

Question 1, Sample Answer 1

Question 1

Prior to examining either of the issues presented by Senator Hatch under the tenets of administrative law, it must first be determined if the FEC is even an agency. Under the APA an agency means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.” Here, it is clear that the FEC is a multi-headed agency that was created by the organic statute set forth in 2 U.S.C.A. § 437(c). Thus, this statute will be the reference for many concerns as it is the crux of the power of the FEC and its amendments.

Shift to executive structure

Senator Hatch first proposes that Congress amend the FEC to make it an executive structure. Here, the issue is whether Congress may constitutionally delegate the power of appointment of all the members of the FEC members wholly to the President; therefore accomplishing Senator Hatch’s core goal of shifting the political power within the Committee to the Republican party under President Bush. For constitutional guidance we should look to the Appointments Clause of Article II (cl. 2) which sets forth the specific methods by which the personnel described within the clause may constitutionally be appointed to office.

Under the Necessary and Proper Clause, Congress may create offices and provide methods of appointment consistent with the Constitution. After looking to the Appointments Clause, the first question must be whether the members of the FEC qualify as “Officers of the United States” or “inferior Officers” under the Appointments Clause. The Supreme Court ruled that “Officers of the United States” are any appointee exercising significant authority pursuant to the laws of the United States. (Buckley v. Valeo) Principal officers are selected by the President with the advice and consent of the Senate, while Congress may allow inferior officers to be appointed by the President alone, by the heads of the departments or by the Judiciary. (Article II)

In Buckley a different system of compiling the Commission was used that what Senator Hatch is proposing here, but the analysis and ruling in Buckley are still helpful in analyzing our situation here. Buckley specifically addressed whether members of the FEC were officers of the

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United States, thus giving them the power to discharge the functions of the commission requiring them to be appointed per the Appointments Clause. Under the system described in Buckley, four of the six voting members of the FEC were appointed by members of Congress. The FEC performed legislative, judicial, and executive functions. The court objected to this system because the Congress could not constitutionally vest in itself or its officers the authority to appoint Officers of the United States when the Appointments Clause prohibited it from doing so. Consequently, there was a clear separation of powers issue.

The court found that there was not a delegation problem to the extent that the FEC is merely aiding Congress, because four of the six members were appointed by Congressional members. However, the members could not concurrently exercise executive or judicial functions because of this same appointment structure. Thus, because four of the six members were not appointed by the President, they were not “Officers of the United States” and their appointment by members of Congress limited their role to one in aid of legislation.

Hence, a shift may be made here to executive structure proposed by Senator Hatch by Congress vesting the power of appointment of those officers in the President under the Appointments clause. Those appointees will then become “Officers of the United States.” In the shift to the executive structure, the FEC will avoid the problem enumerated in Buckley. There, the Congressionally appointed members were enforcing powers, which is a power not within the confines of the legislative power or function of Congress. Because the executive functions provided to the FEC are reserved to the President, and the president appoints the members under Senator Hatch’s plan, then the shift to an executive system would not create the separation of powers and Article II problem presented in Buckley. Accordingly, since the appointment lies within the hands of the President, there will be no Constitutional problems with the FECA clause reserving “exclusive jurisdiction” with respect to the civil enforcement of the provisions.

(§ 437(c)(b)(1))

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Moreover, because Congress would be delegating the power to the FEC, it can give the FEC its investigative and informative nature so it may act in the “legislative” capacity as well. Furthermore, Congress may delegate Article III judicial power to the FEC as an agency because it has that power under the Constitution. Congress has broad Article II power to shape the manner in which disputes are resolved regarding public rights, like election problems, and the delegation will be valid so long as there is some form of judicial review.

However, there may be some political backlash on this issue. Many will argue that a Commission of this type should not have its composition vested in the power composed wholly of presidential appointees, as any administration of the Act would undoubtedly have a bearing on any incumbent President’s campaign for reelection. Although, the Court rejected this argument in Buckley, it may gain more credence now with the heightened political climate after the 2000 Presidential election.

Investigation and establishment of appropriate standards

Although we may shift the power to the President to appoint these members of the FEC, may Congress vest in the FEC the power to investigate what happened in Florida and establish appropriate standards to resolve those problems? This is an issue of public law, so it is possible that these functions may be delegated to the agency. However, the key issue is whether or not Congress may validly delegate these functions to the FEC. Congress has the power of an investigative and informative nature that Congress may delegate to one of its own committees, and thus if Congress gives a full delegation for an intelligible reason, then it may be acceptable.

First, we will look at the FEC’s power to investigate what took place in Florida. In the unamended organic statute, 437(c)(b)(2) states “nothing in the Act will be construed to limit, restrict or diminish any investigatory... authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.” Hence, we would need to look and see if there is currently a committee within Congress examining and investigating the situation in Florida. If so, having power to the FEC to investigate the situation in Florida would be

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overstepping the bounds of the organic statute and would begin to infringe on Congressional powers.

Should Senator Hatch wish to amend the FECA to give the FEC the power to investigate the Florida issue, Congress must set forth an “intelligible principle” in providing this delegation to the FEC. Congress must provide an intelligible principle to which the body authorized to exercise the delegated authority is directed to conform, and therefore such legislative action is not a forbidden delegation of legislative power. (Hampton v. U.S.) Therefore, Senator Hatch should not make his political intents behind the amendments widely known.

Although Senator Hatch should be concerned about his party’s future, it would serve his purposes to discuss the need for substantive reform on the issue of voting procedures, rather than his desire to see President Bush reelected. The “intelligible principle” here should be that the last election demonstrated the large margin of error possible under the current system, and how there is a need for investigation and reform on the election front in order to provide for valid elections of our country’s President, Congressmen and Senators. Should Congress fail to provide such an intelligible principle, the delegation could be challenged as unconstitutional. (Panama Refining Co. v. Ryan) Congress should follow the example set forth in Mistretta, where the Sentencing Reform Act clearly explained what the sentencing commission should do, and set out specific directives to govern particular situations.

If Senator Hatch seeks to amend the enabling statute to provide sole authority to investigate the Florida situation, Congress would need to concurrently remove its own authority to investigate the situation so as to prevent non-delegation problems. While it is the trend to uphold Congress’s delegation of authority to agencies, a clear infringement by the agency on a Congressional mandate would cause a major problem.

In terms of the FEC establishing appropriate standards to resolve the problems in Florida, this falls under the heading of agency rulemaking. Again, this delegation of Congress to the FEC of rulemaking power must meet the same requirements as the delegation of investigative power.

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Congress must set forth an intelligible principle for delegating this power. While Congress may not delegate its legislative powers to another branch of government, it may obtain the assistance of its coordinate branches and may delegate power under broad general directives. Thus, Congress could delegate the rulemaking authority to the FEC to set standards to resolve the problems in Florida.

Question 1, Sample Answer 2

Question I

Part 1 of proposal: Changing the FEC to an executive structure (or at least replace certain current members).

Executive agencies are those agencies whose members are subject to unlimited presidential removal. The structure of executive agencies is commonly single-headed. If such a change were to be implemented, we should also consider whether a change from the current multi-member structure of the FEC should be changed to a single-headed structure. There are some obvious political risks involved with such a change. Giving the President unlimited removal power over the FEC, certainly gives the appearance of impropriety. Any appearance that the political party in the White House controls how elections will be handled poses serious risks of a political backlash. Executive agencies' main benefit is their political accountability, while independent agencies are more appropriate for non-political situations. Although there is a political risk in restructuring the FEC into an executive structure, that risk may be lessened if the multi-member structure is kept in place rather than using the single-headed structure and appointing a hard-core Republican to the head.

The political advantage to changing the FEC to an executive structure is that the current administration would wield much more control over any of the election procedure reforms created by the FEC if it were executive in structure.

Another alternative that you mentioned was removing some of the current members of the FEC and replacing them with Bush appointees. The current statute, § 437 (a)(1), authorizes the President to appoint the members with the advice and consent of the Senate. This section also restricts the appointed members to a maximum of 3 out of 6 to be from the same political party. In order to entrench Republican authority within the FEC, the statute would have to be

amended to remove the 3-member limitation, or the entire structure would have to be changed to a single-headed agency. Either of these options entails the risks of political backlash.

Removal of current hard-core Clintonian officers may pose some Constitutional problems. Congress may only remove these officers through their Art. I impeachment powers. The United States Supreme Court in *Bowsher v. Synar* held that Congress could not reserve a degree of removal power beyond its constitutional impeachment power. This holding would also forbid Congress from trying to entrench certain appointees through establishing specific reasons that would allow Congress to remove the officers.

The President may be able to remove some of the current officers. Article 2 §2 cl.2 provides the President with the authority to appoint "Officers of the United States" with the advice and consent of the Senate. The Constitution is silent as to the President's authority to remove such appointees. The Court's original understanding, under the *Decision of 1789* and *Myers v. US*, of this silence was that removal was part of the President's inherent powers that could not be limited by Congress. *Humphrey's Executor* marks the Court's retreat from this position. The Court in *Humphrey's* allowed statutory limitation on removal if the Officer's functions were quasi-legislative or quasi-judicial. *Morrison* allows Congress to limit removal only if it does not affect the President's ability to carry out his Constitutional duties.

The organic statute involved here does not limit the removal power of the President, so it seems as if the President would be able to remove the members of the FEC as his inherent power. In amending the structure of the agency, Congress could also change the appointment procedure from Presidential appointment with advice and consent of the Senate (default) to appointment by (1) President without the advice and consent of the Senate, (2) Courts of Law, or (3) Heads of Departments under authority of Article 2 §2 cl.2. In order to change the

appointments in any of these ways, the officer being appointed must be “inferior Officers” rather than “Officers” (principle officers) for Constitutional purposes. *Buckley v. Valeo* defined principle officers as any appointee exercising significant authority pursuant to the laws of the US. The Court decided that there would be no delegation problem for having principle officers be appointed by someone other than the President as long as the officers’ functions were merely aiding the legislative branch. But here the FEC performs investigatory executive functions and possible judicial functions, so if they are principle officers, they need to be appointed by the President with advice and consent of the Senate. *Morrison v. Olsen* provided further guidance on what is an inferior officer. Factors that indicate an officer is inferior are limited duties and tenure, limited jurisdiction, and whether subordinate to a superior who is a “principle officer” (*Edmond v. US* stressed this final factor). Under this analysis, the members of the FEC are probably not inferior officers. They have limited tenure of 6 years. Their duties, which include investigating, promulgating rules, enforcing/administering statute and rules, are fairly broad. They have jurisdiction over all civil enforcement of the statutes they administer. Finally, they are not inferior to a Presidentially appointed superior. Under the current structure of the FEC, the officers are probably principle officers and may only be appointed by Presidential appointment upon the advice and consent of the Senate. However, if the structure were changed from a multi-membered independent agency to a single-headed executive agency, the agency head would be a principle officer and the other members may be inferior officers. The advantage of these officers having “inferior” classification is that the bill we propose could either vest the appointment power in a head of Department or in the President himself without the advice and consent requirement. Historically the Senate has deferred to a newly elected President when “advising and consenting,” but avoiding this process could have its benefits.

Part 2 of proposal: Have the FEC investigate the Florida Election Problems and establish appropriate standards to resolve those problems.

Delegating this power to the FEC may pose some Constitutional problems. One possible challenge could be based on the Enumerated Powers Doctrine. This Doctrine is a formalistic argument based on the language of the constitution. It is basically an assertion that any administrative agency is not constitutional because this “fourth branch” of government was not provided for in the Constitution. For example, establishing appropriate standards to resolve potential election problems is a legislative power. Article 1 § 1 states that *all* legislative power shall be vested in Congress. This pure formalist argument has not been accepted by the Court, which endorses more of a functionalist approach: transfer of power to agency is ok as long as it is not the branch’s “core function.” Agencies are now accepted as Constitutional.

Another possible challenge to this transfer of power to the FEC would be under the non-delegation doctrine. The non-delegation doctrine provides standards for determining when Congress has gone past simply delegating legislative authority and has simply allowed executive and judicial actors to carry out their Constitutionally proscribed functions. Historically lines were drawn between important subjects and those of less interest (*Wayman v. Southard*). *J.W. Hampton v. US* held that as long as Congress lay down and “intelligible principle,” the delegation would not be unconstitutional. *Mistretta v. US* represents the modern Courts reasoning that in our increasingly complex society, Congress must be allowed to delegate authority under broad general directives in order to do its job. In *Industrial Union Dept AFL-CIO v. American Petroleum Inst*, Rehnquist’s concurrence laid out the functions the non-delegation doctrine serves: (1) ensures to extent practical that important social policy choices are

made by Congress, the branch of government most responsive to the popular will, (2) intelligible principle guides the exercise of delegated authority (idea that the accountable branch is still really in charge), and (3) provides reviewing courts standards to test the exercise of agency power. The Court has only struck down a statute twice using the non-delegation doctrine. The Court recently emphasized this point in soundly rejecting a non-delegation doctrine claim in *American Trucking*. The non-delegation doctrine is now more of a rule of statutory construction than a viable basis to find a statute unconstitutional. However, the statute should provide the FEC with some general guidelines or goals in order to avoid any potential non-delegation challenge. We would want to identify what types of problems we want the FEC to investigate such as unfair, confusing, or inaccurate voting practices that may raise barriers to voters exercising their voting rights. We would then instruct the FEC to establish by appropriate means standards that would protect the right to vote equally among all voters by eliminating these possible barriers to effective vote-casting. Providing an intelligible principle such as this would defend against any possible non-delegation argument.

If Congress wants the FEC to use the formal §556/557 rulemaking procedures in establishing these standards, they would have to use the “magic language” required by *US v. FECR*: “after hearing on the record.” We probably would not want to require formal rulemaking if we want to pass these standards in the near future due to the longer, drawn-out formal rulemaking process. Note and Comment rulemaking would probably be best suited for our purposes here.

In sum, the political problems with meddling with elections, especially considering the circumstances of the election pose more of a problem than the Constitutional problems.

Question 2, Sample Answer 1

Question 2

Assuming that the National Association of State Governments has standing to bring a law suit on the touch screen technology requirement, I believe it could bring a law suit challenging the requirements providing that some initial hurdles are met (see discussion below). I will examine the executive order issued by President Bush and then regulations published by Kathryn Harris in the Federal Register.

Executive Order

President Bush's Executive order calls for the votes of federal officers in the 2004 national election to be cast on touch screen ballots as required by the FEC regulations. This order, and my client's exception to it, presents an issue of the President's power to issue an executive order affecting a subject which Congress has already delegated to the FEC. In this particular case, the executive order could be challenged on the basis of a separation of powers argument. Here, one could claim that the subject matter of this order is outside the president's authority to act. Specifically, that this is an *ultra vires* act that exceeds the scope of the President's authority under the Constitution.

The case I would look to for guidance on this issue is Youngstown Sheet & Tube Co. V. Sawyer. In Youngstown, an executive order by President Truman was invalidated. The Court found that the President's power did not encompass his action – the seizure of steel mills. Absent independent constitutional authority, the President could lawfully seize the steel mills only if authorized, explicitly or by fair implication by statute. Because no statute authorized the President to take the action, it was unlawful.

In the ruling in Youngstown, Justice Jackson pointed out that Presidents act pursuant to express or implied statutory authority. Thus, an action would be upheld in these situations if the constitution vested either power in the President to act as he had or power in Congress to authorize the challenged initiative through delegated authority. In contrast, if the Presidential action contradicted Congress's express or implied policy, the

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President's claim of authority would be most dubious. Thus, where Congress has acted in an express or implied manner, the President's power is at its weakest.

Here, President Bush acted in a similar manner as Truman did in Youngstown, and falls within the situation where Congress has acted in an implied or express manner. Here, Congress specifically delegated its jurisdiction to regulate the election of federal officers and the ability to issue regulations, polices, and procedures about those elections to the FEC. Thus, the President's power to exercise any power in that area is at its weakest. Because the ability to issue regulations about the election procedures was vested in Congress, and Congress expressly delegated that power while failing to statutorily empower the President to do so, the President was without power to act. Thus, the president went beyond his statutory and Constitutional mandate by issuing his executive order, and I believe the court would strike it down if challenged.

Reviewability of regulations published by the FEC

The next element of this case I would want to look at is the notice and resulting regulations created by the FEC. Ultimately, in examining these regulations, the major question for my clients is whether or not they may seek judicial review of the regulations. Consequently, before examining the merits of any challenges my clients may make, I would want to see if judicial review was precluded, if my clients had met the requirement of finality, and if the case was ripe for judicial review. These initial hurdles would have to be crossed before we could bring a claim on this issue.

First on the issue of preclusion, I noted that the organic statute of the FEC does not expressly precluded judicial review. Thus, I would want to analyze if my client's case was impliedly precluded. There is a heavy presumption in favor of reviewability. The court therefore would look to any specific language, legislative history, or Congressional intent that is fairly discernible in the detail of the legislative scheme. Most

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likely, the court would comply to the express *unius est exclusion alterius doctrine*, and rule accordingly.

Next, I would look to the issue of exhaustion – both statutory and common law. In my review of the statute, I noted that there are no steps set forth in the statute enumerating any exhaustion requirements which my clients would have to fulfill. Therefore, I would next look to the common law tradition requiring litigants before agencies to exhaust the remedies before going to court. Here, the court would use the balancing test used in McCarthy and weigh the harm to the individual that comes from applying the exhaustion requirement against the agency's efficiency interest at having the exhaustion requirement to begin with.

Finally, I would want to make sure the agency action is both final, and ripe for review. The court would look to see if the agency action is indeed a final order, and if not if the final order rule may be lifted under one of the exceptions to the rule. In arguing for my clients, I would claim that the regulations ordered by Harris are indeed final. Moreover, in its examination of the ripeness of the issue, the court would perform a balancing test considering the fitness of the issues for judicial review, and the hardship to the parties of withholding the review. Here I would argue that there would be a great hardship to the states in implementing the technology changes, and the court should look to the ruling in Abbot Labs.

Should I manage to meet the initial burden of showing that the case is ready for judicial review, I would then have to attack the regulations themselves.¹ Consequently, the first place I would begin is to make sure the agency followed the proper process required by the organic statute. I believe Regulation A is a rule issued by the agency, and must therefore meet the requirements of rulemaking. Because the organic statute does not provide any procedural requirements, I would thus look to the APA.

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Under the § 553 APA the issuance of a notice of a proposed rulemaking is an essential part of the process. The APA requires the notice to include, a statement of the time, place and nature of the proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects involved. Here, the court should consider whether agency's actual notice and the tightness of the fit between the rule and the notice. The notice given by the FEC does give the time and manner of the proceedings (submission by March 1, 2002), and it does state that its legal authority under the amended FECA. While it does ask states to submit descriptions of the mechanisms used, and the assessments of other available technologies, the notice gives no discussion of the FEC's intent to upgrade the systems and possibility of using the forfeiture of federal funds as an enforcement measure. Thus, I believe the "tightness of the fit" between the notice and the rule is not close enough, and the final rule was not a logical outgrowth of the notice. In sum, it strays too far and my clients would argue for a new notice and comment process.

Next I would have to separate out Regulation A and Regulation B and examine the standards the court would use in reviewing each agency decision. Regulation A stems from the FEC engaging in rulemaking, and therefore one must determine whether it was formal or informal rulemaking. Here, the organic statute is silent on the type of hearing procedures required, and thus we must look to § 553 of the APA and the relevant case law. Under United States v. Florida East Coast Railway, the presumption is that the default is informal rulemaking unless Congress says otherwise. Because the organic statute is silent, informal rulemaking will be assumed. Thus, we should look to the standard of judicial review

This standard is set forth in § 706(2)(c) of the APA. Because the court will be reviewing a rule promulgated under informal proceedings, the court will only hold the

¹ Judicial review is granted under § 706((2) of the APA, and gives the court the power to hold unlawful and

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regulation unlawful and set it aside if the findings and conclusions are found to be arbitrary and capricious, and abuse of discretion or not otherwise in accordance with the law. Thus, under the rule in Association of Data Processing v. Board of Governors of the Federal Reserve, the court would look to the evidence produced as a result of the hearing and any thing else the agency below happened to look at.

The agency here has made a factual determination about what types of election technology should be used based on the information sent in by the states, and the responses from various other participants. The comments indicated that upgrading was much less expensive than computerization. However, it also illustrated that various studies indicated that voter participation would increase 15% with computerized systems as opposed to 5% with upgraded systems. In examining the rule under the arbitrary and capricious standard, the court would look to see if the agency “showed its work.” The agency only provided a short blurb in its regulation, and did not present any of the conflicting evidence – such as cost – which it considered when making its decision. Therefore the court may find that there was not a “tight fit” between the agency’s explanation and its rule.

I believe Regulation B represents an agency interpretation of law. Regulation B provides for enforcement measures if the requirements of Regulation A are not met. I believe that the FEC interpreted the clause located in § 437(c)(b)(1) of the FECA (giving the commission exclusive jurisdiction with respect to civil enforcement of its policy provisions) to give the FEC the power to take away federal appropriations if states do not meet the requirements of Regulation A. thus, because this is an agency interpretation of a question of law, and that agency has the power to administer the statute in question, a court would review Regulation B under the Chevron standard.

set aside agency action, findings and conclusions which do not meet the muster of the relevant standards.

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Under Chevron the court will do a two part analysis of the agency's interpretation of the FECA. First, the court will look to see if the plain meaning of the statute is clear. Here, the statute clearly states that the Commission shall have exclusive jurisdiction with respect to the civil enforcement of "such provisions." A further reading indicates "such provisions" include the policy the FEC formulates. Should the court determine the language is clear, and the FEC's action with regard to Regulation B was consistent with the statutory intent, then Regulation B will be upheld. However, if after a further reading the court that the "exclusive jurisdiction" clause is not clear, it will move to the second step of the Chevron analysis.

The second step asks if the statute is not clear, then was the agency's interpretation of it reasonable. The court will give a full and fair consideration of the reasonableness of the agency's action, and see if the agency looked to both sides of the issue. However, while the court would review Regulation B under Chevron, Chevron creates a great deal of court deference to the agency interpretation. Hence it may be quite difficult to overcome the presumption for the agency's interpretation, especially because the FECA's grant of "exclusive jurisdiction" seems so clear under the first step.

I believe in examining this case, the court may first reject the case on the exhaustion requirement. While the factual scenario presents no discussion of whether or not there are further administrative remedies, my client should exhaust those first. Furthermore, once a court was able to review Regulation A and B, I believe they may uphold Regulation A and Regulation B. While regulation A did fail to present some contrary evidence, I believe it would pass muster under the arbitrary and capricious standard. But perhaps not since it failed to present some contrary evidence in its explanation. However, under Chevron, the agency's interpretation of the law underlying Regulation B will be given strong deference which may be difficult to overcome in a claim by my client.

Question 2, Sample Answer 2

Question 2 May such a claim be brought?

This question involves the issue of court access. Preclusion, exhaustion, finality and ripeness are some of the court access issues that must be addressed in order to determine if a claim could be brought. There are two types of preclusion, express and implied. The statute at issue does not contain any evidence of statutory preclusion much less implied preclusion (*Block v. Community Nutrition*). There is a strong presumption of judicial review, so even if this statute did preclude review, if we could come up with a convincing argument for judicial review, the Court would likely allow it.

Exhaustion is a doctrine that controls the timing of judicial review. There are two types of exhaustion, statutory and common law. 2 U.S.C. §437 contains no statutory exhaustion requirement either in the form of a jurisdictional prerequisite or a ban of certain arguments if not raised first in front of the agency. *McCarthy v. Madigan* identified the twin purposes of exhaustion: it protects agency authority, and it promotes judicial efficiency. Common law exhaustion is required by the courts without statutory mandate when efficiency of the agency outweighs the harm to the individual due to the exhaustion requirement. There are many possible exceptions to common law exhaustion. However, *Darby v. Cisneros* held that when the APA applies to agency action there cannot be common law exhaustion, only statutory exhaustion. Here, the APA applies and there is no statutory exhaustion, therefore, exhaustion does not prohibit out suit.

Finality is another doctrine that controls the timing of a lawsuit. §704 of the APA provides that judicial review is available for all *final* agency action. Lack of finality means lack of subject matter jurisdiction for federal courts, so they must raise the issue even if the parties do not. Finality is the only court-access “requirement” that is jurisdictional. The final order rule

has an exception if it can be established that the harm to the person seeking review outweighs the harm to the administrative process (examples: health/safety, economic hardship, or unreasonable delay). *Bennet v. Spear* provided that in order for an agency action to be final two conditions must be met: (1) action must mark the “consummation” of agency’s decision making process (not merely tentative), and (2) action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.” The regulation in question here represents a consummation of the agency’s notice and comment rulemaking. The consequences to the states for not complying represent legal consequences flowing from the agency action. Therefore, the agency action here is final, and the final order rule poses no bar to our suit.

The last court access hurdle for us is the ripeness requirement. The rationale of the ripeness requirement is to prevent the courts from getting involved in abstract disagreements over administrative policies until action has been formalized and its effects felt in a concrete way. *Abbott Labs v. Gardner* supplied a two-part test for ripeness: (1) fitness of issues for judicial decision, (2) hardships to parties of withholding judicial review. The states that are required to meet these new standards are likely to incur an average cost of \$10 million per state to upgrade to the touch-screen methods. This high cost is likely to satisfy the second part of the Abbott test. The first requirement of the Abbott test depends on the legal theory advanced. Here the likely theories are lack of adequate notice or abuse of discretion. If the controversy is purely a legal issue, then this first prong of Abbott is satisfied. If the court needed a specific application of the regulation in order to evaluate the reasons for it, then it may decide the issue is not ripe for judicial review. The possible challenges here include challenges such as abuse of discretion and arbitrary and capriciousness. It is probable that the Court would not use ripeness to bar this pre-enforcement challenge.

How to attack the validity of the touch-screen and compliance provisions? How is a court likely to analyze those challenges and dispose of the case?

The basis for the challenge of the agency action would depend on what the agency action is. For example, only adjudications can be challenged on due process grounds. The action here seems clear that it was Notice and Comment rulemaking. Rulemaking applies prospectively and applies prospectively, while adjudication affects identifiable parties and applies retrospectively. The main focus in making the distinction is on the generality of the application. Here, the regulation is prospective and affects the rights of a broad class of unspecified individuals; therefore, the agency action involved here was rulemaking (*Londoner and Bi-Metallic*).

Both challenging the procedures used during the rulemaking as well as what standard of review the court will apply depends on whether the agency action was formal or informal. The procedures used by the agency here make it clear that informal, notice and comment rulemaking was in effect here. Formal rulemaking is rare unless the magic language is in the statute “after hearing on the record.” This statute contained no “triggering language.” therefore, informal.

Informal rulemaking has 3 requirements: (1) issuance of notice of proposed rulemaking, (2) conduct of hearing, (3) issuance of final rule along with a statement explaining the reason for the rule. Vermont Yankee prohibited courts from “grafting” additional procedures onto the § 553 notice and comment requirements.

One possible theory on which to attack the regulation is inadequate notice of the rulemaking. *MCI Telecommunications Corp v. FCC* held that notice must be “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.” The court stated that the reasons for the notice requirements were: public participation and fairness, and assure agency will have facts and information relevant to the problem before it. Possible notice

problems include: (1) rule that results was not contemplated by notice, (2) notice incomplete so that meaningful participation by interested parties was not accomplished, and (3) the notice and the rule do not have the requisite “tightness of fit.”

There are exceptions to the § 553 procedures. Subject matter (§553(a)) exclusion from rulemaking excuses rules concerning military/foreign affairs, agency management, public property, loans, grants, benefits, or contracts. None of these subject matter exclusions apply to this case. Character exclusion (§553(b)(3)(A)) excuses interpretive rules, general statements of policy, or rules of agency procedure. *JEM Broadcasting* provided the test for determining if a rule is procedural: if it does not alter the rights or interest of parties. In this sense the inquiry whether the rules are substantive or procedural is similar to the Erie doctrine. This involves looking at the effects are sufficiently grave so that notice and comment procedures are needed to safeguard the policies underlying the APA. This regulation will have a significant effect on the parties involved in the form of increased costs to the tune of \$10 million; therefore, this rule is not procedural, and that exclusion does not excuse it from the notice and comment procedures.

Three tests exist for determining if a rule is an excluded interpretive rule or policy statement. The legal effects test looks to see if the rule is a binding norm on the regulated parties (did the agency intend the rule to be a binding norm?). The regulation promulgated by the FEC was clearly intended to be a binding norm as evidenced by the enforcement provision. The second test, the substantial impact test looks to see if the rule has a substantial impact on regulated parties. The current thought is that this test has been invalidated by *Vermont Yankee*. The third test, the impact on agencies test, analyzes how the agencies have treated the regulation. For example, in *United States Telephone Ass’n v. FCC* the court decided that because the agency enforced a schedule of base penalties as a rule, the court would treat it as a rule. This test

requires time to pass after the rule is promulgated before the analysis into whether it is excluded from Notice and Comment procedures. The other two tests allow a determination to be made the moment the rule is promulgated. In our case, there has not been adequate time to analyze the “effect on agencies” yet; therefore, the court would have to use the legal effects test and conclude that this rule did not fit into any of the character exclusions.

The final type of exclusion is provided by §553(b)(3)(B), the exclusion for good cause. This requires that good cause be shown that procedures are impractical (emergency situation). This exclusion type calls for balancing the need for public participation in rulemaking and the agency’s interest. The FEC could argue that the election situation was an emergency situation that required immediate action. The counter argument would be that we’ve had these election procedures in place for years, so there is no real emergency, at least not enough to outweigh the need for public participation.

If no exclusion doctrine applies, then there is definitely an issue as to whether appropriate notice was given to provide all the interested parties adequate opportunity to participate in the rulemaking process. Would have to argue that specific technological requirements are not an adequate outgrowth of the notice provided. The court would likely reject this challenge, especially considering that it explicitly requested the states (our client) to submit comments and assessments of other available technologies.

Another theory to attack the agency action would be to claim that factual findings of the agency that “touch-screen technology was the most widely available, user friendly, and accurately counted technology for the collection of election ballots.” Because this was informal rulemaking, the substantial evidence test applies only in the D.C. Circuit. This test requires looking at the “whole record” including any contrary evidence to see if determinations were

based on substantial evidence (Universal Camera). The Majority of jurisdictions use the arbitrary and capricious standard (may take into account evidence that was part of the agency record but not produced at the hearing). The information in the record shows that computerized would be more expensive and increase voter participation more. Other than that the record does not support the claims findings that it was the most widely available, and the record explicitly says that accuracy was not increased. The court could easily find that this was not supported by substantial evidence or that it was arbitrary and capricious.

If this agency action was a policy decision, then the hard look doctrine applies. The Hard look doctrine basically insures that the agency have looked carefully and thoughtfully at the problems under consideration. The agency must “show its work”, or provide the reviewing court with reasons for its decision. The policy behind this is that judges are not experts, but rather “gatekeepers of the process.” *Motor Vehicle Manufactureres Ass’n of US v. State Farm* provided possible bases for finding arbitrary and capriciousness through the Hard Look Doctrine: (1) agency relied on factors Congress did not intend, (2) agency did not think about an important aspect of the problem it should have considered, (3) agency’s explanation runs counter to weight of evidence, or (4) agency’s action is so implausible. Here, the only possible problem would be that it ignored an important aspect of the problem that is should have considered. Such a problem may be the civil rights problems in the Florida election. The FEC did not seem to consider this problem in making its determination. It also did not consider the price to the states in implementing this action. A court may likely rule similar to the *Motor Vehicle* court and find the action fails the Hard Look doctrine. The counter argument to this is that the Court should not substitute its judgment for that of the agency, that this is a political question that requires deference to the new administration.

Question 3, Sample Answer

Question 3

Prior to beginning any analysis of this case under administrative law, I would first determine if the Liquor Licensing Board is an agency. After determining that the Board is an agency, I would then look for possible avenues of relief for my client under administrative law rulings. In the case of *The Staggering Tiger* there are two primary avenues for relief with respect to the actions by the Board. The first is to challenge the Board's actions under the claim that it did not fulfill the procedural requirements of the APA. The second avenue for relief would be to claim that the Board has violated Bud's due process rights under the Constitution and the ruling in *Matthews v. Eldridge*. However, in my analysis I do see some problems with Bud's claims.

Process required in the adjudication

In the case at bar, an agency is making an administrative determination about a single individual on a retrospective issue. Thus, the agency action must be examined within the context of an adjudication. The determination must then be made as to if it is a formal or informal adjudication that took place, and what standards should the agency have adhered to in that adjudication. Specifically, did Bud receive proper notice, and what kind of hearing was he entitled to. On this issue, one must look to the organic statute to see what procedures are required by delegation by the state legislature.

Here, the statute states that the Board may act "upon notice and after hearing." However, the statute does not provide much more in the way of guidance for procedural requirements and the clause must be interpreted. Unfortunately, the courts are split on this issue. Although the court in *Seacoast* ruled that when the language in the organic statute requires adjudication there is a presumption of formality, the ruling in *City of West Chicago* held that there is a presumption that a formal hearing is not required unless there is a clear expression of intent. Moreover, the D.C. Circuit held in *Chemical Waste Mgm't* that the court would defer to the agency under a standard like that in *Chevron*.

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Specifically at issue here is whether or not Bud was required to have the opportunity to present his case personally at the “hearing”. Consequently, the success of Bud’s case will depend on which standard the courts of the State of Ticoma apply. If the court applies the Seacoast standard, the standards relating to formal adjudication will apply. Thus, under § 554 of the APA, Bud should have been given the opportunity to argue and support his case at the hearing and the letter Bud sent in would not meet the standard of § 554(c) requiring that all interested parties have the opportunity to be heard. (Londoner) Therefore, Bud would probably prevail on the grounds that he had not been given due process.

In contrast, if the state courts adhere to the city of West Chicago or Chemical Waste Management standards, Bud’s claim will not be so successful. Under West Chicago, the court will presume an informal hearing, under which the APA imposes no procedural restraints. Thus, constitutional due process is the only standard which regulates informal adjudication, and it would be likely the court would have to defer to the agency and hold that the notice and Bud’s letter was sufficient in terms of procedural requirements. Moreover, if the Ticoma follows the D.C. Circuit, it will use the Chevron standard and in every likelihood defer to the agency’s judgment. Consequently, the success of Bud’s claim in challenging the procedures provided to him by the Board will depend on the standards used in the State of Ticoma.

Bud also claims here that the allegations are not only lurid, but totally unfounded. Thus, that shifts our concern to what standard the court will review the agency’s determination of fact. If the court determines that the adjudication was formal in nature, the court will require a substantial evidence review. Subsequently, in order for the court to strike down the agency’s decision, Bud will have to demonstrate that there is no evidence that would support the decision despite contrary evidence in the “whole record.”

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This inquiry will be one of “feel” that will be guided by a mood calling for an appropriate standard of review.

However, if the adjudication is deemed to be informal, the court will review the agency’s factual determinations under the arbitrary and capricious standard. Thus, the decision by the agency will be held unlawful only if the findings and conclusions are found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Here the court will look at everything that was presented to the agency.

The final issue I will discuss regarding the agency’s decision is their interpretation of the statute with regard to who may bring the referendum. Bud’s story implies that the national chains are “behind” the referendum movement, and thus presented a petition to the board. However, the statute requires that legal voters of the city must submit the petition. Therefore, I think if this is the case, then the agency made some sort of misinterpretation of the law here and it should be examined by the court under the Chevron.

First the court will ask if the plain meaning of the statute is clear. Here, the statute is clear that legal voters of the city must bring the petition for the referendum. Thus it would seem that the agency’s interpretation runs contrary to the statute, and the agency’s interpretation should be thrown out. However, if it is not clear that the agency’s interpretation runs contrary to the plain meaning of the statute – perhaps the president of one of the national chains is a registered voter, and she brought the petition before the agency – then the court would have to look to the second prong of Chevron and ask whether or not the agency’s interpretation of the statute was reasonable.

Due Process under the 5th and 14th Amendments

The next issue for consideration is Bud’s possible claim under the Due Process Clause. Here our two main concerns are whether the revocation of the liquor license implicates a property interest, and if so, what process is due. Here we would look to the

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Court's ruling in Matthew's v. Eldridge for guidance. There the Court enumerated a three-part test to determine if there is process due, and if so, how much.

First, the court must look to the nature of the private interest that will be affected by the deprivation. Here, Bud will lose his liquor license, and therefore will be unable to serve alcohol in his establishment. Because The Staggering Tiger is known as a tavern where college students go to unwind, it is likely that the loss of a liquor license will equate to the loss of his business, and thus economic property. While the statute states that the license does not qualify as a property interest, I believe that this qualifies as an impermissible "bitter with the sweet argument" which was rejected in Loudermill. The state is essentially drafting the statute to give the right, but then also say rights may be withdrawn without the required process.

Next, the court would look to see if the current procedures carry risk of erroneous deprivation of process, and the likelihood that additional procedures will correct that risk of error. Here, the statute requires "notice and after hearing" after a petition of at least 500 signatures is presented to the Board. The Board must then decide if the referendum will appear and if so, then the voters will vote on the issue. Here, there are significant procedural requirements, but as the Board has interpreted "hearing" the party's rights being affected is not able to personally present their case, thus opening up the opportunity for false accusations. Thus, by opening up the adjudication to a hearing to further ventilate the issues, risk for error could be decreased by presenting a full account to the board before they refused the renewal.

Finally, the court will look at the additional fiscal and administrative costs to the government of providing the additional procedures. Providing a further hearing to Bud would be of a fairly low cost. While there may be some efficiency argument on the part of the agency, the risk of erroneous deprivation is high enough here to warrant a further