UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 93551 / November 10, 2021

ADMINISTRATIVE PROCEEDING

File No. 3-20650

In the Matter of **American CryptoFed DAO LLC,** **Respondent.**	**RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO CONFIRM THE TEXT OF SECTION 12(j) OF SECURITIES EXCHANGE ACT OF 1934 AND MANDATE PROCEDURE**

On November 10, 2021, the Securities and Exchange Commission ("Commission" or "SEC") issued an order instituting administrative proceedings ("OIP") against American CryptoFed DAO LLC ("American CryptoFed" or "Respondent") pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"). Pursuant to *Rule 250 (a) Motion for a ruling on the pleadings*, Respondent hereby moves the Commission to confirm that (i) Section 12(j) of the Exchange Act contains the specific phrase "on the record" and (ii) cross-examination is mandated by a chain of statutes of 5 U.S. Code § 554 (a) and (c) as well as 5 U.S. Code § 556 (a) and (d), as a matter of law.

The OIP's Paragraph 11 asserts the following regarding Section 12(j) while omitting the specific phrase "on the record":

"Section 12(j) allows the Commission to deny, suspend the effective date of, suspend for a period not to exceed 12 months, or revoke the registration of a security if, after notice

OS Received 12/16/2021

and opportunity for hearing, the Commission finds the issuer has failed to comply with the Exchange Act or its rules."

However, the relevant text of Section 12 (j) in the statute reads as follows:

"The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, **on the record** after notice and opportunity for hearing, that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder." (15 U.S.C. § 78l(j)) (Emphases added).

It is indisputable that in the OIP's Paragraph 11, the key phrase relevant to these proceedings, "on the record" was missing. Respondent requests the Commission to confirm that these three words in the statute, "on the record" is contained in the text of Section 12(j) of the Exchange Act and codified to 15 U.S.C. § 78l(j) above. The concept "on the record" is so important that it triggers a chain of statutes related to a hearing "on the record" which will definitely lead to a mandated cross-examination in this precedent setting case. These statutes below speak for themselves. All emphases in bold are added.

5 U.S. Code § 554 – Adjudications
(a) This section applies, according to the provisions thereof, in every case of adjudication required **by statute to be determined on the record** after opportunity for an agency hearing,…
(c) The agency shall give all interested parties opportunity for—
(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
(2) to the extent that the parties are unable so to determine a controversy by consent, **hearing and decision on notice and in accordance with sections 556** and 557 of this title.

5 U.S. Code § 556 - Hearings; presiding employees; powers and duties; burden of proof; evidence; **record as basis of decision**
(a) This section applies, according to the provisions thereof, to **hearings required by section** 553 or **554** of this title to be conducted in accordance with this section.
(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with

the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. **A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

The statutes "5 U.S. Code § 554 (a) and (c)" lead the hearing procedure to "5 U.S. Code § 556 (a) and (d)", which specifies:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts (Emphasis added).

It is indisputable that **cross-examination** can only be conducted orally at an in-person hearing. However, the Division of Enforcement ("Division") has stated their disagreement with Respondent's opinion through stating the following in an email dated November 29, 2021, attached as Exhibit 4:

"Fifth, in your November 27, 2021 email, you stated your reasons why you believe a hearing "on the record" must be an oral hearing. While an oral hearing is sometimes appropriate, we disagree that every proceeding must include an oral hearing. For example, Commission Rule of Practice 250 provides for resolving some cases via a motion for summary disposition, a practice which has been upheld by the D.C. Circuit in Kornman v. SEC, 592 F.3d 173, 181 (D.C. Cir. 2010)."

However, the case *Kornman v. SEC* (D.C. Circuit) which the Division cited, failed to even consider 5 U.S. Code § 556 Section (d) — likely because it was not raised by the parties — and therefore these opinions of *Kornman v. SEC* (D.C. Circuit) cannot be regarded as probative into the issue of whether the Statute permits an administrative summary disposition skipping over the procedure of in-person oral hearing for cross-examination. An empirical study of SEC summary disposition from its promulgation in 1995 through 2019, entitled "IS ADMINISTRATIVE SUMMARY JUDGMENT UNLAWFUL?", authored by

Alexander Platt, published at Harvard Journal of Law & Public Policy, Vol.44, No.2, Spring 2021, attached as Exhibit 6, demonstrates below the illegality of the SEC summary disposition for cases requiring a hearing "on the record" (APA in the quotes below refers to Administrative Procedure Act):

The SEC and other agencies are using administrative summary judgment to impose sanctions on defendants in formal administrative adjudications without conducting any inperson, oral hearing. This practice is prohibited. The plain text of Section 556(d) of the APA, the legislative history of the provision, and the contemporaneous legal practice all indicate that Congress permitted agencies to skip over the in-person hearing only in a subset of formal adjudications—those involving "rule making or determining claims for money or benefits or applications for initial licenses"—and not those involving the imposition of "sanctions." The judicial opinions that have upheld administrative summary judgment in sanctions cases are unpersuasive because they fail to confront this provision or its historical context. (p.328)

The author also analyzed the case of *Kornman v. SEC* and concludes below that the D.C. Circuit decision cannot be regarded as probative.

In *Kornman v. SEC,* the D.C. Circuit upheld the SEC's use of summary disposition in an enforcement action brought under Investment Advisers Act § 203(f) that imposed a collateral bar—that is, a license revocation. As discussed above, the APA's plain text and well-established precedents require that the hearing in such an action (required by statute to be "on the record") comply with the APA's rules governing formal adjudication, including Section 556(d).In fact, the Supreme Court had specifically recognized that an action brought by the SEC under Investment Advisers Act § 203(f) was "clearly 'a case of adjudication' within 5 U.S.C. § 554"— thus triggering the APA's formal adjudication rules, including Section 556**. As shown above, Section 556(d) plainly entitles the respondent in such an action an absolute right to an oral hearing…**(p.292).(Emphasis added).

Thus, in *Kornman,* the D.C. Circuit failed to consider the APA or Section 556(d) specifically and relied mainly on legally inapposite cases. The only case it relied on that was on the right legal point turned on a pure policy analysis that similarly failed to consider the text or history of the operative statute. (p.295).

The Division and Respondent discussed the procedure related to the hearing "on the record" and summary disposition, but could not reach an agreement, via email

communications from November 18 , 2021 through December 1, 2021, attached as Exhibit 1, 2, 3, 4 and 5.

For the reasons set forth above, Respondent respectfully requests that the Commission confirms that (i) Section 12(j) of the Exchange Act contains the specific phrase "on the record" and (ii) cross-examination is mandated by a chain of statutes of 5 U.S. Code § 554 (a) and (c) as well as 5 U.S. Code § 556 (a) and (d), as a matter of law.

Dated: December 16, 2021

Respectfully submitted,

DocuSigned by:
Marian Orr
AE52AD38E6AC4EC...

By /s/ Marian Orr

Marian Orr

CEO, American CryptoFed DAO LLC

1607 Capitol Ave Ste 327

Cheyenne, WY. 82001

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was filed by eFAP and was served on the following on this 16th day of December 2021, in the manner indicated below:

By Email:

Christopher Bruckmann, Trial Counsel

Division of Enforcement – Trial Unit

U.S. Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549-5949

202-551-5986

bruckmannc@sec.gov

DocuSigned by:
Marian Orr
AE52AD38E6AC4EC...

By /s/ Marian Orr

Marian Orr

CEO, American CryptoFed DAO LLC

1607 Capitol Ave Ste 327

Cheyenne, WY. 82001

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 93551 / November 10, 2021

ADMINISTRATIVE PROCEEDING

File No. 3-20650

In the Matter of **American CryptoFed DAO LLC,** **Respondent.**	**EXHIBIT INDEX FOR RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO CONFIRM THE TEXT OF SECTION 12(j) OF SECURITIES EXCHANGE ACT OF 1934 AND MANDATE PROCEDURE**

Exhibit 1 - November 18, 2021 American CryptoFed Email to Division of Enforcement.

Exhibit 2 – November 22, 2021 Division of Enforcement Letter to American CryptoFed.

Exhibit 3 – November 27, 2021 American CryptoFed Email to Division of Enforcement.

Exhibit 4 - November 29, 2021 Division of Enforcement Letter to American CryptoFed.

Exhibit 5 - December 1, 2021 American CryptoFed Email to Division of Enforcement

Exhibit 6 - "IS ADMINISTRATIVE SUMMARY JUDGMENT UNLAWFUL?",
by Alexander Platt, Harvard Journal of Law & Public Policy, Vol.44, No.2, Spring 2021.

OS Received 12/16/2021

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 1

---------- Forwarded message ---------
From: **Marian Orr** <marian.orr@americancryptofed.org>
Date: Thu, Nov 18, 2021 at 8:50 AM
Subject: In the Matter of American CryptoFed DAO LLC, AP File No. 3-20650
To: Bruckmann, Christopher <bruckmannc@sec.gov>
Cc: Zerwitz, Martin <ZerwitzM@sec.gov>, Baker, Michael <BakerMic@sec.gov>, Scott Moeller <scott.moeller@americancryptofed.org>, Zhou Xiaomeng <zhouxm@americancryptofed.org>

Dear Mr. Bruckmann,

On November 10, 2021, the Securities and Exchange Commission ("Commission") issued an order instituting administrative proceedings ("OIP") against American CryptoFed DAO LLC ("Respondent") pursuant to Section 12(j) of the Securities Exchange Act of 1934.

The OIP stated: "IT IS FURTHER ORDERED that the institution of these proceedings stays the effectiveness of the Respondent's Form 10 filed on September 16, 2021."

However, the statute's plain text in Section 12 (j) prohibits the Commission from issuing such an order leading to a sanction without a hearing conducted "on the record."

The relevant text of Section 12 (j) reads as follows:
"The Commission is authorized, by order, as ***it deems necessary or appropriate for the protection of investors*** to deny, ***to suspend the effective date of***, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, ***on the record*** after notice and opportunity for hearing, that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder." (15 U.S.C. § 78*l*(j)) (*Emphases added*).

The statute's plain text in Section 12 (j) explicitly mandates a hearing "on the record," granting Respondent an absolute right to an oral hearing in cases where the Commission seeks to suspend the effective date of a security registration as stated in this OIP. An order to stay Respondent's Form 10 filing can only be made after a hearing "on the record" is held before an administrative law judge ("ALJ") designated

by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form, wholly considered, and submitted to the Commission.

The phrase 'on the record' indicates that Respondent is entitled in these administrative proceedings to invoke the formal process of an oral hearing. This ensures that Respondent has the opportunity to provide a defense by oral or documentary evidence, rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts prior to any sanctions.

At the hearing, the burden is on the Commission to prove, by a preponderance of the evidence, that "it deems necessary or appropriate for the protection of investors" to stay Respondent's Form 10 filing. By explicitly requiring a hearing "on the record," the statute of Section 12(j) prohibits the Commission from abdicating its burden of proof in cases such as this OIP seeking to impose a sanction staying Respondent's Form 10 filing.

In summary, as a matter of law, the Commission should immediately withdraw the order which has stayed Respondent's Form 10 filing, because i) there is no genuine issue as to any material fact, and ii) the order does not meet the requirements of the plain text of Section 12 (j) of the Securities Exchange Act of 1934.

Please confirm your receipt of this email.
Please let me know by November 23, 202, whether you agree to withdraw the order.

Sincerely,

Marian Orr
CEO, American CryptoFed DAO
1607 Capitol Ave Ste 327
Cheyenne, WY. 82001

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 2

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ENFORCEMENT

November 22, 2021

BY EMAIL

Marian Orr
CEO, American CryptoFed DAO
1607 Capitol Ave, Ste 327
Cheyenne, WY 82001
Marian.Orr@americancryptofed.org

Re: *In the Matter of American CryptoFed DAO LLC*
AP File No. 3-20650

Dear Ms. Orr:

I write to respond to several issues that you have raised in recent e-mails regarding the above-captioned administrative proceeding that has been instituted by the Securities and Exchange Commission ("SEC" or "Commission") against American CryptoFed DAO LLC ("American CryptoFed").

First, in this administrative proceeding, I only represent the SEC's Division of Enforcement (the "Division"), and not the Commission as a whole or the individual Commissioners. In SEC administrative proceedings such as this one, the Commission acts as the final decision-maker, and neither I, nor any other member of the Division can speak for, bind, or alter the orders of the Commission in this matter. Thus, American CryptoFed may make any request to change a Commission order by filing a motion with the Commission, as set forth in Rule 154 of the SEC's Rules of Practice. We appreciate the opportunity to discuss such issues with you before you file a motion, as there are times when we might agree not to oppose a motion by American CryptoFed (as was the case when American CryptoFed asked for additional time to file an Answer to the Order Instituting Proceedings and the Division agreed not to oppose that motion).

Second, we are seeking clarification regarding the Notices of Appearance that American CryptoFed filed on November 14, 2021 and sent to us by e-mail that same day. Rule 102(b) provides in part that "a bona fide

officer of a corporation, trust or association may represent the corporation, trust or association." We do not contest Ms. Orr's ability to represent American CryptoFed in the proceeding as its Chief Executive Officer. It is, however, unclear whether Scott Moeller and Xiaomeng Zhou, each of whom are simply listed as an "Organizer" of American CryptoFed, qualify as a bona fide officer of American CryptoFed. We request that you describe how each of them meet the definition of "officer" in 17 CFR § 240.3b-2, or are otherwise able to represent American CryptoFed in the proceeding.

Third, we are responding to your e-mail dated November 18, 2021 requesting that the Commission immediately withdraw the portion of the Order Instituting Proceedings that stayed the automatic effectiveness of American CryptoFed's Form 10 registration statement. As discussed above, the Division of Enforcement does not have the authority to withdraw an order of the Commission in this proceeding, or any portion of it. If American CryptoFed wishes to seek relief from the stay, it may file a motion under Rule 154. The Division would likely oppose any such motion. The Division's position is that the Commission has not imposed a sanction in this matter. The Order Instituting Proceedings makes clear that the Commission has not denied the registration statement, suspended it, or revoked it; rather it states that the Commission has instituted proceedings to determine "whether it is necessary and appropriate for the protection of investors to deny, or suspend the effective date of the" securities registered by the Form 10. Additionally, as stated in the Order Instituting Proceedings, "the institution of these proceedings *stays* the effectiveness of the Respondent's Form 10" (emphasis added). The Division notes that this stay is consistent with the Supreme Court's ruling in *SEC v. Jones*, 298 U.S. 1 (1936) regarding the legal effect of the SEC instituting proceedings to review a registration statement. There, the Supreme Court noted that a Commission order instituting proceedings to review a registration statement *automatically* stayed that registration statement from becoming effective, even without an order from the Commission specifying that such a stay was being put in place: "When proceedings were instituted by the commission and the registrant was notified and called upon to show cause why a stop order should not be issued, the practical effect was to suspend, pending the inquiry, all action of the registrant under his statement." *Id.* at 18. Additionally, it is unclear from your November 18 e-mail whether American CryptoFed is only seeking to have the stay lifted, or whether in the alternative it is seeking an expedited hearing. While we do not agree with your characterization that a hearing "on the record" must be an oral hearing, we have no objection to asking the Commission to take this matter under consideration on an expedited basis. Indeed, upon your request, the Division produced the investigative file more quickly than required by Rule 230 and even before American CryptoFed had been officially served with the Order

Instituting Proceedings. Accordingly, if American CryptoFed wishes to seek expedited consideration of this matter, please let us know.

Fourth, we are responding to your e-mail dated November 19, 2021 regarding a prehearing conference in this matter. We appreciate your efforts to reach out and prepare for this conference in advance, and are willing to conduct the prehearing conference promptly after American CryptoFed files its Answer to the Order Instituting Proceedings. As indicated above, the Division cannot bind the Commission in this matter, and several of the issues you raised in your e-mail appear, at least as we presently understand them, to be efforts to bind the Commission, both in this matter and more broadly. We are not foreclosing any avenues of discussion for the prehearing conference, rather we are simply trying to be clear about our role and authority in this matter. We think, therefore, that a more fruitful topic for discussion at the prehearing conference would be whether there are any amendments American CryptoFed could make to its Form 10 such that the parties could agree to recommend to the Commission that it accept a settled resolution and/or dismiss these proceedings, which may include allowing a revised, and legally compliant, American CryptoFed registration statement to become effective. As part of those discussions, we are willing to listen and consider any suggestions you have for resolving this matter.

Finally, if American CryptoFed does wish to expedite these proceedings (which is one of the intended purposes of a prehearing conference under Rule 221) we suggest that discussing several of the topics listed in Rule 221 may help achieve that goal, including exchanging witness lists and copies of exhibits; stipulations; the schedule for exchanging prehearing motions or briefs; and summary disposition of any or all issues. We are happy to discuss any of those topics at the prehearing conference after you file your Answer, or in advance of the prehearing conference if you feel that would also be productive.

Please feel free to contact us to further discuss any of these issues.

Regards,

/s/ Christopher M. Bruckmann
Christopher M. Bruckmann

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 3

---------- Forwarded message ---------
From: **Marian Orr** <marian.orr@americancryptofed.org>
Date: Sat, Nov 27, 2021 at 6:22 AM
Subject: Re: Prehearing Conference - In the Matter of American CryptoFed DAO LLC, AP File No. 3-20650
To: Bruckmann, Christopher <bruckmannc@sec.gov>
Cc: Zerwitz, Martin <ZerwitzM@sec.gov>, Baker, Michael <BakerMic@sec.gov>, Scott Moeller <scott.moeller@americancryptofed.org>, Zhou Xiaomeng <zhouxm@americancryptofed.org>

Dear Mr. Bruckmann,

Please consider this email as my third response to your letter of November 22, 2021. This email focuses on explaining the statute requirements as to why American CryptoFed is entitled to an oral hearing, when a hearing is explicitly required by statute to be conducted "on the record." My next email will focus on explaining American CryptoFed's methodology as to how we can explore a settled resolution within the Commission's existing regulatory structure to accommodate cryptocurrency innovations.

"While we do not agree with your characterization that a hearing "on the record" must be an oral hearing……", you stated in your November 22, 2021, letter.

A chain of statutes related to a hearing "on the record" will definitely lead us to an oral hearing. These statues below speak for themselves. All emphases in bold are added.

1. **5 U.S. Code § 554** – Adjudications

- (a) This section applies, according to the provisions thereof, in every case of adjudication required **by statute to be determined <u>on the record</u>** after opportunity for an agency hearing,…….

- (c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
(2) to the extent that the parties are unable so to determine a controversy by consent, **hearing and decision on notice and in accordance with sections 556** and 557 of this title.

2. **5 U.S. Code § 556** - Hearings; presiding employees; powers and duties; burden of proof; evidence; **record as basis of decision**

- (a) This section applies, according to the provisions thereof, to **hearings required by section** 553 or **554** of this title to be conducted in accordance with this section.

- (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. **A party is entitled to present his case or defense by oralor documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

The statues "5 U.S. Code § 554 (a) and (c)" lead us to "5 U.S. Code § 556 (a) and (d)", which specifies "**A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.**"

It is indisputable that **cross-examination** can only be conducted in oral hearing.

OS Received 12/16/2021

Of course, we are open to your arguments to prove your statement "we do not agree with your characterization that a hearing "on the record" must be an oral hearing……"

As usual, please confirm receipt of this email.
I'm looking forward to your response.

Sincerely,

Marian Orr
CEO, American CryptoFed DAO
1607 Capitol Ave Ste 327
Cheyenne, WY. 82001

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 4

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ENFORCEMENT

November 29, 2021

BY EMAIL

Marian Orr
CEO, American CryptoFed DAO
1607 Capitol Ave, Ste 327
Cheyenne, WY 82001
Marian.Orr@americancryptofed.org

Re: *In the Matter of American CryptoFed DAO LLC*
AP File No. 3-20650

Dear Ms. Orr:

I write to respond to the issues raised in your recent emails regarding the above-captioned administrative proceeding instituted by the Securities and Exchange Commission ("Commission") against American CryptoFed DAO LLC ("American CryptoFed").

First, in your November 25, 2021 email, you asked for additional information regarding our position that we are not convinced that Mr. Moeller or Mr. Zhou can represent American CryptoFed in this proceeding. As we previously indicated, we are not seeking anything further with respect to this at this time, but we reserve the right to do so in the future. If we seek relief with respect to this in the future, we will explain our reasoning in more detail at that time.

Second, in your November 25, 2021 email you asked "can you let us know where in any of our disclosures to the Commission has American CryptoFed stated it will use Form S-8 'to distribute Locke tokens to more than 500 entities', which the OIP alleges in Paragraph 8." We believe you misunderstand the Order Instituting Proceedings ("OIP"). The relevant portion of paragraph 8 of the OIP states that

> American CryptoFed asserted that upon effectiveness of the Form 10, it will use Form S-8 . . . to distribute Locke tokens to more

> than 500 entities, such as municipalities, merchants, banks, and "crypto exchanges," and non-employee individual contributors.

We believe this paragraph makes clear, as written, that the allegation is that American CryptoFed plans to use the Form S-8 to distribute Locke tokens to more than 500 entities ***and*** non-employee individual contributors. This point is made even more clear by the first sentence of paragraph 9 of the OIP, which begins with "*[t]he individuals and entities* to whom American CryptoFed planned to distribute Locke tokens are not employees of American CryptoFed, . . ." (emphasis added). The bases for these allegations include the statements in the Form 10 that

> CryptoFed will grant restricted, untradeable and non-transferable Locke tokens to municipalities, merchants, banks, crypto exchanges and individual contributors to execute the Ducat Economic Zone plan attached as Exhibit 2. In anticipation of mass distribution which will quickly surpass the 500-person threshold under Exchange Act Section 12(g)3, CryptoFed elects to proactively file this Form 10 to subject itself to the periodic reporting requirements and then file Form S-8 upon the effectiveness of Form 10 in 60 days.

We contend that the preceding quote outlines a plan to engage in a mass distribution to both entities and individual contributors, and that the allegation in paragraph 8 of the OIP correctly alleges that American CryptoFed intends to use the Form S-8 to engage in that distribution.

Third, in your November 26, 2021 email, you laid out your position with respect to the Commission's Order staying the effectiveness of American CryptoFed's Form 10. We disagree with multiple aspects of your position, including that staying the effectiveness of a registration statement is the same as staying a court proceeding, and that any statements in our November 22, 2021 letter are false. Rather, we contend that there is a distinction between denying, suspending or revoking a registration statement, and staying the automatic effectiveness of a registration statement. The former are potential sanctions at the end of a proceeding, whereas the latter is a temporary measure during the proceeding. We also do not agree with your characterizations of the statements in our November 22, 2021 letter as "admissions" that there should not be a stay order. If you file a motion to lift the stay, we will likely oppose that motion for the reasons set forth in our November 22, 2021 letter.

Fourth, in your November 26, 2021 email you replied to our earlier inquiry about whether you were seeking to expedite these proceedings by

stating that "it would be inappropriate to ask 'the Commission to take this matter under consideration on an expedited basis.'" We had extended the offer to expedite the proceedings because we believed it might have been something you wished to do. We appreciate your clarification that you do not wish to expedite these proceedings. We may nonetheless choose to seek an expedited resolution to this matter and can discuss that with you at the prehearing conference after you file your Answer to the Order Instituting Proceedings. By our calculations, your Answer is due on Monday, December 6, 2021. We ask that you confirm that you plan to file your Answer by that date.

Fifth, in your November 27, 2021 email, you stated your reasons why you believe a hearing "on the record" must be an oral hearing. While an oral hearing is sometimes appropriate, we disagree that every proceeding must include an oral hearing. For example, Commission Rule of Practice 250 provides for resolving some cases via a motion for summary disposition, a practice which has been upheld by the D.C. Circuit in *Kornman v. SEC*, 592 F.3d 173, 181 (D.C. Cir. 2010).

Sixth, in your November 28, 2021 email, you set forth "American CryptoFed's methodology as to how we can collaboratively explore a settled resolution within the Commission's existing regulatory structure to accommodate cryptocurrency innovations." To the extent that this email proposes changes to existing Commission Rules and Regulations, I remind you that in this proceeding, I represent the Division of Enforcement, and not the Commission or the individuals Commissioners. If you have changes to Commission Rules or Regulations that you would like to propose, you are free to propose that the Commission enact new rules or regulations. To the extent you are proposing a path forward in this specific instance by requesting Commission authorization under Exchange Act Section 12(c) to accept alternative information in lieu of the requirements of Exchange Act Section 12(b), please provide a detailed explanation regarding what alternative information American CryptoFed would provide in response to each of the categories of missing information specified in the OIP and why that information is "of comparable character" to the required information. We do not believe that Section 12(c) "mandates" the acceptance of alternative information, but will evaluate any specific proposed alternative information in good faith and determine whether to oppose or concur with your request.

Please feel free to contact us to further discuss any of these issues.

Regards,

/s/ Christopher M. Bruckmann
Christopher M. Bruckmann

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 5

---------- Forwarded message ---------
From: **Marian Orr** <marian.orr@americancryptofed.org>
Date: Wed, Dec 1, 2021 at 9:32 AM
Subject: Re: In the Matter of American CryptoFed, AP File No. 3-20650
To: Bruckmann, Christopher <bruckmannc@sec.gov>
Cc: Scott Moeller <scott.moeller@americancryptofed.org>, Zhou Xiaomeng <zhouxm@americancryptofed.org>, Zerwitz, Martin <ZerwitzM@sec.gov>, Baker, Michael <BakerMic@sec.gov>

Dear Mr. Bruckmann,

Thank you very much for your letter of November 29, 2021. This email is to respond point-by-point to your letter with headings correlating to the headings in your letter.

First, "As we previously indicated, we are not seeking anything further with respect to this at this time, but we reserve the right to do so in the future. If we seek relief with respect to this in the future, we will explain our reasoning in more detail at that time." you stated with regards to Scott Moeller and Xiaomeng Zhou's representation of American CryptoFed. We do not believe you can "reserve the right to do so in the future", while refusing to provide us an explanation and thereby creating unnecessary uncertainties and undue burdens for us. We will file a motion to ask you to provide your reasoning as to why you "are not convinced that Mr. Moeller or Mr. Zhou can represent American CryptoFed in this proceeding.", given that I already explained to you on November 24, 2021, as to why both Mr. Moeller and Mr. Zhou are eligible to represent American CryptoFed pursuant to Rule 102(b).

Second, on November 23, 2021, I explained in my email that i) American CryptoFed DAO Constitution Section 14.6 (p. 12-13), attached to Form 10 filing as Exhibit 1, clearly defines that the Form S-8 will be used for natural persons, satisfying the requirements of the instructions to Form S-8, and ii) distribution to entities will be pursuant to Ducat Economic Zone Plan, attached to the Form 10 filing as Exhibit 2, which defines the eligibility as "municipalities and/or businesses with $5 million USD assets", in compliance with the Commission's "Amendments to Accredited Investor Definition" adopted on August 26, 2020 under the Securities Act of 1933 ("Securities Act").

Upon Form 10 registration becoming effective, American CryptoFed will be able to distribute to an unlimited number of municipalities and/or businesses entities with $5 million USD assets. It is obvious that American CryptoFed does not need any additional form filings other than the Form 10 to achieve mass adoption by municipalities and/or businesses entities with $5 million USD assets.

Can you please explain why American CryptoFed would need to use Form S-8 for mass distribution to municipalities and/or businesses entities with $5 million USD assets? We want to be sure that you interpret our Form 10 filing in good faith. "The SEC's order substitutes "entities" for "persons" and adds the list of potential recipients to the registrant's statement. By this legerdemain, the SEC converts a statement that might be true in some cases into a statement that is false in all cases.", said Mr. Keith Paul Bishop, partner at Allen Matkins, in his article entitled "SEC Alleges Form 10 Was Misleading, But Is The SEC's Order Itself Misleading?". https://www.natlawreview.com/article/sec-alleges-form-10-was-misleading-sec-s-order-itself-misleading

Otherwise, we will need to file a Motion for More Definite Statement to seek for specification pursuant to Rule 220 (d).

Third, the Supreme Court's ruling in SEC v. Jones, 298 U.S. 1 (1936) you cited, does not support the Commission's Stay Order, because the clock of the registration statement was still running in SEC v. Jones, while the clock of the registration statement of American CryptoFed's Form 10 filing has been stopped by the Stay Order. Unless you can provide better precedent for the claims made, we will file a motion to have the Stay Order lifted.

Fourth, I confirm that we will file our Answer to the OIP by December 6, 2021.

Fifth, the case *Kornman v. SEC* (D.C. Circuit) you cited, failed to even consider **5 U.S. Code § 556** Section (d) below — likely because it was not raised by the parties — and therefore these opinions cannot be regarded as probative into the issue of whether the Statute permits the Commission's administrative summary disposition. Unless you can provide better precedent for the claims made, we will file a motion to confirm that the plain text of **5 U.S. Code § 556** Section (d) below can

only be reasonably interpreted as granting respondents an absolute right to an oral hearing.

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5 U.S. Code § 556 - Hearings; presiding employees; powers and duties; burden of proof; evidence; **record as basis of decision**

· (a) This section applies, according to the provisions thereof, to **hearings required by section** 553 or **554** of this title to be conducted in accordance with this section.

· (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. **A party is entitled to present his case or defense by oralor documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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Sixth, the rationale for the existence of Statute 15 U.S. Code § 78l (c) and (h) is for the scenarios that Statute 15 U.S. Code § 78l (b) and (g) are not applicable. We will file a motion to confirm that American CryptoFed is entitled to apply for exemptions and alternative information provided by 15 U.S. Code § 78l (c) and (h), unless you can provide a convincing legal argument to prove otherwise. At the same time, we will draft a proposal for you and the Commission to consider. We may enlist a group of legal professionals from various law firms to assist with drafting the

proposal to the Commission, and invite the crypto community to participate in this collaborative effort as well, including the hearing required in section (h).

As usual, please confirm receipt of this email.

Sincerely,

Marian Orr
CEO, American CryptoFed DAO
1607 Capitol Ave Ste 327
Cheyenne, WY. 82001

RESPONDENT

AMERICAN CRYPTOFED DAO LLC

EXHIBIT 6

IS ADMINISTRATIVE SUMMARY JUDGMENT UNLAWFUL?

ALEXANDER I. PLATT*

ABSTRACT

When the Securities and Exchange Commission (SEC) files an administrative enforcement action, the respondent is ordinarily entitled to present their case orally at an in-person hearing before one of the agency's Administrative Law Judges. But, in hundreds of administrative proceedings over the past twenty-five years, the agency has skipped over this in-person hearing, instead resolving actions on motions for "summary disposition."

This is illegal. Most SEC administrative proceedings are governed by the Administrative Procedure Act's (APA) provisions governing "formal" adjudications. One of those provisions—long overlooked or misinterpreted by scholars and courts—can only be reasonably interpreted as granting respondents an absolute right to an oral hearing in cases where the agency is seeking to impose "sanctions" like those the SEC imposes in administrative proceedings. The 1946 Congress that enacted the APA declined to follow the trans-substantive summary judgment rule that had

* Associate Professor of Law, University of Kansas School of Law For helpful comments I thank Michael Asimow, Kent Barnett, Josh Braver, Colin Doyle, Greg Elinson, Abbe Gluck, Guha Krishnamurthi, Rick Levy, Aaron Nielson, Peter Salib, Lawrence Solum, Matthew Stephenson, Louis Virelli, Steve Ware, Sarah Winsberg, and participants at the Sixth Annual Civil Procedure Workshop hosted by Northwestern University and at the New Voices in Administrative Law Panel at the AALS 202 Annual Meeting Special thanks to James Tierney for thoughtful and critical engagement on numerous drafts For research assistance, I thank Charlie Birkel, Avery Holloman, and Ricardo Cruzat Reyes I respectfully dedicate this paper to the memory of Stephen F Williams, a wonderful mentor, role model, and inspiration

OS Received 12/16/2021

been recently adopted as part of the Federal Rules of Civil Procedure, and instead followed the alternative model of the many American states that permitted summary judgment only in specifically enumerated categories of cases. The legislative history and contemporaneous interpretations confirm that the APA prohibits summary process for formal adjudications leading to "sanctions."

Administrative summary judgment is also questionable on policy grounds. Proponents argue that administrative summary judgment promotes administrative efficiency, but have overlooked how the procedure may distort agency enforcement priorities, undermine congressional control of administrative agencies, be subject to systematic abuse by agencies, and unfairly deprive some individuals of important procedural rights.

This paper provides an empirical study of SEC summary disposition from its promulgation in 1995 through 2019, examines the text and history of the APA to demonstrate the illegality of this procedure, and challenges the conventional policy justifications for the procedure.

OS Received 12/16/2021

TABLE OF CONTENTS

OS Received 12/16/2021

OS Received 12/16/2021

INTRODUCTION

When the Securities and Exchange Commission (SEC) launches an enforcement action in its administrative forum, the respondent is ordinarily entitled to an oral in-person hearing before an Administrative Law Judge (ALJ). But, in hundreds of cases, the agency has dispensed with this time-consuming hearing, instead resolving the matter on a motion for "summary disposition," analogous to the motion for summary judgment under Federal Rule of Civil Procedure 56.[1]

This is illegal.[2] Virtually all of the cases where the SEC obtains summary dispositions are covered by the Administrative Procedure Act's (APA) provisions governing "formal" adjudications.[3] One of those provisions—long overlooked or misinterpreted by scholars, courts, and litigants—grants respondents an absolute right to an oral hearing in formal adjudications where the agency is seeking to impose "sanctions" like those at stake in the SEC cases.[4] In these cases, a respondent is entitled to an in-person hearing even if the government can demonstrate that there is no genuine dispute as to any material fact.

As I show below,[5] the text of the APA provision at issue[6] can only be reasonably read as permitting agencies to skip over oral hearings in three specifically enumerated classes of formal proceedings—those involving "rule making or determining claims for money or

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Infra Part I C

2 Here and throughout I use the terms "unlawful" and "illegal" in a lawyerly sense, meaning that the practice is prohibited by the governing statute when that statute is construed using the traditional tools of statutory construction and that I believe a court would be likely to strike the practice down as illegal if and when presented with the interpretive evidence I present here *Cf. infra* Part II E (discussing three modern courts that have upheld SEC Summary Disposition without referring to the APA)

3 *Infra* Part I B (discussing the distinction between "formal" and "informal" adjudi cation under the APA); *see also* Appendix A (listing SEC statutory authorities that pro vide for hearings "on the record")

4 *Infra* Part II

5 *Infra* Part II A

6 5 U S C § 556(d) (20 8)

OS Received 12/16/2021

benefits or applications for initial licenses"[7]—and impliedly prohibits this procedure in all other cases, including those involving "sanctions." The legislative history of the provision at issue confirms this interpretation: shortly before enactment, the Senate Judiciary Committee rejected a proposal to expand the operative provision to apply to "'accusatory' proceedings," explaining that such proceedings "are traditionally the type of proceeding in which seeing and hearing the witnesses is required. . . ."[8]

Contemporary lawyers may find it impossible to believe that Congress would have wanted to force an agency to waste time on a hearing where there was no genuine dispute as to any material fact. But such an absolute guarantee would have been quite familiar to the legislators who enacted the APA in 1946.[9] At the time, many state courts allowed for summary judgment only in a narrow subset of cases; for cases outside the specified categories, it was unavailable.[10] Congress evidently followed the model of these jurisdictions when it drafted the summary judgment provision of the APA, limiting an agency's ability to take away a defendant's right to an in-person hearing to certain types of formal administrative adjudications just as many states limited summary judgment to certain types of actions.[11]

Although three federal courts have upheld SEC summary disposition, none of them even considered the key provision or its history (likely because it was not pressed by the parties), and so the decisions cannot be regarded as probative.[12]

This legally suspect procedure has not only been used by the SEC to resolve hundreds of individual enforcement actions, it has also

7 *Id.*
8 *Infra* Part II B
9 *Infra* Part II C
0 *Infra* Part II C
Id.
2 *Infra* Part II E

OS Received 12/16/2021

skewed the agency's enforcement priorities at times toward bringing the type of cases that are amenable to resolution using the technique. The controversial "broken windows" enforcement program that the agency pursued under the leadership of Chair Mary Jo White rested very heavily on summary dispositions and might not have been possible without it.[13] And many other federal agencies have been relying on administrative summary judgment in formal administrative proceedings resulting in sanctions.[14]

The agencies, courts, and commentators who have promoted and embraced administrative summary judgment have generally relied on a very simple appeal to the concept of administrative efficiency—the procedure allows agencies to reduce procedural costs without sacrificing meaningful procedural rights.[15] But this conventional justification fails to confront the possibility that the procedure as it is actually used on the ground may distort agency enforcement priorities, undermine congressional control of administrative agencies, be subject to systematic abuse by agencies, and unfairly deprive some individuals of important procedural rights.[16] Below, I illustrate these concerns using SEC summary disposition as a case study. But the scope of these (and other) problems with the administration of summary judgment across the enforcement bureaucracy is unknown. The last comprehensive study of the practice was sponsored by the Administrative Conference of the

3 *Infra* Part I C

4 *Infra* Part III

5 *Infra* Part V A

6 Notably, agencies' own judgments regarding the policy merits of administrative summary judgment may be less relevant in this context because courts do not apply *Chevron* deference to agency interpretations of the APA *See, e.g.*, Metro Stevedore Co v Rambo, 52 U S 2 , 37 n 9 (997) (declining to defer to agency director s interpre tation of the APA because, inter alia, [t]he APA is not a statute that the Director is charged with administering)

OS Received 12/16/2021

United States (ACUS) and was completed over fifty years ago.[17] In this paper, I outline some key open questions for future researchers regarding how administrative summary judgment is being used across the federal government.[18]

This paper proceeds in five parts. Part I reviews the structure of SEC administrative enforcement including its relation to the APA. It also reviews the origins of SEC summary disposition and provides an empirical examination of how the SEC has used the tool from its creation through the first three years of the Clayton SEC. Part II shows why this procedure is illegal under the APA—examining the text of that statute, its legislative history, the historical context, early post-enactment interpretations, and then modern judicial decisions. Part III reviews other agencies across the federal government that have used administrative summary judgment in formal adjudications leading to sanctions. Part IV offers some additional explanations for why this apparently illegal procedure has survived. Part V presents and criticizes the conventional policy justification for administrative summary judgment, and outlines important open questions about how it is actually being used to shape administrative adjudication and enforcement.

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7 Ernest Gellhorn & William F Robinson, Jr , *Summary Judgment in Administrative Adjudication*, 84 HARV L REV 6 2 (97) (finding the procedure effectively reduced ad ministrative delay and encouraging broader adoption of the practice by federal agen cies)

8 There are ongoing debates about the proper method for interpreting statutes *See, e.g.*, Lawrence Solum, *Legal Theory Lexicon: Theories of Statutory Interpretation and Con struction*, LEGAL THEORY BLOG (Dec 2, 20 8), https //lsolum typepad com/legalthe ory/20 8/ 2/legal theory lexicon theories of statutory interpretation and construc tion html [https //perma cc/4UUV HW6J]; Alexander I Platt, *Debiasing Statutory Interpretation,* 39 OHIO N U L REV 275, 279 8 (20 2) (discussing methodological un certainty) Adherents of all major theories of statutory interpretation should find some thing of interest in this Article Textualists can focus on the analysis of the text of § 556(d) provided in Part II A Intentionalists can focus on the legislative history and historical context discussed in Parts II B and II C, and perhaps also the post enactment history discussed in Part II D Purposivists, Eskridgean dynamicists, and Posnerian pragmatists might focus on the policy arguments discussed in Part V

OS Received 12/16/2021

I. THE RISE OF SEC SUMMARY DISPOSITION

The SEC's mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[19] The SEC's Enforcement Division "primarily supports the SEC's mission by investigating and bringing actions against those who violate the federal securities laws."[20] Following an investigation, the Enforcement Division can refer a matter to the U.S. Department of Justice (DOJ) for consideration of criminal charges,[21] file a civil lawsuit in federal district court, or commence an Administrative Proceeding (AP).[22] This article is concerned exclusively with the final option.

This part reviews the basic structure of SEC administrative enforcement, and then provides a detailed review of the Summary Disposition procedure, including an overview of how the procedure has been used by the agency from its inception in 1995 through the first three years of Chairman Jay Clayton's leadership of the agency.

A. SEC Administrative Proceedings

Administrative Proceedings (APs) are governed by the SEC's own Rules of Practice.[23] An AP is initiated with an Order Instituting Proceedings (OIP), the equivalent of an indictment or complaint, which outlines the charges against the respondent and the factual

9 U S SEC & EXCH COMM'N, WHAT WE DO (June 0, 20 3), https //www sec gov/Article/whatwedo html [https //perma cc/G8FQ W9JJ]

20 *Oversight of the SEC's Division of Enforcement: Hearing Before the Subcomm. on Cap. Mkts., Sec. and Inv. of the H. Comm. on Fin. Servs.*, 5th Cong (20 8) (statement of Stephanie Avakian & Steven Peikin, Co Directors, SEC Division of Enforcement), https //www sec gov/news/testimony/testimony oversight secs division enforcement [https //perma cc/2QVW Z2R6]

2 They may also refer matters to state securities enforcers *See* Andrew K Jennings, State Securities Enforcers (Apr 26, 2020) (unpublished manuscript) (on file with author)

22 U S SEC & EXCH COMM'N, *supra* note 9

23 7 C F R §§ 20 00 06 (2020)

OS Received 12/16/2021

basis for those charges.[24] Though the SEC's Enforcement Division prosecutes the case, the OIP is issued by the Commission itself.[25]

Actually, much action takes place before the OIP is issued. The agency typically notifies the target that it is considering filing charges ahead of time and provides an opportunity to contest the contemplated charges in writing.[26] If the target chooses to make such a submission, it will be forwarded along with the recommendation of the Enforcement Division to the Commission, which makes the ultimate decision of whether to initiate a proceeding.[27] Settlements are also often negotiated at the pre-OIP stage.[28]

Once an OIP is filed, the SEC's Chief ALJ assigns the matter to one of the SEC's ALJs.[29] Depending on the "nature, complexity, and urgency" of the matter, the ALJ will set a hearing to begin approximately 120 days, 75 days, or 30 days from the date of service of the OIP.[30] The hearings are presumptively public[31] and are conducted

24 *Id.* § 20 200

25 *E.g.*, *id.* § 20 0 (a)(7)

26 U S SEC & EXCH COMM'N, ENFORCEMENT MANUAL § 2 4 (20 7)

27 *Id.* §§ 2 4 2 5

28 *E.g.*, Urska Velikonja, *Securities Settlements in the Shadows*, 26 YALE L J F 24, 28 (20 6) ("From FY 2007 to FY 20 5, between a third and one half of all defendants in primary enforcement actions settled with the SEC before the enforcement action was filed ")

29 7 C F R §§ 20 0, 200 30 0(a)(2) (2020); *see also* 5 U S C § 3 05 (20 8) (requiring that ALJs "shall be assigned to cases in rotation so far as practicable") In late 20 9, Brenda Murray retired as SEC's Chief ALJ after twenty five years of service in this role *Press Release: Chief Administrative Law Judge Brenda Murray to Retire*, U S SEC & EXCH COMM'N (Nov 27, 20 9), https //www sec gov/news/press release/20 9 246 [https //perma cc/W9WX CZSV] Also in 20 9, SEC ALJ Cameron Elliott left to become an ALJ at the International Trade Commission Press Release, U S International Trade Comm n, Elliott Named New Administrative Law Judge at U S International Trade Commission (Apr , 20 9), https //www usitc gov/press room/news release/20 9/er040 ll 070 htm [https //perma cc/7SLU 79XQ] The remaining three ALJs include two appointed in 20 4 (Jason Patil and James Grimes) and one appointed in 996 (Carol Fox Foelak) Alexander I Platt, *SEC Administrative Proceedings: Backlash and Reform*, 7 BUS LAW , 4 n 7 (20 6)

30 7 CFR §§ 20 360(a)(2)(i) & (ii) (20 8)

3 *Id.* § 20 30

OS Received 12/16/2021

in the physical environment of a courtroom—either at the SEC's own headquarters or in a federal courthouse. At the hearing, the burden is on the Enforcement Division to prove its case by a preponderance of the evidence,[32] and the ALJ will consider any evidence (including hearsay) that is not "irrelevant, immaterial, unduly repetitious, or unreliable."[33]

B. SEC Administrative Proceedings and APA Formal Adjudication

SEC enforcement actions arise under a variety of statutory authorities, but the vast majority of these trigger the formal adjudication rules articulated by the Administrative Procedure Act (APA). Sections 556 and 557 of the APA lay out rules for administrative adjudication that are applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[34] Courts have understood this language as triggering applicability of Sections 556 and 557 to any administrative hearings that are either (a) explicitly required by statute to be conducted "on the record,"[35] or (b) otherwise of a char-

32 Steadman v SEC, 450 U S 9 , 95 (98)

33 7 C F R § 20 320

34 5 U S C § 554(a) The statute lays out six exceptions "except to the extent that there is involved ( ) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee, except a [sic] administrative law judge appointed under section 3 05 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives " *Id.*

35 *See* Steadman v SEC, 450 U S 9 , 96 n 3 (98) (holding that an SEC administrative action filed under the authority of Investment Advisers Act 203(f) was "clearly a 'case of adjudication' within 5 U S C § 554" because the statute required the hearing be "conducted 'on the record '"); Pension Benefit Guar Corp v LTV Corp , 496 U S 633, 654 55 (990) (upholding an informal agency adjudication without an oral hearing when the statute did not require a hearing to be on the record); City of Taunton v EPA, 895 F 3d 20, 29 (st Cir 20 8) ("The phrase 'on the record' serves to invoke formal agency adjudication under the APA "); R R Comm n of Tex v United States, 765 F 2d

OS Received 12/16/2021

acter such that the "substantive content of the adjudication" indicates formality.[36] Appendix A lists some of the SEC's statutory authorities that explicitly require a hearing "on the record" or have been otherwise construed by courts as triggering the APA's formal adjudication rules.[37] The Supreme Court has squarely held that SEC enforcement actions under Investment Advisers Act § 203(f) and Investment Company Act § 9(b) both trigger the APA's requirements of formal adjudication,[38] and has strongly implied that others do as well.[39]

The SEC itself acknowledges that the APA's formal adjudication rules provide a superseding limitation on its own regulatory procedural rules in the many cases where the underlying statute requires a hearing "on the record." In a comment to the 2003 version of the Rules of Practice, the agency explained:

> [I]n any particular proceeding the APA may govern the rules or the specific procedures that the Commission is

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22 , 228 (D C Cir 985) (explaining that "the APA adjudication section, 5 U S C § 554, only applies in cases of adjudication 'required by statute to be determined on the record after opportunity for an agency hearing'" and finding that because "the operative stat ute simply does not require a hearing 'on the record,'" "Congress has thus not seen fit to require a formal adjudication subject to 5 U S C §§ 556, 557"); *cf.* Richard E Levy & Sidney A Shapiro, *Administrative Procedure and the Decline of the Trial*, 5 U KAN L REV 473, 486 87 (2003) (discussing relevant Supreme Court precedent on formal rulemak ing)

36 *E.g.*, *Steadman*, 450 U S at 96 n 3; CHARLES H KOCH & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 2 33 (3d ed 2020) ("Congress is not always meticulous in the language it uses and hence it is often necessary to consider language which does not recite precisely the word formula used in the APA ") *But see* 3 RICHARD J PIERCE & KRISTIN E HICKMAN, ADMINISTRATIVE LAW TREATISE § 6 2 (6th ed 20 8) (reviewing split among courts regarding when an agency must provide formal adjudication in the absence of express statutory command to provide a hearing "on the record") For criti cal takes on the doctrine in this area, see Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO WASH L REV ARGUENDO (20 7); Aaron L Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST L J 237 (20 4)

37 *Infra* Appendix A (listing SEC provisions triggering formal adjudication)

38 *Steadman*, 450 U S at 96 97 n 3

39 *See* Lucia v SEC, 38 S Ct 2044, 2053 (20 8) (citing APA §§ 556 557 as defining the role and responsibilities of SEC ALJs); *accord id.* at 2066 (Sotomayor, J , dissenting)

OS Received 12/16/2021

> required to employ. Which requirements of the Administrative Procedure Act are applicable to a particular Commission proceeding depends on the language of the statute authorizing the proceeding. *An adjudication is subject to the requirements of 5 U.S.C. §§ 554, 556 and 557 if the Commission is authorized by statute to make its determination "on the record, after notice and opportunity for an agency hearing."* Such adjudications are often referred to as "on the record" or formal adjudications. Other adjudications, including those where the Commission is authorized by statute to make its determination "after opportunity for hearing," are often referred to as informal adjudications.[40]

C. SEC Summary Disposition

In 1993, the Administrative Conference of the United States (ACUS) published a set of Model Adjudication Rules for the federal bureaucracy,[41] which included a rule allowing parties to move for a "summary decision" before the hearing showing that there was

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40 *Rules of Practice*, U S SEC & EXCH COMM'N (July 2003), https //www sec gov/about/rulesprac072003 htm [https //perma cc/3ZP5 GBSH] (em phasis added); *see also* SEC, Rules of Practice (Final Rules), 60 Fed Reg 32,738, 32,745 (June 23, 995) (same language) In 20 8 the SEC filed briefs with the Supreme Court citing APA §§ 556 and 557 as defining the role and responsibilities of SEC ALJs Brief for Respondent Supporting Petitioners at *3 4, Lucia v Securities and Exchange Com mission, 38 S Ct 2044 (20 8) (No 7 30), 20 8 WL 25 862; Reply Brief for Respond ent Supporting Petitioners at * , Lucia v SEC, 38 S Ct 2044 (20 8) (No 7 30), 20 8 WL 806836

The Administrative Conference of the United States has collaborated with Stanford Law School to produce a compilation of information about federal adjudication regimes across the federal government However, in conflict with the analysis presented in the text above, this ACUS resource lists SEC ALJ hearings as "Type B" adjudication, which it defines as adjudications that "do not trigger the APA " SECOOALJ0004, ADJUDICA-TION RESEARCH JOINT PROJECT OF ACUS AND STANFORD LAW SCHOOL, https //acus law stanford edu/scheme/secooalj0004 [https //perma cc/HF8J 4T3Z]; FAQ, ADJUDICATION RESEARCH JOINT PROJECT OF ACUS AND STANFORD LAW SCHOOL, https //acus law stanford edu/content/user guide [https //perma cc/XE77 SEDV]

4 MODEL ADJUDICATION RULES (ADMIN CONF OF THE U S 993), https //www acus gov/sites/default/files/documents/ 993 model adjudication rules pdf [https //perma cc/95JV 84LC]

OS Received 12/16/2021

no "genuine issue as to any material fact."[42] The SEC drew heavily on these Model Rules—including the model rule authorizing summary decision—when it adopted comprehensive amendments to the Rules of Practice governing its administrative proceedings two years later.

Under the SEC's 1995 amendments to the rules of practice, parties were for the first time allowed to "make a motion for summary disposition of any or all allegations" before the hearing by showing that there was "no genuine issue with regard to any material fact."[43] An ALJ reviewing such a motion was required to take as true "[t]he facts of the pleadings of the party against whom the motion is made."[44]

Over the ensuing decades, the Commission (and ALJs) broadened the interpretation of when the SEC could use the rule in a series of cases. The doctrinal expansion culminated in a 2007 decision where the Commission established an affirmative presumption that summary disposition would be appropriate in certain types of cases—namely "follow-on" proceedings where the Commission is seeking to impose an additional penalty on a defendant who has already been found liable for a securities-related violation in another venue.[45]

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42 *Id.* at 8 The genesis of ACUS's model rule on summary decision dates to a 97 study on the topic commissioned by the agency and published in the *Harvard Law Review* *See* Gellhorn & Robinson, *supra* note 7

43 SEC Rules of Practice, 60 Fed Reg 32,738, 32,767 (June 23, 995)

44 *Id.*

45 Conrad P Seghers, Admin Proceedings No 3 2433, Release No 2656 (U S Sec & Exch Comm'n Sept 26, 2007) ("For a follow on proceeding, summary disposition may be inappropriate in certain rare circumstances when 'a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct '") (citation omitted); *see also* Alexander I Platt, Unstacking the Deck Administrative Summary Judgement and Political Control, 34 YALE J ON REG 439 (20 7) (describing the evolution of SEC cases on summary disposition) For discussion of judicial decisions to address summary disposition, see *infra* Part II D

OS Received 12/16/2021

In 2016, the Commission amended its rule governing summary disposition. Under the newly promulgated Section 250(a), a respondent may file a motion for a ruling on the pleadings, challenging the Commission's legal basis for proceeding, without seeking leave from the ALJ.[46] In certain less complex cases,[47] the new Section 250(b) authorized the SEC to file a motion for summary disposition without first seeking leave of the ALJ.[48] Under the rule, the motion must assert that "the undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted . . . show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law."[49] In more complex cases, Section 250(c) requires the division to seek leave of the ALJ before seeking summary disposition.[50]

The federal register notice accompanying the 2016 amendments also reconfirmed and embraced a number of Commission prece-

46 7 C F R § 20 250(a) (2020); *see also* SEC, Amendments to the Commission's Rules of Practice, 8 Fed Reg 50,2 , 50,224 (July 29, 20 6) (the new rule "permits a respondent to seek a ruling as a matter of law based on the factual allegations in the OIP and permits either party to seek a ruling as a matter of right"); *id.* (the motion is "available to any party as a matter of right"); *see also* Platt, *supra* note 29 at 40 42, 49 (discussing the advantages of such a rule and proposing that the agency adopt it)

47 7 C F R § 20 250(b) (applying to administrative proceedings assigned to the 30 or 75 day timeline); *see also id.* at § 20 360(a)(2) (requiring the Commission to assign each case to a 30, 75, or 20 day timeline depending on "the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the pro tection of investors")

48 7 C F R § 20 250(b); *see also* Amendments to the Commission's Rules of Prac tice, 8 Fed Reg at 50,224 ("Leave of the hearing officer is not required to file such a motion in 30 and 75 day cases This is consistent with existing practice in the proceed ings we have designated for shorter timeframes including, for example, proceedings pursuant to Exchange Act Section 2(j) [i e , delinquent filing cases] as well as follow on proceedings where we have repeatedly observed that summary disposition is typ ically appropriate because the issues to be decided are narrowly focused and the facts not genuinely in dispute ")

49 7 C F R § 20 250(b)

50 7 C F R § 20 250(c)

OS Received 12/16/2021

dents regarding the interpretation of summary disposition standard. First, the standard for summary disposition was "analogous to Federal Rule of Civil Procedure 56."[51] Second, "the facts should be construed in the light most favorable to the non-moving party."[52] Third, a non-moving party "may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing."[53] Fourth, summary disposition is "typically appropriate" in follow on-proceedings and delinquent filing cases "because the issues to be decided are narrowly focused and the facts not genuinely in dispute."[54]

The Commission recently tripled-down on this position. In a July 2020 order, the Commission held that a "disputed" delinquent filing case could *not* be resolved on a motion for judgment on the pleadings under Rule of Practice 250(a) because the defendant's answer contained denials and other allegations which "must be taken as true" for purposes of such a motion.[55] But the Commission reiterated that cases like this could be resolved on summary disposition because facts were not "genuinely" in dispute.[56]

Figure 1 shows the SEC's use of summary disposition over time.

5 Amendments to the Commission's Rules of Practice, 8 Fed Reg at 50,224

52 *Id.*

53 *Id.*

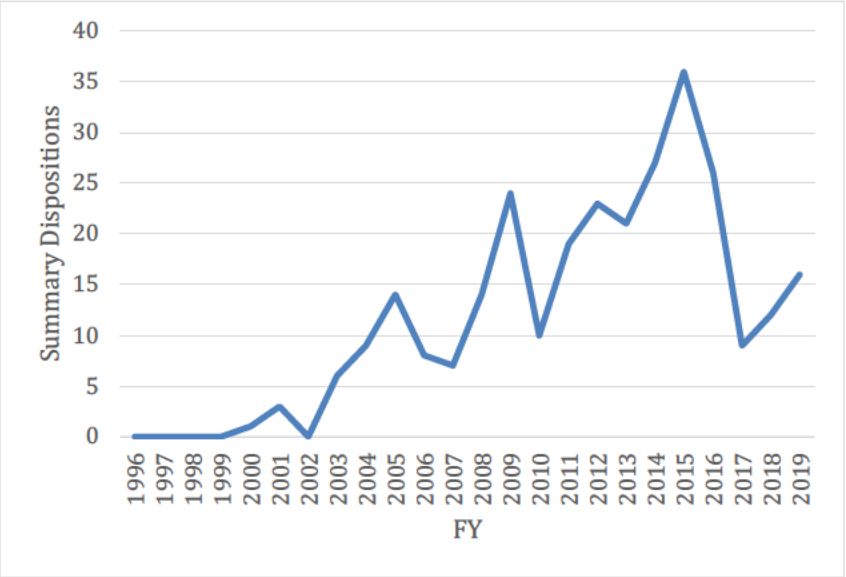
54 *Id.*

55 *Id.*

56 Healthway Shopping Network, Admin Proc File No 3 9343, Release No 89374 (U S Sec & Exch Comm'n July 22, 2020) (quoting 20 6 Adopting Release, 8 Fed Reg at 50,224)

OS Received 12/16/2021

FIGURE 1 SEC SUMMARY DISPOSITIONS[57]



The use of summary disposition peaked in 2014, 2015, and 2016. This coincides with the period when the Commission was pursuing what then-Chair Mary Jo White described as a "broken windows" enforcement strategy.[58] White announced at the beginning of this period that the SEC would aggressively prosecute "small" violations which, she explained, were "very often just the first step toward bigger ones down the road," and so leaving them unpunished fostered "a culture where laws are increasingly treated as toothless guidelines."[59] White explained that the SEC would be able to pursue this new policy without sacrificing focus on major violations because the agency would be able to bring and resolve the small

57 The data presented here comes from my own analysis of all ALJ Initial Decisions and Orders from the SEC website *ALJ Initial Decisions: Administrative Law Judges*, U S SEC & EXCH COMM'N, https //www sec gov/litigation/aljdec shtml [https //perma cc/B9M4 TK3X]; *ALJ Orders: Administrative Law Judges*, U S SEC & EXCH COMM'N, https //www sec gov/alj/aljorders shtml [https //perma cc/Z265 7GFD] Data through 20 5 were presented in an earlier paper Platt, *supra* note 45, at 264 68

58 Mary Jo White, *Remarks at the Securities Enforcement Forum* (Oct 9, 20 3), https //www sec gov/news/speech/spch 009 3mjw [https //perma cc/Y7MM PGXW]

59 *Id.*

OS Received 12/16/2021

cases "quickly."[60] The data show that summary disposition played a key part in this enforcement strategy.[61]

The "broken windows" policy was highly controversial: many doubted Chair White's assurances, and worried that the agency's reallocation of resources toward pursuing minor violations had reduced the agency's focus on bigger cases.[62] After Chairman Jay Clayton took over, the agency quickly abandoned the policy.[63]

60 *Id.*

6 Chairman Jay Clayton's abandonment of the Broken Windows policy is not the only factor contributing to the drop off in summary dispositions after 20 6 For a few months during the post 20 6 period, administrative proceedings were stayed in the wake of the constitutional challenge to the administrative proceeding system in the *Lucia* case *See* Pending Admin Proceedings, Release No 83675, 20 8 WL 3494802 (U S Sec & Exch Comm'n July 20, 20 8); Pending Admin Proceedings, Release No 83495, 20 8 WL 3 93858 (U S Sec & Exch Comm'n June 2 , 20 8); *see also* Pending Admin Proceedings, Release No 0603, 20 9 WL 396878 (U S Sec & Exch Comm'n Jan 30, 20 9) (announcing an end to a fourteen day stay caused by a lapse in appropriations)

62 Commissioner Michael S Piwowar criticized the policy with a pithy, much repeated aphorism "If every rule is a priority, then no rule is a priority " Michael S Piwowar, *Remarks to the Securities Enforcement Forum 2014*, U S SEC & EXCH COMM'N (Oct 4, 20 4), https //www sec gov/news/speech/20 4 spch 0 4 4msp [https //perma cc/5LUB A5M2] Other critics accused the SEC of using the "broken windows" as a cover for going *soft* on the big offenders David Dayen, *A Corporate Defender at Heart, Former SEC Chair Mary Jo White Returns to Her Happy Place*, INTERCEPT (Feb 7, 20 7, 3 55 PM), https //theintercept com/20 7/02/ 7/a corporate defender at heart former sec chair mary jo white returns to her happy place [https //perma cc/8TWN U8GZ] Leading academics were also critical *See SEC Investor Advisory Meeting*, U S SEC & EXCH COMM'N (Oct 5, 20 5), https //www sec gov/news/other webcasts/20 5/investor advisory committee 0 5 5 shtml [https //perma cc/4DGJ YTF7] (comments of Don Langevoort) ("I think the idea that small case enforcement deserves an important place in the agenda is dangerous "); John C Coffee, Jr , *Hobson's CHOICE: The Financial CHOICE Act of 2017 and the Future of SEC Administrative Enforcement*, U S SEC & EXCH COMM'N, n 5, (June 22, 20 7), https //www sec gov/spotlight/investor advisory committee 20 2/coffee hobsons choice act htm [https //perma cc/Q3FL 8G4H] (criticizing SEC broken windows as "overly ambitious")

63 After the 20 6 election, Commissioner Piwowar, an early critic, reflected back on "broken windows" as a "misguided effort" that "proved successful at boosting our enforcement statistics" but "did not meaningfully improve investor protection " Michael S Piwowar, *Remarks at FINRA and Columbia University Market Structure Conference*, U S SEC & EXCH COMM'N (Oct 26, 20 7), https //www sec gov/news/speech/speech piwowar 20 7 0 26 [https //perma cc/UXX7 2FG9] Commissioner Hester Peirce went further, repudiating the "broken windows" policy in a lengthy speech, claiming that

OS Received 12/16/2021

However, the agency has continued to routinely rely on summary dispositions.[64]

Between 1995 and 2019, the SEC resolved a total of 285 cases on summary disposition. This figure (as well as the statistics discussed above) does *not* include cases where the ALJ held the respondent in default.[65] Virtually all of these cases arise under statutes that explicitly mandate a hearing "on the record" or, lacking such language, have been found by courts to trigger APA's requirements on formal hearings anyway. Between 2015 and 2019, ninety-eight out of ninety-nine (99%) of summary dispositions granted were in cases covered by the APA's formal adjudication provisions. All of these cases imposed at least one of following remedies: (1) associational bar; (2) revoked or suspended registration; (3) disgorgement or monetary penalties; and (4) cease and desist. Table 1 lays out the frequency with which each remedy was imposed:

---

the policy diverted scarce enforcement resources away "from high priority issues"; that it led the agency to avoid "important matters that would have been time consuming to pursue"; that the enforcement statistics generated under the approach were "misleading"; that it contributed to an "unhealthy capital formation environment"; and that it weakened collaborative relationships between the SEC and the industry Hester M Peirce, *The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference*, U S SEC & EXCH COMM'N (May , 20 8), https //www sec gov/news/speech/peirce why behind no 05 8# ftnref [https //perma cc/N844 RTMM]

64 *See* Figure

65 Many of the respondents in these cases failed to respond to the Enforcement Division's motion for summary disposition While the SEC's rules of practice authorize the ALJ in such circumstances to find the respondent in default, *see* 7 C F R § 20 55(a)(2) (2020), the ALJ in all of these cases declined to take up that option and instead *granted* the Commission's motion for summary disposition If I am correct that the motion for summary disposition is illegal, then it is also illegal to use that motion to trigger a default

OS Received 12/16/2021

TABLE 1 REMEDIES IN CASES RESOLVED ON SUMMARY DISPOSITION (2015 2019)

Associational Bar	71 (72%)
Revoked or Suspended Registration	26 (27%)
Disgorgement or Civil Penalty	7 (7%)
Cease & Desist	5 (5%)

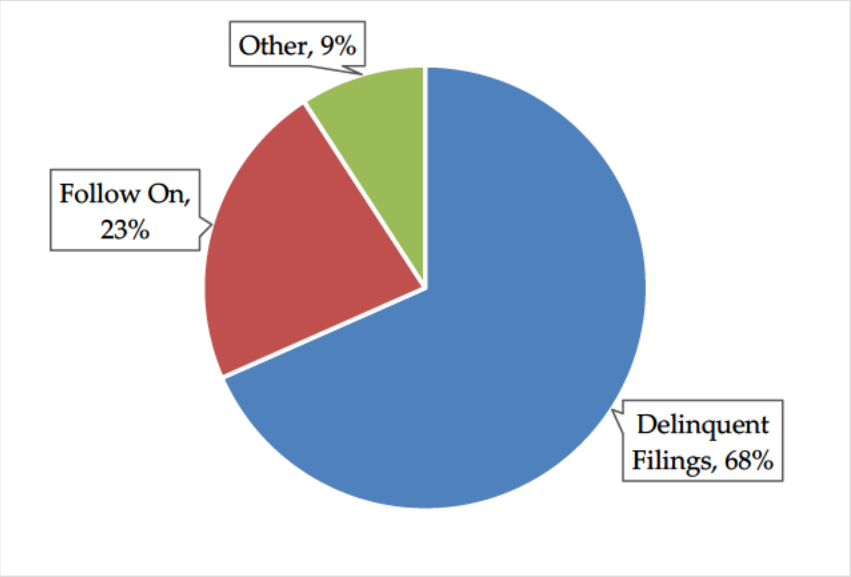
These findings are consistent with earlier findings that about two-thirds of summary dispositions granted for the agency between 1996 and 2016 involved some sort of associational bar, and about one-third involved a revoked registration.[66]

Two types of cases dominate: (1) "follow-on" cases, where the agency is seeking to impose an additional penalty on someone already convicted of a securities-related violation; and (2) "delinquent filing" cases, where the SEC is seeking to suspend or revoke the registration of an issuer who has failed to comply with periodic filing requirements.

66 *See* Platt, *supra* note 45, at 467

OS Received 12/16/2021

FIGURE 2 TYPES OF CASES RESOLVED ON SUMMARY DISPOSITION (2015 2019)



Again, these findings are parallel to earlier work finding that similar proportions of summary dispositions between 1996 and 2014 were comprised of delinquent filings and follow-ons.[67]

II. THE LEGAL CASE AGAINST SEC SUMMARY DISPOSITION

SEC summary disposition and its analogues across the federal bureaucracy are illegal under the Administrative Procedure Act (APA). A close analysis of the text of APA § 556(d) in Section A below shows that the only reasonable reading of that provision is that it provides respondents with an *absolute* right to an oral hearing in formal adjudications where the government is seeking to impose what the APA refers to as "sanctions." The legislative history and broader historical context of the enactment of the provision in 1946, surveyed in Sections B and C, provide unequivocal support for this reading, as do immediate post-enactment interpretations by courts,

67 Platt, *supra* note 45, at 467 68

OS Received 12/16/2021

executive branch officials, and legal scholars surveyed in Section D. Finally, as discussed in Section E, only three courts of appeals have addressed the legality of SEC summary disposition. All three have accepted it as legal, but none of these courts even considered Section 556(d). The opinions therefore cannot be considered probative.

Before proceeding, it is worth noting that because courts do not apply *Chevron* deference to agency interpretations of the APA,[68] if and when this matter comes before a court, there should be no thumb on the scale weighing in favor of the agencies' interpretation.

A. The Text of the APA Bars Summary Disposition in Formal Adjudications Culminating in "Sanctions."

The text of APA § 556(d) unmistakably creates an *absolute* right to a hearing for formal adjudications involving "sanctions." Section 556(d) includes six sentences:

> [1] Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.
>
> [2] Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.
>
> [3] A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in

68 Metro Stevedore Co v Rambo, 52 U S 2 , 37 n 9 (997) (declining to defer to agency director s interpretation of the APA because, inter alia, "[t]he APA is not a stat ute that the Director is charged with administering") *But see* Ryan D Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N Y U L REV 2 3, 254 56 (20 9) (questioning this rule and arguing that, although the SEC "probably has no more to say about ad ministrative adjudication *in general* than does the EPA" the "opposite is surely the case" "with respect to administrative adjudication *under the Securities Act*" and, "[i]f that s right, why not think that Congress intends for courts to defer to the SEC concerning how to interpret the APA s adjudication provisions *in SEC proceedings*?")

OS Received 12/16/2021

> accordance with the reliable, probative, and substantial evidence.
>
> [4] The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.
>
> [5] A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.
>
> [6] In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

In this Part, I interpret what this provision means for SEC summary disposition in four steps: (1) Sentence Five creates a general entitlement for parties in formal adjudications to present oral evidence and Sentence Six articulates specific limitations on this right; (2) Sentence Six articulates two conjunctive (not disjunctive) limitations on the general right to present oral evidence provided in Sentence Five: (i) the enumeration of three categories of cases in which an oral hearing can be deprived and (ii) the requirement that the respondent not be prejudiced by the deprivation; (3) Sentence Six's enumeration of three categories of cases where agencies can force parties to present evidence in written (not oral) form does not include cases involving what the APA refers to as "sanctions"; and (4) no other sentence or clause in Section 556(d) can be reasonably construed as providing a "backdoor" authorization of summary judgment in sanctions cases.

OS Received 12/16/2021

1. Sentence Five Creates a General Entitlement for Parties in Formal Adjudications to Present Oral Evidence and Sentence Six Articulates Specific Limitations on This Right.

The first clause of Sentence Five entitles a party to a formal adjudication to present his case or defense "by oral or documentary evidence." When read in isolation, there are two possible readings of the "entitlement" this clause provides:

Interpretation A	Interpretation B
A party is entitled to present his evidence *and* to determine whether to present the evidence in oral or written form.	A party is entitled to present his evidence, but the agency may dictate the form of that presentation.

Under Interpretation A, Sentence Five establishes a right to present evidence *in oral form*, that is, to present it in person, before the court. Under Interpretation B, Sentence Five establishes no such right.

Reading Sentence Five in its statutory context decisively resolves the ambiguity in favor of Interpretation A.[69] The immediately following sentence (Sentence Six) defines the circumstances in which the agency may "adopt procedures for the submission of all or part of the evidence in written form." If an agency adopts procedure for the submission of "all" of the evidence in "written form," it is prohibiting a party from presenting his evidence in oral form. Sentence Six therefore defines circumstances in which an agency is allowed

69 *Cf.* United Savings Ass'n v Timbers of Inwood Forest Assocs , 484 U S 365, 37 (988) ("Statutory construction is a holistic endeavor A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law ")

OS Received 12/16/2021

to *force* a party to present his evidence in written form and *not* oral form. Sentence Six gives agencies the authority to deprive parties of the right to present evidence in oral form under certain precisely defined circumstances.

This restriction only makes sense if Sentence Five is governed by Interpretation A. Under that interpretation, Sentence Five establishes a general right for parties to present evidence in oral form, and then Sentence Six carves out specific exceptions to that right. This interpretation gives full meaning to both sentences. By contrast, under Interpretation B, Sentence Five would not give any right to present evidence in oral form and Sentence Six would be nonsensical and incoherent. Why would Sentence Six define the precise circumstances in which an agency may force a party to present his evidence in written form if the agency could do this in every case? Interpretation A harmonizes the two provisions and is the only plausible interpretation.[70]

Put another way, the right that Sentence Five gives parties to present evidence in oral form is limited by the exceptions created by Sentence Six. The exceptions in Sentence Six would make no sense if Sentence Five had not created such a right.[71]

2. Sentence Six Articulates Two Conjunctive (Not Disjunctive) Limitations on the General Right to Present Oral Evidence Provided in Sentence Five.

> "[1] In rule making or determining claims for money or benefits or applications for initial licenses an agency may, [2] when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

70. *Cf.* Corley v United States, 556 U S 303, 3 4 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ")

7 *See id.*

OS Received 12/16/2021

Sentence Six articulates two layers of limitation on when an agency may deprive parties of their right to present evidence in oral form. The first layer of limitation provided by Sentence Six is that it articulates *three classes of cases* in which an agency *may* prohibit oral evidence: (1) rule making; (2) applications for initial licenses; and (3) claims for money or benefits. The second layer of limitation provided by Sentence Six is that it articulates a *circumstance* in which an agency may prohibit oral evidence: namely, "when a party will not be prejudiced thereby."

The only reasonable reading of these two limitations is that they are conjunctive, not disjunctive. That is, Sentence Six is best read as limiting an agency's ability to prohibit oral evidence to cases that meet *both* criteria, i.e., cases that fall under the three categories *and* where such prohibition would not prejudice the party. The grammatical structure of the sentence does not allow the alternative reading. Had the phrase "when a party will not be prejudiced thereby" been incorporated directly into the opening clause of the sentence enumerating three categories of cases, it might have plausibly been construed as a further refinement of that initial limitation and an explanation of Congress's rationale in articulating the three categories of cases where summary process might be used. However, the phrase does not appear in the first clause; it appears as an interruption in the middle of the second one, defining agency power to require written proceedings. This grammatical structure shows that the phrase clearly operates as an independent limitation on that power, not as a mere explanatory refinement of the first one.[72]

72 *Cf.* Flores Figueroa v United States, 556 U S 646, 650 (2009) (adopting the interpretation that "seems natural" "[a]s a matter of ordinary English grammar")

Because Sentence Six limits an agency's power to require the submission of "all *or part*" of the evidence in written form, one consequence of the interpretation I have advanced here is that, in sanctions cases, the prosecuting agency cannot move even for *partial* summary disposition But the restriction on agency power only applies to "evidence," not to legal disputes or procedural matters, which may still be resolved on the papers And, in any event, nothing here prohibits a defendant in one of these cases from

OS Received 12/16/2021

3. Sentence Six's Enumeration of Three Categories of Cases Where Agencies Can Force Parties to Present Evidence in Written (Not Oral) Form does not Include Cases Where the Agency Seeks to Impose "Sanctions."

There is one APA-defined category of cases that is conspicuously omitted from the carveout in Sentence Six: cases where the agency seeks to impose "sanctions" on the respondent.[73] "Sanction" is the term used by the APA to refer to the various remedies that are imposed in administrative enforcement actions. The APA defines "sanction" as:

> the whole or a part of an agency—(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person; (B) withholding of relief; (C) imposition of penalty or fine; (D) destruction, taking, seizure, or withholding of property; (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (F) requirement, revocation, or suspension of a license; or (G) taking other compulsory or restrictive action.[74]

Sentence Six mentions every type of "agency action" enumerated by the APA except for sanctions. "Sanction" is one of five varieties of "agency action" enumerated by the APA.[75] The other four are rules, orders, licenses, and relief.[76] "Orders" is an extremely capacious category, defined to include every final agency action except

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voluntarily waiving his right to present evidence orally and agreeing to the submission of all or part of the evidence in written form

73 *Cf.* NLRB v SW Gen, Inc, 37 S Ct 929, 940 (20 7) (explaining that the canon *expressio unius est exclusio alterius* applies where there is a "sensible inference that the term left out must have been meant to be excluded")

74 5 U S C § 55 (0) (20 8)

75 *Id.* § 55 (3)

76 The definition also includes "the equivalent or denial thereof, or failure to act" *Id.*

OS Received 12/16/2021

for rulemaking.[77] So there are really only three substantive categories of agency action other than sanctions: rules, licenses, and relief. The three types of adjudications mentioned in Sentence Six of 556(d) directly correspond with each of these non-sanctions types of "agency action." Sentence Six mentions "rule making," which is equivalent to the agency action of making "rules." Sentence Six mentions "determining claims for money or benefits," which corresponds to "relief," defined by the APA as (inter alia) an agency's "grant of *money* . . . recognition of a *claim*, . . . or . . . taking of other action . . . *beneficial* to . . . a person."[78] Finally, Sentence Six mentions "applications for initial licenses," which refers to a subset of the agency action of "licenses."

Further, the types of licensing actions implicitly *excluded* from Sentence Six are specifically *included* in the APA's definition of sanctions. The APA defines "licensing" as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."[79] Sentence Six's reference to "applications for initial licenses" logically refers to some of these licensing actions—e.g., a "grant" or "denial"—but not others, which necessarily posit an *existing* license—e.g., a "revocation" or "suspension." This is further evidence that Sentence Six was crafted to exclude "sanctions," which includes the "revocation" and "suspension" of licenses.[80]

---

77 *Id.* § 55 (6)

78 *Id.* § 55 ( ) (emphasis added)

79 *Id.* § 55 (9) The APA defines a "license" as the "whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission " *Id.* § 55 (8)

80 It is true that one of the specifically enumerated categories in Section 556(d) does arguably include one small subset of cases involving "sanctions " The APA defines the term "sanctions" as including, in part, the "withholding of relief " Section 556(d) authorizes summary process in cases "determining claims for money or benefits," which as I showed above, has some overlap with what the APA defines as "relief " So, to be more precise under § 556(d), summary disposition *would* be appropriate in cases involving one variety of "sanctions" namely the "withholding of relief" but not in any other variety

OS Received 12/16/2021

Additionally, Section 556(d) itself mentions "sanctions" in Sentence Three, imposing the substantial evidence standard, making the failure to include it in Sentence Six more conspicuous.

Finally, interpreting Sentence Six to create a more stringent procedural standard for cases involving "sanctions," including the revocation or suspension of licenses, is consistent with other provisions of the APA imposing heightened procedures for taking away licenses and diminished procedures for applications for initial licenses.[81]

4. Nothing Else In Section 556(d) (or the rest of the APA) Provides Covert Authorization of Summary Judgment in Sanctions Cases.

Other clauses and sentences of Section 556(d) do not overcome Sentence Six (as construed above) and provide a backdoor authorization of summary judgment in sanctions cases.

For instance, the rules of evidence encompassed in Sentence Two cannot be reasonably read as providing a covert authorization for eliminating oral hearings altogether in cases involving sanctions. The sentence requires agencies to exclude "oral . . . evidence" that is "irrelevant, immaterial, or unduly repetitious." Just like Sentence Five, the grant of authority here to exclude evidence is necessarily limited by the more specific rule articulated by Sentence Six, which prohibits agencies from entirely skipping over oral hearings for certain types of proceedings.[82] Reading Sentence Two as authorizing agencies to exclude *all* oral evidence—and thereby skip the hearing

8 *See infra* Part III As I show in Part II B, the legislative history suggests that Con gress was especially concerned about protecting procedural rights in the context of en forcement proceedings Beyond the specific legislative history, it seems quite plausible for Congress to have provided a heighted level of protection for defendants in "sanc tions" proceedings, in which the burden of proof rests on the government, as compared to benefits or initial licensing proceedings, in which the burden rests with the movant

82 *Cf.* RadLAX Gateway Hotel, LLC v Amalgamated Bank, 566 U S 639, 645 (20 2) ("[I]t is a commonplace of statutory construction that the specific governs the general " (citations omitted))

OS Received 12/16/2021

altogether—would essentially read Sentence Six as a nullity, contravening well-established principles of statutory interpretation.[83] It would also controvert well-established rules in the law of evidence against allowing motions *in limine* to function as de facto motions for summary judgment.[84]

Similarly, Sentence Five's final, limiting phrase—"as may be required for a full and true disclosure of the facts"—cannot be read as a covert blanket authorization for summary judgment even in sanctions cases. The best reading of this sentence is that this limiting phrase only modifies a party's entitlement to conduct cross-examination. Sentence Five gives a party three entitlements—"[1] to

83 *E.g.*, Corley v United States, 556 U S 303, 3 4 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant " (citations omitted))

84 *E.g.*, Hana Fin , Inc v Hana Bank, 735 F 3d 58, 62 n 4 (9th Cir 20 3) ("A motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim "); Meyer Intellectual Props Ltd v Bodum, Inc , 690 F 3d 354, 378 (Fed Cir 20 2) ("Because we conclude that it was procedurally improper for the court to dispose of [defendant s] inequitable conduct defense on a motion *in limine*, we reverse the court s decision and remand for further proceedings "); Mid America Tablewares, Inc v Mogi Trading Co , 00 F 3d 353, 363 (7th Cir 996) (finding that although argument regarding sufficiency of evidence "might be a proper argument for summary judgment or for judgment as a matter of law, it is not a proper basis for a motion to exclude evidence prior to trial"); Bradley v Pittsburgh Bd of Educ , 9 3 F 2d 064, 069 (3d Cir 990) ("Unlike a summary judgment motion, which is designed to eliminate a trial in cases where there are no genuine issues of fact, a motion *in limine* is designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions "); Duran v Hyundai Motor Am , Inc , 27 S W 3d 78, 92 (Tenn Ct App 2008) ("Thus, a motion in limine should not be used as a substitute for a dispositive motion such as a motion for summary judgment "); Cannon v William Chevrolet/Geo, Inc , 794 N E 2d 843, 849 (Ill App Ct 2003) ("Motions in *limine* are not designed to obtain rulings on dispositive matters but, rather, are designed to obtain rulings on *evidentiary* matters outside the presence of the jury "); Lin v Gatehouse Constr Co , 6 6 N E 2d 5 9, 524 (Ohio Ct App 992) ("[A]n evidentiary motion is not the proper way to dismiss those causes of action not otherwise settled by the parties "); BHG, Inc v F A F , Inc , 784 A 2d 884, 886 (R I 200) ("[A] motion in limine is not intended to be a dispositive motion " (quoting Ferguson v Marshall Contractors, Inc , 745 A 2d 47, 50 (R I 2000)); McCracken v Edward D Jones & Co , 445 N W 2d 375, 379 (Iowa Ct App 989) ("A motion in limine is not ordinarily employed to choke off an entire claim or defense "); Cass Bank & Trust Co v Mestman, 888 S W 2d 400, 404 (Mo Ct App 994) ("[A motion *in limine*] is not a substitute for a summary judgment motion ")

OS Received 12/16/2021

present his case or defense by oral or documentary evidence, [2] to submit rebuttal evidence, and [3] to conduct such cross-examination"—and then closes with the limiting phrase "as may be required for a full and true disclosure of the facts." Under the well-established "rule of the last antecedent," "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."[85] Applying that principle here, the limiting phrase would be restricted to only the last entitlement, namely the right to conduct cross-examination. Further, the reference to "cross-examination" is the only one of the three entitlements that is preceded by the modifier "such," which signals that this entitlement is going to be uniquely subject to a limitation.

Finally, the APA's instruction in Section 706 that courts reviewing agency action (including adjudications) should take "due account" of the "rule of prejudicial error" does not create a covert authorization of summary judgment.[86] Sentence Six of Section 556(d) specifically excludes considerations of "prejudice" from decisions about whether respondents in sanctions proceedings are entitled to a hearing. Construing the general instruction in Section 706 as somehow sweeping prejudice back in makes no sense and defies well-accepted principles of statutory interpretation.[87]

* * *

These four points provide strong textual evidence that Section 556(d) provides an *absolute* right to an oral hearing for respondents

85 Lockhart v United States, 36 S Ct 958, 962 (20 6) (quoting Barnhart v Thomas, 540 U S 20, 26 (2003)); *see also id* at 963 ("This Court has applied the rule from our earliest decisions to our more recent ")

86 5 U S C § 706 (20 8)

87 *See* RadLAX Gateway Hotel, LLC v Amalgamated Bank, 566 U S 639, 645 (20 2) ("[I]t is a commonplace of statutory construction that the specific governs the general " (quoting Morales v Trans World Airlines, Inc , 504 U S 374, 384 (992))

OS Received 12/16/2021

facing formal adjudications leading to sanctions.[88] Any residual doubt is resolved by the legislative history discussed in the next Part.

B. Legislative History Confirms That The APA Bars Summary Disposition In Formal Adjudications Leading To Sanctions.

The direct legislative history of the APA confirms that this provision was intended and understood by Congress as permitting summary adjudication (for example, adjudication on the papers) of only certain specified classes of formal adjudications and prohibiting it in all others.

The January 1941 Attorney General's Report on Administrative Adjudication[89] recommended that the APA promote "expedition and simplification" by providing for the "substitution" of written evidence for an oral hearing in an "appropriate" subset of formal administrative proceedings.[90] The Report specifically endorsed the "'shortened procedure' used in certain cases by the Department of

88 There is nothing in the text of Sentence Six or § 556(d) that purports to limit its applicability to the subset of "procedures" adopted by an agency that are made applicable to all cases and not to those (like summary disposition) where one party (for example, the agency) must file a motion That is, both the grant of authority to skip oral hearings and the limitations on that authority would, by the plain text of the statute, apply equally to (a) a "procedure" eliminating oral hearings in all cases; and (b) a "procedure" enabling a party to file a motion asking the ALJ to eliminate the oral hearing

89 *See* JOANNA L GRISINGER, THE UNWIELDY AMERICAN STATE ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 65 73 (20 2) (describing the work of the Attorney General's committee and its "significant" influence on the legislative process leading to the APA); Cass R Sunstein, *Chevron as Law*, 07 GEO L J 6 3, 646 (20 9) ("Because of the influence and prestige of the Committee, and its role in defining the debate that eventually led to the APA, that report deserves careful attention "); George B Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW U L REV 557, 594 98, 63 36 (996) (describing in detail the committee's work and influence)

90 OFFICE OF THE ATTORNEY GENERAL, FINAL REPORT OF THE ATTORNEY GENERAL S COMMITTEE ON ADMINISTRATIVE PROCEDURE 69 (94)

OS Received 12/16/2021

Agriculture and the Interstate Commerce Commission."[91] In the latter case, the Report acknowledged that the procedure was used "only if the parties consent."[92] The sole model for modern administrative summary judgment was drawn from the Department of Agriculture. As the Report explains, this agency's "most complete utilization of written evidence as a substitute for the testimonial process" was in a subset of the agency's "reparation" proceedings—essentially private actions for damages by growers, merchants and others related to interstate agricultural transactions—where the complainant was seeking less than $500 in damages.[93] In such cases, the Department of Agriculture's regulations provided that a "hearing will not be held unless deemed necessary or desirable by the Department's officers, or unless granted upon application of complainant or respondent 'setting forth the peculiar facts making such hearing necessary for a proper presentation of the case.'"[94] Instead, in these cases, "'the issues will be determined upon the sworn statements of facts submitted by the parties in support of the complaint and answer,' and upon depositions in respect of those facts which are within the knowledge of persons other than the complainant or respondent."[95]

Later that year, the Senate considered a bill sponsored by the minority of the Attorney General's committee that addressed the issue of written evidence in formal adjudications.[96] The bill provided that, in formal administrative adjudications:

> Reasonable cross-examination in open hearing shall be permitted in the sound discretion of the presiding officer except that . . . any agency may adopt procedures for the disposition of contested matters in whole or part upon the

9 *Id.*
92 *Id.*
93 *Id.* at 405
94 *Id.*
95 *Id.*
96 *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. on the Judiciary*, 77th Cong 4 (94)

OS Received 12/16/2021

> submission of written evidence, particularly with respect to technical matters and matters of conclusion or inference upon readily available and generally undisputed data, but subject always to rebuttal or cross-examination upon demand.[97]

A subcommittee of the Senate Judiciary Committee held extensive hearings on this bill and others, but consideration was suspended because of World War II.[98]

In January 1945, the Senate Judiciary Committee began consideration of a bill that included a different provision governing the use of written evidence in formal adjudications:

> Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence except that in rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence subject to opportunity for such cross-examination and rebuttal.[99]

Whereas the original pre-War proposed provision would have allowed agencies to skip oral hearings in all types of cases, this new post-War version limited this power to particular types of cases: namely, "rule making or determining applications for licenses."[100]

The Judiciary Committee accepted a suggestion that this "written-evidence provision should be made applicable to claims and reparation cases," amending the provision so that it read: "In rule

97 *Id.* (quoting S 674, 77th Cong § 309(i) (942))

98 *See* HISTORY OF ADMINISTRATIVE PROCEDURE LEGISLATION 933 946, at 6 (Hein)

99 Administrative Procedure Act, H R 203, 79th Cong § 7(c) (945) (reprinted in *Administrative Procedure: Hearing Before the H. Comm. on the Judiciary*, 79th Cong 59 (945)); *see* STAFF OF S COMM ON THE JUDICIARY, 79TH CONG , REP ON THE ADMINISTRATIVE PROCEDURE ACT (Comm Print 945) (noting that Sen McCarran introduced a bill with the same text as HR 203); *see also id.* (discussing this provision and explaining that the "[s]ubmission of written evidence was recommended by the Attorney General's Committee ")

00 H R 203 § 7(c)

OS Received 12/16/2021

making *or determining claims for money or benefits* or applications for licenses any agency may . . . ."[101] They also broke the provision into two separate sentences—one granting parties the right to present "oral or documentary evidence," and the second empowering agencies to require the submission of written evidence in three categories of cases.[102] Finally, they also added the word "initial" to the phrase "applications for licenses."[103]

Critically, the Committee also rejected a "suggestion" to expand this provision to apply to "adjudications (or 'accusatory' proceedings)."[104] In justifying its rejection, the Committee explained that such proceedings "are traditionally the type of proceeding in which seeing and hearing the witnesses is required. . . ."[105]

As reported by the Committee, Section 7(c) provided that:

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.[106]

The Senate Judiciary Committee Report summarized the provision as follows:

> The written evidence provision of the last sentence of the subsection is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is

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0 STAFF OF S COMM ON THE JUDICIARY, 79TH CONG , REP ON THE ADMINISTRATIVE PROCEDURE ACT 3 (Comm Print 945) (emphasis added)

02 S REP NO 752, at 22 (945)

03 *Id.*

04 STAFF OF S COMM ON THE JUDICIARY, *supra* note 99, at 3

05 *Id.* at 30 3

06 S REP NO 752, at 22

OS Received 12/16/2021

> done in written form. In those situations, however, *the provision limits the practice to specified classes of cases* and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby."[107]

The Committee Report also warned that "[t]he exemption of rulemaking and determining initial applications for licenses from provisions of . . . 7(c) . . . may require change if, in practice, it develops that they are too broad," and reiterated that "where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions."[108]

Along the way, in an October 1945 submission, the Attorney General explained that, under the Section, agencies would be "empowered . . . to dispense with oral evidence *only in the types of proceedings enumerated*; that is, in instances in which normally it is not necessary to see and hear the witnesses in order properly to appraise the evidence."[109]

This version was subsequently passed by the Senate in February 1946,[110] and was introduced in the House, where it was referred to the House Judiciary Committee.[111] The May 1946 House Report on the bill included the same language as the Senate report describing this provision as limiting the practice of requiring written evidence to "specified classes of cases, and even then, only where and to the extent that 'the interest of any party will not be prejudiced thereby.'"[112] The House approved the bill and the President signed it into law in June 1946.[113]

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07 *Id.* at 208 09 (emphasis added)

08 *Id.* at 2 6

09 ADMINISTRATIVE PROCEDURE ACT HEARING ON H R 203 BEFORE THE H COMM ON THE JUDICIARY, 79th Cong 4 (946) (appendix to Attorney General s statement at 408) (emphasis added)

0 Administrative Procedure Act § 7(c)
H R REP NO 980, at 235 (946)

2 *Id.* at 270 7

3 Administrative Procedure Act, Pub L 79 404, 60 Stat 236 (946)

OS Received 12/16/2021

This language as enacted is virtually identical to the version still in force today.[114] Further, as enacted, the statute drew the same distinction as it does today between "applications for initial licenses" and other types of licensing decision,[115] and also defines the term "sanctions" and uses the term throughout.[116]

* * *

This legislative history supports the key textual points discussed in the prior Part.

First, the penultimate sentence of Section 7(c) provides a general entitlement to parties to present oral evidence, subject to the limitations imposed by the final sentence.[117] Plainly, this is what the 1941 Attorney General's Committee Report had in mind with the proposal to expedite and simplify formal adjudications by authorizing agencies to force the "substitution" of written evidence for oral evidence in certain situations.[118] The initial 1941 version of the provision made this explicit—providing a grant of a right to an oral hearing and a limitation on that right in the same sentence, and stat-

4 *Compare* Administrative Procedure Act § 7(c) *with* 5 U S C § 556(d) (20 8) The differences are as follows ( ) instead of "every" party, the statute now applies to "a" party; (2) instead of "any agency" the statute now applies to "an agency"; and (3) in stead of "where the interest of any party will not be prejudiced thereby" the statute now reads "when a party will not be prejudiced thereby " None of these differences seem to be meaningful

5 *See* Administrative Procedure Act § 7(c); *id.* § 5(c) (exempting separation of func tions rules proceedings "determining applications for initial licenses"); *id.* § 8(a) (providing flexible rules for initial decisions in cases involving "rule making or deter mining applications for initial licenses"); *see also id.* § 9(b) (providing for special proce dures that apply to the "withdrawal, suspension, revocation, or annulment of any li cense")

6 *Id.* §§ 2(f), 7(c)

7 *Id.* § 7(c)

8 OFFICE OF THE ATTORNEY GENERAL, FINAL REPORT OF THE ATTORNEY GENERAL S COMMITTEE ON ADMINISTRATIVE PROCEDURE at 69 (94)

ing that the grant was applicable "except" where the limitation supervened.[119] Although later versions of the bill broke these into two sentences and dropped the word "except," there is no reason to think that this was done to change the relationship between the two sentences. Further, the House and Senate Committee Reports both describe the provision as articulating a "limit[]" on agencies' power to force parties to submit written evidence.[120]

Second, the "no prejudice" requirement and the three classes of cases are two *conjunctive* limitations on agencies' power to deprive parties of an oral hearing. The House and Senate Committee reports make this explicit: "[T]he provision limits the practice to specified classes of cases and, even then, only where and to the extent that 'the interest of any party will not be prejudiced thereby.'"[121]

Finally, the three enumerated classes of cases where Congress authorized agencies to take away a parties' right to an oral hearing excludes cases involving the imposition of "sanctions."[122] The Senate Judiciary Committee considered and specifically rejected a proposal to extend this power to what they referred to as "accusatory" proceedings, because (they explained) such proceedings "are traditionally the type of proceeding in which seeing and hearing the witnesses is required. . . ."[123]

In sum, the legislative history confirms what the text already demonstrates: APA Section 556(d) provides parties facing formal adjudications that may result in the imposition of sanctions with an *absolute* right to an oral hearing, even if they would not be "prejudiced" by losing that hearing.

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9 *Administrative Procedure: Hearings*, *supra* note 09 (reciting S 674, 77th Cong § 309(i) (94))

20 H R REP NO 980, supra note at 27 (946); S REP NO 752, at 208 09 (945)

2 H R REP NO 980, at 27

22 *Id.*

23 STAFF OF S COMM ON THE JUDICIARY, 79TH CONG , REP ON THE ADMINISTRATIVE PROCEDURE ACT 30 3 (Comm Print 945)

OS Received 12/16/2021

C. Historical Context: The Persistence of Subject-Limited State Summary Judgment Rules After the Enactment of the FRCP.

To a modern lawyer, providing an "absolute" right to a hearing may seem odd.[124] But the Representatives and Senators who enacted the APA in the 1940s would have been intimately familiar with this practice.[125]

In the late nineteenth and early twentieth centuries, many states adopted rules authorizing summary judgment and virtually all of

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24 *E.g.*, P R Aqueduct & Sewer Auth v EPA, 35 F 3d 600, 605 (st Cir 994) ("To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure Indeed, to argue as does petitioner that a speculative or purely theoretical dispute in other words, a non genuine dispute can derail summary judgment is sheer persiflage "); Crestview Parke Care Ctr v Thompson, 373 F 3d 743, 750 (6th Cir 2004) ("It would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact Given that federal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material disputes to be resolved in a trial, it would be bizarre if administrative agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow a similar rule "); *see also* Platt, *supra* note 45, at 442 445 (collecting commentators and courts talking about the irrationality of limiting summary judgment to certain classes of cases)

25 *Cf.* Evan D Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN L REV 807, 829 30 (20 8) (describing the new "APA Originalism," which attends not only to the text and formal legislative history of the statute but also "to the relevant historical context including the linguistic, epistemological, institutional, and *legal* premises from which those who enacted the APA proceeded " (emphasis added)); Sunstein, *supra* note 89, at 643 (conducting a self described "APA Originalism" analysis of the *Chevron* doctrine and finding that, for such an analysis, "there is no escaping [the] central question [of] judicial practice at the time that the APA was enacted "); *see generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 26 YALE L J 908 (20 7) (providing detailed reconstruction of judicial deference to executive interpretation prior to and contemporaneous with the enactment of the APA in order to evaluate the *Chevron* doctrine); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 27 HARV L REV 285, 308 09 (20 4) (challenging the interpretation of the APA as adopting a presumption of reviewability based on, inter alia, "[t]he absence of an established pre APA practice of presuming review in the face of statutory ambiguity or silence ")

OS Received 12/16/2021

these rules explicitly limited the types of actions in which summary judgment could be employed.[126] For instance, many states limited summary judgment to actions seeking recovery of a "debt or liquidated demand."[127] Other states included a somewhat broader list

26 Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N Y U J L & LIBERTY 73, 79 (20 0) ("every state initially passed much narrower summary judgment statutes"); Eugene A Gordon, *The New Summary Judgment Rule in North Carolina*, 5 WAKE FOREST INTRAMURAL L REV 87, 87 88 (969) ("Several states, long prior to the adoption of the federal rules, adopted a summary judgment rule but in most cases restricted its application ") *But see* Charles E Clark & Charles U Samenow, *The Summary Judgment*, 38 YALE L J 423, 470 (929) ("Only in Indiana and Virginia is it available generally in civil actions In all other jurisdictions, the kinds of action in which it may be employed are carefully specified "); Hon Diane P Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA CITY U L REV 23 , 234 n 9 (20) ("By the 920s, only Indiana and Virginia made summary judgment pro cedures available in all types of actions ")

27 A few key examples

- *NEW YORK* authorized summary judgment in 92 , limiting it to ac tions "to recover a debt or liquidated demand arising on a con tract or on a judgment for a stated sum " Thomas McCall, *Summary Judgment Under New York Rules*, 0 A B A J 22, 22 (924); *Waxman v. William son*, 75 N E 534, 536 (N Y 93); Clark & Samenow, *supra* note 26, at 445; Felix Cohen, *Summary Judgments in the Supreme Court of New York*, 32 COLUM L REV 825, 837 (932); Leonard S Saxe, *Summary Judgments in New York A Statistical Study*, 9 CORNELL L Q 237, 237 (934); Frank T Boesel, *Summary Judgment Procedure*, 6 WIS L REV 5, 5 (930); Hubert Dee Johnson, *Depositions, Discovery, and Summary Judgments Under the Proposed Uniform Federal Rules*, 6 TEX L REV 9 , 202 (938); EDWARD J BRUNET, MARTIN H REDISH & MI-CHAEL A REITER, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE § 6 0 n 7 (994); *see also* Haramati, *supra* note 26, at 82 (describing the New York rule as "extremely circumscribed"); Bernard L Shientag, *Summary Judgment*, 74 N Y L REV 87, 88 (940) ("The Rule as first adopted was narrow in scope ")
- *CALIFORNIA* authorized summary judgment only in actions "to re cover upon a 'debt or liquidated demand '" Hilton H McCabe, *Summary Judg ment*, S CAL L REV 436, 438 (938)
- *WISCONSIN* authorized summary judgment in actions "to recover a debt or liquidated demand arising on contract, or on judgment for a sum stated " Louis C Ritter & Evert Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions*, 2 MARQ L REV 33, 39 (936) (citing Wis Stat § 270 635); *see also* Evan Haynes, *The Pending Summary Judgment Bills*, 8 ST B J 39, 4 n 7 (933); *see also* Robert Wyness Millar, *Notabilia of American Civil Procedure 1887 1937*, 50 HARV L REV 0 7, 055 56 (937) ("[I]n New York and Wisconsin, although the proceeding does not lie in any

OS Received 12/16/2021

of cases that could be amenable to summary judgment, but even these broader rules still excluded many types of actions.[128] Subject-

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case of tort demands, it is available in the case of a suit to foreclose a lien or mortgage, or a suit to compel an accounting under a written contract ")

- *MASSACHUSETTS* allowed for summary judgment "[i]n any action of contract where the plaintiff seeks to recover a debt or liquidated demand " Norwood Morris Plan Co v McCarthy, 4 N E 2d 450, 453 (Mass 936); Ernest A Fintel, *Methods of Objecting to Pleadings and of Obtaining Summary Judgment*, 4 MO L REV 4, 54 (939)
- *NEW JERSEY* authorized summary judgment only "in an action brought to recover a debt or liquidated demand arising (a) upon a contract express or implied, sealed or not sealed; or (b) upon a judgment for a stated sum; or (c) upon a statute " Haynes, *supra* note 27, at 4 ; Boesel, *supra* note 27, at 5 6; Clark & Samenow, *supra* note 26, at 442 43; Katz v Inglis, 60 A 3 4, 3 5 (N J 932); Grossman v Brick, 39 A 490, 49 (N J Sup Ct 927); Haramati, *supra* note 26, at 79
- *RHODE ISLAND* allowed summary judgment "in a contract action where the plaintiff sought to recover a debt or liquidated demand in money payable by the defendant " Fisher v Sun Underwriters Ins Co of New York, 79 A 702, 703 (R I 935); Stephen J Fortunato, Jr , *Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in Celotex?*, 2 ROGER WILLIAMS U L REV 53, 55 n 2 (997)
- *THE DISTRICT OF COLUMBIA* limited summary judgment to contract actions Boesel, *supra* note 27, at 8 (quoting DC Rule 73 as authorizing sum mary judgment "[i]n any action arising ex contractu"); Clark & Samenow, *su pra* note 26, at 457 (explaining that the DC Rule was "limited to contract actions ")
- *ILLINOIS* similarly limited summary judgment to contract Clark & Samenow, *supra* note 26, at 459

28 A few key examples

- *CONNECTICUT* authorized summary judgment "in any action to re cover a debt or liquidated demand in money arising (*First*) (a) on a nego tiable instrument, a contract under seal or a recognizance; (b) on any other contract excepting *quasi* contracts; (c) on a judgment for a stated sum; (d) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; (e) on a guaranty, when the claim against the principal is in respect of a debt or liquidated demand only; and (*Second*) in any other ac tion (f) for the recovery of specific chattels, (g) to quiet and settle the title to real estate (h) to discharge any claimed invalid mortgage " CONNECTICUT PRACTICE BOOK § 52 (934) *quoted in* Fintel, *supra* note 27, at 68; *See* Charles E Clark, *The New Summary Judgment Rule in Connecticut*, 5 A B A J 82, 82 83 (929); Clark & Samenow, *supra* note 26, at 440; *see also* Haramati, *supra* note 26, at 8 ("Connecticut permitted summary judgment to be used in many categories of actions in which the amount of money in question was

matter limitations for summary judgment were so dominant that, in 1937, the *American Law Reports* published a lengthy annotation dedicated to construing these subject-matter limitations in state summary judgment rules.[129]

Congress broke from this tradition in 1938 by enacting Federal Rule of Civil Procedure (FRCP) 56, which allowed for summary

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uncontested Connecticut, however, still did not permit summary judgment in cases with indeterminate damages " (footnote omitted))

- *NEW YORK* expanded its Rule 3 in 932 to authorize a few more categories, but continued to prohibit summary judgment in others, including in all tort law actions Shientag, *supra* note 27, at 89; Ritter & Magnuson, *supra* note 27, at 36; Saxe, *supra* note 27, at 240 4 ; Fintel, *supra* note 27, at 7; Johnson, *supra* note 27, at 202; Haramati, *supra* note 26, at 83 84
- *CALIFORNIA* expanded its summary judgment rule to include actions "to enforce or foreclose a lien or mortgage " McCabe, *supra* note 27, at 438; Louis C Levy, *Summary Judgment*, 8 ST B J 7, 7 (934) ("Generally, the Cal ifornia enactment is a prototype of New York's with one outstanding excep tion, to wit California expressly authorizes foreclosure of mortgages, while New York does not "); Haynes, *supra* note 27, at 4 42 ("Recent statutes, rules, and amendments thereto in other jurisdictions have materially ex tended the scope of summary judgment procedure The question arises whether or not the proposed California provision should be extended to in clude some or all of these classes of cases, or other classes It is submitted that for the time at least it should not ")
- *WISCONSIN* expanded its initial summary judgment statute to in clude some additional categories of cases Ritter & Magnuson, *supra* note 27, at 40; *see also* Schafer v Bellin Mem l Hosp of Wis Conf of Methodist Epis copal Church, 264 N W 77, 80 (Wis 935) (explaining that the summary judgment statue applies, inter alia, "'in an action to recover a debt or liqui dated demand arising on a contract, express or implied, sealed or not sealed '"); Slama v Dehmel, 257 N W 63, 64 (Wis 934) (explaining that the summary judgment statute "by its terms applies only to actions 'to re cover a debt or liquidated demand arising on a contract '")
- *ILLINOIS* also expanded its rule to cover additional categories of cases *See* Ritter & Magnuson, *supra* note 27, at 37 38; *see also* Charles E Clark, *The New Illinois Civil Practice Act*, U CHI L REV 209, 2 n 8 (933) (explaining that under the new Illinois statute, "[t]he provisions for summary judgment are still over restricted in the kinds of actions to which they ap ply ")

29 *What amounts to "debt," "liquidated demand," "contract," etc., within contemplation of summary or expedited judgment statutes*, 07 A L R 22 (937)

OS Received 12/16/2021

judgment in *all actions*.[130] States would gradually follow this transsubstantive approach—but the movement was nowhere near complete by the mid-1940s, when Congress was considering and ultimately enacting the APA provision governing summary judgment

30 FED R CIV P 56 advisory committee's note on rules (937) ("This rule is applicable to all actions, including those against the United States or an officer or agency thereof "); *see also* MacDonald v Du Maurier, 44 F 2d 696, 702 (2d Cir 944) (Clark, J , dissenting) ("[T]he [FRCP], unlike all earlier procedural systems in this country or England, make the remedy of summary judgment available for *all not a selected few civil actions* "); Arnstein v Porter, 54 F 2d 464, 479 (2d Cir 946) (Clark, J , dissenting), *abrogated by* Zhang v INS, 386 F 3d 66 (2d Cir 2004) ("The clear cut provisions of F R 56 conspicuously do not contain either a restriction on the kinds of actions to which it is applicable (unlike most state summary procedures) or any presumption against its use "); Charles E Clark, *The Summary Judgment*, 36 MINN L REV 567, 569 (952) ("The striking difference between the federal rule [adopted in 938] and previous models is that the procedure is available in any civil action "); Charles E Clark, *Summary Judgments: A Proposed Rule of Court*, 2 F R D 364, 365 (94) ("[U]ntil the adoption of the new federal rules [in 938], which by Federal Rule 56 swept away all these complicating restrictions, the general pattern of the reform had been one of stating its application in only designated, although steadily augmented, types of actions "); James A Pike & John W Willis, *The New Federal Deposition Discovery Procedure: II*, 38 COLUM L REV 436, 456 (938) ("Several features are found in the new [Federal] Rules which have heretofore not generally appeared in summary judgment statutes First, there is no limitation as to the type of action in which the remedy is available ") (footnote omitted); J Palmer Lockard, *Summary Judgment in Pennsylvania: Time for Another Look at Credibility Issues*, 35 DUQ L REV 625, 636 (997) ("Rule 56 completed summary judgment's metamorphosis into a trans substantive rule Rule 56, at the time of its adoption marked a major, if not revolutionary, change in summary process in American law ") (footnote omitted); Alexander Holtzoff, *Origins and Sources of the Federal Rules of Civil Procedure*, 30 N Y U L REV 057, 078 (955) ("For the first time, as far as the author is aware, summary judgments were made applicable to actions of all kinds without exception Theretofore wherever they were permitted the custom had been to limit them to specific types of actions "); Chas S Coffey, *Summary Judgment Procedure for Tennessee*, 6 TENN L REV 393, 396 (940) ("The widest scope yet given the procedure in America, and perhaps in any jurisdiction, is found in the new Federal Rules "); 4 ILL PRAC , CIVIL PROCEDURE BEFORE TRIAL § 38 (2d ed) ("Federal Rule 56 was one of the first provisions that authorized a summary judgment by either party in any civil action "); Johnson, *supra* note 27, at 202 (quoting Martin Conboy, *Depositions, Discovery and Summary Judgments*, 22 A B A J 88 , 884 (936)) ("The [federal summary judgment] rules now under consideration are a departure from the existing English and American rules, inasmuch as there is here no restriction to any class of action, whereas there are such restrictions in other jurisdictions "); Brunet et al , *supra* note 27, at 53 ("Prior to the 938 enactment of the Federal Rules, some jurisdictions had allowed summary judgment only for certain types of claims ")

OS Received 12/16/2021

in formal adjudication. At least eleven states had subject-matter limitations in their summary judgment rules well into the 1940s, including California,[131] Connecticut,[132] Illinois,[133]

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3 *See* Loveland v City of Oakland, 59 P 2d 70, 72 (Cal Dist Ct App 945) ("Section 437c [of the California Civil Code] provides that a motion for summary judgment may be made ' in an *action* to recover upon a *debt* or upon a *liquidated demand* or to recover an *unliquidated debt or demand for a sum of money only* arising on a *contract* express or implied in fact or in law '"); Bromberg v Bank of Am Nat Tr & Sav Ass n, 35 P 2d 689, 690 (Cal Dist Ct App 943) (quoting 437c of the Code of Civil Procedure as permitting summary judgment "in an action to recover upon a debt "); Haupt v Charlie s Kosher Mkt , 2 P 2d 627, 628 (Cal 94) ("[T]he second count of the complaint states a cause of action 'upon a liquidated demand' and 'to enforce a lien' therefor, within the meaning of section 437c of the Code of Civil Procedure authorizing summary judgment in such cases "); State *ex rel.* Mitchell v Wolcott, 83 A 2d 759, 76 (Del 95) ("[T]he controlling California statute provides that summary judgment applies only to 'an action to recover upon a debt or upon a liquidated demand * * * or to recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law * * * ' Code Civ Proc § 437c "); 6 WITKIN, CAL PROC 5TH PWT § 203 (2020) ("Prior to [953], the statute, originally limited to 'an action to recover a debt or liquidated demand,' went through a gradual process of amendment to include actions to foreclose a lien or mortgage, to recover property, and for specific performance and accounting The 953 revision eliminated this list of actions and adopted the broad approach of Fed R Civ P 56, containing no restrictions ")

32 *See* DAVID GEORGE PASTON, SUMMARY JUDGMENT IN NEW YORK INCLUDING SUMMARY JUDGMENT RULES IN OTHER STATES AND IN U S DISTRICT COURTS 405 06 (958) (quoting Conn Gen Stat § 7655, amended by Conn Gen Stat § 3 29D (Supp 955)); Rifkin v Safenovitz, 40 A 2d 88, 89 (Conn 944) (holding that an action qualified for summary judgment under Connecticut Practice Book § 52 because it was "one to recover a 'liquidated demand in money' arising on a 'contract' within the provisions of the section "); Perri v Cioffi, 09 A 2d 355, 356 (Conn 954) ("Section 52 of the Practice Book empowers the court to render a summary judgment in actions to recover a debt or a liquidated demand in money and in certain other classes of action specifically mentioned ")

33 *See* Barber Colman Co v A & K Midwest Insulation Co , 603 N E 2d 2 5, 2 9 20 (Ill App Ct 992) ("Prior to a revision in 955, however, the [Illinois summary judgment] motion was applicable only in contract actions, actions on a judgment for the payment of money, actions to recover possession of land, and actions to recover possession of specific chattels In 955, authority for the entry of summary judgments was extended to all civil cases "); Fisher v Hargrave, 48 N E 2d 966, 97 (Ill App Ct 943) ("Under Rule 3 of the New York Civil Practice Act, summary judgment is permitted 'in an action * * * to recover a debt or liquidated demand arising on a contract express or implied * * * ' This provision is substantially identical with § 57 of the Illinois act "); Eagle Indem Co v Haaker, 33 N E 2d 54, 55 (Ill App Ct 94) ("The suits to which

OS Received 12/16/2021

the statute is applicable are suits on contracts, express or implied, and judgments 'for the payment of money '"); 4 ILL PRAC , CIVIL PROCEDURE BEFORE TRIAL § 38 (2d ed) ("Prior to the revision of 955, however, the motion was applicable only in contract actions, actions on a judgment for the payment of money, actions to recover possession of land, and actions to recover possession of specific chattels In 955, authority for the entry of summary judgments was extended to all civil cases, thereby establishing the summary judgment practice in Illinois in the general form it possesses today " (footnote omitted))

OS Received 12/16/2021

Iowa,[134] Massachusetts,[135] New Jersey,[136] New York,[137] Rhode Island,[138] West Virginia,[139] Wisconsin,[140] and Virginia[141]—comprising

34 *See* IOWA CODE § 237 (946) (summary judgment is available "in an action which is either (a) to recover a debt or some other money demanded which is liquidated, or on a recognizance, or on a judgment for a stated sum, or on any contract, except quasi contract; or (b) To recover a sum under a statute fixing its amount or creating a liability in the nature of a contract; or (c) On a guaranty of a debt, or of some other claim that is liquidated; or (d) To recover specific chattels ; or (e) To quiet or settle title to real estate (f) To discharge an invalid lien or mortgage "); Kriv v Nw Sec Co , 24 N W 2d 75 , 753 (Iowa 946) (quoting Rule 237 "Summary judgment may be entered in an action to quiet or settle title to real estate "); Paston, *supra* note 32, at 407 08 (same rule in effect as of 958); Humboldt Livestock Auction, Inc v B & H Cattle Co , 55 N W 2d 478, 484 (Iowa 967) ("Rule 237, R C P , so far as applicable here, then stated 'Summary judgment may be entered in an action, upon any claim * * * (a) to recover a * * * money demand which is liquidated * * * arising on a negotiable instrument * * * or on any contract * * * '")

35 *See* Cmty Nat Bank v Dawes, 340 N E 2d 877, 880 & n 4 (Mass 976) (noting that the "limited predecessors" to the MA summary judgment rule, which "permitted a plaintiff in an action of contract who sought to recover a debt or liquidated demand to move for the immediate entry of judgment for the amount claimed" was not repealed until 975); Paston, *supra* note 32, at 4 5 (noting that, as of 958, Massachusetts allowed summary judgment "[i]n any action of contract where the plaintiff seeks to recover a debt or liquidated demand ")

36 *See* Clark, *The Summary Judgment*, *supra* note 30, at 569 ("New Jersey, which had had the restricted rule, substituted the more general rule in its adoption of federal procedure in 948"); *see also* Chapman v Mitchell, 44 A 2d 392, 393 (N J Sup Ct 945) ("Supreme Court Rule 8 , N J S A Tit 2, requiring an affidavit verifying the cause of action, stating the amount claimed, and the plaintiff s belief that there is no defense to the action, is applicable only when the motion is for summary judgment upon a debt or liquidated demand arising upon a contract, a judgment for a stated sum, or upon a statute ")

37 *See* Tenny v Tenny, 36 N Y S 2d 704, 707 (N Y Sup Ct 942) ("There are eight subdivisions under Rule 3 which specify the type of actions in which such a motion may be made "); Garlick v Garlick, 53 N Y S 2d 32 , 322 (N Y Sup Ct 945) ("A motion for summary judgment is maintainable in this type of action, which is essentially one to recover a liquidated indebtedness "); McGreevy v McGreevy, 08 N Y S 2d 643, 644 (N Y App Div 95) ("A motion by plaintiff for summary judgment may not be granted unless the action comes within one of the first eight subdivisions of Rule 3 "); Wolfman v Wilson Bldg Inc , 62 N Y S 2d 786, 787 88 (N Y Sup Ct 956) (discussing several limitations on the scope of Summary judgment under Rule 3); EDWARD Q CARR, ET AL , CARMODY'S MANUAL OF NEW YORK CIVIL PRACTICE 36 63 (946) (quoting Rule 3); Paston, *supra* note 32, at 393 94 (same); *see also* Clark, *The Summary Judgment* (952), *supra* note 30, at 569 (criticizing New York in 952 for re

OS Received 12/16/2021

a substantial portion of the states that had any sort of summary judgment rule.[142]

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taining explicit limitations on the types of cases amenable to summary judgment); SAMUEL S TRIP, GUIDE TO MOTION PRACTICE LITIGATED MOTIONS IN THE NEW YORK CIVIL COURTS 277 (949 955) ("Summary judgment is distinguished from judgment on the pleadings in that in the former the plaintiff is limited to cases specified in the eight subdivisions of Rule 3 of the Rules of Civil Practice, whereas in the latter the plaintiff may move in any case "); *id.* at 284 ("A plaintiff may obtain summary judgment only if the action is embraced in one of the eight subdivisions of Rule 3 "); Jack B Weinstein & Harold L Korn, *Preliminary Motions in New York: A Critique*, 57 COLUM L REV 526, 527 (957) ("The present limitation of summary judgment in New York to enumerated types of action serves no purpose save to spawn a great number of irreconcilable deci sions as to whether particular cases fall within or without the enumerated nine ")

38 *See* Goucher v Herr, 4 A 2d 65 , 653 (R I 940) ("The summary judgment stat ute contemplates the final disposition of a case by execution on a judgment for a 'debt or liquidated demand in money '"); Paston, *supra* note 32, at 429 (noting that, as of 958, Rhode Island permitted summary judgment in "any action founded on contract, express or implied, where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant ")

39 *See* City of Beckley v Craighead, 24 S E 2d 908, 909 (W Va 943) ("[N]otice of motion for judgment to recover money due on contract brought under Code, 56 2 6, must allege that the amount sought to be recovered is due and payable to the plaintiff from the defendant by virtue of the terms of a contract, either express or implied, with which the defendant has failed to comply "); W Va Code § 56 2 6 (96) ("Any person entitled to recover money by action on any contract may, on motion obtain judg ment for such money ")

40 *See* Unmack v McGovern, 296 N W 66, 67 (Wis 94) (quoting sec 270 635, Wisconsin stats "Summary judgment may be entered as provided in this section in an action (a) To recover a debt or demand arising on a contract, express or implied (other than for breach of promise to marry); or "); *but see* Joseph A Ranney, *Practicing Law in 20th Century Wisconsin: Continuity and Change in Everyday Legal Life, Part 2*, 70 WIS LAW 20, 22 (997) ("At first summary judgment was limited to actions on debts, liqui dated damages and judgments, but it proved to be a popular and effective tool for re ducing caseloads and in 94 the court expanded it to encompass all types of actions ")

4 Thomas D Terry, *Summary Judgment in Virginia*, 2 WM & MARY L REV 353, 356 (960) (In 950, Virginia Rule 3 20 "extend[ed] summary judgment to include all types of actions ")

42 *See* Clark, *The Summary Judgment*, *supra* note 30, at 568 n 9 (finding that just twenty eight states had some rule for summary judgment as of 949) Some of the states with no summary judgment rules in place later enacted rules that were subject matter limited In 955, New Hampshire enacted its first summary judgment rule and limited it to "any action founded on contract, in which the plaintiff seeks to recover a debt or liquidated demand " Nashua Tr Co v Sardonis, 36 A 2d 332, 333 (N H 957)

OS Received 12/16/2021

Contemporaneous courts and commentators observed the reluctance of states to embrace trans-substantive summary judgment in the wake of FRCP 56. In 1941, Charles E. Clark, a principal architect of the federal rules, aggressively criticized all the "complicating restrictions" that many states retained on the substantive scope of summary judgment.[143] A decade later, Clark was still making the same complaint, criticizing jurisdictions where summary judgment could "be had only in the actions named and designated in the rule or statute."[144]

Similarly, a 1950 Note in the *University of Pennsylvania Law Review* explained that "in many cases the remedy is still more or less restricted to [certain] types of actions."[145] And, in 1951, the Supreme Court of Delaware observed that "[a] number of states in this country have statutes specifying the types of action in which motions for summary judgment may be resorted to."[146] In 1961, a commentator observed that "[i]n some states [summary judgment] is limited in its use to certain types of actions and parties."[147] As late as 1970, a court observed "considerable divergence" among the jurisdictions authorizing summary judgment "as to the kinds of cases in which it may be used," noting that the "the most frequent limitation is restriction to claims for liquidated damages and to contract transactions."[148]

In sum, as Congress was considering and ultimately enacting the APA in the 1940s, many states still restricted summary judgment to a select subset of cases. The trans-substantive revolution launched

43 Charles E Clark, *Summary Judgments and a Proposed Rule of Court*, 25 J AM JUD SOC'Y 20, 2 (94)

44 Clark, *supra* note 30, at 569

45 E H Heisler, Note, *Summary Judgment in the Federal Courts*, 99 U PA L REV 2 2, 2 2 (950)

46 State *ex rel.* Mitchell v Wolcott, 83 A 2d 759, 76 (Del 95)

47 Robert H Hall, *Effective Use of Motions for Summary Judgment in Georgia*, 23 GA B J 439, 439 (96)

48 Pridgen v Hughes, 77 S E 2d 425, 426 (N C Ct App 970)

OS Received 12/16/2021

by the FRCP in 1938 would gradually eradicate subject-matter limitations on state summary judgment rules—but that movement was still in its infancy when Congress was drafting and enacting the APA.

Above, I showed that Section 556(d) of the APA is best understood as providing an *absolute* right to an in person hearing for any party subject to a formal adjudication resulting in sanctions—that is, such a party would have a right to an oral hearing even if there is no genuinely disputed issue of material fact. Modern lawyers might find this strange, but it is entirely consistent with the practice of many U.S. jurisdictions at the time the APA was enacted.

D. Courts and Commentators Widely Confirmed This Understanding After Enactment of the APA.

Post-adoption practice can provide further insight into the contemporary Congress's understanding of the APA.[149] Sources published immediately following the enactment of the APA further confirm that Congress provided an *absolute* right to an oral hearing for actions falling outside the specifically listed types of adjudication.

The 1947 U.S. Attorney General Manual (AG Manual) on the APA[150] noted that the statute permitted submission of all or part of the evidence in written form only in "proceedings involving rule making or determining claims for money or benefits or applications

49 *See, e.g.*, Sunstein, *supra* note 89, at 652 56 (examining "post 946 practice" as part of self described "APA Originalism" analysis of *Chevron* doctrine)

50 Scholars have noted that this source may not be entirely reliable because it expressed the administration's preferred views that is minimizing the restrictions on agencies *E.g.*, Sunstein, *supra* note 89, at 652 n 204 (relying on the AG Manual in his self described APA Originalism analysis of the *Chevron* doctrine while noting that it "might not be counted as an authoritative (or neutral) understanding of the meaning of the APA"); Shepherd, *supra* note 90, at 666 (noting that the AG manual "interpreted the act [sic] in a manner that suppressed to a minimum the bill's limits on agencies") These concerns serve only to amplify my point here the Manual *itself* concedes limits on the power of agencies to skip over hearings

OS Received 12/16/2021

for initial licenses" and explained the logic of the limitation as follows: "Typically, in these cases, the veracity and demeanor of witnesses are not important."[151]

Northwestern Law School Professor Nathaniel L. Nathanson recognized immediately after enactment that Section 7(c) created an "*absolute* guaranty of the right to oral examination" for cases other than rule making or determining claims for money or benefits or applications for initial licenses, and that in those cases "the agency *cannot* compel any party to submit evidence in writing rather than orally."[152] Nathanson himself suspected that this rule was "too rigid," but concluded that it was what Congress intended both from the text and the committee reports (surveyed above).[153]

Similarly, NYU Law Professor Bernard Schwartz recognized immediately after enactment that Section 7(c) created a right to an oral hearing, but limited that right "only to cases which partake of a judicial character" and not necessarily to "rule-making or determining claims for money or benefits or applications for initial licenses."[154] He also recognized in a later work that the APA distinguished between "applications for initial licenses" and "licensing" more generally (which encompassed both applications and revocation/suspension procedures), and acknowledged that the requirement of an oral hearing in Section 7(c) did "not apply with full effect to *initial* license proceedings."[155]

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5 DEP T OF JUSTICE, ATTORNEY GENERAL S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 78 (947)

52 Nathaniel L Nathanson, *Some Comments on the Administrative Procedure Act*, 4 ILL L REV 368, 402 04 (947) (emphasis added); *see also* Grisinger, *supra* note 89, at 76 (relying on Nathanson's article in her influential history of the APA)

53 *Id.*

54 Bernard Schwartz, *The American Administrative Procedure Act, 1946*, 63 L Q REV 43, 54 (947); *see also* Shepherd, *supra* note 89, at 657 (relying on this Schwartz article in his influential history of the APA); Grisinger, *supra* note 89, at 82 (relying on other contemporaneous work by Schwartz in her influential history of the APA)

55 Bernard Schwartz, *Administrative Terminology and the Administrative Procedure Act*, 48 MICH L REV 57, 73 (949) (emphasis added)

OS Received 12/16/2021

Similarly, in the few decades following enactment, many courts carefully construed the text of Section 556(d) as carving out an exception to the right to an oral hearing in the three specifically enumerated classes of cases. For instance, in 1971, the Supreme Court relied on Section 556(d)'s applicability to "claims for money or benefits" to allow for the consideration of written reports submitted as evidence in the context of a social security disability case.[156] Two years later, the Court explained how Sentence Six of Section 556(d) operated to allow agencies to skip over oral hearings in the context of formal rulemakings:

> [E]ven where the statute requires that the rulemaking procedure take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection (d) provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby." Again, the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.[157]

Judge Henry Friendly reached a similar conclusion in an earlier case, finding that Section 556(d) empowered an agency to skip oral hearings even for the subset of rulemakings that triggered the "formal" requirements of APA §§ 556–557:

> What Congress gave by that provision of the APA, it partially took away by another. The final sentence of § 556(d) provides:
>
> . . . .
>
> Congress thus determined that even when rulemaking had to be done by a hearing "on the record," the record

56 Richardson v Perales, 402 U S 389, 409 (97); *id.* at 408 0; *see also* Platt, *supra* note 45, at 452 n 63 (collecting cases)

57 United States v Fla E Coast Ry Co , 4 0 U S 224, 24 (973)

OS Received 12/16/2021

> did not always have to be made in the traditional manner.[158]

Lower courts also relied on the text of Section 556(d) to allow written procedures in the context of applications for initial licenses.[159]

* * *

To be sure, not everyone followed the text of the APA. In his 1958 Administrative Law Treatise, Professor Kenneth Culp Davis acknowledged that Section 556(d)'s authorization to skip over oral hearings "seems to be limited to particular types of proceedings."[160] Nevertheless, he asserts that "one may assume" that the provision authorizes agencies to skip oral hearings "in any type of proceeding."[161] This seems to be an example of Davis's tendency in his post-APA writings to "consistently favor an understanding of the APA's provisions that would allow for administrative flexibility that [he] thought normatively desirable."[162]

More broadly, in the post-New Deal era, many commentators "openly celebrated administrative law's common law character"[163]—and administrative summary judgment was no exception.

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58 Long Island R R Co v United States, 3 8 F Supp 490, 498 (E D N Y 970) (Friendly, J , for a three judge district court)

59 *E.g.*, Gencom Inc v FCC, 832 F 2d 7 , 74 n 2 (D C Cir 987) (affirming the FCC's "adoption of a paper hearing procedure" under the APA because "§ 556(d) of the APA contains an express exemption which provides that, in processing applications for initial licenses, 'an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form '"); Nat Res Def Council v EPA, 859 F 2d 56, 9 (D C Cir 988) (explaining that § 556(d) "explicitly exempts [initial licensing] from some elements of formal adjudication"); Cel lular Mobile Sys , Inc v FCC, 782 F 2d 82, 98 (D C Cir 985) ("the APA expressly authorizes 'paper hearings' *in licensing cases* when a party will not be prejudiced by that procedure"); *see also* Platt, *supra* note 45, at 452 n 63 (collecting cases)

60 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 4 6 (st ed 958)

6 *Id.*

62 Bernick, *supra* note 25, at 845

63 Gillian E Metzger, *Embracing Administrative Common Law*, 80 GEO WASH L REV 293, 3 7 (20 2); *see also* Bernick, *supra* note 25, at 825

OS Received 12/16/2021

For instance, a landmark 1972 *Harvard Law Review* article by leading administrative law scholars endorsed the adoption of trans-substantive administrative summary judgment across the federal government as a rational method to "reduce delay" in the administrative system.[164] But, although the authors acknowledged that APA § 556(d) constituted the relevant legal "authority" for agencies "to adopt a summary decision rule," they failed altogether to confront the limitations contained in that provision regarding the parameters of the procedure.[165] As discussed below, some courts have followed the same course—endorsing broad, policy-based rationales for administrative summary judgment without regard for the limitations on the practice imposed by the text of Section 556(d).[166]

64 Gellhorn & Robinson, *supra* note 7, at 6 2; *see also* Platt, *supra* note 45, at 443 45

65 Gellhorn & Robinson, *supra* note 7, at 630 n 89 In addition to § 556(d), the authors identify two other purported sources of authority for summary decision rules First, they point to the following language in APA § 555(b) "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it " *Id.* This language evinces a general concern with timeliness in administrative actions, but cannot trump any of the specifically defined procedural rights contained in other sections, including the absolute right to a hearing provided to parties in formal adjudications resulting in sanctions *E.g.*, RadLAX Gateway Hotel, LLC v Amalgamated Bank, 566 U S 639, 645 (20 2) ("[I]t is a commonplace of statutory construction that the specific governs the general") Second, the authors point to agency specific enabling statutes which often give the agency power to adopt "such rules and regulations as are necessary to implement the purposes of the act " *Id.* (citing, as an example, the National Labor Relations Act § 6, 29 U S C § 56 (964)) But an open ended rulemaking authority does not empower an agency to override any specific statutory command, including the specific procedural commands of the APA *E.g.*, Chevron U S A Inc v Nat Res Def Council, Inc , 467 U S 837, 843 (984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress ")

66 *See* Platt, *supra* note 45, at 452 53

OS Received 12/16/2021

E. Three Modern Courts Have Considered and Upheld SEC Summary Disposition, but All Three Ignored the Text and History of Section 556(d).

More recently, three U.S. Courts of Appeals have upheld the SEC's use of summary disposition to resolve formal adjudications that impose sanctions.[167] However, all three courts failed to even consider Section 556(d)—likely because it was not raised by the parties—and therefore these opinions cannot be regarded as probative into the issue of whether the APA permits administrative summary judgment.

1. *Kornman v. SEC* (D.C. Circuit)

In *Kornman v. SEC*,[168] the D.C. Circuit upheld the SEC's use of summary disposition in an enforcement action brought under Investment Advisers Act § 203(f) that imposed a collateral bar—that is, a license revocation.[169] As discussed above, the APA's plain text and well-established precedents require that the hearing in such an action (required by statute to be "on the record") comply with the APA's rules governing formal adjudication, including Section 556(d).[170] In fact, the Supreme Court had specifically recognized that an action brought by the SEC under Investment Advisers Act § 203(f) was "*clearly* 'a case of adjudication' within 5 U.S.C. § 554"—thus triggering the APA's formal adjudication rules, including Section 556.[171] As shown above, Section 556(d) plainly entitles the respondent in such an action an *absolute* right to an oral hearing.[172]

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67 Kornman v SEC, 592 F 3d 73, 89 (D C Cir 20 0); Gibson v SEC, 56 F 3d 548, 555 (6th Cir 2009); Brownson v SEC, 66 F App x 687, 688 (9th Cir 2003)

68 592 F 3d 73 (D C Cir 20 0)

69 *Id.* at 76

70 *Supra* Part I B

7 Steadman v SEC, 450 U S 9 , 97 n 3 (98)

72 *Supra* Part II A D

OS Received 12/16/2021

The D.C. Circuit—in an opinion joined by then-Judge Kavanaugh—reached the opposite conclusion.[173] The court did not explain why Section 556(d) did not bar the agency's practice—the court failed to even mention the APA in its opinion.[174] Instead, the court found that the Investment Advisers Act § 203(f) did not define the word "hearing" and so determined that it was proper for the court to defer to the agency's own determination regarding what that word required.[175] The court noted that there was a "well-established" pattern of agencies construing the word "hearing" as permitting a hearing solely "on the pleadings," without requiring any opportunity for in person testimony, and found that many courts had approved this practice.[176]

But the D.C. Circuit relied on cases that were simply inapposite to the Section 556(d) analysis.[177] Several of the cases on which the court based its decision involved hearings that were not required by statute to be conducted "on the record" and therefore (unlike Investment Advisers Act § 203(f)) did not trigger the application of APA § 556(d).[178] For instance, the D.C. Circuit relied on the Supreme Court's decision in *Weinberger v. Hynson, Westcott & Dunning, Inc.*,[179] but the statute at issue did not require the hearing to be conducted "on the record," and the Court in that case specifically held that the proceeding involved was *not* subject to the APA's hearing provisions of Sections 556 and 557.[180] The D.C. Circuit also

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73 *Kornman*, 592 F 3d at 88

74 *See generally id.*

75 *Id.* at 82

76 *Id.*

77 *E.g.*, Weinberger v Hynson, Westcott & Dunning, Inc , 4 2 U S 609 (973); John D Copanos & Sons, Inc v Food & Drug Admin , 854 F 2d 5 0 (D C Cir 988)

78 *Id.*

79 4 2 U S 609 (973)

80 *Id.* at 623 n 9 ("Under the Administrative Procedure Act, a court reviews agency findings to determine whether they are supported by substantial evidence only

OS Received 12/16/2021

relied on its own earlier decision in *John D. Copanos & Sons, Inc. v. FDA*;[181] however the court did not discuss the applicability of the APA in that case, and the statute involved did not specify that the hearing needed to be conducted "on the record."[182]

Other cases the D.C. Circuit relied on involved applications for initial licenses, or rulemakings, and therefore would qualify under Section 556(d) as the type of formal adjudications where summary disposition is permissible.[183]

The D.C. Circuit cited only one case that involved a formal APA adjudication outside of the exempted categories: the Sixth Circuit's decision in *Crestview Parke Care Ctr. v. Thompson*.[184] That case involved an action by the Centers for Medicare and Medicaid Services to impose a civil monetary penalty (a "sanction") in a hearing arising under a statute that required it to be held "on the record."[185] The *Crestview* court correctly acknowledged that this statute triggered the requirements of APA formal adjudication but nevertheless upheld the use of summary judgment.[186] The *Crestview* court reasoned as follows:

> It would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact. Given that federal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material disputes to be resolved in a trial, it would be bizarre if administrative

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in a case subject to the hearing provisions of 5 U S C §§ 556 and 557 or 'otherwise re viewed on the record of an agency hearing provided by statute ' This is not such a case ")

8 854 F 2d 5 0 (D C Cir 988)

82 *Id.* at 5 8

83 *E.g.*, P R Aqueduct & Sewer Auth v EPA, 35 F 3d 600, 605 07 (st Cir 994) (application for initial license); United States v Storer Broad Co , 35 U S 92, 202, 205 (956) (same); Costle v Pac Legal Found , 445 U S 98, 208, 2 (980) (application for extension of license)

84 Crestview Parke Care Ctr v Thompson, 373 F 3d 743 (6th Cir 2004)

85 *Id.* at 748

86 *Id.* at 750

OS Received 12/16/2021

> agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow a similar rule. It may make as good, if not more, policy sense to have a standard for summary judgment in HHS administrative proceedings as it does to have one in federal court proceedings.[187]

This policy analysis may or not be persuasive,[188] but it is squarely in conflict with the text and history of Section 556(d) detailed above.[189]

Thus, in *Kornman,* the D.C. Circuit failed to consider the APA or Section 556(d) specifically and relied mainly on legally inapposite cases. The only case it relied on that was on the right legal point turned on a pure policy analysis that similarly failed to consider the text or history of the operative statute.[190]

2. *Gibson v. SEC* (6th Circuit)

In *Gibson v. SEC*,[191] the Sixth Circuit upheld the use of summary disposition by the SEC in a follow-on action filed under Exchange Act § 15(b) and Investment Advisers Act § 203(f) imposing a broker-dealer and investment adviser bar.[192] The Court did not consider the APA, much less Section 556(d), in upholding the practice. In fact, the court relied on cases upholding the use of summary judgment in a district court action where the APA obviously does not apply.[193]

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87 *Id.* (citation omitted)

88 *Cf. infra* Part V (analyzing policy arguments for and against administrative summary disposition)

89 *Supra* Part II A D

90 In an earlier case, the D C Circuit came close to addressing the issue but found that the respondent had waived the argument and so did not address it Seghers v SEC, 548 F 3d 29, 33 (D C Cir 2008)

9 Gibson v SEC, 56 F 3d 548 (6th Cir 2009)

92 *Id.* at 554

93 *Id.* at 553 (relying on SEC v George, 426 F 3d 786 (6th Cir 2005) and SEC v Waco Fin , Inc , 75 F 2d 83 (6th Cir 985))

OS Received 12/16/2021

3. *Brownson v. SEC* (9th Circuit)

The other opinion to address the issue is an unpublished opinion by the Ninth Circuit in *Brownson v. SEC*.[194] The Ninth Circuit upheld the use of summary disposition by the SEC in a follow-on action under Exchange Act § 15(b) imposing a Broker-Dealer bar.[195] The court did not cite the APA, much less analyze Section 556(d).[196]

* * *

Three out of three appellate courts to evaluate SEC Summary Disposition have upheld the practice. But none of those cases even considered the relevant statutory provision—Section 556(d) of the APA. Accordingly, these decisions cannot be regarded as probative.

III. ILLEGAL ADMINISTRATIVE SUMMARY JUDGMENT ACROSS THE ENFORCEMENT BUREAUCRACY

The SEC is not alone in utilizing summary disposition in the context of formal agency adjudications involving the imposition of sanctions in contravention of Section 556(d) of the APA. This Part reviews some other examples of agencies engaged in this practice. This list is not comprehensive. If the legal arguments presented in this paper are correct, each of these agencies may have to abandon its summary judgment practices.

A. Department of Health and Human Services

The Department of Health and Human Services (HHS) and its subsidiary agencies, including the Centers for Medicare and Medicaid Services (CMS), have the power to impose various sanctions

94 Brownson v SEC, 66 F App x 687 (9th Cir 2003)
95 *Id.* at 688
96 *Id.*

OS Received 12/16/2021

(including monetary penalties) on regulated healthcare entities.[197] Targets of at least some of these regulatory enforcement actions are entitled to a hearing "on the record" covered by the APA's rules on formal adjudication.[198] HHS has adopted rules of procedure that govern these formal adjudications which authorize any party to move for summary judgment.[199] CMS has relied on "summary judgment" in formal adjudications resulting in sanctions, and this practice has been upheld by an ALJ, HHS's Departmental Appeals Board, and at least one circuit court.[200]

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97 *E.g.*, 42 U S C § 395i 3(h)(2)(B)(ii) (20 8) (the HHS Secretary "may impose a civil money penalty in an amount not to exceed $ 0,000 for each day of noncompli ance ")

98 *E.g.*, *id.* § 320a 7a(c)(2) ("The Secretary shall not make a determination adverse to any person under subsection (a) or (b) [of this section] until the person has been given written notice and an opportunity for the determination to be made *on the record* after a hearing at which the person is entitled to be represented by counsel, to present wit nesses, and to cross examine witnesses against the person " (emphasis added)); *id.* § 300gg 22 ("The entity assessed shall be afforded an opportunity for hearing by the Secretary upon request made within 30 days after the date of the issuance of a notice of assessment In such hearing the decision shall be made on the record pursuant to sec tion 554 of Title 5 "); *see also* Crestview Parke Care Ctr v Thompson, 373 F 3d 743, 748 (6th Cir 2004) ("The statute authorizing the imposition of penalties on skilled nursing facilities, such as Crestview, requires CMS to hold a hearing 'on the record '")

99 *Alternatives to an oral hearing*, U S DEP'T OF HEALTH AND HUMAN SERV , https //www hhs gov/about/agencies/dab/different appeals at dab/appeals to alj/pro cedures/center for tobacco products case form and informal briefs/index html [https //perma cc/4XNG 62CT] ("An oral hearing (*i.e.*, a hearing at which witnesses are called and testify) is not the only procedure that the ALJ may use to hear and decide a case Any party to a case may file a motion for summary judgment at any time prior to the scheduling of a hearing, or as directed by the ALJ Matters presented to the ALJ for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law related thereto or they will proceed in accordance with an ALJ order ")

200 *Crestview*, 373 F 3d at 747; Rosewood Care Ctr of Inverness v CMS, DAB No 2 20, 2007 WL 330648 , at * (Oct 9, 2007); *see also* Fal Meridian, Inc v HHS, 604 F 3d 445, 449 (7th Cir 20 0) (Posner, J) (resolving appeal from HHS civil penalty case that was resolved before the ALJ on summary judgment without considering the legality of the procedure); Cedar Lake Nursing Home v HHS, 6 9 F 3d 453, 456 (5th Cir 20 0) (similar); Cmty Home Health v HHS, 20 0 WL 56 593, at *6 (N D Ala Feb 24, 20 0) ("No challenge is made here to the agency s use of summary judgment procedure per se "); Nawaz v Price, No 4 6CV386, 20 7 WL 2798230, at *3 (E D Tex June 28, 20 7)

B. Federal Mine Safety and Health Review Commission

The Federal Mine Safety and Health Review Commission (FMSHRC) is an independent adjudicatory agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (Mine Act), which is administered by the Mine Safety and Health Administration, a sub-agency of the Department of Labor.[201] Under the Mine Act, the Secretary of Labor (and her representatives) may issue citations and civil penalties to regulated mines for violations of the act.[202] If the mine requests a hearing within thirty days, it is entitled to one conducted by one of FMSHRC's ALJs "in accordance with section 554 of Title 5," that is, the APA's rules on formal adjudication.[203] FMSHRC's rules of procedure allow the Secretary of Labor to move for "summary decision,"[204] and the Secretary has taken advantage of this procedure in numerous cases involving the imposition of civil penalties.[205]

(rejecting constitutional challenge to HHS summary judgment where the "[p]laintiffs cite no authority suggesting they are entitled to oral argument and concede 'an ALJ is empowered to grant summary judgment, just as a Court is'")

20 *About FMSHRC*, FED MINE SAFETY AND HEALTH REV COMM'N, https //www fmshrc gov/about [https //perma cc/TQ6E YUDD]; *see also* Sharon B Ja cobs, *The Statutory Separation of Powers*, 29 YALE L J 380, 396 (20 9)

202 30 U S C §§ 8 4, 8 5(a) (20 8)

203 *Id.* § 8 5(d)

204 29 C F R § 2700 67 (2020)

205 *E.g.*, Sec'y of Labor v Higgins Ranch, FMRSHR No CENT 2006 258 M (July 27, 2007) (Manning, Arb); Sec'y of Labor v Nyrstar Gordonsville, LLC, FMRSHR No SE 20 5 36 M (Bulluck, Arb); Sec'y of Labor v John Richards Constr , FMRSHR No WEST 20 4 440 M (Aug 25, 20 5) (Bulluck, Arb); Sec'y of Labor v Royal Cement Co , Inc , FMRSHR Docket No WEST 2007 844 M (Dec 9, 2009) (Manning, Arb); Sec'y of Labor v Hammerlund Constr , Inc , FMRSHR Docket No LAKE 20 4 24 M (Bulluck, Arb); Sec'y of Labor v Poland Sand & Gravel, LLC, FMRSHR Docket No YORK 20 7 0096 (Dec 28, 20 8) (Bulluck, Arb); Sec'y of Labor v Pocahontas Coal Co , LLC, FMRSHR Docket No WEVA 20 5 854 (Dec 24, 20 5); Sec'y of Labor v Tilden Mining Co , LC, FMRSHR Docket No LAKE 2008 503 M (Apr 8, 20) (Paez, Arb); Sec'y of Labor v Kanaval's Excavating Gravel, FMRSHR Docket No YORK 20 3 2 7 M (Oct 24, 20 4) (Paez, Arb); Sec'y of Labor v Warrior Coal LLC, FMRSHR Docket No KENT 2009 870 (May 23, 20 3)

OS Received 12/16/2021

C. Commodity Futures Trading Commission

The Commodity Futures Trading Commission (CFTC) is authorized to impose various sanctions—including monetary penalties, suspending and revoking registrations, and trading bans—on regulated persons and entities who violate the Commodity Exchange Act and regulations promulgated thereunder.[206] Targets of at least some of these enforcement actions are entitled to a hearing "on the record," governed by the APA's rules on formal adjudication.[207] The CFTC's rules of procedure governing these hearings permit the agency to move for summary disposition,[208] and the agency has taken advantage of this procedure in formal adjudications resulting in sanctions.[209]

206 *E.g.*, *Enforcement*, COMMODITY FUTURES TRADING COMM'N, https //www cftc gov/LawRegulation/Enforcement/OfficeofDirectorEnforcement html [https //perma cc/4BAV AETP]

207 7 U S C § 8(a) (20 8) ("In the event of a refusal to designate or register as a con tract market or derivatives transaction execution facility any person that has made ap plication therefor, the person shall be afforded an opportunity for a hearing on the rec ord before the Commission "); *id.* § 8(b) ("The Commission is authorized to suspend for a period not to exceed 6 months or to revoke the designation or registration of any contract market or derivatives transaction execution facility Such suspen sion or revocation shall only be made after a notice to the officers of the contract market or derivatives transaction execution facility or electronic trading facility affected and upon a hearing on the record"); *id.* § 9(4) ("If the Commission has reason to believe that any person (other than a registered entity) is violating or has violated this section, or any other provision of this chapter (including any rule, regulation, or order of the Com mission promulgated in accordance with this section or any other provision of this chapter), the Commission may serve upon the person a complaint [which shall in clude] a notice of hearing [which] may be held before an administrative law judge designated by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form and submitted to the Commis sion "); *see also* Monson v DEA, 589 F 3d 952, 959 (8th Cir 2009) ("[T]he Commodity Exchange Act[] provides that a person aggrieved by a Commodities Futures Trading Commission (CFTC) decision or targeted by a CFTC administrative action is entitled to a full hearing on the record before the agency or an administrative law judge (ALJ) ")

208 *See* 7 C F R § 0 9 (a) (2020) ("Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the pro ceeding ")

209 *E.g.*, Brenner v CFTC, 338 F 3d 7 3, 7 5 (7th Cir 2003)

OS Received 12/16/2021

D. Nuclear Regulatory Commission

The Nuclear Regulatory Commission (NRC) has authority to impose various sanctions on regulated entities for violations of the Atomic Energy Act and Energy Reorganization Act and regulations promulgated thereunder, including revoking or suspending licenses and imposing civil penalties.[210] Targets of at least some of these enforcement actions are entitled to a hearing "on the record" covered by the APA's rules governing formal adjudications.[211] The NRC's rules of procedure authorize the filing of motions for summary disposition.[212] The agency has taken advantage of this procedure, though it is unclear if it has done so in any cases covered by the APA's formal hearing requirements resulting in sanctions.[213]

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2 0 *Enforcement Program Overview*, U S NUCLEAR REGULATORY COMM'N, https //www nrc gov/about nrc/regulatory/enforcement/program overview html [https //perma cc/4LCQ QWCB]

2 *E.g.*, 42 U S C § 2282a(c)(2)(A) (20 8) ("[T]he Secretary shall assess the penalty, by order, after a determination of violation has been made *on the record* after an opportunity for an agency hearing *pursuant to section 554 of Title 5* before an administrative law judge appointed under section 3 05 of such Title 5 " (emphasis added)) *But see id.* § 2239(a)( )(A) ("In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2 83, 2 87, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding "); Citizens Awareness Network, Inc v United States, 39 F 3d 338, 348 (st Cir 2004) ("For years, the courts of appeals have avoided the question of whether section 2239 requires reactor licensing hearings to be on the record ")

2 2 0 C F R § 2 7 0 (2020) ("Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party s favor as to all or any part of the matters involved in the proceeding ")

2 3 *Cf.* Advanced Med Sys , Inc v NRC, 6 F 3d 903 (6th Cir 995) (granting summary disposition to suspend a license under § 2239(a)( )(A) which does not require a hearing "on the record")

OS Received 12/16/2021

E. Administrative Conference of the United States

The Administrative Conference of the United States (ACUS) is an independent federal agency, with an exceptional reputation among administrative law scholars, "charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure."[214] As discussed above, in 1993 ACUS promulgated a set of Model Adjudication Rules as a resource for agencies considering changes to their own rules.[215] The 1993 model rules were intended to apply to "formal adjudication" including adjudications conducted pursuant to the APA.[216] They included a rule allowing any party to move for "Summary Decision" without regard to whether the proceeding involved sanctions.[217]

According to ACUS, "Numerous agencies have relied on the Model Rules to improve existing adjudicative schemes, and new agencies, like the Consumer Financial Protection Bureau, have relied on them to design their procedures."[218] For instance, the SEC adopted its rule providing for summary disposition just two years after the ACUS model rules were released, and borrowed heavily from those model rules.[219]

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2 4 *The Administrative Conference of the United States (ACUS)*, ADMIN CONF OF THE U S , https //www acus gov/acus [https //perma cc/LR4W 23VY]

2 5 MODEL ADJUDICATION RULES (993) (ADMIN CONF OF THE U S), https //www acus gov/sites/default/files/documents/ 993 model adjudication rules pdf [https //perma cc/HL9N MUFV]

2 6 Kent H Barnett, *Preface* to MODEL ADJUDICATION RULES, at iv (ADMIN CONF OF THE U S 20 8), https //www acus gov/sites/default/files/documents/Model%20Adjudication%20Rules%209 3 8%20ACUS 0 pdf [https //perma cc/G6X4 UBQJ]

2 7 MODEL ADJUDICATION RULES (993), *supra* note 2 5, § 250

2 8 *Model Adjudication Rules (2018 Revisions)*, ADMIN CONF OF THE U S , https //www acus gov/research projects/model adjudication rules 20 8 revisions [https //perma cc/H2HM CXFP]

2 9 *Supra* text accompanying notes 4 42

OS Received 12/16/2021

In 2018, ACUS released an updated revised version of the Model Adjudication rules.[220] Again these rules were intended to apply to, inter alia, adjudications covered by the APA's rules.[221] And again, they contain a rule providing for summary decision, without regard to whether there are "sanctions" involved.[222]

* * *

This is not a comprehensive account of agencies using administrative summary judgment in formal proceedings resulting in sanctions, but it serves to illustrate the scope of the practice. If the legal arguments presented above are correct, all of these agency practices are unlawful.

IV. EXPLAINING THE PERSISTENCE OF ILLEGAL ADMINISTRATIVE SUMMARY JUDGMENT

I have argued that the APA prohibits summary dispositions of formal adjudications involving sanctions.[223] But I have also shown that many agencies continue to do this.[224] Why has the apparently illegal practice managed to survive for so long?

I have already flagged two important explanations:

First, as noted in Part II.C, contemporary lawyers and judges may find it impossible to believe that the 1946 Congress meant to require that agencies conduct in-person, oral hearings in certain classes of cases even when there was no genuine dispute of material fact. In fact, it's not only possible, it's the best interpretation. When the APA was drafted and enacted in the 1940s, many important U.S. jurisdictions explicitly allowed for summary judgment only in certain classes of cases, and prohibited courts from skipping over trials

220 *Supra* note 2 8
22 *Id.* at
222 *Id.* at 55
223 *See supra* Part II
224 *See supra* Parts I C & III

OS Received 12/16/2021

in all other types of cases.[225] This practice has changed, and subject-matter restrictions on summary judgment are virtually unheard of.

Second, as discussed above in Part II.E and below in Part IV, the agencies, courts, and scholars that have embraced administrative summary judgment have apparently been convinced of the merits of the procedure based on a very simple argument that it promotes administrative efficiency without depriving anyone of meaningful procedural rights. But, on closer inspection, this simple and appealing argument does not hold up. There are reasons to worry that the procedure may be abused by agencies, may distort enforcement priorities, and may unfairly deprive some individuals of important procedural rights. There are a slew of unanswered questions about how administrative summary judgment *actually* shapes enforcement and adjudication.

This Part turns to offer two additional explanations for the persistence of administrative summary judgment in sanctions cases: (A) a common misperception about the "trans-substantive" nature of the APA's rules governing formal adjudications; and (B) the changing norms of judicial review of agency action.

A. A. The Myth of the Trans-Substantive APA

Scholars often refer to the APA as a "trans-substantive" procedural statute.[226] The truth is that while the APA is generally trans-

225 *See supra* Part II C

226 *E.g.*, David Marcus, *Trans Substantivity and the Processes of American Law*, 20 3 B Y U L REV 9 , 2 3 (20 4) ("Congress, by a unanimous vote, passed the trans substantive APA in 946"); Jerry L Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 9 YALE L J 362, 365 (20 0) (discussing the "explicitly transsub stantive federal Administrative Procedure Act (APA) "); Gillian B Metzger, *The Constitutional Duty To Supervise*, 24 YALE L J 836, 898 (20 5) (referring to the "trans substantive APA"); Thomas W Merrill, *Step Zero after City of Arlington*, 83 FORDHAM L REV 753, 759 (20 4) (referring to "trans substantive statutes like the Administrative Procedure Act"); Evan J Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L REV 7, 52 (2006) (referring to "the APA[] and other transsubstantive procedural statutes"); Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Adminis*

OS Received 12/16/2021

substantive, it also contains some important exceptions.[227] The same is true of the APA's provisions governing formal adjudication; these are generally trans-substantive, but there are some limits.[228]

This paper brings one of these into focus: the APA allows agencies to move for summary judgment in some formal adjudications but not others, depending on the type of remedy at issue. Summary judgment is permitted in formal adjudications involving claims for money or benefits like SSA disability adjudications, but not in formal adjudications involving sanctions like SEC enforcement actions.

But this is not the only example of non-trans-substantive provisions in the APA. Below, this Part discusses a few other examples.

Overgeneralization about "trans-substantivism" of APA's formal adjudication procedures may help explain the puzzle at the heart of this paper. I have shown that the SEC relied on an illegal procedure for several decades in hundreds of cases without facing any serious challenge. No respondent ever raised Section 556(d) in a legal challenge—nor did any ALJ, commissioner[229] or circuit court judge[230] raise the issue *sua sponte*. The "summary disposition" rule

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trative Procedure Act, 26 GEO MASON L REV 923, 938 (20 9) (referring to "trans sub stantive statute[s] like the APA") *But see* Richard E Levy & Robert L Glicksman, *Agency Specific Precedents*, 89 TEX L REV 499, 500 (20) (surveying the proliferation "agency specific" administrative law precedents and suggesting that "the universality of administrative law doctrine may not be as pervasive as is commonly assumed ")

227 Not unlike the FRCP *See* Fed R Civ P 9 I do not dispute that the APA is trans substantive in the sense that it applies equally to enforcement matters filed by the SEC as to the FTC Rather, I am showing that the APA is not trans substantive in the sense that it does not apply equally to formal adjudications that involve "sanctions" as those that do not

228 A related but distinct point is that most administrative adjudication is con ducted outside the parameters of the APA's cross cutting uniform rules *See* Emily S Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 20 9 WIS L REV 35 (20 9); Emily S Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L J 749 (2020)

229 *Cf.* Sharon B Jacobs, *Administrative Dissents*, 59 WM & MARY L REV 54 (20 7)

230 *See supra* Part II E

OS Received 12/16/2021

went through numerous rounds of notice and comment,[231] but no commentator ever raised the issue of Section 556(d)—nor did (evidently) the SEC's General Counsel.[232] The common over-generalization about the trans-substantive nature of the APA's rules governing formal adjudications might provide a clue as to why the summary disposition procedure survived for so long without any serious legal challenge.

Identifying the special, differentiated treatment of "sanctions" cases under the APA is also relevant to active debates about the future of administrative adjudication. The independence of administrative adjudicators has been called into question by a series of recent events. First, the Supreme Court's 2018 decision in *Lucia v. Securities and Exchange Commission*[233] held that these ALJs were "Officers of the United States" within the meaning of the Constitution's Appointments Clause,[234] and therefore must be appointed directly by the "Head of the Department"—that is, the Commission itself—instead of other, less political actors.[235] Second, and as predicted by the dissenting Justices,[236] this holding catalyzed (ongoing) constitutional challenges to the statutory "for cause" removal protections that Congress afforded for ALJs to insulate them from political influence.[237] Third, shortly after the *Lucia* decision, President Trump

23 *E.g.*, SEC Amendments to the Commission's Rules of Practice, 8 Fed Reg 502 (Sept 26, 20 6); SEC Rules of Practice, 60 Fed Reg 32738 (June 23, 995)

232 *Cf. Office of the General Counsel*, U S SEC & EXCH COMM'N, https //www sec gov/ogc [https //perma cc/GG7E HKMV] ("The OGC Legal Policy Group provides legal analysis and advice to the Commission concerning the federal securities laws, *administrative laws*, and other applicable laws The Group ana lyzes all regulatory recommendations to the Commission from the operating divi sions and offices " (emphasis added))

233 38 S Ct 2044 (20 8)

234 U S CONST art II, § 2, cl 2

235 *Id.*

236 *Id.* at 2057 (Breyer, J , concurring in the judgment in part and dissenting in part)

237 *E.g.*, Cochran v SEC, 969 F 3d 507 (5th Cir 2020), as revised (Aug 2, 2020) (denying claims on jurisdictional grounds); Gibson v SEC, 795 F App x 753 (th Cir 20 9) (same)

OS Received 12/16/2021

issued an order eliminating the stringent competitive hiring rules and examinations for the hiring of ALJs that were designed to ensure that ALJs were picked based on their qualifications rather than their likelihood of favoring the agency.[238]

These events have led some to rethink the fundamentals of administrative adjudication. Some scholars have come to the conclusion that a system of administrative adjudication ought to treat *enforcement* matters differently than other types of adjudications (for example, those involving claims for money or benefits).[239] This pa-

238 Exec Order No 3,843, 83 Fed Reg 32,755 (July 3, 20 8)

239 Steven G Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L REV 82 , 862 (20 8) (proposing "that all the current ALJs assigned to agencies whose actions deprive a person of life, liberty, or property be defunded and that Congress should appropriate funds to create new Article III Administrative Law Courts, the judges of which should be nominated by the President and confirmed by the Senate" and clarifying that this proposal "would not apply to the hundreds of statutory ALJs and hearing examiners who decide Social Security or disability cases or who rule on tax and immigration claims" but rather those "in the EPA, the NLRB, the FCC, the FTC, FERC, the SEC, and OSHA"); Michael Greve, Remarks at Administrative Conference of the United States Symposium on Federal Agency Adjudication, Panel 4 Alternatives to Traditional Agency Adjudication, at 9 20 50 (Aug 27, 2020), https //www acus gov/meetings and events/event/symposium federal agency adjudication [https //perma cc/9MSZ YR8X] (proposing creation of a new "Administrative Court" with jurisdiction over agency "coercive interferences with private conduct the FTC, the SEC, OSHA, the FCC, EPA, and the like to the exclusion of tax matters, benefit determinations and rulemaking proceedings," review of which would remain as it is today); Ronald Cass, Remarks at Administrative Conference of the United States Symposium on Federal Agency Adjudication, Panel 4 Alternatives to Traditional Agency Adjudication, at 4 50 42 50 (Aug 27, 2020), https //www acus gov/meetings and events/event/symposium federal agency adjudication [https //perma cc/9MSZ YR8X] (arguing that, outside of enforcement cases, it is good for agency heads to have direct authority over the adjudication system, but that "[t]here are some cases, however, where clearly we are dealing with questions of rights, where the government is seeking to enforce its view of what the law is against individuals, who do have private rights [These] enforcement actions by the government are the sort of enforcement actions that really should be viewed as implicating private rights They are decided sometimes by ALJs, sometimes by AJs, sometimes by other mechanisms within the government I think that requires a very careful look because those sort of questions, that really are matters of right, ought to be decided by

OS Received 12/16/2021

per shows that the APA's drafters generally agreed with this principle—that, within the domain of formal adjudications, the APA provided *additional* procedural rights for cases involving the imposition of "sanctions," above and beyond what it required in other cases.

* * *

Defining "Adjudication"—The APA's rules governing formal adjudications in Sections 556 and 557 apply to all hearings "required by statute to be determined on the record after opportunity for agency hearing."[240] But these rules do *not* apply to all hearings required by law to be "on the record."[241] A hearing "on the record" is exempt from the APA's requirements if it involves:

> (2) the selection or tenure of an employee, except a[n] administrative law judge . . . ;
>
> (3) proceedings in which decisions rest solely on inspections, tests, or elections;
>
> (4) the conduct of military or foreign affairs functions;
>
> . . . .
>
> (6) the certification of worker representatives.[242]

Separation of Functions—The APA mandates a separation of the prosecutorial from the adjudicatory functions of an agency in the context of formal adjudications, providing:

Article III courts "); Michael B Rappaport, *Replacing Agency Adjudication With Independent Administrative Courts*, 26 GEO MASON L REV 8 , 826 27 (20 9) (proposing "administrative court regime" under which "agencies would make enforcement decisions, but the adjudication would be heard by independent courts" and excluding Social Security and Medicare adjudications)

240 5 U S C § 554(a) (20 8)

24 *Id.*

242 *Id.*

OS Received 12/16/2021

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings.[243]

But this "separation of functions" requirement does not apply to *all* formal adjudications. The statute specifically exempts from this requirement those formal adjudications involving "applications for initial licenses" or "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers."[244]

Recommended Decisions—The APA requires that, when an agency makes a decision in a formal adjudication "without having presided at the reception of evidence, the presiding employee . . . shall first recommend a decision."[245] However, this stringent requirement does not apply all formal adjudications. In cases involving "rule making or determining applications for initial licenses," the agency "may issue a tentative decision" or another employee may recommend a decision.[246]

Taking away a License—The APA provides a special set of procedural rights for the subset of formal adjudications in which the agency is seeking to take away a license. 5 U.S.C. § 558(c) provides:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> > (1) notice by the agency in writing of the facts or conduct which may warrant the action; and

243 *Id.* § 554(d)
244 *Id.*
245 *Id.* § 557(b)
246 *Id.* § 557(b)( )

OS Received 12/16/2021

> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.[247]

The specific notice requirement and the opportunity to correct the wrongdoing are not available to respondents in all formal adjudications involving the imposition of "sanctions," but only to the subset of cases involving the agency's attempt to take away a license.

B. A New Paradigm of Judicial Review of Agency Action

The leading historian of the SEC, Joel Seligman, argues that the agency's laws "endured as well as they did long after enthusiasm for the New Deal period's policies generally had waned" because "the SEC has shown unusual prowess in exploiting the flexibility of the administrative process."[248] There are countless examples. Just months after the 1933 Securities Act was enacted, the SEC devised a "comment letter" process to advise companies on how to fix faulty disclosures without resorting to the exclusive (and very costly) statutory remedy of stop-order proceedings.[249] Also early on, the agency devised the "no-action" letter process so that companies could request informal advice from the agency before taking an action that gets close to the line of legality.[250] In the 1970s, the agency devised the "Wells" process to engage potential enforcement targets in dialogue prior to the commencement of formal enforcement proceedings.[251] In these cases and others, the SEC has gone outside of its specifically delegated statutory authority to

247 *Id.* § 558(c)

248 JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 6 9 (3d ed 2003)

249 *Id.* at 620; *see also* Alexander I Platt, *Gatekeeping in the Dark: SEC Control Over Private Securities Litigation Revisited*, 72 ADMIN L REV 27, 55 62 (2020) (providing an overview of the contemporary comment letter process)

250 SELIGMAN, *supra* note 248 at 620

25 Paul S Atkins & Bradley J Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 3 FORDHAM J CORP & FIN L 367, 375 83 (2008)

OS Received 12/16/2021

develop new administrative techniques. Many of these innovations subsequently became fundamental parts of the securities enforcement landscape.

Summary disposition is another example of the SEC attempting to "exploit[] the flexibility of the administrative process."[252] But this procedural innovation that played such a key (and often beneficial) role in the development of the U.S. securities regulation regime may no longer be possible. Historically, the agency benefitted from accommodating judicial constructions of the underlying statutory regime and a hefty amount of deference to the agency's judgment as to what procedures were wise and best suited to administer the law. But courts today operate under a different paradigm. It goes by different names—Neoclassical Administrative Law,[253] APA Originalism,[254] APA Fundamentalism,[255] Anti-Administrativism,[256]

252 SELIGMAN, *supra* note 248 at 6 9

253 Jeffrey A Pojanowski, *Neoclassical Administrative Law*, 33 HARV L REV 852, 898 99 (2020) ("The neoclassicist takes the APA and other organic statutes seriously and is inclined to reject judicial doctrines that depart from legislative instructions on point The neoclassicist will look to the original understanding of the APA and, in the event that the APA prescribes concrete rules of decision, favor treating those in structions as fixed, enduring law, not a springboard for common law that contradicts that entrenched understanding ")

254 Bernick, *supra* note 25, at 84 ; Sunstein, *supra* note 89, at 6 9 20; *see also* Mi chael E Herz, *Breaking News: New Form of Superior Agency Guidance Discovered Hiding in Plain Sight*, JOTWELL (Feb 6, 20 7), https //adlaw jotwell com/breaking news new form of superior agency guidance discovered hiding in plain sight/ [https //perma cc/ZUV6 4EEP] (coining the term "APA Originalism"); *cf.* Gillian E Metzger, *The Roberts Court and Administrative Law*, 20 9 SUP CT REV , 58 ("I am skep tical of efforts to broadly replace administrative common law with a textual and originalist approach to the APA" because "the original meaning of the APA was and remains contested "); Daniel B Rodriguez, *Bias in Regulatory Administration* 3 32 (Nw Pub L Research Paper No 9 4, 20 9) (discussing whether Justice Kavanaugh was committed to "a novel version of so called APA originalism")

255 Sunstein, *supra* note 89, at 634 n 94

256 Gillian E Metzger, *1930s Redux: The Administrative State Under Siege*, 3 HARV L REV , 38 (20 7) (discussing the "Judicial Turn" at the core of anti administrativist movement as "particularly evident in the efforts to replace interpretive deference with independent judicial judgment")

OS Received 12/16/2021

Asymmetrical Formalism[257]—but the bottom line is that courts today are less likely to let agencies play fast and loose with their statutory authority, even where agencies have a very compelling policy-based rationale for doing so. Under this more stringent regime, the SEC's program of summary disposition is unlikely to pass legal muster.

Given the SEC's long and important history of exploiting the "flexibility" of its statutes and the administrative process, it is unsurprising that the agency appears to be struggling to adapt to the new more stringent regime of judicial review. A recent string of losses at the Supreme Court is a testament to this.[258] Summary disposition seems like just one more SEC practice that may be felled by the shift to a more stringent and skeptical model of judicial review.

257 Daniel E Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 9 MICH L REV 455, 484 85 (2020)

258 *E.g.*, Dave Michaels, *Supreme Court Justices Indicate They May Further Narrow SEC's Enforcement Authority*, WALL ST J (Mar 3, 2020), https //www wsj com/articles/supreme court justices indicate they may further narrow secs enforcement au thority 583265540 [https //perma cc/9L69 VEAD] (noting that the SEC "has lost a string of important appeals before the high court"); *see, e.g.*, Liu v SEC, 40 S Ct 936, 947 49 (2020) (curtailing the agency's ability to seek disgorgement); Kokesh v SEC, 37 S Ct 635, 639 (20 7) (finding that SEC disgorgement constituted a "penalty" and therefore a more stringent statute of limitations was applicable to these enforcement actions); Gabelli v SEC, 568 U S 442, 454 (20 3) (applying a more stringent statute of limitations to certain SEC enforcement actions); *see also* Lucia v SEC, 38 S Ct 2044, 2049 (20 8) (finding the agency's ALJ's had been unconstitutionally appointed); Platt, *supra* note 45, at 462 (discussing various constitutional challenges to SEC enforcement provoked by Dodd Frank); *cf.* Alexander I Platt, *The SEC's Proposal To Raise the § 13(f) Reporting Threshold Rests on a Misinterpretation of the Provision's Legislative History*, YALE J ON REG NOTICE & COMMENT (July 6, 2020), https //www yalejreg com/nc/the secs proposal to raise the %C2%A7 3f reporting threshold rests on a misinterpretation of the provisions legislative history by alexander i platt/ [https //perma cc/SFD5 KBUD] (flagging legal error in SEC's recent proposal to eliminate quarterly reporting for all but the biggest ten percent of institutional investment managers)

OS Received 12/16/2021

V. THE UNCERTAIN POLICY CASE FOR ADMINISTRATIVE SUMMARY JUDGMENT

There are also reasons to worry as a policy matter about how administrative summary judgment is being used by administrative agencies across the board. This Part reconstructs the policy arguments made in support of administrative summary judgment, articulates concerns with the procedure and shows why the conventional justifications are incomplete, and outlines some open questions for future research on administrative summary judgment.[259]

A. Conventional Justifications for Administrative Summary Judgment

Until the early 1970s, very few agencies used administrative summary judgment.[260] This began to change after the publication of an article by Professor Ernest Gellhorn and William Robinson in the *Harvard Law Review* in 1971.[261] The article, presenting the results of a study sponsored by the Administrative Conference of the United States, urged agencies to "take a leaf from the federal rules of civil procedure" and use administrative summary judgment "to reduce delay."[262] They argued that the statutory right to a hearing was no obstacle because "statutory . . . rights to a hearing should not be interpreted as prohibiting the use of summary judgment by an agency to eliminate futile evidentiary hearings."[263] The right to a hearing could be properly dispensed with, therefore, in those cases where "the absence of a hearing could not affect the decision,"[264]

259 This Part draws on Platt, *supra* note 45
260 Gellhorn & Robinson, *supra* note 7, at 622 28
26 Gellhorn & Robinson, *supra* note 7
262 *Id.* at 6 2
263 *Id.* at 620
264 *Id.* at 6 7

OS Received 12/16/2021

and "when the papers filed with the motion clearly reveal that an evidentiary hearing would serve no useful purpose."[265]

Armed with a justification for dispensing with statutory hearing rights, agencies embraced administrative summary judgment. And, when challenged, courts upheld it based on the same rationale.[266] They reasoned that holding a statutory hearing that would not enhance the accuracy of the outcome would be "strange,"[267] a "waste [of] time,"[268] would defy "[c]ommon sense,"[269] and "serve no useful purpose,"[270] and so such a design "cannot [be] impute[d] to Congress."[271]

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265 *Id.* at 6 6

266 *See* Weinberger v Hynson, Wescott & Dunning, Inc , 4 2 U S 609, 62 (973) ("If FDA were required automatically to hold a hearing for each product even though many hearings would be an exercise in futility, we have no doubt that it could not fulfill its statutory mandate "); Costle v Pac Legal Found , 445 U S 98, 2 5 (980) (rejecting the requirement of a hearing in all cases except where the agency demonstrates a lack of genuine issue of material fact because this procedural requirement would "raise serious questions about the EPA's ability to administer the program "); Nat'l Indep Coal Operators' Ass'n v Kleppe, 423 U S 388, 399 (976) (upholding regulations which keyed the statutory requirement of a hearing to a request for such a hearing in part where "[e]ffective enforcement of the Act would be weakened if the Secretary were required to make findings of fact for every penalty assessment including those cases in which the mine operator did not request a hearing and thereby indicated no disagreement with the Secretary's proposed determination "); P R Aqueduct & Sewer Auth v EPA, 35 F 3d 600, 605 07 (st Cir 994) ("[S]ummary judgment often makes especially good sense in an administrative forum, for, given the volume of matters coursing through an agency's hallways, efficiency is perhaps more central to an agency than to a court ")

267 Crestview Parke Care Ctr v Thompson, 373 F 3d 743, 750 (6th Cir 2004)

268 United States v Storer Broad Co , 35 U S 92, 205 (956)

269 Veg Mix, Inc v U S Dep't of Agric , 832 F 2d 60 , 607 (D C Cir 987)

270 Hess & Clark, Div of Rhodia, Inc v FDA, 495 F 2d 975, 985 (D C Cir 974)

27 *Weinberger*, 4 2 U S at 62 ; *see also P.R. Aqueduct & Sewer Auth.*, 35 F 3d at 606 ("Due process simply does not require an agency to convene an evidentiary hearing when it appears *conclusively* from the papers that, on the available evidence, the case only can be decided one way " (emphasis added)); Burnele v Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N C L REV 277, 284 (986) ("[N]o good reason exists for proceeding with a formal hearing in the absence of any genuine issue of material fact "); *id.* at 282 (administrative summary judgment "ensures that neither members of the public nor federal agencies are allowed to gain unfair advantages as a result of *meaningless*

OS Received 12/16/2021

This justification for administrative summary judgment implicitly reflects an economic view of civil procedure. Judge Posner set the terms in 1973, articulating the goal of procedure as the minimization of the sum of "error costs" and "direct costs."[272] Though "error costs" is a capacious term, encompassing *all* social costs imposed by the adjudication, Posner traced these costs to "judicial error"—i.e., inaccurate adjudication.[273] Others have followed this approach, emphasizing the tradeoff between procedural cost and outcome accuracy.[274] Reframed in these terms, this justification for administrative summary judgment embraces it as a way to avoid time-consuming and expensive hearings wherever the benefits (reduced procedural costs) outweigh the costs (inaccuracy).[275]

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procedural steps " (emphasis added)); R Cammon Turner, Note, *Streamlining EPA's NPDES Permit Program With Administrative Summary Judgment:* Puerto Rico Aqueduct & Sewer Authority v Environmental Protection Agency, 26 ENVTL L J 729, 730 (996) (administrative summary judgment "effectively resolve[s] disputes without expending valuable agency resources or infringing on a party's statutory right to a hearing ") D C Circuit Judge Harold Leventhal framed the point most colorfully "[T]he right of op portunity for hearing does not require a procedure that will be empty sound and show, signifying nothing " Citizens for Allegan Cty , Inc v Fed Power Comm'n, 4 4 F 2d 25, 28 (D C Cir 969)

272 Richard A Posner, *An Economic Approach to Legal Procedure and Judicial Admin istration*, 2 J LEGAL STUD 399, 400 (973)

273 *See id.* at 40 ("[R]eduction of error is a goal of the procedural system" because such error is a "source of social costs "); George J Stigler, *The Optimum Enforcement of Laws*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 55, 56 (Gary S Becker & William M Landes eds , 974) ("There is one decisive reason why the society must forego 'complete' enforcement of the rule enforcement is costly ")

274 *See, e.g.*, Daniel Klerman, *The Economics of Civil Procedure*, ANN REV OF L & SOC SCI 353, 354 (defining "error costs" as efficiency losses caused by "inaccurate ad judication") For a more nuanced view, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 4 HARV L REV 96 , 86 87 n 536 (200) ("Legal procedures that pro duce more accurate outcomes typically will lead to more desirable behavior" but "[w]e do not mean to suggest that effects on accuracy are the only relevant features of proce dure besides cost ")

275 Klerman, *supra* note 274, at 355 ("By terminating cases early, [dispositive mo tions] reduce direct costs, such as the cost of discovery and trial Whether they increase error costs depends on the standards used If motions are granted only when the prob ability that the plaintiff would prevail at trial is zero or very low, then motions increase error costs by little or nothing ")

OS Received 12/16/2021

Courts that have upheld administrative summary judgment have also drawn on and expanded Gellhorn and Robinson's analogy to summary judgment in the civil context. One court explained:

> Given that federal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material disputes to be resolved in a trial, it would be bizarre if administrative agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow a similar rule.[276]

Another explained: "[S]ummary judgment is less jarring in the administrative context; after all, even under optimal conditions, agencies do not afford parties full-dress jury trials."[277]

B. Some Doubts About the Conventional Justification For Administrative Summary Judgment

The conventional justification for Administrative Summary Judgment articulated above is focused on decisions that an agency makes at the *individual* case level, analyzing whether an in-person hearing would be beneficial in the context of a particular case.[278] Because there are many more possible violations than there are resources available to investigate and enforce them, a critically important function of agencies like the SEC is to choose which cases

276 Crestview Parke Care Ctr v Thompson, 373 F 3d 743, 750 (6th Cir 2004) (citation omitted)

277 P R Aqueduct & Sewer Auth v EPA, 35 F 3d 600, 606 (st Cir 994); *see also* Weinberger v Hynson, Westcott & Dunning, Inc , 4 2 U S 609, 62 22 (973) ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment")

278 *See supra* Part I A

OS Received 12/16/2021

to pursue and which to ignore.[279] Authorizing administrative summary judgment may make an agency more likely to pursue certain cases by making them more amenable to a cheap and easy resolution without the expense of a full hearing or trial.

A key question—one that is not addressed by administrative summary judgment's proponents—is whether this shift in enforcement priorities is likely to improve or undermine effective enforcement. For an ideal public enforcer—that is, one who selects its portfolio of cases based completely on legitimate public policy goals—adding administrative summary judgment to its toolbox would facilitate the speedy resolution of some additional, worthy cases, effectively allowing the agency to expand its footprint. But we know that public enforcers do not always live up to this ideal—scholars have devoted thousands of pages to critiquing enforcement priorities of prosecutors and administrative agencies and calling attention to the perverse incentives that may skew these priorities away from the pursuit of the public interest.[280]

279 *See e.g.*, Margaret H Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State*, 02 CORNELL L REV 929, 933 34 (20 7) ("No public enforcers at least not in the U S have the resources to pursue every possible violation of the law They have to pick and choose, to set priorities and goals ")

280 For discussions focused on the SEC, see for instance Urska Velikonja, *Politics in Securities Enforcement*, 50 GA L REV 7, 9 20 (20 5) ("The ultimate result of congressional oversight during the last decade is an increase in enforcement targeting strict liability violations and follow on cases, obscured almost entirely by meaningless reporting of enforcement results a result that both Congress and SEC leadership seem to be comfortable with, although it does not improve compliance with the law, and can produce embarrassing enforcement failures like Bernie Madoff's Ponzi scheme "); Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 0 CORNELL L REV 90 , 933 40 (20 6) (similar); Jonathan R Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV J L & PUB POL'Y 639, 643 47 (20 0); Jed S Rakoff, Is the SEC Becoming A Law Unto Itself?, Keynote Address at PLI's 46th Annual Securities Regulation Institute, at 0 (Nov 5, 20 4), https //www akingump com/a/web/3725 /Sec Reg Inst final pdf
[https //perma cc/D3ZE 5EPG], (suggesting the SEC may be "tempted" to avoid hard cases in federal court to avoid the embarrassment of "well publicized defeats"); and Alexander I Platt, *The Non Revolving Door*, J CORP L (forthcoming Apr 202) (reviewing literature on how the SEC "revolving door" may skew its enforcement priorities)

OS Received 12/16/2021

Some enforcement agencies have particularly strong incentives to set priorities in a manner designed to please congressional overseers or the broader public at the expense of the agency's own expert policy judgment.[281] And these constituencies, in turn, may cause the agency to abuse administrative summary judgment in a way that undermines effective enforcement. For instance, under the leadership of Chair Mary Jo White, the SEC's Enforcement Division seemed to be trying to appease congressional overseers by deliberately maximizing the total number of enforcement actions it pursued during a given fiscal year, even though this statistic had no meaningful correlation to the actual efficacy of the enforcement program.[282] Administrative summary judgment would be a very useful tool for such an agency to rack up cheap and easy wins to build up the total number of cases filed—without actually contributing to overall effectiveness of the agency's enforcement program and perhaps even detracting from it by the misallocation of resources.[283] Sure enough, the SEC's use of administrative summary judgment evidently peaked during the height of the SEC's "broken windows" enforcement strategy under Chair White.[284] Even

28 *E.g.*, Platt, *"Gatekeeping" in the Dark*, *supra* note 249, at 43 (collecting sources)

282 *E.g.*, Platt, *Unstacking the Deck*, *supra* note 45, at 472 75 *But see* Hester M Peirce, SEC Comm'r, Lies and Statistics Remarks at the 26th Annual Securities Litigation and Regulatory Enforcement Seminar (Oct 26, 20 8), https //www sec gov/ news/speech/peirce speech lies statistics 026 8 [https //perma cc/BW8F EPRP] ("I commend Chairman Clayton and our co directors of the Enforcement Division, Steph anie Avakian and Steven Peikin, for trying to lead the enforcement program in a direc tion that focuses on serious violations and deemphasizes penalties and case counts ")

283 The concern is that the agency's shift to low impact cases comes at the expense of more serious ones On the other hand, given that these cases are, by definition, cheap and easy to resolve, it may be that they did not meaningfully detract from the agency's prosecution and investigation of more serious matters It is difficult if not impossi ble to prove or disprove these hypotheses However, it does seem clear that the agency used the "broken windows" cases to undermine effective congressional over sight of the enforcement program by creating a false sense of productivity based on the raw number of cases filed

284 *Supra* Part I C

OS Received 12/16/2021

though each individual case under the program may well have satisfied the Posnerian equation (reduced procedural cost without sacrificing accuracy), the overall result is not captured by that narrow analysis—a change in the composition of the types of cases that the agency brings in the first place.

Other departures from the idealized implementation of administrative summary judgment posited by its proponents are also possible. While the conventional justification implicitly assumes that administrative law judges will cabin administrative summary judgment to appropriate cases, there are reasons to worry.[285] Administrative prosecutors have a structural interest in pushing for the broadest possible domain for summary judgment. The fact that they appear in every case may create a repeat player effect, and give them the ability to "play for rules"—that is, select cases strategically to advance more permissive rulings on the availability of administrative summary judgment.[286]

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285 For discussion of mounting concerns regarding ALJ independence after *Lucia*, see Kent H Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L J 695 (2020) and Richard E Levy & Robert L Glicksman, *Restoring ALJ Independence*, 05 MINN L REV 39 (2020)

286 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Le gal Change*, 9 L & SOC'Y REV 95, 00 0 (974); *see also* Eric A Posner, *Law, Economics, and Inefficient Norms*, 44 U PA L REV 697, 704 (996) ("[A]ctors who benefit more from inefficient rules than from efficient rules have every incentive to litigate the latter while settling disputes arising under the former [There is] ample reason to believe that repeat players can exploit the institutional constraints binding courts in order to effect doctrinal changes that redistribute wealth to them ") Galanter focused on ordi nary civil litigation where certain parties tend to appear in different cases in similar roles Others have developed the argument further tracing certain developments in civil procedure to the strategic advantages of "repeat players " *See* Arthur R Miller, *From* Conley *to* Twombly *to* Iqbal *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L J (20 0) (discussing motions to dismiss); Samuel Issacharoff & George Loe wenstein, *Second Thoughts about Summary Judgment*, 00 YALE L J 73 (990) (summary judgment); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judi cial Preferences for Settlement*, 2002 J DISP RESOL 55, 66 67 (2002) ("Procedural rule making has become another arena to be captured by institutional interests The effects of repeat player defendants have been tracked in the limitations imposed on discovery and in the promotion of non court based decisionmaking ") There is an even

OS Received 12/16/2021

The development of the doctrine on use of SEC summary disposition in follow-on cases provides a case in point. Follow-on cases involve a respondent who has already been found liable for a securities violation in some other forum.[287] The SEC then brings an action to impose a separate penalty.[288] These may be severe, including monetary fines and lifetime bars from the industry.[289] In exercising their discretion to choose an appropriate punishment, SEC's ALJs are required to weigh various factors including "the sincerity of the defendant's assurances against future violations," "the degree of scienter involved," "the defendant's recognition of the wrongful nature of his conduct," and "the likelihood of future violations."[290] These factors seem to be exactly the kind of issues that an in-person hearing would be helpful to elucidate: they require individualized credibility assessments and investigation into facts beyond those required to establish the underlying violation.[291] Nevertheless, a few years after the summary disposition rule was created in 1995, SEC prosecutors began seeking summary disposition in follow-on actions. The Commission confronted the question for the first time in 2002.[292] Respondent John Brownson had already pleaded guilty to criminal securities fraud charges when the Enforcement Division commenced an AP, based on the same conduct leading to his guilty

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stronger basis to suppose it is true in the administrative context, where the government always appears in the same role

287 *See* Platt, *supra* note 45, at 467

288 *Id.*

289 For a review of SEC Bars, see James Fallows Tierney, Reconsidering Securities Industry Bars (Sept 5, 2020) (unpublished manuscript) (on file with author)

290 Steadman v SEC, 603 F 2d 26, 40 (5th Cir 979) (quoting SEC v Blatt, 583 F 2d 325, 334 n 29 (5th Cir 987)), *aff'd on other grounds*, 450 U S 9 (98)

29 Indeed, the progenitors of the conventional justification for administrative summary judgment, Gellhorn and Robinson, proposed restrictions on administrative summary judgment in cases where motive and intent play leading roles or which involve[d] a question of witness credibility Gellhorn & Robinson, *supra* note 7, at 6 4 n 9, 6 8

292 *See* Brownson, Exchange Act Release No 34 46 6 , 77 SEC Docket 3097, 3097 (July 3, 2002)

OS Received 12/16/2021

plea, seeking to bar him from associating with any broker or dealer.[293] The Division moved for summary disposition, and the ALJ granted the motion.[294] Brownson appealed to the Commission, claiming he was entitled to present his evidence regarding the various penalty factors in a live, oral hearing.[295] The Commission sided with its prosecutors.[296] It conceded that "[s]ummary disposition may not be appropriate in every case," since some follow-on respondents "may present genuine issues with respect to facts that could mitigate his or her misconduct" pursuant to the public interest factors, but held that Brownson (who was a pro se respondent) had "wholly fail[ed] to specify" what evidence he expected to present "or explain how it would establish circumstances, such as rehabilitation or mitigating factors that would counter a determination that it is in the public interest to bar him."[297] This was hardly a blanket approval. Nevertheless, SEC prosecutors ran with it, and (with ALJ acquiescence) began systematically dispensing with hearings in follow-on actions. And, in a 2007 decision, when the Commission considered the issue again, it established a full-blown *presumption in favor of summary disposition* for follow-on proceedings.[298] Some of these cases may fail the Posnerian equation—the reduction in procedural costs in these cases may well come at the expense of accuracy.

Further, the conventional justification for administrative summary judgment rests on a technocratic tradeoff between accuracy

293 *Id*. at 3097 98

294 *Id*. at 3098

295 *Id*

296 *Id*. at 3099

297 *Id*. at 3099, n 2

298 *See* Seghers, Investment Advisers Act Release No IA 2656, 9 SEC Docket 945, 949 (Sep 26, 2007) ("For a follow on proceeding, summary disposition may be inappropriate in certain rare circumstances when 'a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct '") (quoting *Brownson*, 77 SEC Docket at 3099 n 2))

OS Received 12/16/2021

and the costs of adjudication; when a costly hearing would not enhance accuracy, the agency can skip it, regardless of what the statute says. But administrative procedure is not just a machine to maximize administrative efficiency. Among other values, administrative procedure serves as a key mechanism that Congress uses to control executive branch agencies.[299] Authorizing agencies to skip over statutorily mandated hearings *undermines* that control.[300]

The conventional justification for administrative summary judgment also relies on a flawed analogy between administrative and civil variants of summary judgment—if the procedure is good enough for federal court, then surely it is good enough for administrative adjudication. First, as just discussed, administrative procedure serves a distinct political function—accountability to Congress—for which there is no analogue in the context of civil procedure. Second, some features of administrative adjudication arguably call for *more* protective procedures than civil litigation, not less. Article III judges might well be reasonably trusted to wield the power of summary judgment, which requires making a decision with less information than after a full blown hearing, without entailing that ALJs be similarly trusted.[301] Moreover, parties subjected to formal APA hearings may not have access to the full panoply of discovery rights available in federal court, and without effective discovery, a party opposing an agency's motion for summary judgment is at a disadvantage.[302] Finally, the analogy to the civil motion fails because formal adjudications involving sanctions may bear a

299 *See* Jonathan R Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J L ECON & ORG 93, 94 (992); Mathew D McCubbins, Roger G Noll & Barry R Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L ECON & ORG 243, 244 (987); Mathew D McCubbins, Roger G Noll & Barry R Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA L REV 43 , 443 (989)

300 Platt, *supra* note 45, at 44

30 *See id.* at 446 47

302 *See id.* at 447

OS Received 12/16/2021

closer resemblance to criminal prosecutions than civil proceedings.[303] While ALJs do not have the power to incarcerate, they do hand out significant penalties,[304] including (in the case of the SEC), lifetime bars on individuals from participating in an entire area of the economy.[305] For criminal sentencings, most jurisdictions recognize a defendant's right of allocution.[306] Depriving an administrative defendant of his statutory right to face the judge who will impose his "sentence" conflicts with broadly accepted norms.[307]

Even assuming the analogy between civil and administrative summary judgment was airtight, this would hardly provide a complete policy justification for the latter. For generations, scholars have raised a host of concerns about FRCP 56, many of which might present parallel worries about administrative summary judgment: for example, that it might discourage settlement,[308] fundamentally alter the balance of the underlying procedural regime in favor of

303 *See, e.g.*, Steven R Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 HARV BUS L REV 29, 30 3 (20 4)

304 The SEC would object to the terminology "penalty " *See id.* at 33 Officially, bars are supposed to be "remedial" not to penalize the respondent *See id.* at 46

305 *See* Tierney, *supra* note 289, at 2

306 6 WAYNE R LAFAVE ET AL , CRIMINAL PROCEDURE § 26 4(g), at 779 80 (3d ed 2007) (collecting sources)

307 *Cf., e.g.*, Arthur F Matthews, *Litigation and Settlement of SEC Administrative Pro ceedings*, 29 CATH U L REV 2 5, 259 60 (980) ("Since the Commission must tailor its sanction to comply with public interest criteria, character witness testimony can consti tute a crucial underpinning of a respondent's trial strategy In this respect, trial of the administrative proceeding resembles criminal litigation much more than routine civil litigation ")

308 *E.g.*, John Bronsteen, *Against Summary Judgment*, 75 GEO WASH L REV 522, 547 (2007) *But see* Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY U CHI L J 689, 697 (20 2)

OS Received 12/16/2021

one party,[309] impose heavy costs on adjudicators,[310] and put too much weight on efficiency and not enough on other important procedural values.[311]

C. Some Open Questions On Administrative Summary Judgment

Notwithstanding the confident statements of administrative summary judgment's promoters, the true impact of the procedure in the enforcement context is actually complicated and uncertain.

The practice of administrative summary judgment has not been subject to comprehensive study in the fifty years since the Administrative Conference study by Gellhorn and Robinson.[312] It is time to revisit the issue. Future research might examine how ASJ has been actually implemented by analyzing the procedure "on the ground" by agencies through qualitative legal analysis of agency rules, guidance (for example, enforcement manuals), filings, adjudicatory decisions, quantitative analysis of administrative filings and decisions, and interviews with current and former agency personnel. Researchers might also analyze the impact of ASJ on agencies themselves (including on their enforcement priorities and the

309 Bronsteen, *supra* note 308, at 547; Issacharoff & Loewenstein, *supra* note 286, at 03; Patricia M Wald, *Summary Judgment at Sixty*, 76 TEX L REV 897, 9 4 (998); Arthur R Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N Y U L REV 982, 32 (2003) These concerns are subject to empirical debate *Compare* Joe S Cecil et al , *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J EMPIRICAL LEGAL STUD 86 , 896 (2007), *with* Jonah B Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 62 U PA L REV 663, 673 (20 4)

3 0 Suja A Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA L REV 39, 78 79 (2007)

3 Miller, *supra* note 309, at 048

3 2 Summary Decision in Agency Adjudication (Recommendation 70 3), 38 Fed Reg 9,785 (July 23, 973) (Administrative Conference of the United States); Gellhorn & Robinson, *supra* note 7

In this article and a prior one, I looked at the SEC's use of Summary Disposition, but to my knowledge there is no similar study of any other agency, much less any effort to examine ASJ more globally

OS Received 12/16/2021

types of cases pursued) as well as on the private parties who appear in agency proceedings.

There are many open questions for future researchers to address, including the following:

1. SUBSTANTIVE LIMITS—Writing in 1971, Gellhorn and Robinson understood that summary judgment under FRCP 56 was categorically unavailable in certain cases, including those turning on "novel or significant" legal questions,[313] on "policy questions of first impression or public importance,"[314] or on an individual's state of mind.[315] Their endorsement of ASJ was expressly contingent on ASJ being subject to parallel limitations.[316] Since Gellhorn and Robinson's Report, however, many of these boundaries on summary judgment in federal court have eroded,[317] and there is reason to believe that at least some agencies have similarly broadened the applicability of ASJ beyond the domain originally envisioned by Gellhorn and Robinson. For instance, as discussed above, the SEC has made frequent use of ASJ to determine what penalty should be imposed on a defendant—an issue that, by law, turns (in part) on the party's state of mind.[318]

OPEN QUESTION: What, if any, substantive limitations have agencies imposed on the use of ASJ?

3 3 Gellhorn & Robinson, *supra* note 7, at 6 4

3 4 *Id.* at 6 8

3 5 *Id.* at 6 4

3 6 *Id.* at 6 4, 6 6, 6 8, 63

3 7 For example, fifteen years after Gellhorn and Robinson's report, the Supreme Court issued a "trilogy" of decisions that have been understood as encouraging broader use of Summary Judgment in federal litigation Matsushita Electric Indus Co v Zenith Radio Corp , 475 U S 574 (986); Anderson v Liberty Lobby, Inc , 477 U S 242 (986); Celotex Corp v Catrett, 477 U S 3 7 (986); *see, e.g.*, Issacharoff & Loewenstein, *supra* note 286, at 73 (arguing that the Supreme Court's "trilogy" "significantly expanded the applicability of summary judgment")

3 8 Platt, *supra* note 45, at 480 83, 489

OS Received 12/16/2021

2. PROCEDURAL PREREQUISITES—Gellhorn and Robinson defended ASJ against charges of unfairness by defining several procedural prerequisites that must be in place in order for an agency to use the procedure. For instance, they suggested that an agency should not use ASJ when the defendant or respondent was not represented by counsel because "summary disposition by motion could take unfair advantage of a party's lack of legal training."[319] They also suggested ASJ should be unavailable where the defendant did not have a "sufficient opportunity to obtain defensive facts" through discovery.[320] But not all agencies have implemented these procedural limitations. For instance, the SEC has used ASJ extensively against unrepresented defendants.[321]

OPEN QUESTION: What, if any, procedural prerequisites have agencies incorporated into ASJ practice and procedure?

3. SYMMETRY—Gellhorn and Robinson insisted that ASJ must be "double-edged"—that is, it must be available not only to agencies, but to private parties as well.[322] However, even where a procedure is technically available to private parties, as a practical matter it may not be truly available. For instance, in a prior article, I showed that although the SEC's rule authorized "any party" to move for summary disposition, between 1996 and 2014, defendants won just five motions for summary disposition, while the Agency's Enforcement Division won 186.[323]

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3 9 Gellhorn & Robinson, *supra* note 7, at 6 7 8

320 *Id.*

32 Platt, *supra* note 45, at 478

322 Gellhorn & Robinson, *supra* note 7, at 6 9

323 Platt, *supra* note 45, at 466; *see also id.* at 479 (quoting the SEC's Chief ALJ at a hearing in 20 4 explaining that the Commission "does not want motions for summary disposition granted" in favor of defendants "because you're second guessing their de cision that the case needs to get set down for hearing and that there is a legal basis for it")

OS Received 12/16/2021

OPEN QUESTION: To what extent is ASJ used offensively (by agencies) and defensively (by private parties)? What are the explanations for any asymmetry?

4. DELAY—Reducing delay in the administrative process was the primary goal articulated by both ACUS and Gellhorn and Robinson in endorsing ASJ.[324] But Gellhorn and Robinson also recognized that ASJ could itself become a source of additional delay, particularly when combined with a right of interlocutory appeal.[325] Some agencies have adopted procedures designed to minimize the risk that ASJ would cause additional delay. For instance, the FTC has provided for certain time-sensitive dispositive motions to be made directly to the Commission rather than the ALJ in the first instance.[326] The SEC requires a defendant to obtain "leave" from the ALJ before moving for summary disposition in certain cases.[327] And the FCC permits the ALJ to "take any action deemed necessary to assure that summary decision procedures are not abused" including by ruling "in advance of a motion that the proceeding is not appropriate for summary disposition," and by referring frivolous

324 The opening sentence of ACUS' Recommendation 70 3 reads as follows "Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists " Summary Decision in Agency Adjudication (Recommendation 70 3), 38 Fed Reg 9,785 (July 23, 973) The opening sentence of Gellhorn and Robinson's report reads as follows "Delay is widely acknowl edged as a major inadequacy of the administrative process " Gellhorn & Robinson, *su pra* note 7, at 6 2

325 Gellhorn & Robinson, *supra* note 7, at 625 ("Requiring the submission of all facts and arguments in written form when the case is complicated and the evidence is voluminous would probably only introduce further delay into many agency proce dures "); *id.* at 627 (criticizing the FTC's practice of reviewing almost all interlocutory decisions appealed by disappointed parties which "may ensure that summary decision motions will become the latest sport of attorneys seeking delay "); *id.* at 629 n 88 ("un less interlocutory review is restricted, the summary decision rule could readily become another device for delay")

326 6 C F R § 3 22 (2020)

327 7 C F R § 20 250(c) (2020)

OS Received 12/16/2021

and bad faith motions to the Commission for possible disciplinary action against the filing attorney.[328]

OPEN QUESTION: Has ASJ been successful at reducing delay in the administrative process? What procedural adaptations have individual agencies put in place to minimize the potential for additional delay?

5. SHAPING ENFORCEMENT PROGRAMS—Gellhorn and Robinson were focused exclusively on ASJ's ability to help an agency quickly resolve the cases it has *already* decided to bring.[329] They overlooked the possibility that the availability of ASJ could impact the types of cases that the agency brings in the first instance. As discussed above, there is reason to suspect that the availability of ASJ does affect the types of cases an agency chooses to initiate.[330] In a regime without ASJ, enforcement is expensive: there are substantial fixed costs for each litigated proceeding, because the respondent will be entitled to an oral hearing before an ALJ regardless of the complexity of a case. The agency will therefore be disinclined to risk scarce resources on low-level cases. Even if many of them will settle, the few that do not will prove not worth the procedural costs. ASJ allows the agency to quickly dispose of the easiest cases without the cost of a hearing even where the defendant refuses to settle. By lowering the procedural costs of a given action, ASJ essentially empowers the agency to *process* cases, rather than *adjudicate* them. ASJ makes enforcement cheaper, and thereby makes easy but trivial cases much more attractive because it allows the agency to match the procedural cost with the significance of the action. For example,

328 47 C F R § 25 (2020)

329 Gellhorn & Robinson, *supra* note 7

330 *See supra* note 273

OS Received 12/16/2021

as shown above, the SEC's well-publicized shift to a "Broken Windows" enforcement program under Chair Mary Jo White[331] was facilitated by an expansive use of ASJ.[332]

OPEN QUESTION: How has the availability of ASJ shaped agencies' enforcement programs by impacting the types of cases the agency brings in the first instance?

CONCLUSION

The SEC and other agencies are using administrative summary judgment to impose sanctions on defendants in formal administrative adjudications without conducting any in-person, oral hearing. This practice is prohibited. The plain text of Section 556(d) of the APA, the legislative history of the provision, and the contemporaneous legal practice all indicate that Congress permitted agencies to skip over the in-person hearing only in a subset of formal adjudications—those involving "rule making or determining claims for money or benefits or applications for initial licenses"—and not those involving the imposition of "sanctions." The judicial opinions that have upheld administrative summary judgment in sanctions cases are unpersuasive because they fail to confront this provision or its historical context.

Proponents' attempts to justify the procedure in an easy appeal to administrative efficiency fall short because (inter alia) these arguments fail to account for the ways the procedure may be (and seems to already have been) used to skew enforcement priorities, undermine congressional control of administrative agencies, and impair important procedural rights for some defendants.

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33 *E.g.*, Mary Jo White, Chair, Sec and Exch Comm n, Remarks at the Securities Enforcement Forum (Oct 9, 20 3) (announcing a new enforcement program modeled after the broken windows theory of policing that is, the idea that when a broken window is not fixed, it is a signal that no one cares, and so breaking more windows costs nothing '" (quoting George L Kelling & James Q Wilson, *Broken Windows: The police and neighborhood safety*, ATL MONTHLY, Mar 982, at 29))

332 *See* sources cited *supra* note 57; *supra* Figure

OS Received 12/16/2021

APPENDIX A
SEC ENFORCEMENT STATUTES THAT TRIGGER APA FORMAL ADJUDICATION RULES

PROVISION	TRIGGER FOR APA FORMAL ADJUDICATION
Exchange Act § 12(j)	The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, *ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING*, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.
Exchange Act § 15(b)(4)	The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, *ON THE RECORD AF TER NOTICE AND OPPORTUNITY FOR HEARING*, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer . . .
Exchange Act § 15(b)(6)(A)	With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from

OS Received 12/16/2021

	being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nation-ally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, *ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR A HEARING*, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person . .
Exchange Act § 17A(c)(3)	The appropriate regulatory agency for a transfer agent, by order, shall deny registration to, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such transfer agent, if such appropriate regulatory agency finds, *ON THE RECORD AFTER NO TICE AND OPPORTUNITY FOR HEARING*, that such denial, censure, placing of limitations, suspension, or revocation is in the public interest and that such transfer agent, whether prior or subsequent to becoming such, or any person associated with such transfer agent . . .
Exchange Act § 17A(c)(4)(C)	The appropriate regulatory agency for a transfer agent, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with the transfer agent, or suspend for a period not exceeding 12 months or bar any such person from being associated with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization, if the appropriate regulatory agency finds, *ON THE*

OS Received 12/16/2021

	RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has . . .
Investment Advisers Act § 203(e)	The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any in-vestment adviser if it finds, *ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING*, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such in-vestment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated . . .
Investment Advisers Act § 203(f)	The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nation-ally recognized statistical rating organization, if the Commission finds, *ON THE RECORD AFTER NO TICE AND OPPORTUNITY FOR HEARING*, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has . . . CASES: *Steadman v. SEC*, 450 U.S. 91 n.13 (1981).

OS Received 12/16/2021

Investment Company Act § 9(b)	CASES: *Steadman v. SEC,* 450 U.S. 91 n.13 (1981).

OS Received 12/16/2021