide rules or instead to give meaning to statutes by case-by-case adjudication. Because the doctrines are substitutes for each other, albeit imperfect substitutes, if the Court were to overrule Seminole Rock, agencies that place a high value on their own future flexibility could achieve it by pivoting to Chenery II. Yet for regulated parties, this could be worse than the status quo because even an ambiguous
rule generally provides more notice than an open-ended statute. Equally troublesome, because overruling Seminole Rock would discourage rulemaking, it would reduce public participation in the regulatory process.

The insight that Seminole Rock and Chenery II are interconnected—meaning what happens to one affects the other—counsels in favor of stare decisis. Importantly, however, if the Supreme Court is inclined to overrule Seminole Rock, it should also revisit aspects of Chenery II to prevent problematic substitution. For instance, the Court could begin affording Skidmore rather than Chevron deference to statutory interpretations announced in adjudications and could also bolster fair notice. Absent such revisions, overruling Seminole Rock may harm the very people the Justices hope to help.

Michael Sant’Ambrogio & Adam Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827187. Federal agencies in the United States hear almost twice as many cases each year as all the federal courts. But agencies routinely avoid using tools that courts rely on to efficiently resolve large groups of claims: class actions and other complex litigation procedures. As a result, across the administrative state, the number of claims languishing on agency dockets has produced crippling backlogs, arbitrary outcomes and new barriers to justice.

A handful of federal administrative programs, however, have quietly bucked this trend. The Equal Employment Opportunity Commission has created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve “pattern and practice” claims of discrimination by federal employees before administrative judges. Similarly, the National Vaccine Injury Compensation Program has used “Omnibus Proceedings” resembling federal multidistrict litigation to pool common claims regarding vaccine injuries. And facing a backlog of hundreds of thousands of claims, the Office of Medicare Hearings and Appeals recently instituted a new “Statistical Sampling Initiative,” which will resolve hundreds of common medical claims at a time by statistically extrapolating the results of a few hearing outcomes.

This article is the first to map agencies’ nascent efforts to use class actions and other complex procedures in their own hearings. Relying on unusual access to many agencies—including agency policymakers, staff and adjudicators—the article takes a unique look “inside” administrative tribunals that use mass adjudication in areas as diverse as employment discrimination, mass torts, and health care. In so doing, the article unearths broader lessons about what aggregation procedures mean for policymaking, enforcement and adjudication. Even as some fear that collective procedures may stretch the limits of adjudication, the study supports a very different conclusion: group procedures can form an integral part of public regulation and the adjudicatory process itself.

**Other recent Articles of Interest**

Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261 (2016). In 2012, the Government Accountability Office surprised many administrative law specialists by reporting that fully 35% of major rules and 44% of nonmajor rules issued by federal agencies lacked prepromulgation notice and opportunity for public comment. For at least most of the major rules, however, the issuing agencies accepted comments from the public after issuing the rule, and in most of those cases the agencies followed up with new final rules, responding to comments and often making changes in response thereto. Agency rules that invert the procedural steps of notice-and-comment rulemaking in this way do not precisely comply with the Administrative Procedure Act, yet are arguably close enough that some courts have felt compelled to uphold them. Challenges to rules adopted in this manner have created a jurisprudential mess, as courts struggle to balance their duty to enforce the requirements of the Administrative Procedure Act with the practical realities of the modern administrative state. The sheer extent of the practice demonstrates the need for a more consistent judicial response. This article explores the different approaches courts have taken to judicial review of postpromulgation notice and comment. The article concludes that the all-or-nothing models embraced by some courts are doctrinally and practically untenable, but that the middle-ground alternatives employed by other courts thus far do not ensure that postpromulgation notice and comment function as an equivalent substitute for prepromulgation procedures. Fortunately, the existing jurisprudential muddle is not so rigidly fixed as to require Congress, or even necessarily the Supreme Court, to resolve it. The article proposes a solution to the middle-ground problem, first by reviewing the doctrinal theory surrounding agency rulemaking and then by articulating a set of factors for courts to employ in evaluating postpromulgation notice and comment case by case.

Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers. cfm?abstract_id=2799334. Federal rulemaking has traditionally been understood as a text-bound, technocratic process. However, as this article is the first to
uncover, rulemaking stakeholders—including agencies, the President and members of the public—are now deploying politically tinged visuals to push their agendas at every stage of high-stakes, often virulently controversial, rulemakings. Rarely do these visual contributions appear in the official rulemaking record, which remains defined by dense text, lengthy cost-benefit analyses, and expert reports. Perhaps as a result, scholars have overlooked the phenomenon identified here: the emergence of a visual rulemaking universe that is splashing images, GIFs, and videos across social media channels. While this new universe, which the article calls “visual rulemaking,” might appear to be wholly distinct from the textual rulemaking universe on which administrative law has long focused, the two are not in fact distinct. Visual politics are seeping into the technocracy.

This article argues that visual rulemaking is a good thing. It furthers fundamental regulatory values, including transparency and political accountability. It may also facilitate participation by more diverse stakeholders—not merely regulatory insiders who are well-equipped to navigate dense text. Yet we recognize that visual rulemaking poses risks. Visual appeals may undermine the expert-driven foundation of the regulatory state, and some uses may threaten or outright violate key legal doctrines, including the Administrative Procedure Act and longstanding prohibitions on agency lobbying and propaganda. Nonetheless, the article concludes that administrative law theory and doctrine ultimately can and should welcome this robust new visual rulemaking culture.

Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182 (2016). A large body of literature in administrative law discusses presidential control of executive agencies through centralized review of regulations in the Office of Information and Regulatory Affairs (OIRA), part of the White House’s Office of Management and Budget (OMB). Largely overlooked in this literature is how the President’s budget acts as a source of agency policy control—in particular, how the White House exercises control through OMB’s authority to prepare the budget, oversee agencies’ execution of the budget, and create and implement management initiatives through the budget process. This article identifies seven levers associated with OMB’s work on budget preparation, budget execution, and management and shows how these levers can control agency policymaking. These levers have some salutary aspects, especially in their valuable coordination work throughout the administrative state, but they also raise a series of accountability concerns related to opacity, the extensive discretion afforded to civil servants and lower-level political appointees, and the potential for substantive policy (and political) choices to be obscured by technocratic-sounding work. The article concludes with a reform agenda, mapping out ways that the President, OMB, Congress, and civil society should respond to these accountability problems. Future analyses of OIRA’s authority should incorporate discussion of the complementary power of OMB to use the budget as a source of agency policy control.

Zachary S. Price, *Reliance on Nonenforcement*, 58 Wm. & Mary L. Rev. (forthcoming 2017), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823808. Can regulated parties ever rely on official assurances that the law will not apply to them? Recent marijuana and immigration nonenforcement policies have presented this question in acute form, as both policies effectively invite large numbers of legally unsophisticated people to undertake significant legal risks in reliance on formally nonbinding governmental assurances. The same question, however, arises across a range of civil, criminal, and administrative contexts, and it seems likely to recur in the future so long as partisan polarization and divided government persist.

This article proposes that answering the question requires a messy and contestable balance between separation-of-powers costs and fairness considerations. As a general matter, the balance tilts in favor of preserving the enforceability of substantive prohibitions, so as to deny executive officials de facto authority to cancel statutes by inviting reliance on promised nonenforcement. In certain circumstances, however, particularly acute fairness concerns or limited separation-of-powers costs support recognizing a reliance defense. Courts have already recognized a limited antientrapment due process defense in some cases where enforcement officials mistakenly assure regulated parties that planned conduct is lawful. This article proposes that an analogous reliance defense should bar use of information obtained in reliance on promised nonenforcement, including information provided to the government in connection with current immigration programs; that other forms of indirect reliance, such as providing facilities or services to formally illegal businesses, might receive protection; that courts should sometimes protect individuals’ reliance on congressionally mandated (rather than agency-initiated) nonenforcement; and that longstanding persistence of overt nonenforcement policies should eventually support a due process defense of desuetude.

Even with such mitigations and qualifications, significant unfairness to individual defendants remains possible. Presidents should seek to avoid problems of reliance wherever possible by using clemency powers or administrative measures rather than nonenforcement to mitigate the impact of disfavored laws. For its part, Congress should either devote greater energy to amending or repealing outdated laws or else delegate broader executive authority to do so.
Chair’s Comment
continued from page 2

I appreciate how David and Cynthia have worked together over the last few months to affect a seamless transition in the EIC position. We look forward to working with David in the years ahead. I remind readers, however, that the ARLN is only as good as the contributions prepared by Section members, so I am counting on readers to bring David a wealth of material with which to work.

The transition to a new Presidential administration will focus attention on issues of public administration and administrative law. The nation is at several key inflection points—on the future of the Affordable Care Act, the authority of the EPA to address climate change, the structure of agencies regulating the financial services and securities industries, as well as the balance of power within and among the branches just to mention a few. The articles in this issue of the ARLN on infrastructure permitting legislation, the role of administrative law in addressing various forms of sex discrimination, compliance monitoring, regulation of e-cigarettes, and a proposal for restructuring the FDA inform on matters of importance for administrative lawyers and the public. My goal is for the Section to continue playing its usual useful role in illuminating the relevant administrative law issues for decisionmakers in the government and for lawyers who must navigate the issues on behalf of clients and agencies.

The Fall Conference on December 8-9 in Washington, D.C., will begin that process. Taking place after the November election, this substantive program will provide an early opportunity for commentary on the approaches in the new Administration and Congress. A panel on Presidential Transition will feature distinguished scholars and speakers who have had experience in government and on transition teams. Please consult the Section’s webpage for additional information about the program, which will include the traditional summary and analysis of developments in the law.

Improving the Administrative Process, A Report to the President-Elect of the United States 2016 is the Section’s major effort to elucidate issues for the Presidential transition. As the 2016 campaign has revealed and as the Section’s Report to the POTUS-Elect states, the forty-fifth President “will face a pressing need to improve the process by which federal agencies make law and affect the lives of millions of Americans.” In preparing this Report, the Section aimed to identify “non-partisan strategies for improvement and reassessment” to assist the President in overseeing the executive branch. The recommendations address a range of issues such as requiring transition workers to adhere to the ethical code ACUS developed, handling “midnight regulations,” overseeing the rulemaking process, improving the Administrative Procedure Act as proposed by the Section’s Resolution 106B adopted by the ABA HOD last year, posting guidance on websites, engaging in retrospective review, using current communication and information technologies, improving the process of agency adjudications and addressing backlogs, and using alternative dispute resolution. Emily Schleicher Bremer, Assistant Professor, University of Wyoming College of Law, and Paul Noe, Vice President, Public Policy, American Forest & Paper Association, ably chaired the working group committed to this project. Assuming that the Report successfully navigates the ABA approval process, the Section plans to present the document to the President-Elect immediately following the election.

With regard to appointments of agency leaders, both the 2008 and 2016 Reports to the POTUS-Elect recommend that the President and Senate “act promptly” to “appoint persons of high quality to positions of leadership”. In addition, the 2016 report urges the President to “attach particular importance to appointing a chairman for ACUS”. Recently, the Section Council became aware that the President had nominated a bi-partisan slate for six positions on the Board of Governors of the United States Postal Service Commission. The Senate Committee on Homeland Security and Government Affairs has approved the nominees by mostly unanimous votes. Currently, only one of the nine positions on the Board of Governors is filled and that person’s term will expire in December, a situation creating severe operational difficulties for the Postal Service. Recently, the President nominated Matthew Weiner to fill the position of Chair of ACUS. Given the Section’s longstanding commitment to the regular appointment of agency leaders and its particular interest in the role that ACUS plays in developing best practices for administrative agencies, the Section is seeking approval through the required processes to urge the Senate to act on these pending nominations as soon as possible.

The Section’s continuing advocacy for meaningful public access to materials incorporated by reference into agency regulations as specified in Resolution 112 and for agencies to have Presidentially-appointed leaders in place are examples of the relevance of our work. We owe it to the profession and to the public to make every effort to ensure that the Section’s well-considered positions, informed by the deep knowledge and diverse expertise of Section members, become government policy.

Renée M. Landers
Chair, 2016–2017