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AN EXTENDED HYPOTHETICAL FOR TEACHING ADMINISTRATIVE LAW

Charles H. Koch, Jr.*

Many law students begin Administrative Law disoriented in a fundamental way and many go through the entire course without finding stable ground. While most law students have been exposed to traditional lawyering since infancy, they do not have a similar context upon which to study the administrative process. In their other courses, they are given increasing doses of a recognizable version of legal practice until they feel comfortable with it. They study administrative law with no such nurtured grounding. Indeed, administrative law challenges many of the assumptions of traditional Anglo-American legal principles.

Such context is difficult to create artificially especially in a semester or, when actually needed, in the beginning stages of the course. I have confronted this absence of context with a "simulation" or extended hypothetical. I would like to describe the goals and nature of this extended hypothetical.¹

I. GOALS

Administrative Law should be committed to the practical application of administrative law. Administrative Law students should leave the course with a foundation for engaging in an administrative practice. At least, they should be given as much basic practical understanding as any course can.

Confounding any effort to teach an "applied" course in Administrative Law is the vast array of programs and administrative schemes. The classic administrative law cases, for example, bounce the students from one administrative scheme to another, each involving a heavy investment in

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¹ Sample "lessons" of the current version of the Hypothetical is included as Appendix A and the fictitious statute to which many of the lessons refer is included as Appendix B, reprinted with permission of Matthew Bender & Co., one of the LEXIS Publishing companies. All rights reserved.

understanding a complex substantive discipline. The students quickly lose focus. They are not sure what they are to glean from these cases. Indeed, we often talk about issues that were somewhat peripheral to the core controversy.

How can we overcome this disorienting array of substantive controversy in which administrative law issues are imbedded? I think administrative law does so through a search for commonality. The practical application of administrative law looks to strategies for sharing fundamental principles from among various substantive programs. In some senses, this search for commonality might have the feel of the search for "rules" in other courses. Yet, the common ground developed in Administrative Law cannot be characterized as "rules" to be applied in similar circumstances, but rather systemic principles which are shared at the initial stage of confronting common problems.

The hypothetical helps me demonstrate the transfer of evolved understanding regarding several common administrative law problems. My experience is that it replicates the actual practice of administrative law in that one learns the established treatment of a question in one system to apply it to a similar question in another system. For example, the law regarding the treatment of the hearsay rule in disability cases may be used to answer a hearsay question at the FTC.

In order to teach these common and transferable characteristics, I work from two well-established categories of generalization. The first is the traditional four procedural models: formal and informal adjudication and formal and informal rulemaking.² The second is based on the common issues confronting administrative processes.

It is, of course, no novelty to center the discussion of internal process on categories derived from the distinction between rulemaking and adjudication and the extent to which these tasks must be accomplished by a trial-like procedure. Every system, in our legal culture and those others I have studied, distinguishes the enterprise of making decisions focused on individual dispute resolution and that of resolving broad, general questions. Constitutional and statutory prescriptions, as well as the "common law" that has developed around them, have grounded administrative law principles on the distinction between rulemaking and adjudication. State and federal APAs are organized

² See Administrative Procedure Act, 5 U.S.C. §§ 553, 554 (1994 & Supp. IV 1998).

from this distinction. And since *Londoner*³ and *Bi-Metallic*,⁴ procedural due process begins with this distinction.

The process for engaging in these two categories of decision making ranges among various levels of procedural formality, from very formal to no participatory rights. In our legal culture, formality equates with the methods of trial so that one pole of this continuum rests on a trial-like model. Between this pole and no participation are nearly an infinite mix of types of participation. Procedural alternatives can be studied by describing points along this continuum, although these points are somewhat artificial. Interacting with the distinction between adjudication and rulemaking, these points produce a frame of reference for the study and transfer of understanding among administrative decision making tasks.

Less often explicit in organizing either the teaching or practice of administrative law is the generalized understanding developed for categories of issues. Nonetheless, such generalizations help make administrative law manageable. Diverse substantive programs confront common categories of issues and some common principles cover decision making with respect to those categories. The diverse substantive programs are brought together through these categories and common questions can be explored so that learning from among individual programs can be spread throughout the administrative law system. The internal procedures, the nature of external monitoring, and the very authority of the bureaucracy can be understood in terms of these issue categories.

For example, the concept of review of the policy OSHA makes to implement workplace safety programs can help students to understand the review of policy for the Aid to Families with Dependent Children program. The presumptions in favor of the Food and Drug Administration's expert judgments as to technical facts may also be accorded to judgments of technical facts made by the Nuclear Regulatory Commission.⁵ The process for finding individual facts in declining state PUC electricity rate-making systems can legitimize fact finding processes for emerging environmental permitting

³ *Londoner v. City & County of Denver*, 210 U.S. 378 (1908).

⁴ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

⁵ Agency regulations regarding matters specific to a particular agency are, of course, frequently given deference by the judiciary because the agency is presumed to have particular expertise. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

programs.

Unfortunately, resort to the generalizations created by these two strategies casts an aura of artificiality. Because this approach is divorced from substantive content, it engenders an image of highly stylized and conceptual study. To a large extent, success in teaching Administrative Law hinges on breathing a sense of reality into its generalities.

An attractive technique for doing so is to focus on a manageable set of administrative programs. The students need to inform themselves about a few, hopefully inherently interesting, substantive areas. The general principles emerge within these programs and administrative law, external to the sample programs, can be transferred into the context created by them. I find this to be a useful pedagogical technique.

Over the years, however, I sought the advantage of focusing on one administrative law program, especially designed for teaching Administrative Law. No single existing program served this pedagogical purpose. Therefore, I developed the hypothetical program described below along with characters and scenarios designed to demonstrative administrative law principles.

II. DESIGNING THE HYPOTHETICAL SCENARIO

A. *The Legislative Scheme*

The hypothetical is grounded on a fictitious statute, "The Wine Trade Commission Act,"⁶ designed to support discussions of various basic administrative law issues. One of the reasons for this fictitious legislative scheme is to provide statutory language as a springboard for discussion of the cases and the general APA. Thus, all but one section of the fictitious act relates to process. Still, in order to assure some connection to reality, each of these statutory provisions is based on provisions in existing legislation.

The legislative scheme provides only the most skeletal substantive law. The basic strategy of building the extended hypothetical around a new and nascent administrative scheme is to minimize the commitment to substantive law. The absence of deep substantive background captures one of the major advantages of this approach. The student need not invest a substantial amount of energy in mastering even a single program. Necessary substantive law can be developed through the hypothetical exercises. Student attention then is not diverted by substantive issues other than those created by the hypothetical.

⁶ See Appendix B, *infra*.

Similarly, the danger of passionate digression into social policy issues is avoided by the choice of consumer protection in the wine industry. While many of us enjoy wine, it does not create the emotional tension of other issues. Yet, while it does not raise passions, it is fun. In addition, the substantive "expertise" problem is mitigated because many law faculty and students seem to know a bit about wines, the basics are fairly simple, and brief forays into the industry are interesting and straightforward. (Even those who object to alcohol should not find concentration on the *regulation* of this industry too disagreeable and no one to date has objected to the hypothetical on those grounds.)

A second pedagogical advantage is that students see, indeed participate in, the development of substantive law for this particular agency and derive and develop procedural law. Thus, the hypothetical develops an understanding of how substantive law evolves through the administrative process. It forces the students to participate in the law making and it demonstrates the interaction among the various units within the agency. The students see both the rulemaking and adjudicative processes presenting the agency with the need to develop "agency law." It permits a discussion of the agency's relation with other institutions, particularly the courts, in the development of the agency's substantive law.

For this purpose, it replicates old-fashioned agencies rather than those created since the 1970s. In the early stages of administrative law, agencies were given a mission and trusted to find the best way to carry out that mission. For example, Brandeis constructed the Federal Trade Commission with a very broad mandate, "unfair method of competition," and intentionally left to the FTC the task of giving that phrase meaning.⁷ This model serves administrative law teaching well. Therefore, my fictitious statute borrows from section 17 of the Securities Act of 1933 for its major substantive provision.⁸ This section renders illegal practices described only as "any device . . . to defraud" or the omission of "material fact."⁹ It necessarily focuses attention on process, the process carrying forward this broad mandate.

B. The Agency

The hypothetical revolves around the working of a fictitious agency, the Wine Trade Commission. The basic structure of this legislative scheme is

⁷ See Federal Trade Commission Act, 15 U.S.C. § 41-77 (1994 & Supp. IV 1998).

⁸ 15 U.S.C. § 77a (1933).

⁹ See *id.*

modeled after the Federal Trade Commission.¹⁰ As suggested above, the FTC model also has the advantage of being an agency of an older vintage for which the legislation leaves the agency substantial scope to design procedures and evolve its substantive law.

The wine agency is new and in its formative stage. This stage is generally the most exciting moment in the life of an agency. Everyone is new and the younger staff, with whom the students are likely to identify, often end up helping their more senior colleagues understand ruling principles. Nothing is settled and the students have the opportunity to form the agency using the law presented in the course. These circumstances are exciting to the students, albeit fairly rare in actuality.

The agency is staffed with as many different types of individuals as feasible. A practical lesson students can learn from this device is that agencies (and governments in general) are communities of fairly diverse individuals with different backgrounds, training, social policy biases, and ambitions. Government is generally presented as a monolith, unaffected by the individual personalities working within it. Nothing, of course, could be further from the truth, and both those who will work in government and those who will engage in government related practice are more effective if they learn to deal with the diversity.¹¹

C. Characters

The characters orient the students within the hypothetical. The students are made to apply the general administrative law principles from a variety of perspectives, both inside and outside the agency. All the characters are composites of individuals I have known, most during my FTC staff days.

Many characters simulate those with whom the students can identify or can expect to deal in the early stages of their administrative practice. When law school focuses on legal practice, it does so many years in the students' future. Even the most confident and ambitious student must see a tremendous gap between, say, an appellate court perspective and their immediate future.

¹⁰ I worked for the Federal Trade Commission prior to becoming a professor. This experience has left me very comfortable with the reality of the situations presented. I feel this is a tremendous advantage and I encourage others to design the hypothetical agency around an agency with which they are familiar.

¹¹ I find that a now somewhat dated video developed by the League of Women Voters, "The Regulators," also helps give the students a sense of the realities of administrative operation. The video tracks a rule through the internal EPA rulemaking process. For one thing, it demonstrates the various tensions that affect the final regulatory design.

In contrast, the hypothetical leads them to apply basic principles in the more realistic context of very junior staff attorney or associate.

The two core characters are recent law graduates with whom the students should be able to identify. Abby is a new associate, right out of law school, in a major D.C. law firm. Ben is nearly as new, having moved from a prominent clerkship onto the agency staff.

Abby will represent Gallery, a major wine producer. Of course, Ben engages in actions against Gallery. These actions present judicial review and rulemaking context along with basic law enforcement adjudication. Ben, and less often Abby, must deal with various characters within the agency, other staff, the bureau director, and, since he is a budding star, even the general council and agency head. Abby, while less often engaged with the others within the agency, represents private clients who raise questions that are not easily presented in the context of the epic struggle between Gallery and the Wine Commission.

D. Individual Lessons

The intended use of the materials is to form a running hypothetical. The individual lessons are constructed to raise questions appropriate to the focus of the particular class.¹² One advantage of an extended hypothetical is that each individual problem is presented in an established context and to somewhat fully formed characters.

The hypothetical lessons attempt to place the students in realistic situations calling for the application of fundamental principles. Identifying with certain characters also forces the students to see the questions from different levels. To the extent possible, however, the hypothetical seeks to present administrative law questions in a “street-level” context.

Design of the individual lessons enables the hypothetical to fit individual teaching agendas. For me, the individual lessons are organized and designed to cover those parts of my casebook I choose to cover. In fact, I continually revise those lessons presented in my teacher’s manual. Actual use might convince me that a scenario needs revision to accomplish its purpose. Or an examination question might suggest improvements in a particular lesson. I would hope that others would modify the basic design to fit their own purposes.

¹² Some sample lessons are included as Appendix A.

Some of the lessons ask the students to apply the administrative law principles in a state context. Most of us teach federal law, and in fact, even state administrative law opinions are dominated by federal law. Nonetheless, by forcing application of these principles in a state context, the hypothetical reminds the students that they may actually confront an issue in their state practice. It also permits a discussion of any contrasting state approach, especially in the law school's state, without requiring materials particularized for that purpose.

III. USING THE HYPOTHETICAL

The extended hypothetical need not be associated with a particular teaching strategy. I have found that it easily accommodates, and can enhance, all of the traditional approaches. Indeed, I have experimented with several techniques to satisfy myself that the hypothetical could support other methods.

Obviously, the hypothetical is designed to support a problem solving teaching technique. It forces the students to apply the learning from various programs and systems presented by the casebook to solve a problem presented by the hypothetical. That is, the student must actually use the tools of administrative law: relevant legislation, the APA and enabling act, and case law as compiled and digested in the casebook.

The hypothetical could be used to support a case focused approach. For example, in considering a nondelegation case, one could shift to the fictitious act, even without reference to a lesson, to delve further into the implications of broad delegations. Application of the language in relevant cases to the WTC's broad delegation might alert the students to the implications of that doctrine. One might ask how the WTC will treat its delegation as informed by an understanding of the nondelegation doctrine.

The fictitious act and hypothetical scenes also support lecture. Even though I am committed to the dialogue style (generally "Socratic"), I find occasion to lecture. Even here, however, I find myself referring to the hypothetical scenes or the fictitious act. I can envision, if I desired, using them to aid a purely lecture approach.

IV. CONCLUSION

Simulated administrative practice through an extended hypothetical with an enabling act and established characters solves several problems in teaching Administrative Law. First, and perhaps most important, it prevents the subject from drifting off into theory and abstraction. Although administrative law relies on broad generalization, the hypothetical demonstrates how general concepts

might be used in practice situations. Second, in that regard, the hypothetical develops the practical techniques for sharing learning among programs and systems. Third, the hypothetical can demonstrate how the federal law that dominates most of our teaching can be applied in state and local context. Fourth, the hypothetical locates the course on a level at which the student can anticipate practicing. In sum, it furthers the overarching strategy of casting Administrative Law as a course the student can and will use.

Appendix A

THE SIMULATION

DAYS OF WINE AND REGULATION*

Simulation for

Koch, Administrative Law, 3d ed.

Abigail ("Abby, for heaven's sake") stood at her mailbox in her Washington, D. C. apartment building holding two letters. Ironically, she knew the gist of both before she opened them. The first was from her mother living in the rural midwestern town where her father owns the hardware store. It would have the same small farm-town gossip, different in only the minutest detail from the gossip that preceded it. It would end with some maternal daydream with vague references to a home and children. Her mother always refers to her stay in Washington as if it were a vacation trip. The other letter was as formal and terse as her mother's letter was rambling and chatty. It, she knew, was a notice that she had passed the D.C. bar. She had read her name in a list in the Washington Post that afternoon.

Abby has just joined a large Washington law firm, specializing in government practice. She will assist with one of the firm's major clients, Gallery. Gallery is a large wine producer. Abby will help represent Gallery in matters related to the new Wine Trade Commission (WTC or Commission). Of particular concern at present is the prospect of law enforcement proceedings against Gallery for alleged violations of the new wine act. Also of interest is a recently issued rule tightly regulating the adding of sugar to wines. Indeed, Abby spent most of the day in the WTC's general counsel's office as part of the Gallery team discussing these matters.

At the meeting, Abby was introduced to Dan. The new Wine Merchants Association (Association) hired Dan as its general counsel. His duties are numerous, including monitoring WTC's regulatory activities affecting the wine industry. Abby will work closely with Dan in the future.

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Dan sees their mutual nemesis on the Hill as Brit. Brit is chief of Senator Bisby's staff. She encouraged the Senator to push through the wine legislation that established both the Association and the WTC. Both entities are to regulate anti-consumer practices in the wine industry as well as promote that industry. Brit has proven to be a particularly dogged skeptic regarding the wine industry's practices.

At present, Abby hungered to celebrate her bar passage. She had called her parents that afternoon and by now most of her home state had been informed. But, here she knew no one as yet. After only a brief reflection, she wheeled out of her apartment building and headed for a nearby bar. At least she could toast herself before she went back to her apartment.

But she did not have to celebrate alone. At the bar was a man, whose name she remembered is Ben, she had met that day at the offices of the Wine Trade Commission (WTC). Her fear of celebrating alone suppressed her reticence and she introduced herself to Ben. To her relief, Ben's face brightened and he ordered her a drink.

Ben had recently joined the General Counsel's office of the newly formed WTC after a clerkship for a judge on the United States Circuit Court of Appeals for the District of Columbia. He grew up, she quickly found out, in a fancy northeastern suburb. His father had made a financial success of a sole practice his father started over his parents' grocery store. Ben's mother was an irrepressible public interest advocate. Together they gave him his values and the best education in the world. It was natural then for him to take a job in a consumer protection agency despite offers from the top firms in the country. While protecting wine consumers was not exactly poverty law, it promised to be an entertaining venture in the defense of the public interest. As his judge advised him at the time: "Working for a new or revitalizing agency is the most fun in government." Already he found himself surprisingly responsible for foundational decisions about enforcement strategy and methods of proceeding.

That night Abby learned a good deal about the WTC, information that will no doubt serve her well in the near future. Therefore, she listened more carefully than she might have otherwise to Ben's playful description of the major players at the WTC.

Carl is the WTC chair. He was recently defeated in a hotly contested congressional race. The party rewarded his loyalty with a position at the Department of Agriculture. When the WTC was created, he was appointed

its chair. Although nominally a lawyer, his entire career has been in politics and government.

The chair can rely on the two other commissioners from the President's party. Ben thinks it appropriate that their names are Fred, lawyer from a state bond firm in Sacramento, and Barney, a lawyer turned commercial real estate developer from Denver, because of their Stone Age mentality. Ben believes that the executive office can rely as well on the fourth commissioner, Sally. Unlike the other commissioners, she is not a lawyer but an economist. The oddball is Clara. Even though a commissioner not in the President's party was required by the wine act, Clara's views are more radically different than expected. As one very lone truly independent member of the WTC, it seemed she would be harmless if sometimes uncomfortably vocal.

Except for the chair, the commissioners will rarely have direct impact on Ben's work. The officials of most interest for him are the General Counsel and the Assistant General Counsel for Litigation. The greatest surprise to Ben has been the quality of these two individuals.

Chris is the General Counsel. After law school, she began a phrenetic career as a campaign manager and then administrative assistant to several members of Congress. Then she took a job in the legal department of the Health Care Finance Administration of the Department of Health and Human Services in search of a predictable and manageable time commitment. She was senior career lawyer in the legislative branch when Carl offered her the General Counsel position. Ben finds Chris to be shrewd rather than brilliant. He said he would not make jokes about her partly because he respects her abilities and partly because "she knows everything said or done in this town."

The Assistant General Counsel is Ralph. Ralph had a reputation as a brilliant criminal trial attorney before coming to the WTC. Although he took the job as a change of pace, he attacked it with all his impressive energy. By nature, he believes in the free market and hence he finds regulatory action uncomfortable. Yet, Ben has found him open to argument and willing to support a well reasoned and soundly prepared position even if not one he would naturally advance himself. Ben often contemplates the idea of following Ralph to his firm when they both tire of government service.

From this admission, the conversation moves to their dreams of the future and from that to even more trivial and forgettable tavern chatter until they noticed the late hour. As it happens, their parallel careers would bring them together constantly, often on the opposite sides of the WTC processes. [A

complete character list is provided at the end of the simulation.]

* * * * *

Lesson 2A.1. [Choice of procedures] Members of Congress who are particularly interested in the wine act are beginning to openly criticize the WTC for its lack of vigor. Carl wants to quiet this criticism from the “Hill” and wants some action to show them. In order to add vigor to the WTC’s enforcement efforts, Carl asked Ben to head a special task force. Ben determined that Gallery’s labels promise its wines are made of a much higher quality grape variety than is actually used in the wines. He finds that it also failed to disclose additives that enhance the taste and shelf-life of its wine. He argues that consumers want to know this information. Noting that section 5 of the wine act makes it unlawful “to omit to state a material fact,” Ben suggests that this language would authorize the WTC to bring an enforcement action against Gallery for failure to disclose its wine ingredients.

- a. What functions will the WTC need to perform here?
- b. Ben then considers whether he should recommend that the WTC promulgate a rule under section 8 before taking any enforcement action or instead immediately initiate a law enforcement adjudication under section 7 against Gallery.
- c. What can be accomplished by a rule?
- d. If it chooses an adjudication, what effect on subsequent enforcement against other wine bottlers?
- e. What is the WTC’s authority to choose?

* * * * *

Lesson 2B.1. [Application of procedural due process] Abby is assigned the case of one of the firm’s clients, Sid. Sid owns a small, local liquor wholesale operation in which he distributes wine along with other alcoholic beverages. He is required by the WTCA to join the Wine Merchants Association in order to continue carrying wine. Recently, the Association suspended Sid for

violating pricing disclosure provisions of its “Fair Marketing Practices” rules promulgated under the language in section 6(d), authorizing the Association to “regulate the conduct of its members.” The Association’s adjudication board issued the suspension after an abbreviated hearing. Abby would like to challenge the procedural adequacy of the suspension. Can she demonstrate the elements necessary to establish a procedural due process interest in Association membership?

Lesson 2B.2. [Procedures required by due process] Abby is asked to represent a friend’s son, Nick, a second year law student at a state school. Nick was denied a position on the Law Review. Selection for law review is based on a “write-on” competition. Nick submitted his paper on the assigned topic, but was not one of the students selected. When he was not selected, he asked the editors for a written critique of his paper, but they refused to provide any explanation for their decision. He then asked the faculty advisor to review his case. The advisor met with Nick and the review’s editor-in-chief. After this conference, the advisor told Nick that he saw no reason to “second-guess” the editors. Nick then appealed to the law school dean. The dean refused to consider his request. Nick hired Abby to challenge the editors’ decision. What additional procedures might Abby realistically demand in a due process action and what arguments should she make for the alternative procedures?

Lesson 2C.1. [Procedures required by statute] Chris decided that the WTC must develop procedures for promulgating rules. She asked Ralph to review the statutory requirements and recommend procedures to carry out the WTC’s statutory mandate. Ralph was appalled at the informality of the rulemaking procedures established by WTCA section 8. He then asked Ben to draft rulemaking procedures.

- a. What procedures are required for making rules under the APA? Does the WTCA modify these requirements? Do these procedures satisfy due process?
- b. Does section 8(c) require trial-like procedures for wine merchant license rules?
- c. What arguments might Ben make to satisfy Ralph about the adequacy of these procedures?
- d. Will the opportunity for judicial scrutiny of WTC rules help satisfy Ralph

about the fairness of its rulemaking procedures?

- e. Ben notices that section 6(d) authorizes the Association to make rules. He wonders whether the APA rulemaking requirements apply to the Association's rulemaking. Should the WTC nonetheless dictate procedures to the Association?

* * * * *

Lesson 4A.3. [Review of adjudication] Judge Fox is considering an appeal from an WTC "cease and desist" order. The order resulted from an enforcement hearing, initiated before the promulgation of the sugar rule, charging Hill Wines, Inc. with adulterating its wine in direct violation of WTCA section 5. The WTC ALJ, Joe, found that the addition of sugar to the juice naturally produced by the wine grapes did not constitute a practice in violation of WTCA section 5, but that the failure to disclose additives, even sugar, constituted an omission of a "material fact" which did violate the Act. Joe found that the addition of sugar, if needed, was a general industry practice, and that Hill's actions did not constitute fraud. He rejected, however, testimony from Hill's expert that wine drinkers generally knew that sugar may be added and that they did not care because they judged the wine by taste, not ingredients. For that reason, his order required disclosure. Both Hill and the WTC staff appealed the decision to the full Commission. The Commission, after oral argument, agreed with Joe that the failure to disclose sugar additives violated WTCA section 5. It also held, however, that the addition of sugar constituted the employment of a "device, scheme or artifice to defraud," which was not excused by industry practice. In the alternative, it disagreed with Joe's conclusions with respect to the industry practice and stated that its experience is that reputable wine producers do not add sugar to their wines. Therefore, the Commission's order prohibited the addition of sugar whether disclosed or not. Hill appealed that order. On judicial appeal, Hill argued that the order was not supported by "substantial evidence."

- a. Is the substantial evidence standard the appropriate standard in this case?
- b. What should Fox consider in applying the substantial evidence standard?
- c. Under this standard, should Fox review differently Hill's contention that not only the WTC's order, but also the more lenient ALJ order, should be overturned because Joe erroneously rejected the testimony by its expert?

- d. Hill also urged that, even if the order is found to be supported by substantial evidence, the WTC abused its discretion by its harsh sanctions against Hill for practices Hill believed were merely matching competitors and did not harm consumers even if technically in violation of the WTCA. How should Fox review the exercise of "discretion" here?
- e. Assume instead Fox was considering appeal of a rule in which the WTC said adding sugar must be disclosed. What would the standard of review be and how would it differ from review in this case?

* * * * *

Lesson 6B.1. [Rulemaking procedures] The WTC is considering comprehensive labeling rules. Brit is contemplating a proposed rule which would require disclosure of grape varieties for all wines, including the percentage of each grape varieties used in the wine. The rule might also set standards for designation of region of origin and vintage. It might even require some health information on wine labels. Brit recognizes that the configurations of the proposed rule are extremely important.

- a. What kind of information should she ensure will appear in the notice of proposed rulemaking?
- b. Abby wants to cross-examine the key staff expert. Is that required? Wise?
- c. What information should Brit want in the record in order to consider such a rule? How should she go about obtaining this information?
- d. What use should she make of information submitting by the wine industry? By the consumer groups?
- e. What would Abby do to protect her client in this rulemaking?
- f. The law requires some effort to negotiate certain rules. Would the labeling rule be a good candidate for negotiated rules? What will the WTC gain by negotiating a labeling rule? How should Brit structure the negotiated rulemaking process?

* * * * *

Lesson 6C.1. [Making a rule] After the completion of an extensive public comment period, Brit's staff sends her a recommended final labeling rule. She reviews the rule, the accompanying statement and the record. Her attention is particularly drawn to the staff's efforts with respect to several specific problems. The record shows that some wine producers add food coloring and artificial chemicals to make low quality grapes look and taste like good wine. Many add preservatives and some of these growers add antibacterial solutions to meet local health standards. The staff recommends strict disclosure requirements for additives. It suggests that even though the proposed rule contained no provision regarding additives, the notice did suggest that the WTC might consider disclosure of health information. It urges that this was sufficient notice to justify the additive provision.

- a. How should she evaluate the content of the staff's draft rule and the statement of basis and purpose?
- b. What should lead her to send it back for more work?
- c. What would lead her to conclude that the record was adequate? Should it contain a cost/benefit analysis?
- d. One provision of the recommended final rule surprises Brit. The staff concluded that the WTC made a mistake in not including additives in the proposed rule. Should Brit approve this provision of the rule? What support should she demand for an additive requirement? How could the statement demonstrate that the additive requirement would be worthwhile?
- e. She notes that the staff expressed concern about the effect of the rule on small, boutique vineyards. These are very marginal producers and the cost of a new labeling regulation may put most of them out of business. Still, the staff recommends broad application of the rule. Should Brit approve this recommendation or suggest an alternative?

* * * * *

Lesson 7B.1. [Allocation of decision making responsibility in the adjudicatory hierarchy] Because the rulemaking is quiet, Dan is assigned a case involving a contractor. The contractor's construction license has been suspended by the state construction board after it found that the contractor engaged in fraudulent practices. The construction standards are set by the

state contractor board, whose members are private citizens engaged in construction. Under the administrative procedures, he must appear before a special ALJ. The ALJ is selected by the board's chair from the state ALJ pool. At the hearing the contractor has an informal opportunity to state his case, through counsel if desired. The findings of the ALJ are final, but an ALJ's conclusion of law may be appealed to the board. The board has designated its general counsel to hear these appeals. On appeal of the suspension decision, Dan argues that his client did not have an impartial hearing.

- a. How would he make that argument and how would the state counter the argument?
- b. How would Dan's argument be changed by the fact that the state has adopted one of the model APAs?

* * * * *

Lesson 7B.3. [Presenting an administrative case] As part of his case, Ben has Professor Peck testify regarding his conclusions about consumer preferences based on information compiled by a task force commissioned by the WTC. Neither Peck nor the task force conducted any of these studies themselves. The professor states that the studies show that consumers would like to know about additives and grape varieties. As Peck begins to testify, Abby objects. She notes that, while *reliable* hearsay is admissible in an administrative hearing, this hearsay should not be admitted. She also urges that under the circumstances she should have the opportunity to cross-examine the employee.

- a. How should Joe rule?
- b. If Joe allows the testimony, how should Abby counter this testimony?
- c. In anticipation of Abby's strategy, Ben asks Joe to take official notice of the studies supporting the task force report. May Joe take official notice of these studies? What procedures should he follow in doing so? How should Abby respond?

* * * * *

Lesson 8A.2. [Bias and separation of functions] In her challenge to the WTC's disclosure order against Gallery, Abby contends that the decision violated the APA because of Joe's long service as a government lawyer. Particularly, she is concerned that Joe was the FTC's staff attorney in a consumer protection investigation of the wine industry's labeling practices. One of the firms investigated was Gallery. She understands that the staff recommended that a complaint be issued against the largest members of the wine industry, surely including Gallery, but a change in administration aborted the investigation. Can Abby make a case that Joe's presiding in this case violates the doctrine of separation of functions? Should she be allowed discovery to uncover information that might lead to a petition to disqualify for bias?

* * * * *

Lesson 8C. [Ethics in government] Ben has a major personal decision to make. Ralph has decided to quit and return to his law firm. He has asked Ben to join him. The money is substantial and the firm is extremely prestigious. The firm has a major wine producer as a client and it wants Ralph and Ben to serve that client. Should Ben and Ralph be permitted to represent clients in WTC related actions? Both wonder how much the Ethics in Government Act and the Rules of Professional Conduct will interfere with any practice before the WTC.

* * * * *

Lesson 9A.1. [Use of personal information compiled by the government] A powerful friend of Ben's family has offered to nominate his father to the state Supreme Court. His father knows this will involve a close scrutiny of his personal life, both present and past. Although he has been an exemplary citizen throughout his life, he had a number of confrontations with federal authorities during his student days. No formal action was ever initiated against him but he wonders what the files in several agencies might contain about him. He asks Ben several questions about these files. Under what law might a newspaper obtain access to these files? Can a state investigative authority obtain access to the files? Can Ben's father obtain access to these files

himself? If he finds unacceptable information in them, can he have that information removed or otherwise challenge it?

* * * * *

Lesson 9B.2. [Exceptions to the Freedom of Information Act] Gallery is concerned that information contained in the annual reports submitted to the WTC under section 6(e) of the wine act might be available under the FOIA. It asks Abby to find some protection for them. The particular information is:

- (a) Any information concerning the content of the Gallery's wines.
- (b) The WTC scientists' assay of the wine content.
- (c) Information about future plans for the production of new wine.
- (d) Marketing plans for last year's advertising programs.
- (e) An exchange of letters between Gallery and its accounting firm that is attached to the annual report.
- (f) Personal letter written by Gallery's CEO discussing the questionable behavior of Gallery's staff at a retirement party.

Abby wonders whether the agency can protect the information Gallery submitted under the FOIA.

CHARACTER LIST

Major players:

Abby - Begins as a lawyer with the D. C. office of a major New York law firm and represents Gallery, a national wine bottler, and other clients of the firm. Later, she becomes general counsel for the "Wine Merchants Association."

Association - The Wine Merchants Association, a self-regulatory organization created by the wine act and supervised by the WTC.

Ben - A lawyer with the WTC who works his way up the agency ladder.

Brit - She begins as chief of Senator Bisby's staff. She is later appointed from Senator Bisby's office as head of the WTC's rulemaking division.

Carl - The first chair of the WTC. He was given that position because of his political loyalties and not his talents.

Chris - She begins the simulation as WTC's General Counsel and later becomes WTC chair. Her appointments are the result of both connections and talent.

Dan - He is hired by the Association to represent it in legislative and regulatory affairs.

Gallery - A large national wine bottler that has trouble with the WTC.

Joe - Former Federal Trade Commission trial attorney who is now an Administrative Law Judge (ALJ) for the WTC.

Ralph - A talented criminal lawyer who takes some time from private practice to take a position as the WTC's Assistant General Counsel for Litigation and then returns to private practice.

The Wrath for Grape - A public interest group specializing in anti-alcohol issues.

Minor players:

Barney - A commissioner who was a commercial real estate developer from Denver.

Bisby - The senator who sponsored of the Wine Trade Commission Act and the legislator most likely to prod the WTC to action.

Clara - A commissioner with a reputation for strong-willed consumer advocacy.

Ernie - An attorney in the WTC's regional office, often engaged in enforcement activities.

Fox - Court of Appeals Judge.

Fred - A commissioner who was a lawyer who specializes in state bond issues from Sacramento.

Hill Wines, Inc. - A particularly shady wine bottler owned by Harlan Hill.

Nick - A second year law student challenging a decision made by the editorial board of his school's law review not to make him a member of the review.

Professor Peck - Consumer behavior expert.

Sally - Former economics professor who serves as one of the WTC commissioners.

Sid - A client of Abby's firm who owns a local liquor wholesale operation.

Appendix B

SAMPLE ENABLING ACT**

Warning. The following *fictitious* enabling act is not law. It is intended as a tool to facilitate discussion. Its sections are derived from sections in actual legislation as described in the "Historical Notes."

WINE TRADE COMMISSION ACT

[fictitious]

Sec. 1

Enactment

Sec. 2

Definitions

Sec. 3

Development of American Wine Industry

Sec. 4

Emergency Trust Fund

Sec. 5

Employment of Manipulative and Deceptive Devices

Sec. 6

Licensing of Wine Merchants

Sec. 7

Orders

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Sec. 8

Rules

Sec. 9

Judicial Review

Sec. 10

Enforcement

Sec. 11

Administrative Penalties

Sec. 12

Citizen Suits

Sec. 13

Separability

Sec. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that an independent agency is hereby created and established to be known as the Wine Trade Commission (hereinafter referred to as the Commission) which shall be headed by a chair and four other commissioners who shall be appointed by the President with the advice and consent of the Senate. No more than three commissioners shall be of the same political party. The Commissioners shall serve for seven years but may be removed by the President for inefficiency, neglect of duty or malfeasance in office. The Commissioners shall have authority to employ and fix the compensation of such attorneys, special experts, clerks and other employees as they may find necessary for the proper performance of their duties and as appropriated by Congress. With the exception of the Commissioners, attorneys and special experts, all employees of the Commission shall be part of the classified civil service and shall enter the service under such rules and regulations as may be prescribed by the Commission and by the Office of Personnel Management. The Federal Alcohol Administration Act, 27 U.S.C. §§ 201-212, is amended to remove all references to wine. The Secretary of Treasury shall hereafter have no jurisdiction over the wine industry.

Historical Note

This section was derived from the enactment clause of the Federal Trade Commission Act.

Sec. 2 Definitions.

(a) *Association.* The Association is the Wine Merchants Association constituted under this Act.

(b) *Commission.* The Commission is the Wine Trade Commission (WTC).

(c) *Commissioners.* The Commissioners are the five members of the Commission who will administer the agency, issue rules and decide all cases. They shall be presided over by one of the members who shall chair the meetings.

(d) *Rule.* A rule is any statement of general applicability, having the force of law, promulgated under the authority of this Act.

(e) *Wine.* Wine includes any alcoholic drink made from a fermented fruit unless otherwise defined by the Commission.

(f) *Wine merchants.* Wine merchants are all growers, wholesalers and dealers in wine as defined by the Commission.

Sec. 3 A Plan for Development of American Wine Industry.

The Commission shall promptly initiate and carry out a program for the promotion and development of the American wine industry. This program shall include development grants from such funds as Congress appropriates for that purpose. The Commission is authorized and directed to prepare a comprehensive plan for the conduct of the development programs. The Commission shall transmit such comprehensive plan to the President and to each House of the Congress within 120 days of the establishment of the Administration.

Historical Note

This section was derived from the Solar Energy Research, Development and Demonstration Act of 1974, 42 U.S.C. §§ 5503 & 5564.

Sec. 4 Emergency Trust Fund

(a) *Creation of trust fund.* The Commission shall set and collect an annual fee from licensees under sec. 6. This fee will be allocated to a Trust Fund and the Trust Fund will be used to insure individual growers against crop failure or other natural disasters. The Trust Fund will be administered by the Commission in cooperation with the individual states.

(b) *Disaster relief.* In the case of any individual, the determination of whether or not he suffered a disaster covered by subsection (a) of this section and of the day such disaster began, and the determination of the day on which such disaster ceases, shall be made by a State agency pursuant to an agreement entered into under subsection (c) of this section. Except as provided in subsections (d) and (e) of this section, any such determination shall be the determination of the Commission for purposes of this Act.

(c) *Federal/state cooperation.* The Commission shall enter into an agreement with each State which is willing to make such an agreement under which any appropriate State agency or agencies will make the determinations referred to in subsection (a) of this section with respect to all individuals in such State, or with respect to such class or classes of individuals in the State as may be designated in the agreement at the State's request.

(d) *Commission review of state determinations.* The Commission may on its own motion review a determination, made by a State agency pursuant to an agreement under this section, that an individual is under a disaster and, as a result of such review, may determine that such individual is not under a disaster or that such disaster began on a day later than that determined by such agency, or that such disaster ceased on a day earlier than that determined by such agency.

(e) *Hearing.* Any individual dissatisfied with any determination under subsection (b) or (d) of this section shall be entitled to a hearing thereon by the Commission or its delegatee.

(f) *Payment to the states.* (1) Each State which has an agreement with the Commission under this section shall be entitled to receive from the Trust Funds, in advance or by way of reimbursement, as may be mutually agreed upon, the cost to the State of carrying out the agreement under this section. The Commission shall from time to time certify such amount as is necessary for this purpose to the Managing Trustee, reduced or increased, as the case may be, by any sum (for which adjustment hereunder has not previously been made) by which the amount certified for any prior period was greater or less

than the amount which should have been paid to the State under this subsection for such period; and the Managing Trustee, prior to audit or settlement by the General Accounting Office, shall make payment from the Trust Funds.

(2) *Limits on use of funds.* If a state objects to the Commission's determination, it may request that the Commission reconsider that determination. Upon such a request, the Commission shall reconsider its determination under the procedures set out in 5 U.S.C. §§ 571-583. Notwithstanding 5 U.S.C. § 581, all determinations of the Commission under this section shall be final.

Historical Note

Subsection (a) of this section is new.

Subsections (b) to (f) of this section are derived from the Social Security programs disability provision, 42 U.S.C. § 421. Subsection (f)(2) is new law.

Sec. 5 Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mail, in connection with the purchase or sale of wine:

- (a) to employ any device, scheme, or artifice to defraud,
- (b) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Historical Note

This section was derived from section 17 of the Securities Act of 1933, 15 U.S.C. § 77q.

Sec. 6 *Licensing Wine Merchants.*

(a) *License required.* It shall be unlawful for any person to act as a wine merchant in interstate commerce unless such person has first obtained a "wine merchants" license from the Commission.

(b) *License application.* A person may obtain a license as a wine merchant by filing with the Commission an application as prescribed by the Commission. A wine merchant license shall be granted if the applicant complies with rules and regulations promulgated by the Commission in accordance with section 8(c) of this act.

(c) *Suspension and revocation of a license.* The Commission may by order, after the opportunity for a hearing as prescribed by the Commission, suspend or revoke any license for violation of this act or the rules of the Commission promulgated in accordance with section 8 of this act.

(d) *Wine Merchants Association.* The Commission shall cause a private association of wine merchants to be formed known as the "Wine Merchants Association." The Association shall regulate the conduct of its members. The Association may make rules and these rules shall be binding on its members after review by the Commission. It shall be unlawful for any person to sell wine other than at retail unless that person is a member in good standing of the Association.

(e) *Required reports.* The Commission may require any member of the Association to submit such reports as it deems necessary to carry out the purpose of this Act. Any person required to file a special report, who shall fail so to do within the time fixed by the Commission for filing the same and such failure shall continue for thirty days after notice of such default, shall forfeit to the United States the sum of \$1000 for each and every day of the continuance of such failure which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the person resides or, if a corporation, where it has its principal office or in any district in which it does business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

(f) *Release of information.* In accordance with its rules and regulations, the Commission may release information obtained under this section if such release will further the Commission's law enforcement purpose. Any officer

or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Historical Note

Subsections (a) to (d) of this section are derived from section 15 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78o. Subsections (e) and (f) are derived from section 10 of the Federal Trade Commission Act, 15 U.S.C. § 50.

Sec. 7 Orders.

(a) (1) Whenever the Commission has reason to believe that a person is violating this Act, it shall issue and serve upon the person a complaint stating its charges in that respect. After a full hearing, the Commission may issue such orders as it finds necessary to cure the violation. The Commission shall provide for appeal of any initial decision of a violation of this Act.

(2) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a violation of this Act, it may, before commencement of an enforcement action under this section, issue in writing and cause to be served on such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary materials or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

(b) (1) An order conferring a development grant may be issued after a general notice that the grant is available and an opportunity to submit written application. A person denied a grant may appeal that decision to the Commission. A person challenging a denial shall be afforded a conference with the Commission or its delegatee. The conference shall include rights of

parties to have reasonable notice, to appear in person or by counsel or other qualified representative for the informal presentation of factual data, argument, or proof, to have notice of any contrary facts or information in the possession of the agency upon which it may rely in any way in making an adverse decision, to receive prompt decision and to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision.

(2) In order to assure compliance with the conditions of a grant, the Commission or its delegatee may enter the premise of the grant holder.

Historical Note

Subsection (a)(1) of this section is derived from subsection 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45.

Subsection (a)(2) is derived from the False Claims Act, 31 U.S.C. § 3733.

Subsection (b)(1) of this section is suggested by the 1981 Model State Administrative Procedure Act, § 4-401.

Sec. 8 Rules

(a) *General Rulemaking Authority.* The Commission shall have the power to make rules and regulations for the purpose of carrying out the provisions of this Act.

(b) *Procedures for rulemaking.* (1) The Commission shall initiate all such rulemaking with a Notice of Proposed Rulemaking. The notice shall be published in the Federal Register. In addition to publication, the Commission shall assure that all interested persons have actual notice of the proposed rulemaking.

(2) In addition to seeking information by other methods, the Commission before publication of the notice shall solicit comments from interested members of the public on the subject matter of the possible rulemaking under consideration.

(3) Prior to publishing proposed rules in the Federal Register, the Commission shall consider whether the rule is appropriate for negotiated rulemaking under 5 U.S.C. §§ 561 et seq. The Commission may, within its discretion, determine to undertake negotiated rulemaking.

(4) The Commission shall issue a Regulatory Analysis with the proposed rule. The Regulatory Analysis shall estimate the costs and benefits of the proposed rule and compare those costs and benefits with the costs and benefits of alternative courses of action.

(5) Except as provided in subsection (c), the Commission shall promulgate public participation guidelines for soliciting the input of interested parties in the formation and development of its rules. These guidelines shall set out any methods for identification and notification of interested persons and the method whereby interested persons may participate in the issuance of the rule. The guidelines shall set out the circumstances in which the Commission will establish and consult with an advisory panels.

(6) The Commission shall publish the final rule in the Federal Register. The final rule shall be accompanied by a Statement of Basis and Purpose, in compliance with 5 U.S.C. § 553(c), based on the rulemaking record.

(7) Any person may petition the Commission for an exemption from a final rule. After the opportunity for a hearing, the Commission shall determine whether to grant or deny an exemption.

(8) These procedures are inapplicable to a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public.

(c) *Rules regarding wine merchant license.* After the opportunity for a full hearing, the Commission shall promulgate rules pertaining to eligibility for a wine merchant license. Such rule shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the rule, detailed findings of fact on which the order is based.

Historical Note

Subsection (a)(1) of this section is derived from subsection 6(g) of the Federal Trade Commission Act, 15 U.S.C. 46(g). Subsection (b) combines §§ 3-101, 3-105 & 3-116 of the 1981 MSAPA and § 9-6.14:7.1 of the Virginia Administrative Process Act. Subsection (c) contains language from the Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(e)(3).

Sec. 9 *Judicial Review.*

(a) *Petition for review of an order.* (1) Any person who is subject to an order issued under this Act may petition for review of the order in the court of appeals of the United States, within any circuit where the act or practice in question was used or where such person resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.

(2) Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*.

(3) The finding of the Commission as to the facts, if supported by evidence, shall be conclusive.

(4) To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.

(5) The judgment and decree of the court shall be final, except that the same shall be subjected to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(6) *Final order.* An order of the Commission shall become final—

(i) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, but the Commission may thereafter modify or set aside its order;

(ii) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(iii) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(iv) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the

Commission be affirmed or the petition for review dismissed.

(b) *Petition for review of an administrative penalty.* Any person against whom a civil penalty is assessed in accordance with section 11 or who commented on a proposed assessment may obtain review of a determination to assess or refuse to assess such civil penalties under that section. Any wine consumer shall be deemed to have had a nonspeculative injury from such determination.

(c) *Petition for review of a rule.* (1) Not later than 60 days after a rule is promulgated under section 8 by the Commission, any interested person may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has a principal place of business, for judicial review of the rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated for that purpose. The provision of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

(2) For purpose of this section, the term "rulemaking record" means the rule, its statement of basis and purpose, the transcript of any oral hearing, if any, any written submissions, and any other information which the Commission considers relevant to such rule.

(3) Upon the filing of the petition under paragraph (b)(1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided by such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking into account the rules of prejudicial error), or if the findings of fact upon which the rule is based are not supported by substantial evidence. Neither the content and adequacy of the Regulatory Impact Statement required by subsection 8(b)(4) nor the content and adequacy of the Statement of Basis and Purpose required by subsection 8(b)(6) shall be subject to judicial review in any respect.

Historical Note

Section (a) follows closely the classic "petition for review" provision of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Section

(b) contains language from the judicial review provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(g). Section (c) is derived from the judicial review provisions of the Magnuson-Moss Federal Trade Commission Improvement Act of 1975 amendments to the Federal Trade Commission Act, 15 U.S.C. § 57a(e).

Sec. 10 *Enforcement*

(a) *Civil penalty for violation of an order.* Any person who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

(b) *Injunction.* Whenever the Commission has reason to believe—

(1) that any person is engaged in a practice in violation of this act or a rule, promulgated under section 8 of this act;

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the practice upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, resides or transacts business.

(c) *Criminal penalty.* Any person who willfully violates any provision of this Act, or rules promulgated under section 8 of this Act shall upon conviction be fined not more than \$100,000 or imprisoned not more than five years, or both.

Historical Note

Subsection (a) of this section is derived from subsection (l) of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(l).

Subsection (b) of this section is derived from an amendment to the Federal Trade Commission Act, 15 U.S.C. § 53(b).

Subsection (c) of this section is derived from section 32 of the Securities and Exchange Act of 1934, 15 U.S.C. 78ff(a).

Sec. 11 *Administrative penalties*

(a) *Violation.* (1) Whenever on the basis of any information available, the Commission finds that a wine merchant as defined by section 2 has violated this act, either may, after consultation with the State in which the violation occurs, assess a civil penalty.

(2) In determining the amount of any penalty, the Commission shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(b) *Hearing.* Before issuing an order assessing a civil penalty, the Commission shall give to the person to be assessed such penalty written notice and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 or Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(c) *Rights of interested persons.* (1) Before issuing an order assessing a civil penalty, the Commission shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(2) Any person who comments on a proposed assessment of a penalty shall be given notice of any hearing held under this section and of the order assessing such penalty. In any hearing held, such person shall have a reasonable opportunity to be heard and to present evidence.

(3) If no hearing is held before issuance of an order assessing a penalty, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, for such hearing, the Commission

shall immediately set aside such order and provide a hearing in accordance with section (b). If the Commission denies a hearing, it shall provide to the petitioner and publish in the Federal Register notice of and the reasons for such denial.

(d) *Finality of the order.* An order shall become final 30 days after its issuance unless a petition for judicial review is filed or a hearing requested. If such a hearing is denied, such order shall become final 30 days after such denial.

(e) *Collection.* If any person fails to pay an assessment of a civil penalty

(1) after the order making the assessment has become final, or

(2) after a court in an action brought under subsection 9(b) has entered a final judgment in favor of the Commission or Association,

the Commission shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

Historical Notes

This section is derived from subsection 309(g) of the Federal Water Pollution Control Act, 33 U. S. C. § 1319(g).

Sec. 12 Citizen suits

(a) *Authority to bring civil action; jurisdiction.* Except as provided in subsection (b) of this section, any person may commence a civil action on their own behalf

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) a Commission rule or (B) an order issued by the Commission.

(2) against the Commission where there is alleged a failure of the Commission to perform any act or duty under this act which is not discretionary with the Commission.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such rule or order, or to order the Commission to perform such act or duty, as the case may be.

(b) *Notice.* No action may be commenced

(1) under subsection (a)(1) of this section

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Commission, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the rule or order, or

(B) if the Commission or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the rule or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Commission;

Notice under this subsection shall be given in such manner as the Commission shall prescribe by rule.

(c) *Intervention by the Commission.* In such action under this section, the Commission, if not a party, may intervene as a matter of right.

(d) *Award of costs.* The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may order any party, other than the government, to pay the costs of litigation (including reasonable attorney and expert witness fees), whenever the court determines that the award of such costs is appropriate. The court may order the government, when it is a party, to pay such costs to a prevailing party unless the court finds that the position of the government was substantially justified or that special circumstances make an award unjust.

(e) *Nonrestriction of other rights.* Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law. Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any

administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agency, or employee thereof under State or local law.

Historical Note

This section is derived from section 304 of the Clean Air Act, 42 U. S. C. § 7604. Some of the language in the second sentence of subsection (d) comes from the Equal Access to Justice Act, 5 U. S. C. § 504.

Sec. 13 *Separability of Provisions*

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, or circumstance, shall not be affected thereby.