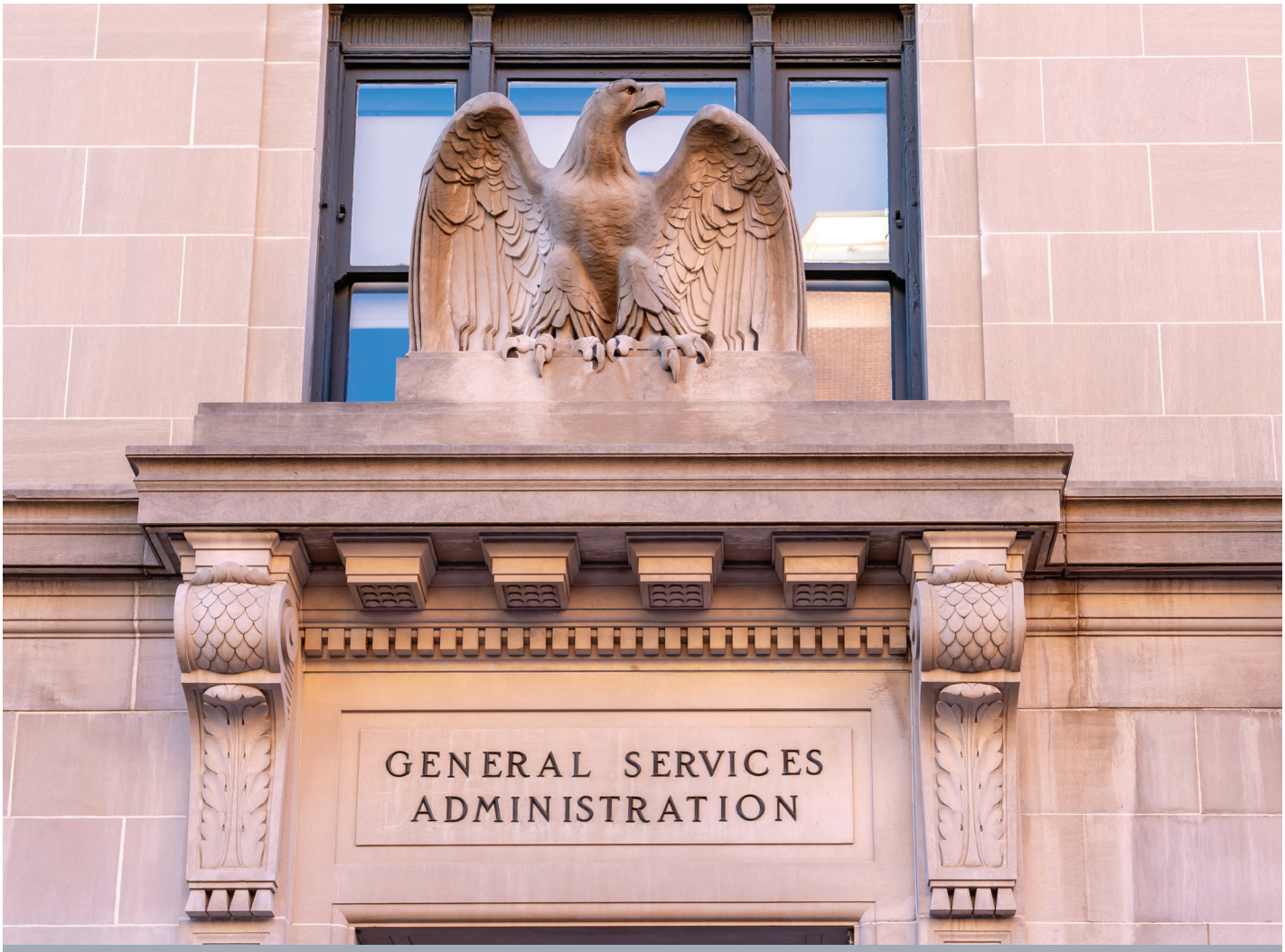


# A Primer on Handling an Administrative Agency Matter

By Matthew P. Allen

## INTRODUCTION

This article provides an overview of the basic structure of administrative agencies, a summary of the main issues lawyers should consider when representing a client in an administrative agency investigation or proceeding, and an update on some recent court decisions that have curbed the power and authority of administrative agencies in the United States.

The executive branch has joined the judicial branch in limiting the authority of federal agencies: The Trump administration's "Department of Government Efficiency" has been tasked by executive order with "deregulating" administrative agencies by repealing agency regulations, reducing agency staff and employees, and attempting to dismantle some agencies entirely. In addition, the White House attempted to remove a Federal Reserve Board governor — and former Michigan State University professor — in a manner that challenges a 90-year-old Supreme Court decision limiting the ability of the president to remove certain agency officials. Not since President Roosevelt's New Deal have we seen such a fundamental shift in administrative law. It makes it an interesting time to examine administrative agencies. And since every U.S. citizen has some interest regulated by an administrative agency, this is a timely topic for our Oakland County legal community.

I've represented companies and individuals in a host of federal, state, and municipal administrative agency investigations, licensing examinations, enforcement actions, and litigation. The agencies I have worked with include the U.S. Securities and Exchange Commission; the Federal Trade Commission; the Federal Election Commission; the U.S. Department of Commerce Bureau of Industry and Security; the Michigan Corporations, Securities & Commercial Licensing Bureau; the Detroit Buildings, Safety Engineering, and Environmental Department; and many others. Frequently, clients facing a regulatory inquiry face parallel criminal exposure from the U.S. Department of Justice or Michigan Department of Attorney General, in addition to private suits for damages by disappointed investors, consumers, or customers.

This article provides an outline of basic issues to consider when preparing to represent a client in an administrative agency matter.

## WHAT ARE ADMINISTRATIVE AGENCIES, AND WHERE DO THEY COME FROM?

Starting in the 1930s, President Roosevelt's New Deal rapidly proliferated the U.S. "administrative state" by creating a host of new agencies with new powers meant to reform government to better respond to the economic, social, and political challenges our country was facing.

It's been said administrative agencies have become "a veritable fourth branch of the Government." They are created by congressional and state legislation, and they usually "reside" in the executive branch. The scope and reach of agency powers are defined by statute and interpreted by the courts. These agencies make rules and regulations for all areas of society where Congress or state legislatures identify a need for government intervention and oversight, including as examples:

- How securities are sold to the public.
- What export controls should be applied to which goods sent to which countries.
- What substances companies can put in our food, air, and water.
- How much society should pay for our nation's social security.
- What the rules of commerce are for companies doing business in the United States.
- What work rules companies and unions can impose on employees.
- What the requirements are for fair and free elections.
- How our national security should be ensured.

And the list goes on and on. In many instances, Congress authorizes these agencies to investigate, adjudicate, and enforce the rules they have written. This creates constitutional tension between, on the one hand, ensuring that agencies exercise only the power and authority Congress has given them, with appropriate oversight by the executive branch, and, on the other hand, providing enough discretion to the agencies so they can effectively apply their technical expertise in whatever area they were created to administer.

Over the decades, government administrations at every level have championed either increasing government agency regulation for the protection of citizens (colloquially known as "big government") or decreasing the scope and reach of agency rules and regulations ("small government"). Sometimes the debate is whether the central federal government or the states should regulate a certain area. At this moment, the most recent iteration of Chief Justice Roberts's U.S. Supreme Court and the Trump administration have made decisions that reflect their belief that federal administrative agencies have extended beyond their proper constitutional authority. These decisions have already begun to create new "subissues" of administrative law in the lower courts that will make their way back to the High Court.

## FIVE-STEP ROAD MAP FOR RESPONDING TO AN ADMINISTRATIVE AGENCY

While there are innumerable state and federal administrative agencies and industries they regulate, the basic model of administrative procedure and decision-making is similar. So whether your client is being investigated or sued by an administrative agency, is seeking relief against another party in an agency proceeding, or is seeking other regulatory relief from an agency, the steps below can be applied to advise your client.

### STEP 1: Understand Your Client's Potential Criminal Exposure and Law Enforcement Involvement

Many administrative rule regimes contain specific authorization for criminal charges and penalties. For example, the U.S. Department of Commerce Bureau of Industry and Security (BIS) is authorized by statute to regulate, investigate, and adjudicate export control and tariff code disputes and impose various civil and regulatory licensing penalties on any person who "violates, conspires to violate, or causes a violation" of the Export Control Reform Act or any Export Administration Regulation. *See, generally,* 50 USC 4801-4852. Congress also included a provision allowing the imprisonment of a person for up to 20 years for "willfully" committing, attempting to commit, or conspiring to commit specific "unlawful acts" set forth in the statute. *See* 50 USC 4819(b). It's the same in Michigan: For example, the governor and Legislature empower the Michigan Corporations, Securities & Commercial Licensing Bureau to regulate and enforce the Michigan Uniform Securities Act, including investigating any "false or misleading" statements or omissions in connection with the purchase or sale of securities. *See, generally,* MCL 451.2102; MCL 445.2034. A person who "willfully violates this act or a rule adopted or order issued under this act … is guilty of a felony punishable by imprisonment" for up to 10 years. MCL 451.2508.

This is in addition to other types of general criminal charges potentially available to the U.S. government or the state of Michigan, such as conspiracy, false pretenses, conversion, embezzlement, mail fraud, and wire fraud.

So, for example, if your client is being investigated by BIS for engaging in transactions "with intent to evade" export control laws or tariff codes, it is important to understand whether investigators may view your client as having "willfully" done so, thus exposing your client to referral by BIS to the U.S. Department of Justice for criminal investigation. In a document-intensive case, sometimes your client's opinion of their intent and "willfulness" may be different from the view federal agents take of your client's knowledge of wrongdoing as reflected in the documents. The more complex or unsettled the law — think tax, campaign finance, and similar laws — the greater likelihood that your client may have effective mens rea defenses to criminal charges. If your client faces criminal exposure, that changes the risk calculus of cooperating in the regulatory investigation or administrative proceeding for various reasons, including but not limited to:

- **Fifth Amendment Rights vs. Cooperation.** An individual client has a Fifth Amendment right to remain silent in

civil or criminal proceedings. However, if they cooperate — by giving interviews or testimony — they may waive that right in a later criminal case. Waiver rules vary by jurisdiction, so counsel must be attentive to local law.

- **Adverse Inferences in Civil and Regulatory Cases.** While silence can't be used against a client in criminal court, civil regulators and plaintiffs may draw adverse inferences from it. This creates a tension between preserving criminal defenses and risking civil liability. One strategy is to seek a stay of civil proceedings pending resolution of related criminal matters, citing due process, judicial efficiency, or comity.

- **Balancing Liberty and Business Interests.** Protecting against criminal exposure may harm a client's regulated business. Clients often must weigh their liberty and business interests when deciding whether to cooperate. Tools like immunity, nonprosecution, or deferred prosecution agreements can help. Companies should consider conducting internal investigations and how they might support cooperation efforts.

- **Identifying the Client and Managing Conflicts.** Corporations lack Fifth Amendment rights, so their cooperation strategy differs from that of individual officers. Companies may try to deflect blame onto individuals. Counsel must identify and manage conflicts and consider common interest agreements to share privileged information without waiver; requirements for these agreements may differ by jurisdiction.

- **Privilege, Cooperation, and Waiver Risks.** Attorney-client and work product privileges are critical in regulatory investigations with criminal overlap. Disclosure of internal investigations may waive privilege, depending on the jurisdiction. For example, the Sixth Circuit does not recognize "selective waiver," meaning any voluntary disclosure to the government waives privilege in all contexts.

Sometimes the risk of cooperating in the face of criminal exposure pays off. For example, I obtained a declination of prosecution from the DOJ and Federal Election Commission in exchange for my client's cooperation efforts in an investigation of potential violations of the Federal Election Campaign Act, and various FEC regulations, relating to a "dark money" political campaign finance structure. But cooperating in the face of criminal exposure requires very clear communication with your client about the risks, as well as a trusted dialogue with regulators and prosecutors.

**STEP 2: Study the Agency-Enabling Legislation: What Is the Scope of the Agency's Authority? What Authority Has the Legislature Delegated to the Agency?**

Administrative agencies can only be created by legislation, and they can exercise only those powers delegated to them in their enabling statute. That authority can be broad or narrow or anywhere between, but it always needs to be expressly endowed to be exercised. The U.S. Supreme Court has recently ruled that statutory silence or ambiguities about an agency's law-interpreting power do not imply a delegation of that power by the legislature to the agency. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2265-66 (2024). So the statutory delegation must expressly empower the agency with authority. The statute must state some "intelligible principle" of the agency's tasks and discretion, or else the delegation will be an unconstitutional attempt to provide broad legislative power to an executive branch agency. *See Pickens v. Hamilton-Ryker IT Solutions, LLC*, 133 F.4th 575, 587-88 (6th Cir. 2025). Courts have upheld very broad delegations of authority as constitutional. Some examples of broad constitutional delegations:

- The **Fair Labor Standards Act** delegates authority to the **secretary of labor** to define by regulation when an employee works "in a bona fide executive, administrative, or professional capacity."

- The **Federal Trade Commission** is empowered by the **Federal Trade Commission Act** to prevent people and entities from using unfair methods of trade or competition affecting commerce.

- **Michigan's Natural Resources and Environmental Protection Act** empowers the **Michigan Department of Environment, Great Lakes, and Energy** to protect and conserve the state's water resources and control pollution of surface and underground waters.

- The **Michigan Uniform Securities Act** empowers the **Michigan Department of Licensing and Regulatory Affairs** — through the **Corporations, Securities & Commercial Licensing Bureau** — to regulate the issuance, purchase, and sales of securities within the state of Michigan.

An agency cannot act beyond its express authority. So read the enabling legislation. Don't skip this part.

As an example of this point, I convinced the Federal Election Commission and Department of Justice to issue a written declination of enforcement action and prosecution against my client in exchange for his cooperation. Section 30122 of the Federal Election Campaign Act makes it unlawful to "make" a political contribution in the name of another. The FEC added a regulation penalizing secondary actors, saying no person shall "knowingly help or assist any person in making a contribution in the name of another."

Because my client was merely a director of the company that allegedly made the political contribution in the name of another company, he was a secondary actor in assisting the company's alleged violation of Section 30122. And because this enabling election law statute did not make secondary actors liable for "helping or assisting" violations of the election laws, the FEC and DOJ lacked constitutional authority to charge my client for violating the election contribution law at issue. The government agreed. As a result, the FEC issued an interim rule removing the regulatory provision making it unlawful to "help or assist" a violation of Section 30122 of the act because it extended beyond the conduct Congress delegated to the FEC to regulate. *See* 88 FR 33816-02, 2023 WL 3620498 (May 25, 2023).

**STEP 3: What Does the Administrative Procedure Act Say, and How Have Recent Supreme Court Decisions Affected Judicial Review Under the APA?**

Congress and most state legislatures have enacted Administrative Procedure Acts that provide general legislative directives and guidelines for agencies to follow in their structure and operations. The federal APA is found at 5 USC 500-808, and the Michigan APA at MCL 24.201-328. Some states, such as Michigan, pattern their APA after the Revised Model State Administrative Procedure Act, drafted by the National Conference of Commissioners on Uniform State Laws, which has approved and recommended the uniform APA for enactment in all states.

APA statutes are generally structured with the following main components, with citations to the federal and Michigan APA provisions for reference:

- **Rulemaking Procedures** — Provides procedures for how agencies in that jurisdiction shall process and publish rules governing their administration. There may be formal and informal rulemaking procedures, required notice and comment periods on proposed rules, requirements for public hearings and input, and requirements for regulatory impact statements about the cost and burdens the proposed rule will impose on agencies and the public, among other

issues. *See, e.g.,* 5 USC 553, 561-570; MCL 24.231-266.

- **Adjudication Procedures** — Provides due process protections for contested proceedings before the agency, including identification, qualifications, and powers of hearing officers, usually administrative law judges; notice requirements for respondents; scope of any discovery; hearing requirements, including any applicable rules of evidence, burdens of proof, presumptions, form of witness testimony, and maintenance of the record; and requirements for final decisions and orders. *See, e.g.*, 5 USC 554-559; MCL 24.271-288.

- **Judicial Review of Agency Decisions** — These provisions outline what rights parties have to judicial review, the forum and venue of judicial proceedings, the types of actions reviewable, the categories of relief available, and the critically important scope and standard of judicial review available. *See, e.g.*, 5 USC 701-706; MCL 24.301-306.

The U.S. Supreme Court has recently limited the deference federal courts are required to give to agency legal interpretations of federal statutes. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2265-66 (2024). My view is that this correspondingly requires the court to overrule prior decisions permitting federal courts to defer to agency interpretations of their own rules, called the *Auer* doctrine for the case in which it was applied. *See* Matthew P. Allen, *A Matter of Deference*, American Bar Association (Mar. 3, 2025).

Be sure to study the detailed commentary and analysis contained in the uniform APA relating to a provision at issue because it may prove a helpful reference when advocating an interpretation of the corollary rule in your state's APA or even the federal APA.

An example shows how the APA can benefit your client. I recently persuaded the Securities and Exchange Commission to withdraw an "extraordinary circumstances" standard it had imposed on my client as a condition to rejoining the securities industry, ruling it exceeded the agency's authority under the Investment Advisers Act of 1940 and the Securities Exchange Act of 1934. *See* SEC Release No. 6872 (April 11, 2025).

Under SEC Rule of Practice 193 (17 CFR 201.193), a person barred from the industry may reapply by showing it's "in the public interest." In a 1994 SEC release (No. 34720), the commission distinguished between "qualified" bar orders (allowing reentry after a set time) and "unqualified" ones (implying permanent exclusion). The release introduced the "extraordinary circumstances" standard for unqualified bars, though this standard isn't in Rule 193 and lacked interpretive guidance. Importantly, the 1994 release didn't go through APA notice and comment procedures.

We argued the 1994 release was a legislative rule because it imposed new legal duties not found in Rule 193. Legislative rules require APA compliance, including public vetting. *See Mann Constr., Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022). Because the SEC hadn't followed APA procedures, the rule was invalid and couldn't be applied to our client.

In its final order, the SEC granted our client's application and stated it would no longer use the "extraordinary circumstances" test under Rule 193. *See* SEC Release No. 6872, at 5.

### STEP 4: Learn the Rules — Impact of Agency Regulations, Rules, Guidelines, Manuals, and Guidebooks

Because finding and succeeding on constitutional or APA challenges to an agency's structure or rulings is a rare occurrence, and judicial review of agency final decisions is limited, lawyers must put their best case forward under the agency's rules. This means understanding all the regulations, rules, guidelines, letter rulings, no-action letters, rules of practice, manuals, and guidebooks that may apply to the agency action. Federal regulations are published in the *Federal Register* and then codified in the Code of Federal Regulations (CFR). The CFR is divided into 50 titles that cover broad areas subject to federal regulation. In Michigan, regulations are published in the *Michigan Register* and then codified in the Michigan Administrative Code. Both are overseen by the Michigan Office of Administrative Hearings and Rules, which is part of the Department of Licensing and Regulatory Affairs.

Administrative agencies in different jurisdictions or regulating different subject matters each have different procedural and substantive rules governing their proceedings. The example below illustrates the types of laws, rules, and manuals applicable in the federal regulation of the purchase and sale of securities.

In Section 10(b) of the Securities Exchange Act of 1934, Congress makes it unlawful to use any "manipulative or deceptive device or contrivance" in connection with the purchase or sale of any security in violation of "rules and regulations as" the SEC may prescribe. 15 USC 78j(b). Rule 10b-5 was created by the SEC to enforce Section 10(b) under the authority delegated there. Rule 10b-5 generally prohibits fraud, fraudulent statements or omissions, and deceit in connection with the purchase or sale of any security. 17 CFR 240.10b-5. The SEC is empowered by Congress to investigate and bring enforcement actions against individuals and entities suspected of violating the federal securities statutes or the


SEC "rules and regulations thereunder." 15 USC 78u. Congress authorized the creation of self-regulatory agencies like the Financial Industry Regulatory Authority (FINRA) to regulate and enforce the Exchange Act and, in FINRA's case, FINRA Rules governing broker-dealers, under the oversight of the SEC. 15 USC 78o-3.

The SEC's Division of Enforcement oversees the agency's civil law enforcement function by investigating and prosecuting securities law violations, including violations of Section 10(b) and Rule 10b-5. The division's more than 100-page Enforcement Manual is a reference for SEC enforcement staff and contains important details defense lawyers should master in order to navigate their client's rights and strategies, including types of SEC investigations; how they are ranked within the commission; how whistleblowers are used; how criminal referrals are made to the DOJ; the Wells process to try to resolve the investigation; how assertions of attorney-client, Fifth Amendment, and other privileges affect the investigation; and detailed cooperation tools and procedures, among many other provisions. FINRA has its own manual containing similar rules and provisions for FINRA investigations of broker-dealers and their agents.

If the SEC finds cause to sue your client for Section 10(b) or Rule 10b-5 violations after an investigation concludes, it can do so by filing a civil action in a federal court with competent jurisdiction over your client, or by filing an in-house administrative action before an SEC administrative law judge. There are significant consequences for your client depending on the SEC's decision. In federal court, your client is protected by the familiar due process protections of the Federal Rules of Civil Procedure and Federal Rules of Evidence. In SEC administrative actions, however, the SEC Rules of Practice apply. 17 CFR 201.100-900. These are very different from — and offer fewer procedural rights and protections to your client than — the Federal Rules of Civil Procedure and Evidence. But there are also benefits to proceeding in an administrative action in certain cases.

**STEP 5: Research and Understand Important Court Decisions That May Affect Your Rights and Claims Before the Agency**

Courts seem to be constantly interpreting some aspect of administrative law, so case law research is critical. Since we're using securities law as our example, here are some recent decisions in addition to the cases discussed above affecting the authority of the SEC and FINRA:

***SEC v. Jarkesy*, 603 U.S. 109 (2024) — Seventh Amendment Requires Jury Trial of SEC Penalty Cases**

The Supreme Court held that the U.S. Constitution prohibits the SEC from bringing civil penalty actions as in-house administrative proceedings. The court found that statutory penalty cases were "suits at common law" under the Seventh Amendment and therefore required a jury to decide. The court found that securities penalty cases were not "public rights" matters that could be taken from Article III courts and decided by the executive branch.

***Alpine Sec. Corp. v. FINRA*, 121 F.4th 1314 (DC Cir. 2024), *cert denied*, 2025 WL 1549780 (S. Ct. 2025) — Regulation by Private Entities Must Be Supervised by Government Agency**

FINRA is a private entity that Congress permits to regulate certain parts of the securities industry under the supervision and ultimate control of the SEC. In *Alpine*, FINRA expelled a broker-dealer member for violating FINRA rules in an expedited proceeding. Because FINRA's decision was not reviewable by the SEC before it took effect, the court held that Alpine was likely to succeed on its claim that FINRA's decision violated the private nondelegation doctrine, "which requires that a private entity statutorily delegated a regulatory role be supervised by a government actor."

***West Virginia v. EPA*, 597 U.S. 697 (2022) — Agencies Limited When Regulating 'Major Questions'**

Part of a series of High Court decisions in 2022 that presaged a decline of judicial deference to agency decisions, *West Virginia v. EPA* refused to defer to the Environmental Protection Agency's interpretation of a Clean Air Act provision that the EPA claimed as the statutory basis to regulate greenhouse gas emissions by power plants. The court found that the EPA rule would make industrywide changes of "vast economic and political significance" and, under the "major questions" doctrine, the EPA could do so only with express permission from Congress, which the court found it did not have.

## CONCLUSION

"[Administrative law] moves pretty fast. If you don't stop and look around once in a while, you could miss it." Not exactly Ferris Bueller's advice, but equally prescient. For legal practitioners, staying ahead in any administrative proceeding requires not only a firm grasp of statutory frameworks and procedural rules but also an awareness of the broader constitutional currents shaping the apparent transformation of agency authority. Stay tuned.

*Matthew P. Allen, an attorney with Miller, Canfield, Paddock and Stone, PLC, has tried and arbitrated a wide variety of cases, ranging from felony matters in Detroit's criminal courts to bet-the-company securities cases. Allen has been named a leading lawyer in Michigan and the United States by the Best Lawyers in America, Michigan Super Lawyers, and Leading Lawyers. Allen is also a Fellow in the Litigation Counsel of America, an invitation-only trial lawyer honorary society composed of less than 0.5% of American lawyers.*