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A Primer on the Reviewability of Agency Delay and Enforcement Discretion

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Summary

Congress regularly authorizes and requires administrative agencies to implement and enforce regulatory programs. As such, agencies routinely make decisions about when to promulgate regulations and when to enforce statutory requirements against parties who violate the law.

During the 113th Congress, the Obama Administration announced that certain federal agencies would not enforce specific aspects of the Affordable Care Act (ACA) for a period of time in order to allow the public to further prepare for proper compliance with the law in the future. This has led to numerous questions regarding how courts treat administrative delays of regulatory programs. When can a suit be brought to force the agency to apply the law?

It is important to distinguish between two distinct types of agency delays: (1) delays resulting from when an agency fails to meet a statutory deadline for promulgating rules or completing particular adjudications, and (2) affirmative decisions to withhold enforcement of a provision of law on the public at large. The former arises in a scenario in which Congress has enacted a statute that expressly requires an agency to take a specific action by a certain date that the agency fails to meet. Because agencies can often struggle to meet tight congressional deadlines imposed by laws, courts have established a balancing test, known as the *TRAC* test, to determine whether the agency should be compelled to take action. The second type of delay occurs in a scenario in which an agency refuses, for a period of time, to *enforce* a statutory prohibition or requirement that Congress has imposed on third parties. This type of delay is generally implemented by announcing a period of non-enforcement during which the agency will not pursue or punish non-compliance with the law. Courts determine whether these delays are reviewable in court by following the Supreme Court's holding in *Heckler v. Chaney*.

This report will discuss the general legal principles applied in determining whether administrative delays are reviewable in court in these two different contexts and then address whether the procedures outlined in the Administrative Procedure Act (APA) are applicable to these delays.

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Introduction

During the 113th Congress, the Obama Administration announced that certain federal agencies would not enforce specific aspects of the Affordable Care Act (ACA)¹ for a period of time in order to allow the public to further prepare for proper compliance with the law in the future.² This has led to numerous questions regarding how courts treat administrative delays of regulatory programs. This report will discuss the general legal principles applicable to judicial review of administrative delays in two different contexts: (1) delays in meeting a specific statutory deadline for implementing rules or completing particular adjudications, and (2) delays in the enforcement of a provision of law on the public at large. The report will then address whether the procedures outlined in the Administrative Procedure Act (APA) apply to these delays.

The first type of agency delay—delays in meeting a specific statutory deadline for implementing rules or completing particular adjudications—arises when Congress has enacted a statute that expressly requires an agency to take a specific action by a specific date. For example, the ACA includes a number of mandatory rulemaking provisions that require agencies to issue certain substantive rules by certain dates.³ An agency's failure to meet this type of statutory deadline is generally assessed pursuant to a multi-factor balancing test established in *Telecommunications Research & Action Center v. FCC*, discussed further below.⁴

The second type of delay occurs when an agency delays the *enforcement* of a statutory prohibition or requirement that Congress has imposed on third parties. An agency generally implements this delay by announcing that, as an enforcement policy, the agency will not pursue or punish non-compliance with the law for a certain period of time. The underlying law takes legal effect and conduct in violation of that law remains unlawful, but the agency—in an exercise of its enforcement discretion—does not take action in response to violations of the provision until after a certain date. For example, although a provision in the ACA requiring that health plans meet certain minimum coverage requirements became effective in January 2014, the Center for Medicaid Services has announced that it will not enforce these requirements for certain plans for at least one year.⁵ This type of enforcement delay would generally be assessed, if at all, pursuant to standards established for determining whether non-enforcement decisions are “committed to agency discretion by law” under the APA.⁶

¹ P.L. 111-148 (2010). ACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010) (HCERA). These acts will be collectively referred to in this report as “ACA.”

² See Internal Revenue Service, Notice 2013-45, NOT-129718-13 (July 3, 2013), *available at* <http://www.irs.gov/pub/irs-drop/n-13-45.PDF>.

³ For example, section 6001(a) of the ACA requires the Secretary of HHS to issue rules relating to physician ownership and investment in hospitals by January 1, 2012. These regulations were issued on November 30, 2011. 76 FR 74122. For a general discussion of mandatory and discretionary rules issued under the ACA see CRS Report R43386, *Upcoming Rules Pursuant to the Patient Protection and Affordable Care Act: The Fall 2013 Unified Agenda*, by Maeve P. Carey and Michelle D. Christensen.

⁴ 750 F.2d 70 (D.C. Cir. 1984).

⁵ For a discussion of this delay see, CRS Report WSLG724, *Obama Administration's "Fix" for Insurance Cancellations: A Legal Overview*, by Jennifer A. Staman, Todd Garvey, and Daniel T. Shedd.

⁶ 5 U.S.C. § 701(a); see also *Heckler v. Chaney*, 470 U.S. 821 (1985).

Given this framework, it would appear that the context in which an agency delay arises may alter the manner in which the court evaluates the delay. We now turn to the question of the legal standards to be applied in the two identified scenarios: where an agency delay has resulted in the failure to meet a statutory deadline, and where an agency is relying on enforcement discretion to delay the enforcement of a duly enacted law.

Legal Standards and Limitations Applied to Administrative Delays

Statutory Deadlines⁷

The APA does not provide concrete time limits for agency action—instead, it leaves most deadlines for Congress to establish, if at all, in the particular agency’s enabling statute. Even absent a specific deadline, however, the APA states that an agency must “proceed to conclude a matter presented to it ... within a reasonable time.”⁸ Further, Section 706 of the APA states that courts shall “compel agency action unlawfully withheld or unreasonably delayed.”⁹ As such, the APA provides individuals with a cause of action when an agency takes an unreasonable amount of time to act.

However, a claim of unreasonable delay can only be brought against an agency for actions that the agency is legally obligated to take. The Supreme Court has stated that “a claim under § 706(1) [of the APA] can proceed only when a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take.”¹⁰ If the decision to act is “committed to agency discretion by law,” then no claim can be made against the agency for failing to take such an action.¹¹ In other words, an agency must be required to act by law in order to establish a claim that the agency has unreasonably delayed in acting.

Cases involving claims that an agency has unreasonably delayed taking required actions are typically brought when an agency has failed to meet a statutorily mandated deadline.¹² For example, if Congress requires an agency to promulgate rules by a certain date, or to complete adjudications within a specified period of time, a claimant may file suit against the agency for unreasonable delay if the statutory deadline has passed. Although courts generally are more willing to compel an agency to act if it has missed a statutory deadline, they will not necessarily do so. Instead, courts will often undertake a balancing test to determine whether the court should force the agency to act.

⁷ For additional information on how courts treat claims of unreasonable delay under the APA, see CRS Report R43013, *Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment*, by Daniel T. Shedd.

⁸ 5 U.S.C. § 555(b).

⁹ *Id.* at § 706(1).

¹⁰ *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

¹¹ 5 U.S.C. § 701(a)(1), (2).

¹² See, e.g., *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002); *In re Blue Water Network and Ocean Advocates*, 234 F.3d 1305 (D.C. Cir. 2000); *In Re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991).

The balancing test commonly used by most federal courts is referred to as the *TRAC* factor test, after the case in which the test was first established, *Telecommunications Research & Action Center v. FCC* (“*TRAC*”).¹³ Under such an analysis, a court will assess whether Congress has established any indication for how quickly the agency should proceed; determine whether a danger to human health is implicated by the delay; consider the agency’s competing priorities; evaluate the interests prejudiced by the delay; and determine whether the agency has treated any party less favorably than others.¹⁴ A court balances these *TRAC* factors on a case-by-case basis to determine whether agency action should be compelled. It can be difficult to predict which way a court will decide any particular case as “[t]here is no per se rule as to how long is too long to wait for agency action.”¹⁵ Courts will often take a missed deadline into heavy consideration, but, generally, will still evaluate the remaining factors when determining the outcome of the case.¹⁶

If Congress is not satisfied with relying on judicial enforcement of statutory deadlines, Congress may insert “hammer” provisions into the text of certain statutes.¹⁷ These provisions dictate what is to happen if a regulatory deadline is missed. The consequences for missing a deadline vary. Some laws establish a regulatory scheme that will be put in place if an agency misses a deadline,¹⁸ while others mandate that the agency’s *proposed* rule will go into effect if a final rule is not promulgated by the deadline.¹⁹ Finally, at least one law has withheld funding from an agency until certain rules are promulgated.²⁰ Although these provisions can force an agency to act quickly, they can also be challenging for Congress to establish due to the extensive time that is often required to develop an effective regulatory scheme. In addition to these hammer provisions, Congress may always use political pressure, congressional hearings, and the appropriations process to influence agencies to act with more urgency.²¹

These types of administrative delay are relatively common as agencies may encounter difficulties in meeting statutory deadlines.²² However, they differ fundamentally from situations where agencies use “administrative enforcement discretion” when deciding whether to enforce a statute or regulatory scheme.

¹³ 750 F.2d 70 (D.C. Cir. 1984) (“*TRAC*”).

¹⁴ *Id.* at 80 (internal quotations omitted).

¹⁵ *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991).

¹⁶ *See In re Blue Water Network and Ocean Advocates*, 234 F.3d 1305 (D.C. Cir. 2000) (applying the *TRAC* factors to determine whether to compel an agency to act even though it missed a statutory deadline by a margin of 8 years); *In Re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991) (applying the *TRAC* factors and then concluding: “Though we agree with Barr that FDA’s sluggish pace violates a statutory deadline, we conclude that this is not an appropriate case for equitable relief.”); *but, see Forrest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1998) (holding that when an agency fails to act by a “statutorily imposed absolute deadline,” the action has been “unlawfully withheld” and the court has no choice but to compel the agency to act). It is worth noting that if an agency promulgates a rule after the statutory deadline for issuing such a rule has passed, the delayed regulation would still be valid, unless the underlying statute provides otherwise. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 155, 171-72 (2003).

¹⁷ *See Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking* 15–16 (4th ed. 2006).

¹⁸ *See, e.g.*, 42 U.S.C. § 6924(d)(1-2).

¹⁹ *See, e.g.*, The Nutrition Labeling and Education Act of 1990, P.L. 101-535.

²⁰ *See Department of Transportation and Related Agencies Appropriations Act, 1988*, P.L. 100-202, Title 1.

²¹ For more information on the congressional oversight process, see CRS Report RL30240, *Congressional Oversight Manual*, by Todd Garvey et al. For more information on controlling agencies through appropriation, see CRS Legal Sidebar WSLG789, 2014 Omnibus Appropriations: Controlling Federal Agencies through Appropriations, by Daniel T. Shedd.

²² *See, e.g.*, *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002); *In re Blue Water Network and Ocean Advocates*, 234 F.3d 1305 (D.C. Cir. 2000); *In Re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991).

Enforcement Discretion

When an agency decides not to enforce a statute against regulated parties for a certain period of time, courts are likely to review this as an act of enforcement discretion. Federal agencies generally have flexibility in determining whether and when to initiate an enforcement action against a third party for violations of a law the agency is charged with administering. This freedom in setting enforcement priorities, allocating resources, and making specific strategic enforcement decisions is commonly described as “administrative enforcement discretion” and arises principally from a combination of the President’s constitutionally assigned obligation to “take care that the laws be faithfully executed,” and the APA’s command that courts avoid reviewing discretionary agency decisions.²³ Discretionary enforcement activities may include any range of actions, including, but not limited to, the imposition of penalties or the initiation of an agency investigation, prosecution, adjudication, lawsuit, or audit.

In situations where an agency *refrains* from bringing an enforcement action, courts have historically been cautious in reviewing the agency determination—generally holding that such non-enforcement decisions are “committed to agency discretion” and therefore not subject to judicial review under the APA.²⁴ The seminal case on this topic is *Heckler v. Chaney*, a Supreme Court case in which death row inmates challenged the Food and Drug Administration’s refusal to initiate an enforcement action to block the use of certain drugs in lethal injection.²⁵ In rejecting the challenge, the Supreme Court held that “an agency’s decision not to prosecute or enforce ... is a decision generally committed to an agency’s absolute discretion.”²⁶ The Court noted that agency enforcement decisions involve a “complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” including,

whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.²⁷

Agencies, the court reasoned, are “far better equipped” to evaluate “the many variables involved in the proper ordering of its priorities” than are the courts.²⁸ Consistent with this deferential view, the *Heckler* opinion proceeded to establish the standard for the reviewability of agency non-

²³ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”). It would appear that agency enforcement discretion exercised in the administrative context, though similar, is to be distinguished from prosecutorial discretion exercised in the criminal context.

²⁴ Under the APA all final agency actions are presumptively reviewable by a federal court. See 5 U.S.C. §§ 701, 702, 704. However, the APA excludes from review “agency action committed to agency discretion by law.” 5 U.S.C. § 701; See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that the “committed to agency discretion” exception to judicial review is “very narrow” and “is applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply’”) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

²⁵ 470 U.S. 821.

²⁶ *Id.* at 831.

²⁷ *Id.*

²⁸ *Id.* at 831-32.

enforcement decisions, holding that an “agency’s decision not to take enforcement action should be *presumed immune from judicial review*.”²⁹

However, the Court also clearly indicated that the presumption against judicial review of agency non-enforcement decisions may be overcome in certain situations.³⁰ The *Heckler* Court suggested that a court may review an agency enforcement determination “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”³¹ Additionally, the Court suggested that judicial review of non-enforcement may be appropriate when an agency has “consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”³² However, lower federal courts have only rarely had the opportunity to clarify these exceptions to *Heckler*’s presumption of non-reviewability.³³

It should be noted that dismissal of a challenge to an agency non-enforcement decision under the APA is not necessarily recognition by the court that the agency was acting within its authority. A legal distinction must be made between a decision in which a court reviews the merits of a challenge and approves of the agency action or inaction, and one in which a court dismisses the challenge for lack of jurisdiction before reviewing the merits. Although, as a practical matter, either decision results in the same outcome (i.e., the continuation of the agency decision), it would be inappropriate to state that a court that has dismissed a claim against an agency for lack of jurisdiction has accorded legal approval to the agency action or inaction.

Statutory Guidelines

The *Heckler* opinion specifically recognized Congress’s authority to curtail an agency’s ability to exercise enforcement discretion “either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”³⁴ Congress may, for instance, choose to remove an agency’s discretion by indicating “an intent to circumscribe agency enforcement discretion” and “provid[ing] meaningful standards for defining the limits of that discretion.”³⁵ In this manner, Congress essentially overrides the inherent

²⁹ *Id.* at 832.

³⁰ For example, enforcement decisions must not be carried out in a discriminatory manner such that the agency is in violation of the Equal Protection Clause. *Yick Wo v. Hopkins* 118 U.S. 356 (1886). The D.C Circuit has also held that the *Heckler* presumption does not apply when a non-enforcement decision is actually an agency interpretation of a statute. *See Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (“[N]othing in the holding or policy of *Heckler v. Chaney* [] precludes review of a ...challenge of an agency’s announcement of its interpretation of a statute, even when that interpretation is advanced in the context of a decision not to take enforcement action.”) (citations omitted). This report briefly focuses on only two exceptions.

³¹ *Heckler*, 470 U.S. at 832.

³² *Id.* at 833 n.4.

³³ The dearth of case law relating to agency non-enforcement may be due to the difficulty of finding a plaintiff who has been sufficiently injured by agency inaction to obtain standing. *See, e.g.,* CRS Legal Sidebar, *Obama Administration Delays Implementation of ACA’s Employer Responsibility Requirements: A Brief Legal Overview*.

³⁴ *Heckler*, 470 U.S. at 833. *See also* *Souder v. Brennan*, 367 F. Supp. 808, 811-12 (D.D.C. 1973) (“It is undisputed that the Department of Labor has a declared policy of non-enforcement of the minimum wage and overtime provisions with regard to patient-workers at non-Federal institutions for the mentally-ill. It is also clear to the Court that if the Fair Labor Standards Act does apply to such patient-workers then the policy of non-enforcement is a violation of the Secretary’s duty to enforce the law.”).

³⁵ *Heckler*, 470 U.S. at 834.

discretion possessed by the agencies in the enforcement of federal law and provides a reviewing court with a standard upon which to review the agency inaction. Although the exercise of agency discretion may therefore be influenced by congressional controls, it would appear that Congress's intent to curtail the agency enforcement discretion must be made explicit, as courts are hesitant to imply such limitations.³⁶

In applying this standard, the *Heckler* Court held that the Food Drug and Cosmetic Act (FDCA) had not curtailed the FDA's discretion in a manner sufficient to allow the Court to review the agency's non-enforcement determination. The FDCA provided only that the Secretary was "authorized to conduct examinations and investigations" and not that he was required to do so.³⁷ Moreover, the Court determined that the FDCA's requirement that any person who violates the Act "shall be imprisoned ... or fined" could *not* be read to mandate that the FDA initiate an enforcement action in response to every violation.³⁸ The FDCA's prohibition on certain conduct, although framed in mandatory terms, was insufficient to permit review of non-enforcement absent additional language delineating how and when the agency was to respond to violations. "The Act's enforcement provisions," held the Court, "thus commit complete discretion to the Secretary to decide how and when they should be exercised."³⁹

However, in a pre-*Heckler* case, *Dunlop v. Bachowski*,⁴⁰ the Court found that a statute had removed agency discretion with regard to its enforcement in a particular circumstance. In *Dunlop*, a union member challenged the Secretary of Labor's refusal to bring an enforcement action to set aside a union election.⁴¹ The Labor-Management Reporting and Disclosure Act (L-MRDA) provides that upon the filing of a complaint, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation ... has occurred ... he shall ... bring a civil action."⁴² The Court rejected the agency's argument that the Secretary's determination of whether to bring a civil action was an unreviewable exercise of administrative discretion. In doing so, the Court cited approvingly⁴³ to the appellate court's conclusion that:

[T]he factors to be considered by the Secretary, however, are more limited and clearly defined: § 482(b) of the L-MRDA provides that after investigating a complaint, he must determine whether there is probable cause to believe that violations of § 481 have occurred affecting the outcome of the election. Where a complaint is meritorious ... the language and purpose of § 402(b) indicate that Congress intended the Secretary to file suit. Thus, [] the Secretary's decision whether to bring suit depends on a rather straightforward factual determination, and we see nothing in the nature of that task that places the Secretary's decision "beyond the judicial capacity to supervise."⁴⁴

³⁶ The D.C. Circuit has suggested that "guidelines" can take the form of "standards in the statute itself, in regulations promulgated by an administrative agency in carrying out its statutory mandate, or in other binding expressions of agency viewpoint." *Crowley Caribbean Transp. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (citations omitted).

³⁷ 21 U.S.C. § 372.

³⁸ *Heckler*, 470 U.S. at 835.

³⁹ *Id.*

⁴⁰ 421 U.S. 560 (1975).

⁴¹ *Id.*

⁴² 29 U.S.C. § 482.

⁴³ *Dunlop v. Bachowski*, 421 U.S. 560, 567 n.7 (1975) ("We agree with the Court of Appeals, for the reasons stated in its opinion, 502 F. 2d 79, 86-88 (CA3 1974), that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion.").

⁴⁴ *Bachowski v. Brennan*, 502 F.2d 79, 88 (3rd Cir. 1974).

In *Heckler*, the Supreme Court confirmed the continued validity of the *Dunlop* decision, but distinguished the two decisions, holding that unlike the FDCA, the L-MRDA “quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power.”⁴⁵

As discussed above, the language held to override the presumption against review of agency non-enforcement in *Dunlop* contained an express trigger for when enforcement was to take place. Federal statutes that do not contain language defining how and when the agency is to exercise its enforcement discretion, even when framed in mandatory terms, generally have not been held to override agency enforcement discretion. For example, a congressional command that an agency “shall enforce” a particular statute, without additional guidelines as to the circumstances under which enforcement is to occur, is generally insufficient to permit review of a non-enforcement decision.⁴⁶ The *Heckler* court suggested as much, noting that it could not “attribute such a sweeping meaning” to language that was commonly found in criminal provisions.⁴⁷

Abdication of Statutory Responsibilities

In *Heckler*, the Supreme Court also suggested that the presumption against the review of non-enforcement may be overcome if the agency has “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”⁴⁸ The Court, however, was non-committal as to whether such an agency policy would in fact be reviewable, stating only that “[a]lthough we express no opinion on whether such decisions would be unreviewable under [the APA], we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not “committed to agency discretion.”⁴⁹

In raising the “statutory abdication” argument, the Court cited to *Adams v. Richardson*, a decision from the United States Court of Appeals for the D.C. Circuit (D.C. Circuit).⁵⁰ *Adams* involved a challenge to the Secretary of Health, Education, and Welfare’s (HEW’s) failure to enforce Title VI of the Civil Rights Act of 1964 (Title VI). The law in question “authorizes and directs” federal agencies to ensure that federal financial assistance is not provided to segregated educational institutions.⁵¹ The Secretary asserted that the law provided federal agencies with “absolute discretion” with respect to whether to take action to cut off funding.⁵² The court disagreed, holding—in language characteristic of the “statutory guidelines” exception—that “Title VI not

⁴⁵ *Heckler*, 470 U.S. at 834.

⁴⁶ *See, e.g., id.* at 835 (“The section on criminal sanctions states baldly that any person who violates the Act’s substantive prohibitions ‘shall be imprisoned. . . or fined.’ Respondents argue that this statement mandates criminal prosecution of every violator of the Act but they adduce no indication in case law or legislative history that such was Congress’ intention in using this language, which is commonly found in the criminal provisions of Title 18 of the United States Code. *See, e.g.,* 18 U.S.C. § 471 (counterfeiting); 18 U.S.C. § 1001 (false statements to Government officials); 18 U.S.C. § 1341 (mail fraud). We are unwilling to attribute such a sweeping meaning to this language...”).

⁴⁷ *Id.*; *see also* *Atlantic Green Sea Turtle v. County Council of Volusia County*, 2005 U.S. Dist. LEXIS 38841 (2005) (holding that just because the Endangered Species Act said that violations of regulations “shall” be enforced, the statute did not remove agency enforcement discretion).

⁴⁸ *Heckler*, 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).

⁴⁹ *Id.*

⁵⁰ 480 F.2d 1159 (1973).

⁵¹ 42 U.S.C. § 2000d-1.

⁵² *Adams*, 480 F.2d at 1162.

only requires the agency to enforce the Act, but also sets forth specific enforcement procedures.”⁵³ The court appeared to give great weight to the scope of the Secretary’s non-enforcement, noting:

More significantly, this suit is not brought to challenge HEW’s decisions with regard to a few school districts in the course of a generally effective enforcement program. To the contrary, appellants allege that HEW has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty.⁵⁴

The court determined that HEW had consistently and unsuccessfully relied on voluntary compliance as a means of enforcing Title VI without resorting to the more formal and effective enforcement procedures available to the agency. This “consistent failure” was a “dereliction of duty reviewable in the courts.”⁵⁵

Given the sparse case law associated with this exception, it is difficult to assess what level of non-enforcement constitutes an abdication of statutory responsibilities. It seems that if an agency announced that it would no longer enforce a provision of law against any individual at any time, regardless of the nature of the violation, a court could be willing to review the policy. Whether more limited non-enforcement policies—for instance if an agency announced that it will not enforce a particular provision against a particular group or that it will *delay* enforcement of a particular provision for a specified period of time—could also be subject to review would appear to be less clear. For example, in *Schering Corp. v. Heckler*, the D.C. Circuit held that the FDA decision not to pursue an enforcement action against a drug manufacturer for a specific period of time fell “squarely within the confines of [*Heckler*]” and was therefore not reviewable.⁵⁶

It is clear, however, that announced agency policies of widespread non-enforcement are much more likely to satisfy the “statutory abdication” standard than more traditional, case-by-case, enforcement decisions. Indeed, in *Crowley Caribbean Transportation v. Pena*, the D.C. Circuit made a clear distinction between “single-shot non-enforcement decisions” on one hand, and “an agency’s statement of a general enforcement policy” on the other.⁵⁷ The court determined that an agency’s “general enforcement policy” was reviewable where the agency had (1) “expressed the policy as a formal regulation”; (2) “articulated [the policy] in some form of universal policy statement”; or (3) otherwise “[laid] out a general policy delineating the boundary between enforcement and non-enforcement” that “purport[s] to speak to a broad class of parties.”⁵⁸ The court articulated its reasons for finding review of general enforcement policies to be appropriate as follows:

By definition, expressions of broad enforcement policies are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings. As

⁵³ *Id.*

⁵⁴ *Id.* The court also noted that HEW was playing an affirmative role in the violation of federal law by “actively supplying segregated institutions with federal funds.” *Id.* The court acknowledged that it is one thing to say the agency “lacks the resources necessary to locate and prosecute every civil rights violator” and “quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools.” *Id.*

⁵⁵ *Id.* at 1163.

⁵⁶ 779 F.2d 683, 685 (D.C. Cir. 1985). The agency had bound itself not to initiate an enforcement action by the terms of a settlement agreement.

⁵⁷ 37 F.3d 671, 676 (D.C. Cir. 1994).

⁵⁸ *Id.* at 676-77.

general statements, they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion. Second, an agency's pronouncement of a broad policy against enforcement poses special risks that it "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," a situation in which the normal presumption of non-reviewability may be inappropriate. Finally, an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc.⁵⁹

Procedural Requirements for Implementing a Delay

Whether an agency must follow notice and comment rulemaking procedures when it declares its intent to delay enforcement of certain provisions of a statute depends on whether the declaration is considered a "rule" for the purposes of Section 553 of the APA. Only "legislative rules" are subject to the informal rulemaking procedures outlined in the APA; an agency may promulgate guidance documents and interpretive rules without having to undergo notice and comment procedures.⁶⁰ A party may challenge an agency's characterization of any action and argue that a particular statement should have been issued pursuant to notice and comment procedures.⁶¹ However, courts sometimes have difficulty differentiating between general statements of policy, such as guidance documents, and legislative rules.⁶²

Courts have described a legislative rule to be a rule through which an agency "intends to create a new law, rights or duties," or a rule that is "issued by an agency pursuant to statutory authority and which implement[s] the statute."⁶³ Similarly, one court explained that a rule is legislative if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties."⁶⁴ Notably, courts distinguish legislative rules from guidance documents because they have a binding effect: "[I]f a statement has a present-day binding effect, it is legislative."⁶⁵

Guidance documents, which are not defined by the APA, generally are considered to be a particular type of agency rule, known as a "general statement of policy."⁶⁶ The APA provides that an agency may issue these general statements of policy without having to undergo notice and

⁵⁹ *Id.* at 677 (citations omitted).

⁶⁰ 5 U.S.C. § 553.

⁶¹ 5 U.S.C. § 706(2)(D).

⁶² *See* *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citing cases and articles that describe the distinction as "fuzzy," "blurred," and "enshrined in considerable smog"); *Hector v. United States Dep't of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996); JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 75 (4th ed. 2006).

⁶³ *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc); TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947), available at <http://www.law.fsu.edu/library/admin/1947iii.html>.

⁶⁴ *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

⁶⁵ *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 n. 4 (D.C. Cir. 1987).

⁶⁶ 5 U.S.C. § 553(d)(3)(A).

comment rulemaking procedures.⁶⁷ According to the Office of Management and Budget’s (OMB’s) Final Bulletin on Agency Good Guidance Practices, the term “guidance document” is defined as “an agency statement of general applicability and future effect, other than a regulatory action ... that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue.”⁶⁸ Similarly, the Supreme Court has defined the term “general statement of policy” to be a statement “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”⁶⁹ Therefore, guidance documents do not create new legal obligations on the public, but, instead, inform the public on how an agency intends to carry out certain agency functions. One court notes that a statement cannot be characterized as a guidance document, and is instead a legislative rule, if the pronouncement “narrowly limits administrative discretion or establishes a binding norm.”

Although it can be difficult to ascertain whether a court would characterize an agency statement delaying enforcement actions as a guidance document or a legislative rule, the following examples of such agency statements may provide some guidance on this issue.⁷⁰

Exercising Enforcement Discretion

It appears that, at least in some circumstances, a statement addressing agency enforcement priorities could qualify as a guidance document. When an agency declares that it will only enforce a particular law at a certain time or under certain circumstances, it is not imposing a new legal obligation on the public. In fact, the underlying legal obligation technically remains in effect. Instead, the agency has simply informed the public that it will not seek to enforce the provisions of the statute in the enumerated situations.⁷¹ As addressed in *Heckler*, it seems the agency could be viewed as exercising administrative discretion when it determines that enforcement of the law in a particular situation should not proceed.⁷² Because an agency’s decision to enforce a statute in a given situation is discretionary,⁷³ an agency’s announcement of its enforcement policy would appear to qualify as a guidance document under the Supreme Court’s decision in *Lincoln v. Vigil*, which describes a general statement of policy as a statement “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”⁷⁴ Further, because such a declaration would not

⁶⁷ *Id.*

⁶⁸ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007).

⁶⁹ *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)).

⁷⁰ It is worth noting that under the traditional form of agency delay—that is, where an agency fails to take a discrete action by a statutory deadline—no rulemaking is required. Often, the agency has not been able to accomplish the required action within the time provided by Congress. In this type of situation, the agency simply has not taken any action; therefore, no rulemaking procedures are required. However, as mentioned above, an agency may be subject to a suit by a party seeking to compel the agency to take action. *See* 5 U.S.C. § 706.

⁷¹ For example, *see* Fish and Wildlife Service, Director’s Order No. 210 § 2(b) (Feb. 25, 2014), as amended (May 15, 2014) (declaring that, as a matter of enforcement discretion, the Fish and Wildlife Service intends not to enforce the moratorium on the importation of African elephant ivory if the ivory is part of a household move or an inheritance), available at <http://www.fws.gov/policy/do210.pdf>.

⁷² *See Heckler*, 470 U.S. 821.

⁷³ *See, e.g., Id.*

⁷⁴ *Lincoln*, 508 U.S. at 197 (quoting TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 30 n.3 (1947)).

appear to impose any new legal obligations on the public, it would seem that a court could determine that such a statement would not require notice and comment procedures prior to promulgation.⁷⁵

For example, on July 3, 2013, the Internal Revenue Service (IRS) issued Notice 2013-45 (Notice), stating that the IRS would not enforce the “employer mandate” of the ACA during 2014 in order to allow for “additional time for input from employers” on how the law can be effectively implemented.⁷⁶ The Notice further encourages employers to “voluntarily comply with the information reporting provisions.”⁷⁷ The IRS promulgated the Notice without undergoing notice and comment rulemaking procedures. However, the IRS does not appear to impose a new legal obligation on any parties, but, rather, the IRS seems to notify the public of its intent to not enforce these provisions against employers during 2014.⁷⁸ A court would likely find that such a statement is a guidance document, because it merely notifies the public on how the agency plans to perform a discretionary function—enforcement discretion.⁷⁹

However, in other circumstances, an agency’s declaration of a delay or enforcement policy could require notice and comment procedures. In February 2014, the IRS announced final regulations implementing the employer mandate from the Affordable Care Act.⁸⁰ In those regulations, the IRS provided for “transition relief” from the employer mandate tax for certain employers—that is, qualifying employers would not have to pay the tax.⁸¹ In order to be eligible for transition relief, employers must certify that they have met certain requirements established by the agency.⁸² Here, because the IRS is *requiring* employers to conduct a specific activity in order to be eligible for the transition relief—that is, provide certification—the transition relief is imposing a legal obligation on a party in order to qualify for a specific form of tax treatment. It would appear that an agency taking this approach to delaying a statutory provision would have to use informal rulemaking procedures because the agency would impose a legal obligation on a party, who wanted to benefit from the delay.⁸³

Missing Statutory Deadlines

Under the other form of agency delay—that is, where an agency fails to take a discrete action by a statutory deadline—no rulemaking is required. Often the agency has simply not been able to accomplish the required action within the time provided by Congress. In this type of situation, the agency has not taken any action; therefore, no rulemaking procedures are required. However, as

⁷⁵ See *General Motors Corp.*, 742 F.2d at 1565; *American Mining Congress*, 995 F.2d at 1112.

⁷⁶ Internal Revenue Service, Notice 2013-45, NOT-129718-13 (July 3, 2013), available at <http://www.irs.gov/pub/irs-drop/n-13-45.PDF>.

⁷⁷ *Id.*

⁷⁸ See *id.*

⁷⁹ This report does not opine on the legality of the IRS policy, but rather notes that a court would likely find that to release such a statement would not require notice and comment procedures.

⁸⁰ Department of the Treasury, Internal Revenue Service, Shared Responsibility for Employers Regarding Health Coverage; Final Rule, 79 Fed. Reg. 8544 (Feb. 12, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-02-12/pdf/2014-03082.pdf>.

⁸¹ *Id.* at 8574.

⁸² *Id.*

⁸³ See *Community Nutrition Institute*, 818 F.2d at 946 n. 4.

mentioned above, an agency may be subject to a suit by a party seeking to compel the agency to take action.⁸⁴

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⁸⁴ It is worth noting that if an agency promulgates a rule after the statutory deadline for issuing such a rule has passed, the delayed rule would still be valid, unless the underlying statute provides otherwise. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 155, 171-72 (2003).