RULEMAKING*

Part I. Judicial Developments

Section 553 of the Administrative Procedure Act (APA)\(^1\) generally requires a federal agency to provide public notice and an opportunity for comment on any proposed rule. The APA definition of “rule”\(^2\) is broad enough to encompass virtually any agency statement about what regulated parties must or should do in the future. The APA’s exceptions for “interpretative rules” and “general statements of policy,” however, exclude the vast majority of agency statements from the requirement for notice and comment.\(^3\) These are typically considered to be informal statements or guidance documents, as opposed to binding legislative rules. The APA’s “procedural rule” and “good cause” exceptions also authorize agencies to issue some binding legislative rules without going through notice and comment.\(^4\)

This framework is quite sensible. The idea is that if an agency is going to tell people or companies what they have to do in their lives or their businesses (by adopting a legislative rule), the agency must first tell them about the possible requirement and give them a chance to comment on it. By contrast, if the agency is simply going to change how people or businesses interact with the agency (a procedural rule), without changing what they must do in their lives or businesses, the agency need not seek comment. Similarly, if the agency is simply going to tell the public its understanding of the meaning of a statute or regulation, without changing the

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\(^1\) 5 U.S.C. §553.


\(^4\) 5 U.S.C. §553(b)(3)(A) & (B).
requirements of either (an interpretive rule), the agency need not seek comment. By the same
token, if the agency wants to tell the public about its policies in implementing a statute or
regulation (a statement of policy), again without changing either or imposing any new
requirement, it may do so without seeking comment.

Sometimes it is important for an agency to adopt a new binding requirement (legislative
rule) right away, without taking the time for notice and comment. Environmental resources,
financial stability, or even human lives may hang in the balance. For that circumstance, the APA
provides the “good cause” exception, under which an agency may impose substantive
requirements or limitations without notice and comment.

This is logical, even obvious, in the abstract. The devil, of course, is in the details, which
continue to provide fodder for judicial decisions. The decisions below range from issues
involving exceptions to notice and comment to questions of retroactivity and harmless error.

A. Exceptions to the “Notice and Comment” Requirement

1. The Procedural Rule Exception

The concept of the procedural rule exception\(^5\) is that an agency may change procedures
without going through notice and comment as long as it does not change the substantive
requirements affecting the public. The Transportation Security Administration (TSA) tried to
rely upon the procedural rule exception in defending its recent shift from reliance on
magnetometers to the use of full-body scans, which can detect non-metallic objects such as
liquids or powders.\(^6\) To the TSA, this was simply a procedure, merely “alter[ing] the manner in


\(^6\) The discussion of the TSA litigation is drawn from material forthcoming in the News from the Circuits column in
37 Admin. & Reg. L. News No. 1 (Fall 2011).
which the parties present themselves or their viewpoints to the agency,” which is one of the hallmarks of a procedural rule. Since a body scan is probably the most direct and complete way of presenting oneself to an agency, the exception might apply.

The D.C. Circuit, in Electronic Privacy Information Center v. U.S. Department of Homeland Security, disagreed, finding that the severity of the body scan intrusion on privacy was sufficient to preclude reliance on the procedural exception. The court dismissed in a footnote the proposition that the use of scanners might somehow not constitute a “rule” under the APA, noting that “the question at issue is again whether the agency’s pronouncement is or purports to be binding.”

Ultimately, the court remanded without vacating because it expected the agency to act quickly on remand to cure the defect in its actions. The court declined TSA’s invitation to indicate that the TSA could invoke the “good cause” exception, discussed below, noting only that it did not reach the issue. Presumably the TSA can rely upon that exception in light of the urgent need to protect aircraft safety, but the agency must recognize the application of § 553 of the APA to its actions and affirmatively claim the exemption.

2. The “Interpretative Rule” and “Statement of Policy” Exceptions

As noted above, the interpretive rule and statement of policy exceptions to notice and comment allow an agency to explain to the public how it interprets a statute or regulation or what, as a matter of policy, it intends to do with respect to some particular issue. As straightforward as that may seem, the courts have struggled with both of these exceptions. With

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7 2011 WL 2739752 (D.C. Cir. 2011).
respect to statements of policy, the courts, despite *Vermont Yankee*, have settled on the proposition that if an agency states a policy in binding terms, the agency must first go through notice and comment. They seem to have had greater difficulty, however, recognizing what constitutes an interpretive statement.

In one of the classic formulations, the D.C. Circuit in *American Mining Congress v. Mine Safety and Health Administration (AMC)*, sought to determine whether a statement has “legal effect” by asking

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. 9

The court applied this complex formula to an MSHA statement that an x-ray of a certain reading constituted a “diagnosis” of a certain disease among miners because a “finding of a disease [by x-ray] is surely equivalent, in normal terminology, to a diagnosis.”

Almost hidden in the *AMC* court’s formulation is a simpler approach suggested (indeed dictated) by the language of the APA. Under the APA, the question is whether the statement is “interpretative” – an interpretation. A Federal District Court in Alabama grasped this proposition in *Alabama v. Centers for Medicare & Medicaid Services*, noting that, “‘[t]he distinction between an interpretative rule and a substantive rule ... likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute.’” 10 This approach directly reflects the nature of the interpretive enterprise. If the agency, applying interpretive

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8 Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (admonishing the courts not to impose procedural requirements beyond the applicable statutory *minima*).

9 995 F.2d 1106, 1112 (D.C. Cir. 1993).

methods, derives a statement from the original language, the statement is an interpretation exempt from notice and comment.

The statement at issue in *Alabama v. Centers for Medicare & Medicaid Services* did not qualify. In a dispute over the amounts of state Medicaid fraud and abuse recoveries to be paid to the federal government, the underlying statutory language provided that

> the pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

By contrast, the agency letter purporting to interpret this language provided, in considerable detail, that the state must seek to recover both state and federal damages, return both compensatory and a share of double or treble damages to the federal government, and calculate damages before deducting fees and costs. Perhaps the last point constitutes an interpretation of the term “net amount recovered,” but the previous points cannot even arguably be derived as a matter of interpretation. According to the court, “the remainder of the letter is not at all ‘drawn linguistically from the actual language of the statute.’”

The court rejected the agency’s argument that it was closing a loophole in the statute. Although the agency might have the discretion to close the loophole and to do it in that particular way (presumably pursuant to *Chevron* Step 2 deference\(^\text{11}\)), this is an exercise in policy-making authority and “goes beyond the text of a statute.” In that case, the agency “has created a legislative rule and must first engage in notice and comment rulemaking.”

The Transportation Safety Administration (TSA) stumbled for similar reasons in

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Electronic Privacy Information Center v. U.S. Department of Homeland Security,\textsuperscript{12} discussed earlier. The court rejected the TSA’s argument that it was simply interpreting its broad authority,\textsuperscript{13} to screen for dangerous items. Although noting that there was “some merit to the TSA’s argument that it has done no more than resolve an ambiguity inherent in its statutory and regulatory authority,” the court said the purpose of the APA “would be disserved” if an agency could avoid notice-and-comment in this situation. Perhaps it would have helped if the court had spoken in terms of interpretive method, which is the central characteristic of an interpretation. The TSA made a policy choice in implementing its broad statutory authority, but that choice (under either a \textit{Chevron} Step 2 analysis or a \textit{State Farm} analysis) did not involve interpretation of the statute.

The Department of Veterans Affairs fared better in \textit{Guerra v. Shinseki},\textsuperscript{14} in which a veteran challenged the agency’s refusal to pay certain enhanced benefits despite his total disability. The question was whether the statute required the veteran to be rated at 100% disabled with respect to at least one disability even though, taken together, his various disabilities, all below 100%, rendered him unemployable. The outcome hinged on the statutory requirement that the veteran have “a service-connected disability rated as total.” The veteran attacked earlier general counsel opinions explaining that this statutory language required “a single service-connected disability rated as total.” Since this was simply a reading of the statute, adding nothing to what could reasonably be drawn from the language, the agency easily prevailed in arguing that the opinion constituted an interpretive rule.

\textsuperscript{12} 2011 WL 2739752 (D.C. Cir. 2011). As with the procedural rule discussion, this material is drawn from a publication in the Administrative and Regulatory Law News. See n. 6, \textit{supra}.

\textsuperscript{13} The TSA was required by statute to screen each passenger to assure no one is “carrying unlawfully a dangerous weapon, explosive, or other destructive substance.”

\textsuperscript{14} 642 F.3d 1046 (2011).
UPMC Mercy v. Sebelius\textsuperscript{15} adds a useful discrete point to the discussion of interpretive rules. The issue was what constitutes a “final determination” of underpayment to a hospital under Medicare. This mattered because the earlier the “final determination,” the more interest would accrue to the hospital. This issue was originally governed by a regulation (issued with notice and comment) providing that the “final determination” occurred when there was a Notice of Program Reimbursement and “… a written determination of an underpayment by the intermediary after the cost report is filed.” The agency relied upon a new version of the regulation, purportedly issued as an interpretive statement without notice and comment, providing that a final determination exists when there is a Notice of Program Reimbursement and “… [a] written determination of an underpayment is made by the intermediary after a cost report is filed.”

The court rejected the agency’s position because the new formulation narrowed the required “written determination” from an undefined universe to one issued by the “intermediary,” one of the actors in the regulatory scheme. In so doing, the court rejected the agency’s argument that this did not change the meaning of the regulation. More interesting for the purpose of this discussion, the court held (given the absence of any precedent to the contrary) that an agency may not rely upon the interpretive rule exception to “literally rewrite a portion of a regulation.” This is significant because the problem with the original regulatory language can be seen as ambiguity: it was not clear who was to make the “written determination of an underpayment by the intermediary.” The agency’s ultimate position is arguably a plausible interpretation of the original poorly written language. The agency might have had greater success if it had issued an informal guidance document, rather than changing the actual words of the

\textsuperscript{15} 2011 WL 2517323 (D. D.C. 2011).
Unfortunately, the D.C. Circuit confused the discussion of interpretive statements in *NRDC v. EPA*. EPA relied upon both the statement of policy exception and the interpretive rule exception to justify issuance of an informal Guidance Document under the Clean Air Act. The D.C. Circuit quickly dispensed with the statement of policy argument: “because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule.”

As to the interpretive rule exception, the court both emphasized the interpretive nature of EPA’s statement and concluded that the statement was “legislative” in nature, requiring notice and comment. This appears to fly in the face of the interpretive rule exception because an interpretive statement is by definition not legislative in nature (unless an agency chooses to use notice and comment to adopt an interpretation).

To oversimplify the underlying substantive law, EPA once had in place a 1-hour ozone standard. It then promulgated an 8-hour ozone standard that it said would improve protection of public health overall, including in 1-hour periods, but that it acknowledged could lead to “high 1-hour exposures of concern.” After much litigation, it was determined that “nonattainment areas,” which had not achieved compliance with those standards, were subject to both standards. This triggered § 185 of the CAA, which requires states to impose fees on all major stationary sources (e.g., factories) in areas that miss their deadlines.

With eight areas of severe nonattainment facing significant costs, a Clean Air Act

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16 Perhaps not. To a careful writer or reader, the original language is not ambiguous, but incomplete. As the court correctly held, the new language narrowed the provision from its original meaning.

Advisory Committee asked EPA whether it would be a “legally permissible” for states to forgo imposing § 185 fees by pursuing either a “program alternative” (e.g., a plan to reduce vehicle emissions, rather than focusing on stationary sources) or an “attainment alternative” (essentially considering areas in compliance with the 8-hour standard to be in compliance with the 1-hour standards).

EPA responded with a Guidance Document stating, as characterized by the court, that “EPA believes 1-hour nonattainment areas have flexibility to choose between the statutorily mandated program and an equivalent—i.e., the program alternative.” EPA also said that states could avoid the fees by relying on the “attainment alternative.”

NRDC challenged the Guidance Document on the ground that EPA had failed to comply with the notice-and-comment requirements of § 553 of the APA. In finding finality and ripeness, the court noted that EPA had “definitively interpreted section 172(e) as permitting alternatives,” thereby altering “the legal regime.” The court then held that the Guidance Document did not qualify for the interpretive rule exception to notice and comment.

Unfortunately, the court asserted that “this rule is not interpretive; it is legislative.” This is not a useful formulation of the issue. It is true that if this statement is not interpretive, it is a legislative rule. But the question is whether the statement is interpretive or not – whether it constitutes an interpretation of the statute using whatever interpretive materials may be useful for that purpose. Addressing that question, the court said that “nothing in the statute, prior regulations, or case law” authorized EPA to consider alternatives as set out in the Guidance document. Here, the court is on the right track. If it is not arguably possible to derive a statement from the underlying statute or regulations, the statement cannot be an interpretation.
3. **The “Good Cause” Exception**

Under the “good cause” exception, an agency may forgo notice and comment if it finds (and explains why) that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 18 The courts generally articulate a demanding test under which the exception “is to be narrowly construed” and will apply “only when delay would do real harm,”19 but the courts struggle to determine what actually constitutes good cause. As discussed in Part F. below, courts sometimes rely upon the “harmless error” principle to leave rules in place even in the absence of good cause.

For the last three years, several good cause decisions have involved the Sex Offender Registration and Notification Act (SORNA), which was enacted in 2006. SORNA requires sex offenders who travel in interstate commerce to register in each jurisdiction where the offender resides, is an employee, or is a student. SORNA provides that the Attorney General shall issue regulations determining whether these requirements apply to offenders convicted before SORNA’s enactment and to appropriate rules for registration.

In February 2007, the Attorney General, acting without notice and comment, issued an interim regulation providing that SORNA applies to all sex offenders, including those convicted before the enactment of SORNA. The Attorney General relied upon the good cause exception of the APA to justify making the rule immediately effective (rather than delaying the effective date for the otherwise required 30 days) and to justify issuing the rule without notice and comment.

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The Fourth and Eleventh Circuits upheld reliance on the good cause exception,\textsuperscript{20} while the Sixth and Ninth Circuits rejected it, emphasizing the narrow scope of the exception and the need to show essentially an emergency in order to invoke it.\textsuperscript{21} General assertions of possible sex offender behavior were not enough for the latter.

In 2011, one Circuit and a District Court in another Circuit have addressed the question, both rejecting the proffered justification. In \textit{U.S. v. Johnson},\textsuperscript{22} the Fifth Circuit rejected the good cause argument because local authorities could have prosecuted most of these offenders before the rule, and the rule did not provide new information to local authorities. It simply authorized the federal government to prosecute sex offenders already in violation of state law. The court usefully contrasted the situation before it, in which there had been no specific threat of particular harm, with the facts of \textit{American Transfer & Storage Co. v. Interstate Commerce Commission},\textsuperscript{23} in which the ICC had had to issue interim regulations within two days in order to continue operating at all.

Similarly, a District Court in \textit{U.S. v. Cotton},\textsuperscript{24} after an extensive discussion of underlying principles, rejected the Attorney General’s good cause argument “given the pre-existing state and federal sex offender registry schemes that were in place already and that allowed for the ‘prosecution and imposition of criminal sanctions’ for a sex offender's failure to register.” However useful SORNA might be as an addition to the previously existing enforcement scheme,

\textsuperscript{20} United States v. Gould, 568 F.3d 459, 469–70 (4th Cir.2009), and United States v. Dean, 604 F.3d 1275, 1278–82 (11th Cir.2010).

\textsuperscript{21} United States v. Cain, 583 F.3d 408, 419–24 (6th Cir.2009), and United States v. Valverde, 628 F.3d 1159, 1166–69 (9th Cir.2010).

\textsuperscript{22} 632 F.3d 912 (5th Cir. 2011).

\textsuperscript{23} 719 F.2d 1283 (5th Cir.1983).

\textsuperscript{24} 760 F.Supp.2d 116 (D.D.C. 2011).
the inability to apply it to previously-convicted offenders was not the sort of emergency that justified foregoing notice and comment.25

We may soon know the definitive resolution of the SORNA disputes. The U.S. Supreme Court has granted certiorari in Reynolds v. U.S.,26 which involved the “good cause” issue along with several others. Since the issue was not mentioned in the October 3, 2011, oral argument, however, resolution seems unlikely in the near future.

As with the specter of sex offenders run rampant, the mere mention of national security tends to suggest good cause for immediate government action, even when the government is actually loosening previously established regulations. Perhaps this explains the District Court’s acceptance of the Coast Guard’s good cause argument in San Diego Navy Broadway Complex Coalition v. U.S. Coast Guard.27 In San Diego, the Coast Guard had previously adopted a rule requiring a 100-yard on-shore security zone around any cruise ship berthed at the Broadway Pier, but the Coast Guard had not enforced the rule since at least 2004. Since 2004, the Pier had been operated under a Coast Guard-approved Facility Security Plan that did not require the security zone, but the agency had not amended the rule requiring the security zone. With a major cruise ship due to arrive soon, plaintiffs sought a TRO requiring the Coast Guard to enforce the security zone. After that filing, but before the TRO hearing, the Coast Guard relied on the good cause exception to issue a Temporary Final Rule (TFR) without notice and comment. The TFR

25 Interestingly, the courts in both U.S. v. Johnson and U.S. v. Cotton found ways to sustain either the rule or the indictment. As discussed in Part F below, the Johnson court relied on the harmless error principle, while the Cotton court found other valid regulations that could sustain the indictment.


temporarily eliminated the security zone pending completion of a new notice and comment proceeding on the issue. The Coast Guard argued that immediate action was justified by the need “to avoid the potential disruption that could be caused to major roadways just onshore” if the rule were enforced and by the need to “relieve an unnecessary burden imposed by varying interpretations” of the security zone rule. Upon losing their argument for a TRO, the plaintiffs challenged the agency’s reliance on the good cause exception.

The court accepted the Coast Guard’s argument, noting that, “the Coast Guard reasonably believed the TRO requested by Plaintiff would have resulted in a substantial disruption and diversion of Coast Guard resources.” This reasoning is quite odd for several reasons. First, it was highly unlikely that the court would issue a TRO, and it did not do so. Second, even if the court had issued a TRO, the agency could have issued the temporary rule at that point, when the prospect of disruption was real, rather than when that prospect was highly speculative. Third, in the absence of the highly unlikely TRO, the possibility of disruption came down to a matter of agency discretion. In light of the Facility Security Plan, the Coast Guard had not enforced the security zone for several years. There was no real prospect that the Coast Guard would enforce the zone, so there was no emergency justifying foregoing notice and comment. It is important to note that even if the underlying rule had become something of a dead letter due to the agency’s exercise of its discretion not to enforce it, the rule continued to apply unless changed through the necessary procedures. Having failed to change the rule for several years, the agency could hardly rely on its own delays to justify changing the rule without notice and comment as the cruise ships bore down on the pier.

28 The court also noted that the Coast Guard had said it would initiate notice-and-comment proceedings to finalize the Temporary Interim Rule. It is well established that a promise of later proceedings does not by itself vitiate the failure to comply with the requirement for notice and comment.
The court’s decision in *San Diego* contrasts with a longstanding D.C. Circuit decision, *Union of Concerned Scientists v. Nuclear Regulatory Commission*, in which the court rejected the NRC’s good cause argument in a comparable situation. After the Three Mile Island accident, the NRC had adopted the “environmental qualification” rule under which nuclear reactor safety equipment had to be capable of withstanding the environment created by a nuclear accident. The rule set a compliance date of June 30, 1982. As that date approached, however, the industry was not ready. On June 30, 1982, the NRC, acting without notice and comment, indefinitely delayed the environmental qualification requirement. As “good cause,” the NRC asserted its own inability to promulgate a final rule before the June 30 compliance deadline and its concern that without the change the nuclear industry would be “in jeopardy of enforcement action,” although the agency made clear that it considered all reactors to be safe and that it would not enforce the rule after the compliance deadline. Since the agency could solve its own problem through the exercise of prosecutorial discretion, the court could find no emergency justifying dispensing with the requirement for notice and comment before changing the underlying substantive rule.

B. Requirement for and Adequacy of Notice and the Extent of the Right to Comment

Several recent decisions address the requirement for and adequacy of notice of a proposed rule. The decisions are quite fact-specific, but they reflect the general principle that the public must be given notice of a rule change and that the notice must be sufficient, as judged by the particular facts, to comment on issues important to the agency’s decision. In some cases, the nature of notice or opportunity for comment may be affected by the provisions of other statutes. And an agency change from the original proposal will require additional notice and comment unless the change is a “logical outgrowth” of the proposal.

29 711 F.2d 370, 382-384 (D.C. Cir. 1983).
1. **Notice of changes to cross-referenced requirements**

   In *City of Idaho Falls, Idaho v. FERC*, the D.C. Circuit indicated that agencies may face difficulties if they adopt regulations that purport to adopt by reference materials appearing in the rules of other agencies or entities. The court reviewed a rule purporting to “fix . . . annual reasonable charges” for the use of federal lands by hydropower projects. After years of making such decisions on an ad hoc basis, FERC in 1987 had adopted Regulation 11.2, providing that such charges would be set “on the basis of the schedule of rental fees for linear rights-of-way” developed by the Forest Service. Regulation 11.2 also provided that FERC would update its fees to reflect changes in land values established by the Forest Service. In deciding to rely upon the Forest Service figures, FERC evaluated various options and determined that the Forest Service figures, although “not precisely fitted to hydroelectric projects,” were “the best approximation available” because they “would be more representative of the fair market value of the type of land most often used for hydroelectric projects than any” alternative methodologies.

   In 2008, the Forest Service adopted a new significantly different methodology for determining land rental values. The change resulted in higher values and higher charges when, pursuant to Regulation 11.2, FERC, acting without notice and comment, adopted new Forest Service figures in 2009. Operators of hydroelectric power projects on federal lands challenged FERC’s action as a violation of the requirement for notice-and-comment.

   FERC argued that its action was not a legislative rule requiring notice and comment, but a procedural action under Regulation 11.2 or an interpretive rule exempt from notice and

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31 This discussion is drawn from the News from the Circuits column at 36 Admin. & Reg. L. News, No. 3, 20 (Spring 2011).
comment. In FERC’s view, it was simply implementing its longstanding rule that rental charges would be based upon figures developed by the Forest Service. Thus, the court should defer to the agency’s interpretation of its own regulation.

Even under the highly deferential standard of review, the D.C. Circuit was “unable to accept FERC’s interpretation.” FERC asserted that it had adopted the Forest Service’s fee schedule independent of that agency’s methodology at the time. As noted above, this was contrary to the record, which demonstrated that FERC had carefully evaluated that methodology in choosing among various alternative sources of land value figures. The court found FERC’s position “especially dubious” because it would require FERC to accept whatever figures the Forest Service might develop regardless of the accuracy of any new Forest Service methodology. Among other things, this would be contrary to the values of public participation and informed decisionmaking that the notice-and-comment process is designed to promote.

The court also noted that the statute required FERC to fix the rental charges in question. Although, as it had done, FERC could reasonably evaluate and adopt a fee schedule developed by another agency, it could not abdicate its responsibility by committing itself to the fee schedule of another agency without regard to how that agency might change its methodology in the future. This principle of agency responsibility, coupled with the requirement to give notice of such changes, could constrain agency reliance on references to materials published by other entities.

2. **Stringent imposition of notice and comment despite comparable procedures**

The APA requirement to give notice of “the terms or substance of the proposed rule or a description of the subjects and issues involved”\(^{32}\) has grown from the seemingly minimal

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\(^{32}\) 5 U.S.C. §553(b)(3).
requirements of that language to an obligation to give notice of everything on which the agency significantly relied in developing the proposed rule.\textsuperscript{33} Judge Kavanaugh of the D.C. Circuit has questioned this development,\textsuperscript{34} and a panel of the Third Circuit recently split on just how stringently the requirement should be enforced.

\textit{Prometheus Radio Project v. F.C.C.},\textsuperscript{35} is the latest in a long line of litigation over the Federal Communications Commission’s efforts to regulate ownership of different types of media – newspapers, radio and TV stations.\textsuperscript{36} The Commission’s efforts began in 1975, with rulemaking efforts in 2003 (remanded on various issues) and 2008 (the subject of this decision). Generally, the issues had to do with limits on cross-ownership of various types of media outlets and with the agency’s efforts to implement its long-standing policy of increasing minority and female ownership of the media.

In a stringent application of the notice requirement § 553 of the APA, the majority held that the FCC had not provided adequate notice of its latest version of the rule governing newspaper/broadcast media cross-ownership. In its earlier remand, the court had “advised that “any new ‘metric’ for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.” As a result, the FCC had issued a Further Notice of Proposed Rulemaking in which it invited “comment on all the issues remanded . . . regarding cross-ownership.” It also specifically asked, “\textit{Should limits vary depending upon

\textsuperscript{33} See, e.g., Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (requiring EPA to disclose for comment the “test results and procedures” that had resulted in the proposed rule).


\textsuperscript{35} 2011 WL 2653785 (3d Cir. 2011).

\textsuperscript{36} The discussion of Prometheus Radio Project v. FCC is taken from the News from the Circuits column in forthcoming in 37 Admin. & Reg. L. News No. 1 (Fall 2011).
the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits?” (emphasis by the court). After a 90-day comment period and an additional 60 days for responsive comments, the Commission announced that it had commissioned 10 economic studies, but dissenters criticized the transparency of the process undertaken to develop the studies and the amount of time to complete the studies. Publication of the studies prompted a flurry of criticisms of the process. The FCC then held six public hearings on media ownership across the country. The Chairman of the Commission then published an Op-Ed piece in the New York Times describing his own “proposal” and set a 28-day deadline for responses, again prompting criticism from dissenting colleagues. After much pressure and late-night scrambling, the Commission issued the challenged rule by a 3-2 vote.

In reviewing the charge of inadequate process, the majority strongly emphasized the purposes of the APA to assure testing of the proposal in the crucible of public comment and ensure fairness to the parties. The majority quoted the D.C. Circuit’s HBO decision[^37] for the proposition that an agency “has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible” and emphasized that the agency had an obligation to remain “open-minded.” Relying in part on the limited time available after the Chairman’s Op-Ed piece and essentially characterizing the notice as limited to the two sentences quoted above in italics, the court found that, “[t]his is not the agency engagement the APA contemplates.”

The dissent took a very different approach, arguing that the notice had to be judged in light of the long history of the agency’s proceedings and the litigation. As he saw it, the FCC had clearly sought comment on the full range of cross-ownership issues, such that the rule was “not just the product of one isolated rulemaking, but is instead the outcome of an iterative and

interactive process of statutorily prescribed agency review of broadcast media regulation and our
judicial review of that agency action.”

The two sides represent competing visions of the administrative state. The majority treats
the proceedings as if they were adjudicatory in nature, emphasizing process to assure fairness to
the participants, while the dissent views the long chain of events as an iterative decision-making
process in which procedural arguments must be judged in the larger context.

3. Statutory procedures other than notice and comment

Sometimes statutes other than the APA affect the extent of the agency’s obligation to
provide notice or seek comment under the APA, but courts are likely to look askance at an
agency’s argument that some other statute allows it to do less than the APA minimum. That was
the case in Lake Carriers’ Association v. EPA,38 in which EPA argued that §401(a) of the Clean
Water Act39 supplanted the notice-and-comment requirements of the APA. Lake Carriers
involved a rule creating a Vessel General Permit (VGP) setting pollution control requirements
for vessels on the nation’s waters. Since the VGP is a federal permit, §401(a) of the Clean Water
Act requires state certification of compliance with state standards before the permit may be
issued. That requirement is simple enough where a discharge is a single pipe in a particular state.
Here, however, the discharge could occur in any of many states as a vessel travels across state
boundaries. EPA’s draft permit indicated that the agency was seeking certifications from all of
the relevant states, but it did not identify the conditions that would be imposed by the states in
providing those certifications.

38 2011 WL 2936926 (D.C. Cir. 2011).
EPA issued the final rule without providing an opportunity to comment on all of the various conditions. When challenged, EPA cited §401(a) of the CWA, which provides that a certifying state “shall establish procedures for public notice ... and, to the extent it deems appropriate, procedures for public hearings” in connection with certification applications.” According to EPA, this procedural scheme supplanted its own obligations under §553 of the APA.

The D.C. Circuit disagreed, quoting from §559 of the APA, “Subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly.” Noting that it had “looked askance at agencies’ attempts to avoid the standard notice and comment procedures,” and had held that exceptions to §553 “must be narrowly construed and only reluctantly countenanced,” the court said that an agency is excused from §553’s mandate when a subsequent statute “plainly expresses a congressional intent to depart from normal APA procedures.” The mere reference to state procedures related to permit issuance could not vitiate EPA’s obligations in issuing the general permit.

From the agency’s perspective, things can get worse, as they did in California Wilderness Coalition v. U.S. Department of Energy,40 which involved a challenge to DOE’s designation of national interest electric transmission corridors under the Energy Policy Act of 2005. The Ninth Circuit held that DOE had failed to engage in “consultation with affected states,” as required by § 216 of the Act, rejecting that the agency’s use of notice and comment complied with provision. The Energy Policy Act required DOE to prepare a study of electric transmission congestion “in consultation with affected states.” Based upon the study, DOE was then to designate national interest electric transmission corridors, which allow fast-track approvals of new transmission

40 631 F.2d 1072 (9th Cir. 2011).
lines. In preparing the congestion study, DOE gave presentations at conferences, held meetings, sought public comment, and reached out to state officials through the National Association of Regulatory Utility Commissioners, but it did not specifically invite states to consult on the study. It then published a draft of the study, took comment, and then contacted governors of each affected state to arrange consultation meetings. DOE also did not disclose congestion modeling data to the affected states.

Several states challenged DOE on the ground that its actions did not constitute “consultation” with the affected states. Despite some ambiguity in the term “consultation,” the Ninth Circuit held for the states at *Chevron* Step One, relying on the dictionary definition of “consultation” as including discussions “before” action. The court also relied upon the juxtaposition of two statutory provisions, one requiring “consultation,” the other requiring an “opportunity for comment.” Since DOE’s actions constituted the latter, accepting its argument would render the “consultation” requirement superfluous. Reliance on the APA model of notice-and-comment was not enough to constitute consultation under the Energy Policy Act of 2005.

4. **Logical outgrowth and summary of applicable principles**

In another stringent interpretation of the right to comment, the U.S. District Court for the District of Columbia refused in *Career College Association v. Duncan*,41 to find that a Department of Education rule was a “logical outgrowth” of the original proposal. The rule involved the requirements to be met by distance-learning programs to comply with the Higher Education Act (HEA). The proposal stated that the “HEA requires institutions to have approval from the States where they operate to provide postsecondary educational programs.” The final

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rule, however, required that “online and distance education providers to obtain authorization from States in which their students are located and studying, and not simply from the State(s) in which the schools have physical campuses or conduct classes.”

The Department of Education might have gotten away with an argument that “where they operate” encompasses wherever the distance-learning programs have students, but the court contrasted the new regulation with the previous one, which had referred specifically to the “State in which the institution is physically located.” The ambiguity of the new proposal was not enough to give notice of the proposition that the programs might need approvals beyond their physical locations.

Finally, Judge Easterbrook in *NRDC v. Jackson*, responded quite succinctly to an argument for an additional round of comments on EPA’s response to earlier comments:

That's not how rulemaking works. An agency publishes draft rules; private parties comment; the agency analyzes the comments and adopts a rule, making revisions as needed. Unless the revisions materially change the text, adding features that the commentators could not have anticipated, there's no need for another round of public comments. In other words, the public gets to comment on the proposed rules, not on the agency's response to earlier public comments. 42

C. **Extent of the Agency Duty to Respond to Comments**

Agencies must respond to comments that are material to issues raised in a rulemaking proceeding. 43 To be material, comments must be such that, “if true . . . would require a change in [the] proposed rule.”44

42 2011 WL 2410398 *3-4 (7th Cir. 2011).


44 Louisiana Federal Land Bank Ass’n, FCLA v. Farm Credit Administration, 336 F.3d 1075, 1080 (D.C. Cir. 2003).
In *Sherley v. Sebelius*, the U.S. District Court for the District of Columbia clarified that if the proposed rule is narrowly focused, the response obligation does not extend to a political issue that could change the outcome. After the 2008 election, President Obama issued an Executive Order lifting President Bush’s limitations on funding embryonic stem cell research and directing the National Institutes of Health to “prepare guidance that would describe standards for the responsible conduct of federally-funded [human embryonic stem cell] research.” NIH then issued draft guidelines “to establish policy and procedures under which NIH will fund research in this area, and to help ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law.”

Two scientists engaged in adult stem cell research challenged the rule arguing, among other things, that NIH had failed to comply with its duty to respond to material comments because it had “completely ignored every public comment categorically objecting to funding of embryonic stem cell research.” They argued that such comments were plainly relevant and, “if adopted, would require a change in an agency's proposed rule.”

Their argument failed because NIH had not invited comment on the underlying issue of whether to fund embryonic stem cell research. President Obama had already decided that issue, and NIH was obligated to follow his Executive Order to develop appropriate guidelines for implementing that decision. The purpose of comments was to address, ideally to improve, the guidelines. Despite the determinative nature of the political question addressed by the comments, they were irrelevant to the much narrower proposal.

**D. Agency Discretion to Vary From Established Rules**

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Two recent decisions address the question of when an agency may deviate from previously adopted legislative rules. The answer depends upon the nature of each rule and the requirements of the statute under which the agency adopted the rule.

In *National Roofing Contractors Association v. U.S. Department of Labor*, the Occupational Safety and Health Administration (OSHA) had adopted a rule requiring “guardrail systems, safety net system, or personal fall arrest system” at certain construction projects, subject to exceptions to be determined on a case-by-case basis. Five years later, in 1999, the Secretary issued a Directive to its personnel not to enforce the original rule as long as a project used slide guards or other fall-protection systems as described in the Directive. After seeking comments on whether the original rule should be amended, the agency in 2010 decided the original requirement was appropriate and closed the rulemaking. The agency also rescinded the 1999 Directive, replacing it with a 2010 Directive that authorized administrative proceedings for employers seeking exceptions on a case-by-case basis.

The National Roofing Contractors Association challenged the 2010 Directive as a new legislative rule that had been issued without notice and comment. The Seventh Circuit disagreed, recognizing that the 1999 Directive had simply been the exercise of prosecutorial discretion not to take enforcement action in certain situations, while the 2010 Directive had similarly constituted the exercise of prosecutorial discretion, this time to determine exceptions to the rule on a case-by-case basis. These actions were entirely appropriate in light of the agency’s need to direct its own personnel and resources:

> When all duties rest on a statute or valid regulation—as they do here—agencies are free to be lenient in enforcement without committing themselves to use rulemaking in order to become more strict. The 1999 Directive reflects a policy of lenience, and the 2010

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46 639 F.3d 339 (7th Cir. 2011).
Directive a policy of strict enforcement, but neither policy is an “occupational safety and health standard.”

Accordingly, the agency was entitled to issue both Directives without notice and comment. Judicial interference with the agency’s discretion would raise serious separation-of-powers concerns in light of the agency’s need to make prosecutorial decisions in many factors, including prosecutorial resources.

By contrast, the National Marine Fisheries Service failed in its effort to provide for variation from guidelines required by statute. The applicable statute addressed the problem of “bycatch,” which are “fish that are inadvertently or unavoidably captured by nets or other gear and then discarded.” The statute required the agency to “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.”

The agency issued a rule adopting a methodology involving various requirements to assure an accurate count. The rule also authorized the Fisheries Service to deviate from the methodology in years when certain external operational constraints (including funding levels) would prevent the agency from fully implementing the methodology.

In Oceana, Inc. v. Locke, the D.C. Circuit rejected the agency’s effort to grant itself broad discretion to determine when to act on a case-by-case basis rather than imposing the methodology required by the statute. According to the court, when an agency seeks “to reserve in advance some discretion to depart on a case-by-case basis from an otherwise applicable rule, [t]he agency must adequately define the circumstances that ‘trigger’ the case-by-case analysis, and it must set an ‘identifiable standard’ to guide its judgment when operating under that procedure.” The vague standard of “external operational constraints,” particularly allowing consideration of funding levels, did not constitute such an “identifiable standard.”

The difference between these two cases involves the source of the agency’s authority and discretion. In *National Roofing Association Contractors*, the agency was at the height of its powers, exercising traditional prosecutorial discretion unbounded by any explicit constraints. In *Oceana*, however, the agency sought to insert seemingly unlimited discretion into a statutory scheme that imposed very specific requirements. It could have achieved a degree of discretion by articulating an “identifiable standard” for the exercise of that discretion. In this case, however, it had failed to articulate such a standard.

E. Retroactivity

In two recent decisions, D.C. Circuit panels upheld the arguably retroactive effects of both a regulation and a statute, both times prompting dissents emphasizing the force of the presumption against retroactivity. In *National Petrochemical & Refiners Ass’n v. Environmental Protection Agency*, the court upheld a regulation effective July 1, 2010, despite the fact that it arguably imposed new requirements governing industry actions prior to that date. In *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Department of the Treasury*, the court rejected an argument that a 1998 statute had an impermissible retroactive effect because (as interpreted) it prohibited the renewal of a U.S. trademark held by a Cuban government entity. The various opinions represent distinctly different approaches to analyzing claims of

48 This discussion appeared in substantially this form in the News from the Circuits column in 36 Admin. & Reg. L. News No. 4, 24 (Summer 2011).


50 2011 WL 1120271 (D.C. Cir. 2011) (hereafter *Empresa Cubana*).
impermissible retroactivity.\footnote{In a third recent decision, \textit{Sacks v. SEC}, 2011 WL 3437088 (9th Cir. 2011), the Ninth Circuit held an SEC regulation impermissibly retroactive where the regulation prohibited the challenger from representing parties in securities-related arbitrations after he had been doing so for sixteen years. This was effectively a new penalty for previous behavior that had caused him to be banned from the securities industry in 1991.}

In 2007, Congress enacted the Energy Independence and Security Act, which required that the volume of renewable fuels in gasoline be increased by specific amounts for each year from 2008 to 2022. EPA was to issue revised regulations implementing these requirements in time for the volume requirements to be implemented for each of the years in question. EPA missed the deadline for the 2009 requirements and ultimately issued a single regulation combining the requirements for 2009 and 2010 in a regulation promulgated on February 3, 2010, with an effective date of July 1, 2010.

Industry challenged EPA’s authority to issue the combined requirement on the ground that the statute stated that the volume for each year “shall” be a certain amount – a plain language, clear meaning argument under \textit{Chevron} Step One. The court in \textit{National Petrochemical} found ambiguity because Congress had not spoken on the question of what to do if the agency missed a statutory deadline. In an interesting twist on a \textit{U.S. v. Mead} analysis, the court avoided \textit{Chevron} deference on the ground that, “it would indeed be odd to conclude that Congress implicitly entrusted a laggard agency with the authority to devise a remedy for its own untimeliness.” Having refused an invitation to defer to the agency, the court held on its own authority that Congress would not have intended that EPA lose the authority to implement the statute merely because it missed a deadline for issuing a regulation.

That left the question of whether the regulation effective July 1, 2010, was impermissibly retroactive because it governed industry behavior for all of 2010. In a highly functional analysis,
the majority found both that the statute implicitly authorized this type of retroactivity and that the retroactivity itself was permissible. The court’s analysis turned largely on the fact that the statute had set specific volume increases for each of the years at issue, so industry was fully on notice of what would ultimately be required, and that Congress understood that there could be some retroactive effect in the newly adopted regulations. Thus, the structure of the statute sustained the new rule to the extent that it was retroactive.

Judge Brown, dissenting from a denial of rehearing en banc, refused to find implicit authority for retroactive rulemaking. In her view, such an exception to the requirement for express congressional authority “conflicts with the Supreme Court’s clear-statement rules, usurps legislative power, renders statutory deadlines precatory, multiplies uncertainty for regulated entities, and encourages lethargic administration.” To her, Congress set the deadlines, and it was the job of Congress to change them. Congress could have addressed the potential for such retroactivity by specifically authorizing it, enacting an interim rule itself, or authorizing expedited rulemaking of some kind. Where Congress instead left in place the usual notice-and-comment “procedures of the APA, courts should not infer congressional intent to permit retroactive rulemaking.”

The **Empresa Cubana** decision also reflected these contrasting views of the judicial role, one seeking to implement the substantive congressional purpose, the other holding strictly to formal procedural requirements to enforce the presumption against retroactivity. In 1963, President Kennedy imposed an embargo on Cuba, as authorized by the Trading With the Enemy Act. The resulting Treasury Regulations prohibited most trade of any kind, but they included an exception for allowing Cuban-affiliated entities to register and renew U.S. trademarks. The regulations also provided that such exceptions “may be amended, modified, or revoked at any
time.” Cubaexport obtained a U.S. trademark for Havana Club rum in 1976 and renewed it in 1996. In 1998, Congress enacted legislation eliminating the exception on which Cubaexport had relied. As a result, Treasury denied Cubaexport’s application for renewal in 2006.

Cubaexport challenged the decision as a violation of the presumption against retroactivity because it applied the 1998 legislation to an existing trademark. The majority rejected this argument on the ground Cubaexport had no vested right in its trademark because the regulations provided that exceptions to the ban could be modified or revoked at any time.

Judge Silberman dissented, relying on the presumption against retroactivity. To him, the question was whether the statutory term “transaction” could encompass renewal of an existing trademark where the 1998 legislation had eliminated the exception for “registration and renewal” of trademarks. Particularly in light of the fact that a right to a trademark is generally perpetual unless the trademark is abandoned, Judge Silberman concluded that the 1998 legislation should be interpreted to apply only to future trademark registrations, not to those already in existence.

F. Harmless Error

Section 706 of the APA provides that on judicial review of agency action, due account shall be taken of the rule of prejudicial error.” This is also known as the harmless error principle. Not surprisingly, agencies often argue that their failure to follow required procedures was harmless, typically because they would have reached the same result anyway, or because they instituted later proceedings to take comment on an immediately effective rule.

Recent decisions reveal starkly different judicial responses to these agency claims. In

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U.S. v. Johnson\textsuperscript{53} and San Diego Navy Broadway Complex Coalition v. U.S. Coast Guard,\textsuperscript{54} two courts reached different conclusions about the availability of the “good cause” exception to notice and comment,\textsuperscript{55} but they both held that any error was harmless. Johnson, which involved the rule applying SONRL to previously convicted sex offenders, separately addressed the exception’s applicability to the APA requirement for a 30-day delay before a rule takes effect and the requirement for notice and comment. As to the former, the court held that if the time had been provided, compliance would have occurred by March 30, 2007, while the defendant did not travel interstate until January 2008, so the lack of delay was harmless as to the particular defendant. The court had somewhat more difficulty finding harmless error as to the failure to take notice and comment, but it persevered. The court’s theory was that this was a simple, binary case – requiring a “yes or no” answer - as compared to more complex rulemakings, and that the Attorney General had thoroughly grappled with “the issues and challenges inherent in the regulation.” Since there was “no suggestion that, if given the opportunity to comment, Johnson would have presented an argument the Attorney General did not consider in issuing the interim rule,” the failure to provide notice and comment was harmless.

In San Diego Navy Broadway Complex Coalition v. U.S. Coast Guard,\textsuperscript{56} involving the Temporary Interim Rule eliminating the 100-yard security zone surrounding the Broadway Pier, the court said it was difficult to see how things would have been different if the Coast Guard had complied with the notice-and-comment requirement. The court pointed in particular to the fact that the plaintiffs had not participated in the notice-and-comment process the Coast Guard had

\textsuperscript{53} 632 F.3d 912 (5th Cir. 2011).

\textsuperscript{54} 2011 WL 1212888 (S.D.Cal. 2011).

\textsuperscript{55} See discussion above in Part I.A.(3).

\textsuperscript{56} 2011 WL 1212888 (S.D.Cal. 2011).
offered after implementing the Temporary Interim Rule. Neither did the plaintiffs indicate to the court what comments they would have made nor how those comments could have contributed to the Coast Guard’s decision.

By contrast, the courts in *U.S. v. Cotton*, 57 and *California Wilderness Coalition v. U.S. Department of Energy*, 58 both rejected agency arguments as to the adequacy of their procedures and found that the agencies’ procedural errors were not harmless. 59 The *Cotton* court, addressing the immediate effectiveness of the sex offender provisions of SONRL, rejected the harmless error defense on the ground that it would “eviscerate the good cause standard because ‘an agency could always violate the APA’s procedural requirements based on the representation that it would have adopted the same rule had the proper process been followed.’”

In *California Wilderness Coalition*, however, the Ninth Circuit split on whether the agency’s failure to consult the states as required by the statute had constituted harmless error. 60 The majority emphasized the need for caution in determining harmless error in the rulemaking context, in which an agency can generally adopt whatever outcome it wishes as long as it adequately explains its reasons. Thus, the majority held that it is not enough to focus on whether the error might have changed the outcome. Rather, the question is whether the error “clearly had no bearing on the procedure used or the substance of decision reached.” Here, the error had prevented “an exchange of information and opinions before the agency makes a decision,” which is not the same as mere consideration of comments. To the majority, collaborative interchange is

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58 631 F.2d 1072 (9th Cir. 2011).
59 See discussions of *U.S. v. Cotton* (involving the “good cause” exception) above in Part I.A.(3) and of *San Diego* (involving the effect of a distinct statutory requirement) above in Part I.B.(3).
60 This discussion appeared in substantially this form in the News from the Circuits column in 36 Admin. & Reg. L. News No. 4, 24 (Summer 2011).
inherent in the concept of “consultation”: “the congressional notice requirement reflects the desirability of the interactive process itself.” The majority vacated the study, rejecting DOE’s attempt to limit the remedy to areas as to which states had shown prejudice.

Judge Ikuta argued that the majority had violated the Supreme Court’s admonition in *Shinseki v. Sanders* that the burden is on the challenger to demonstrate harmless error and that there must be a showing of actual harm. Disputing the majority’s emphasis that it is inappropriate to examine outcomes, the dissent asserted that a “challenger can carry its burden of showing prejudice from an agency’s procedural error by demonstrating ‘with reasonable specificity’ that it could present specific facts or arguments to an agency ‘that may allow it to mount a credible challenge,’ or can point to key ‘omissions in data and methodology’ that makes the agency’s decision unreliable.” Thus, both the majority and dissent were prepared to find harmless error in failures of process, without regard to outcome. Judge Ikuta detailed many contacts and exchanges that he said render the formal statutory violation harmless, while the majority saw in the “consultation” provision a requirement for true collaborative exchange not met by mere comments. Judge Ikuta would characterize the majority’s position as inconsistent with holdings by other circuits, which raises the prospect of the Supreme Court addressing this issue.

**Part II. Administrative Developments**

On February 3, 2009, President Obama ordered the Director of the Office of Management and Budget (OMB) to develop a new executive order on regulatory review.61 Two years later, January 18, 2011, President Obama issued that new order, Executive Order 13,563, “Improving

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Regulation and Regulatory Review,\textsuperscript{62} which reaffirmed the principles of Executive Order 12,866 with some refinements and directed all agencies to undertake a retrospective analysis of existing rules to promote efficiency and effectiveness and minimize unnecessary burdens. President Obama followed with Executive Order 13,579,\textsuperscript{63} which urged the independent agencies to follow the various principles of E.O. 13,563. In early September, President Obama (through OIRA Director Cass Sunstein) took the unusual step of openly directing the Administrator of the Environmental Protection Agency to reconsider a major Clean Air Act regulation. Finally, OMB issued its annual report on the benefits and costs of federal agency regulation.

A. Executive Order 13,563

Executive Order 13,563 reaffirmed the principles and structures of Executive Order 12,866, which had been issued by President Clinton in 1993. In so doing, it restated familiar principles that agencies must (1) base any regulation on a “reasoned determination that its benefits justify its costs,” (2) minimize the costs of regulations consistent with achieving their purposes, (3) take approaches that maximize net benefits, taking into account distributive impacts and equity, (4) specify performance objectives rather particular behaviors, and (5) assess available alternatives, including the use of economic incentives.

Reaching somewhat beyond previous executive orders, E.O. 13,563 articulated several new or refined generally applicable principles. It also directed all agencies to undertake retrospective review of existing regulations.

1. General Principles of E.O. 13,563


\textsuperscript{63} 76 Fed. Reg. 41587 (July 11, 2011).
As compared with previous executive orders, E.O. 13,563 places greater emphasis on thorough consideration of unquantifiable values and distributive impacts and seeks to enhance public participation, particularly through more effective use of the internet. The executive order also emphasizes promoting innovation and flexible, non-command-and-control approaches to achieving regulatory goals.

After directing agencies to quantify costs and benefits as accurately and fully as possible, Section 1(c) provides that agencies may “consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” Section 2 directs agencies to provide internet access to relevant information, “including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.” Agencies are also to provide “an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.” As far as possible, agencies are to provide comment periods of at least sixty days, and Section 2(c) provides that agencies should seek public input before issuing a notice of proposed rulemaking.

Three provisions reflect substantive concerns. Section 3, in addition to directing that agencies coordinate with each other and harmonize regulations, mandates that they seek “means to achieve regulatory goals that are designed to promote innovation.” Section 4 emphasizes regulatory approaches that reduce burdens and maintain, and even rely upon, freedom of choice, such as warnings, appropriate default rules, and disclosure requirements. Finally, Section 5 requires agencies to “ensure the objectivity of any scientific and technological information and processes used to support the agency’s regulatory actions.”
2. **Requirement for retrospective review of existing regulations**

Section 6 of E.O. 13,563 requires agencies, within 120 days of the date of the order, to submit plans to review existing regulations to determine whether any should be “modified, streamlined, expanded, or repealed” to make the regulatory program more effective and less burdensome.\(^6^4\) On May 26, 2011, Cass Sunstein, Director of the Office of Information and Regulatory Affairs (OIRA), reported substantial progress in this effort in a speech to the American Enterprise Institute.\(^6^5\)

Not surprisingly, this claim has been the subject of some dispute. On August 24, 2011, Susan Dudley, Director of ORIA in the George W. Bush administration, wrote that the retrospective effort was not unprecedented, as the President had claimed, and that many of the claims were misleading, reflecting costs that had never been imposed, for example, or actions that had never been taken.\(^6^6\) Time will tell how well the Obama administration succeeds with this effort.

### B. **Executive Order 13,579**

On July 11, 2011, President Obama issued Executive Order 13,579,\(^6^7\) which seeks to

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\(^6^7\) 76 Fed. Reg. 41587 (July 11, 2011).
bring independent agencies into line with traditional Executive Branch agencies. As to the various general principles of E.O. 13,563 discussed above, this executive order provides, for example, that, “Independent regulatory agencies, no less than executive agencies, should promote” the goals of protecting the public health, promoting jobs, and the like and, to the extent permitted by law, independent agencies should comply with the various provisions of E.O. 13,563 related to public participation, innovation, flexible approaches, and science.

As with those general principles, E.O. 13,579 urges (e.g., “should consider,” “should develop and release”) independent agencies to undertake the retrospective review of regulations mandated for Executive Branch agencies.

It is difficult to determine the likely effect of executive orders that purport to reach independent agencies. The White House has not even tried to use the language of requirements or mandates, and it is constrained by the President’s general inability to dismiss the members of independent agencies for cause (the practical source of the President’s ability to direct actions from Executive Branch agencies). If nothing else, this should indicate that the White House and OMB will support budget requests related to these efforts, but even that is not certain.

C. The Ozone Rulemaking Directive

After years of work, the Environmental Protection Agency developed a proposed rule that would have tightened the health-based standard governing atmospheric ozone pollution. EPA sent its proposal to OMB on June 11, 2011. On September 2, 2011, in a highly unusual move (perhaps unprecedented in terms of its directness), OIRA Administrator Cass Sunstein responded to the proposal in a letter to EPA Administrator Lisa Jackson: “The President has instructed me to return this rule to you for reconsideration. He made it clear that he does not
support finalizing the rule at this time.”\(^{68}\) The letter went on to state reasons for the President’s decision, emphasizing the need for predictability and certainty in regulatory affairs, which the President believed was threatened by the impending mandate to revisit the same rule again in 2013.

This letter posed – and answered, apparently – the question of who is really in charge of an Executive Branch agency. Is it the Administrator or Secretary, charged with implementing the various statutes subject to possible dismissal by the President? Or is it the President, directing in whatever detail he may wish, the actions of the Administrator or the agency? Despite the letter’s polite language “requesting . . . that you reconsider the draft final rule,” there was no doubt that Administrator Jackson had no real choice in the matter (other than resignation, presumably).

The Obama ozone directive prompted predictable responses. Environmentalists were outraged. For example Liza Heinzerling of Georgetown Law School, wrote that the decision was terribly bad news, and terribly bad policy,” arguing that the decision violated the Clean Air Act, flew in the face of science, and contradicted the President’s own recognition of the economic benefits of the Clean Air Act.\(^{69}\) By contrast, Jack Gerard, President and CEO of the American Petroleum Institute, said, “The president’s decision is good news for the economy and Americans looking for work. EPA’s proposal would have prevented the very job creation that

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President Obama has identified as his top priority.”\textsuperscript{\textit{70}} Whoever is right about the substantive effect of his decision, President Obama’s open assertiveness raises presidential control of rulemaking to another level of visibility.

\textbf{D. Annual Report on Benefits and Costs of Federal Regulation}

As required by the Regulatory-Right-to-Know Act, OMB prepared the fourteenth annual Report to Congress on the Benefits and Cost of Federal Regulation. For convenience, OMB published that report together with the required annual Report to Congress on Agency Compliance with the Unfunded Mandates Reform Act.\textsuperscript{\textit{71}} The report reviewed regulations from October 1, 2000 to September 30, 2010. The bottom line for major federal regulations in the study was estimated annual benefits in the aggregate of $32-655 billion and estimated costs in the aggregate of $44-62 billion.

As the ranges for both benefits and costs suggest, the estimates are subject to considerable uncertainty. Moreover, sometimes benefits or costs cannot be adequately quantified for reasons varying from a lack of necessary information to the difficulty of quantifying unquantifiable benefits such as protection of the environment or enhance protection of homeland security.

Chapter III of the Report provides an update on implementation of the Information Quality Act, summarizing the status of information correction requests and agency annual


The final portion of the document is OMB’s Sixteenth Annual Report to Congress on Agency Compliance with the Unfunded Mandates Reform Act (UMRA).

E. Administrative Conference of the United States

The newly revived Administrative Conference of the United States has begun issuing recommendations and research products. Part F below discusses ACUS recommendations and other actions related to e-Rulemaking.

ACUS has also initiated several studies related to rulemaking (see http://www.acus.gov/research/the-conference-current-projects/ for details):

1. **Agency Innovations in e-Rulemaking.** This study examines e-rulemaking practices at federal agencies to identify useful innovations and best practices.

2. **Congressional Review Act.** This study examines the strengths and weaknesses of the Congressional Review Act and compares it to other possible means of congressional review of rulemaking, with a view toward identifying potential improvements.

3. **Incorporation by Reference.** Agency rules frequently incorporate privately developed standards or other materials by reference. This study examines the issues raised by this practice and seeks to capture the experience, knowledge, and best practices of the various agencies that engage in incorporation by reference.

4. **Midnight Rules.** As presidential administrations come to an end, there is almost inevitably a flurry of final rules at or near the final day of the administration. This study examines the various issues raised by this practice.

5. **Science in the Administrative Process.** With science playing an increasingly important role in the administrative process, arguments abound about whether agencies pay sufficient attention to sound science and whether they permit science to be trumped by politics. This study examines these disputes, with attention to science advisory panels, OMB’s Peer Review Bulletin, and the Information Quality Act.

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72 Id. at 78-90.

73 Id. at 91-98.
F. E-Rulemaking Developments

1. ACUS Recommendations

a. Legal Considerations in e-Rulemaking

One focus of the Administrative Conference of the United States (ACUS) this year has been the legal issues agencies face in e-Rulemaking. In March, Bridget C.E. Dooling released an ACUS-commissioned report exploring the questions that e-Rulemaking has raised about how agencies should approach issues such as accepting electronic comments and how to properly present electronic dockets.74 Additionally, ACUS released a memorandum in April covering research ACUS staffers had done into five questions:

(1) Have courts upheld the legality of agencies using technological proxies to conduct document review in contexts other than e-Rulemaking, such as the Freedom of Information Act (“FOIA”);

(2) Would agencies have good arguments against liability for the disclosure of protected information in comments posted in an online docket;

(3) Does the System of Records Notice (“SORN”) for the Federal Docket Management System (“FDMS”) satisfy the requirements of the Privacy Act;

(4) Has the National Archives and Records Administration (“NARA”) advised agencies that it is lawful to destroy the paper copy of a comment once that comment has been scanned and included in an approved electronic recordkeeping system; and

(5) Is it appropriate for the Administrative Conference to issue recommendations to courts.75

In June, ACUS adopted a set of seven recommendations, based in part on this research. The recommendations address four primary legal issues agencies face in e-Rulemaking: (1)


processing large numbers of similar or identical comments; (2) preventing the publication of inappropriate or protected information; (3) efficiently compiling and maintaining a complete rulemaking docket; and (4) preparing an electronic administrative record for judicial review.

The seven ACUS recommendations follow the premise that the Administrative Procedure Act (APA) is flexible enough to accommodate all of the changes agencies face with e-Rulemaking. The first recommendation, addressing large numbers of similar or identical comments, suggests that agencies “consider . . . using reliable comment analysis software to organize and review public comments.”76 Agencies should also develop ways to allow the public and commenters to flag comments that have inappropriate or protected content (such as trade secrets).

Second, ACUS recommends that agencies “assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov.”77

The third recommendation is that agencies use electronic records instead of paper records. Additionally, ACUS reports that the National Archives and Records Administration has determined that agencies are not legally required, at least in some circumstances, to keep paper copies of properly scanned comments as long as the comments are stored in an approved electronic recordkeeping system.

The fourth recommendation is for agencies to make all studies and reports relied on in a rulemaking available to the public in an electronic docket. The agencies should do this as soon as practicable, but not if the information would be protected from disclosure in response to an


77 Id. at 5.
appropriate FOIA request. Additionally, the fifth recommendation calls for agencies to put a descriptive entry or photograph in the electronic docket for every physical object they receive during the comment period.

The sixth recommendation is that agencies provide electronic, as opposed to paper, copies of a rulemaking record early in any litigation concerning the rulemaking. Finally, ACUS recommends that agencies ensure that their records schedules include records generated during e-Rulemaking, as part of their responsibilities under the Federal Records Act.

b. Rulemaking Comments

ACUS has also adopted a set of best practices for the rulemaking commenting process to “promote public participation and improve rulemaking outcomes more effectively.”

i. Recommendation One

In order to enhance public participation and the usefulness of public comments, the e-Rulemaking Project Management Office at EPA should publish guidelines that explain what types of comments are most beneficial and what are the best practices for parties submitting comments. Individual agencies should publish supplements to these common guidelines. The common guidelines and any agency supplements should be posted on agency websites, Regulations.gov, and anywhere else that will promote widespread availability of the information.

ii. Recommendation Two

In making decisions about the length of a comment period, agencies should balance the competing interests of promoting optimal public participation and ensuring that a rulemaking is
conducted efficiently. Specifically, “significant regulatory actions” under Executive Order 12,866 should have a comment period of at least 60 days, and all other rulemakings should have at least a 30-day period. If an agency decides to set a shorter period, it should provide an explanation of why it is doing so.

iii. Recommendation Three

Agencies should post online all comments they receive within a specified period after submission. This includes all electronically submitted comments and all paper comments, which should be scanned and posted.

iv. Recommendation Four

The e-Rulemaking Project Management Office and individual agencies should develop and publish policies on how to handle anonymous comment submissions.

v. Recommendation Five

Agencies should adopt and publish policies on how they will treat late comments, and they should apply those policies consistently. The policies should include whether the agency will accept late comments for a rulemaking and should be announced in public forums such as Regulations.gov and in Federal Register notices about the rulemaking. The agency may make it clear that late comments are disfavored and will only be considered to the extent practicable.

vi. Recommendation Six

After all comments have been posted, agencies should provide opportunities for the public to reply to submitted comments. This could be accomplished through a reply period, an oral hearing, or some other forum that allows for input on submitted comments.

vii. Recommendation Seven
Agencies should closely monitor their rulemaking dockets to ensure that a rulemaking record has not become stale due to, for example, changed circumstances. If an agency believes that a rulemaking record has become stale, it should consider using mechanisms such as supplemental notices of proposed rulemaking to refresh the record.

B. Report to ACUS on Federal Agency Use of Electronic Media in the Rulemaking Process

In July of this year, Cary Coglianese from the University of Pennsylvania School of Law delivered a broad-ranging report on how agencies have been using electronic media in the rulemaking process. From both empirical and investigative research, Professor Coglianese identified ten themes in current agency practice and presented seven recommendations for ACUS to adopt and for agencies to follow.

1. Ten Themes

   1. The value of the Internet
   2. The complexity of rulemaking information
   3. Effectively using electronic media to support rulemaking is a management challenge as much as a technology challenge.
   4. Agencies face multiple audiences.
   5. Agencies face increasing pressure to load information on their homepages.
   6. Agencies are attentive to accessibility for special populations.
   7. Managing the accumulation of information is an emerging concern.
   8. Agencies are still learning how to use social media.
   9. Ongoing evaluation is crucial for making continuous improvement.

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10. Effective use of electronic media requires adequate resources.

2. Seven Recommendations

1. Administrative agencies should manage their use of the internet with rulemaking participation by the general public in mind.

2. Agencies should provide a one-stop location on their home pages for all agency rulemakings currently open for comment.

3. Agencies should consider, in appropriate rulemakings, hiring facilitators to manage discussion of the rulemaking on social media sites.

4. Agencies should strive to improve the accessibility of their websites to all members of the public.

5. Agencies should display comment policies in accessible locations or provide links to the comment policy in multiple, accessible locations, especially on webpages that elicit comments from the public.

6. Agencies should develop systematic protocols for the retrieval of old material online.

7. Agencies should conduct ongoing evaluations of their use of the internet against the goals of e-Rulemaking.


In September, the White House released the Open Government Partnership U.S. National Action Plan to build on President Obama’s Open Government Initiative. The Plan states that the Administration will overhaul Regulations.gov to make the commenting mechanisms, search functions, user interfaces, and other major features easier for the general public to use.80 The Plan does not provide any specifics on what this overhaul will include.

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III. Legislative Developments

In this era of divided government, it is not surprising that there have not been any significant legislative developments related to core issues of administrative law. This has not prevented the apparently energized Republican Party from trying, however. Republicans have introduced at least three bills that would change the basic structure of administrative rulemaking. They have also introduced various other bills targeted at specific agencies or programs.

A. Congressional Review of Rules

Nearly two decades after enactment of the Congressional Review Act, regulatory opponents have used it to invalidate only one agency rule. They have introduced forty-three resolutions of disapproval, of which only two have passed one house of Congress, and only one has been disapproved by Congress.

Now comes H.R. 10, the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require congressional approval of major rules before they could take effect. Congressional approval would take the form of a joint resolution. The requirement would be subject to an exception for situations in which the President determines that the rule is necessary due to an imminent threat to health or safety or other similar emergency. This would allow the rule to take effect for ninety days.

This would reverse the burden of action, requiring both houses to agree on approval

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rather than on disapproval. Opponents have argued that that the REINS Act fails the bicameralism and presentment requirements that doomed the one-house legislative veto in *I.N.S. v. Chada*, and that it threatens the President’s constitutional prerogatives. Supporters respond that the Act meets the formal requirements of *Chada* because a joint resolution requires bicameralism and presentment to the President and that this approach corrects an imbalance of authority by having binding law approved by Congress, as envisioned by the founders.

**B. Revisions to APA Rulemaking Procedures**

On September 22, 2011, Senators Rob Portman (R-Ohio) and Mark Pryor (D-Ark) and Representatives Lamar Smith (R-Texas) and Collin Peterson (D-Minn.) introduced the Regulatory Accountability Act of 2011, which would dramatically change the Administrative Procedure Act’s provisions governing legislative rulemaking. To some extent, the proposal imposes through statutory change practices that are already in place through executive orders (e.g., general consideration of costs and benefits, emphasizing innovation, and encouraging pre-proposal notice of potential rules), but the imposition of these as statutory requirements and the addition of several others would radically change the process of adopting and reviewing federal regulations.

For the first time, this legislation would impose a statutory requirement that all regulations be subject to cost-benefit analysis, regardless of congressional determinations in other statutes that costs should not be considered in protecting the public health. Agencies would be required to consider “all potential alternatives,” and “all potential costs and benefits,” with both requirements accompanied by detailed explications of what agencies will have to do to comply.

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The bill would require agencies to issue Advanced Notices of Potential Rulemaking 180 days prior to proposing any major rule and to provide 90 days for comments on proposed rules. It would require agencies to use science and technical information that meets the requirements of the Information Quality Act and would provide for hearings on whether information meets those requirements. It would also require formal hearings under §§ 556 and 557 of the APA on certain rules and on disputes about compliance with the Information Quality Act.

Some of these provisions are consistent with what President Obama has proposed in E.O. 13,563, but one new concept seems quite distinct from his emphasis on the need to consider non-quantifiable values and impacts as far as possible. The Act would prohibit an agency from allowing “qualitative factors” to outweigh “quantitative evidence in the record unless the agency determines that there is a compelling need to protect health, safety or public welfare based upon those qualitative factors and the need is within the scope of the statutory provision that authorizes the rule.” This appears to be the first statutory attack on agency consideration of qualitative factors relevant to an agency’s decision.

Whether this bill would improve the regulatory process, as its proponents would argue, or would further ossify rulemaking and detract from effective decisionmaking, as its opponents would say, one thing is certain. Lawyers will benefit. The APA provisions to be replaced by this proposal were something of a concise constitution for the administrative state, covering roughly one page of single-spaced text. By contrast, this proposal covers approximately 23 pages in the form of a draft bill, imposing various new judicially enforceable requirements, thereby creating a gold mine for lawyers.
C. Cost-Benefit Requirement and Controls on Guidance Documents

Senator Susan Collins (R-ME) has introduced the Clearing Unnecessary Regulatory Burdens (CURB) Act (S. 602), which would require cost-benefit analysis of any significant new regulations. It would also require an assessment of alternatives:

an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned significant regulatory action, identified by the agency or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

The CURB Act would also impose controls on the issuance of guidance documents, much as President Bush did with Executive Order 13,422, which President Obama revoked. Each agency would have to create written procedures governing the issuance of significant guidance documents, maintain a list of such documents on its website, and provide for public comment on significant guidance documents.

Unlike the Bush Executive Order, and all other Executive Orders governing the administrative process, the CURB Act does not preclude or otherwise address judicial review of agency actions governed by the Act. As with the Regulatory Accountability Act, the lawyers will have a field day.

D. Proposals Targeting Specific Programs or Agencies

Several other proposals tending to restrict or burden agency rulemaking or other activities have appeared in the legislative hopper or been passed by the House. Typically they relate to specific programs or agencies, with the Environmental Protection Agency as a major target.

Among the proposals that would affect EPA, the Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act of 2011, H.R. 1705, would require the President to establish
a Committee for the Cumulative Analysis of Regulations that Impact Energy and Manufacturing in the United States. The Committee would analyze and report on those impacts for 2016, 2020, and 2030. The analysis would focus on the effects of rules on global competitiveness, energy supplies and prices, and employment.

Also targeting the EPA, the Reducing Regulatory Burdens Act of 2011, H.R. 872, which passed the House on March 31, 2011, would ease requirements on users of pesticides authorized for use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Subject to certain exceptions, no longer could EPA or a state require an NPDES permit for a discharge of such a pesticide or its residue.

Addressing one of the most high-profile issues of recent years, the House on April 7, 2011 passed H.R. 910, the Energy Tax Prevention Act. The Act would repeal various EPA actions addressed to the control of greenhouse gasses, including the finding that greenhouse gasses cause or contribute to endangering the public health or welfare, and it would prohibit EPA from taking such actions in the future.

The Consumer Financial Protection and Soundness Improvement Act, H.R. 1315, would place tighter controls on one of President Obama’s signature initiatives, the Bureau of Consumer Financial Protection. Most notably, it would authorize the Chair of the Financial Stability Oversight Council to reject any Bureau regulation by a majority vote of the Council, rather than the current 2/3 vote requirement. It would also require the Council to set aside a Bureau regulation that the Council determines to be “inconsistent with the safe and sound operations of U.S. financial institutions” (by contrast to the current language, which merely authorizes such action and then only if the U.S. banking and financial system would otherwise be at risk).

Finally, H.R. 2587, the Protecting Jobs from Government Interference Act, which passed
the House on September 15, 2011, is aimed directly at the ongoing dispute over Boeing’s
decision to build a new plant in South Carolina. The General Counsel of the NLRB alleged that
Boeing chose to build a new plant in South Carolina in retaliation for the protected union-related
activities of Boeing employees in Seattle. The Protecting Jobs from Government Interference
Act would prohibit the NLRB from issuing orders related to the location of a company’s
facilities.