Regulatory Monitors: Policing Firms in the Compliance Era

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Regulatory Monitors: Policing Firms in the Compliance Era

Rory Van Loo*

Like police officers patrolling the streets for crime, the front lines for most large business regulators—Environmental Protection Agency engineers, Consumer Financial Protection Bureau examiners, and Nuclear Regulatory Commission inspectors, among others—decide when and how to enforce the law. These regulatory monitors guard against toxic air, financial ruin, and deadly explosions. Yet whereas scholars devote considerable attention to police officers in criminal law enforcement, they have paid limited attention to the structural role of regulatory monitors in civil law enforcement. This Article is the first to chronicle the statutory rise of regulatory monitors and to situate them empirically at the core of modern administrative power. Since the Civil War, often in response to crises, the largest federal regulators have steadily accrued authority to collect documents remotely and enter private space without any suspicion of wrongdoing. Those exercising this monitoring authority within agencies administer the law at least as much as the groups that are the focus of legal scholarship: enforcement lawyers, administrative law judges, and rule writers. Regulatory monitors wield sanctions, influence rulemaking, and create quasi-common law. Moreover, they offer a better fit than lawyers for the modern era of “collaborative governance” and corporate compliance departments because their principal function—information collection—is less adversarial. Yet unlike litigation and rulemaking, monitoring-based decisions are largely unobservable by the public, often unreviewable by courts, and explicitly excluded by the Administrative Procedure Act. The regulatory-monitor function can thus be more easily ramped up or deconstructed by the President, interest groups, and agency directors. A better understanding of regulatory monitors—and their relationship with regulatory lawyers—is vital to designing democratic accountability not only during times of political transition but as long as they remain a central pillar of the administrative state.

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Introduction

Upton Sinclair’s 1906 novel The Jungle provoked public outcry by graphically exposing American meatpacking industry health violations, such as vermin infestations, prompting lawmakers to charge the U.S. Department of Agriculture (USDA) with inspecting facilities nationwide. After the subprime mortgage crisis helped push the economy to the edge of a cliff in 2008, a new agency was created—the Consumer Financial Protection Bureau (CFPB)—with the first federal mandate to routinely examine mortgage servicers and payday lenders. When the Deepwater Horizon oil rig exploded and sank off the Gulf Coast in 2010, arguably the “worst environmental disaster in U.S. history,” the Department of the Interior dissolved the responsible agency, created three in its place, and has since doubled the number of offshore energy inspectors.

These incidents expanded administrative agencies’ authority not only to litigate but also to monitor. Monitoring authority enables agencies to regularly collect nonpublic information from firms without suspicion of wrongdoing. Under the Bush and Obama Administrations alone, in addition to the subprime-mortgage crisis and Deepwater oil spill, public backlash prompted monitor-enhancing legislation to keep lead out of children’s toys; prevent salmonella deaths from tainted peanut butter, ice cream, and other packaged foods; and reduce prescription drug price

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6 On policy makers’ broader responses to such major crises, see, e.g., POLICY SHOCK: RECALIBRATING RISK AND REGULATION AFTER OIL SPILLS, NUCLEAR ACCIDENTS AND FINANCIAL CRISSES (Edward J. Balleisen, , Lori S. Bennear, Kimberly D. Krawiec & Jonathan B. Wiener, eds., 2017).
manipulation.\(^9\) Whereas the literature has paid considerable attention to administrative rulemaking and adjudication, it has left the story of regulatory monitoring largely untold.\(^{10}\)

Some agencies describe monitoring as their “backbone”\(^11\) or “core”\(^12\) and it is surely not lost on administrative observers that it is a meaningful part of what agencies do.\(^13\) Less obvious is why the responsible bureaucrats---some of whom wear hard hats and goggles to inspect dangerous machinery, search for “black rot, white rot, yellow rot” in food manufacturing plants,\(^14\) or pore through accounting ledgers---merit the kind of sustained legal scholarly attention given to those writing rules and litigating cases.

This Article’s primary goal is to sketch regulatory monitors’ place in the federal regulatory architecture. It examines their statutory rise and workforce size at all nineteen “large” federal regulators.\(^15\) By drawing on employee manuals, agency annual reports, Congressional budget requests, job postings, and interviews, it also begins to piece together the enforcement role that regulatory monitors play and how that role relates to agency functions occupied by lawyers.\(^16\) In short, it situates regulatory monitors at the center of administrative power.

Just as it would be incomplete to analyze criminal law enforcement without distinguishing police officers from prosecutors, this Article shows that a part of administrative law is missing without distinguishing regulatory monitors from agency enforcement lawyers. To be clear, police officers are unique in terms of state authority by having the discretion to use physical force and

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\(10\) The literature has also provided broad accounts of administrative surveillance aimed at private individuals for other purposes. See, e.g., Daphna Renan, The Fourth Amendment as Administrative Governance, 68 Stan. L. Rev. 1039, 1043 (2016) (describing how the administrative state engages in “sweeping surveillance activity” that must be integrated with the “law and theory of the Fourth Amendment”). It has also covered court-ordered monitoring. See, e.g., Veronica Root, The Monitor-“Client” Relationship, 100 Va. L. Rev. 523, 531–33 (2014).


\(13\) See Gary Lawson, Federal Administrative Law 10 (6th ed. 2007) (acknowledging that most agency activity lies outside lawyerly roles); Julie E. Cohen, The Regulatory State in the Information Age, 17 Theoretical Inquiries L. 369, 396 (2016) (“[T]he two modalities [of rulemaking and adjudication] are not so much opposites as they are endpoints on a continuum, and . . . a great deal of agency activity occurs in the space between them.”); cf. Eric Biber & J.B. Ruhl, The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State, 64 Duke L.J. 133, 142 (2014) (“Topics such as . . . inspections and monitoring . . . deserve more attention than we can give here.”); William H. Simon, The Organizational Premises of Administrative Law, 78 Law & Contemp. Probs., nos. 1 & 2, 2015, at 61, 70 (describing both main administrative law paradigms after World War II as relying on monitoring by agencies).


\(15\) See infra section I.B (defining large regulators and discussing the methodology used to identify them).

\(16\) Publicly available documents were sufficient for most of these agencies’ roles and responsibilities, but to fill in some gaps and to improve accuracy at least one interview was conducted with a current or former employee at each of the agencies or departments studied. Interviews were semistructured, with anonymous interviewees located through chain referral. For a similar interview methodology and review of the literature discussing limitations of such an approach, see, e.g., John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539, 1551 (2017).
immediately take away life or liberty. And individuals are arguably more powerless in the face of police officers than businesses are in the face of bureaucrats.

While most regulatory monitors do not wield guns, they stand between life and death through safety inspections of airplanes, nuclear facilities, highway vehicles, and food. Although regulatory monitors cannot immediately arrest individuals, they may identify criminal wrongdoing, such as embezzlement, leading to imprisonment, and can limit a business owner’s freedom to earn a livelihood by ordering the immediate shutdown of oil-drilling operations or food manufacturing. They also protect against devastating nonphysical threats by patrolling financial institutions for conduct that could cost families their homes or collapse the economy. Furthermore, regulatory monitors have a forceful informal sanction: the ability to ramp up inspection frequency and intensity, which itself inflicts pain and costs. With monitoring, as with policing, sometimes the process is the punishment.

The analogy to police officers is illustrative because both groups have a patrol function at their core and make frontline law enforcement decisions. But the comparison structurally understates regulatory-monitor authority in three main ways. First, police have more constitutional constraints placed on them. Whereas police officers must generally have probable cause or a search warrant to enter private space, the Supreme Court has held that the Fourth Amendment constrains regulatory searches far less. Unlike police officers, for instance, Environmental Protection Agency (EPA) inspectors can enter private spaces without any suspicion of wrongdoing to make observations or collect samples so long as it is part of a “general neutral administrative plan.”

Second, the power of regulatory monitors in many agencies extends further along the spectrum of enforcement authority. According to one prominent account, “the most significant...”

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20 See infra section III.B.4.


23 National-Standard Co. v. Adamkus, 881 F.2d 352, 361–63 (7th Cir. 1989) (holding that EPA inspectors can conduct searches based on administrative warrants, which require either that (1) there is “specific evidence of an existing violation,” necessitating a lesser degree of probable cause than criminal warrants; or that (2) the search is “part of a general neutral administrative plan”).
design flaw in the federal criminal system” is prosecutors’ ability to enforce and adjudicate laws. In many agencies, regulatory monitors combine prosecutors’ enforcement and adjudication authority with the patrol function of police officers and investigatory function of detectives: They not only identify wrongdoers but also investigate, reach multimillion-dollar settlements, submit formal charges, and ultimately determine the fate of regulated entities.

Third, regulatory monitors may have greater influence on policymaking. Police officers have tremendous ability to arrest people in light of the breadth of potential violations on the books. Those violations are, however, part of a detailed code. Some regulatory monitors can go further by requesting internal business changes that advance principles, even if the original behavior was not clearly illegal—such as when a monitor believes a company’s internal process for reviewing legal complaints is likely to miss future violations. In terms of rulemaking, regulatory monitors post their employee manuals online, which businesses study intently to build compliance systems. Those manuals thereby shape industry behavior without any notice-and-comment process. Additionally, postvisit examination and inspection reports have become a meaningful body of common law, used by businesses to make their case in subsequent inspections.

A key backstory to regulatory monitors’ current status is the advent in recent decades of “new governance” models emphasizing collaborative regulation. As this Article argues below, the emphasis on collaborative regulation syncs better with inspectors and examiners—who “work alongside, not against[] industry”—than with litigators, whose main powers rest on adversarial court proceedings. Current governance models also emphasize “continuous” information flows so that rules respond rapidly to firms’ conduct, inducing greater reliance on regulatory monitors’ real-time data. Moreover, as courts, Congress, and the President have increasingly constrained agency


25 See infra section III.B.

26 To be clear, that code is expansive enough to give police officers tremendous power to arrest people. See infra section III.C.1.

27 See Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 Wm. & Mary L. Rev. 2075, 2124-25 (2016) (“The compliance function, in particular, is designed to inculcate norms of behavior that exceed narrow legal obligations.”).

28 Parrillo, supra note 18, at 27 n.47. Courts have not, however, treated manuals as substantive rules having the force and effect of law in adjudications. See Disabled Am. Veterans v. Sec’y of Veterans Affairs, 859 F.3d 1072, 1078 (Fed. Cir. 2017) (holding that an employee manual was not binding on the agency in adjudications and therefore was not required to go through notice-and-comment procedures not subject to judicial review).

29 See infra section III.C.1.


31 See infra section II.A.1.

32 See Hayes, supra note 11.

33 See Freeman, supra note 30, at 22, 28–29 (“Monitoring and information exchange are crucial to an effective implementation and compliance regime . . . .”).
rule writing and litigation, agencies would be expected to rely more on less-constrained monitoring activities to exercise authority.

By situating regulatory monitors at the center of administrative power, this Article also places them at the intersection of leading public law conversations. One strand of scholarship has stressed the importance of the structural design of public institutions in incentivizing optimal acquisition of information—the “lifeblood of effective governance.” A major reason Congress created agencies was to undertake “specialized information-gathering” ill-suited for courts. This literature has also analyzed agencies’ external strategies for acquiring information—but focusing on agencies as unitary entities rather than looking at internal groups.

Another related strand of scholarship argues that standard depictions of administrative law are incomplete because “agencies are typically treated as unitary entities.” Congressional and agency leaders allocate clout among various subagency offices, divisions, and decisionmakers. Acknowledging these internal allocations improves understanding of “the most puzzling principles and doctrines of administrative law.” Early studies provided rich insights into agency organizational design, including the role of inspectors, “but the bulk of this work was done decades ago, largely in the context of administrative adjudication.” Since then, agencies’ regulatory approaches have shifted significantly, and adjudication has declined. Consequently, scholars have recently revived the project of “cracking open the black box of agencies to peer inside” the organizational

34 See infra section II.A.3.
37 See, e.g., Cary Coglianese, Richard Zeckhauser & Edward Parson, Seeking Truth for Power: Informational Strategy and Regulatory Policymaking, 89 Minn. L. Rev. 277, 281–85 (2004) (“In this Article, we analyze regulators’ gathering of information from firms as a strategic game.”). Professors Coglianese, Zeckhauser, and Parson mention regulatory monitors in passing, but they examine a broader set of information-collection mechanisms like phone conversations with industry experts, for a wider array of purposes, such as one-time rulemaking studies. See id. at 288–89, 305, 319–24.
39 See Magill & Vermeule, supra note 38, at 1035–36 (offering a descriptive model of agencies that draws attention to how power is distributed between various offices and officials within an agency).
40 Id. at 1035.
41 See, e.g., Eugene Bardach & Robert A. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness 73 (1982) (discussing how agencies and inspectors have configured their operations to meet legislative demands for rule enforcement); John Braithwaite et al., An Enforcement Taxonomy of Regulatory Agencies, 9 Law & Pol’y 323, 324 (1987) (“Deterrence or sanctioning strategies seek to identify and detect breaches of law through patrol and inspection; they then seek to develop a case for the courts through investigation.”); see also Colin Diver, A Theory of Regulatory Enforcement, 28 Pub. Pol’y 257, 258 (1980) (discussing inspectors from a theoretical perspective). This Article draws on those early studies. However, that literature focuses on (a) mostly inspectors, (b) a different set of agencies, including state and local agencies and typically excluding those that regulate trade or finance, and (c) agencies’ overall regulatory approach rather than on regulatory monitors. See, e.g., Bardach & Kagan, supra, at 7 (“The focus of this book is on the social dimension of unreasonableness: the experience of being subjected to inefficient regulatory requirements.”). The literature thus lacks any systematic study of regulatory monitors as a distinct group across the largest federal agencies, leaving open the question of regulatory monitors’ origins and power in the modern administrative state.
43 See, e.g., id. For an overview of the governance and market transformations behind this shift, see infra Part II.
44 Magill & Vermeule, supra note 38, at 1035.
structure of both rulemaking\textsuperscript{45} and enforcement.\textsuperscript{46} Others have looked more broadly at how to improve frontline decisionmakers, a category that includes inspectors and administrative law judges.\textsuperscript{47}

Despite the lack of sustained attention to regulatory monitors or articulation of their distinct role in the modern administrative state,\textsuperscript{48} these strands of literature indirectly lay the foundations for understanding how regulatory monitors are crucial to administrative law. For most agencies, regulatory monitors are an organizationally distinct group at the heart of the policymaking and enforcement black boxes.\textsuperscript{49} They are the gatekeepers for information, and thus for the “lifeblood” of agencies.\textsuperscript{50}

As such, regulatory monitors are relevant to administrative law’s central preoccupations. The overriding purpose of administrative law is the accountability of delegated authority. The 1946 Administrative Procedure Act (APA) enables courts and the public to check agencies.\textsuperscript{51} Yet regulatory monitors operate in the “soft” administrative law\textsuperscript{52} space largely exempted from the APA.\textsuperscript{53} Since regulatory monitors’ actions are less reviewable than those of more formal legal actors and the technical process of collecting information remains out of sight between crises, the rise of regulatory monitors potentially insulates agencies from public accountability.

Finally, scholars have debated how the law should address external stakeholders competing for influence over agencies. The literature identifies mechanisms, such as cost–benefit analysis, that

\begin{itemize}
\item \textsuperscript{45} See, e.g., Nou, supra note 42, at 422–25 (examining the internal divisions within agencies and how agency leaders deploy these divisions to advance its objectives). Professor Nou does not mention regulatory monitors and instead focuses on organizational mechanisms that give agency leaders control over information vital for decisionmaking, especially related to rulemaking. See id. at 429–31.
\item \textsuperscript{46} See, e.g., Rachel E. Barkow, Overseeing Agency Enforcement, 84 Geo. Wash. L. Rev. 1129, 1130–31 (2016) (acknowledging that “[d]espite the centrality of enforcement to agency practice, enforcement discretion receives relatively little attention,” and “begin[ning] to catalog approaches for overseeing it”); Margaret H. Lemos, Democratic Enforcement? Accountability and Independence for the Litigation State, 102 Cornell L. Rev. 929, 942–43 (2017) (“[E]nforcement has inspired far less attention than rulemaking or adjudication. . . . This Article seeks to fill that gap.”).
\item \textsuperscript{47} E.g., Daniel E. Ho, Does Peer Review Work? An Experiment of Experimentalism, 69 Stan. L. Rev. 1 (2017). Professor Ho underscores regulatory monitors’ importance by closely studying inspectors and emphasizing the “extensive discretion” of “frontline government officials carry[ing] out the law.” Id. at 5. His focus is on a broader function—frontline decisionmaking, which is exercised by other groups such as lawyers and judges—and a broader set of agencies—including local agencies that exercise adjudicatory power over individuals. See id at 5–10. Nonetheless, his work produces significant empirical and policy insights into regulatory monitors. See id. at 11–13. For earlier valuable empirical studies of inspectors, see, for example, Bardach & Kagan, supra note 41; Braithwaite et al., supra note 41.
\item \textsuperscript{48} When broad administrative law conversations mention monitoring, it is often of agencies, not firms. See Nou, supra note 42, at 423 (noting “administrative law’s overwhelming focus on the influence of agencies’ external monitors”).
\item \textsuperscript{49} See infra section I.A.
\item \textsuperscript{50} See infra section I.B., Part III.
\item \textsuperscript{51} It does so by, for example, involving the public in notice-and-comment rulemaking. See 5 U.S.C. § 553 (2012). It also specifies judicial review of final agency action. See id. § 702.
\item \textsuperscript{53} See 5 U.S.C. § 554(a)(3) (excepting “proceedings in which decisions rest solely on inspections” from the notice-and-comment process).
\end{itemize}
alter the President’s ability to control a defiant bureaucracy. It also explores organizational design features that insulate agencies from industry capture. Regulatory monitors add another dimension to these discussions. For instance, in 1961, about a month into a new job as a frontline Food and Drug Administration (FDA) examiner, Dr. Frances Kelsey received what her supervisors described as routine papers submitted for a new sleep aid used off-label for morning sickness. Despite intense pressure from the drug’s manufacturer, she withheld approval by repeatedly demanding more rigorous clinical evidence than the FDA typically required. It was ultimately discovered that in Germany alone that the drug, thalidomide, had caused an estimated 10,000 incidents of deaths or shrunken or missing limbs in babies born to mothers who had taken the drug. Mass harm was averted in the United States because a frontline examiner stood firm in exercising her agency’s statutory power.

As powerful actors, regulatory monitors have in recent decades served as an important lever for any presidential ramp-up or drop-off in regulation. Most recently, as part of a planned “deconstruction of the administrative state,” President Trump has taken steps to make the FDA

54 See, e.g., Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1819–21 (1996) (discussing the nondelegation doctrine); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 176–79 (1994) (summarizing the checks and balances on presidential power over the administrative state); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2253–72 (2001) (providing an overview of the ways agencies are constrained); Michael A. Livermore, Cost–Benefit Analysis and Agency Independence, 81 U. Chi. L. Rev. 609, 614–15 (2014) (describing the way cost–benefit analysis constrains agencies); Kevin Stack, The President’s Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263, 267 (2006) (arguing that the President does not have the authority to act directly under a statute or bind the discretion of lower-level officials unless Congress directly grants such authority, in contrast to the operating assumption).

55 See Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 17–18 (2010) (arguing that the analysis of an agency’s independence should shift from the traditional focus on insulation from the presidency to instead consider design features that prevent capture by interest groups).


57 See S. Rep. No. 87-1744, at 40–42 (1962) (detailing over forty-six contacts by the drug’s manufacturer attempting to “expedite clearance,” including one with Dr. Kelsey’s immediate supervisor calling her letter “somewhat libelous” and requesting that pressure be applied to her).

58 See Frederick Dove, What’s Happened to Thalidomide Babies?, BBC (Nov. 3, 2011), http://www.bbc.com/news/magazine-15536544/ [https://perma.cc/Z26Y-Q9C4] (“No-one knows how many miscarriages the drug caused, but it’s estimated that, in Germany alone, 10,000 babies were born affected by Thalidomide. Many were too damaged to survive for long.”).

59 See infra section I.C.2.


drug-approval process “much faster,” and his appointees have moved to decrease federal inspections of polluting factories, examinations of banks, and monitoring of offshore oil platforms. The ease with which such changes can be made varies by agency. At the FDA today, external influence faces more structural constraints than in the 1950s. Following the thalidomide incident, Congress codified the type of heightened reporting requirements that Dr. Kelsey had sought. Streamlining the drug approval process would now largely depend on changes to the law rather than convincing a frontline examiner. A change in the law would mean greater visibility and public involvement. By contrast, in other agencies, legal rules and organizational structure leave regulatory monitors’ decision process more susceptible to alteration without public knowledge.

By mapping out this underappreciated administrative law of monitoring, the discussion below thus implicates broader concerns that regulatory enforcement lacks mechanisms for legitimacy such as those found in administrative rulemaking and adjudication. Indeed, given that monitoring makes up so much of agency activity, updating the legal framework for the modern era of monitoring would contribute to the important projects of designing agencies more effectively and making administrative law more administrative. Beyond more familiar mechanisms such as transparency, a team paradigm may be needed for the administrative state, with regulatory lawyers and regulatory monitors as coequal branches of administration.

The discussion is structured as follows. Part I provides an overview of regulatory monitors by defining their distinct role in agencies and surveying their statutory emergence. Part II articulates the changes in governance and markets that have organizationally favored regulatory monitors more than rule writers and litigators. Part III begins to map out major organizational design choices. It provides the first quantitative and qualitative evidence indicating regulatory monitors’ presence and


65 See infra section IV.A.

66 Administrative law here is meant in its broader sense. See Magill & Vermeule, supra note 38, at 1056 (“Judicial review is but one corner of administrative law, which also involves statutes, executive orders, and other legal instruments that structure the agencies and the procedures they use.”).

67 See Lemos, supra note 46, at 931–32 (“Despite its manifest importance, we lack a theoretical framework for assessing the legitimacy of public enforcement, or situating it in our broader scheme of democratic governance.”).

68 See Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95, 97 (2003) (criticizing the APA for imposing an “essentially judicial concept of governance” that subjects agencies to “inappropriate procedural rigidities” instead of accommodating “new modes of governance” like priority setting and resource allocation).

Electronic copy available at: https://ssrn.com/abstract=3168798
influence across the largest independent and cabinet-level regulators. Part IV considers how future agency architects might improve the regulatory-monitor framework for more optimal governance. Designers could improve many agencies through transparency, mandated minimum numbers of inspections, appeals, appointments, and intra-agency coordination among lawyers and regulatory monitors. Above all, whether the goal is to guard against abuse of agency authority or business capture of bureaucrats, administrative law could benefit from viewing regulatory monitors as what they have become: dominant state actors vital to the well-being of firms and citizens.

I. The Statutory Rise

Unlike other actors in the typical administrative narrative, such as the rule writer and enforcement lawyer, regulatory monitors have a less-well-documented core power. Accordingly, this Part begins by providing a definition and then offers a brief historical overview of their accumulation of statutory monitoring authority across large regulators.

A. Regulatory Monitors as Distinct Actors

This Article defines regulatory monitors as those whose core power is to regularly obtain nonpublic information from businesses outside the legal investigatory process. Monitoring can be broken down into two main types: visitation and reporting. Visitation authority allows regulators to physically enter private business space to observe or collect information. Reporting requires firms to remotely transmit information, such as business records, which are then received by regulatory monitors within the agency.69

This seemingly straightforward authority does not easily fit into common descriptions of the administrative state. Legal treatments of administrative agencies typically break down their activities into rulemaking and enforcement, or sometimes into ex ante rulemaking and ex post enforcement.70 Regulatory monitors arguably act ex ante because they aim to “secure compliance before violations occur.”71 But securing compliance from a particular regulated entity is very different from writing rules of general applicability, so categorizing monitoring as “ex ante” is a poor fit.

That leaves ex post enforcement as a more natural place for monitoring in the standard ex ante–ex post dichotomy. But as the Supreme Court explained, “Our cases have always understood ‘visitation’ as this right to oversee corporate affairs, quite separate from the power to enforce the law.”72 When in its first year the CFPB broke with tradition by sending enforcement lawyers along on its early regular on-site visits, called bank exams, the practice was met with “relentless opposition

69 These two categories are distinct from agencies monitoring publicly available data.


from bankers.”

The agency ultimately ended the practice, with one former CFPB official explaining, “The bureau learned that the nature and logistics of the two jobs are very different . . . ”

The U.S. Office of Personnel Management (OPM) recognizes regulatory monitors’ distinct role, classifying attorneys in the “Legal and Kindred” category. It lists the most common titles used for regulatory monitors elsewhere: Inspectors, Auditors, and Examiners. Legal scholars’ frequent omission of regulatory monitors reflects the common view that this group is doing something apart from “Legal and Kindred” actors.

Despite the confusion, it is important to recognize that internal agency groups can be distinguished by their core legal powers. Litigators hold the keys to the courts. Rule writers author text enacted as law. Regulatory monitors peer inside firms.

B. Defining Large Regulators

While examples throughout the Article involve a variety of regulators, to manage the scope of the empirical analysis and investigation of statutory history, this Article focuses on “large” regulators of business. The OPM defines an agency as “large” if it has more than 1,000 employees. To identify the set of all large regulators within this group, I located every agency in the OPM’s database with over 1,000 employees and a mission focused on regulating businesses. This includes both “Cabinet-Level” agencies and “Large Independent Agencies.” The nineteen agencies fitting this description were the CFPB, Federal Energy Regulatory Commission (FERC), Food Safety and Inspection Service (FSIS), Mine Safety and Health Administration (MSHA), Occupational Safety and Health Administration (OSHA), Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Office of the Comptroller of the Currency (OCC), EPA, Equal Employment Opportunity Commission (EEOC), Federal Communications Commission (FCC), Federal Deposit Insurance Corporation (FDIC), Federal Reserve, Federal Trade Commission (FTC), National Credit Union Administration (NCUA), National Labor Relations Board (NLRB), Nuclear Regulatory Commission (NRC), and Securities and Exchange Commission (SEC).

Large regulators were chosen as the category, rather than medium or small regulators, under the assumption that any given large regulator is more likely to have a bigger influence on the
business world than any given small or medium regulator, due to resource allocation. That focus, however, inevitably leaves out important regulators. Surely some medium and smaller agencies have considerable influence, and by some metrics may be more influential than some large agencies. Also, considerable monitoring of businesses happens at the state level.  

To differentiate business regulators from other agencies, a narrow definition was applied: the agency must focus on enforcing laws against businesses. If the agency focuses on overseeing substantial personal activities, it was eliminated. Thus, the Internal Revenue Service (IRS) is eliminated under this criterion because a substantial part of what it does is oversee individuals’ tax returns—even though the IRS also oversees revenue collection from businesses. Much of this Article’s analysis would apply to agencies that collect information from individuals. But collection of information from individuals carries different implications for privacy, and it is less relevant to some of the discussions below about market transformations and compliance departments.  

An agency was also omitted if it did not enforce laws against businesses but instead was focused on some other activity. The U.S. Patent and Trademark Office (USPTO), for instance, is focused on “granting U.S. patents and registering trademarks.” The USPTO leaves it to the patent and trademark holders, however, to enforce their intellectual property rights in court.

There is no universally accepted definition of “business regulator,” and by other defensible definitions of the term, the USPTO and IRS could have been included. It is worth noting that the USPTO and IRS would, if included, presumably strengthen at least parts of this Article’s central thesis, since those agencies rely heavily on employees who regularly collect information. But it becomes less clear how to think about the role of lawyers in an agency that does not have a strong law enforcement role.

Large agencies may not, of course, be representative of agencies as a whole. It is possible that smaller agencies are inherently more likely to rely on enforcement lawyers than monitors, for instance, due to their limited resources. Further study would be needed to determine whether that is the case, although at least some excluded medium and small business regulators, such as offshore oil regulators, also rely heavily on monitoring. Additionally, large independent agencies collectively comprise ninety-three percent of all independent agency employees listed in the OPM database, meaning that they presumably reflect a substantial portion of the regulatory force.

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79 See, e.g., Sam Lewis, Insurtech: An Industry Ripe for Disruption, 1 Geo. L. Tech. R. 491, 498 (2017) (“In the United States, the federal government plays only a small role in the insurance regulatory system. Individual states issue most insurance regulations.”).

80 See infra Part II.


83 See infra notes 167–169 and accompanying text (discussing monitoring outside the context of large agencies).

84 See FedScope, supra note 75 (noting that large independent agencies have 160,524 total employees, medium independent agencies have 11,230, and small independent agencies have 1,440).
C. The Statutory Growth of Monitoring Authority

The modern monitoring framework is the product of numerous ad hoc statutes that give different agencies various levels of visitation and reporting powers. Today’s large business regulators can be historically classified into one of three categories: those that had strong monitoring authority from the outset, those that gradually accumulated monitoring authority, and those that have limited monitoring power today.

1. Original Monitors: Banking, Transportation, and Utilities

Although historical treatments of the administrative state sometimes begin with federal control of the railroads of the 1880s, the first of today’s large business regulators was born during the Civil War, at a time when states implemented most inspection regimes. In 1864, recognizing that a successful military campaign required a stable financial system, President Lincoln declared that a “national system will create a reliable and permanent influence in support of national credit and protect the people against losses in the use of paper money.” Later that year, he signed the National Bank Act, creating the Office of the Comptroller of the Currency (OCC). The OCC’s mission included ensuring compliance with federal banking laws, which sought to ensure a bank did not fail and thereby spark bank runs that could collapse the economy.

The OCC’s main regulatory tool was monitoring. The OCC could not litigate. Although the agency could write rules, it rarely used that authority. Its chief sanction was revoking a bank’s


90 See National Banking Act of 1864 §§ 22, 24, 45, 47 (granting authority to the Secretary of the Treasury to prescribe certain regulations); see also 12 U.S.C. § 211 (providing the modern authority for the Comptroller to promulgate regulations).

91 See White, supra note 89, at 21.
national charter, a seldom-used option given the OCC’s need to prevent bank closings. OCC examiners still had the effect, when they appeared unannounced, of “terrorizing” lower-level bank cashiers. But as a statutory matter, the agency was built more to monitor than to litigate.

Initially, the OCC focused on reviewing quarterly bank reports and monthly statements. It soon became clear that this enabled bankers to “window dress[]” reports. Congress responded by requiring a minimum of two surprise annual examinations of each national bank. The OCC already had the ability to conduct examinations in its originating statute.

Congressional Record, supra note 92. Such decisions triggered formal procedures, such as appeals and hearings. See id. See Eugene N. White, Lessons from American Bank Supervision from the Nineteenth Century to the Great Depression, in 17 Macropopreiodntial Regulatory Policies: The New Road to Financial Stability? 41, 48 (Stijn Claessens et al. eds., 2012).


O. Henry, A Call Loan, in Heart of the West 240, 241 (1904); see also Hawke, supra note 94 (confirming O. Henry’s accounts of OCC bank examiners).

White, supra note 89, at 21.


Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.). To become insured, banks had to accept federal examinations. Id. § 5. At first, the FDIC required approval from other banking regulators to examine, but in 1950 it received broader discretion to conduct examinations of its member banks. White, supra note 89, at 26.

While only some state banks had joined the Federal Reserve, “virtually all banks” signed up for FDIC oversight, thereby greatly expanding monitoring’s reach. Id.


Electronic copy available at: https://ssrn.com/abstract=3168798
This early visitorial authority can also be seen in the infrastructure services industries of transportation, energy, and telecommunications agencies. The largest modern transportation agency, the Federal Aviation Administration (FAA), built an early model for its contemporary safety program in 1932. The country was divided into six “Lighthouse district areas,” within which a single “patrol pilot[]” would fly around, able to enter any airplane, open any airport door, or review any flight-related document. Like bank examiners, patrol pilots could sanction by recommending the “suspension and revocation” of licenses. Similarly extensive visitation can be found in the origins of today’s largest agencies overseeing energy and telecommunications, the Federal Regulatory Energy Commission (FERC) and Federal Communications Commission (FCC).

As these financial, transportation, telecommunications, and energy industries have evolved, monitoring statutes have mostly kept pace. Congress updated monitoring to reach new financial organizations, such as hedge funds, new products such as credit cards, and even a shadow banking rating organizations and securities brokers and dealers. The SEC could require “reasonable periodic, special, or other examinations” of “accounts, correspondence, memoranda, papers, books, and other records . . . at any time.” Id. § 13(h)(4) (codified at 15 U.S.C. § 78m). Credit unions were also subject to federal examination. Federal Credit Union Act, Pub L. No. 86-354, 48 Stat. 1216 (1934) (codified in scattered sections of 12 U.S.C.). Authority was assumed in 1970 by the National Credit Union Administration (NCUA). See A Brief History of Credit Unions, NCUA, https://www.ncua.gov/About/Pages/history.aspx [last visited Oct. 11, 2018].


The FCC’s 1934 originating statute grants authority to “inspect all transmitting apparatus.” Communications Act of 1934, Pub. L. No. 73-416, § 303(a), 48 Stat. 1064, 1083 (codified as amended in scattered sections of 47 U.S.C. (2012)). The FCC assumed responsibilities and personnel previously of the Federal Radio Commission. See id. § 603(a). For common carriers, such as telephone companies, the Act provides that “[t]he Commission shall examine into transactions entered into by any common carrier” and “shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing.” Id. § 215(a). This includes the submission of reports and inquiries into management. Id. § 218.
system that had by some measures become larger than the traditional banking system.\textsuperscript{111} The FAA today has monitoring authority over drones.\textsuperscript{112} Regulators’ initial oversight of hydroelectric dams has extended to other energy sources, such as nuclear power.\textsuperscript{113} The FCC, by classifying wireless phone companies as common carriers, broadened its visitation authority originally intended for landline telephone companies.\textsuperscript{114}

2. Gradual Monitors: Health, Safety, and the Environment

Another set of agencies has gained monitoring authority more incrementally. This development pattern most closely fits those agencies, like environmental regulators, focused on protecting from physical harm. The earliest arose in pharmaceuticals. After several children died from tainted vaccines in 1902,\textsuperscript{115} Congress authorized federal agents to “enter and inspect any establishment for the propagation and preparation of any virus, serum, toxin, [or] antitoxin.”\textsuperscript{116}

\begin{footnotes}

\item\textsuperscript{112} Unmanned Aircraft Joint Training and Usage Plan, Pub. L. No. 113-66, 127 Stat. 870 (2013) (“The Secretary of Defense, the Secretary of Homeland Security, and the Administrator of the Federal Aviation Administration shall jointly develop and implement plans and procedures to review the potential or joint testing and evaluation of unmanned aircraft equipment and systems . . . .”)


\item\textsuperscript{114} See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). Cable systems also came under FCC jurisdiction. See United States v. Southwestern Cable Co., 392 U.S. 157, 167–73 (1968) (finding that the FCC had broad authority to regulate a mobile communication form using microwaves). Deregulation in these areas has not removed broad authority to extract information. See Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated Industries Law, 98 Colum. L. Rev. 1323, 1325–26 (1998) (“The role of the agency has been transformed from one of protecting end-users to one of arbitrating disputes among rival providers and, in particular, overseeing access to and pricing of ‘bottleneck’ facilities that could be exploited by incumbent firms to stifle competition.”). Internet providers were also subject to FCC monitoring and had been classified as common carriers. See Open Internet Order, 80 Fed. Reg. 19737 (Apr. 13, 2015). That classification was removed in December of 2017. See FCC, Restoring Internet Freedom, https://www.fcc.gov/restoring-internet-freedom [https://perma.cc/Z6MM-CZXN] (last visited Oct. 11, 2018).

\item\textsuperscript{115} Sharon B. Jacobs, Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States, 64 Food & Drug L.J. 599, 601 (2009) (“[T]he deaths of children from contaminated vaccines provided the impetus for the passage of the Biologies Control Act of 1902.”).

\item\textsuperscript{116} Biologies Control Act of 1902, Pub. L. No. 57-244, § 3, 32 Stat. 728, 729 (codified as amended at 42 U.S.C. § 262(c)).
\end{footnotes}
Related visitorial statutes soon followed for meat and therapeutic drugs.\textsuperscript{117} These powers were more limited than those of banking and transportation regulators,\textsuperscript{118} since inspectors could not examine documents.\textsuperscript{119}

A shift began in 1938 when scores of people died after ingesting a new elixir used to treat sore throats.\textsuperscript{120} Had the company run tests, the poisonous properties would have been evident.\textsuperscript{121} This prompted legislation requiring pharmaceutical companies to submit to the FDA information about drugs before any sale.\textsuperscript{122} The FDA had a sixty-day window after each submission, during which it could intervene.\textsuperscript{123} Examiners could also postpone the effective date of an application, permitting consideration for an additional 120 days.\textsuperscript{124} But the legislation did not set a minimum threshold for the rigor of test data, nor did it require a drug company to gain approval. Approval happened automatically if the FDA examiner failed to respond in time.\textsuperscript{125} Also, the amount of time in which the FDA could consider an application was limited.\textsuperscript{126} Thus, the laws allowed drug companies to engage in similar “window dressing” that plagued banks’ early reports to the OCC.\textsuperscript{127}

It was in this statutory context that Dr. Kelsey received, in her first few months on the job in 1961, the four-volume submission for thalidomide.\textsuperscript{128} Her supervisor observed, “[T]his is a very easy one. There will be no problems with sleeping pills.”\textsuperscript{129} Even though Dr. Kelsey repeatedly requested more scientific evidence before each sixty-day window expired, the company did not have the data she sought, and the FDA lacked the authority to compel the production of that data.\textsuperscript{130} Consequently, the FDA was still negotiating with the pharmaceutical company and the drug had not

This function ultimately went to the FDA. See Bryan A. Liang, Regulating Follow-On Biologics, 44 Harv. J. on Legis. 363, 433 (2007).

\textsuperscript{118} See supra section I.C.1.
\textsuperscript{119} See Winton B. Rankin, Inspection Authority, 18 Food Drug Cosm. L.J. 673, 673 (1963) (“[P]resent law and facilities only permit occasional spot checks through factory inspection . . . .”).
\textsuperscript{120} David F. Cavers, The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions, 6 Law & Contemp. Probs. 2, 20 (1939) (“At least 73, perhaps over 90, persons in various parts of the country . . . died as a result of taking a drug known as ‘Elixir Sulfanilamide’ . . . .”).
\textsuperscript{121} See id. (“Tests on animals or even an investigation of the published literature would have revealed the lethal character of the solvent.”).
\textsuperscript{123} Id. § 505(e).
\textsuperscript{124} Id.; see also Kelsey, supra note 56, at 51, 55 (explaining what happened when the FDA found that the new drug application was incomplete).
\textsuperscript{125} Federal Food, Drug, and Cosmetic Act § 505(e).
\textsuperscript{126} Id.
\textsuperscript{127} See supra section I.C.1.
\textsuperscript{128} See Kelsey, supra note 56, at 48–49.
\textsuperscript{129} Id. at 49.
\textsuperscript{130} See James L. Zelenay, Jr., The Prescription Drug User Fee Act: Is a Faster Food and Drug Administration Always a Better Food and Drug Administration?, 60 Food & Drug L.J. 261, 264–66 (2005) (noting that although examiners had the authority to reject a new drug application as unsafe, the FDA likely did not have the authority to delay an application on the basis of “insufficient information”).
been approved when reports of widespread birth defects emerged from Germany, which had approved the drug years earlier.  

Fueled by public alarm that the United States had barely avoided tragedy, President Kennedy signed a law requiring pharmaceutical companies to submit heightened scientific evidence—a precursor to the FDA’s modern clinical trials. Even without evidence that the drug would be unsafe, starting in the 1960s FDA officials could withhold drug approval and “inspect records, files, papers, processes, controls and facilities” of pharmaceutical companies. In 2011, after deaths and illnesses from tainted peanut butter, cookies, and ice cream products, Congress gave the FDA broad food-inspection powers, matching those the agency had received for drugs.

The thalidomide incident marked the beginning of a period of rapid growth in health monitoring. Amidst worsening air quality and related health concerns, the federal government launched the EPA in 1970. The agency has regularly received new visitation authority over private companies in a range of sectors. In the same year as the EPA launched, Congress created the

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131 See Kelsey, supra note 56, at 65–67; see also Peltzman, supra note 64, at 1050–51 (discussing the thalidomide crisis as the catalyst for increased FDA monitoring of new drugs entering the market).

132 Jacobs, supra note 115, at 609–12 (discussing coverage of thalidomide that emphasized the episode as a potential “national tragedy [that] had been averted thanks only to the ‘skeptical FDA physician’”).

133 See Kefauver Harris Amendment, Pub. L. No. 87-781, 76 Stat. 780 (1962). Drug companies were also required to submit any reports of adverse effects, which they previously could have withheld. See Zelenay, supra note 56, at 266 (summarizing the increased reporting requirements included in the 1962 act).

134 Compare Kefauver Harris Amendment § 102 (codified as amended at 21 U.S.C. § 355(d)) (listing grounds for “refusing to approve the application” that do not address safety concerns, including that there is “a lack of substantial evidence that the drug will have the effect it purports or is represented to have”), with 21 U.S.C. § 355(d) (1958) (listing only safety concerns as grounds for “refusing to permit the [drug] application to become effective”). See also Zelenay, supra note 130, at 265 & n.31 (noting that rejecting the thalidomide application in 1961 for “insufficient information” may not have been within the FDA’s statutory mandate).

135 See Rankin, supra note 119, at 673.

136 Recent Legislation, Food Safety Modernization Act Implements Private Regulatory Scheme, 125 Harv. L. Rev. 859, 859–60 (2012) (linking several high-profile deaths from salmonella to the Food Safety Modernization Act).


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Occupational Safety and Health Administration (OSHA), whose originating statute empowered it to enter workplaces to conduct inspections, examine documents, and question employees. Whereas prior federal visitorial powers targeted specific industries—drugs, food, banking, mining, or transportation—the EPA and OSHA obtained cross-industry reach, enabling the federal government to look inside almost every private business across the country. In 1978, in Marshall v. Barlow’s, Inc., the Supreme Court found a Fourth Amendment administrative search warrant requirement for industries without “a long tradition of close government supervision.” But this ruling has left many domains subject to warrantless monitoring searches. Moreover, inspectors in other industries regularly give a Miranda-style warning that the employer has the right to request a warrant, which businesses rarely exercise. Thus, despite some obstacles along the way, the largest federal health, safety, and environmental regulators incrementally over the past century obtained the type of visitorial tools that the OCC received for banks during the Civil War.

3. Limited Monitors: Trade and Labor

Regulators focused on protecting individuals from economic harms have more limited monitoring authority. Spurred by Ida Tarbell’s popular writings about the “autocratic powers in granted to the EPA by these acts). Congress also requires firms to notify the EPA of the development of new chemicals. See 15 U.S.C. § 2604(a) (giving the EPA ninety days to write a rule following notice).


144 436 U.S. 307, 313, 320–21 (1978). The EPA is held to similar standards. See National-Standard Co. v. Adamkus, 881 F.2d 352, 361 (7th Cir. 1989). In industries with a history of close regulatory oversight, an exception to the Fourth Amendment’s search warrant requirement is appropriate. See Marshall, 436 U.S. at 313–14.

145 Marshall does not prevent warrantless administrative searches in various heavily regulated industries. See, e.g., Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986) (allowing the EPA to conduct warrantless aerial surveillance of private property); Donovan v. Dewey, 452 U.S. 594, 605–06 (1982) (allowing the Department of Labor to conduct warrantless searches to inspect worker health and safety in the mining industry); United States v. Chuang, 897 F.2d 646, 651 (2d Cir. 1990) (holding that the OCC can conduct warrantless searches of bank documents).

146 See Miranda v. Arizona, 384 U.S. 436, 467–68 (1966) (establishing the duty of officers to inform those in custody of their right to remain silent).

147 Interview with OSHA Deputy Regional Administrator and Regional Administrator (Apr. 7, 2017) [hereinafter Interview with OSHA]. Despite the significance of a constitutional protection, Marshall’s practical impact is limited. The Court acknowledged that the Fourth Amendment was less relevant to OSHA than to criminal searches. See Marshall, 436 U.S. at 320. Unlike police officers, OSHA would not need “probable cause . . . based . . . on specific evidence of an existing violation.” Id. The agency could instead obtain a warrant if the search was part of a “general administrative plan.” See id. at 320–21. This ruling forced OSHA to develop national inspection plans. Interview with OSHA, supra. If needed, an OSHA inspector can easily obtain a warrant without probable cause by showing the magistrate judge its plan. Id.

148 See supra section I.B.1.

149 In contrast to the agencies discussed in this section, the SEC protects investors, who are often institutional. Also, the
commerce” of John D. Rockefeller’s Standard Oil Company,\textsuperscript{150} and the activism of President Theodore Roosevelt,\textsuperscript{151} the Federal Trade Commission (FTC) was founded in 1914.\textsuperscript{152} Its two main missions are to protect consumers and to promote competition. The FTC had from the outset the power “[t]o require . . . corporations engaged in commerce . . . to file with the commission . . . both annual and special[] reports or answers in writing to specific questions . . . as to the organization, business, conduct, practices, [and] management.”\textsuperscript{153} President Roosevelt had unsuccessfully advocated for a stronger monitoring framework: mandatory notifications prior to mergers and acquisitions.\textsuperscript{154} In 1976, Congress extended that authority.\textsuperscript{155} Despite its extensive report-collecting tools, the agency has never had explicit visitation authority for either competition or consumer protection.

The two leading regulators of employment have even more limited monitoring authority than the FTC. Amidst the labor unrest of the Great Depression, Congress tasked the National Labor Relations Board (NLRB) with the “protection by law of the right of employees to organize and bargain collectively.”\textsuperscript{156} The NLRB’s originating statute did not mention monitoring in the traditional sense. The agency perhaps comes closest to monitoring today through its on-site supervision of union elections.\textsuperscript{157}

In the face of nationwide protests and unrest, the 1964 Civil Rights Act established the Equal Employment Opportunity Commission (EEOC) and required companies to maintain

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\textsuperscript{150} Ida M. Tarbell, The History of the Standard Oil Company 229 (reprint 1963) (Macmillan, two vols. in one 1933) (1904); see also 1 Tarbell, supra, at 158 (concluding that Standard Oil had “great power . . . resistless, silent, perfect in its might”). Tarbell’s writings would ultimately contribute to the breakup of Standard Oil. See Steve Weinberg, Taking on the Trust: The Epic Battle of Ida Tarbell and John D. Rockefeller 246--51 (2008).

\textsuperscript{151} See F.M. Scherer, Sunlight and Sunset at the Federal Trade Commission, 42 Admin. L. Rev. 461, 462 (1990) (noting President Roosevelt’s role in providing the impetus for the founding of the Bureau of Corporations, the predecessor of the FTC).


\textsuperscript{153} Id. § 6(b).

\textsuperscript{154} See Scherer, supra note 151, at 462--63 (discussing the monitoring framework that Roosevelt advocated for in a 1900 letter to the New York legislature).


\textsuperscript{157} See ABA, Representation Law and Procedures 17, https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/representation_procedures.authcheckdam.pdf [https://perma.cc/82N9-3829] (last visited Oct. 11, 2018) (noting that elections are supervised by an NLRB agent on the employer’s premises). Since the NLRB’s main role is to conduct the elections, such as by overseeing the agreement as to time, place, and methods for voting, the main purpose is not as clearly to collect nonpublic information as to manage an event. See Nat’l Labor Relations Bd., Conduct Elections, https://www.nlrb.gov/what-we-do/conduct-elections (last visited Dec. 14, 2018).
employment records. The original House bill for the agency had put forth an information collection authority modeled after the FTC, but that language was removed in the face of intense Senate opposition. The final legislation specified that to collect records the EEOC must write rules. In both the EEOC and NLRB, “examination” occurs mostly after a firm is accused. But the EEOC has used its original statutory authority to write rules to require businesses to submit to the EEOC confidential employee data broken down by race, gender, and other categories.

As yet, no crisis or national outcry has driven Congress to give explicit visitorial authority to these three agencies. But the creation of the CFPB in 2011 represented a break with the traditional absence of visitorial authority for regulators focused on protecting against economic harms to individuals. The FTC had previously exercised consumer protection authority for many financial institutions implicated in the subprime mortgage crisis, such as nonbank mortgage servicers. Congress moved most of that authority to the CFPB after millions of families lost their homes to foreclosure, many due to unscrupulous lending. Unlike the FTC, the CFPB was given broad visitorial authority to regularly appear on-site. Thus, despite remaining more limited than other spheres, the largest regulators of individual economic rights can monitor to some extent. Additionally, between the launch of the CFPB and the increase in FTC antitrust reporting, the overall trajectory of this sphere of regulation has been toward more statutory monitoring authority.

D. Summary of the Statutory Rise

Across diverse industries and under both Democratic and Republican party leadership, Congress has since the mid-1800s steadily expanded federal agencies’ ability to monitor private

159 See Michael Z. Green, Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation, 105 Dick. L. Rev. 305, 320 (2001) (describing the much stronger authority for the EEOC envisioned in the committee version of the bills and the opposition that limited the agency’s authority).
160 42 U.S.C. § 2000e-8(c) (requiring employers to “make and keep such records” relevant to determining whether unlawful employment practices occurred but requiring employers to make reports only “as the Commission shall prescribe by regulation or order”).
163 Banking regulators had a secondary mission of consumer protection, but their main mission was rooted in stability concerns. See supra Part I.C.1.
165 12 U.S.C. § 5514(b)(1) (noting that the “Bureau shall require reports and conduct examinations on a periodic basis”).
firms. This historical accumulation of federal authority spans other areas not covered above because small and medium regulators govern them, including offshore oil drilling, liquor stores, and firearm manufacturers. Overall, among the nineteen large federal regulators, only the NLRB is without substantial monitoring authority. Two others, the FTC and the EEOC, have the meaningful ability to collect records, but not to conduct on-site inspections. Sixteen of the nineteen largest agencies have both strong visitorial monitoring and record collection authority. The laws are in place for a formidable regulatory-monitor state.

II. The Institutional Rise

Agency behavior is determined not just by its underlying statutes but also by stakeholders. Scholars have focused on the changing influence of external stakeholders such as Congress, the President, and special interest groups on the administrative state. Internal agency groups also compete for control, but their history has been largely studied through the lens of policy instruments. A standard account holds that adjudication dominated agency policymaking until the 1970s, when agencies entered “an age of rulemaking.” The internal narrative then becomes vague, despite general recognition that in the 1990s and 2000s new governance models took hold. Some observers believe that rulemaking still remains the dominant policy instrument, while others see a shift to either “policy through litigation, negotiated settlements, or the waiver of rules in individual contexts.”

168 See Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970) (“Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand.”).
169 See United States v. Biswell, 406 U.S. 311, 316−17 (1972) (concluding that “inspections for compliance with the Gun Control Act pose only limited threats to . . . privacy” and when “regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are” minimal, “the inspection may proceed without a warrant where specifically authorized by statute”).
170 See supra section I.B (listing the nineteen large regulators and describing the methodology for identifying them).
171 See infra Appendix A; supra section I.B.
172 See, e.g., Kagan, supra note 54, at 2253 (arguing that President Clinton ushered in an era of “presidential administration,” but noting that “[a]t the dawn of the regulatory state, Congress controlled administrative action”).
173 See, e.g., Daniel A. Farber & Anne Joseph O’Connell, Agencies as Adversaries, 105 Calif. L. Rev. 1375, 1407−08 (2017) (presenting a typology of inter- and intra-agency conflict, noting that agency conflicts “manifest in all forms of decision making: rulemaking, adjudication, and program-level policy,” and acknowledging that the scholarship focuses on rulemaking).
175 See infra section II.A.
177 See Magill, supra note 174, at 1398−99. Professors Magill and Vermeule identify various factors that reallocate power toward and away from lawyers, without distinguishing regulatory monitors or seeing an overall trend. See Magill & Vermeule, supra note 38, at 1077.
This Part adds an unexamined dimension to that internal organization narrative by filling out the role of the monitoring group.\textsuperscript{178} It shows how prominent changes in governance and markets have plausibly moved regulators to rely more on monitors than on other groups. The governance changes include greater weight on collaborating with businesses, the rise of compliance departments in corporations, and increased external stakeholder pressure. The market changes include the greater sophistication of modern businesses, the pace of innovation, and the ubiquity of information technologies. Although the focus is on recent historical shifts, the main goal is to lay the foundations for understanding the role of regulatory monitors today.

\textbf{A. Governance Changes Favoring Regulatory Monitors}

Over the past thirty years, agencies have adopted new approaches to governing firms. Prominent observers attribute the change to a “crisis in confidence”\textsuperscript{179} in regulation, or the perception that in “the administrative state . . . much is terribly wrong.”\textsuperscript{180} Regardless of its origins, three main features of new governance make regulatory monitors more internally important: emphasis on collaboration between regulators and regulated entities, reliance on business self-regulation, and oversight of agencies by external stakeholders.

1. Collaborative Governance

One major shift in the modern regulatory approach is a greater emphasis on collaboration.\textsuperscript{181} The U.S. House Budget Committee displayed this philosophy in OSHA’s 2017 budget hearing, encouraging the agency to minimize punishment and instead “partner with businesses to create safer workplaces.”\textsuperscript{182} The extent to which any given agency has adopted this model varies, but one of its features is seeing rules as provisional, requiring the parties to flexibly “devise solutions to regulatory problems.”\textsuperscript{183}

The emphasis on partnership is important, in part, for the acquisition of information. Agencies today generally believe rules should be “responsive to[] the particular contexts in which they are deployed” by relying on “feedback mechanisms” that are “continuous.”\textsuperscript{184} Firms that are

\textsuperscript{178} At the core of existing internal narratives is a recognition that organizational dynamics of administrative agencies have shifted in response to new governance paradigms and market evolutions, but how those dynamics intersect with regulatory monitors has yet to be explored.

\textsuperscript{179} Ayres & Braithwaite, supra note 30, at 158.

\textsuperscript{180} See Freeman, supra note 30, at 8–9 (discussing widespread critiques of ossified regulation).

\textsuperscript{181} See id. at 4, 22 (identifying an emerging “model of collaborative governance”); see also Lobel, supra note 30 at 344.


\textsuperscript{183} Freeman, supra note 30, at 22. This depiction intersects with elements of Professors Ayres and Braithwaite’s “responsive regulation.” See Ayres & Braithwaite, supra note 30, at 35–36 (presenting a generic “enforcement pyramid” demonstrating that agencies seek regulatory compliance more frequently through efforts at “persuasion” than the use of civil or criminal penalties or license revocations); see also infra notes 295–299 and accompanying text.

\textsuperscript{184} Freeman, supra note 30, at 22, 28.
less afraid of punishment, it is thought, become more willing to share information. For instance, the EPA’s new cooperative model gave it “open access” to citrus-juice plants, whereas in the prior relationship “companies resist[ed] inspection and cooperate[d] with the EPA only grudgingly.” The cooperative model aims to free the parties to focus their energies on fixing mistakes and identifying causes instead of fighting over whether anything was wrong.

Litigation groups are seen as less well-suited to this model. Legal investigations cause information exchange to become “bogged down as target firms resist[] compliance and pursue[] blocking actions in the courts.” Consider, again, the example of how the CFPB in its early financial examinations brought along enforcement lawyers. Industry groups had criticized the practice, saying that “the presence of enforcement attorneys at routine examinations created a hostile regulatory environment.” The CFPB’s Ombudsman had studied the matter and warned that the presence of attorneys would serve as “a barrier to a free exchange.” Asked to explain its subsequent termination of the policy, the CFPB said that it “wasn’t efficient.”

A collaborative relationship with continuous information flow would naturally propel an agency to become more dependent on regulatory monitors. Although some regulatory monitors have been viewed as critical and overbearing, their information collection does not assume the regulated entity has misbehaved. Indeed, the scholarly depiction of the collaborative model of governance matches some historical descriptions of early bank examiners, who because of limited sanction authority “recommended” rather than commanded, and relied on “cooperation” to achieve compliance. Banking regulators have remained “famously nonadversarial,” and energy inspectors have retained a team-oriented approach. An agency adopting collaborative governance might thus seek to shift more interactions from regulatory lawyers to regulatory monitors.

2. Compliance Departments and Self-Regulation

185 Id. at 61.
186 Scherer, supra note 151, at 471 (observing dynamics in the 1970s, from the perspective of having been an FTC economist).
187 See supra note 73 and accompanying text.
190 Witkowski, supra note 73.
191 See Hawke, supra note 94, at 4.
192 See White, supra note 89, at 21; White, supra note 93, at 48.
193 See Robertson, supra note 86, at 71.
194 David Zaring, Administration by Treasury, 95 Minn. L. Rev. 187, 208 (2010).
195 See Hayes, supra note 11 (describing how energy inspectors “work alongside, not against, industry to ensure operators follow acceptable industry practices and federal safety standards”).
Many regulators now emphasize “management-based regulation.” Fiscal constraints simply make it impossible to monitor all private actions even for the most dangerous activities: Federal inspectors estimate that only one to two percent of all “safety related” nuclear plant activities are subject to close, annual government monitoring. Self-regulation does not necessarily mean an absence of oversight, but “that regulation should respond to . . . how effectively industry is making private regulation work.” This self-regulatory model encourages regulatory experimentalism. Instead of a bottom-up approach of examining every product, document, or facility for strict adherence to a code, the agency “intervene[s] at the planning stage, compelling regulated organizations to improve their internal management so as to increase the achievement of public goals.” In essence, the regulator engages in a top-down assessment of a firm’s self-monitoring.

The need for self-monitoring helps explain why “the compliance department has emerged, in many firms, as the co-equal of the legal department.” When the legal department runs a company’s compliance, the concern is that the process may become “excessively legalistic.” Compliance departments review employees’ practices or consumer complaints not only to ensure that the company is not breaking the letter of the law as determined by the legal department, but in many cases to tell the company how to “comply with the spirit of the law.” The compliance department keeps internal records of violations and the firm’s responses—records that regulatory monitors can later examine.

EPA rules, for example, require companies producing hazardous chemicals to build a risk management plan and perform inspections of their equipment. Companies must regularly submit the documentation to authorities, listing all incidents that have occurred. Environmental agencies then audit those internal reports, which may result in a “determination of necessary

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197 See Ayres & Braithwaite, supra note 30, at 4.
198 See Ayres & Braithwaite, supra note 30, at 4.
200 Coglianese & Lazer, supra note 196, at 694.
201 Griffith, supra note 27, at 2077.
203 See Michele DeStefano, Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer, 10 Hastings Bus. L.J. 71, 149 (2014) (quoting from the author’s interview with an anonymous chief compliance officer in the financial industry).
204 See generally id. at 91–97 (describing the function of the compliance department).
205 40 C.F.R. § 68.73(b)–(c) (2018) (requiring companies to develop and train employees concerning “procedures to maintain the on-going integrity of process equipment”).
206 See id. § 68.73(d).
207 See id. § 68.220(a)–(b).
208 Id. § 68.220(a).
revisions” to the company’s systems. 

Agencies also enlist a growing number of private third-party monitors to assess compliance.

Depending on how it is implemented, self-regulation can diminish the role of regulatory monitors relative to other agency groups because it privatizes core monitoring tasks. This is particularly true when the agency delegates all monitoring to third parties. But replacement is not how most agencies have approached self-regulation. Many still conduct their own inspections, alongside industry self-monitoring. Rather, the model transforms the agency into a manager of private monitors.

From an internal perspective, agencies’ regulatory monitors— not their litigators— normally assume this managerial role. Thus, this managerial model moves regulatory monitors from examining the details of paperwork or safety valves to making sure others do those jobs. In some sense, this amounts to promoting regulatory monitors to a more senior supervisory role. As supervisors of large business departments rather than individual documents or equipment, regulatory monitors can collect more information in the same amount of time, because the company’s compliance employees create a data report that the regulatory monitors would have previously compiled.

Moreover, the compliance department is prominent inside large businesses, with the Chief Compliance Officer typically reporting to the CEO and often the board. Consequently, any

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209 Id. § 68.220(e).
210 See Jodi L. Short & Michael W. Toffel, The Integrity of Private Third-Party Compliance Monitoring, Admin. & Reg. L. News, Fall 2016, at 22, 22 (noting that third-party certification is used in “a wide array of domains, including food safety, pollution control, product safety, medical devices, and financial accounting”); see also Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. Econ. & Org. 53, 93–94 (1986) (giving examples of industries in which liability is imposed upon third-party monitors like the underwriters of securities to incentivize thorough and accurate gatekeeping in order to prevent fraudulent products from reaching the market). See generally Kraakman, supra, at 56–60 (outlining the benefits of relying on third-party monitors and noting that “[i]n general, third-party strategies can exploit private enforcement information ex ante . . . by disclosing it to enforcement officials or potential victims or by relying on private monitors themselves to take obstructive action short of direct disclosure”). The SEC uses a related model by overseeing a private regulator, the Financial Industry Regulatory Authority (FINRA), which performs examinations and has its own enforcement group. See Fin. Indus. Regulatory Auth., FINRA 2015 Year in Review and Annual Financial Report 12–13 (2016), https://www.finra.org/sites/default/files/2015_YIR_AFR.pdf [https://perma.cc/2V76-GV88].
212 Third-party private auditing has grown in recent years. See Lesley K. McAllister, Regulation by Third-Party Verification, 53 B.C. L. Rev. 1, 6 (2012). Private parties also often serve as monitors after courts determine wrongdoing. See Root, supra note 10, at 527.
213 See supra notes 205–209 and accompanying text for an example of how the EPA imposes self-monitoring obligations in addition to conducting its own inspections.
214 See, e.g., SEC, Agency Financial Report Fiscal Year 2016, at 9 (2016), https://www.sec.gov/about/secpar/secafir2016.pdf [https://perma.cc/Y8PU-TBW2] (noting that the monitors in the Office of Compliance Inspections conducts the examinations of private monitors, as distinct from the litigators in the Enforcement Division and the Office of General Counsel). An agency group that is already the most knowledgeable about monitoring activities would be the natural home for such managing of private monitors.
215 See Griffith, supra note 27, at 2077.
regulatory-monitor recommendation for improving a firm’s compliance system can affect a broader portion of the business on a more enduring basis. Imagine, for instance, that a credit-card company has been found to have illegally charged consumers fees. In a precompliance world, the regulator might rely on a legal settlement or court order requiring the company to stop charging that fee moving forward. In the era of compliance management, the regulator (today, the CFPB) can bypass the courts and simply ask the company to develop a system for internally reviewing customer complaints for legal violations. That internal change means that the compliance department moving forward will catch not only this particular illegal credit card fee but also other improper fees that might arise in the future. Furthermore, the CFPB examination group regularly checks to make sure financial institutions have such customer complaint monitoring systems in place, even without any evidence that the firm has done anything wrong.216

In other words, the firm’s compliance team essentially serves as the regulatory monitors’ agents. Scholars have more broadly recognized that the compliance “revolution” in corporate governance means that “prosecutors can externalize a portion of their budget.”217 While that may be true, in terms of internal organizational dynamics, agencies would be expected to shift some of what was previously prosecutors’ domain—promoting compliance through litigation—to regulatory monitors.

The move to compliance management may also reallocate responsibilities between regulatory monitors and rule makers. Compliance management reflects how “[b]est practices are the new means through which Congress and federal agencies are making administrative law.”218 In the Clean Water Act, Congress mandated that states and the EPA identify “best management practices” for tackling the biggest source of water pollution: runoff from cities and farms.219 The EPA then shares “success stories” that can be adopted elsewhere.220 In a world of formal rules that must be strictly applied, the rulemaking group spells out the particular steps a firm must take to comply with the law. Conversely, in a world of best practices, there are often multiple ways to satisfy the mandate. A best practices regime thereby allows agency regulatory monitors not only to identify the best practices in the first place, but also to assess whether a given firm’s practices come close enough to “best.”

3. Heightened Stakeholder Oversight

Agencies have come under increasing scrutiny from Congress,221 the President,222 and courts.223 This oversight may drive agencies toward greater reliance on regulatory monitors for three

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216 Interview with Former CFPB employee (Mar. 10, 2017) [hereinafter CFPB Interview].
217 See Griffith, supra note 27, at 2077, 2127.
220 See Zaring, supra note 218, at 331.
222 See, e.g., Kagan, supra note 54, at 2281--318 (discussing President Clinton’s role in shaping the regulatory activity of the executive branch agencies).
main reasons. First, as a general matter, “[a]dministrative agencies, like trial judges facing appellate review, dislike having their decisions reversed.” To avoid wasted efforts and delays, agencies insulate themselves from oversight. They have substituted policy statements and interpretative guidelines for official rules to avoid having to go through notice and comment. For enforcement, agencies have turned to extrajudicial strategies such as settlements and recommendations. As the FDA explains of a regulatory-monitor tool it has used increasingly in recent years, a “Warning Letter is informal and advisory. . . . FDA does not consider Warning Letters to be final agency action on which it can be sued.” Courts have agreed.

The same rulemaking and litigation groups could control informal activities. However, informal tools move further from the distinct functions and skillsets of legal actors, opening the door for other groups to assume related responsibilities. Moreover, court oversight has restricted even rule makers’ informal alternatives. After industry complaints that the FDA was using “Good Guidance Practices” to write de facto rules, Congress required the agency to solicit public notice and comment prior to issuing major guidelines. However, those constraints did not address regulatory monitors’ main textual outlets, such as their industry-wide inspection manuals and case-by-case recommendations.

Second, rulemaking has slowed considerably. Under the recent Bush and Clinton administrations, on average, over eight hundred days passed between a rule’s agenda publication and final adoption. When rules are not updated, frontline regulatory monitors or their supervisors must interpret old laws to apply them to new practices. If agencies are largely unable to write formal

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225 See id. at 1782–1813 (describing how agencies choose from various regulatory instruments to self-insulate from presidential review).

226 Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, 41 Duke L.J. 1385, 1393 (1992) (observing the “increasing tendency of agencies to engage in ‘nonrule rulemaking’”); Zaring, supra note 218, at 297 fig.2 (showing a significant and steady increase in the annual number of regulations referencing “best practices” in the Federal Register from 1980 to 2004).

227 Sant’Ambrogio & Zimmerman, supra note 176, at 2034 (“Agencies . . . have, with modest success, adopted informal techniques in response to system-wide disputes that otherwise would overtax traditional, individualized adjudication.”).


229 See Holistic Candlers and Consumers Ass’n v. FDA, 664 F.3d 940, 944 (D.C. Cir. 2012) (“The letters plainly do not mark the consummation of FDA’s decisionmaking.”).


232 See infra section III.C.

rules, and instead engage in soft rulemaking, agencies may be incentivized to write vaguer rules that are nonbinding.\textsuperscript{234} Imprecise rules may force agencies to rely more on frontline actors’ persuasion and judgment. Instead of following a lawyer’s written instructions (the legal rule), regulatory monitors in such agencies can act more like clients, consulting lawyers only as needed with help in interpretation.\textsuperscript{235}

Third, one of the impulses behind greater external oversight is to “ensure[] that regulatory agencies exercise their policymaking discretion in a manner that is reasoned.”\textsuperscript{236} Most prominently, courts and the President have imposed cost-benefit analyses,\textsuperscript{237} and “lawyers will have little to contribute to this quintessentially technocratic problem.”\textsuperscript{238} Additionally, the Paperwork Reduction Act (PRA) constrains rule writers’ ability to collect supportive information from firms.\textsuperscript{239}

In contrast to these legal constraints on lawyers’ core activities, in recent years Congress has imposed widespread monitoring minimums, such as annual or more frequent on-site examinations of credit rating organizations,\textsuperscript{240} food manufacturers,\textsuperscript{241} and oil producers.\textsuperscript{242} To be sure, statutes in some contexts require regular actions by rule writers and litigators if an agency chooses to act. For the EPA to ban a chemical, for instance, it must write a rule.\textsuperscript{243} But Congress does not mandate annual minimums for the number of chemicals banned, rules written, or trials litigated. Thus, whereas the external pressure for informed regulatory decisions slows down rule writers’ core activity—producing rules—it expands regulatory monitors’ basic function.

\textbf{B. Market Transformations Favoring Regulatory Monitors}

Whatever the inherent democratic accountability deficiencies of older governance models may have been, new regulatory strategies were perhaps inevitable given the market transformations

\textsuperscript{234} See Zaring, supra note 194, at 208–209 (noting that financial regulators have adopted “principles-based regulation” that is largely unreviewable by courts and enforced informally, rather than by utilizing the rule of law). But see Daniel Walters, The Self-Delegation False Alarm, 118 Colum. L. Rev. (forthcoming 2018) (manuscript at 58–62), https://papers.ssrn.com/abstract_id=3120654 (on file with the Columbia Law Review) (noting that even with the incentives for vague self-delegation created by the Auer decision, agencies have a “strong[] interest in promoting clarity in the regulatory text” to improve enforceability because “[i]n addressing the risk of hard look review, agencies will of necessity seek to reduce vagueness”).


\textsuperscript{238} See Magill & Vermeule, supra note 38, at 1051.


\textsuperscript{242} See 43 U.S.C. § 1348(c) (2012).

of recent decades. These changes have lessened or eliminated the sophistication gap between regulatory monitors and lawyers, expanded information asymmetries between regulatory monitors and legal groups, and provided regulatory monitors with technological tools that are more helpful to them than to rule makers or litigators.

1. Increased Sophistication

Modern businesses have reached unprecedented size and complexity. All major industries have become more concentrated, creating bigger organizations with separate multimillion-dollar product lines. Oil companies have built ever larger floating cities drilling miles deeper under the ocean floor, manufacturers release thousands of new chemicals into the environment annually, and large businesses deploy big data computer algorithms for key decisions.

These transformations mean that an agency seeking to continue performing the same level of monitoring must now deploy additional regulatory monitors. Until recently, an examiner could “storm[] into the bank, count[] the cash, add[] up the deposits, look[] at a sampling of the loans, and pronounce[] the work done.” Today, “[t]he sheer depth of complexity that afflicts bank balance sheets prevents even experts from discerning what banks own and owe, what they sold and received, and whether they are compliant with . . . hundreds of banking statutes.” At large banks, it takes a team of examiners many months to do what used to be wrapped up by one examiner in a half-day visit.

More complex markets also require greater expertise, including advanced degrees, continuing education, and “leading experts in the most esoteric financial fields.” Regulatory monitors have varying backgrounds. In banking, examiners tend to have finance backgrounds. Oil inspectors often have engineering degrees. FDA drug reviewers are typically scientists, doctors, or statisticians, and many USDA facilities inspectors are veterinarians. Agencies have raised salaries to accommodate the additional educational requirements.

As markets and businesses become more complex, monitors’ main object of analysis becomes more like lawyers’ main object of analysis—the law, which is also complex. Greater business sophistication may thus lessen the gap between monitors and lawyers, to the extent that both groups increasingly require greater technical expertise.

244 See BSEE Annual Report, supra note 19, at 15 (noting the increase in drill rigs).
247 See Hawke, supra note 94, at 2.
248 Conti-Brown, supra note 101, at 165.
249 See Hawke, supra note 94, at 2–3.
250 See id. at 8.
252 USDA Inspection, supra note 12, at 15.
253 BSEE Budget, supra note 5, at 55, 64 (requesting more funding for inspectors due to “increased complexity in OCS oil and gas activities”).
2. Faster Innovation

The rate of market changes has accelerated to unprecedented levels, meaning that many of today’s “routine” products were until recently “exotic or nonexistent.” Therefore, new employees who join an agency will soon have large knowledge gaps without continual updates. They can obtain some of this through phone calls, conferences, and other voluntary mechanisms. Yet much of the relevant information—the nature of Bank of America’s latest automated financial advisor or Ford’s self-driving car—is closely guarded as a trade secret and impenetrable from the outside. Complexity, secrecy, and innovation mean that inspectors “rely on industry representatives to explain the technology at a facility.”

Those explanations will not be expressed in regulatory monitors’ reports, which focus on violations. Nor would it be practical or even legal to transmit all of the first-hand data observed directly into a report. As a result, agencies’ other internal experts, such as scientists in the rulemaking division, will often lack understanding of the latest market developments—an understanding that is indispensable for dynamic regulation. Even if the raw monitoring data were somehow made available to agency actors other than monitors, processing that data would prove difficult for those who—unlike monitors—have not benefitted from industry representatives’ ongoing explanations.

Regulatory monitors may thus hold information monopolies compared not only to other legal actors, but also to other technocrats in the agency, such as nonlawyer technical experts in the rulewriting department. Rapidly changing markets shift the locus of business expertise further inside the firm, and thereby shift expertise within the agency more toward those who regularly operate inside the firm: regulatory monitors.

3. Technological Tools

Every bureaucrat, including litigators, has more access to information than ever before. However, while information technologies can speed up legal research, they are less able to speed up court dockets or public notice-and-comment periods. To the contrary, information technologies enable more parties to participate in formal agency decisionmaking processes, even submitting tens of thousands of fake comments for proposed rules. These advances slow down rulemaking by increasing the information that must be processed and the stakeholders that must be managed.

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254 See, e.g., Hawke, supra note 94, at 6.
255 Coglianese et al., supra note 37, at 330.
256 Deepwater Report, supra note 5, at 77; see also Conti-Brown, supra note 101, at 165.
257 Wendy Wagner et al., Dynamic Rulemaking, 92 N.Y.U. L. Rev. 183, 197 (2017) (positing that “some agencies operate in such rapidly changing technological environments that one would expect them to be adjusting their rules periodically to prevent entire programs from becoming obsolete”).
In contrast, because regulatory monitors do not have the same external procedural constraints, their most substantial limit is the resources required to transmit and analyze information. When information submission becomes too burdensome, businesses may object. Additionally, regulatory monitors’ travel to business locations to look through paperwork has traditionally consumed considerable monitoring funds and time. Even if volumes of paperwork were obtained, human resources constrained regulatory monitors’ ability to sift through that paperwork.

Technologies have reduced these barriers by providing remote monitoring devices that continuously transmit data, such as EPA sensory equipment on space satellites and inside factories that tracks businesses’ pollution.²⁵⁹ Billions of daily transactional data flow from energy companies to FERC²⁶⁰ and from securities firms to the SEC.²⁶¹ Interagency pooling of these technologies multiplies the available data.²⁶² Regulatory monitors then analyze these big data sets with advanced modeling and machine-learning algorithms.²⁶³ As a result, in various agencies, “on-site time as a percentage of overall examination hours dropped,”²⁶⁴ and “inspectors . . . conduct[ed] more thorough inspections.”²⁶⁵ Today, holding employees constant, regulatory monitors can process more nonpublic data more thoroughly, extending the reach of their core authority.

Thus, unlike in the mid-1800s, national bank examiners’ appearance today is less likely to get “the bank force . . . dancing at [their] beck and call.”²⁶⁶ Instead, modern regulatory monitors more suitably meet with a senior executive or engineer running a large, self-regulating compliance system. Technologies convert what was previously a “one-time snapshot of performance taken on a particular inspection day” to a “‘movie’ of the plant’s processes.”²⁶⁷ Disruption is minimized because in some industries firms never stop working for---or collaborating with---regulatory monitors.

III. An Overview of Regulatory Monitors Today

The discussion so far has shown that changes over the past century in statutes, governance, and markets have formed the foundation for regulatory monitors’ ascendancy to a lead role within the administrative state. But authority on the books and the authority demanded by external realities do not necessarily translate into authority used. Courts have held that an agency’s decisions about the extent to which it “‘monitors’ as well as ‘enforces’ compliance fall squarely within the agency’s

²⁵⁹ See Esty, supra note 245, at 156.
²⁶⁴ See Fin. Indus. Reg. Auth., supra note 210, at 5 (estimating a decrease from thirty-two percent to nineteen percent).
²⁶⁵ BSEE Budget, supra note 5, at 32.
²⁶⁶ See Henry, supra note 99, at 241; see also Hawke, supra note 94.
²⁶⁷ See Freeman, supra note 30, at 60 (quoting Interview with Bill Patton, Director of XL, EPA Region 4 (Mar. 14, 1997)) (describing EPA upgrades); see also Hawke, supra note 94, at 9 (describing the OCC’s “ongoing . . . on- and off-site monitoring”).
exercise of discretion.” Inertia and internal politics influence organizational design. While the recent literature has helped lay the foundations for understanding why monitoring has become important, empirical evidence of actual regulatory monitors exercising that authority has been anecdotal or localized.

A fundamental empirical question thus remains unanswered: How big a role do regulatory monitors play in the regulatory state today? More specifically, how do regulatory monitors influence the administration of the law? While recognizing that “the sheer bewildering heterogeneity of the administrative state makes it impossible to generalize about the allocation effects of agency structure,” this Part provides the first systematic empirical evidence of the role that regulatory monitors play in the federal regulatory process. The evidence not only indicates the scope of regulatory monitors’ presence in the administrative process but begins to map out key agency organizational design choices shaping regulatory monitors’ influence.

A. Monitoring Firms

Resource allocation is one of many “modes of governance” through which political leaders exercise power. Statutes commonly provide an “incomplete design,” leaving agency heads to finish the task of deciding how many regulatory monitors and lawyers to hire, and how to use them. This section provides the first data on how these decisions have allocated regulatory monitoring and legal resources across all large U.S. regulators.

In many agencies—such as banking regulators, the Mine Safety and Health Administration, and the USDA’s Food Safety & Inspection Service—the federal personnel database or some public report provided a clear figure for the number of personnel devoted to monitoring. In other agencies, such as the FCC, FDA and EPA, monitors are officially listed in other categories such as scientists, veterinarians, and engineers. A category was counted as monitors only when other sources indicated that it was mostly comprised of monitors. It is possible that some of these categories

268 Gillis v. U.S. Dep’t of Health & Human Servs., 759 F.2d 565, 576 (6th Cir. 1985); see also Madison-Hughes v. Shalala, 80 F.3d 1121, 1129–31 (6th Cir. 1996) (ruling that the Department of Health and Human Services’ decision not to collect data about racial disparities in health services was unreviewable).

269 Magill & Vermeule, supra note 38, at 1059.

270 See Rubin, supra note 63, at 97 (noting that resource allocation is a “new mode[] of governance” not recognized by the Administrative Procedure Act).


272 For a description of how the agencies were chosen, see supra section IB.

273 Agency personnel figures are mostly from the OPM. See U.S. Office of Pers. Mgmt., supra note 75. They are supplemented by interviews, annual reports, and other sources as necessary. For instance, the Federal Reserve does not report its personnel, which necessitated relying on annual reports and interviews.
include personnel who do not directly monitor, which would cause my figures to overstate the number of monitors. It is also possible that other categories include monitors that I was unable to identify, thereby causing my figures to understate monitors’ presence in some agencies. Assumptions are noted in the appendices, and more focused study of those agencies’ sub-categories would be needed to obtain more precise figures.

Data constraints also limit the figures for legal personnel. Although the main object of comparison here is between enforcement lawyers and monitors, for most regulators the legal figures available combine all legal positions—including those working in rule writing and the office of the general counsel. Consequently, the proportions below understate monitors’ presence relative to enforcement lawyers.

Among the nineteen agencies studied, only three—the FTC, NLRB, and EEOC—have relatively few regulatory-monitor personnel. These three are litigator-dominant, with law-related employees comprising over eighty-five percent of the total regulatory monitor–legal personnel.275 Those three are also the only agencies in the set that have no visitation authority.276 Interviews confirmed that most of these agencies’ lawyers litigate.277 This classification as litigator-dominant differs from a prominent 1980s descriptor of some agency groups as “legalistic,” a term which could apply to regulatory monitors.278

The remaining fifteen agencies all have material numbers of regulatory monitors, both in absolute terms and relative to legal personnel. The five hybrids have some balance between the groups: the CFPB, EPA, FCC, FERC, and SEC.279 In the remaining eleven agencies, regulatory monitors make up over eighty-five percent of the combined regulatory-monitor and legal workforce, making them monitor-dominant.280

Figure 1: Monitors at Large Agencies.

275 See infra Appendix A.
276 See supra section I.A.
277 Telephone Interview with EEOC Employee (Apr. 25, 2017); Telephone Interview with NLRB Employee (Apr. 4, 2017); Interview with FTC Bureau of Consumer Protection Employee (Apr. 12, 2017) [hereinafter FTC Interview].
278 The term “legalistic” is a broader concept that was used to describe, for example, some types of inspectors who operated in a more by-the-book manner. See Bardach & Kagan, supra note 41, at 93 (illustrating this concept).
279 See infra Appendix A.
280 See infra Appendix A.
To what extent do personnel reflect monitoring activity? That question is one of the many in administrative law lacking empirical evidence showing the connection between agency design and agency behavior. Activity data is less consistently available, and comparable, than human-resource data. Any given agency might decide to devote the same number of workers to a small number of

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281 See Christopher R. Berry & Jacob E. Gersen, Agency Design and Political Control, 126 Yale L.J. 1002, 1007 (2017) ("[T]here has been very little quantitative scholarship that establishes a link between agency design and a similar agency output across agencies or over time.");

282 See infra section IV.A.1.
thorough inspections or a large number of light-touch inspections, meaning that one cannot infer that the agency with fewer inspections is monitoring less. Nor can this Article establish a definitive link between design and behavior. Nonetheless, as common sense would indicate, agencies with sizeable regulatory-monitor workforces (both hybrids and monitor-dominant agencies) tend to report extensive monitoring activity.\footnote{See infra Appendix A.}

Even litigator-dominant agencies exercise some amount of statutory monitoring authority, but their monitoring comprises a small part of their information collection. For example, the litigator-dominant EEOC uses its confidential data collected on gender and racial breakdowns to launch systemic discrimination investigations, but those account for less than one percent of its total investigations.\footnote{2016 EEOC Performance & Accountability Rep. 12, 93 https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf [https://perma.cc/3G28-7X9A] (identifying 245 systemic, agency-initiated Commissioner Charges and directed investigations in contrast to the 91,503 total charges investigated); see also EEOC, A Review of the Systemic Program of the U.S. Equal Emp’t Opportunity Comm’n 16 (2016), https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf [https://perma.cc/X9B7-APV9] (explaining that “Commissioner Charges and directed investigations” are used “when the agency learns of a problem or there is reason to believe that discrimination may be more widespread or of a different nature than an individual charge alleges”). The EEOC receives cases mostly from employees. See id. at 34.}

Although FTC competition lawyers regularly rely on a key monitoring program—premerger report submissions—for consumer protection, the agency depends on nonstatutorily-acquired information sources such as industry conferences, online consumer complaints, or litigators watching television in search of deceptive ads.\footnote{See Lesley Fair, The Truth About False Advertising, Presentation at Boston University 16 (Apr. 14, 2017) (on file with the Columbia Law Review) (FTC attorney explaining the FTC’s “Ad Monitoring” and other sources of information in a presentation attended by the author).}

The remaining sixteen agencies—eighty-four percent of the group—conduct significant monitoring, albeit with great variation.\footnote{See infra Appendix A.} Among hybrid agencies, for instance, the EPA completes over ten thousand on-site inspections annually.\footnote{See infra Appendix A.} The FERC and the SEC analyze large volumes of business records and transactional data.\footnote{See infra Appendix A; see also FERC, supra note 260, at 34–35 (describing FERC’s extensive audit and accounting division); U.S. Sec. and Exch. Comm’n, FY 2017 Congressional Budget Justification 6–7 (2017), https://www.sec.gov/about/reports/secf17congbudgetjust.pdf [https://perma.cc/9TYX-UCQC] (noting that “analysis of large datasets, including . . . trading data in equities, options, municipal bonds, and other securities” is important to detect misconduct and describing the SEC’s plan to “improve[] data analysis capabilities” by “invest[ing] in IT”). The CFPB has extensive onsite and remote records-examination programs, while the FCC inspects television and radio broadcasters nationwide and regularly collects business records. See infra Appendix A.}

Federal Reserve’s “examination teams”\textsuperscript{291} provide a year-round presence at nuclear plants and the largest banks.

Personnel numbers have limits in what they say about an institution. Agencies with the same proportion of employees may distribute authority dissimilarly through divergent structural decisions. Regulators may enforce only a small portion of the agency’s authority through on-site visits, as is the case with FCC television and radio station inspections, or a broader array of activities, as is the case with the CFPB examinations of financial institutions.\textsuperscript{292} The following sections discuss those and other high-impact design choices. Nonetheless, if the literature is correct that personnel numbers reflect power and priorities,\textsuperscript{293} only sixteen percent of the major regulators studied clearly favor lawyers, while more than half prioritize regulatory monitors.\textsuperscript{294}

\textbf{B. Enforcing Law}

Regulatory monitors, like police officers, do more than patrol. To varying degrees across agencies, they also make enforcement decisions. Agencies have a “graduated enforcement continuum”\textsuperscript{295} ranging from warning letters to prosecution. That range of activities has been illustrated through a conceptual pyramid, replicated in Figure 2, in which “the proportion of space at each layer represents the proportion of enforcement activity.”\textsuperscript{296} At the larger bottom layer of the pyramid are persuasion and warning letters, and above is smaller space for formal procedures such as civil penalties.\textsuperscript{297} The pyramid does not speak directly to groups within the agency, but implies that those managing the bottom layer of mostly unreviewable conduct control a large portion of enforcement.\textsuperscript{298}

An agency’s designers can set up organizational processes that require regulatory monitors to hand over a case at the first sign of wrongdoing, reserving almost all major enforcement decisions in the pyramid for other groups, such as enforcement lawyers. Litigator-dominant agencies tend to adopt such a structure. Regulatory monitors at hybrid and monitor-dominant agencies, however, play a meaningful role in decisions far along the enforcement spectrum. Some regulatory monitors even act as something close to a prosecutor. An overview of that enforcement participation follows, broken down into (1) citations, recommendations, and warnings, (2) blocking business activities, (3) public shaming, (4) increased monitoring as punishment, and (5) control over investigations and charges.

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\textsuperscript{291} See Levitin, supra note 52, at 2044.
\textsuperscript{292} Interview with FCC Senior Attorney (Apr. 13, 2017) (describing how engineers regularly inspect stations and both engineers and lawyers analyze mandatory reports submitted); Interview with Attorney (Apr. 26, 2017) (stating that his clients, communication-sector companies, must regularly submit large volumes of information to the FCC); CFPB Interview, supra note 216.
\textsuperscript{293} See supra note 271 and accompanying text.
\textsuperscript{294} See infra Appendix A (EP); see also supra Figure 1.
\textsuperscript{295} See, e.g., BSEE Annual Report, supra note 19, at 23.
\textsuperscript{296} See Ayres & Braithwaite, supra note 30, at 35.
\textsuperscript{297} See id.
\textsuperscript{298} Ayres and Braithwaite provide examples of regulatory monitors only in passing, and do not explore the implications of responsive regulation for various internal agency groups. See id.
1. Citations, Recommendations, and Warnings

Beginning at the base levels of the pyramid, there is evidence that regulatory monitors drive this enforcement activity at fifteen of the nineteen largest regulators.\(^{300}\) For example, FERC monitors possess the authority to issue public “noncompliance” notifications and direct nonpublic settlement agreements.\(^{301}\) Although not all agencies release such figures, those that are available in agency reports reflect the pyramid’s space allocation in that the quantity of less formal activity is significantly greater than more formal proceedings.\(^{302}\) For instance, in fiscal year 2016, the FDA’s inspections group issued 14,590 warning letters, while its legal division took only twenty-one enforcement actions.\(^{303}\)

In terms of behavioral impact, these recommendations can be far-reaching. Compliance varies across time and agencies, but there are indications that in diverse industries companies

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\(^{299}\) This figure is based on Ayres & Braithwaite, supra note 30, at 35.

\(^{300}\) This includes all agencies except the FCC, EEOC, NLRB, and FTC. See infra Appendix B.

\(^{301}\) See, e.g., FERC, supra note 260, at 39.

\(^{302}\) See infra Appendix B.

cooperate when informally advised to take a course of action.\footnote{See FERC, supra note 260, at 35 (reporting that in fiscal year 2016, energy companies implemented ninety-eight percent of FERC’s “audit recommendations” within six months); Richard M. Cooper & John R. Fleder, Responding to a Form 483 or Warning Letter: A Practical Guide, 60 Food & Drug L.J. 479, 480 (2005) (noting that food companies typically comply with FDA inspectors’ requests); Interview with Former FDIC Employee (Mar. 10, 2017) (stating that financial institutions “almost always” comply with examiners’ requests).} Even the recommendations of regulatory monitors at hybrid agencies can lead to substantial payouts, albeit less than those of litigators. In a recent six-month period, CFPB examinations prompted financial institutions to refund $44 million to consumers, while the enforcement group secured $82 million.\footnote{2016 CFPB Semi-Ann. Rep. 11, https://files.consumerfinance.gov/f/documents/Report.Spring_2016_SAR.06.28.16.Final.pdf [https://perma.cc/T84Y-TFWB]. At FERC, auditors identified energy-company noncompliance that led to customer refunds and price reductions amounting to $5.3 million, less than a third of the $18 million for litigators. See FERC, supra note 260, at 12, 39.}

Why would a firm comply with these expensive recommendations?\footnote{See FDA, supra note 228, at 2.} Despite being “advisory,” they carry the threat of harsher follow-up. As the FDA’s manual notes, the warning letter provides “an opportunity to take voluntary and prompt corrective action before [FDA] initiates an enforcement action.”\footnote{See FDA, supra note 228, at 2.} Moreover, regulatory monitors’ requests may not need backup from an agency’s litigation group, as the rest of this section explains.

2. Blocking Business Activity

A more intrusive enforcement power comes in the form of preventing business operations ex ante or suspending market access ex post. In at least eleven of the nineteen agencies, regulatory monitors exercise such authority.\footnote{The eleven agencies are the FDA, OCC, USDA (FSIS), FAA, FCC, FDIC, Federal Reserve, FMCSA, MSHA, SEC, and NRC. See infra Appendix B.} Ex ante approval may be required only for new activities, such as launching new medical devices or opening a new bank branch.\footnote{See 12 C.F.R. § 303.40(2018) (noting that banks must apply to the FDIC before establishing a branch); About FDA Product Approval, FDA, https://www.fda.gov/NewsEvents/ProductsApprovals/ucm106288.htm [https://perma.cc/UM63-UCGS] (last updated December 29, 2017) (explaining which products are subject to ex ante review by the FDA).} Other times agencies must approve daily activities, as is the case for every chicken carcass sold in the United States.\footnote{See USDA Inspection, supra note 12, at 15.}


\footnote{Cf. Parrillo, supra note 18, at 37 (discussing factors that incentivize regulated parties to follow guidance, including: “(A) pre-approval requirements, (B) investment in relationships to the agency, (C) intra-firm constituencies for compliance beyond legal requirements, and (D) the risks associated with one-off enforcement”).}
chemicals.\textsuperscript{312} Restraints on business activity can significantly hurt a firm, both in terms of immediate lost revenues and longer-term loss of clients who may have been relying on the provision of some output at a given time.

3. Public Shaming

Whereas the other categories of sanctions rely on directly punishing the business, public shaming takes an indirect approach. Many agencies publicly post the name of the business alongside the violations identified by regulatory monitors.\textsuperscript{313} One can learn, for example, that in 2014, oil inspectors shut down certain offshore Exxon operations thirteen times.\textsuperscript{314} A January 27, 2017 OSHA inspection of an Amazon warehouse uncovered a “serious” worker health violation leading to a $5,975 fine.\textsuperscript{315} On March 2, 2017, FDA inspectors caught Wal-Mart selling tobacco to minors in cities ranging from Memphis, Tennessee, to Scottsdale, Arizona.\textsuperscript{316} The posting of such information can be seen as a form of transparency---a means for the public to know what their government agents are doing---rather than as a sanction. But companies fear bad regulatory publicity, a risk that has grown in the internet era because sanction results can spread more easily.\textsuperscript{317} Given that a few thousand dollars in fines is insignificant to a large company, the public posting of monitoring violations enables some regulatory monitors to have greater enforcement power over businesses.

4. The Process as Punishment

Another indirect enforcement mechanism is agencies’ discretion to increase monitoring intensity.\textsuperscript{318} Regulators sometimes formally announce that good behavior will lessen oversight.\textsuperscript{319} But

\textsuperscript{312} See 30 C.F.R. § 250.101 (2012) (providing an overview of BSEE’s authority); BSEE Annual Report, supra note 19, at 23–24 (describing BSEE’s enforcement approach and listing various incidents of noncompliance that the agency addressed in 2015); Telephone Interview with Former EPA Employee A (Apr. 12, 2017).

\textsuperscript{313} In other industries, such as finance, examiners’ reports are private. The CFPB aggregate reports provide some detail about its examiners’ findings without identifying companies. See 2016 CFPB Semi-Ann. Rep., supra note 305, at 75.


\textsuperscript{317} See Nathan Cortez, Adverse Publicity by Administrative Agencies in the Internet Era, 2011 BYU L. Rev. 1371, 1373 (describing the use of negative publicity as an enforcement tactic employed by federal regulators).

\textsuperscript{318} Professor Ed Rubin has recognized this possible use of monitoring. See Rubin, supra note x, at 125 (“Agencies can use investigations themselves—repeated visits by inspectors or demands for documents—as sanctions.”).

\textsuperscript{319} See, e.g., Parrillo, supra note 18, at 45 (“The relationship between an agency and a regulated party . . . may operate at an institutional and official level, if, say, the agency has an announced policy of reducing the frequency of inspections for parties
they stop short of publicly describing monitoring as punishment, which might provoke court challenges. Nonetheless, some agencies communicate that monitoring is both a consequence and a reward. OSHA, for instance, has a Voluntary Protection Program in “recognition of the outstanding efforts of employers,” which awards firms by subjecting them to fewer inspections. OSHA’s “Severe Violator Enforcement Program” involves higher penalties and “increased OSHA inspections in these worksites, including mandatory OSHA follow-up inspections, and inspections of other worksites [owned by the violator].” The agency explains this policy by noting that “[h]igher penalties and more aggressive, targeted enforcement will provide a greater deterrent.”

Regulatory monitors’ scrutiny can be costly to firms, and firms predictably seek to avoid intense monitoring. In negotiated rulemaking with the EPA, industry representatives have pushed for rewarding exemplary firms by giving them “tax credits” and “less frequent inspection audits.” Thus, the threat of increased scrutiny provides one avenue for regulatory monitors to obtain compliance even without direct sanction authority.

5. Investigations and Charges

For more significant sanctions, such as large fines and the revocation of licenses, there is typically an investigatory phase after the regulator becomes aware of a potential violation. Regulators can allocate control over that investigatory process to different groups. At agencies with sizeable litigation divisions, such as at the SEC, enforcement lawyers control much of the investigatory function because they have their own investigation resources. Even at such agencies, regulatory monitors’ influence can extend beyond the handoff if the enforcement lawyer seeks regulatory monitors’ expertise or if regulatory monitors originated the case. But regulatory monitors wield less influence overall in such agencies.

who have a good track record.

320 For example, that could imply that the inspection was a final determination of rights or not part of an “administrative plan.” See Marshall v. Barlow’s, Inc., 436 U.S. 307, 321 (1978) (holding, in part, that the Constitution requires agency searches of commercial facilities to be part of a “general administrative plan”).


322 OMB Watch, supra note 60, at 6–7.


324 See id.

325 See Parrillo, supra note 18, at 52.

326 See Freeman, supra note 30, at 14–17.

327 For instance, lawyers warn that a firm ignoring an FDA inspector’s request is “likely to be subject to extraordinarily intense and more frequent inspections.” Cooper & Fleder, supra note 304, at 480.

328 See Freeman, supra note 30, at 67.
Agencies with smaller legal groups rely more on the inspector to investigate. FAA inspectors will investigate and recommend an airline’s civil penalty or a pilot’s suspension before attorneys take over the case. The SEC and FAA models allow attorneys to decide the formal charges, but still reflect the relationships in federal criminal law enforcement, where “iterated interactions between agents and prosecutors will affect investigative and adjudicative decisionmaking.”

Alternatively, regulatory monitors may lead cases through the formal charge phase. When an explosion or death occurs on an offshore oil platform, inspectors investigate and build the “case” for civil penalties. Based on the inspector’s case and the company’s response, “the Reviewing Officer will issue a decision identifying the amount of any final civil penalty.” That process led to over $6 million in civil penalties in 2015. OSHA inspectors in the vast majority of cases set fines and negotiate final settlements with businesses without ever involving litigators. Thus, regulatory monitors may serve as investigators, prosecutors, and de facto final decisionmakers.

* * *

The confluence of case-specific sanction control, as well as the degree of regulatory monitors’ information monopoly, provides an overall sense of their influence over agency enforcement. Difficulties arise in comparing the external impact of regulatory monitors and litigators. One legal case or rule can establish an industry standard. Tens of thousands of warning letters, Incidences of Noncompliance, and citations do not attract as much attention as a $415 million SEC legal settlement with Merrill Lynch. But institutionalized through large firms’ compliance systems, and spread across millions of transactions, even nonquantifiable regulatory monitors’ interventions can have far-reaching impact.

332 See BSEE Civil Penalties, supra note 331 (emphasis added).
333 See BSEE Annual Report, supra note 19, at 23–24.
334 See Interview with OSHA, supra note 147. After OSHA inspectors and their supervisors decide on civil penalties, companies may then pay, negotiate, or file a legal appeal. See id. By one regional leadership’s estimate, firms rarely appeal, and about eighty percent of the time a negotiation ensues. See id. OSHA inspectors do not usually involve solicitors unless the negotiations falter. See id.
335 See supra section II.B.2.
Despite variation and comparison difficulties, regulatory monitors in at least fifteen of the nineteen large agencies have significant enforcement influence in several of the categories described above.\textsuperscript{337} Multiple levers—including statutory authority, workforce size, internal information reliance, formal sanctions, and planning—can shift influence away from the legal division. As more of these levers align at a given agency and across the administrative state, regulatory monitors become the drivers of regulatory enforcement.

\textit{C. Making Law}

Agencies make law through their determinations in individual cases and by issuing broader rules. Regulatory monitors contribute to each of these areas of policy development.

1. Creating Common Law

Since the 1990s, FTC enforcement lawyers have created a common law of privacy with “hardly any judicial decisions to show for it.”\textsuperscript{338} FTC lawyers have done so through settlement agreements, which set industry-wide practices.\textsuperscript{339} Individual regulatory-monitor determinations can have a similar effect. A plethora of reports, warnings, and other monitor decision results are available online.\textsuperscript{340} These documents offer great detail. For instance, one of the FDA’s 17,000 warning letters from 2015 reveals that during a Deerfield, Illinois inspection of Walgreens’s over-the-counter drug preparation, the “[i]nvestigator observed what appeared to be hundreds of dead insects” throughout the facilities, and a follow-up laboratory analysis revealed “spore-forming bacteria.”\textsuperscript{341} The FDA’s recommendations to Walgreens regarding behavioral changes are also specific.\textsuperscript{342}

Like a lawyer to a judge, firms use these texts to plead their case.\textsuperscript{343} The firm might argue that in a prior inspection at a different firm, similar observations led to different recommendations.

\textsuperscript{337} See infra Appendix B (detailing the techniques that monitors at the nineteen large agencies utilize to sanction firms). There was insufficient evidence to conclude that regulatory monitors at the FCC, FTC, EEOC, and NLRB had significant influence. See infra Appendix B. Further research into the inner workings of these agencies could produce such evidence, particularly at the FCC, which has a significant number of monitors and amount of monitoring activity. See infra notes 477--479, 515--517, and accompanying text.


\textsuperscript{339} See id.

\textsuperscript{340} See infra notes 368--370 and accompanying text.


\textsuperscript{342} See id. (requiring the laboratory management to assess operations, including “the prevention, destruction, repellence, or mitigation of the specific pests that were found in the warehouse” and in particular to “assess the aseptic processing operations” using a third-party consultant).

\textsuperscript{343} See Interview with OSHA, supra note 147 (noting that attorneys routinely rely on OSHA citations to gather information about violations and develop the nuances of a case); Interview with EPA, supra note 312 (noting that companies use decisions from one site to negotiate with the EPA for different sites).
The EPA has warned its inspectors to follow national procedures because “[p]olicy decisions at one facility can have a precedential effect on all other facilities.”344 Firms study regulatory monitors’ reports to learn how to operate in the future. Since the reports can contain specific recommendations not required by law,345 these regulatory monitors—and those who oversee them—wield the ability to not only interpret law but to create it.

2. Writing Rules

Regulatory monitors’ most straightforward form of soft rulemaking is the writing of their employee manuals. These manuals give instructions as to what information the regulatory monitors should collect and how they should analyze the data they observe, often running close to a thousand pages in length.346 Firms meticulously study these texts to adjust behavior.347 Manuals are most influential in industries governed by best practices and principles-based rules, which are more subject to interpretation than industries with detailed codes for every violation.348 Manuals do not serve as the sole basis for court enforcement unless the agency treats them as substantive law and processes them through notice and comment.349 But a firm may still choose to follow the manual simply because it reflects the expectations of a powerful government actor.350

In a minority of industries, such as finance and securities, regulatory monitors also lead formal rulemaking related to their expertise.351 In those agencies, it would be standard for agency directors or the general counsel ultimately to approve any rules written by regulatory monitors before subjecting them to notice and comment.352

Regulatory monitors’ expertise enables them to influence both formal and soft rulemaking, but organizational configurations can lessen information asymmetries. Some agencies mandate the

345 See supra section II.A.2.
347 See McGarity, supra note 226, at 1393–96 (providing an example of a waste generator examining agency text for guidance).
348 See supra section II.A.2.
349 See United States v. Bioclinical Sys., Inc., 666 F. Supp. 82, 83 (D. Md. 1987) (“Congress has mandated that a full and deliberate public process, including the making of recommendations by a broad-based advisory committee and the opportunity for public hearing, be followed before the FDA may establish a GMP.”).
350 See supra section III.B.1.
351 See FERC, supra note 260, at 58 (describing a FERC regulatory monitor’s recent writing of a rule for notice and comment); BSEE Interview, supra note 331 (stating that Department of the Interior regulatory monitors draft offshore-energy regulations).
352 See Raymond P. Baldwin & Livingston Hall, Using Government Lawyers to Animate Bureaucracy, 63 Yale L.J. 197, 198 (1953) (The stated duties of an Office of General Counsel include: . . . preparing and reviewing administrative rules, regulations and reports, and drafting proposed legislation; and . . . participating in the policy-making process of the agency.”).
sharing of regulatory monitors’ reports with a separate rulemaking group, which analyzes the reports for trends. At many agencies, the regulatory monitors’ division leads authorship of manuals, subject to legal review. Others assign the manual writing to the rulemaking group, giving external groups more control over regulatory monitor-related policymaking.

However, the location of the individuals managing the process does not give the full picture. The manuals are hundreds of pages long and often delve into esoteric considerations such as, in the case of FAA flight inspectors, the need to avoid “signals . . . that are greater than 48 µA in the 90 Hz direction from the glide slope crosspointer value.” The rules themselves may be similarly detailed. Due to the technical density, even when the rulemaking group writes manuals or rules they may need help drafting the text unless they previously served as regulatory monitors. As a former EPA senior attorney described the process, the manual writer in Washington, D.C. may have no field experience, and instead manages a working group of regional inspectors to draft the actual text.

IV. Implications and Limits on Regulatory Monitors

The previous Part showed the breadth and structure of modern regulatory monitors’ power. An individual regulatory monitor’s impact is rarely as salient as Dr. Kelsey’s was during the thalidomide period. Instead, such life-altering regulatory-monitor impact is broadly institutionalized. The FAA articulates the organizational trifecta by describing its inspectors as serving to “develop, administer, and enforce the regulations and standards relating to aviation safety.” These functions create a virtuous cycle. Regulatory monitors regularly write or advocate for rules and policies that give them more data. Better data equips them to more forcefully advocate policy and enforcement priorities. As would be expected in an administrative state beset by rule ossification and intent on informed collaboration with industry, regulatory monitors have emerged in the compliance era wielding considerable administrative power.

The claim that regulatory monitors lie at the heart of the regulatory state implicates prominent administrative law and policy debates. With the administrative lens adjusted for regulatory monitors’ full status, they inevitably become targets in the tug-of-war among Congress,
the President, and interest groups for external control over agencies. Regulatory monitors also necessarily compete with other internal groups for influence over the agency’s actions. This Part takes up the questions of external and internal influence in turn, and identifies a set of legal and organizational design choices that determine how regulatory monitors can best serve their agencies’ missions.

A. External Accountability Mechanisms

One of the central questions in administrative law is the appropriate balance of accountability and independence for unelected bureaucrats. Both laws and organizational design alter the balance of accountability and independence. Some of these constraints guard against regulatory monitoring inactivity—most notably, statutory minimums. Others could prevent either inactivity or excess; for instance, public disclosures and paper trails promote transparency, and the officer appointments process ensures that monitor leaders are publicly vetted in advance.

1. Public Disclosures

Visibility can bring accountability to unelected officials, in the broader sense of improving the exercise of authority. Immediately after her 1981 appointment by President Reagan, EPA Administrator Ann Gorsuch suspended hazardous waste rules and reduced legal cases by eighty-four percent. An “awakened, angry and energized public,” sensing that businesses had captured the agency, paved the way for Gorsuch’s resignation in less than two years. Visibility can also curtail excesses, as demonstrated by the increased oversight that viral videos of police officer abuses prompted.

Changes to regulatory monitors are less salient. Whereas agency rules and litigation are by default public, regulatory monitors’ reports need not be. Bank examiners and occupational inspectors—unlike police officers and enforcement lawyers—operate mostly in private spaces, making it difficult for third parties to document excesses.  

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361 Currently, various stakeholders outside the agency can influence regulatory monitors. One study of President Obama’s first year cited mostly regulatory monitors’ activity in concluding that agencies “appear to be exercising their enforcement authority more strenuously than they had in recent years.” See OMB Watch, supra note 60, at 4. As President Trump has sought to reorganize the executive branch, regulatory monitors have provided options. See supra notes 62–63 and accompanying text.

362 See Lemos, supra note 46, at 946; see also Jacob E. Gersen & Matthew C. Stephenson, Over-Accountability, 6 J. Legal Analysis 185, 186–87 (2014) (arguing that more accountability is not always necessarily in the public’s best interests).


Elected officials have begun to chip away at regulatory-monitor secrecy. In 2011, President Obama ordered agencies to “make . . . information concerning their regulatory compliance and enforcement activities” such as “administrative inspections, examinations, reviews, warnings, [and] citations” available for online search. Executive agencies have accommodated. For instance, for each inspection, the FDA posts any noncompliance identified, “voluntary” recommendation made, and overturned findings. The Trump administration attracted considerable attention when it cut off public access in other areas, such as White House visitor logs. President Obama’s directive thus may subtly constrain the Trump administration from taking contrary action.

Congress has also contributed to the transparency framework. In 2010 it required agencies to publicize “the tabulation, calculation, or recording of activity or effort that can be expressed in a quantitative or qualitative manner.” Although this law does not mention regulatory monitors, major regulators release statistics such as the number of examinations. Consequently, aggregate changes, like cuts in examination numbers, are now more visible in many agencies.

In some agency-specific statutes, Congress has gone further. The Clean Air Act, for example, requires publication of any auditor’s “preliminary determination” that an internal system should be revised. Dodd–Frank mandated that the SEC release reports summarizing examination findings, a break with the financial regulation tradition of “on-site examiners who enforce quite informally and often on a face-to-face and confidential, instead of a written and public, basis.”

This transparency framework, despite some value, is variant and unstable. Independent agencies, except when required by statute, have complied less thoroughly with President Obama’s directive than have executive agencies, and a new president could easily issue a contrary order.
Additionally, in many agency-specific statutes, Congress overlooked monitoring. The main regulator of offshore oil platforms, for instance, must publish information about its postaccident investigations, but not its regular inspections.\textsuperscript{379}

Moreover, many transparency mandates focus on aggregate disclosures, which provide limited insight. An agency that conducts fewer examinations over time may be doing so because industry has captured it or because it is conducting more thorough examinations. An agency meting out fewer regulatory-monitor sanctions for violations could mean less vigilant agencies or more compliant firms.

The design of many monitoring-transparency statutes also leaves open a window for obfuscation. For example, although the Clean Air Act mandates the publication of any preliminary audit determinations, it does not require a decision or report upon inspection, stating only that regulators “\textit{may} issue the owner or operator of a stationary source a written preliminary determination.”\textsuperscript{380} That leaves the sequence of decisionmaking unclear as to what the frontline inspector’s determinations were, rather than the managerial pressures that followed. In contrast, in the Food, Drug, and Cosmetic Act, for instance, Congress mandated that “prior to leaving the premises, the officer or employee making the inspection \textit{shall} give to the owner, operator, or agent in charge a report in writing . . . A copy of such report shall be sent promptly to the [Health and Human Services] Secretary.”\textsuperscript{381}

One policy response would be to require more comprehensive transparency. Default requirements might include those adopted by the FDA, such as (1) visibility into the entire regulatory-monitor chain of command; and (2) identification of the company. Transparency has well-known drawbacks that would need to be considered before expanding it. In particular, transparency could prompt firms to stem the exchange of regulatory information to avoid more stringent regulation.\textsuperscript{382} And chain-of-command disclosures may also leave much unclear, as “the inner workings of complex bureaucracies \textit{cannot} be captured neatly in charts or guidelines.”\textsuperscript{383} Some activities might need to remain private due to the necessity of protecting companies’ trade secrets. Transparency has also been used as a political tool for deregulatory goals.\textsuperscript{384}

But even without identifying the company, chain-of-command reports can have value. If the number of overturned frontline regulatory-monitor decisions changes significantly over time, the reports could suggest that leaders are captured by industry or that they are inadequately supervising frontline monitors. The data could also enable third parties to identify regulatory-monitor best practices or abuses of power. A recent study of publicly available health inspection microdata found


\textsuperscript{380} 40 C.F.R. § 68.220(e) (emphasis added).


\textsuperscript{382} See Coglianese et al., supra note 37, at 290–92.

\textsuperscript{383} See Nou, Intra-Agency Coordination, supra note 42, at 482.

\textsuperscript{384} See generally David E. Pozen, Transparency’s Ideological Drift, 128 Yale L.J. 100, 102 (2018) (arguing that the dominant policy rationale for increased government transparency in the twenty-first century emphasizes the capacity of transparency mechanisms “to make government leaner and less intrusive”).}
that inconsistent application of the law subjected restaurants to an “inspector lottery.”\textsuperscript{385} At least one agency subsequently adopted institutional improvements indicated by those findings.\textsuperscript{386} For such advancements to be made, external parties need access to data. Despite limits, transparency mechanisms can improve public oversight of regulatory monitors and those who seek to coopt them.

2. Private Paper Trails

Given the limits on public disclosures, Congress has sometimes turned to private disclosures. Even when kept private, an agency paper trail could deter problematic managerial behavior because it leaves open the possibility of subsequent investigation. For example, OCC examiner Victor Del Tredici caught a bank president illegally diverting loan fees into his personal account,\textsuperscript{387} but Del Tredici’s superiors ignored his report for nine months.\textsuperscript{388} After the bank failed and its president went to jail, Congressional inquiries into the agency’s inaction on the report publicly embarrassed OCC leadership, even though the report itself had been private.\textsuperscript{389} The paper trail also helped restore Del Tredici’s standing after OCC leadership had stripped him of his authorities over the incident.\textsuperscript{390} A manager made aware of the possibility of subsequent legal investigations or public criticism is more likely to internalize diverse constituents’ views---an “observer effect.”\textsuperscript{391}

Mandated paper trails for manager reviews have other accountability benefits, which can be more broadly defined to include the effective exercise of government power. A paper trail makes reviews more likely to happen in the first place, which is important because reviews can improve the accuracy of frontline decisions.\textsuperscript{392} Also, managerial reviews of regulatory monitors help fulfill what is arguably a “constitutional duty to supervise” agency employees.\textsuperscript{393}

\textsuperscript{385} See Daniel E. Ho, Fudging the Nudge: Information Disclosure and Restaurant Grading, 122 Yale L.J. 574, 574, 635--38 (2012) (analyzing data from a restaurant-sanitation grading system in New York and concluding that grade distributions are “essentially random” and that current grades have little correlation with grades in future inspection cycles).

\textsuperscript{386} Ho, Does Peer Review Work?, supra note 47, at 1. This field experiment tested a mechanism indicated as significant by the original database study. See id. at 11--13.


\textsuperscript{388} See id.


\textsuperscript{390} See id.

\textsuperscript{391} Ashley S. Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 Fordham L. Rev. 827, 862 (2013) (“The premise of the observer effect is that the executive responds to certain or probable judicial [scrutiny] . . . [T]he executive is more likely to perceive that a court may intervene . . . when the courts sense a shift in [public opinion].”).

\textsuperscript{392} See, e.g., Ho, Does Peer Review Work?, supra note 47, at 96 (noting that a paper trail makes direct oversight easier, which in turn enables supervisors to moderate inconsistencies between decisions made by frontline monitoring staff).

\textsuperscript{393} See Gillian E. Metzger, The Constitutional Duty to Supervise, 124 Yale L.J. 1836, 1874--904 (2015) (defining the “duty to supervise,” describing its constitutional basis, and delineating its scope).
3. Statutory Minimums

Whereas both public disclosures and private paper trails rely on informational mechanisms, Congress can impose direct constraints through statutory “timing rules.” More often, however, minimums were mandated or increased in response to an often-observed regulatory pattern in which “[h]istory keeps repeating itself.” After monitoring authority already existed in an industry, subsequent oil spills, economic crises, mining deaths, and food poisoning outbreaks have led Congress to impose activity floors, such as annual inspections. These minimums guard against the “problem of public underinvestment in information.”

Minimums alone, like transparency or paper trails, have limits. Regulatory monitors may not comply with legislative agendas, particularly following budget cuts. Indeed, agencies such as the EPA usually face more than ten deadlines in a given year across all of their activities, and sometimes over fifty deadlines. Courts have shown a willingness to compel agencies to take action after

394 Jacob E. Gersen & Eric A. Posner, Timing Rules and Legal Institutions, 121 Harv. L. Rev. 543, 545 (2007) (“A timing rule, as we define it, is a rule that substantially affects the timing of a government action, including legislation and executive action.”).

395 See, e.g., Burke, supra note 106, at 15 (noting semiannual inspections of steamboats).

396 George M. Burditt, The History of Food Law, 50 Food & Drug L.J. (Special Issue) 197, 200 (1995).

397 Deepwater Report, supra note 5, at 28–30 (describing government reaction to a series of offshore disasters); see also 43 U.S.C. § 1348(c) (2012) (providing for “scheduled onsite inspection” and “periodic onsite inspection without advance notice” of offshore facilities subject to environmental regulation).


400 See FDA Food Safety Modernization Act, Pub. L. No. 111-353, sec. 421(a), 124 Stat. 3885, 3923 (2012) (codified as amended at 21 U.S.C. § 350(a)(1) (2011)) (providing that the “Secretary shall identify high-risk facilities and shall allocate resources to inspect [food manufacturing] facilities according to the known safety risks of the facilities’); Jacob, supra note 15, at 600–01 (positing that, although crises are not the only factor motivating the passage of new legislation, many “key food and drug laws” can be “traced . . . to calamities in the last century”). High-risk facilities must be inspected at least every three years. 21 U.S.C. § 350(a)(2)(B).

401 See Stephenson, supra note 35, at 1427–37 (suggesting solutions for the problem of “misalignment” between the “marginal social costs . . . [and] the relevant government agent’s private marginal costs,” which “leads to socially suboptimal investment in information”).

402 See, e.g., U.S. Dep’t of Labor, No. 05-08-001-06-001, Underground Coal Mine Inspection Mandate Not Fulfilled Due to Resource Limitations and Lack of Management Emphasis 1 (2007), https://www.oig.dol.gov/public/reports/oa/2008/05-08-001-06-001.pdf [https://perma.cc/RWQ8-6XZQ] (reporting that the Mining Safety and Health Administration “did not complete one or more statutorily-required inspections at 107 . . . of the Nation’s 731 underground coal mines” in part due to the Administration’s “decreasing inspection resources”).

missing deadlines.\textsuperscript{404} But the “end-game” in such situations is unclear because higher courts have “exhibited a virtually complete unwillingness” to imprison agency leaders.\textsuperscript{405} Moreover, agencies can satisfy minimums perfunctorily, as many believe bank regulators did leading up to the financial crisis.\textsuperscript{406} Minimums may also hinder agencies’ ability to adjust to fast-changing markets if, for example, effective remote monitoring becomes achievable.

Still, legislative strictures generally, and deadlines in particular, likely influence agencies.\textsuperscript{407} Even independent regulators, over which Congress has less influence, report compliance with statutory floors.\textsuperscript{408} Regulatory monitors are highly skilled and likely could have earned more working elsewhere, which means some are presumably driven by a sense of public service. Allowing these employees to evaluate questionable business conduct could provide avenues for prompting enforcement, even in a captured agency. For example, the regulatory monitors might convince reluctant superiors to take action.

Statutory minimums also undermine industry capture of agencies because of leaks. In 2013, Federal Reserve compliance examiner Carmen Segarra unsuccessfully asked her superiors to take action against Goldman Sachs.\textsuperscript{409} She later released forty-six taped hours of “cozy” conversations between examiners and bankers, and nonaction despite “window dressing” of reports and “shady” behavior.\textsuperscript{410} The incident prompted congressional scrutiny and foreshadowed later criminal charges resulting from blurred lines between the regulator and bank.\textsuperscript{411} Other bureaucrats have used Wikileaks to reveal documents.\textsuperscript{412} Whether these avenues improve governance is beyond the scope of the current discussion. Nonetheless, minimums can stifle complacency and capture by forcing agencies to deploy resolute regulatory monitors.

\textsuperscript{404} See id. at 952–54 (noting that despite limits on judicial review of agency inaction, missed statutory deadlines “may spur a court to order the agency to act, but will almost never allow the court to specify the content of that action”).

\textsuperscript{405} Nicholas R. Parrillo, The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power, 131 Harv. L. Rev. 685, 697 (2018); see also Gersen & O’Connell, supra note 403, at 964 (“Most statutes that impose deadlines are silent about what should happen if the agency misses the deadline.”).

\textsuperscript{406} See, e.g., Levitin, supra note 52, at 2041–45 (explaining various ways in which financial regulators may be captured by industry).


\textsuperscript{410} See id. (internal quotation marks omitted) (first quoting Sen. Sherrod Brown) (then quoting former Federal Reserve Senior Supervisory Bank Examiner for Goldman Sachs Michael Silva).


4. Appointments

Another mechanism for involving heightened oversight is through the appointments process. Many agencies’ legal division heads are considered “inferior officers,” which triggers an appointment process mandated by the Constitution. That process can enable external stakeholders to have a say in whether the appointee is fit for a post that could have a major effect on people’s rights. The heads of large regulatory monitoring groups are not seen as requiring appointments, whereas some attorney leaders are.

This appointments asymmetry may in some cases be inconsistent with the actual influence that monitors have on the administration of the law. Directors of regulatory monitors in some agencies have similar or greater ability to oversee the final legal rights of regulated entities as do those leading attorney divisions. Congress has in the past recognized the appropriateness of overseeing the appointment of regulatory monitors. In 1852, lawmakers required the bureaucrats who managed steamboat inspectors to be appointed by the President.

Given the size of the federal bureaucracy today, it may not be practical to require an appointments process for all federal employees who have a significant effect on rights. But the appointments process offers a potential additional mechanism for ensuring that the individuals entrusted with monitoring are fit for their immense power. At the very least, it is worth reexamining the statutory designation of monitor leaders for appointments processes to remove any inconsistencies with comparable attorney counterparts.

B. Internal Accountability: Lawyers and Monitors as Rivals and Reviewers

Scholars have in recent years shown how internal “administrative rivals---perhaps as much as Congress, the President, and the courts---shape agency behavior.” That literature has focused on other groups or functions: how civil servants can check agency leaders, how separation of
enforcers and adjudicators advances due process, and how little-noticed inspectors general provide agency oversight from within. This Article underscores how regulatory monitors—including those who lead them—are also a potentially influential internal actor who can help contribute to a healthy balance of internal agency power. Three fundamental design decisions influence the extent to which regulatory monitors operate as agency rivals: resource allocation, formal appeals processes, and cross-functional independence.

1. Resource Allocation

Agency architects have settled on greatly differing allocation of resources to regulatory monitors—from comprising almost all of the enforcement workforce to almost none. A crucial agency-specific question is what regulatory-monitor allocations are optimal, weighing the costs of different regulatory configurations and the benefits in terms of deterrence and, ultimately, general welfare. Definitive answers to such complex questions must await empirical studies comparing different monitoring models in similar contexts. One hypothesis to test is whether a balance of powers provides benefits over the alternatives.

There are reasons to posit that hybrid agencies might function best. At one extreme, agencies with limited regulatory-monitor power presumably risk being too blind to regulate effectively. The many historical examples of crises associated with insufficient monitoring lend support to this hypothesis. Additionally, observers in different regulatory spheres have recently identified many legal problems in need of greater agency monitoring, particularly in areas governed by litigator-dominant agencies. Professor Scott Hemphill and I have, for different reasons, called for the FTC to use monitoring authority more for antitrust and consumer protection. A government task force concluded that the EEOC should collect more data to identify systemic discrimination. And Professor Frank Pasquale has argued that more monitoring of medical devices could save lives.

419 See, e.g., Barkow, supra note 24, at 890, 896.
421 This issue touches on two larger debates that scholars have covered. The first is the tradeoffs between lawyers and technocrats. See generally Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (2009) (EP). Second, scholars have explored how to design agencies for the optimal collection of information. See generally Stephenson, supra note 35 (offering a framework for designing public institutions with adequate incentives for acquiring policy-relevant information).
422 See supra section III.A.
423 See supra section I.C.
426 See Frank Pasquale, Grand Bargains for Big Data: The Emerging Law of Health Information, 72 Md. L. Rev. 682, 683 (2013) (arguing that “[p]roviders have kept vital information about price, quality, and access secret to maintain a competitive advantage or hide shortcomings” and have thus “impeded the types of large-scale analysis common in other industries”).
At the other extreme, it is important to study the potential pitfalls of overreliance on regulatory monitors. This inquiry takes on particular importance in light of new governance models that might drive the administrative state toward greater reliance on administrative monitors. Policymakers have repeatedly turned to litigators following monitor-dominant regulators’ failures. After the 1990 Exxon Valdez oil tanker crashed into an Alaskan reef, releasing eleven million barrels of oil, Congress passed the Oil Pollution Act to strengthen oil regulators’ civil penalties. The 2002 Enron scandal “converted FERC from an economic regulator to an enforcement agency” by prompting an expansion of FERC’s ability to prosecute “market manipulation.” Following the 2008 financial crisis, lawyers began to play a larger role at bank regulators. Each of these agencies, prior to the scandal, was monitor-dominant.

Capture by industry is a common explanation for such failures. Regulatory monitors’ regular and frequent contact with businesses may make them particularly susceptible to leniency, giving them “empathy bred by personal contact.” Lawyers are not immune to capture or what is sometimes given as its principal explanation, the revolving door of employees working for regulators one day and regulated entities the next. But enforcement lawyers’ more arms-length removal from industry—and perhaps their unique professional thought process—could make resource allocation to them an internal agency check on monitors’ likelihood of capture. Resource allocation to monitors, on the other hand, helps ensure an agency does not operate in the dark.

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427 See supra section II.A.
431 See Conti-Brown, supra note 101, at 93 [source PDF?].
434 Cf. Diver, supra note 41, at 286 (describing a “sense of empathy or allegiance bred by personal contact or professional kinship” that can cause inspectors to “become reluctant to report violations”).
435 See, e.g., David Zaring, Against Being Against the Revolving Door, 2013 U. Ill. L. Rev. 507, 511—12 (describing and critiquing common concerns about the revolving door).
436 See generally Schauer, supra note 421 (EP).
2. Appeals

Formal appeals provide a potential check on some regulatory-monitor actions. Some regulatory-monitor enforcement decisions, such as those suspending access to markets, constitute final agency actions, trigger formal administrative processes, and will likely get transferred to legal groups and ultimately public courts if appealed.\(^\text{437}\) However, Congress has typically imposed less procedural oversight of regulatory monitors. A Department of the Interior authorizing statute requires formal adjudicative processes including, for example, subpoena power mirroring that in “the district courts of the United States” for offshore oil platform investigations, but not for inspections.\(^\text{438}\) The CFPB’s founding statute requires administrative law appeals for CFPB enforcement actions, but not for examination findings.\(^\text{439}\) Such agency-specific statutes mirror the APA’s exemption of “proceedings in which decisions rest solely on inspections.”\(^\text{440}\)

Despite statutory lenience regarding regulatory-monitor appeals, some agencies have built formal processes enabling firms to appeal regulatory monitors’ decisions, even when not required by statute. One model leaves appeals within the regulatory-monitor chain of command.\(^\text{441}\) That procedural design would lessen the influence of the frontline monitor, but overall still retain enforcement influence within the larger monitoring group. Other agencies have routed regulatory monitors’ appeals outside the monitor group, such as through administrative law judges.\(^\text{442}\)

These design choices have limits. Even when agencies set up an appeals process outside the regulatory-monitor group, the fear of informal repercussions, such as a damaged relationship and stricter inspections, may deter the use of such appeals processes. Additionally, for many decisions, such as a temporary halting of activities or blocking of a chicken entering the stream of commerce, the appeals process may be impractical given the magnitude or timing of the decision.

3. Monitor–Lawyer Teams and Rivalries

Once an agency’s leaders have decided to deploy both regulatory monitors and regulatory lawyers, a number of questions remain about how these groups should interact on an ongoing basis. Numerous models exist. At some agencies, lawyers and monitors function as teammates. At others, enforcement lawyers “become prisoners of the work done by inspectors.”\(^\text{443}\)

\(^{437}\) See, e.g., Biber & Ruhl, supra note 13, at 145--48.

\(^{438}\) See 43 U.S.C. § 1348(c)–(d), (f) (2012).


\(^{442}\) See, e.g., 30 C.F.R. § 290.2 (permitting those adversely affected by a final decision of an official from the Department of the Interior’s Bureau of Safety and Environmental Enforcement to appeal the decision to the Department’s Interior Board of Land Appeals).

\(^{443}\) Cf. Diver, supra note 41, at 280 (characterizing inspectors’ role in the enforcement process).
As discussed above, various organizational design choices influence the extent to which agency lawyers and monitors are interdependent. When lawyers are required to have visibility into monitors’ activities, such as through the mandatory sharing of inspection reports, lawyers become more independent in taking action. When monitors receive sanction authority, they become more independent in securing compliance.444

Even hybrid agencies have deployed greatly divergent models for how their powerful groups of monitors and lawyers should interact. The CFPB organizationally imposes more separation between the two groups. CFPB examiners and lawyers coordinate some actions.445 But they organizationally occupy separate offices and ultimately can pursue separate tracks for resolving even multimillion-dollar wrongdoing.446

In contrast, the EPA does not organizationally separate out the inspection function.447 Once inspectors identify anything beyond a minor violation, they work side by side with lawyers. EPA collaboration means that both engineers and lawyers are often involved in deciding on sanctions, negotiating with firms, and even coauthoring legal briefs.448 Consequently, each meaningful regulatory-monitor decision is peer-reviewed both by someone trained within a professional code of ethics for the administration of justice and by someone familiar with the science and corporate culture.449

The organizational relationships between lawyers and regulatory monitors presumably can influence enforcement and policy outcomes. Some agencies’ enforcement orders make it clear that they believe lawyer-monitor organizational design matters---albeit for private entities. The SEC and the Department of Health and Human Services (HHS) have mandated that malefiant companies separate their compliance and legal departments.450 In other words, the SEC and HHS have mandated for businesses a level of separation that the EPA does not have for its own lawyers and compliance-related personnel. To the extent the company’s compliance and legal departments serve as internal regulators, similar organizational principles may be appropriate for both public and private monitors.451

Since these organizational questions about regulatory monitor--lawyer peer review and independence have yet to be studied, it is difficult to assess the merits of these approaches.452

444 See supra section III.B.
445 Cf. Witkowski, supra note 73 (“[E]nforcement attorneys will continue to coordinate with examiners offsite.”).
448 See Interview with EPA, supra note 312; see also Joel A. Mintz, Enforcement at the EPA 113 (rev. ed. 2012).
449 See Interview with EPA, supra note 312. See generally Schauer, supra note 421 (discussing lawyers’ approach to reasoning). Peer review alone can improve regulatory-monitor performance. See Ho, Does Peer Review Work?, supra note 47, at 79--82 (discussing the evidence that shows how peer review can improve the accuracy and consistency in administering the law).
450 For a critique of these mandates, see DeStefano, supra note 203, at 122--55.
451 See supra section II.A.2 (discussing self-regulation).
452 Peer review of inspectors has been studied in great depth, but peer review across these two groups has not been. See supra notes 391--393 and accompanying text. Nor have scholars turned their attention to the ideal level of organizational
regulatory lawyers and regulatory monitors have different expertise, worldviews, and legal authority. It is plausible that a set of agency-mandated processes for cross-functional peer review and information-sharing could better organizationally set regulators up for success in overseeing complex markets.

Conclusion

Scholars commonly describe agencies as engaging in ex ante rulemaking and ex post enforcement. Ongoing monitoring should be added to that standard account of agency activity and studied more closely. Regardless, the traditional aim of administrative law—designing accountability mechanisms such as transparency and appeals—could better reflect the tripartite nature of regulators’ legal functions.

Additionally, those who regularly extract information from firms influence much of the administrative state’s law-related activity. Any regulatory analysis that ignores regulatory monitors or groups them together with enforcement actors risks obscuring agencies’ vital “internal laws.”453 This self-regulating administrative-monitoring ecosystem is ripe for systematic study to identify best practices for weeding out extremes of overbearing, blind, or captured agencies. A key question is how much of the existing regulatory-monitor structure should be ingrained in the law rather than left to bureaucratic discretion or control by the President.

Perhaps most importantly, regulatory-monitor resource allocation and intergroup processes should be added to the toolbox for designing agencies to increase effectiveness and accountability.454 Regulatory monitors are vital to the front line of business compliance. But lawyers—as judges, drafters of laws, and intra-agency rivals—are the “foot soldiers of our Constitution.”455 The organizational design of these two groups’ intersection is crucial to a healthy system of checks and balances with regulatory monitors as a powerful internal branch of administration.

dependence among regulatory monitors and regulatory lawyers.

453 Mashaw & Harfst, supra note 223, at 443 (“Bureaucratic institutions have their own internal laws, expressed both in regulation and in routine.”).

454 For an overview of anticapture organizational-design mechanisms, see generally Barkow, supra note 55.

Appendix A: Employees and Monitoring

The nineteen large regulators are the Consumer Financial Protection Bureau (CFPB), Federal Energy Regulatory Commission (FERC), Food Safety & Inspection Service (FSIS), Mine Safety & Health Administration (MSHA), Occupational Safety and Health Administration (OSHA), Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Office of the Comptroller of the Currency (OCC), Environmental Protection Agency (EPA), Equal Employment Opportunity Commission (EEOC), Federal Communications Commission (FCC), Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, the Federal Trade Commission (FTC), National Credit Union Administration (NCUA), National Labor Relations Board (NLRB), Nuclear Regulatory Council (NRC), and the Securities and Exchange Commission (SEC). Data in the appendices aim to provide a survey of the level of activity across large regulators, but should not be viewed as comprehensive. Additionally, the data provide a snapshot based on the most recent year readily available, and activity may vary over time. Drawing firm conclusions about the level of monitoring and the number of monitor employees would for many agencies require a more in-depth study focused on the full array of an agency’s activities and employees over a longer timeframe.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Monitor Personnel</th>
<th>Legal Personnel</th>
<th>Monitor Percent</th>
<th>Annual Monitor Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>CFPB</td>
<td>416</td>
<td>349</td>
<td>54%</td>
<td>177 examinations and related[^457]</td>
</tr>
<tr>
<td>FSIS</td>
<td>8,107</td>
<td>440</td>
<td>95%</td>
<td>1.7 million products inspected[^458]</td>
</tr>
<tr>
<td>FERC</td>
<td>509[^459]</td>
<td>308</td>
<td>62%</td>
<td>398 account reviews, 423 reports, 2,330 inspections[^460]</td>
</tr>
</tbody>
</table>

[^456]: Unless otherwise specified, figures are all examiner, inspection, or compliance positions for regulatory monitors and all Legal and Kindred employees from the U.S. Office of Personnel Management. See FedScope, supra note 75. Monitor Percent = Monitor Personnel / (Monitor Personnel + Legal Personnel). Figures reflect those reported through the end of 2016, although some figures have been updated since then.


[^459]: This figure includes Accounting, Auditing, Engineering, and General Business. Interview with FERC, supra note 432 (clarifying classifications).

<table>
<thead>
<tr>
<th>Agency</th>
<th>Monitor Personnel</th>
<th>Legal Personnel</th>
<th>Monitor Percent</th>
<th>Annual Monitor Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>FDA</td>
<td>11,493$^{461}$</td>
<td>203</td>
<td>98%</td>
<td>&gt;160,000 inspections$^{402}$</td>
</tr>
<tr>
<td>MSHA</td>
<td>1,524$^{463}$</td>
<td>141$^{464}$</td>
<td>91%</td>
<td>19,642 inspections$^{465}$</td>
</tr>
<tr>
<td>OSHA</td>
<td>1,827$^{466}$</td>
<td>277$^{467}$</td>
<td>93%</td>
<td>35,822 inspections$^{468}$</td>
</tr>
<tr>
<td>FAA</td>
<td>4,388$^{469}$</td>
<td>342</td>
<td>93%</td>
<td>Inspect 227,900 aircraft$^{470}$</td>
</tr>
<tr>
<td>FMCSA</td>
<td>644$^{471}$</td>
<td>46</td>
<td>93%</td>
<td>118,494 inspections$^{472}$</td>
</tr>
<tr>
<td>OCC</td>
<td>2,715</td>
<td>209</td>
<td>93%</td>
<td>768 applications$^{473}$</td>
</tr>
<tr>
<td>EPA</td>
<td>1,682$^{474}$</td>
<td>1,102</td>
<td>60%</td>
<td>13,500 inspections$^{475}$</td>
</tr>
</tbody>
</table>

$^{461}$ This figure includes scientists, engineers, consumer protection, and medical officers. Telephone Interview with FDA Employee (March 24, 2017) (describing job responsibilities).

$^{462}$ See Compliance Check Inspections, supra note 289.


$^{464}$ This figure was determined using the same methodology (for the same reasons) that was used to determine the legal personnel figure for OSHA. See infra note 467.


$^{466}$ OSHA, FY 2017 Budget Justification, supra note 182, 28–29.

$^{467}$ Legal employees are listed as zero for OSHA in the database, because legal is centralized in the Department of Labor (DOL). This figure is calculated as “Legal and kindred” (except Worker’s Compensation Claims examiners) from DOL proportioned out to OSHA’s percent of DOL employees. See FedScope, supra note 75; Interview with OSHA, supra note 147 (explaining how DOL solicitors serve the department’s various agencies).

$^{468}$ OSHA, supra note 182, at 45. This figure corresponds to the number of inspections performed in fiscal year 2015, not including inspections of federal agencies.

$^{469}$ This figure excludes 418 employees categorized as “General Inspection, Investigation, Enforcement, and Compliance,” due to the inability to obtain information differentiating the responsibilities within this category.

$^{470}$ FAA, FY 2009 Citizens’ Report: Summary of Performance and Financial Results 4 (2009), https://www.faa.gov/about/plans_reports/media/2009 Chízens_Report.pdf [https://perma.cc/YMP7-D5NA]. This statistic is from fiscal year 2009 because the FAA has not published updated figures; however, the agency’s more recent reports indicate no lessening of inspection responsibilities. See, e.g., FAA, FY 2017 Performance and Accountability Report 50 (2017), https://www.faa.gov/about/plans_reports/media/2017 FAA PAR.pdf [https://perma.cc/6ABR-8Y42] (“Since 2010, the FAA has seen an increase of approximately . . . 800 percent . . . in the number of inspections FAA performs to ensure safety compliance.”).

$^{471}$ See Fed. Motor Carrier Safety Admin., 2017 Pocket Guide to Large Truck and Bus Statistics 18 (June 2017), https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/81121/2017-pocket-guide-large-truck-and-bus-statistics-final-508c-0001.pdf [https://perma.cc/3KRF-WKJ6]. This figure counts only FMCSA Employees engaged in safety inspections, rather than the larger group of monitors, which would include managerial, support, and oversight positions, since they are not differentiated in the OPM database. Note that federal inspectors represent five percent of the total inspector force, most of whom are state employed. See id.

$^{472}$ See id. at 18. This total refers to the number of federal inspections conducted in 2016.


$^{474}$ This figure corresponds to employees categorized as “Environmental Engineers” in the OPM database. See FedScope, supra note 75; see also Joel A. Mintz, Enforcement at the EPA 11 (rev. ed. 2012) (confirming that the number of personnel

60
<table>
<thead>
<tr>
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<th>Monitor Percent</th>
<th>Annual Monitor Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>EEOC</td>
<td>N/A</td>
<td>522</td>
<td>0%</td>
<td>Analyses of 67,146 employer reports</td>
</tr>
<tr>
<td>FCC</td>
<td>308&lt;sup&gt;477&lt;/sup&gt;</td>
<td>602&lt;sup&gt;478&lt;/sup&gt;</td>
<td>34%</td>
<td>Undisclosed number of radio inspections and transaction reviews&lt;sup&gt;479&lt;/sup&gt;</td>
</tr>
<tr>
<td>FDIC</td>
<td>2,719</td>
<td>454</td>
<td>86%</td>
<td>6,892 examinations&lt;sup&gt;480&lt;/sup&gt;</td>
</tr>
<tr>
<td>Federal Reserve</td>
<td>1,382&lt;sup&gt;481&lt;/sup&gt;</td>
<td>69&lt;sup&gt;482&lt;/sup&gt;</td>
<td>95%</td>
<td>4,190&lt;sup&gt;483&lt;/sup&gt;</td>
</tr>
<tr>
<td>FTC</td>
<td>20&lt;sup&gt;484&lt;/sup&gt;</td>
<td>711</td>
<td>3%</td>
<td>~1,200 merger transactions&lt;sup&gt;485&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

conducting inspections for the EPA is approximately 1,600).


<sup>478</sup> See Inspection Fact Sheet, FCC, https://www.fcc.gov/reports-research/guides/inspection-fact-sheet [https://perma.cc/STN2-FX8U] (last visited Nov. 8, 2018) (describing why and how FCC inspections of radio installations occur); Mergers and Acquisitions, FCC, https://www.fcc.gov/proceedings-actions/mergers-and-acquisitions [https://perma.cc/THJ2-KFCG] (last visited Nov. 8, 2018) (describing the FCC’s responsibility for reviewing business transactions in which an FCC license will be transferred). The FCC does not provide readily accessible data about its monitoring activities, making it difficult to assess how extensively it uses its monitoring authority. Interviews indicated, however, that the agency engages in regular inspections of radio stations and processing of information submitted by businesses. See Interview with FCC, supra note 292.

<sup>479</sup> See FedScope, supra note 75. Interview with FCC, supra note 292 (explaining employee breakdowns).


<sup>481</sup> This figure reflects Engineers and Analysts from FedScope, supra note 75. Interview with FCC, supra note 292 (explaining employee breakdowns).

<sup>482</sup> This figure is an estimate of the number of employees who work on the Consumer Sentinel Network. See FTC Interview, supra note 277 (estimating the size of the Consumer Sentinel group); Consumer Sentinel Network Data Book 2017, FTC (March 2018), https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/consumer-sentinel-network-data-book-2017/main [https://perma.cc/M3SA-L7LN] (explaining that the Consumer Sentinel Network stores consumer complaints from various data contributors and makes them available to law enforcement).

<sup>483</sup> This figure is limited to Hart-Scott-Rodino Act (HSR) transactions. Since the annual aggregate figures released...
<table>
<thead>
<tr>
<th>Agency</th>
<th>Monitor Personnel</th>
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<th>Monitor Percent</th>
<th>Annual Monitor Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCUA</td>
<td>886</td>
<td>31</td>
<td>97%</td>
<td>9,465 contacts (^{486})</td>
</tr>
<tr>
<td>NLRB</td>
<td>0</td>
<td>797</td>
<td>0%</td>
<td>Minimal clear monitoring (^{487})</td>
</tr>
<tr>
<td>NRC</td>
<td>1,641</td>
<td>115</td>
<td>93%</td>
<td>Continual presence, 99 plants (^{488})</td>
</tr>
<tr>
<td>SEC</td>
<td>1,631 (^{489})</td>
<td>1,466 (^{490})</td>
<td>53%</td>
<td>2,400 examinations (^{491})</td>
</tr>
</tbody>
</table>

**Appendix B: Sanction Control**

<table>
<thead>
<tr>
<th>Dep’t (Agency)</th>
<th>Monitor Citations, Voluntary actions</th>
<th>Monitor Blocking Access</th>
<th>Monitor Formal Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>CFPB</td>
<td>$44 million in redress (^{492})</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>FSIS</td>
<td>25,516 noncompliances documented (^{493})</td>
<td>Pre-approve each meat and poultry product (^{494})</td>
<td>--</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Dep’t (Agency)</th>
<th>Monitor Citations, Voluntary actions</th>
<th>Monitor Blocking Access</th>
<th>Monitor Formal Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>FERC</td>
<td>214 recommendations, $5.3 million in refunds&lt;sup&gt;495&lt;/sup&gt;</td>
<td>--</td>
<td>Charge: license revocation&lt;sup&gt;496&lt;/sup&gt;</td>
</tr>
<tr>
<td>FDA</td>
<td>14,590 warning letters&lt;sup&gt;497&lt;/sup&gt;, 2,847 recalls&lt;sup&gt;498&lt;/sup&gt;</td>
<td>Investigate: penalties &amp; recommend charges&lt;sup&gt;499&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>MSHA</td>
<td>97,255 citations and orders&lt;sup&gt;500&lt;/sup&gt;</td>
<td>Inspectors order mine evacuations&lt;sup&gt;501&lt;/sup&gt;</td>
<td>Charge: $48 million in civil penalties&lt;sup&gt;502&lt;/sup&gt;</td>
</tr>
<tr>
<td>OSHA</td>
<td>65,044 violations&lt;sup&gt;503&lt;/sup&gt;</td>
<td>--</td>
<td>Charge: civil fines&lt;sup&gt;504&lt;/sup&gt;</td>
</tr>
<tr>
<td>FAA</td>
<td>Warning letters, pilot retraining&lt;sup&gt;505&lt;/sup&gt;</td>
<td>Pre-approve aircraft design&lt;sup&gt;506&lt;/sup&gt;</td>
<td>Investigate: civil penalties, license&lt;sup&gt;507&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>495</sup> See FERC, supra note 260, at 5.
<sup>496</sup> See Interview with FERC, supra note 432 (noting that monitors have the authority to influence license revocations but that, in practice, licenses are almost never revoked).
<sup>497</sup> See FDA, supra note 303, at 1.
<sup>498</sup> See id. For additional context on the FDA’s recall procedure, see Dep’t of Health & Human Servs., Office of Inspector General, A-01-15-01500, Early Alert: The Food and Drug Administration Does Not Have an Efficient and Effective Food Recall Initiation Process 1 (2016), https://oig.hhs.gov/oas/reports/region1/11501500.pdf [https://perma.cc/6W53-VGQ8] (finding that the FDA does not have “an efficient and effective food recall initiation process that helps ensure the safety of the Nation’s food supply”).
<sup>499</sup> See FERC, supra note 260, at 5.
<sup>501</sup> See supra note 334.
<sup>502</sup> See, e.g., Robinson, supra note 329, at 29–30.
<sup>503</sup> See FAA 2017 Performance and Accountability Report, supra note 470, at 12. (“The old standards ensured adequate levels of safety, but failed sufficiently to accommodate rapidly developing technological innovations. Today, instead of telling manufacturers how to build airplanes, the FAA’s regulations set performance standards and allow general aviation manufacturers to develop the designs which meet those standards.”); see also FAA, FY 2009 Citizens’ Report, supra note 470, at 6. Prior to issuing a voluntary automobile recall, the DOT requires monitoring groups to obtain consent from the legal department. See Interview with DOT Employee (Mar. 26, 2017).
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<sup>507</sup> See Robinson, supra note 329, at 31.  
<sup>511</sup> See OCC 2016 Annual Report, supra note 473, at 31.  
<sup>512</sup> See id. at 32; OCC, 2016 Bank Supervision, supra note 367, at 4–7.  
<sup>513</sup> See Interview with EPA, supra note 312 (stating that notices of minor violations found in inspection can be sent to the company without legal review or enforcement action if corrected within thirty days).  
<sup>515</sup> See Interview with FCC, supra note 292.  
<sup>516</sup> See id.  
<sup>517</sup> See id.  
<sup>518</sup> FDIC, supra note 480, at 25–27.  
<sup>519</sup> Interview with FDIC, supra note 304.  
<sup>520</sup> See Federal Reserve Annual Report 2015, supra note 481, at 57.  
<sup>521</sup> This figure is from 2016. See Nat’l Credit Union Admin., supra note 486, at 16.  
<sup>522</sup> Interview with NCUA employee (Apr. 11, 2017).  
<sup>523</sup> See U.S. Nuclear Regulatory Comm’n, Enforcement Program Annual Report 4, 18 (2015),
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524 See U.S. Nuclear Regulatory Comm’n, supra note 523, at 26.
526 See SEC, supra note 214, at 21.