The Fourth Branch & Underground Regulations

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A Forward on Checks and Balances

The America of today is not the land of liberty that our Founding Fathers envisioned. Whereas the revolutionary generation fought a war for independence out of contempt for a central government that sought to meddle in their lives, the modern regulatory state is all pervasive in our everyday affairs—especially in our working lives. Indeed, we might well borrow from William Shakespeare's Hamlet in summing up the state of affairs in America today: "Something is rotten in [Washington]."

But if the Founders envisioned a sea of liberty with only modest islands of regulation, how is it that we are now swimming in federally mandated red-tape? We offer a few answers here, but focus chiefly on what we call the rise of the "Fourth Branch of government" (*i.e,*. the administrative agencies of the federal government). The reality is that the "Fourth Branch" is growing at a monstrous rate, entangled in every aspect of our lives. As George Washington School of Law Professor Jonathan Turley puts it: "Today, the vast majority of 'laws' governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats."[1]

Since the mid-1990s, regulatory agencies have adopted more and more regulations. The numbers are telling. In 1993 federal agencies had published 4,369 pages of regulations.[2] By 2003 the number of pages published in the federal register totaled up to 49,813 (a ten-fold increase).[3] And by 2012 the figure had grown to 81,883 pages.[4] The increase is in part explained by statutory mandates to include certain forms of analysis in newly promulgated rules, but it also reflects the reality that federal agencies are issuing increasingly more rules, including rules of broader scope and reach.

Perhaps not coincidentally, this escalation in administrative rulemaking comes at a time when Congress is entrenched in gridlock over a whole host of deeply contentious issues. The great irony is that the Framers designed our system to prevent factions from imposing new laws in the absence of broad-based social consensus; however, with the rise of the Fourth Branch, public policy is increasingly set by *unelected bureaucrats,* under the political direction of only the President.

Of course, our system requires a strict separation of powers between the branches, such that it remains the exclusive prerogative of the Executive Branch to apply and enforce the laws Congress has enacted.[5] But, since federal courts now defer to executive agencies on their interpretation of the law, the Executive Branch has broad leeway to set public policy by stretching statutory language.[6] Unfortunately, this deference has led to a breakdown in the system of checks and balances, culminating in the rise of the Fourth Branch.

It should be remembered that the ultimate goal of separating powers between three competing branches of government was to preserve freedom.[7] Indeed, the requirement for broad social consensus, on new laws, was designed to protect political minorities.[8] For this reason political stalemate was viewed as a virtue—a guard against the capricious whims of what might otherwise be a majoritarian mob.[9]

But over the past several years our President has chastised Congress for "not doing [its] job."[10] This rhetorical ploy is offered as a form of moral justification for taking unilateral executive action to break the stalemate over public policy. It speaks to the progressive milieu, which exults the policymaking function of the state over the need for broad social consensus. And it degrades the virtue of checks and balances as an evil to be invoked only by "obstructionists."

Not only is the President openly questioning the wisdom of checks and balances, he has repeatedly and explicitly threatened to take matters into his own hands if Congress "fails to act"—at least to the extent there is room for liberal interpretation of existing statutes.[11] And again, since our courts afford tremendous deference to agencies when interpreting statutes over which they administer or enforce—including even questions as to the scope of the agency's jurisdiction—the reality is that the President can accomplish a great deal through his "pen and phone."

The result is an increased emphasis on setting policy through administrative agencies that are not directly accountable to the public—and in a manner that subverts the entire system of separate powers. Of course, the Courts have not *completely* abdicated their duty to ensure that promulgated regulations are consistent with the language of enacted statutes; however, in affording the Executive Branch broad deference, when liberally construing statutes, the universe of potential regulatory action is greatly—perhaps exponentially—expanded beyond what Congress may have ever intended.[12] This most likely explains the rising tide of regulations.[13]

Yet the number of official regulations promulgated tells only part of the story. It is important to recognize that the Fourth Branch sets policy through various other actions that may be just as offensive to our constitutional system. Policy is often set through Executive Order, informal guidance, *amicus* filings and or adjudication. And while these actions are not categorically repugnant, they are troubling in that they shut-out the possibility of public comment and the transparency that would be required in the more open and deliberative notice-and-comment process—which is the formalistic process used by Agencies when adopting *official regulations* under the Administrative Procedures Act.[14]

Our concern is that "underground regulations" obscure political accountability, and diminish the possibility of broad-based social consensus on public policy—meaning that influential factions (i.e., interest groups) may have disproportionate influence in setting regulatory policy when their "pick" is in the White House. This should be a concern for all Americans because it undermines the very principles of republicanism and our nation's democratic values. As discussed here, this is an especially serious concern for America's small business community because business owners must navigate the perpetually changing regulatory seas—usually without the benefit of in-house compliance officers.[15]

What follows is a white paper, prepared by the NFIB Small Business Legal Center, explaining the problem of underground regulations in greater detail, and identifying numerous examples of executive actions that we think should have undergone some form of notice-and-comment—as a matter of good governance.

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INTRODUCTION

Running a small business is hard work. It requires vision, drive, ambition, and an entrepreneurial 'can-do' attitude. But, to keep a business afloat, you need more than just 'good business sense.' As a small business owner you must also become an expert on all sorts of regulatory issues confronting your business on a day-to-day basis. Your only alternative is hiring in-house compliance officers, or outside legal counsel. But these options are costly.

To be sure, mom-and-pop businesses cannot usually afford to bring a compliance officer in-house. And given that attorney bills can add-up quickly, business owners are naturally hesitant to solicit legal counsel. Instead they often find themselves investing tremendous time and energy trying to understand their duties and sorting out regulatory questions on their own. This results in inefficiencies, as they are drawn away from their businesses. So, it should come as no surprise that "regulatory uncertainty" and "unreasonable regulations" are listed as top concerns for small business owners nationally—according to studies published by the NFIB Research Foundation.[16]

Every day we hear from small business owners struggling to figure out how to handle employment or labor legal issues, how to contest administrative decisions, how to navigate permit processes etc. And the stakes are usually high because a mistake might very well lead to a lawsuit, or an enforcement action. That is when businesses really feel the sting of regulation.

Unfortunately there is no sign of relief for small business on the horizon. The ocean of regulations, governing their everyday functions, is constantly changing, expanding and growing evermore cumbersome. Every year thousands of pages of new regulations are promulgated, in voluminous publications in the Federal Register. Of course these regulations are mind-numbingly difficult to read—even for trained legal minds—if not impossible to understand for laymen. So it truly is helpful when a governing agency provides easily digestible guidance in terms that ordinary folks can understand. To be sure, we frequently direct small business owners to helpful online resources, explaining regulations simply enough.

Yet in some cases guidance documents can be longer and more difficult to comprehend than the official regulation. For example, as of 1992 "formally adopted rules of the Federal Aviation Administration [were] only two inches thick, but the corresponding guidance materials, over forty feet."[17] Thus there is a risk that guidance documents may further complicate regulatory issues if they are not carefully crafted to explain regulatory requirements concisely and in plain English.

But, when making guidance documents—or, any other statement of policy or official interpretation of the law—there is also an acute risk that federal agencies will affirmatively create new regulatory burdens. If a federal agency publically advances an interpretation that its regulations require X, Y, and Z, this interpretive statement becomes the *de facto*—if not *de jure*—

law on the matter because the regulated community must conform conduct accordingly to *avoid the risk* of an enforcement action, or a lawsuit predicated upon alleged non-compliance.[18] This is highly controversial because only Congress can make law.[19]

Of course, it is now well settled that Congress can enact broadly worded statutes and that agencies can flesh-out the details—as long as they do so consistent with the actual words of the statute.[20] To be sure, the Supreme Court long ago abandoned rigid enforcement of the "non-delegation doctrine."[21] And, given that courts now defer to the agency's reasonable interpretation of ambiguous language, agencies have a great deal of wiggle-room when promulgating governing regulations.[22]

Yet, Congress enacted the Administrative Procedures Act (APA) to ensure that regulations are at least adopted in an open and deliberative process, wherein the regulated public has an opportunity to weigh in with questions, concerns and suggestions.[23] Though this still may arguably vest agencies with too much power to set policy—at least policy established through the "notice-and-comment" process is transparent, and allows the regulated public to voice concerns. However, the trouble is that not all administrative rules must go through "notice-and-comment."

The APA exempts so called "non-legislative rules," which includes both "general statements of policy" and "interpretive rules."[24] And, as we explain in this report, many of these "non-legislative rules" impose real burdens on small business. This is especially troubling because these rules are issued by faceless bureaucrats, with no political accountability, without any opportunity for public input—and often without any advance notice to the public. Indeed, these underground regulations undermine the democratic values that should underpin all public policy in America.

As such, we maintain that *important changes in public policy*—whether established in a "legislative" or "non-legislative" rule—should undergo a notice-and-comment process of some sort. And we would say the same of any new rule imposing real burdens on the regulated community—whether the interpretive rule is announced as a guidance or advisory, or if announced through targeted enforcement actions, or strategic amicus filings in court.

To be clear, we are concerned equally with underground regulations whether announced in an online press release, in a government-run blog post, in a legal filing before a court, or in an Executive Order. Whenever a new interpretation effectively pronounces new rules, we maintain that there must be a meaningful opportunity for public-input. This is as a matter of "good government."[25]

Bringing Underground Regulations to the Light of Day

The U.S. Supreme Court recently reaffirmed that agencies may issue official "interpretations" of ambigious statutes without going through notice-and-comment procedures.[26] The Court was uninamous in holding that—by its plain language—the Administrative Procedures Act (APA) imposes no procedural requirements for an agency to pronounce an official "interpretation" of law.[27] More controversially, *Perez v. Mortgage Bankers Assoc.*, ruled that this affords agencies wide latitude not only to give a definitive interpretation in the first instance, but also to change that interpretation at any point, without any opportunity for public input.[28] This only underscores the scope of powers agencies now wield to issue "interpretive" underground regulations.

Writing for the majority, Justice Sotomayer agnostically surmised that Congress' decision to exempt "interpretive rules" from notice-and-comment requirements "may [or may not] be wise policy."[29] The implication was that it is for Congress to decide when to require notice-and-comment procedures, not for the courts. And, of course, with enactment of the APA in 1946, Congress was clear in excluding "interpretative rules" from notice-and-comment requirements.

But, as Justice Scalia argued in his concurring opinion, Congress never envisioned that the courts would give such radical deference to agency interpretations at the time the APA was enacted.[30] Echoing those frustrations, Justice Thomas bemoaned the "steady march toward deference," explaining that "[w]hen courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check..." that was intended to guard against the "accumulation of governmental powers" in the Executive Branch. [31]

In chorus, Justices Ailito and Scalia emphasized that, in affording such deference to agency interpretations, the courts have ceded tremendous powers to the Executive Branch.[32] Indeed, the Executive Branch is enabled to effectively make law through its "interpretations" because those interpretations are generally beyond reproach.[33] But that was not the regime Congress envisioned when excluding "interpretive rules" from the APA's notice-and-comment requirements:

> "The APA [generally requires notice-and-comment for rules, but] exempts interpretive rules from these requirements. But this concession to agencies was meant to be more modest in its effects than it is today. For despite exempting interpretive rules from notice and coment, the Act provides that 'the reviewing court shall… interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.' The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. ***In such a regime, the exemption for interpretive rules does not add much to agency power.*** An Agency may use interpretive rules to advise the public by explaining its interpretation of the law. But the agency may not use

> interpretive rules to bind the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means."[34]

We agree with this 'originalist' construction of the APA. Agencies should not be afforded broad latitude to formulate law through underground interpretive regulations. But that understanding has long since been abandoned in favor of radical deference. This has turned the narrow exception for "interpretive rules" into a gaping hole that now affords the Executive Branch tremendous latitude to "control the extent of its notice-and-comment-free domain."[35]

> "By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. ***Interpretive rules that command deference do have the force of law.***"[36]

Unfortunately, barring unforeseen events, we can assume that the doctrine of deference to agency interpretations is here to stay. As such, it may be necessary to consider the possibility of amending the APA to reign in the Executive Branch—so as to restore the balance of powers contemplated at the time of its original enactment, and to bring us closer to the state of affairs that the Founders originally envisioned. This may be achieved by adopting a total prohibition on "underground regulations."

* * *

We offer one over-arching principle: the regulated public should have a right to voice concerns over any newly announced rule, policy, or administrative interpretation of law that may impose *affirmative regulatory burdens* on individuals or businesses. We would call this a moral imperative in a liberal democratic system. Indeed, if government exists to serve the people, it has fiduciary-like duties to ensure transparency and to ensure that concerned citizens have an opportunity to be heard—otherwise there is an undue risk that government serves its institutional interests, or may be captured by the interests of politically powerful factions.[37] Thus, we maintain that government necessarily violates its fiduciary duties to the public when the President, or an agency, adopts burdensome rules outside the light of an open and deliberative notice-and-comment process.

The principle is pretty straight-forward. Regardless of whether the rule in question might be characterized as either a "legislative" or "interpretive" rule under the existing APA framework, we maintain that the rule should not be adopted or enforced until it has gone through some form of notice-and-comment. This is a normative argument—a matter of good governance.

As the law currently stands only "legislative rules" must go through notice-and-comment.[38] But perhaps it is time to consider tweaking that rule. For one, it is notoriously difficult to distinguish between legislative and interpretive rules.[39] More fundamentally, liberal democratic principles demand that institutions should be reformed to at least ensure transparency and the opportunity for public comment on "important" or "significant" rules—which we would define as those imposing *substantive regulatory burdens*, such added compliance costs, or new liabilities.

Note that the principle we've outlined does not take into account—or require any analysis of—anticipated economic impacts of new policies announced in guidance materials, or through other means. Our approach differs from that employed President George W. Bush's Executive Order 13422.[40] Under that order, and its implementing documents, the Bush Administration set forth rules requiring all "significant guidance" to go through notice-and-comment. But the outlined definition of a "significant guidance" made clear that the requirement only applied to guidance materials that would "have [had] a broad and substantial impact on regulated entities, the public or other Federal agencies."[41] The Bush Administration specifically required notice-and-comment for any guidance that was anticipated to impose costs of $100 million in any one year.[42]

In our view, the principles of open and deliberative rulemaking should apply with regard to any rule that imposes new liabilities for individuals and small business owners. Without question, the imperative for notice-and-comment is all the greater when the rule promises to impose heavier economic burdens; however, for the reasons set forth herein, no individual or business should be burdened by new rules on which they have not had an opportunity to comment. Accordingly, we would encourage agencies to allow some opportunity for notice-and-comment on all new rules imposing liabilities or other regulatory burdens—without regard to quantifiable compliance costs.

* * *

What follows is a discussion of executive orders, guidance documents, amicus filings and enforcement actions that we believe violate this essential precept of good governance. We call these "underground regulations" because they (1) have been adopted under the radar, without going through a notice-and-comment process, and (2) impose substantive burdens on the regulated community. In each case, real lives have been affected. We focus specifically on the impact on small businesses because regulatory burdens generally have a disproportionate impact on smaller firms.

GUIDANCE, FIELD RULINGS & INFORMAL LETTERS

As a practical matter, it is necessary for federal agencies to explain their regulatory regimes to the pubic through a medium that is easily accessible and in a manner that is easily understood.[43] Otherwise the regulated community would operate in a fog of confusion over what the law demands. They would be walking through a regulatory mine field with no guidance at all. For that reason, the small business community truly appreciates government efforts to explain regulatory requirements cogently and succinctly.

Practical considerations likewise demand that agencies must prepare documents breaking-down and summarizing regulatory requirements, the steps necessary for permit approvals, enforcement priorities etc.[44] These guidance documents are important, not only as a tool to ensure that agency employees interpret and apply existing statutes and regulations in a consistent manner, but also in giving the regulated community fair notice as to how the agency intends to administer and enforce the law. But there is a bright and discernable line between merely restating the law as it stands and establishing regulatory policy through "guidance."

In a true guidance or advisory, the document should do no more than restate the requirements of established law—ideally as plainly and simply as possible.[45] But where the agency offers an interpretation that seeks to apply existing legal principles to address questions of statutory interpretation that are not well settled, there is a significant risk that the new interpreation may impose affirmative burdens on the regulated community.[46] While of course the agency's interpration would have to be applied and affirmed in court before it could be officially incorporated into the standing body of regulatory law, the "guidance" may nonetheless impose immediete burdens on the regulated community as a practical matter. This is because a newly announced interpretation puts the public on notice that the agency intends to administer and enforce the law in a certain manner. Anyone who ignores the new interpretation—proceeding with business as usual—risks fines, sanctions, enforcement actions, and or lawsuits.

We submit that a "guidance" should more properly be viewed as a substantive regulation if it imposes new compliance costs or otherwise exposes individuals or businesses to new liabilities. If the interpretation is not already well settled, it should not be applied unless and until concerned citizens have had an opportunity to voice their concerns. Under this framework, only controversial "guidance documents" would need to go through notice-and-comment procedures because guidance on settled questions would not be viewed as imposing any new regulatory burden. Of course, the APA currently exempts "interpretive rules" from notice-and-comment procedures. But maybe it is time to reconsider that exemption in light of the reality that agencies frequently pronounce changes in regulatory policy in a manner that imposes new burdens on the public without giving any opportunity for citizens to voice concerns. At least notice-and-comment would encourage public participation, awareness and perhaps meaningful dialogue.

IRS Prohibits Stand-Alone Reimbursement Accounts under Affordable Care Act

The Affordable Care Act was controversial from its inception, and still—five years since its enactment—the ACA continues to breed controversy and political unrest. On a practical level it has also been a source of tremendous frustration for small business owners, many of whom have been struggling to figure out what—if any—obligations they have under the new health care law. In fact mass confusion over what the ACA requires has prompted the Obama Administration to delay full enforcement of some of the more controversial provisions of the Act, which has in turn sparked further controversy over whether the Administration is abiding by the law.[47] We raise this point not to take sides in that debate—but only to emphasize the imperative need for federal agencies to explain the law in plain english.

The goal should be to *restate the law* in straightforward terms that any college-educated person can understand, without resorting to lawyers and CPAs. Without question this is a challenge when dealing with complex regulatory schemes; however, in such a case, it is all the more important to provide the public with simple and concise explanations. Unfortunately, the U.S. Department of Health and Human Services, the Department of Labor and the Internal Revenue Service have done a particularly poor job of explaining the ACA's requirements in easily digestable terms. Considering how systemic confusion was (and remains) over how basic provisions work, one might say that the Obama Administration botched this aspect of the ACA's roll-out every bit as much as it botched the roll-out of the federal health exchange.

Even worse, in some cases, where the Administration offered "guidance," it was not so much 'restating the law' as giving an *interpretive gloss*. Put simply, when explaining certain ambigious provisions, federal agencies issued interpretive statements which effectively pronounced new rules—imposing legal obligations and liabilities that Congress may not have ever intended. Still worse, these underground regulations are pronounced without any opportunity for public comment. One clear example is IRS's guidance on stand-alone reimbursement accounts (*i.e.* the practice of giving employees a set amount of money for their health care expenses on a monthly or annual basis in lieu of health insurance).[48] The IRS issued a guidance, which declared this practice illegal under the ACA—despite the fact that no single provision of the ACA directly addressed stand-alone reimbursement accounts.

This interpretive rule is certainly consistent with the Obama Administration's policy objectives. Specifically, the Administration's stated goal has been to achieve near universal health insurance coverage. And in furtherance of that goal, the Administration has encouraged employers to provide health insurance to their employees. So it should not be surprising that IRS choose to interpret ambigious provisions of the ACA in a manner that affirmatively discourages employers from giving employees money to use toward their health expenses *in lieu* of providing health insurance. But there was no clear textual prohibition on this practice—likely because many in Congress assumed employers would be free to continue offering these benefits to employees, or to pursue this arrangement as an alternative to paying costly health insurance premiums.

Many small business owners have said that they would like to provide their employee's with some financial assistance toward their health care expenses, even if they can't afford to offer health insurance. Those concerns have been exacerbated in the past five years, as numerous businesses have lost their pre-ACA insurance plans, and have found that ACA-compliant plans are cost prohibitive.[49] But IRS never sought input from these business owners. Instead IRS choose to issue a definitive interpretation of the ACA—proclaiming this practice is illegal—without any public outreach. Through sub-regulatory guidance, IRS has effectively made law. And employers who choose to defy IRS risk severe penalties of $100 per day, *for each employee*.[50] That's an annual tax of $365,000 for a business with only ten employees.

This is especially strange because the ACA imposes no obligation on businesses with fewer than 50 full time employees (or full time equivalents) to provide any form of health insurance.[51] Nonetheless, IRS has interpreted the Act as imposing draconian penalties on small employers who decide to offer up-front cash to help their employee's with health expenses, in lieu of offering costly health insurance.[52] IRS justifies this rule on the theory that the practice violates the ACA's prohibition on "life-time or annual limits" on health insurance coverage.[53] But of course, one would think those provisions would govern insurance company practices—not mom-and-pop businesses seeking to find creative ways to help their employees.

Yet one cannot go so far as to say that IRS' interpretive rule is plainly inconsistent with the text of the ACA. Indeed, the Act is either silent or incoherent on this issue. But, the troubling thing is that courts will generally defer to an agency's interpretation—which enables the Executive Branch to flesh out ambiguities in accordance with the President's preferred policy objectives—which is what happened here.[54] The agency's interpretation may or may not comport with the interpretation a court might think most appropriate.[55] ; however, it will likely receive deference if challenged.

Of course it is important to remember that judges have wrestled with ambiguous statutory texts for centuries. This is what courts do—they *say what the law is*.[56] And the courts have developed a sophisticated set of analytical rules to aid judges in deciding upon the 'best interpretation.' These "canons of construction" are logical principles that judges employ to descipher the meaning of statutes.[57] Federal agencies will always defend their interpretations in court by invoking the canons of construction, but they do so—not as an impartial arbitrators, but—as partisan advocates for the positions they have already taken. So it is truly baffling that the courts have recently developed a doctrine of deference toward federal agencies. In deferring to agency interpretations, the courts have abdicated the responsibility of deciding what the law is under the canons of construction. And this leads to the aggregation of federal powers in the Executive Branch. As the addage goes, one cannot expect a fox to guard the hen house.

DOL Changes its Intepretation of Qualifying Exempt Employees Under the FLSA

It is absolutely imperative for employers to properly classify their employees as either "exempt" or "non-exempt" under the Fair Labor Standards Act (FLSA) because only "exempt" employees can be paid a flat salary.[58] Indeed, "non-exempt" employees must be paid an hourly wage, and are entitled to overtime if they work more than 40 hours in a week.[59] As such, employers face the possibility of federal enforcement actions and lawsuits for backpay should they misclassify an employee.

The FLSA provides that the classification is based on the employee's duties. In a very generalized sense, white-collar professional work is generally considered "exempt", and blue-collar working class jobs are "non-exempt."[60] But in many cases it is difficult to say how a specific employee should be classified. This is an issue that comes up time and again for small businesses in every industry, especially when an employee is charged with various duties. A good example would be mortgage loan officers—*i.e.* workers "who typically assist prospective borrowers in identifying and then applying for various mortgage offerings."[61]

In 2006, under the George W. Bush Administration, DOL issued an opinion letter definitively stating that mortgage loan officers qualified as exempt employees under the FLSA.[62] This was welcomed news for the companies employing mortgage loan officers. But in 2010 DOL made an about-face. The agency issued a new opinion letter—rescending the 2006 opinion and asserting that mortgage loan officers must be classified as "non-exempt."[63]

The Mortgage Bankers Association (MBA), representing over 2,200 real estate finance companies, brought suit against DOL on the theory that the agency should have gone through notice-and-comment. We agreed.[64] But ultimately the Supreme Court held that DOL was free to change its intepretation as it saw fit because the APA only requires notice-and-comment procedures for "legislative rules."[65]

Be that as it may, we maintain that DOL's 2010 opinion letter nonetheless constitutes a classic "underground regulation." As a matter of good government, the agency should have allowed for notice-and-comment because the 2010 opinion letter imposed substantive burdens on the regulated community. Specifically, employers of mortgage loan officers, are now required to track those employee's hours and to comply with FLSA's overtime requirements—which means added compliance costs, and new liabilities. MBA, and other concerned groups, should have had an opportunity to raise concerns before DOL rescinded its 2006 interpretation.

DOL's Underground Rules on Independent Contractors

For decades small business owners have struggled to distinguish "independent contractors" from employees. However, one rule of thumb has typically been a tried and true test in making this determination – *control*. The more an employer controls "when, where, and how" work is performed, the more likely that worker is an employee – not an independent contractor.

But, on July 15, 2015, the Department of Labor (DOL) significantly rewrote the rules on independent contracting in an "official interpretation" of the Fair Labor Standards Act, which essentially contorted case law—cherry-picking select cases that the agency liked, while ignoring pro-business decisions that cut against the agency's interpretation. In this manner, DOL pronounced new rules that never went through notice-and-comment, and which Congress never voted on. With the stroke of a pen, the DOL Administrator purported to settle a complicated issue over which the courts have long taken divergent approaches, therein instantly reducing the number of American workers that the agency it will consider to be independent contractors in the future. Yet again, this sweeping change was made outside of the normal rulemaking process, and in a manner that has immediate impacts on small business owners throughout the nation.

In "Administrator's Interpretation No. 2015-1"[66] the agency purported to pronounced definitive rules on how the so called "economic realities" test should be applied when determining whether a worker is an independent contractor. As a practical matter, this will convert tens of thousands of independent contractors into employees. Even more concerning, many small businesses will learn about this new guidance through DOL enforcement actions, and plaintiff's attorneys, unless they consult with their own proactively. The trouble is that under the new guidance, employers can no longer be confident that a worker is an independent contractor just because she directs her own hours, owns and uses her own tools, and works where she likes. Under DOL's new approach other factors will be considered. The business must also determine whether, now other things:

- The worker has a significant ability to determine her wages beyond just the hours she chooses to work (e.g., can create efficiencies to bring in bigger profits?);
- The worker has other clients and doesn't just rely on work from his business to pay the bills; and
- The worker's taking on of risk is at least somewhat comparable to the risk the business undertakes.

As an initial matter, a chief characteristic of DOL's newly minted "economic realities" test is how subjective it is. To perform a proper analysis, a business hiring an independent contractor must do significant research on, and receive a lot of information from, the independent contractor about her business. Although DOL says this guidance does not have the force or effect of law, employment lawyers across the country are currently advising their clients to conduct independent contractor audits based on the new guidance to see if any workers should be converted to employees. Additionally, it's just a matter of time before the trial bar carries the new guidance into court as "Exhibit A" in a wage and hour lawsuit against a business owner who is being sued by an independent contractor claiming that he was actually an employee all along. And unfortunately for small business defendants, DOL's guidance surely will receive tremendous deference from judges across the country. What is more, DOL has said that it is stepping up enforcement efforts to ensure employees are not inappropriately classified as independent contractors. No doubt the "guidance" will be a key tool in those enforcement actions.

Had DOL made this change through notice and comment rulemaking, small business owners would have had an opportunity to demonstrate the real-world problems with trying to apply such a *subjective* test when analyzing workers, as well as the practical difficulties that result in ignoring business formalities. The agency might also have heard from independent contractors who specifically chose not to be employees and rather contract out their services because of the flexibility it gives them. But pronouncing new rules through guidance, DOL denied the regulated community the right to be heard, and denied itself the opportunity to improve its approach to these regulatory issues.

EEOC's Underground Rules on Pregnancy Discrimination

On July 14, 2014 the Equal Employment Opportunity Commission (EEOC) released a new guidance on pregnancy discrimination setting forth rules that EEOC derived from the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA).[67] But the guidance went beyond merely restating what was plainly and unambigously required by the law. Instead the agency took an aggressive approach to statutory construction, applying these anti-discrimination laws in a manner that would prohibit employers from engaging in conduct that was not clearly covered by either law.[68]

For example, the guidance stated that the PDA protects not only pregnant women, but also women who have previously been pregnant or who intend to become pregnant in the future.[69] The guidance also employed a broad intepretation of the Act in a manner that effectively requires employers to give women the option to "change their schedules or use sick leave for lactation-related needs", at least if the employer's policy currently "allows employees to change their schedules … to address non-incapacitating medical conditions…"[70] And in the same vein, the guidance established a rule that employers must give a requested accomodation to pregnant employees if the company has given similar accomodations to any other employees—a rule that the Supreme Court ultimately rebuffed because it would give pregnant employees "most-favored-nation" status, over all of other protected classes.[71]

All of this is controversial because these rules exposed employers to new liabilities that were not clearly mandated by statute or any promulgated regulation. As such, the guidance was a classic example of an "underground regulation" because it effectively imposed regulatory burdens on employers, and was adopted without allowing any opportunity for employers to offer input. Indeed, until the Supreme Court rejected the guidance, it was an effective rule because businesses had no choice but to comply if they wanted to avoid the risk of legal action.

Of course it is somewhat encouraging that the Supreme Court refused to defer to EEOC's interpretation of the law; however, that is not the norm.[72] The Supreme Court rejected EEOC's guidance in this case for a few extraordinary reasons. The guidance took a position on which previous EEOC guidelines were silent, and in a manner that was inconsistent with positions long advocated by the Government.[73] EEOC also failed to explain the basis for the guidance. And probably most damning, EEOC issued the guidance only after the Supreme Court decided to address the issue.[74]

EEOC's Underground Rules on Credit Checks

Federal law prohibits employers from making adverse employment decisions on the basis of race.[75] Accordingly, employers must be exceedingly careful to avoid any inference that an adverse employment decision may be attributable to a discriminatory intent.[76] To be sure, employers can be sued if there is any appearance of discrimination. For this reason, the EEOC, the agency charged with enforcing federal anti-discrimination laws, has long warned employers to avoid asking potential applicants about race; after all, race has no bearing on the individual's capacity to perform the work in question.[77]

That sort of guidance is consistent with well established case law. But, occasionally the EEOC releases guidance documents on less-settled—more controversial—rules. An especially provocative example would be EEOC's 2012 "Enforcement Guidance" which provided that an employer may violate anti-discrimination laws by using credit checks because credit checks may have a disparate impact on minorities.[78] EEOC reasoned that minorities are more likely to have financial problems, and that this means that employers may be screening-out a disproportionate number of minority applicants if they run background checks on prospective employees.

The EEOC brought an enforcement action against Kaplan, alleging that the company was discriminating against minorities because it was running credit checks on prospective employees.[79] But, Kaplan had a legitimate business purpose for running credit checks on applicants—*i.e.* to avoid the risk of hiring employees who may be subject to undue temptations to engage in fraudulant conduct.[80] Employers have a real interest in taking measures that reduce risk of fraud and related liabilities. Interestingly, it also came out during the proceedings that "EEOC runs credit checks on applicants for 84 of the agency's 97 positions… [for the same reason]."[81]

In the end, the EEOC ran into trouble proving that Kaplan's policy had a disparate impact because the agency could not identify, with any degree of certainty, the race of those job applicants who had not received an offer of employment.[82] But for our purposes what matters is that the agency issued a statement interpreting the law in a manner that effectively imposed burdens on the regulated community without allowing the public any opportunity to voice concerns. Regardless of whether a business might ultimately win in court, as did Kaplan, what matters is that businesses were forced into a catch-22. As a practical matter, once EEOC issued the guidance, employers were effectively saddled with new regulatory burdens because they had to comply or face the prospect of an enforcement action. And, in complying, businesses risk other—potentially catostrophic—liabilities if they should hire an employee who engages in fraud, or embezzlement.

EEOC's Underground Rules on Criminal Background Checks

On April 25, 2012, the EEOC released a new controversial guidance outlining rules on how employers should conduct criminal background checks on employees.[83] These rules impact the vast majority of employers. Most employers run some form of criminal background check in order to screen-out employees who may otherwise prove troublesome. Such procedures may help eliminate candidates who might have a propensity to misappropriate company assets, or who may pose a threat to the safety of other employees or patrons.[84] In this litigous age, employers are rightfully concerned about potential liabilities if they bring on an employee who turns out to be a 'loose canon.' But, federal laws prevent employers from simply denying employment on the basis of a past conviction unless the offense is viewed as job related.[85] Accordingly, EEOC's guidance could be viewed as outlining a safe-harbor for those employers who wish to continue screening-out job candidates; however, the guidance is not meant to serve merely as a safe-harbor, but as a statement of rules that the EEOC maintains are derived from existing statute.

Specifically, the guidance provides that employers should consider three factors before screening-out a job applicant: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.[86] Further, the guidance provides that employers may not screen-out an applicant without giving him or her an opportunity to explain why their past offenses will not affect their work.[87] And employers that fail to abide by these requirements face the prospect of an EEOC enforcement action or a lawsuit.[88]

Though obstensibly held-out as "guidance", the document imposes affirmative rules that expose employers to potential liabilities. The guidance sets forth a roadmap for litigation against any business that fails to comply. Unfortunately small business owners are the most likely to stumble into such a regulatory trap because they usually make employment decisions without the aid of full-time human resource professionals, and without the benefit of in-house legal counsel. In this regard, small businesses are especially vulnerable.[89]

With rules of this sort it would be best to allow for some form of notice-and-comment because there is a greater chance that small business owners will learn about the impending rules if the agency should choose to go through notice-and-comment. And more fundamentally, those employers wishing to raise concerns should have an opportunity to be heard. In this case, employers should have been allowed the chance to educate the EEOC on the practical difficulties that these rules impose on their businesses. Specifically, many businesses are rightfully concerned that EEOC's rule forces them into a catch-22: On the one hand they risk a potential enforcement action if they screen-out applicants with criminal records; on the other, they face the prosect of civil lawsuits should they hire an employee with a propensity to commit acts of violence.

OSHA's Underground "Union Walk Around Rule"

On Feburary 21, 2013, Former Deputy Assistant Secretary for the Occupational Safety and Health Administration (OSHA), Richard Fairfax, released a controversial opinion letter.[90] The so called "Fairfax Memo" concludes that an employee may ask that a union official accompany OSHA officials during safety inspections of a worksite, regardless of whether the company is unionized or has a collective bargaining agreement in place. Accordingly, the Fairfax Memo provides that a union represenative may accompany an OSHA inspector as the employee's "personal representative", provided that the employees have requested the union official's presence and the OSHA inspector agrees to allow it.[91] But the employer is given no say in the arrangement. Under the Fairfax Memo, employers must allow union officials to walk around the worksite with OSHA inspectors.

Under the Occupational Safety and Health Administation Act, employees are permitted to have a "personal represenative" present during OSHA inspections.[92] But the 'union walk around rule" stretches the text of the Act quite liberally. A plain reading of the pertinent statutory language would not suggest that a union operative should be considered a "personal represenative":

> "The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer … is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such a third party may accompany the Compliance Safety and Health Officer during the inspection."

In setting forth a definitive interpretaton of the Act, the Fairfax Memo establishes a rule that employers must allow this invasion, and must open themselves up to the possibility that union operatives will use the opportunity to lay the groundwork for a unionization campaign. These are real regulatory injuries.[93] And the business community should have had an opportunity to protest the new rule, before it was announced, through a notice-and-comment process.

REGULATION BY AMICUS

One of the most effective ways for an Administration to set federal regulatory policy without raising public awareness—and political backlash—is through strategic amicus filings, in cases between private litigants, where there is potential to establish precedential authority on a question of statutory interpretation. These “friend of the court” briefs are intended to guide the court’s analysis on difficult legal questions. In principle they should offer useful insights, expertise and practical considerations that the court may find helpful in resolving thorny issues.[94]

In some cases a judge will call upon the Department of Justice, or other agencies, to file a friend of the court brief because courts assume that an agency, charged with administering and enforcing a statute, may offer particularly valuable insight and institutional expertise.[95] In other cases federal agencies proactively file amicus briefs when they have identified cases that, in their view, raise important open questions of statutory construction.[96] Most commonly these briefs urge reversal of an arguably errant district court judgement that the agency believes causes disharmony between jurisdictions, or which might otherwise have serious implications for how the agency administers or enforces a statute.

As such, agencies have traditionally used amicus briefs as a tool to ensure consistent interpretations of statutes, or to weigh in on cases of great importance.[97] But, in recent years some scholars have raised concerns over the appearance that amicus briefs are being used to advance the President’s political agenda. Notably, University of Maryland Law School professor, Deborah Eisenberg recently published a comprehensive analysis of the Department of Labor’s (DOL) amicus practices since the New Deal.[98] Her study confirmed that there has been a steep escalation in DOL’s amicus activity in the past quarter-century.[99] Though the up-tick began under the Bill Clinton and George W. Bush Administrations, the Obama Administration has nearly doubled DOL’s amicus activity since 2008.[100]

Given that amicus briefs can be a particularly efficient means of influencing how the courts interpret statutes, it is easy to see why an Administration might view an aggressive amicus program as an attractive option for setting policy. Amicus briefs are far less costly to prepare than are enforcement actions, which would otherwise require agencies to bring full-fledged lawsuits against individuals or businesses.[101] And amicus filings have the added benefit—for an ideologically motivated President—of allowing an Administration to effectively set public policy under the radar because (a) newly asserted positions need not go through the APA’s notice-and-comment process, and (b) only those parties directly involved in the litigation—or closely following the case—will be aware of a federal filing.[102]

Of course, there is nothing wrong—*per se*—with a government agency filing an amicus brief. For that matter, amicus briefs are an important safeguard for ensuring parties have an opportunity to be heard in cases where their interests may be affected. To be sure, private individuals, companies and trade associations file amicus briefs commonly in cases that may have implications on their lives or business practices. For that matter, the NFIB Small Business Legal Center frequently files in state and federal courts on a host of issues to ensure that the small business community has a voice.[103]

This is important because the resolution of a question—as to how a statute should be interpreted—will often set public policy on that matter. For this reason, these cases are just as important as a legislative decision to include, retain or omit specific language in a draft bill. Given that precedential authority resolves difficult questions of statutory construction in a manner that affirmatively sets—or at least settles—public policy, it is important for interested parties to have an opportunity to be heard as they would when other branches of the government establish or settle policy. Thus, the judicial practice of allowing amicus briefs accomodates an interest in open government by ensuring that affected parties have an opportunity to be heard.[104] And along those lines, amicus filings can further the court's interest by ensuring a diviersity of perspectives on the questions presented in litigation.[105]

In this vein, there is certainly a legitimate role for an agency, charged with administering and enforcing a statute on behalf of the public, to bring to light practical considerations and institutional expertise that may elucidate an issue. As with private prarties who may have an interest in the resolution of a statutory issue, these agencies may have some organic interest in their amicus filings. But, when an Administration changes its position, or announces a new interpretation in amicus filings—or even in a direct enforcement action—there is a likelihood that the newly asserted position is politically or ideologically motivated.[106] And regardless of whether the agency has in fact asserted its new position for the purpose of influencing public policy, the agency nonetheless undermines the goal of ensuring public notice and opportunity for comment when adopting a position that will impose new burdens on individuals or businesses.

In keeping with the principle that public policy should be the product of an open and deliberative process, wherein the public is given an opportunity to offer input, agencies should—in the interest of good governance—allow for some form of notice-and-comment before staking-out a new and controversial position in an amicus filing. We understand the need for agencies to have the flexibility necessary to file briefs on important questions of law within the time-constraints imposed by the courts. And it would certainly be inappropriate to retard the progress of judicial proceedings so as to allow for an agency to solicit public input on a position it intends to take in an amicus filing; however, to the extent reasonably practicable—it would be appropriate to require agencies to offer a notice-and-comment period before advancing a new interpretive position in court. If the judicial calendar does not allow for an extended notice-and-comment period, the interests of open government and free speech would best be served if the agencies were required to offer an expedited form of notice-and-comment—at least in those cases where the agency has decided to file on its own accord, without prompting from the court.

DOL Changes Longstanding Rules for FLSA's Outside Sales Exemption

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), the U.S. Supreme Court held that an agency should not receive deference on a newly-asserted position where the agency has failed to give the public fair notice of the change, or where individuals and businesses have acted—in reasonable reliance—on the Agency's previous position. The case was brought by pharmaceutical sales representatives who alleged that they had been misclassified as "exempt employees" when they should have been classified as "non-exempt." The distinction is crucial for the purpose of wage and hour law because "non-exempt" employees are entitled to overtime for work performed in excess of 40 hours per week.[107] And because mistakes in classification can result in major liabilities, prudent employers are exceedingly careful when classifying employees.

The employer in *SmithKline* had prudently relied on existing DOL regulations—which addressed the exemption for "outside salesm[e]n."[108] Long-standing DOL regulations defined the term to mean "any employee… [w]hose primary duty is … making sales…"[109] Since 1940 DOL had stressed a *liberal* interpretation of the term.[110] But, in a 2009 amicus brief, filed in the Second Circuit, DOL announced—for the first time—a new, and more narrow, interpretation of its regulations.[111] And DOL filed amicus briefs in *SmithKline* to further advance this new position—but with an 'evolving' rationale.[112]

Under the new interpretation announced in DOL's amicus filings, pharmaceutical sales representatives could not qualify as exempt "outside salesm[e]n" because they did not *technically* consummate sales.[113] As a technical matter pharmaceutical sales representatives are forbidden by law from finalizing a sale; under state and federal law they may only promote their company's prescription drugs, meaning that—at most—they could obtain a "nonbinding commitment from a physician to prescribe those drugs in appropriate cases."[114] But, for decades DOL had allowed pharmaceutical companies to treat their sales represenatives as falling within the "outside salesman" definition—notwithstanding the fact that (technically) they merely promote their products.[115] As the defendant-company pointed out, DOL had explicitly "stressed that [the] requirement[,] [for qualification as an outside salesman,] [was] met whenever an employee 'in some sense [made] a sale."[116] The Supreme Court appropriately viewed DOL's new posistion with skepticism—not only because it constituted a change in position, but because it would result in an 'unfair surprise' for employers.[117]

The Court ultimately refused to afford deference to DOL on its new position because it would have imposed "massive liabilit[ies] on [employers] for conduct that occurred well before [the new] interpretation was announced."[118] Thus, the decision to refuse deference was based on equitable concerns over the lack of notice to the regulated public. This suggests that due process concerns can—and should—trump an agency's discretion on matters for which the agency has already spoken, at least where individuals or businesses have acted in reliance on the agency's original position.

DOL was smacked down for changing its position in *SmithKline Beecham Corp.* But, the decision only has limited implications. The Court certainly took issue with the fact that DOL's interpretation had changed, and also with the fact that the agency's rationale—in support of its new rule—was inconsistent even between its amicus briefs in the Ninth Circuit and in the Supreme Court. Nonetheless, the decision only prevents agencies from announcing new rules in amicus briefs where the rule would result in retroactive liabilities or some other "unfair surprise"—such as a newly announced prospective rule that might pull the rug out from under an individual or business that has invested in a business model, or construction project, in reasonable reliance on previous assurances that the plans were legal.

Thus, *SmithKline Beecham Corp.* may be a useful precedent for a party opposing a newly announced rule in an amicus brief—at least where the party can raise essentially equitable concerns about the agency's new position.[119] But in those cases where an agency advocates a new interpretation—in a manner that does not amount to an "unfair surprise"—the agency might still receive deference on its newly asserted rule.[120] The degree of deference afforded will depend on several factors, including whether the position appears to be the product of a deliberative and reasoned process, its consistency with previous positions the agency has taken and the persuasiveness of the agency's rationale.[121]

Yet, there is always a potential argument that a new interpretation represents an ideological or politically convenient position. And, when the new interpretation is announced in an amicus, it may be said that it is not the product of an open and thorough deliberation because the agency arrived at the position outside the formal rulemaking process—*i.e.*, without considering potential objections and concerns from interested parties. Furthermore, a newly announced position may be said to be inconsistent with the agency's prior decisions if it either explicitly contradicts a previous position or inferentially conflicts with a prior practice of acquiescence.[122] And of course the longer the agency has acquiesced in practice, the greater the inference that the newly asserted position constitutes an effort to change policy for political or ideological reasons.[123] Viewed in this light, a newly asserted agency position should be afforded no more deference than a position advocated by a private party in an amicus filing—*i.e.*, it should be accepted only to the extent the court finds its logic persuasive. Nonetheless, we can expect that federal agencies will continue to urge courts to give deference to newly crafted positions asserted in amicus filings.[124] Unfortunately, given the judicial tendancy to defer to the government, it remains an uphill battle for parties opposing 'regulation by amicus.'

FCC Expands its Authority and Avoids Judcial Review Through Amicus Filings

In a particularly startling example of 'regulation by amicus,' the Federal Communications Commission (FCC) succeeded in expanding its jurisdictional reach—and in a manner that immunized the newly asserted rule from judicial review. The Junk Fax Protection Act amended the Telephone Consumer Protection Act in 1995 to prohibit businesses from sending "unsolicited" commercial faxes.[125] The Act vested the FCC with authority to enforce the prohibition, and authorized a private right of action for individuals who receive unsolicited faxes.[126] Thereafter FCC promulgated regulations setting forth these regulatory requirements in more detail.[127]

Unfortunately the regulations were somewhat ambiguous in so far as they could have been interpreted as requiring boilerplate "opt-out" language on all commercial faxes, explaining that recipients could opt-out of future faxes.[128] But this interpretation was controversial because the statutory scheme only appears to authorize FCC to regulate "unsolicited" faxes.[129] That would seemingly mean that FCC lacks the authority to regulate faxes where the sender has obtained express consent.

But, rather than clarifying whether opt-out language was required for consensual faxes through notice-and-comment procedures, the FCC choose to advance an expansive interpretation of its regulations through amicus filings.[130] For example, the agency filed on behalf of the plaintiff in *Nack v. Walburg*, arguing that the regulation should be construed as requiring opt-out language and that such language was necessary because it could not be presumed that consent for receipt of a single fax implies consent to receive future faxes.[131] In doing so, the agency was advocating a rule that we maintain should have been more clearly articulated in the original regulation, and in a manner that would have allowed businesses an opportunity to voice their concerns. And of course, FCC's rule, requiring opt-out language on all faxes, fits our definition of an underground regulation because it imposes major liabilities on businesses that fail to include this boilerplate. The defendant, a small Midwestern publishing company, was facing a 48 million dollar class action lawsuit under the new rule.[132]

But even more alarming was the position that FCC took in contesting the defendant-company's right to raise a constitutional ultra vires argument in its defense: *i.e*. that FCC simply lacked the authority to regulate unsolicited faxes under existing law. In response, FCC filed another amicus brief—this time advancing a controversial interpretation of the Hobbs Act.[133] FCC argued that the Hobbs Act requires concerned parties to petition FCC directly, and to thereafter file a lawsuit, in the Federal Court of Appeals for the District of Columbia, if they wish to bring a substantive challenge to any FCC regulation.[134] Thus, FCC's amicus brief maintained that the Hobbs Act denied the Eighth Circuit jurisdiction to hear Walburg's defense.

Sadly, the Eighth Circuit sided with FCC.[135] Given the deference courts generally afford agencies on questions of statutory construction, the result is not entirely surprising. Yet, the ruling was especially disconcerting in that it denies defendants the right to raise a constitutional defense, and effectively immunized FCC's interpretation from judicial review—so long as the agency chooses to rely on private litigants to enforce the rule.[136] And in announcing a rule that its regulations are immune from direct judicial review in private enforcement actions, FCC set forth yet another underground regulation.

SETTING POLICY THROUGH ENFORCEMENT

The APA allows a federal agency to choose between a few avenues when setting regulatory policy under a statute it has been charged with enforcing. First, the agency may choose to adopt a legislative rule through a formal rulemaking process, or a slightly less formal "notice-and-comment" process.[137] An agency may also seek to adopt an "interpretive" rule through guidance. In the alternative, the agency may choose to establish substantively identical rules through adjudication or enforcement actions. Of course we take issue with interpretive rules announced through guidance because we maintain that notice-and-comment procedures should be utilized as a *prudential matter* in order to ensure transparency and to obtain diverse perspectives from interested parties. And we would say the same with regard to an agency's decision to announce new rules or interpretations in adjudication.

We note that some scholars have argued against aggressive application of notice-and-comment requirements on guidance documents, and interpretive rules out of concern that agencies might respond by advancing the same rules through adjudication or enforcement actions.[138] That would be a particularly troubling result because it would take individuals and businesses by surprise. At least when an agency announces a controversial interpretation in a guidance or opinion letter the regulated community is put on notice that they might be subject to an enforcement action if they do not conform their conduct accordingly. But in an adjudicatory or enforcement action, there is no time to conform conduct—the hammer has already come down on the targeted individual or business. Accordingly, rulemaking through adjudication raises serious due process concerns.[139] But these concerns could be obviated if the agency would simply announce its rules before bringing an enforcement action.

Under the "open dialouge" principle we have outlined, agencies should allow for some form of notice-and-comment, not only to avoid due process concerns but to ensure that public policies, advanced through legal actions, are informed by a free exchange of ideas with all concerned citizens. This is especially important in the context of newly asserted rules in adjudication or litigation—including in *amicus* filings—because in most cases only those parties directly involved with the case will be aware of the agencies actions. This means other interested parties may well be denied any opportunity to raise their concerns.[140]

Of course, it goes without saying that rules advanced by an agency in adjudication or litigation satisfy the criteria we have outlined for an "important" or "signifigant" rule. Indeed, such rules necessarily affect the rights of those parties subject to the adjudication or enforcement. As a matter of good government, new rules should only be advanced in a legal action where the agency has previously announced its intentions to adopt the rule and has solicited public input.

FTC Pronounces Underground Rules on Data Security

In an age where most transactions are handled electronically, data security is a top concern for all of us. There is an ever-present risk that hackers may intercept sensitive personal or financial information for fraudulant purposes. Because this has been an issue of continuing concern to the public, the Federal Trade Commission (FTC) has initiated a campaign to create data security rules for business.[141] But the problem is that FTC has no explicit statutory authority to regulate data security.[142] In fact, FTC has actively lobbied Congress for a statutory amendment that would explicitly confer such authority.[143]

FTC has never officially adopted any formal rule establishing mandatory data security protocols.[144] Nonetheless, FTC has filed a series of highly controversial enforcement actions against businesses that have suffered data security breaches in an apparent attempt to establish data security rules through enforcement precedent.[145] For example FTC has forced a number of companies to sign consent decrees after the Agency alleged that those companies failed to take proper measures to safegaurd sensitive information; these settlements effectively set precedent—warning other businesses that FTC might target them next if they are not proactive enough in employing the latest data security measures.[146] But there are serious questions as to whether FTC has the authority to establish data security rules, and whether the Agency may do so without promulgating regulations that would give businesses advance notice of what is required.

At least two companies—LabMD and Wyndham Hotels —have challenged FTC's authority to regulate data security through enforcement actions. But, neither have found success. In *LabMD*, an Administrative Law Judge affirmed FTC's authority to set data security policy under the Agency's broad charge to combat "unfair business practices."[147] And the Federal District Court of New Jersey recently came to the same conclusion in *Wyndham Hotels*—holding that FTC need not establish its data security rules through regulation, and that the Agency's rules could be announced through enforcement actions.[148] This raises an even more fundamental issue of fairness, as its hard to comprehend how an individual or business could have proper notice of a rule announced at the time of enforcement—especially where the rule is derived from an apparently *evolving* standard.

It may be argued that FTC's enforcement actions, in *LabMD* and *Wyndham Hotels*, represent *ad hoc* decisions as to how to enforce the existing statutory prohibition on "unfair business practices." But the phrase "unfair business practices" is far too vague to offer any meaningful guidance to the regulated community on the complex question of how a company should manage online threats. So even assuming that FTC has authority to regulate data security practices, the Agency must affrimatively explain the governing standard in a manner that can offer the regulated public an opportunity to conform conduct accordingly—otherwise individuals must *guess* as to what is or is not a "fair" data security policy.

FTC apparently proceeds on the theory that its public statements, complaints and previous consent orders offer effective notice to the public. This argument stands in tension with the principle we have outlined that regulatory rules should be established through a deliberative process wherein the public has an opportunity to be heard—a process that ensures full and fair notice. But, even more troubling, in this context, is the fact that FTC's conception of proper data security protocols will necessarily represent an amorphous evolving standard—literally a moving target for businesses seeking to comply.[149]

Companies seeking to guard against online risks are constantly investing in new programs, and hiring or contracting with information technology experts in the war against online fraud. And on the other side of the equation, fraudsters are becoming more savy in finding ways to circumvent, or override, existing security measures. This means that data security protocols must perpetually evolve in response to new threats.

Further complicating matters, experts in the field of data security may proscribe different security policies for varying businesses, depending upon their size, and the nature of their work. For example, financial institutions typically employ the most advanced technologies and protocols because a data breach can result in catastrophic financial losses for parties who have trusted those institutions with their assets.[150] For this reason, federal banking laws require financial institutions to bear the loss in most fraud cases.[151] Likewise, the Uniform Commercial Code, adopted in most states, places the burden on financial institutions to reimburse commercial clients suffering losses as a result of internet fraud—at least in most cases.[152] But for ordinary businesses outside of the financial sector, the risk of a data security breach is still signifigant enough to compel reasonably prudent security measures—without regard to the prospect of evolving FTC regulations.

Companies risk potential negligence lawsuits when sensitive information is compromised—at least where it may be argued that the company failed to take reasonable steps to secure the compromised information.[153] To minimize this risk, companies may be prudent in implementing "best practices" for their specific industry; this may well mean that there is an appropriate standard of conduct under common law—a standard informed by the basic precept that one must avoid conduct that may foreseeably cause injury to another.

But, the common law standard is applicable only where an individual has suffered some affirmative harm as a result of the negligent conduct of another.[154] And if FTC wishes to co-opt the common law standard under the Federal Trade Commission Act, it should explicitly do so through regulation.[155] Instead, FTC is seeking to establish its own form of common law rules on what constitutes appropriate data security protocols through selective enforcement actions.

DOL Seeks to Alter OSHA Test for "Employer"

The Occupational Safety and Health Act allows OSHA to impose penalities on employers who fail to abide by OSHA regulations. And the agency is authorized to impose much more severe penalities—up to $70,000—for employers who are cited with repeated violations.[156] As such, a recurring question arises as to whether a corporation may be counted as a single employer subject to these heightened "repeat offender" penalties where separate subsdiaries have been *individually* cited with violations. In some circumstances the Act requires that the parent corporation must be treated as a single employer over the employees at both subsidiary companies. But the proper test for determining *when* a corporation should be counted as a single employer is very much an open question.[157]

In 2012 the Secretary of the DOL was rebuffed for advancing a new test for the first time during an appeal to the Second Circuit.[158] In that case OSHA sought to impose "repeat offender" penalities on the Loretto Management Corporation (LRC) because it oversaw several subsidiary non-profit corporations, which had been individually cited for violations.[159] Enforcement officers took the position that LRC should be treated as a single employer, but the OSHA Commission ultimately rejected that position finding that LRC did qualify as a single-employer under a three-part test.[160] That test asks whether the companies: (1) shared a common workplace such that employees have access or exposure to the same hazardous conditions; (2) have interrelated and intergrated operations; and (3) share a common management, supervision or ownership.[161]

But, the Secretary appealed the decision to the Second Circuit, arguing—for the first time—that the court should adopt a four-part test, which would consider whether: (1) there were interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership.[162] If accepted, the new test would have weighed more heavily—probably decisively in favor DOL's argument that the company should have been viewed as a single employer, and therefore liable for "repeat offender" penalities. But the Second Circuit refused to entertain the Secretary's arguments because they were not advanced in earlier proceedings before an Administrative Law Judge, and or the Commission.[163]

Nonetheless, the Court did not go so far as to affirmatively reject the four part test. Instead, the Court held that the Secretary must either promulgate a new regulation to clearly establish the test, or the Secretary may reaffirm its four part test in future enforcement actions.[164] This was an explicit inviation for the Secretary to renew efforts to establish a new rule that would have severe consequences—*i.e.*, major liabilities—for affected employers, and to do so without necessarily going through any notice-and-comment process. This is precisely the sort of rule that the small business community should be allowed an opportunity to comment on, so as to explain practical concerns.

NLRB Seeks to Change Rules on Joint-Employers

Last summer the National Labor Relations Board announced that it would treat McDonald's USA LLC ("McDonalds") and its franchisees as joint-employers.[165] Thereafter, in December, the NLRB filed 13 complaints, asserting that McDonald's and her franchisees should be held jointly liable for numerous alleged violations of labor law—stemming from alleged misconduct on the part of McDonald's franchisees.[166] But, there is a serious question as to whether McDonald's may be held liable, as a franchisor, for the actions of its franchisees.

The decision to treat McDonalds as a joint-employer is highly controversial. In this move NLRB effectively announced new rules that will have far-reaching implications for businesses working with independent companies. As one business owner put it, NLRB's newly announced rule throws "a hand-grenade in the middle of the [franchising] business model."[167] NLRB's new approach would treat franchisors as joint-employers with franchisees, or other independent contracting firms, so long as they exert "significant control" over the same employees—a standard that NLRB now argues can be satisfied simply by demonstrating that a franchisor has exerted significant control over every-day business operations, without regard to whether the franchisor has exercised any control over personnel decisions.[168] This not only jeaopardizes the entire franchisor-franchisee model, but it contravenes 30 years of case law, establishing that a franchisor is not a joint-employer unless the franchisor actively exerts control over employment decisions, such as setting wages or disiplinary actions.[169]

NLRB first advanced this new rule in an amicus filing before an Administrative Law Judge (ALJ) in June, 2014.[170] In that case, *Browning-Ferris Industries of California, Inc.*, NLRB argued that the ALJ should change the 30-year old "joint-employer" rule—specifically arguing that today's franchising practices demonstrate the need for a change in order to promote "meaningful collective bargaining… [because] … some franchisors effectively control [] wages 'by controlling every other variable in the business except wages…'"[171] Accordingly, *Browning-Ferris* may well pave the way for NLRB's enforcement actions against McDonalds and other companies that will be deemed joint-employers under the new rule.

For our purposes it's important to recongize that the new rule imposes regulatory burdens, including expanded liabilities, on businesses throughout the country. It means a franchisor must risk quality control by loosening oversight over the franchisee's operations, which may adversly impact the franchisor's brand. In so disrupting the franchisor-franchisee relationship, NLRB's new rule threatens a successful collaborative business model that has enabled many entreprenuers to launch their own businesses. We would suggest that—as a matter of good government—a rule imposing such significant impacts should have been subject to notice and comment.

Department of Justice Leads 'Operation Choke Point'

According to press reports, the Obama Administration has launched a clandestine operation aimed at running fraudulent enterprises out-of-business. The initiative is intended to "change [] structures within the financial system… [so as to] chok[e] [targeted businesses] off from the very air they need to survive."[172] The details are hazy; however, reports confirm that the Department of Justice has exerted pressure—including threats to harrass financial institutions with subpoenas and other legal mechanicisms—so as to coerce banks into discontinuing financial services for businesses in certain targeted industries.[173]

While ostensibly aimed at fraudsters, Operation Choke Point has been sharply criticized as an unlawful attempt to drive legal businesses out of the market.[174] Indeed, critics have rightfully raised concerns that these practices enable the Executive Branch to drive legitimate companies in disfavored industries out-of-business.[175] Reports indicate that DOJ and FDIC had specifically encouraged banks to scrutinize and—in some cases—to terminate their relationships with 30 high-risk merchant categories, including: ammunition sales, coin dealers, dating services, firearm sales, telemarketing, tobacco sales, travel clubs, and especially third party payment processors (TPPPs).[176]

Those concerns prompted 21 members of Congress to send a joint-letter questioning DOJ and FDIC's authority to coerce banks into choking lawful companies out of the market.[177] And on March 24, 2015, a House subcommittee heard testimony from several small business owners who had been locked out of the financial system.[178] For example, one small business owner testified that her bank forced closure of her company's account and that she had not been able to open an account with another bank since then.[179]

Reports confirm that Operation Choke Point has resulted in "more than 50 subpoenas issued to banks and TPPPs [and] several active criminal and civil investigations."[180] And as noted by George Mason Law School Professor, Todd Zywicki, Operation Choke Point has already resulted in litigation, and is likely to spur further lawsuits, as legitimate commercial actors seek access to financial services for which they have been denied. Moreover, reports confirm that DOJ has forced some banks into settlement agreements, whereby they have been forced to terminate financial services to business in disfavored industries.[181]

Of course it's highly questionable whether DOJ has the authority to set standards requiring financial institutions to discontinue financial services for lawful businesses. Though there may be bad apples in any given industry, that does not give the Executive Branch authority to exert pressure to cut an industry or business out of the market without opportunity for due process. Authority to take legal actions against a business must be conferred by a statutory enactment.

EXECUTIVE ORDERS

We maintain that all substantive rules—meaning all rules that may impose regulatory burdens on individuals or businesses—should be subject to a notice-and-comment process. The principle applies to the entire universe of rules that may come from the Executive Branch. This includes executive orders.

The President has power to issue executive orders where the Constitution explicitly vests authority in his office, or where Congress has passed a law that affords the President discretion in administration or enforcement.[182] And since courts generally defer to the Executive Branch when interpreting ambiguous statutory language, there is often significant room for the President to issue executive orders.[183] Such deference affords the President a substantial amount of lattitude to set policies that may impose burdens on individuals or businesses—at the very least with regard to individuals or businesses seeking to obtain contracts, permits, or other discretionary approvals from the government.

Of course the problem with executive orders is that they are issued by one person—and often for the purpose of advancing idelogical goals, if not more base political calculations.[184] With executive orders, there is little or no guarantee that newly adopted rules represent the culmination of a truly deliberative process, or a thoughtful weighing of competing interests. By contrast, statutes passed legislatively are presumptively the product of a deliberative political process, representing the pluralistic interests of a diverse society through elected representatives.

And at least when concerned citizens are given an opportunity for notice-and-comment the rulemaker is forced to hear and consider those concerns—albeit sometimes only in a perfunctory manner. Nonetheless we maintain that allowing an opportunity for notice-and-comment promotes good governance and is crucially important in an age when so many policy questions are decided by the Executive Branch. As such, we would require executive orders to go through some form of notice-and-comment where they impose affirmative burdens, at least in those cases where the executive order is predicated upon the President's authority to enforce or administer a statute enacted by Congress.

Executive Order No. 13496: Requirement that government contractors display "Notice Poster"

On January 30, 2009 President Obama issued an executive order requiring federal agencies to impose new conditions on all federal contracts.[185] These conditions require contractors and sub-contractors to prominently display posters informing employees of their "rights" under federal labor law. Shortly thereafter, the National Labor Relations Board (NLRB) adopted an identical rule applicable to all employers subject to the National Labor Relations Act.[186] In response NFIB brought a lawsuit against NLRB and obtained a judgement in the Federal Court of Appeals for the District of Columbia striking-down NLRB's poster rule.[187] The opinion held that labor law—as well as First Amendment principles—forbids NLRB from imposing this requirement on employers. But, the President's executive order remains in place because the President asserts broad powers to impose conditions on federal contracts as he deems prudent in promoting economy and efficiency of performance of federal contracts.[188]

It is not clear whether this rule truly promotes economy and efficiency in the performance of government contracts. Indeed, businesses contracting with the federal government might have wished for an opportunity to raise such questions and other pertinent objections. But they were given no opportunity for notice-and-comment. Executive Order No. 13496 became effective law as soon as it was issued—imposing affirmative burdens on a substantial sector of the American economy.

Businesses that refuse to display the "notice poster" will not be awarded contracts. And there are very real consequences for non-compliance. Those that fail to comply risk revocation of existing contracts—as well as the possibility that they may find it difficult to obtain future contracts.[189] They also face the prospect of monetary penalities, sanctions and debarment.[190]

Some argue the "poster rule" imposes no meaningful burden becauses businesses wishing to obtain the benefits of a contract will voluntarily submit to these conditions. To be sure, the rule is imposed only as a requirement of obtaining a government contract. But, this ignores the reality that the government can effectively regulate conduct by threatening to withhold discretionary approvals that may be important to an individual's livelihood or essential to business.[191] As such, government can coercively compel individuals or businesses to 'voluntarily submit' to rules as a condition of obtaining contracts, or important permits.

In the case of Executive Order No. 13496, the "notice poster rule" requires companies wishing to obtain the benefit of government contracts—which are usually crucial to these businesses—to waive their First Amendment rights to be free from government compelled speech.[192] We submit that this is a serious regulatory burden—indeed a constitutional injury. For this reason, we maintain it should not have been imposed without notice-and-commment, if at all.

Conclusion

It is past time for the Executive Branch to come back above ground to ensure any new regulatory obligation is promulgated through an open and transparent process.

The Fourth Branch's penchant for power has created a bureaucracy unrecognizable to our nation's Founders and unworkable for our nation's job creators. Unless and until, all three Constitutional branches of government – Congress, the Judiciary, and the Executive – renew their commitment to separation of powers and honor the obligations and limits imposed by the Constitution – the Fourth Branch will continue to grow precipitously. And government transparency and accountability will continue to evaporate unless and until Congress begins to jealously protect its exclusive lawmaking powers, as the Founders envisioned.

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[1] Jonathan Turley, Testimony before House Committee on the Judiciary, "The President's Constitutional Duty to Faithfully Execute the Laws", 7 (Dec. 3, 2013), *available* online at http://judiciary.house.gov/_cache/files/2d1fda91-18a4-467f-818c-62025feaaa6f/120313-turley-testimony.pdf (last visited Feb. 11, 2015).

[2] Karen Kerrigan and Ray Keating, "Regulation and the 'Fourth Branch of Government'", 1, *available* at http://centerforregulatorysolutions.org/wp-content/uploads/2014/04/FourthBranchWhitePaper.pdf (last visited Feb. 11, 2015) (citing National Archives and Records Administration, Office of the Federal Register).

[3] *Id*.

[4] *Id*.

[5] "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014) (internal citations omitted).

[6] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984).

[7] *See Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("Yet individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.").

[8] THE FEDERALIST NO. 10, 78 (James Madison) (Clinton Rossiter ed., 1961) (""liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.").

[9] *Id*.

[10] Jennifer Epstein, President Obama chides Congress, Politico, May 8, 2012, *available* online at http://www.politico.com/news/stories/0512/76052.html (last visited Feb. 11, 2015).

[11] Tamara Keith, *Wielding A Pen And A Phone, Obama Goes It Alone*, National Public Radio, Morning Edition, Jan. 20, 2014, available at http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone (last visited Feb. 11, 2015).

[12] "The basic case for judicial review depends on the proposition that foxes should not guard henhouses. It would be most peculiar, for example, to argue that courts should defer to congressional or state interpretations of constitutional provisions whenever there is ambiguity in the constitutional text. Those who are limited by a legal restriction should not be permitted to determine the nature of the limitation, or to decide its scope. The relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies. In both contexts, an independent arbiter should determine the nature of the limitation." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 446 (1989).

[13] "'[T]he universe of each agency is limited by the legislative specifications contained in its organic act.' This means that Congress must delegate an agency the power to act. If Congress did not act, the agency would have no authority. In the absence of some indication that Congress meant to grant an agency a particular power, there is no reason to presume from the agency's say-so that it properly wields that power--and hence no reason to defer to the agency's

assertion of jurisdiction." Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1534 (2009) (internal citations omitted).

[14] "The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. 'It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.' *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (quoting Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 admin. L.Rev. 59, 85 (1995)).

[15] Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 98-99 (2012)

[16] Uncertainty over government actions and unreasonable government regulations listed in top 5 concerns for small business owners according to national surveys conducted by the NFIB Research Foundation. Holly Wade, Small Business Problems and Priorities, 14 (August, 2012), *available* online at http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf (last visited Feb. 11, 2015).

[17] David J. Baron and Elena Kagan, *Chevron's Nondelegation Doctrine*, The Supreme Court Review, Vol. 2001 201, 207 (2001) ("Peter Strauss has calculated that publication rules appearing in a variety of informal media take up tens or even hundreds of times the library shelf space of regulations printed in the Federal Register."), *available* online at http://www.scotusblog.com/wp-content/uploads/2010/03/Chevrons-Nondelegation-Doctrine.pdf (last visited Feb. 11, 2015); Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1469 (1992) (noting that "the rules of the Federal Aviation Administration (FAA), two inches, but the corresponding technical guidance materials, well in excess of forty feet.").

[18] "The short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by petitioners who must obtain Title V permits in order to continue operating." *Appalachian Power Co.*, 208 F.3d at 1023.

[19] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. Art. I, § 1.

[20] "Congress may and does lawfully delegate legislative power to administrative agencies. Lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests." 1 Kenneth Culp Davis, Administrative Law Treatise S2.01, at 75 (1st ed. 1958) (internal citations omitted).

[21] "Since 1935, the Supreme Court has not invalidated a single statute on nondelegation grounds." Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1178 (1999).

[22] *Chevron, U.S.A.*, 467 U.S. at 843.

[23] "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

[24] Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 381-82 (1985); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276 (2010).

[25] Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 659, 663 (1987).

[26] *Perez v. Mortgage Bankers Ass'n*, No. 13-1041, 2015 WL 998535, at *3 (U.S. Mar. 9, 2015).

[27] *Id*.
[28] *Id*.
[29] *Id*. at 7.
[30] *Id*. at 12 (J. Scalia, concurring).
[31] *Id*. at 15 (J. Thomas, concurring).
[32] *Id*. at 10 (J. Alito, concurring) (detailing concerns "about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies pf the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations.").
[33] *Id*. at 11 (J. Scalia, concurring).
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259, 260-61 (2005).
[38] 5 U.S.C.A. § 553 (West).
[39] Franklin, *supra* note 24 at 278 ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules.").

[40] George W. Bush, Executive Order 13422, Further Amendment to Executive Order 12866 on Regulatory Planning and Review (Jan. 18, 2007), *available* at http://www.presidency.ucsb.edu/ws/index.php?pid=24456 (last visited Feb. 11, 2015).
[41] Rob Portman, Memorandum for the Heads of Executive Departments and Agencies: Issuance of OMB's "Final Bulletin for Agency Good Guidance Practices", Executive Office of the President, Office of Management and Budget, 8 (Jan. 18, 2007), *available* online at http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf (last visited Feb. 11, 2015).

[42] *Id*. at 9.
[43] Other agencies appear to use much of their guidance to clarify highly technical details. Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 815 (2010).
[44] "Administrative agencies must enjoy flexibility, which includes the ability to issue an array of policy and interpretative guidance documents that direct the staff and inform the public of how that agency expects to perform its functions--presumably in a manner consistent with the then-current administration. The ability to issue such documents is critical; agencies could not function effectively if they had to engage in a notice-and-comment rulemaking under the Administrative Procedure Act (APA) each time they alerted their staff and the public about new policy choices, new guidance, or new interpretations. Notice-and-comment rulemaking is cumbersome, often described as ossified: it is both rigid and difficult to maneuver, making it difficult to achieve timely results." Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 Ecology L.Q. 657, 659 (2008).
[45] *See* Merriam-Webster Dictionary, "Guide", *available* online at http://www.merriam-webster.com/dictionary/guide (last visited Feb. 11, 2015) (defining "guide" as "something that provides a person with guiding information.").
[46] "FDA's growing dependence on guidance documents presents a couple of problems. First, these informal announcements may operate as de facto rules but escape normal procedural safeguards for their promulgation or review. Second, they allow the FDA to take positions that do not even constrain agency officials, which leaves regulated entities guessing about their rights and obligations." Lars Noah, *Governance by the Backdoor: Administrative Law(Lessness?) at the FDA*, 93 Neb. L. Rev. 89, 97 (2014).
[47] *See E.g.*, Valerie Jarrett, We're Listening to Businesses about the Health Care Law, The White House Blog (Jul. 2, 2013), available online at https://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law (last visited Mar. 21, 2015).
[48] Employer Health Care Arrangements, Internal Revenue Service, *available* online at http://www.irs.gov/Affordable-Care-Act/Employer-Health-Care-Arrangements (last visited Mar. 21, 2015).
[49] According, to research conducted by the NFIB Research Foundation, nearly 10 percent of small business owners report losing their health insurance. Small Business's Introduction to the Affordable Care Act, Part II, NFIB Research Foundation (Dec. 2014), *available* online at http://www.nfib.com/assets/nfib-aca-study-2014.pdf (last visited Mar.

26, 2015); *see also* Scott Gottlieb, Thousands of Small Businesses Will Also Start Losing Their Current Health Policies Under Obamacare. Here's why, Forbes (Nov. 6, 2013), *available* at http://www.forbes.com/sites/scottgottlieb/2013/11/06/thousands-of-small-businesses-will-also-start-losing-their-current-health-policies-under-obamacare-heres-why/ (last visited Mar. 21, 2015).
[50] *Supra* note 48.
[51] Employer Mandate, U.S. Chamber, *available* at https://www.uschamber.com/health-reform/employer-mandate (last visited Mar. 21, 2015).
[52] *Supra* note 48.
[53] *Id*.
[54] *Mortgage Bankers Assoc.*, 2015 WL 998535, at 15 (J. Thomas, concurring).
[55] *Id*. at 12 (J. Scalia, concurring).
[56] *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").
[57] John F. Manning, *Legal Realism & the Canons' Revival*, 5 Green Bag 2d 283 (2002).
[58] NFIB Guide to Wage and Hour Laws, NFIB Small Business Legal Center (Feb. 2012), *available* online at http://www.nfib.com/Portals/0/PDF/AllUsers/legal/wage-hour/Wage_Hour_Laws_Guide.pdf (Mar. 18, 2015).
[59] *Id*.
[60] *Id*.
[61] *See Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 968-69 (D.C. Cir. 2013).
[62] *Id*.
[63] *Id*.
[64] *Perez v. Mortgage Bankers Assn.*, Sup. Ct. Case Nos. 13-1041; 13-1052, Amicus Brief of National Federation of Independent Business, et al., available online at
[65] *Perez*, 2015 WL 998535.
[66] U.S. Department of Labor, Wage and Hour Division, "Administrator's Interpretation No. 2015-1," (July 15, 2015), *available* online at http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm (last visited August 20, 2015).
[67] Pregnancy Discrimination, U.S. Equal Employment Opportunity Commission, *available* online at http://www.eeoc.gov/laws/types/pregnancy.cfm (last visited Feb. 11, 2015).
[68] Pregnancy Discrimination: EEOC Issues New Enforcement Guidance on Pregnancy Discrimination, Society for Human Resource Management (Jul. 18, 2014), *available* online at http://www.shrm.org/advocacy/governmentaffairsnews/hrissuesupdatee-newsletter/pages/071814_1.aspx (last visited Feb. 11, 2015).
[69] Leslie E. Silverman, What HR Professionals Need to Know About EEOC's New Pregnancy Discrimination Guidance, Society for Human Resource Management, *available* at http://www.shrm.org/Advocacy/GovernmentAffairsNews/HRIssuesUpdatee-Newsletter/Documents/SHRM%20White%20Paper%20on%20EEOC%27s%20Pregnancy%20Discrimination%20Guidance--proofed.pdf (last visited Feb. 11, 2015).

[70] EEOC Issues New Enforcement Guidance on Pregnancy Discrimination, Midlands Blog (Aug. 7, 2014), *available* online at http://www.midfin.com/news/eeoc-issues-new-enforcement-guidance-on-pregnancy-discrimination/ (last visited Feb. 11, 2015).

[71] *Young v. United Parcel Service, Inc.*, Sup. Ct. Case No. 12-1226 (2015), *available* online at http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf (last visited Mar. 25, 2015).
[72] *Id*. at 16-17.
[73] *Id*.
[74] *Id*.
[75] 42 U.S.C. §§ 2000-2.
[76] Elizabeth Milito and Luke Wake, Hiring and Firing: What Every Small Business Needs to Know, National Federation of Independent Business (Apr. 16, 2015), *available* online at https://www.nfib.com/webinars/hiring-and-firing/ (last visited Feb. 11, 2015).
[77] EEOC Compliance Manual, Section 15: Race & Color Discrimination, U.S. Equal Employment Opportunity Commission, *available* online at http://www.eeoc.gov/policy/docs/race-color.html (last visited Feb. 11, 2015).

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[79] Rod Fliegel, Jennifer Mora and William Simmons, EEOC Suit Against Employer Screening Applicants Based on Credit History Information Dismissed, Littler (Feb. 4, 2013), *available* online at http://www.littler.com/publication-press/publication/eeoc-suit-against-employer-screening-applicants-based-credit-history-i (last visited Feb. 11, 2015).
[80] Hans A. von Spakovsky, EEOC Loses Again on Background Checks, Heritage Foundation (Apr. 21, 2014), *available* online at http://www.heritage.org/research/reports/2014/04/eeoc-loses-again-on-background-checks (last visited Feb. 11, 2015).
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[87] *Id*.
[88] EEOC has already begun enforcement actions. *See* Marcel Debruge, Labor: The EEOC's guidance on criminal background checks, Inside Counsel (Jul 15, 2013), *available* online at http://www.insidecounsel.com/2013/07/15/labor-the-eeocs-guidance-on-criminal-background-ch (last visited Feb. 11, 2015).
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[92] 29 C.F.R. § 1903.8(c).
[93] *Unite Here Local 355 v. Martin Mulhall, et al*, Sup. Ct. Case No. 12-99, Amici Curiae Brief of National Federation of Independent Business Small Business Legal Center, *et al.*, *available* online at http://sblog.s3.amazonaws.com/wp-content/uploads/2013/10/NFIB-CATO-Amicus-Brief-in-Mulhall-12-99.pdf (last visited Feb. 11, 2015).
[94] Federal Rules of Appellate Procedure, Rule 29 (explaining that an amicus must explain why its brief is desirable and relevant).
[95] Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 Fla. L. Rev. 1223, 1244, FN 128 (2013).
[96] *See e.g.*, Ben James, DOL Says Judge Dropped Ball In Hearst Intern Wage Row, Law360 (Apr. 7, 2014), *available* online at http://www.law360.com/articles/525688/dol-says-judge-dropped-ball-in-hearst-intern-wage-row (last visited Feb. 11, 2015).
[97] *See e.g.*, Eisenberg, *supra* note 96 at 1245 ("The most active DOL amicus curiae activity in FLSA cases occurred immediately after the Act's passage. After the battle to achieve passage of the FLSA, the Roosevelt and Truman administrations used amicus briefs to establish judicial precedents broadly construing the scope of the FLSA's

protections. Indeed, more than half of all FLSA amicus briefs in the database (170 out of 324 briefs) were filed by these two administrations.")

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*. at 52 ("Amicus briefs are less costly than affirmative litigation, which can demand years of agency staff resources, and rulemaking, which involves expensive and time-consuming notice-and- comment procedures. As an amicus, the DOL can leave the intricacies and expense of factual development and discovery in the case to the litigants represented by private counsel, and use its resources to write one brief that sets forth the agency's interpretation of ambiguities in the law.").

[102] HR Policy Association to Scrutinize DOL Activity in the Courts on Wage and Hour Cases, HR Policy Association (Oct. 2, 2009), *available* online at http://www.hrpolicy.org/position_issue_newsstory.aspx?rid=6596 (last visited Feb. 11, 2015).

[103] Case Index, Small Business Legal Center, National Federation of Independent Business, *available* online at http://www.nfib.com/foundations/legal-center/case-index/ (last visited Feb. 11, 2015).

[104] "Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group. Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (internal citations omitted).

[105] Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J.App. Prac. & Process 279 (1999).

[106] Eisenberg, *supra* note 96 at 1229 ("The increasingly politically charged nature of both the agency's amicus efforts—as seen during the Bush and Obama administrations in particular—and the ideological split in the Supreme Court's decisions about whether to defer to them portends a chaotic future for FLSA litigation in the lower courts. But one thing is clear: the agency amicus strategy can be a potent tool of policy making.").

[107] NFIB Guide to Wage and Hour Laws: What You Need to Know About the Fair Labor Standards Act, National Federation of Independent Business Small Business Legal Center, *available* online at http://www.nfib.com/Portals/0/PDF/AllUsers/legal/wage-hour/Wage_Hour_Laws_Guide.pdf (last visited Feb. 11, 2015).

[108] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

[109] 29 C.F.R. § 541.500.

[110] *SmithKline Beecham Corp.*, 132 S. Ct. at 2163.

[111] "DOL first announced its view that pharmaceutical sales representatives are not outside salesmen in a series of amicus briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the DOL's internal decision making process proved to be untenable." *SmithKline Beecham Corp.*, 132 S. Ct. at 2160.

[112] "The DOL changed course after the Court granted certiorari in this case, however, and now maintains that '[a]n employee does not make a 'sale' ... unless he actually transfers title to the property at issue.' The DOL's current interpretation of its regulations is not entitled to deference under *Auer v. Robbins*... Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief… this general rule does not apply in all cases. Deference is inappropriate, for example, when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation', or when there is reason to suspect that the interpretation 'does not reflect the agency's fair and considered judgment on the matter... There are strong reasons for withholding *Auer* deference in this case. Petitioners invoke the DOL's interpretation to impose potentially massive liability on respondent for conduct that occurred well before the interpretation was announced. To defer to the DOL's interpretation would result in precisely the kind of "unfair surprise" against which this Court has long warned." *SmithKline Beecham Corp.*, 132 S. Ct. at 2159.

[113] *Id*. at 2166.

[114] *Id*. at 2163-64.

[115] *Id*. at 2163.

[116] *Id*.

[117] *Id*. at 2167.

[118] *Id*.

[119] The NFIB Small Business Legal Center recently filed an amicus brief in an Indiana case, arguing that—consistent with *SmithKline Beecham Corp.*—administrative agencies should be denied deference on questions of statutory construction where the agency has changed positions after a business has already invested in a business model or a land use in reliance on the original interpretation. The Indiana Court of Appeals agreed. *Indiana Dep't of Natural Res. v. Whitetail Bluff, LLC*, No. 31A04-1310-PL-502, 2015 WL 416786, at *8 (Ind. Ct. App. Feb. 2, 2015).
[120] "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662, 146 L. Ed. 2d 621 (2000).

[121] *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).
[122] In *SmithKline Beecham Corp.*, the Court emphasized that the parties had relied on DOL's apparent acquiesce to long-standing industry practices.
[123] Eisenberg notes that the FLSA became pretty well settled after the New Deal, and that this corresponded with a decrease in DOL's amicus activity; however, her research confirms that there has been a significant spike in amicus filings over the past twenty years. *See* Eisenberg, *supra* note 96 at 1245. Eisenberg aptly concludes that the recent spike implies that the Bush and Obama Administrations have utilized amicus briefs to advance their respective political agendas.
[124] Eisenberg, *supra* note 96 at 1250.
[125] Pub.L. No. 109–21, 119 Stat. 359; Pub.L. No. 102–243, 105 Stat. 239.
[126] "The TCPA, as amended by the JFPA, defines the term 'unsolicited advertisement' to mean 'any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.' In relevant part, the statute prohibits the 'use [of] any ... device to send, to a telephone facsimile machine, an unsolicited advertisement, unless ... the unsolicited advertisement contains a notice meeting the requirements under paragraph 2(D).'" *Nack v. Walburg*, 715 F.3d 680, 682-83 (8th Cir. 2013) *cert. denied*, 134 S. Ct. 1539, 188 L. Ed. 2d 581 (2014) (internal citations omitted).

[127] 47 C.F.R. § 64.1200(a)(3)(iv).
[128] "As noted by the district court, however, the FCC also set forth a confusing and inconsistent assertion in the 2006 Order. In direct contradiction to the plain language of the regulation and the passage quoted above, the FCC stated, 'the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.' *Walburg*, 715 F.3d at 684.
[129] 47 U.S.C. § 227(b)(a)(C) (2006).
[130] *Walburg*, 715 F.3d at 684.

[131] *Id*.
[132] Karen Harned, A $48 Million Lawsuit Over a Fax, Real Clear Politics (Nov. 15, 2013), *available* online at http://www.realclearpolicy.com/articles/2013/11/15/a_48_million_lawsuit_over_a_fax_734.html (last visited Feb. 11, 2015).
[133] *Walburg*, 715 F.3d at 682.

[134] *Nack v. Walburg*, Case No. 11-1460, Amicus Brief of Federal Communications Commission, *available* online at https://apps.fcc.gov/edocs_public/attachmatch/DOC-315989A1.pdf (last visited Feb. 11, 2015).
[135] *Walburg*, 715 F.3d at 687.
[136] Walburg v. Nack, Sup. Ct. Case No. 13-486, Amici Curiae Brief of National Federation of Independent Business Small Business Legal Center, et al., *available* online at http://object.cato.org/sites/cato.org/files/pubs/pdf/walburg-v-nack.pdf (last visited Feb. 11, 2015).
[137] 5 U.S.C.A. § 553.
[138] Franklin, *supra* note 24 at 306 ("If policymaking by rule becomes sufficiently costly, then agencies will shift to purely adjudicatory mechanisms--sacrificing in the process all of the potential benefits of the rulemaking mode, such as clear notice and broad public participation.").

[139] *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (suggesting that an agency should not change an interpretation in an adjudicative proceeding where doing so would impose "new liability ... on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in a case involving "fines or damages").
[140] NFIB Legal Center actively monitors developments in the federal courts with an aim to weigh in on cases of top concern to the small business community. Nonetheless, we often hear about issues of concern only after time has expired to prepare a brief, or at such a late stage that it infeasible to weigh-in.

[141] FTC has released a guidance on protecting consumer's personal information. Data Security, Federal Trade Commission, *available* online at http://www.ftc.gov/tips-advice/business-center/privacy-and-security/data-security (last visited Feb. 11, 2015).
[142] *Federal Trade Commission v. Wyndam Worldwide Corporation*, Case No. 2:13-cv-01887-ES-SCM, Amici Curiae Brief of Chamber of Commerce, et al., 6, available online at http://www.chamberlitigation.com/sites/default/files/cases/files/2013/U.S.%20Chamber,%20et%20al.%20Amicus%20Brief%20in%20Support%20of%20MTD%20--%20FTC%20v.%20Wyndham%20Worldwide%20Corp.,%20et%20al.%20%28U.S.%20Dist.%20Ct.%20for%20N.J.%29.pdf (last visited Feb. 11, 2015).

[143] *Id*. ("For over a decade, the FTC repeatedly has lobbied for legislation providing it with rulemaking authority under the Administrative Procedure Act (APA) in the area of general data security, thus far to no avail.") (citing Data Security: Hearing Before the H. Comm. on Energy & Commerce, Subcomm. on Commerce, Mfg., & Trade, 112th Cong. 11 (June 15, 2011) (prepared statement of FTC), *available* at http://www.ftc.gov/os/testimony/110615datasecurityhouse.pdf; FTC, Privacy Online: Fair Information Practices in the Electronic Marketplace 36-37 (May 2000), available at http://www.ftc.gov/reports/ privacy2000/privacy2000.pdf).

[144] "Because FTC has never formally promulgated any data security standards, a business has no way of knowing whether it's compliant until after it's been hacked, had its data stolen, completed a costly FTC investigation, and an enforcement action has been filed against it." Federal Trade Commission (FTC) v. Wyndham Worldwide Corp., et al.: U.S. Chamber amicus brief challenges FTC's pattern of punishing businesses that are victims of criminal hacking, U.S. Chamber Litigation Center, *available* online at http://www.chamberlitigation.com/federal-trade-commission-ftc-v-wyndham-worldwide-corp-et-al (last visited Feb. 11, 2015).
[145] *Id*.
[146] Alden Abbott, The Federal Trade Commission's Role in Online Security: Data Protector or Dictator?, Heritage Foundation (Sept. 10, 2014), *available* online at http://www.heritage.org/research/reports/2014/09/the-federal-trade-commissions-role-in-online-security-data-protector-or-dictator (last visited Feb. 11, 2015).
[147] *In the Matter of Labmd, Inc., A Corp.*., 9357, 2014 WL 253518, at *1 (MSNET Jan. 16, 2014).
[148] F.*T.C. v. Wyndham Worldwide Corp.*, No. CIV.A. 13-1887 ES, 2014 WL 1349019 (D.N.J. Apr. 7, 2014), motion to certify appeal granted (June 23, 2014);
[149] "This piecemeal 'regulation by consent order' has enabled the FTC to impose unilaterally its evolving policy choices on businesses without the oversight of the legislative branch, without participation of the corporate community and other interested stakeholders, and without judicial review." Amici Curiae Brief of Chamber of Commerce, *supra* note 131 at 11 (citing *Cf. Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (rejecting notion that an agency should be permitted to "strong-arm[] . . . parties into 'voluntary compliance' without the opportunity for judicial review")).

[150] *Choice Escrow & Land Title, LLC v. BancorpSouth Bank*, 754 F.3d 611, 613 (8th Cir. 2014) (concerning a case where internet fraudsters stole $440,000 from a bank account).
[151] *See* Daniel M. Mroz, *Credit or Debit? Unauthorized Use and Consumer Liability Under Federal Consumer Protection Legislation*, 19 N. Ill. U. L. Rev. 589, 595 (1999).

[152] *See Choice Escrow & Land Title*, 754 F.3d at 616-17.
[153] *See e.g., In re Target Corp. Customer Data Sec. Breach Litig.*, No. MDL 14-2522 PAM/JJK, 2014 WL 6775314, at *1 (D. Minn. Dec. 2, 2014)

[154] "[C]ausation is essential to our conception of tort law because "liability in tort law depends on the defendant's having inflicted harm on the plaintiff." Jared Marshall, *On the Idea of Understanding Weinrib: Weinrib and Keating on Bipolarity, Duty, and the Nature of Negligence*, 19 S. Cal. Interdisc. L.J. 385, 386 (2010) (quoting Ernest Weinrib, Understanding Tort Law, 23 Val. U. L. Rev. 485, 494 (1989)).
[155] We must emphasize that NFIB is *not* calling on FTC to promulgate regulations here. That would be appropriate only if the agency had authority to regulate data security practices.
[156] 29 U.S.C. § 666(a) (emphasis added).
[157] OSHRC Guidance on Repeat Violations and Affiliated Companies, Beveridge & Diamond PC, *available* online at http://www.bdlaw.com/news-1047.html#_edn2 (last visited Feb. 11, 2015).
[158] Case Study: Solis V. Loretto-Oswego Health Care, Law360, New York (Sept. 14, 2012), *available* online at http://www.law360.com/articles/377662/case-study-solis-v-loretto-oswego-health-care (last visited Feb. 11, 2015).
[159] *Supra* note 146.
[160] *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 74-75 (2d Cir. 2012).
[161] *Supra* note 159.
[162] *Loretto-Oswego Residential Health Care Facility*, 692 F.3d at 73.
[163] *Id*. at 74 ("We need not entertain the Secretary's position where, as here, that position was not pressed to the Commission during the adjudicatory process from which the Secretary appeals.").

[164] Id. at 75 ("If the Secretary wishes to alter the Commission's approach to the single employer test, she has many avenues by which to do so. She could challenge the Commission's approach in subsequent cases before ALJs and, ultimately, the Commission. Or she could issue a regulation on the matter.").

[165] NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer, National Labor Relations Board, Office of Public Affairs (Jul. 29, 2014), *available* at http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds (last visited Feb. 11, 2015).
[166] Adam C. Abrahms, Steven M. Swirsky and D. Martin Stanberry, NLRB Issues 13 Complaints Alleging McDonald's and Franchisees Are Joint Employers, Management Memo, Epstein Becker Green (Dec. 19, 2014), *available* online at http://www.managementmemo.com/2014/12/19/nlrb-issues-13-complaints-alleging-mcdonalds-and-franchisees-are-joint-employers/ (last visited Feb. 11, 2015).
[167] Kate Taylor, Franchise Industry Strikes Back at NLRB's 'Joint Employer' Decision, Entrepreneur (Sept. 23, 2014), *available* online at http://www.entrepreneur.com/article/237759 (last visited Feb. 11, 2015).
[168] *Supra* note 166.
[169] Kenneth R. Dolin, Review of NLRB's Specialty Healthcare Test for "Appropriate" Bargaining Units—Part II, Employer Labor Relations Blog, Seyfarth Shaw LLP, *available* online at http://www.employerlaborrelations.com/
[170] https://www.dlapiper.com/en/us/insights/publications/2014/08/employment-fissuring-in-franchising/ (last visited Feb. 11, 2015).
[171] *In re: Browning-Ferris Industries of California, Inc.*, National Labor Relations Board Case 32-RC-109684, Amicus Curiae Brief of NLRB, 14-15, *available* at http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf (last visited Feb. 11, 2015).
[172] Michael Patrick Leahy, Obama's 'Operation Choke Point' Seeks to Destroy Sectors of Private Lending Industry, Breitbart (Jan. 8, 2014), *available* online at http://www.breitbart.com/big-government/2014/01/08/obama-administration-s-operation-choke-point-on-mission-to-destroy-key-sectors-of-private-lending-industry/ (last visited Feb. 11, 2015).
[173] Breanna Deutsch, Justice Dept. aims to cut ties between banks, payday lenders, Daily Caller (Jan. 27, 2014), *available* online at http://dailycaller.com/2014/01/27/justice-dept-aims-to-cut-ties-between-banks-payday-lenders/ (last visited Feb. 11, 2015).
[174] Letter from Jeb Hensarling, Chairman, House Committee on Financial Services, to Honorable Janet Yellen, Chair of the Federal Reserve System (May 22, 2014), *available* online at http://financialservices.house.gov/uploadedfiles/5-22-14_letters.pdf (last visited Feb. 11, 2015).
[175] Todd Zywicki, "Operation Choke Point", The Volokh Conspiracy, The Washington Post (May 24, 2014), available online at http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/24/operation-choke-point/ (last visited Feb. 11, 2015).

[176] Tom Blumer, Establishment Press Has Virtually Ignored DOJ's Pernicious 'Operation Choke Point' For Over a Year, BizzyBlog: The Business End of the Blogosphere (May 2, 2014), *available* online at http://www.bizzyblog.com/2014/05/02/establishment-press-virtually-ignored-dojs-pernicious-operation-choke-point/ (last visited Feb. 11, 2015).

[177] Letter from U.S. Representative Blain Luetkemeyer, *et al.* to Michael Horowitz, U.S. Department of Justice, Inspector General (Oct. 16, 2014), *available* online at http://www.scribd.com/doc/243264284/Letter-to-DOJ-Inspector-General (last visited Feb. 11, 2015).

[178] Ruth Ravve, FDIC Chairman Comes Under Fire During 'Operation Choke Point' Hearings, Fox News (Mar. 24, 2015), *available* online at http://www.foxnews.com/politics/2015/03/24/fdic-chairman-comes-under-fire-during-operation-choke-point-hearings/ (last visited Mar. 26, 2015).

[179] Maggie Ybarra, Small Business Owners Victimized By Operation Choke Point Decry Government Overreach, The Washington Times (Mar. 24, 2015), *available* online at http://www.washingtontimes.com/news/2015/mar/24/operation-choke-point-victim-small-business-owners/?page=all (last visited Mar. 26, 2015).

[180] *Supra* note 165.

[181] "In January 2014, the Justice filed its first proposed settlement as part of Operation Choke Point. The tentative deal called for the $809 million-asset Four Oaks Bank in North Carolina to pay a $1.2 million fine, and to accept tight restrictions on its ability to do business with Internet consumer lenders. A 39-page complaint filed in federal court alleged that Four Oaks willfully ignored violations of the law in order to preserve a lucrative line of business." *Id.*

[182] Elizabeth Price Foley, Testimony before the House Committee on Rules, Providing for authority to initiate litigation for actions by the President inconsistent with his duties under the Constitution of the United States, 8-19 (Jul. 16, 2014), *available* online at http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-FoleyE-20140716.pdf (last visited Feb. 11, 2015).

[183] *Chevron*, *U.S.A.*, 467 U.S. at 843.

[184] William J. Olson, Testimony before the House Subcommittee on Legislative and Budget Process Committee on Rules, The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?, *available* online at http://www.cato.org/publications/congressional-testimony/impact-executive-orders-legislative-process-executive-lawmaking (last visited Feb. 11, 2015).

[185] Executive Order 13496: Notification of Employee Rights Under Federal Labor Laws, United States Department of Labor, Office of Labor-Management Standards, *available* online at http://www.dol.gov/olms/regs/compliance/EO13496.htm (last visited Feb. 11, 2015).

[186] The NLRB's Notice Posting Rule, National Labor Relations Board, Office of Public Affairs (Jan. 6, 2014), *available* online at http://www.nlrb.gov/news-outreach/news-story/nlrbs-notice-posting-rule (last visited Feb. 11, 2015).

[187] *Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 949-50 (D.C. Cir. 2013).

[188] Executive Order 13496, Presidential Documents, Federal Register, Vol. 74, No. 22, 6107 (Feb. 4, 2009), issued Jan. 30, 2009, *available* online at http://www.gpo.gov/fdsys/pkg/FR-2009-02-04/pdf/E9-2485.pdf (last visited Feb. 11, 2015).

[189] Executive Order 13496, *supra* note 39.

[190] *Id*.

[191] "THE doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

[192] *Nat'l Ass'n of Mfrs.*, 717 F.3d at 957.