RESOLVED, That the American Bar Association: (1) generally encourages the use of administratively imposed civil money penalties by federal agencies against regulated persons and entities as one part of an administrative enforcement program that already includes civil or criminal sanctions; and (2) recommends that, in cases involving any significant administratively imposed civil money penalties, the opportunity for a formal adjudication pursuant to the Administrative Procedure Act’s provisions, 5 U.S.C. 554, 556-558, be available to parties; but (3) that the foregoing position relating to the use of administratively imposed civil money penalties does not preclude, and is not inconsistent with, American Bar Association opposition to those portions of H.R. 2179 and S. 476 (108th Congress) that would extend the Securities and Exchange Commission’s administrative penalty authority to non-regulated entities.
I. Introduction

This report with recommendations proposes that the American Bar Association encourage the use of administratively imposed monetary penalty regimes as part of a regulatory program’s comprehensive enforcement scheme. Moreover, whenever administratively imposed monetary penalties are significant, the report and recommendation call for an opportunity for a formal adjudication under the Administrative Procedure Act.¹

This latter part of the recommendation builds on and specifies an application of already existing ABA policy.² In supporting as a general matter the use of administratively imposed money penalties against regulated entities as one part of an overall regulatory enforcement program, the recommendation does not preclude opposition to specific proposed administrative penalties that raise particular issues, such as whether a regulatory program should extend to certain persons at all or what the required standard of culpability should be. For example, an administrative penalty scheme might extend administrative penalties to persons not directly subject to an agency’s regulations only if those persons act knowingly or recklessly. Or for another example, an administrative penalty scheme might extend to those directly regulated by the agency, but not to those whose conduct is not directly regulated by the agency. There may be good reasons to require a higher degree of culpability before imposing any penalty with respect to persons who are not directly subject to an agency's regulations, if only because such persons may not be as aware of those regulations and therefore more likely to violate them inadvertently. By the same reasoning, there may be good reasons not to subject those outside the direct command of the agency's regulations to any penalty, but only to cease and desist authority, for example, leaving penalty authority only with respect to those directly subject to the agency's regulations. This recommendation simply does not address such details of administrative penalty schemes. Thus, this recommendation is not inconsistent with the ABA’s opposition to that portion of H.R. 2179 and S. 476 (108th Congress) that would extend the Securities and Exchange Commission’s administrative penalty authority to non-regulated entities, including lawyers.

II. The Use of Administrative Penalties

¹See 5 U.S.C. §§ 554, 556, and 557.

Although the use of administrative penalties extends as far back as at least 1853, the widespread use as an enforcement mechanism for regulatory programs really began in the 1970s, after the last of the asserted legal objections were rejected by the Supreme Court. A significant cause of the expanded use of administrative penalty provisions in regulatory laws stemmed from a study and recommendation made by the Administrative Conference of the United States (ACUS) in 1972. That study, authored by then-Professor Harvey Goldschmidt established that monetary penalties could provide an important adjunct to agency enforcement tools and that administratively imposed penalties could be a cost-effective means of enforcing regulatory requirements while assuring fairness to private parties. As a result of that study the Conference issued a formal recommendation that agencies should consider asking Congress to grant them the authority to impose administrative penalties where factors supported the use of such penalties. Among the factors to be considered were: the volume of cases to be processed, the availability to the agency of more potent sanctions, the importance of speedy adjudications, the need for specialized knowledge, the relative rarity of questions of law, and the desirability of greater consistency of outcomes. Where administrative penalties were deemed appropriate, the Conference called for their imposition only where there was an opportunity for a formal adjudication pursuant to 5 U.S.C. §§ 554-557 with judicial review in accordance with the APA.

ACUS revisited the issue in 1979 and found that the number of statutory provisions authorizing their use had increased substantially and that their desirability had likewise increased substantially. The Conference again issued a formal recommendation supporting the use of administrative penalties and the use of formal APA adjudication for their imposition. Finally, in 1993, in response to some statutes authorizing administrative penalties after “informal adjudication,” ACUS again studied the subject. While ACUS continued to support the use of administrative penalties by agencies, it was not convinced that a case had been made for dispensing with the requirements for formal adjudication in the APA, especially in light of the APA’s flexibility with respect to the procedures used

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3 Throughout this report and in the recommendation, the term “administrative penalty” refers to a monetary penalty imposed by an administrative agency that is not subject to de novo review in a court. Some statutes provide for agencies to assess, in the sense of propose, a civil penalty, but the recipient of the order has a right either to a de novo trial or de novo review in a federal district court. Because no deference is afforded the administrative determination on either the facts or law, these “assessments” are not true administrative penalties.

4 See Bartlett v. Kane, 57 U.S. (16 How.) 263 (1853) (a Customs-imposed 20 percent penalty on undervalued imported goods).

5 See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm’n., 430 U.S. 442 (1977) (holding that agency imposition of administrative penalties did not violate the Seventh Amendment, even if the imposition of such penalties in a court would require a jury trial). See also Oceanic Steam Navigation Co. v. Stranahan, 214 U.S 320 (1909) (holding that there is no constitutional objection to delegating the imposition of administrative penalties to agencies rather than to courts).


in formal proceedings.\textsuperscript{8} These studies and recommendations by ACUS established both the desirability of administrative penalties in administrative enforcement systems and the fairness of the formal adjudication process. Nothing has happened since the last ACUS study that should change those conclusions.

Indeed, in some circumstances, the fact that an agency has the option of bringing an administrative action may actually make the enforcement program as a whole \textit{fairer}. Every enforcement scheme is “imperfect” in the sense that violations of the substantive norms therein will, to some degree, go undetected and unpunished. On average, federal court actions cost the government more to prosecute. Assuming steady enforcement resources, when enforcement actions may only be brought in federal court, individual defendants may be more likely to bear disproportionately high penalty burdens than where agencies may also bring administrative enforcement actions. At the same time, the lessened resources required for an administrative adjudication, even a formal adjudication under the APA, compared to bringing an enforcement action in federal court, mean that federal agencies can provide effective enforcement more efficiently.

The recognition that administrative penalties serve a valuable purpose in regulatory enforcement has resulted in the proliferation in administrative penalty provisions in recent years. Today, many agencies have authority to assess administrative penalties. These penalty actions are generally adjudicated according to the processes of formal adjudication under the APA, although some are adjudicated under less formal procedures. The finalization of such orders is then followed by an opportunity for judicial review thereof. A 1979 study for the Administrative Conference of the United States uncovered some 348 statutory provisions authorizing 27 different federal agencies to collect civil penalties.\textsuperscript{9}

\textbf{III. Imposition of Administrative Penalties by Formal Adjudication}

Formal adjudication as structured by the Administrative Procedure Act (“APA”) is a fair process, affording all parties ample opportunity to be heard. It is a process guided by an expert and professional corps of adjudicators who seek to ensure justice is done. Furthermore, the model of formal adjudication, subject to federal court review pursuant to 5 U.S.C. § 706, has proliferated to govern an array of legal rights in America since the 1930s. Its very prevalence and continued proliferation suggest that it provides an efficient and fair means of resolving important controversies and does not deprive participants in the process of fundamental rights.

Formal adjudication is the kind of hearing procedure usually employed by agencies levying significant civil penalties. Its strictures are set out expressly in the APA. See 5 U.S.C. §§ 554, 556, 557. The APA envisions a trial before a neutral adjudicator followed by the opportunity for an appeal within an agency and ultimately the


\textsuperscript{9} See Colin Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1439.
opportunity for judicial review. Overall, it is a process that more than satisfies the Constitution’s Due Process right of “fair treatment” where individual interests are at stake.

Although this right of fair treatment “cannot be imprisoned within the treacherous limits of any formula,” the APA’s formal adjudications meet or exceed its expectations. Fair treatment has been said to require, whenever persons are faced with the possibility of “being condemned to suffer grievous loss of any kind,” that they be afforded: (1) adequate notice of what is at stake; (2) the opportunity to present their own case along with the evidence supporting it; (3) the opportunity to rebut the government’s case; (4) the right to do so before an unbiased decision-maker; (5) the receipt of express findings and conclusions based exclusively on the evidence in the record which comprise the government’s final decision; and (6) the exclusivity of the record compiled as a basis of any subsequent judicial review. Formal adjudications conducted under the APA meet every one of these requirements. And where any conceivable objection to the process is raised, the person has the right to appeal to a federal court for review of the entirety of the proceeding.

Because formal adjudications that determine civil penalties are adversarial proceedings, findings of fact and conclusions of law issued by the presiding officer become part of the record upon which the agency must base its final decision. As the proponent of a penalty order, the government bears the burden of persuasion which it must carry with reliable, probative, and substantial evidence. Moreover, the presiding officers in formal adjudications, Administrative Law Judges, are “very nearly as independent of federal agencies as federal trial judges are of the executive branch.” Administrative Law Judges hold to an ethic of impartiality, thoroughness, and accuracy. Finally, the record constitutes the basis of an Article III court’s scrutiny of the agency’s final action.

10 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).


12 McGrath, 341 U.S. at 168.


17 See, e.g., Merritt Ruhlen, Manual for Administrative Law Judges 78 (1982) (“The cornerstone of the formal administrative process is the principle that the decision of the Administrative Law Judge is an
For all of the foregoing reasons the basic elements of formal adjudication, subject to federal court review pursuant to 5 U.S.C. § 706, comprise a fair process. They afford ample opportunity for affected persons to be heard while at the same time allowing governing agencies the flexibility to develop adaptive enforcement procedures and expert capacities in a particular field of law.

Nevertheless, a number of statutes allow for the administrative imposition of significant monetary penalties without the requirement for formal adjudication. While these administrative penalty proceedings may not violate Due Process, they do not provide the same sense of assurance of fair treatment and unbiased determinations, especially where non-ALJ adjudicators are drawn from agency enforcement personnel. Accordingly, absent compelling considerations in favor of informal adjudications of administrative penalties, these proceedings should provide for formal adjudication under the APA. Existing ABA policy reflects this conclusion by supporting the use of formal adjudication under the APA unless Congress specifies otherwise.

The conclusion reached by ACUS in 1993, when it studied the use of informal proceedings for assessing administrative penalties, was that the case had not been made for dispensing with formal adjudications in cases of any significant monetary penalties. Again, there has been no development in the past ten years to suggest a different conclusion.

Respectfully submitted,

William Funk, Chair
Section of Administrative Law and Regulatory Practice

August 2004

independent intellectual judgment, based solely upon the applicable law (including agency regulations and precedent) and the facts contained in the record.”).

18 Cf. Universal Camera, 340 U.S. at 496 (“[E]vidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusions different from the [Agency’s] than when he has drawn the same conclusion.”).


20 Id.


GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Section of Administrative Law and Regulatory Practice
Submitted By: William Funk, Chair

1. Summary of Recommendation(s).

The recommendation supports the use of administratively imposed money penalties as part of an overall administrative enforcement program that includes greater civil or criminal sanctions. When administratively imposed penalties are used, however, persons subject to such penalties should be afforded the opportunity of a formal hearing under sections 554-558 of the Administrative Procedure Act and subsequent judicial review under sections 701-706 of the APA.

2. Approval by Submitting Entity.

This recommendation was adopted by the Council of the Section at its meeting on February 8, 2004.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

ABA House of Delegates Resolution 113 (2000) recommended that Congress, when it considers enactment of legislation requiring a new program including administrative hearings, provide expressly whether the hearing be a formal adjudication under the Administrative Procedure Act; specified factors for Congress to consider in making its determination; and suggested a default rule that any new non-specified hearing be a formal adjudication.

This recommendation is consistent with that resolution, applies the factors and concludes that formal adjudication is appropriate in these cases.

5. What urgency exists which requires action at this meeting of the House?

None
6. **Status of Legislation.** (If applicable.)

On February 25, 2004, the House Financial Services Committee approved legislation, H.R. 2179, that would grant the Securities and Exchange Commission the authority to levy civil money penalties in administrative proceedings against any individual or company accused of violating the federal securities laws. Currently the SEC can do this only against individuals and companies in the securities industry, such as broker-dealers, investment companies, or investment advisors. The House is expected to vote on H.R. 2179 later this year. Previously, on April 9, 2003, the Senate voted to add similar language to an unrelated tax bill, S. 476, under an amendment offered by Sens. Carl Levin (D-MI) and Bill Nelson (D-FL), and the Senate then approved the underlying bill by a vote of 95-5.

On March 18, 2004, the House voted to eliminate language from H.R. 1375, the “Financial Services Regulatory Relief Act,” that would have expanded the authority of the federal banking agencies to assess civil money penalties against a bank's independent contractors—including attorneys, accountants, and appraisers. Under current law, the federal banking agencies must first establish that an independent contractor acted in a “knowingly and recklessly” manner in order to subject the individual to the agencies’ administrative authority. After adopting the amendment, the House then approved the underlying bill by a vote of 392-25.

7. **Cost to the Association.** (Both direct and indirect costs.)

None

8. **Disclosure of Interest.** (If applicable.)

None

9. **Referrals.**

Section of Business Law
Section of Litigation

10. **Contact Person.** (Prior to the meeting.)

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11. **Contact Person.** (Who will present the report to the House.)

Thomas Susman and Judith Kaleta – Section Delegates