Regulatory Monitors

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REGULATORY MONITORS

Rory Van Loo*

Like police officers patrolling the streets for crime, the front line for most large business regulators—Environmental Protection Agency (EPA) engineers, Consumer Financial Protection Bureau (CFPB) examiners, and Nuclear Regulatory Commission (NRC) 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 lawsuits and rulemaking, monitoring-based decisions are largely unobservable by the public, often unreviewable by courts, and explicitly excluded by the Administrative Procedure Act (APA). 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. Lawmakers swiftly passed the Meat Inspection Act, which charged 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 CFPB, with the first 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,” Congress 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 regulators to regularly collect non-public 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 manipulation, among other goals. Whereas the literature has paid considerable attention to administrative rulemaking and adjudication, it has left the story of the rise of regulatory monitoring largely untold.

Some agencies describe monitoring as their “backbone” or “core,” and it is

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8 See infra Part I.
9 The literature also has 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 (2016). It has also covered court-ordered monitoring. See, e.g., Veronica Root, The Monitor-Client Relationship, 100 VA. L. REV. 523, 531–33 (2014).
suredly not lost on administrative observers that it is a meaningful part of what agencies do. 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, or pore through accounting ledgers—merit the kind of sustained legal 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. 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. 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 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

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12 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, LAW & CONTEMP. PROBS., 2015, at 61, 70 (describing both main administrative law paradigms after World War II as relying on monitoring by agencies); see also GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 47 (6th ed. 2007) (acknowledging that most agency activity lies outside of 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.”).


14 While the examples throughout the Article discuss a variety of regulators, the empirical analysis and statutory history focus on all “large” agencies, which the U.S. Office of Personnel Management (OPM) defines as having more than 1,000 employees. To identify the set of all large regulators within this group, I located every agency with over 1,000 employees and a mission focused on regulating businesses in OPM’s “Cabinet-Level” agencies and “Large Independent Agencies.” See FedScope, Employment Cubes, U.S. OFF. OF PERS. MGMT., https://www.fedscope.opm.gov/employment.asp. (last visited April 14, 2017) (on file with the author). This selection process requires some judgment calls about the focus of an agency’s mission. For a list of the agencies, and a brief discussion of omitted agencies, see Appendix A.

15 Publicly available documents were sufficient for most of 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 semi-structured 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).
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 shut-down of oil-drilling operations or food manufacturing.

They also protect against devastating non-physical 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 front-line 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 monitor activity far less. Unlike police officers, for instance, EPA inspectors can enter private spaces without any suspicion of wrongdoing to make observations or collect samples.

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 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 policy making. Police

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18 See infra Part III.B.1.

19 On process punishment in criminal law, see, e.g., MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (2d ed. 1979).

20 Marshall v. Barlow’s, Inc., 436 U.S. 307, 313-14, 321 (1978); City of L.A. v. Patel, 135 S. Ct. 2443, 2452 (2015) (“Search regimes where no warrant is ever required may be reasonable where ‘special needs . . . make the warrant and probable-cause requirement impracticable’ and where the ‘primary purpose’ of the searches is ‘[d]istinguishable from the general interest in crime control.’”).

21 National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989) (holding that EPA inspectors can conduct warrantless searches).


23 See infra Part III.B.1.
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 CFPB examiner believes a bank’s internal review process for loan files 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, post-visit 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 I argue below, the emphasis on collaborative regulation syncs better with inspectors and examiners—who “work alongside, not against industry”—than with litigators, who rely more on adversarial legal authority 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 rule writing and litigation, agencies would be expected to rely more on less-constrained monitoring activities to exercise authority.

This Article’s conceptualization of regulatory monitors 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.

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24 See infra Part III.B.1.
26 See infra Part III.C.2.
28 See Hayes, supra note 10.
29 See Freeman, supra note 27, at 22, 28. Although the literature leaves little doubt that monitoring is an important part of newer governance models, there is a lack of sustained attention to the topic, and relevant discussions focus on how an agency regulates, not on who within the agency regulates.
30 See infra Part II.A.3.
33 See, e.g., Cary Coglianese et al., Seeking Truth for Power: Informational Strategy and Regulatory
Another related strand of scholarship argues that standard depictions of administrative law “are incomplete because agencies are typically treated as unitary entities.” Congress and agency leaders allocate clout among various sub-agency offices, divisions, and decision makers. These internal allocations “point[] the way toward a superior understanding of administrative law.” Early studies provided rich insights into agency organizational design, including 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 structure of both rulemaking and enforcement. Others have looked more broadly at how to improve front-line decision making, a category that includes inspectors and administrative law judges.

Policymaking, 89 MINN. L. REV. 277, 281-85 (2004) (“In this Article, we analyze regulators’ gathering of information from firms as a strategic game.”). Coglianese et al. do mention regulatory monitors’ roles only in passing, as they examine a broader set of information collection mechanisms, such as phone conversations, for a broader array of purposes, such as one-time rulemaking studies. See id. at 288-289, 305.

Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 YALE L.J. 1032 (2011) (“Standard questions in the theory of administrative law involve the allocation of power among legislatures, courts, the President, and various types of agencies.”); see also Jerry L. Mashaw, Federal Administration and Administrative Law in the Gilded Age, 119 YALE L.J. 1362, 1470 (2010) (noting recent growing attention to “internal administrative law” after long being “ignored by modern [] scholarship.”).

See Magill & Vermeule, supra note 34, at 1032.

See id.

See, e.g., John Braithwaite et al., An Enforcement Taxonomy of Regulatory Agencies, 9 LAW & POL’Y 323, 324 (1987); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 73 (1982). 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 but excluding trade and finance, and (c) most importantly, agencies’ overall regulatory approach rather than a sustained focus on regulatory monitors. See, e.g., id. 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.


See, e.g., id.; infra Part II.

See Magill & Vermeule, supra note 34, at 1035.

See Magill & Vermeule, supra note 34. Professor Nou does not mention regulatory monitors, and instead focuses on organizational mechanisms that give agency leaders control over information vital for decision making, especially related to rulemaking. See id. at 429-31.

See infra Part IV.A. For earlier valuable empirical studies of inspectors, see, e.g., Braithwaite et al., supra note 37; Bardach &
Despite the lack of sustained attention to regulatory monitors or articulation of their distinct role in the modern administrative state, 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. They are the gatekeepers for information, and thus for the “lifeblood” of agencies.

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 APA enables courts and the public to check agencies. Yet regulatory monitors operate in the “soft administrative law” space largely exempted from the APA. 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 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, six weeks into a new job as a front-line 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 the

Kagan, supra note 37.

44 When broad administrative law conversations mention monitoring, it is often of agencies, not firms. See Nou, supra note 38, at 423 (noting “administrative law’s overwhelming focus on the influence of agencies’ external monitors”).

45 See infra Part I.A.

46 See infra Part I.B. & III.

47 It does so by, for example, involving the public in notice and comment rulemaking. 5 U.S.C. § 553 (2012). It also specifies court review of final agency action. 5 U.S.C. § 702 (2012).


53 See S. REP. NO. 1744 (1962), reprinted in 1962 U.S.C.C.A.N. 2884, 2906-07 (detailing over 46 contacts by the drug’s manufacturer attempting to “expedite clearance,” including one with Dr. Kelsey’s immediate
drug, thalidomide, had caused an estimated 10,000 incidences of deaths or shrunken or missing limbs in babies born to mothers who had taken the drug.\textsuperscript{54} Mass harm was averted in the U.S. because a front-line examiner stood firm in exercising her agency’s statutory power.\textsuperscript{55}

As powerful actors, regulatory monitors have in recent decades served as an important lever for any presidential ramp-up or drop off in regulation.\textsuperscript{56} Most recently, as part of a planned “deconstruction of the administrative state,”\textsuperscript{57} President Trump has taken steps to make the FDA drug approval process “much faster,”\textsuperscript{58} and his appointees have moved to decrease federal inspections of polluting factories, examinations of banks, and monitoring of offshore oil platforms.\textsuperscript{59} 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 higher reporting requirements Dr. Kelsey had sought.\textsuperscript{60} Streamlining the drug approval process would now largely depend on changes to the law rather than convincing a front-line examiner. This opens the door for court, legislative, and public involvement. By contrast, in agencies such as the EPA and the Federal Reserve, legal rules and organizational structure leave regulatory monitors more susceptible to discretionary change.\textsuperscript{61}

The analysis below maps out this underappreciated administrative law of monitoring.\textsuperscript{62} An understanding of regulatory monitors and their surrounding legal framework is vital to improving the institutional design of agencies. 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 project of “making


\textsuperscript{55} See infra Part I.B.


\textsuperscript{57} Gillian E. Metzger, \textit{Foreword: 1930s Redux: The Administrative State Under Siege}, 131 HARV. L. REV. 1, 2 (2017) (“President Trump’s administration has proclaimed the “deconstruction of the administrative state” to be one of its main objectives.”).

\textsuperscript{58} See, e.g., David Crow, \textit{Trump Drugs Pledge Sparks Sector Rally: Pharmaceuticals}, FIN. TIMES, Feb. 1, 2017, at 12 (quoting President Trump).


\textsuperscript{61} See infra Part IV.A.

\textsuperscript{62} Administrative law here is meant in its broader sense. See Magill & Vermeule, supra note 34, 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.”).
administrative law more administrative.”\textsuperscript{63} They embody the larger concerns that so much of enforcement operates without the same mechanisms for legitimacy as seen in rulemaking and adjudication.\textsuperscript{64} Most significantly, a team paradigm may be needed of the administrative state, with regulatory lawyers and regulatory monitors as co-equal 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 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 minimums, 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.

\section*{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 the accumulation of monitoring statutory authority across large regulators.

\subsection*{A. Regulatory Monitors as Distinct Actors}

This Article defines regulatory monitors as those whose core power is to regularly obtain non-public information from businesses outside of the legal investigatory process. Monitoring can be broken down into two main types: visitation and reporting. Visit\textit{ation} authority allows regulators to physically enter private business space to observe or collect information. Report\textit{ing} requires firms to remotely transmit information, such as business records, which are then received by regulatory monitors within the agency.\textsuperscript{65}

\begin{thebibliography}{99}
\bibitem{lemos} See Lemos, supra note 42, at 931.
\bibitem{biber} These two categories are distinct from agencies monitoring publicly available data, which has been called “ambient” monitoring. See Eric Biber, \textit{The Problem of Environmental Monitoring}, 83 \textit{U. Colo. L. Rev.} 1, 8 (2011) (developing “the distinction between monitoring to determine whether private parties are in compliance...
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. Regulatory monitors are arguably ex ante because they aim to “secure compliance before violations occur.” But securing compliance is a very different function than writing rules.

That leaves ex post enforcement as a more natural place for monitoring in the standard depiction. 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.” 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 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 recognizes regulatory monitors’ distinct role, classifying attorneys in the “Legal and Kindred” category. It lists the 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 exercise statutory authority to peer inside firms.

**B. The Statutory Growth of Monitoring Authority**

The modern monitoring framework is the product of numerous ad hoc statutes that give different agencies very different monitoring powers within visitation and reporting. Today’s large business regulators can be historically classified into one of three categories: strong monitoring authority from the outset, gradual accumulation of monitoring authority, and limited monitoring power.

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70 See Witkowski, supra note 69.
72 See infra Part II.B.
73 For a description of how the agencies were chosen, see supra note 14.
1. Original Monitors: Banking, Transportation, and Utilities

Although historical treatments of the administrative state typically begin with federal control of the railroads of the 1880s, the first of today’s large business regulators was born in 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 main mission was to ensure compliance with federal banking laws, which sought to ensure a bank did not fail and thereby spark bank runs that could collapse the economy.

To pursue those goals, Congress structured the OCC around 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 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 to monitor, not to litigate.

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79 See id.
81 See White, Bank History, supra note 78, at 21.
82 National Banking Act of 1864, Pub. L. No. 103-325, 13 Stat. 99 (1864). Such decisions triggered formal procedures, such as appeals and hearings. See id.
Initially, the OCC focused on reviewing quarterly bank reports and monthly statements.\footnote{National Banking Act of 1864, Pub. L. No. 103-325, § 34, 13 Stat. 99 (1864).} It soon became clear that this enabled bankers to “window dress” reports.\footnote{See White, Bank History, supra note 78, at 21.} Congress responded by requiring a minimum of two surprise annual examinations of each national bank.\footnote{See id.} The OCC already had the ability to conduct examinations in its originating statute.\footnote{National Banking Act of 1864, Pub. L. No. 103-325, § 54, 13 Stat. 99 (1864).} As former bank teller O. Henry recounted, an OCC examiner “One day . . . inserted an official-looking card between the bars of the cashier’s window. Five minutes later the bank force was dancing at the beck and call of a national bank examiner.”\footnote{O. Henry, A Call Loan (1902); Hawke, supra note 84 (confirming O. Henry’s accounts of OCC bank examiners).} Examiners had the authority to enter any room, open any drawer, and look at any document.\footnote{White, Bank History, supra note 78, at 21.}

Although the basic examination tool remained largely unchanged until recently, the institutional and legal framework has swelled steadily. The 1907 financial panic led Congress to create the Federal Reserve,\footnote{See Peter Conti-Brown, The Power and Independence of the Federal Reserve (2015).} which could conduct examinations of national banks—like the OCC—and of state banks that chose to become “members.”\footnote{See id.} After depositor panics sparked bank runs that nearly collapsed the banking system and the stock market crashed in the 1920s, more agencies were added, including the Federal Deposit Insurance Corporation (FDIC) to insure bank deposits,\footnote{Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933). To become insured, banks had to accept federal examinations. Id. At first, the FDIC required approval from other banking regulators to examine, but in 1950 received broader discretion to conduct examinations of its member banks. White, Bank History, supra note 78, 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.} and the SEC “to protect [] the national banking system and . . . investors.”\footnote{The Securities Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934). The SEC had visitation comparable to that of banking regulators, but over securities exchanges, credit 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 . . . ”. The Securities Act of 1934, Pub. L. No. 73-291, § 17a, 48 Stat. 881 (1934). Credit unions were also subject to federal examination. Federal Credit Union Act, Pub L. No. 86-354, 48 Stat. 1216 (1934). Authority was assumed in 1970 by the National Credit Union Administration (NCUA). See NCUA, A Brief History of Credit Unions, https://www.ncua.gov/About/Pages/history.aspx.}

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), in 1932
built an early model for its modern safety program.\textsuperscript{96} The country was divided into six “Lighthouse districts,” within which a single “patrol pilot” would fly around, able to enter any airplane, open any airport door, or review any flight-related document.\textsuperscript{97} Like bank examiners, patrol pilots could sanction by recommending the “suspension and revocation” of licenses.\textsuperscript{98} Similarly extensive visitation can be found in the origins of today’s largest agencies overseeing energy and telecommunications, the Federal Regulatory Energy Commission (FERC)\textsuperscript{99} and Federal Communications Commission (FCC).\textsuperscript{100}

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 system that had by some measures become larger than the traditional banking system.\textsuperscript{101} The FAA today has visitorial

\textsuperscript{96} The FAA describes this program today as its “little-seen but still important . . . flight inspection program.” Scott Thompson, \textit{Flight Inspection History}, FED. AVIATION ADMIN. (May 2008), https://www.faa.gov/about/media/bchron.pdf (last visited Apr. 9, 2017).


\textsuperscript{98} See id. at § 3(b)-(d). Nationwide inspections of airports began the next year. FED. AVIATION ADMIN., FEDERAL HISTORICAL CHRONOLOGY, 1926-1996 (May 2008), https://www.faa.gov/about/media/b-chron.pdf (last visited Apr. 9, 2017).


\textsuperscript{100} For instance, some banks reorganized themselves by forming bank holding companies and thereby shielding new lines of business from examinations. \textit{White, Bank History, supra} note 78, at 28. Congress responded by extending Federal Reserve examinations to cover bank holding companies and subsidiaries. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (1956); Banking Holding Company Act Amendments of 1970, Pub. L. No. 91-607, 84 Stat. 1760 (1970). Within the past few years, financial regulators also gained examination authority over hedge funds. See Dodd-Frank Act § 404. As banks offered more products, such as credit cards, Congress enacted more laws, such as the 1968 Truth-in-Lending Act, thus widening the scope of examination. The Truth in Lending Act, 15 U.S.C. §§ 1601-1667(f) (2012). Banking crises between the 1980s and 2000s forced more comprehensive disclosures in regulatory reports. See \textit{White, Bank History, supra} note 78, at 34. Even third-party service providers that banks use—such as Amazon, IBM, Google, or other
and surveillance drone capabilities.\textsuperscript{102} Regulators’ initial oversight of hydroelectric dams has extended to other energy sources such as nuclear power.\textsuperscript{103} The FCC, by classifying wireless phone companies as common carriers, broadened its visitation authority originally intended for landline telephone companies.\textsuperscript{104}

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

Another set of agencies has gained monitoring authority more incrementally. Those focused on protecting from physical harm, including environment regulators, most closely fit this development pattern. The earliest arose in pharmaceuticals. After twenty-two children died from tainted vaccines in 1902,\textsuperscript{105} Congress authorized federal agents to “enter and inspect any establishment for the propagation and preparation of any virus, serum, toxin, [or] antitoxin.”\textsuperscript{106} Related visitorial statutes soon followed for meat and therapeutic drugs.\textsuperscript{107} These powers were more limited than those of banking and transportation regulators,\textsuperscript{108} since inspectors could not examine documents.\textsuperscript{109}

A shift began in 1938 when scores of people died after ingesting a new elixir used to treat sore throats.\textsuperscript{110} Had the company run tests, the poisonous properties would have been evident.\textsuperscript{111} This prompted legislation requiring pharmaceutical companies to submit to the FDA information about drugs before any sale.\textsuperscript{112} The

\textsuperscript{102} 49 U.S.C. § 40103 (2012).


\textsuperscript{106} Biologics Control Act of 1902, Pub. L. No. 57-244, § 3, 32 Stat. 728 (1902). This function ultimately went to the FDA. See Brian A. Liang, Regulating Follow-on Biologics, 44 HARV. J. ON LEGIS. 363, 433 (2007).

\textsuperscript{107} Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768 (1907); Meat Inspection Act, supra note 2.

\textsuperscript{108} See supra Part I.A.

\textsuperscript{109} Winton B. Rankin, Inspection Authority, 18 FOOD DRUG COSM. L.J. 673 (1963).


\textsuperscript{111} See id.

FDA had a 60-day window after each submission, during which it could intervene. Examiners could also ask for more information, triggering another 60-day window. 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—which happened regularly. Also, the number of times the FDA could follow up was limited.

Thus, the laws allowed drug companies to engage in similar “window dressing” that plagued banks’ early reports to the OCC.

It was in this statutory context that Dr. Kelsey received, in her first month on the job in 1961, the four-volume submission for thalidomide. Her supervisor observed that “[T]his is a very easy one. There will be no problems with sleeping pills.” Even though Dr. Kelsey repeatedly requested more scientific evidence before each 60-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. Consequently, her ability to block the drug had almost expired when reports of widespread birth defects emerged from Germany, which had approved the drug years earlier.

Fueled by public alarm that the U.S. 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 of safety, 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 obtained inspection authority over air polluters in the 1967 Air Quality Act.\(^\text{128}\) Since the EPA launched in 1970,\(^\text{129}\) it has regularly received new visitation over private companies in a range of sectors.\(^\text{130}\) In the same year as the EPA launched, Congress created the Occupational Safety and Health Administration (OSHA),\(^\text{131}\) whose originating statute empowered it to enter workplaces to conduct inspections, examine documents, and question employees.\(^\text{132}\)

Whereas prior federal visitorial powers targeted specific industries—drugs, food, banking, mining,\(^\text{133}\) 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*, the Supreme Court would find a Fourth Amendment search warrant requirement for industries without “a long tradition of close government supervision.”\(^\text{134}\) But this ruling has left many domains subject to warrantless monitoring searches.\(^\text{135}\) Moreover, inspectors in other industries regularly give a *Miranda*-style\(^\text{136}\) warning that the employer has the right


\(^{135}\) *Marshall* does not prevent warrantless administrative searches in various heavily regulated industries such as banking and mining. National-Standard Co. v. Adamkus, 881 F.2d 352 (7th Cir. 1989) (holding that EPA inspectors can conduct warrantless searches); Donovan v. Dewey, 452 U.S. 594 (1982) (allowing the Department of Labor to conduct warrantless searches for worker health and safety); Dow Chemical v. United States, 476 U.S. 227 (1986) (allowing the EPA to conduct warrantless aerial surveillance of private property).

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

Agencies focused on protecting individuals from economic harms have more limited monitoring authority than others. Spurred by Ida Tarbell’s popular writings about the “autocratic powers in commerce” of John D. Rockefeller’s Standard Oil Company, and the activism of President Theodore Roosevelt, the Federal Trade Commission (FTC) was founded in 1914. 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 organization, business, conduct, practices, and management.” President Theodore Roosevelt had unsuccessfully advocated for a stronger monitoring framework: mandatory notifications prior to mergers and acquisitions. In 1976, Congress extended that authority. 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 for either competition or consumer protection.

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137 Interview with OSHA Deputy Regional Administrator and Regional Administrator (Apr., 2017). 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, 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 note 137. If needed, an OSHA inspector can easily obtain a warrant without probable cause by showing the magistrate its plan. Id.

138 See supra Part I.B.1. Agencies’ visitorial tools vary in scope of data that can be requested.

139 The Securities and Exchange Commission (SEC) protects investors, but those investors are often institutional. Also, the agency was formed as part of a broader goal of protecting the financial system rather than individuals. See supra note 95 and accompanying text.


144 See Scherer, supra note 141, at 462.

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{146} The NLRB’s originating statute did not mention monitoring in the traditional sense.\textsuperscript{147} The agency arguably exercises a form of monitoring only through its on-site observation of union elections.\textsuperscript{148}

In the face of nationwide protests and unrest, the 1964 Civil Rights Act\textsuperscript{149} established the Equal Employment Opportunity Commission (EEOC) and required companies to maintain employment records.\textsuperscript{150} The original House bill for the agency had put forth information collection authority modeled after the FTC, but that language was removed in the face of intense Senate opposition.\textsuperscript{151} The final legislation specified that to collect records the EEOC must write rules.\textsuperscript{152} In both the EEOC and NLRB, “examination” occurs mostly after a firm is accused.\textsuperscript{153} 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.\textsuperscript{154}

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 represented a break with the traditional economic regulatory mold. The FTC had previously exercised consumer protection authority for many financial institutions implicated in the subprime mortgage crisis, such as nonbank mortgage servicers.\textsuperscript{155} Congress moved most of that authority to the CFPB only after millions of families lost their homes to foreclosure between 2005 and 2010, many due to unscrupulous lending.\textsuperscript{156} Unlike the FTC, the CFPB was given broad visitorial authority to regularly appear on-site.\textsuperscript{157} Thus, despite remaining more limited than other spheres, the largest regulators of individual economic rights can monitor to some extent. Additionally,

\begin{itemize}
\item \textsuperscript{146} National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449 (1935).
\item \textsuperscript{147} Id.
\item \textsuperscript{150} Id. at § 709(c).
\item \textsuperscript{151} Michael Z. Green, Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation, \textit{105} \textit{Dick. L. Rev.} 305, 320 (2001).
\item \textsuperscript{152} Id.
\item \textsuperscript{153} National Labor Relations Act of 1935, Pub. L. No. 74-198, § 11, 49 Stat. 449 (1935); Civil Rights Act of 1964, Pub. L. No. 88-352, § 709c, 78 Stat. 241 (1964); EEOC v. Shell Oil Co., 466 U.S. 54, 64 (1984) (“[EEOC] power to conduct an investigation can be exercised only after a specific charge has been filed in writing.”).
\item \textsuperscript{154} 29 C.F.R. § 1602.7 (2012).
\item \textsuperscript{155} Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5321, 5322(a)(2), 5491(a) (2012).
\item \textsuperscript{157} Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5514.
\end{itemize}
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.

C. 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 firms. This historical accumulation of federal authority spans other areas monitored outside large regulators, 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 by more than its underlying statutes. As then-Professor Elena Kagan recounted, “The history of the American administrative state is the history of competition among different entities for control of its policies . . . At the dawn of the regulatory state, Congress controlled administrative action by legislating precisely and clearly; agencies . . . functioned as mere transmission belt[s] to carry out legislative directives.” This approach proved untenable as the administrative state grew, requiring delegation of “unfettered discretion” to an expanding bureaucracy. Dissatisfaction with bureaucratic independence led to mechanisms giving interest groups more influence, which had its shortcomings. Kagan argued that President Clinton ushered in “an era of presidential administration.”

Internal agency groups also compete for control, but their history is more difficult to generalize. From a functional perspective, 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

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161 See Appendix A; supra Part I.B.
163 See id. at 2253 (summarizing the literature).
164 See id. at 2246.
general recognition that in the 1990s and 2000s new governance models took hold.\textsuperscript{166} Some observers believe that rulemaking still remains the dominant policy instrument,\textsuperscript{167} while others see a shift to either “policy through litigation, negotiated settlements, or the waiver of rules in individual contexts.”\textsuperscript{168}

This Part adds an unexamined dimension to that internal organization narrative by filling out the role of the monitoring group.\textsuperscript{169} 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{170} in regulation, or the perception that in “the administrative state . . . much is terribly wrong.”\textsuperscript{171} 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{172} 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{173} 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{174}

\textsuperscript{166} See infra Part II.A.
\textsuperscript{168} See Magill, \textit{supra} note 165, at 1398. Professors Magill and Vermeule identify various factors that reallocate power toward and away from lawyers, without distinguishing regulatory monitors or overall seeing a trend. See Magill & Vermeule, \textit{supra} note 34, at 1077.
\textsuperscript{169} 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{170} \textit{AYRES & BRAITHWAITE}, \textit{supra} note 27, at 158.
\textsuperscript{171} See Freeman, \textit{supra} note 27, at 2 (discussing widespread critiques of ossified regulation).
\textsuperscript{172} See Freeman, \textit{supra} note 27, at 2, 22 (identifying an emerging “collaborative governance model”); see also Lobel, \textit{supra} note 27 at 343.
\textsuperscript{174} Freeman, \textit{supra} note 27, at 22. This depiction intersects with elements of Professors Ayres and
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.” Firms that are 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.” Under a cooperative model, the parties can allegedly 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 regulatory monitors can be viewed as “nitpicky,” 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

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175 Id. at 22, 28.
176 Id. at 61.
178 See supra note 69 and accompanying text.
180 CONSUMER FINANCIAL PROTECTION BUREAU, OMBUDMAN’S OFFICE, FY2012 ANNUAL REPORT TO THE DIRECTOR 13 (2012).
181 Witkowski, supra note 69.
182 See Hawke, supra note 84 at 8.
183 See White, BANK HISTORY, supra note 78, at 21, 48.
184 See Robertson, supra note 75, at 71.
186 See Hayes, supra note 10.
monitors.

2. Compliance Departments and Self-Regulation

Many regulators now emphasize “management-based regulation.” Fiscal constraints simply make it impossible to monitor all private actions even for the most dangerous activities: Only one to two percent of all nuclear plant activities are subject to government inspection in the U.S. 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 “directs regulated organizations to engage in a planning process that aims toward the achievement of public goals, offering firms flexibility in how they achieve 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

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188 Peter K. Manning, The Limits of Knowledge, in MAKING REGULATORY POLICY (Keith Hawkins and John Thomas, eds., 1989).
189 See AYRES & BRAITHWAITE, supra note 27, at 4.
191 See Coglianese & Lazer, supra note 187 at 691.
194 See Michele DeStefano, Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer, 10 Hastings Bus. L.J. 71, 149 (2014).
195 See generally id.
196 Clean Air Act, 40 C.F.R. § 68.73 (2007).
197 Id. at § 68.220.
reports,\textsuperscript{198} which may result in a “determination of necessary revisions” to the company’s systems.\textsuperscript{199} Agencies also enlist a growing number of private third-party monitors to assess compliance.\textsuperscript{200}

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.\textsuperscript{201} This is particularly true when the agency delegates all monitoring to third parties.\textsuperscript{202} But replacement is not how agencies have mostly approached self-regulation. Many still conduct their own inspections, alongside industry self-monitoring.\textsuperscript{203} 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.\textsuperscript{204} 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.\textsuperscript{205} Consequently, any 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 pre-compliance 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

\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{202} 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 9.
\textsuperscript{203} See, e.g., Clean Air Act, 40 C.F.R. § 68.220 (2007).
\textsuperscript{205} Griffith, supra note 192, at 2127.
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 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.  

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.” 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.” 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. The EPA then shares “success stories” that can be adopted elsewhere. 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, the President, and courts. This oversight may drive agencies toward greater reliance on regulatory monitors for three main reasons. First, as a general matter, “[a]dministrative agencies, like trial judges facing appellate review, dislike having

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206 Interview with former CFPB employee (Mar., 2017).
207 Griffith, supra note 192, at 2127.
210 See Zaring, supra note 326, at 331.
212 See, e.g., Kagan, supra note 50.
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, “Warning letters are 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, it took on average over eight hundred days between a rule’s agenda publication and final adoption. When rules are not updated, front-line regulatory monitors or their supervisors must interpret old laws to apply them to new practices. If agencies are largely unable to write formal rules, and instead engage in soft rulemaking, agencies may be incentivized to write vaguer rules that are nonbinding. Imprecise rules force agencies to rely more on front-line 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

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216 Thomas 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 208 at 295 (showing that from 1990 to 2004 agencies increasingly referred to best practices as a form of informal rulemaking).
217 Mashaw & Harfst, supra note 436, at 443.
219 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.”).
222 See infra Part III.C.
224 Zaring, supra note 185, at 208.
lawyers only as needed with help in interpretation.\textsuperscript{225}

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{226} Most prominently, courts and the President have imposed cost-benefit analyses,\textsuperscript{227} and “lawyers will have little to contribute to this quintessentially technocratic problem.”\textsuperscript{228} Additionally, the Paperwork Reduction Act (PRA) constrains rule writers’ ability to collect supportive information from firms.\textsuperscript{229}

In contrast to these legal constraints on lawyers’ core activities, in recent years Congress has imposed widespread monitoring \textit{minimums}, such as annual or more frequent on-site examinations of credit rating organizations,\textsuperscript{230} food manufacturers,\textsuperscript{231} and oil producers.\textsuperscript{232} To be sure, statutes in some contexts require regular actions by rule writers and litigators \textit{if} an agency chooses to act. For the EPA to ban a chemical, for instance, it must write a rule.\textsuperscript{233} 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 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.

\textbf{1. Increased Sophistication}

\textsuperscript{225} \textit{See, e.g.}, \textsc{U.S. Equal Emp. Opportunity Comm’n, Fiscal Year 2015 Performance and Accountability Report} \url{https://www.eeoc.gov/eeoc/plan/upload/2015par.pdf} (mentioning how the EEOC engaged in 60 “technical assistance” visits).


\textsuperscript{228} Magill & Vermeule, \textit{supra} note 34, at 1051.

\textsuperscript{229} 44 \textsc{U.S.C.} §§ 3501-3521 (1980).

\textsuperscript{230} Dodd-Frank Act §§ 932(a)(8) (codified at 15 \textsc{U.S.C.} § 78).


\textsuperscript{232} 43 \textsc{U.S.C.} § 1348(c) (2012).

\textsuperscript{233} \textit{See, e.g.}, 15 \textsc{U.S.C.} § 2604(5)(a).
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 more regulatory monitors. Until recently, an examiner could “storm in [to a fair-sized national bank], count the cash, add up the deposits, look at the 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 esoteric [] 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.

Greater technical expertise elevates regulatory monitors’ status within agencies. The internal sophistication gap between regulatory monitors and lawyers has decreased as the gap between their objects of analysis—markets and laws—has shrunk.

2. Information Monopolies

Regulatory monitors may hold information monopolies compared not only to other legal actors, but also to other technocrats in the agency. Even if legal actors had access to all information that regulatory monitors collected, it would be of limited

234 See BSEE ANNUAL REPORT, supra note 17, at 15 (noting the increase in drill rigs).
237 See Hawke, supra note 84, at 2.
238 CONTI-BROWN, supra note 91, at 165.
239 See Hawke, supra note 84, at 2.
240 See id.
242 USDA INSPECTION, supra note 11, at 15.
243 U.S. DEP’T OF THE INTERIOR, supra note 5, at 55, 64 (requesting more funding for inspectors due to “increased complexity in OCS oil and gas activities”).
value because particular skills are required to find and understand the relevant parts of a large data set.

Moreover, 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, a new employee who joins 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. Thus, agencies’ other internal experts, such as scientists in the rulemaking division, may on their own lack insights indispensable for dynamic regulation. 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 decision making 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.

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

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244 See, e.g., Hawke, supra note 84, at 2.
245 Coglianese et al., supra note 33.
246 DEEPWATER REPORT, supra note 5, at 77; see also CONTI-BROWN, supra note 91, at 165.
devices that “continuously transmit data” to agencies. EPA sensory equipment on space satellites and inside factories can track businesses’ pollution. Billions of daily transactional data flow from energy companies to FERC and from securities firms to the SEC. Inter-agency pooling of these technologies multiplies the available data. Regulatory monitors then analyze these big data sets with advanced modeling and machine learning algorithms. As a result, in various agencies, “on-site time as a percentage of overall examination hours dropped,” and “inspectors [] conduct more thorough inspections.” Today, holding employees constant, regulatory monitors can process more non-public 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.” 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.” 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 authority demanded by external realities does not necessarily translate into authority used. Courts have held that an agency’s decision about the extent to which it “monitors as well as enforces compliance fall squarely within the agency’s exercise of discretion.” Inertia and internal politics influence organizational

248 U.S. DEP’T OF THE INTERIOR, supra note 5, at 57.
249 See Esty, supra note 235, at 156.
251 See, e.g., Reportable Food Registry for Industry, U.S. FOOD & DRUG ADMIN. (May 24, 2016), https://www.fda.gov/Food/ComplianceEnforcement/RFR/default.htm (describing how the FDA’s registry is linked to the NIH).
253 See FIN. INDUS. REG. AUTH., supra note 200, at 5 (estimating a decrease from 32 to 19%).
254 U.S. DEP’T OF THE INTERIOR, supra note 5, at 24 (estimating 30% to 40% savings).
256 See O’Henry, supra note 89; Hawke, supra note 84.
257 See Freeman, supra note 27, at 60 (describing EPA upgrades); see also Hawke, supra note 84 (describing the OCC’s “ongoing . . . on- and off-site monitoring”).
258 Gillis v. U.S. DEP’T OF HEALTH & HUMAN SERVS., 759 F.2d 565, 576 (6th Cir. 1985); Madison-Hughes v. Shalala, 80 F.3d 1121, 1129-31 (6th Cir. 1996) (ruling that the Department of Health and Human Service’s decision not to collect data about racial disparities in health services was unreviewable) (internal quotations removed).
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.

Due to data constraints, the legal figures combine all legal positions—including those working in litigation, rule writing, and the office of the general counsel. Comparisons between regulatory monitors and any single legal role would thus yield even higher regulatory monitor proportions than the figures offered below.

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 85% of the total regulatory monitor/legal personnel. Those three are also the only agencies in the set that have

259 Magill & Vermeule, supra note 34, at 1059.
260 See Rubin, supra note 63, at 97.
261 Eric Biber, The Importance of Resource Allocation in Administrative Law, 60 ADMIN L. REV. 1, 16 (2008); see also Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123 (3d Cir. 1998).
263 For a description of how the agencies were chosen, see supra note 14. The figures are mostly from the OPM. See U.S. OFF. OF PERS. MGMT., supra note 71. They are supplemented by interviews, annual reports, and other sources as necessary. For instance, the Federal Reserve does not report its personnel, which meant relying on annual reports and interviews. In some agencies, such as the FDA and EPA, regulatory monitors are spread throughout categories such as scientists, doctors, veterinarians, and engineers. Those groups were only counted when other sources indicated that they played a regulatory monitor role. It is possible the figures omit some regulatory monitors, thereby understating their presence.
264 See Appendix A.
no visitation authority. Interviews confirmed that most of these agencies’ lawyers litigate. This classification as litigator-dominant differs from a prominent 1980s descriptor of some agency groups as “legalistic,” which could apply to regulatory monitors.

The remaining fifteen agencies all have material numbers of regulatory monitors in both an absolute sense and relative to legal personnel. Five have some balance between the groups—the hybrids: the CFPB, EPA, FCC, FERC, and SEC. In the remaining eleven agencies, regulatory monitors make up over 85% of the combined regulatory monitor and legal workforce, making them monitor-dominant.

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 than human resource data. Nor can I establish a definitive link between design and behavior. Nonetheless, one indication from the data available reflects common sense: Agencies with sizeable regulatory monitor workforces (both hybrids and monitor-dominant agencies) extensively exercise statutory monitoring authority.

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. Although FTC competition lawyers regularly rely on key monitoring program—pre-merger report submissions—for consumer protection the agency depends on non-statutorily acquired information sources such as industry conferences, online consumer complaints, or litigators watching television in search of deceptive ads.

The remaining fifteen agencies—83% of the group—monitor significantly. Even hybrid agencies engage in sometimes over ten thousand inspections annually (e.g., the EPA) or regular analysis of private transactional data (FERC and the

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265 See supra Part I.B.
266 Interview with EEOC employee (Apr., 2017); Interview with NLRB employee (Apr., 2017); Interview with FTC Bureau of Consumer Protection employee (Apr., 2017); Interview with former FTC Bureau of Competition employee (Mar., 2017).
267 The term “legalistic” is a broader concept that was used to describe, for example, some types of inspectors who operated in a more legalistic (by the book) manner. See BARDACH & KAGAN, supra note 37, at 93.
268 See Appendix A.
269 See id.
270 See Christopher R. Berry & Jacob E. Gersen, Agency Design and Political Control, 126 YALE L.J. 1002 (2017) (“Unfortunately, there is virtually no empirical scholarship that demonstrates a link between agency design and political responsiveness or agency behavior.”).
271 See infra Part IV.A.1.
272 U.S. EQUAL EMP. OPPORTUNITY COMM’N, FISCAL YEAR 2016 PERFORMANCE AND ACCOUNTABILITY REPORT 93 (identifying 245 Commissioner charges and directed investigations out of a total of 91,503 charges investigated). The EEOC receives cases mostly from employees. See id.
274 See Appendix A.
Monitor-dominant agencies tend to have higher monitoring volumes and greater likelihood of continuous presence. In 2016, the FDA conducted 164,696 surprise tobacco inspections alone, of retailers ranging from CVS to mom-and-pop stores. The NRC’s “resident inspectors” and the Federal Reserve’s “resident examiners” 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. The following sections discuss those and other high-impact design choices. Nonetheless, if the literature is correct that personnel numbers reflect power and priorities, only sixteen percent of the major regulators studied clearly favor lawyers, while more than half prioritize regulatory monitors.

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” ranging from warning letters to prosecution. 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 all major enforcement decisions 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 play something close to a prosecutorial role. A taxonomy of that participation follows.

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275 See id.
277 NUCLEAR REGULATORY COMM’N, ASSESSMENT OF EFFICIENCIES TO BE GAINED FROM CONSOLIDATING OR ELIMINATING REGIONAL OFFICES (June 26, 2003), http://www.nrc.gov/docs/ML0314/ML031470121.pdf.
278 See Levitin, supra note 48, at 2044.
279 See Appendix A.
280 See BSEE ANNUAL REPORT, supra note 17, at 23.
1. Citations, Recommendations, and Warnings

In 1992, Professors Ayres and Braithwaite articulated an emerging “responsive regulation” through a conceptual pyramid, replicated in Diagram I, in which “the proportion of space at each layer represents the proportion of enforcement activity.”\textsuperscript{282} At the larger bottom layer of their pyramid are persuasion and warning letters, and above is smaller space for formal procedures such as civil penalties.\textsuperscript{283} Ayres and Braithwaite provide examples of regulatory monitors only in passing, and were not exploring the implications of responsive regulation for various internal agency groups. But their pyramid implies that the group managing the bottom layer of mostly unreviewable conduct controls a large portion of enforcement.\textsuperscript{284}

At fifteen of the nineteen largest regulators, there is evidence that regulatory monitors drive this activity at the base of the pyramid,\textsuperscript{285} which includes public “noncompliance” notifications and confidential “resolutions.”\textsuperscript{286} Although not all agencies release such figures, those available reflect the pyramid’s space allocation in that the quantity of less formal activity dwarfs more formal proceedings.\textsuperscript{287}

\textsuperscript{281} Based on Ayres & Braithwaite, supra note 27, at 35.
\textsuperscript{282} See Ayres & Braithwaite, supra note 27, at 35.
\textsuperscript{283} See id.
\textsuperscript{284} See supra Part II.A.3.
\textsuperscript{285} This includes all agencies except the FCC, EEOC, NLRB, and FTC. See Appendix B.
\textsuperscript{286} See, e.g., FERC Report, supra note 250, at 39.
\textsuperscript{287} See Appendix B.
instance, in 2016, the FDA’s inspections group issued 14,590 warning letters, while its legal division took only twenty-one enforcement actions.\textsuperscript{288}

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 cooperate when informally advised to take a course of action.\textsuperscript{289} 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.\textsuperscript{290}

Why would a firm comply with these expensive recommendations? 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.”\textsuperscript{291} 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

In at least eleven of the nineteen agencies, regulatory monitors can ex ante block a product from entering the market or ex post suspend access.\textsuperscript{292} Pre-approval may be required only for new activities, such as launching new medical devices or opening a new bank branch.\textsuperscript{293} Other times agencies must approve every product, as is the case for every chicken carcass sold in the U.S.\textsuperscript{294} Even when agencies set up an appeals process for regulatory monitor decisions, that option may not be practical, and the appeals process often runs through the regulatory monitors.\textsuperscript{295}

After a product enters the market, many regulatory monitors can order or request a halt in operations. Federal regulators can recall toys, automobiles, and food based

\textsuperscript{289} FERC REPORT, supra note 250, at 35 (reporting that energy companies implement 98 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., 2017) (stating that financial institutions “almost always” comply with examiners’ requests).
\textsuperscript{290} CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 11 (Spring, 2016). 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 REPORT, supra note 250, at 39.
\textsuperscript{291} See REGULATORY PROCEDURES MANUAL, supra note 218, at 2.
\textsuperscript{292} The eleven agencies are the FDA, OCC, USDA (FSIS), FAA, FCC, FDIC, Federal Reserve, FMCSA, MSHA, SEC, and NRC. See Appendix B.
\textsuperscript{294} See USDA INSPECTION, supra note 11, at 15.
\textsuperscript{295} See infra Part IV.B.
on health or safety concerns. Environmental inspectors can shut down companies that are discharging hazardous chemicals.

3. The Process as Punishment

Agencies have discretion to increase monitoring intensity, whether officially or unofficially. 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 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 “higher penalties and more aggressive, targeted enforcement will provide a greater deterrent.” The EPA’s audit policy program officially only offers reduced penalties for violations as a reward for good behavior, but a statistical study found that well-behaving firms also were subject to fewer inspections, even controlling for other factors.

Regulatory monitors’ scrutiny can be costly to firms, and firms predictably seek to avoid intense monitoring. In environmental negotiated rulemaking, 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.

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296 See, e.g., Fact Sheets & Presentations, supra note 293.
297 See BSEE ANNUAL REPORT, supra note 17, at 23-24; 30 C.F.R. 250.10 (2012); Interview with former EPA employee A (Apr., 2017).
298 See, e.g., Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective 45, 52 ADMIN. CONF. OF THE U.S., (“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 who have a good track record.”).
299 For example, that could imply the inspection was a final determination of rights or not part of an “administrative plan.” See Marshall, 436 U.S.
301 See OMB Watch, supra note 56, at 6-7.
303 See id.
304 See Parrillo, supra note 298, at 52.
305 See Freeman, supra note 27, at 67.
306 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 & John R. Fleder, supra note 289, at 480.
307 See id.
4. Investigations and Charges

Regulators can allocate investigatory control 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.\(^3\)

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.\(^3\) 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 decision making.”\(^4\)

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.\(^5\) 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.”\(^6\) That process led to $3.7 million in civil penalties in 2015.\(^7\) OSHA inspectors in the vast majority of cases set fines and negotiate final settlements with businesses without ever involving litigators.\(^8\) Thus, regulatory monitors may serve as investigators, prosecutors, and de facto final decision makers.

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The confluence of case-specific sanction control, as well as the degree of regulatory monitors’ information monopoly,\(^9\) provides an overall sense of their

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3. See id.
7. See Civil Penalties Assessments and Appeals, supra note 311 (emphasis added).
8. See BSEE ANNUAL REPORT, supra note 17, at 23-24.
9. After OSHA inspectors and their supervisors decide on civil penalties, companies may then pay, negotiate, or file a legal appeal. By one regional leadership’s estimate, firms rarely appeal, and about eighty percent of the time a negotiation ensues. OSHA inspectors do not usually involve solicitors unless the negotiations falter. Interview with OSHA, supra note 137.
10. See supra Part II.B.2.
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 non-quantifiable regulatory monitors’ interventions can have far-reaching impact.

Despite variation and comparison difficulties, at fifteen of nineteen major agencies studied—all except the FCC, FTC, EEOC, and NLRB—regulatory monitors have significant enforcement influence. 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.

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

Professors Daniel Solove and Woodrow Hartzog have documented how, since the 1990s, FTC enforcement lawyers have created a common law of privacy “without a meaningful body of judicial decisions.” FTC lawyers have done so through settlement agreements, which set industry-wide practices. Individual regulatory monitor determinations can have a similar effect. The Freedom of Information Act, executive orders, and the information age have combined to make hundreds of thousands of regulatory monitor reports and warning letters available. 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 over-the-counter drug preparation, “a technician leaned forward into the ISO 5 hood resting both elbows on the hood and covering the ventilation grid. . . hundreds of dead insects” lay throughout the facilities, and a follow-up laboratory analysis revealed “spore-forming bacteria.” The FDA’s recommendations to Walgreens

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317 See Appendix B.
319 See id.
regarding behavioral changes are also specific.\textsuperscript{321}

Like a lawyer to a judge, firms use these texts to plead their case.\textsuperscript{322} The firm might argue that in a prior inspection at a different firm, similar observations led to different recommendations. 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.”\textsuperscript{323} Firms study regulatory monitors’ reports to learn how to operate in the future. Since the reports can contain specific recommendations not required by law,\textsuperscript{324} 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 do observe, often running close to a thousand pages in length.\textsuperscript{325} Firms meticulously study these texts to adjust behavior.\textsuperscript{326} 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.\textsuperscript{327} 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.\textsuperscript{328} But a firm may still choose to follow the manual simply because it reflects the expectations of a powerful government actor.\textsuperscript{329}

In a minority of industries, such as finance and securities, regulatory monitors also lead formal rulemaking related to their expertise.\textsuperscript{330} 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.\textsuperscript{331}

Regulatory monitors’ expertise enables them to influence both formal and soft

\begin{itemize}
\item \textsuperscript{321} See id.
\item \textsuperscript{322} Interview with OSHA, supra note 137; Interview with EPA, supra note 297.
\item \textsuperscript{324} See supra Part II.A.2.
\item \textsuperscript{326} See McGarity, supra note 216, at 1393-96.
\item \textsuperscript{327} See supra Part II.A.2.
\item \textsuperscript{328} United States v. Bioclinical Sys., Inc., 666 F. Supp. 82, 84 (D. Md. 1987).
\item \textsuperscript{329} See supra Part III.B.1.
\item \textsuperscript{330} See FERC REPORT, supra note 250, at 52, 58 (describing a FERC regulatory monitor’s recent writing of a rule for notice and comment); Interview with BSEE, supra note 311 (stating that Department of the Interior regulatory monitors draft offshore energy regulations).
\item \textsuperscript{331} See id.
\end{itemize}
rulemaking, but organizational configurations can lessen information asymmetries. Some agencies mandate the 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 policy making.

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 DC may have no field experience, and instead manages a working group of regional inspectors to draft the actual text.

3. Public Shaming

Many agencies publicly post the name of the business alongside the violations identified by regulatory monitors. One can learn, for example, that in 2014, oil inspectors shut down certain offshore Exxon operations thirteen times. A January 27, 2017 OSHA inspection of an Amazon warehouse uncovered a “serious” worker health violation leading to a $5,975 fine. On March 2, 2017, FDA inspectors caught Wal-Mart selling tobacco to minors in cities ranging from Memphis, TN, to Scottsdale, AZ. Companies fear bad regulatory publicity, a risk that has grown in

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332 See supra Part II.B; cf. Nou, supra note 38, at 425-31 (discussing broadly similar mechanisms).
334 See, e.g., USDA INSPECTION, supra note 11, at 19 (“[The Office of] Policy and Program Development develops regulations as well instructions for inspectors to implement these regulations.”).
335 FED. AVIATION ADMIN., UNITED STATES STANDARD FLIGHT INSPECTION MANUAL 15-65 (Apr., 2015).
336 Interview with EPA, supra note 297.
337 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 CONSUMER FIN. PROT. BUREAU, supra note 290, at 75.
the Internet era because sanction results can spread more easily.\textsuperscript{341} Consequently, the public shaming function provides a potentially powerful mechanism for regulatory monitors to inflict direct punishment.

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.”\textsuperscript{342} These functions create a virtuous cycle. Regulatory monitors regularly write or advocate for rules and policies that give them more data.\textsuperscript{343} 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 modern state 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.\textsuperscript{344} Currently, various stakeholders outside the agency can influence regulatory monitors—most directly, politicians. A watchdog group’s study of President Obama’s first year cited mostly regulatory monitors’ activity in concluding that agencies “appear to be exercising

\textsuperscript{341} Nathan Cortez, \textit{Adverse Publicity by Administrative Agencies in the Internet Era}, 2011 BYU L. REV. 1371 (2011).


\textsuperscript{343} See, e.g., Amendments to a Form & Investment Advisers Act Rules, 80 Fed. Reg. 33717 (Jun. 12, 2015) (proposing “significant new reporting requirements for mutual funds and other registered investment companies.”); FERC REPORT, supra note 250, at 52, 58 (proposing new energy data submission).

\textsuperscript{344} See Lemos, \textit{supra} note 42, at 946; see also Jacob E. Gersen & Matthew C. Stephenson, \textit{Over-Accountability}, 6 J. LEG. ANALYSIS 185 (2014) (arguing that more accountability is not always necessarily in the public’s best interests).
their enforcement authority more strenuously than they had in recent years.”345 As President Trump has sought to “reorganize[] the executive branch,”346 regulatory monitors have provided options.347 Although greater influence by elected politicians is generally seen as advancing majoritarian preferences, “a majority of the electorate is still better off with some degree of bureaucratic insulation from political control.”348

This section explores the legal and organizational web of external constraints on regulatory monitors. Some constraints guard against regulatory monitoring inactivity—most notably, statutory minimums. Others serve more to restrain regulatory monitors’ excesses, such as formal appeals processes. A third category could prevent either inactivity or excess—public disclosures, paper trails, and appointments.

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 Gorsuch349 suspended hazardous waste rules and reduced legal cases by 84 percent.350 An “awakened, angry and energized public,”351 sensing that businesses had captured the agency, paved the way for Gorsuch’s resignation in less than two years.352 Visibility can also curtail excesses, as demonstrated by videos of police officer abuses prompting greater oversight.353

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.354

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, the FDA posts for each inspection 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 post-accident investigations, but not its regular inspections.

Moreover, these 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.

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. In particular, transparency could prompt firms to stem the exchange of information to avoid bad publicity.\(^{367}\)

Transparency has limits. Chain-of-command disclosures may also leave much unclear, as “the inner workings of complex bureaucracies [cannot] be captured neatly in charts or guidelines.”\(^{368}\) Transparency has also been used as a political tool, increasingly for deregulatory goals.\(^{369}\)

But even in anonymous form, chain-of-command reports can have value. If the number of overturned front-line regulatory monitors’ decisions changes significantly over time, the reports could suggest that leaders are captured by industry or inadequately supervising. The data could also enable third parties to identify regulatory monitor best practices or abuse of power. Professor Daniel Ho’s recent study of publicly available health inspection microdata found that inconsistent application of the law subjected restaurants to an “inspector lottery.”\(^{370}\) At least one agency subsequently adopted institutional improvements indicated by his findings.\(^{371}\) 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

Transparency mandates for regulatory monitors must be nuanced because so much of what they do is informal. Some activities might need to remain private due to the necessity to protect companies’ trade secrets. Also, mandating the release of reports may have limited efficacy because regulatory monitors’ decisions might not produce reports. For example, although the Clean Air Act mandates the publication of any preliminary audit determinations, it does not require a decision or report, stating only that regulators “may issue the owner or operator of a stationary source a

\(^{367}\) See Coglianese et al., supra note 33.

\(^{368}\) See Nou, supra note 38, at 482.

\(^{369}\) See generally David Pozen, Transparency’s Ideological Drift, 128 YALE L.J. (forthcoming 2018).

\(^{370}\) See David E. Ho, Fudging the Nudge: Information Disclosure and Restaurant Grading, 122 YALE L.J. 574, 574, 610 (2012).

\(^{371}\) Id., supra note 370, at 653. This field experiment tested a mechanism indicated as significant by the original database study. See id.; Ho, supra note 370, at 653.
written preliminary determination.”\textsuperscript{372} Agency leaders thus might handle corrections informally or not at all, thereby circumventing disclosure.

Congress has forced certain regulatory monitors to document their initial perspectives. In the Food, Drug, and Cosmetic Act, Congress mandated that “prior to leaving the premises, the officer or employee making the inspection 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{373} Forcing regulatory monitors to record and disclose their judgements would improve identification of employee-specific outliers.\textsuperscript{374}

Even when kept private, an agency paper trail could deter problematic managerial behavior. For example, OCC examiner Victor Del Tredici caught a bank president illegally diverting loan fees into his personal account,\textsuperscript{375} but Del Tredici’s superiors ignored his report for nine months.\textsuperscript{376} 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{377} The paper trail also helped restore Del Tredici’s standing after OCC leadership had stripped him of his authorities over the incident.\textsuperscript{378} 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{379}

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 front-line decisions.\textsuperscript{380} Also, managerial reviews of regulatory monitors help fulfill what Professor Gillian Metzger has argued is a “Constitutional duty to supervise” agency employees.\textsuperscript{381}

3. Statutory Minimums

Congress deploys statutory “timing rules”\textsuperscript{382} by requiring an agency to complete

\textsuperscript{372} 40 C.F.R. § 68.220(e) (emphasis added).
\textsuperscript{373} See, e.g., 21 U.S.C. § 374(b) (2012).
\textsuperscript{374} See supra Part IV.A.2.
\textsuperscript{376} See id.
\textsuperscript{378} See id.
\textsuperscript{380} See, e.g., Ho, supra note 43, at 96.
\textsuperscript{382} Jacob E. Gersen & Eric A. Posner, Timing Rules and Legal Institutions, 121 HARV. L. REV. 543 (2007) (“A timing rule, as we define it, is a rule that substantially affect the timing of a government action, including legislation and executive action.”).
a minimal amount of monitoring each year. Lawmakers sometimes imposed a minimum frequency of inspections along with the original authorization of monitoring authority.\footnote{383} More often, however, minimums were mandated or increased in response to an often-observed regulatory pattern in which “history keeps repeating itself.”\footnote{384} 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.”\footnote{385}

Minimums alone, like transparency or paper trails, have limits. Regulatory monitors may not comply with legislative agendas, particularly following budget cuts.\footnote{386} Indeed, agencies such as the EPA usually face more than ten deadlines in a given year across all of its activities, and sometimes over fifty deadlines.\footnote{387} Courts have shown a willingness to compel agencies to take action after missing deadlines.\footnote{388} But the “end-game” in such situations is unclear because higher courts “have exhibited a virtually complete unwillingness” to imprison agency leaders.\footnote{389} Moreover, agencies can satisfy minimums perfunctorily, such as when bank regulators conducted “drive-by examinations” leading up to the financial crisis.\footnote{380} Minimums may also hinder agencies’ ability to adjust to fast-changing markets if, for example, effective remote monitoring becomes achievable.

383 See, e.g., Burke, supra note 96, at 15 (noting semiannual inspections of steamboats).
391 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).
392 Jacob E. Gersen & Anne Joseph O’Connell, Deadlines in Administrative Law, 156 U. PA. L. REV. 923, 939, Figure 2 (2008).
393 See id. at 952-54.
394 Nicholas R. Parrillo, The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power, 131 HARV. L. REV. 685, 686 (2018); Gersen & O’Connell, supra note 392, at 964 (“Most statutes that impose deadlines are silent about what should happen if the agency misses the deadline.”)
395 See, e.g., Levitin, supra note 48, at 2040-43.
Still, legislative strictures generally, and deadlines in particular, likely influence agencies.\textsuperscript{396} Even independent regulators, over which Congress has less influence, report compliance with statutory floors.\textsuperscript{397} 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{398} She later released forty-six taped hours of “cozy” conversations between examiners and bankers, and non-action despite “window dressing” of reports and “shady” behavior.\textsuperscript{399} The incident prompted Congressional scrutiny, and foreshadowed later criminal charges resulting from blurred lines between the regulator and bank.\textsuperscript{400} Other bureaucrats have used Wikileaks to reveal documents.\textsuperscript{401} 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.

4. Appointments

A circuit split regarding the Appointments Clause has revived debates about the meaning of “officer.”\textsuperscript{402} Many agencies’ legal division heads are considered “inferior officers,” which triggers appointment processes that enable external actors to have a say in whether that person is fit for the post. The heads of regulatory monitors are not seen as requiring appointments.\textsuperscript{403} This appointments asymmetry is inconsistent with the actual influence that each group has on the administration of the law. Directors of regulatory monitors in some agencies have similar or greater ability to oversee the


\textsuperscript{399}See id.

\textsuperscript{400}Ben Protess & Peter Eavis, Ex-Goldman Banker to Plead Guilty in Fed Leak, N.Y. Times (Oct. 26, 2015), at A1.


\textsuperscript{402}See Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016).

final legal rights of regulated entities.\textsuperscript{404}

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.\textsuperscript{405} An understanding of monitors, by illuminating agency inner workings, thus not only helps identify important mechanisms for altering agency accountability and independence, but also potential administrative law inconsistencies in need of reconciliation.

\section*{B. Regulatory Lawyers as Teammates 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.”\textsuperscript{406} That literature has focused on other groups or functions: how civil servants can check agency leaders,\textsuperscript{407} how separation of enforcers and adjudicators advances due process,\textsuperscript{408} and how little-noticed inspectors general provide agency oversight from within.\textsuperscript{409} 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.\textsuperscript{410} Two fundamental design decisions influence the extent to which regulatory monitors operate as agency rivals: resource allocation and cross-functional independence.

\subsection*{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.\textsuperscript{411} A crucial agency-specific question is what regulatory monitor allocations are optimal. Definitive answers to such complex questions must await empirical studies comparing different models in similar contexts. One hypothesis to

\begin{thebibliography}{100}
\bibitem{404}See supra Part III.B.
\bibitem{405}See Burke, supra note 96, at 20.
\bibitem{407}See, e.g., Michaels, supra note 406, at 236-38.
\bibitem{408}See, e.g., Barkow, supra note 22, at 890, 896.
\bibitem{409}Shirin Sinnar, Protecting Rights from Within? Inspectors General and National Security Oversight, 65 STAN. L. REV. 102 (2013). Inspectors general are different from inspectors, with the former inspecting government actors and the latter inspecting private (external-to-the-agency) entities.
\bibitem{410}This issue touches on two larger debates that have been covered. The first is the tradeoffs between lawyers and technocrats. \textit{See generally} FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009). Second, scholars have explored how to design agencies for the optimal collection of information. \textit{See} Stephenson, supra note 31 (offering a framework for designing public institutions with adequate incentives for acquiring policy-relevant information).
\bibitem{411}See supra Part III.A.
\end{thebibliography}
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 wage discrimination. And Frank Pasquale has argued that more monitoring of medical devices could save lives.

At the other extreme, it is important to study the potential pitfalls of over-reliance 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. Policy makers 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. Capture is difficult to prove, and lawyers are not immune. But regulatory monitors’ non-adversarial function, and their regular and frequent contact

415 See supra Part II.A.
419 See Conti-Brown, supra note 91, at 93.
420 The Enron scandal shifted FERC from a regulatory monitor-driven to a litigator-driven agency. See Principal, supra note 418; Interview with FERC employee (Apr., 2017). Banking and oil regulators remain regulatory monitor-dominant. See Appendix A.
421 See Levitin, supra note 48, at 2041; DEEPWATER REPORT, supra note 5, at 78.
422 See, e.g., Mashaw et al., Administrative Law, p. 33.
with businesses,\(^{423}\) may make them particularly susceptible.

2. Appeals

Formal appeals and appointment processes could in theory provide a check on regulatory monitor extremes. 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.\(^{424}\) However, Congress has typically imposed far lower procedural oversight of regulatory monitors. A Department of the Interior authorizing statute requires formal adjudicative processes mirroring those in “the district courts of the United States” for offshore oil platform investigations, but not for inspections.\(^{425}\) The CFPB’s founding statute requires administrative law appeals for CFPB enforcement actions but not for examination findings.\(^{426}\) Such agency-specific statutes mirror the APA’s exemption of “proceedings in which decisions rest solely on inspections.”\(^{427}\)

Statutory lenience regarding regulatory monitor appeals has afforded many agency leaders great discretion regarding how to structure regulatory monitor-related decisions. Many agencies have nonetheless built formal processes enabling firms to appeal regulatory monitors’ decisions, even when not required by statute. Some agencies leave appeals within the regulatory monitor chain of command.\(^{428}\) Others route regulatory monitors’ appeals through administrative law judges.\(^{429}\) The design of the appeals process determines the extent to which regulated entities can force a peer review by a lawyer.

3. Monitor-Lawyer Teams

Once an agency’s leaders have decided to deploy both regulatory monitors and regulatory lawyers, and regardless of the formal appeals process, a number of questions remain about how these groups should interact on an ongoing basis. 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 have visibility into each others’ activities, and may consult one another. But they have separate offices and operate separate tracks for resolving even multi-million dollar

\(^{423}\) See supra note 277.

\(^{424}\) See, e.g., Biber & Ruhl, supra note 12, at 145-48.

\(^{425}\) 43 U.S.C. § 1348 (c)-(d), (f) (2012).


\(^{429}\) See, e.g., 30 CFR 290.2 (Department of the Interior appeals).
wrongdoing.

In contrast, the EPA does not organizationally separate out the inspection function. 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 co-authoring legal briefs. 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.

These divergent organizational designs imply that agency leaders believe organizational relationships between lawyers and regulatory monitors matter. Additionally, the SEC and the Department of Health and Human Services (HHS) have mandated that malefiant companies separate their compliance and legal departments. 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.

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. But 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 and studied more closely. Regardless, the traditional aims 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 risks obscuring

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431 Interview with EPA, supra note 297; JOEL A. MINTZ, ENFORCEMENT AT THE EPA 113 (2012).
432 Interview with EPA, supra note 297; Cf. Schauer, supra note 410 (discussing lawyer’s approach to reasoning). Peer review alone can improve regulatory monitor performance. See Ho, supra note 43.
433 For a critique of these mandates, see DeStefano, supra note 194, at 71.
434 See supra Part II.A.2. (discussing self-regulation).
435 Peer review of inspectors has been studied in great depth, but not peer review across these two groups. See supra notes xx to xx. Nor have scholars turned their attention to the ideal level of organizational dependence among regulatory monitors and regulatory lawyers.
agencies’ vital “internal laws.” 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 inter-group processes should be added to the toolbox for designing agencies to increase effectiveness and accountability. 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.” 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.

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436 Mashaw & Harfst, supra note 213, at 443 (“Bureaucratic institutions have their own internal laws, expressed both in regulation and in routine.”).

437 See, e.g., Barkow supra note 51 (offering other anti-capture features); Gersen & Stephenson, supra note 344 (providing an overview of over-accountability and possible solutions).

APPENDIX A

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), Fed. Motor Carrier Safety Administration (FMCSA), Office of the Comptroller of the Currency (OCC), Environmental Protection Agency (EPA), Equal Employment Opportunity Commissions (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).

Two brief notes on the selection of these nineteen are in order. First, the CFPB is listed as the Federal Reserve in the OPM database, because the CFPB receives its funding from the Federal Reserve. Oddly enough, the Federal Reserve’s other functions are not listed in the database. Thus, other sources were used for data on the Federal Reserve’s regulatory authority, called Supervision, which performs a similar bank oversight function as the OCC and FDIC.

Second, there is no uniformly accepted list of business regulators, or even definition of regulator. The agencies included as business regulators were those whose missions made it clear that the agency was primarily focus on enforcing laws against businesses. This criteria inevitably required judgment calls. In early drafts, some commenters inquired into whether two agencies merited attention: the Internal Revenue Service (IRS) and the U.S. Patent and Trademark Office (USPTO). There is a reasonable case to be made for including each of these. Both of these agencies are regulatory monitor heavy, so their inclusion would at least at first glance seem to further strengthen this Article’s thesis. But the IRS devotes considerable resources to applying the law to individuals. The USPTO is solely focused on granting the patent, and considering appeals to that decision, rather than the ongoing enforcement of those laws.

Finally, it is worth considering whether the focus on large agencies is unrepresentative of agencies as a whole. Large agencies were chosen to manage scope and to focus on the agencies most likely to have the largest impact on the regulatory sphere. Further studies of regulatory monitors in agencies of smaller sizes would be needed to draw any small conclusions, but regulatory reliance on monitoring is certainly not limited to large agencies.439

Employees and Monitoring440

439 See supra notes 158 to 160 and accompanying text.
440 Unless otherwise specified, figures are all examiner/inspection/compliance positions for regulatory monitors and all Legal and Kindred employees from U.S. OFF. OF PERS. MGMT., supra note 71. Monitor Percent =
<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[^441]</td>
</tr>
<tr>
<td>FSIS</td>
<td>8,107</td>
<td>440</td>
<td>95%</td>
<td>1.7 million products inspected[^442]</td>
</tr>
<tr>
<td>FERC</td>
<td>509[^443]</td>
<td>308</td>
<td>62%</td>
<td>398 account reviews, 423 reports,</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2,330 inspections[^444]</td>
</tr>
<tr>
<td>FDA</td>
<td>11,493[^445]</td>
<td>203</td>
<td>98%</td>
<td>&gt;160,000 inspections[^446]</td>
</tr>
<tr>
<td>MSHA</td>
<td>1,521[^447]</td>
<td>141[^448]</td>
<td>91%</td>
<td>19,642 inspections[^449]</td>
</tr>
<tr>
<td>OSHA</td>
<td>1,827[^450]</td>
<td>277[^451]</td>
<td>93%</td>
<td>35,822 inspections[^452]</td>
</tr>
<tr>
<td>FAA</td>
<td>4,388</td>
<td>342</td>
<td>93%</td>
<td>Inspect 227,900 aircraft[^553]</td>
</tr>
<tr>
<td>Fed. Motor Carrier Safety</td>
<td>644[^454]</td>
<td>46</td>
<td>93%</td>
<td>118,494 inspections[^455]</td>
</tr>
<tr>
<td>Admin. (FMCSA)</td>
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</tbody>
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Regulatory monitors/(Regulatory monitors + Legal). Figures reflect those reported by the end of 2016, although figures have been updated slightly since then.


[^443]: Includes Accounting, Auditing, Engineering, and General Business. Interview with FERC, supra note 420 (clarifying classifications).


[^445]: Includes scientists, engineers, consumer protection, and medical officers. Interview with FDA, supra note 292 (describing job responsibilities).

[^446]: See Compliance Check Inspections, supra note 276.

[^447]: Of these, about 1,145 actually conduct inspections, whereas the rest engage in related monitoring support and oversight activities. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF LABOR, NO. 05-10-001-06-001, JOURNEYMAN MINE INSPECTORS DO NOT RECEIVE REQUIRED PERIODIC RETRAINING 1-2 (2010).

[^448]: See supra note 451.

[^449]: U.S. DEP’T OF LABOR, AGENCY FINANCIAL REPORT 19 (2016), [https://www.dol.gov/sites/default/files/media/0f_Sec/2016annualreport.pdf](https://www.dol.gov/sites/default/files/media/0f_Sec/2016annualreport.pdf) (putting the figure at 3,095 for coal mines and 16,547 for metal and other non-coal mines).


[^451]: 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 Employment Cubes, supra note 440; Interview with OSHA, supra note 137 (explaining how DOL solicitors serve the department’s various agencies).

[^452]: OCCUPATIONAL SAFETY & HEALTH ADMIN., supra note 450, at 45.


[^454]: Broken down into the federal level, these employees are classified as “Motor Carrier Safety” and “Highway Safety.” See OFF. OF PERS. MGMNT., supra note 71. Of these, 506 perform inspections, while the rest play support and oversight roles for monitoring. See Fed. Motor Carrier Safety Admin., 2017 Pocket Guide to Large Truck and Bus Statistics 18, (Jun. 2017),
Federal Reserve is not included in the OPM data and does not release examiner breakdowns.

5.8% of 16,686 total employees); Interview with Federal Reserve employee (March, 2017) (estimating 80

https://www.federalreserve.gov/publications/annual

large-truck-and-bus-statistics-final-508c-0001.pdf . Federal inspectors represent 5% of the total inspector force, most of whom are state employed. See id.

456 OCC 2016 ANNUAL REPORT, supra note 337.
457 Engineers; see also Joel A. Mintz, ENFORCEMENT AT THE EPA 11 (rev. ed. 2012).
459 See Enforcement Annual Results, supra note 458.
460 Large volume of data analyzed. See supra note 272, and accompanying text.
461 Figure reflects Engineers and Analysts from U.S. OFF. OF PERS. MGMT., supra note 71. Interview with FCC Senior Attorney (April, 2017) (explaining employee breakdowns).
462 This figure is roughly evenly divided between enforcement and other legal functions, such as central legal staff and rule writers. See Fed. COMM’N, FISCAL YEAR 2017 BUDGET ESTIMATES TO CONGRESS 12 (Feb. 2016) (stating the enforcement division has 240 total employees).
463 See id. at 19, 53.
466 See id.
467 See FEDERAL RESERVE ANNUAL REPORT, supra note 465.
468 Estimate of the Consumer Sentinel group. Interview with FTC, supra note 266.
474 Id. Reflects enforcement group total, since database left breakdowns unclear.
475 U.S. SEC. EXCH. COMM’N, AGENCY FINANCIAL REPORT FISCAL YEAR 2016 i-ii (2016),

<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>OCC</td>
<td>2,715</td>
<td>209</td>
<td>93%</td>
<td>768 applications⁴⁵⁶</td>
</tr>
<tr>
<td>EPA</td>
<td>1,682³⁴⁷</td>
<td>1,102</td>
<td>60%</td>
<td>13,500⁴⁵⁸ inspections⁴⁵⁹</td>
</tr>
<tr>
<td>EEOC</td>
<td>N/A</td>
<td>522</td>
<td>0%</td>
<td>Analyses of EEO-1 data⁴⁶⁰</td>
</tr>
<tr>
<td>FCC</td>
<td>308²⁴⁶¹</td>
<td>602²⁴⁶²</td>
<td>34%</td>
<td>Inspections, transaction review⁴⁶³</td>
</tr>
<tr>
<td>FDIC</td>
<td>2,719</td>
<td>454</td>
<td>86%</td>
<td>6,892 examinations⁴⁶⁴</td>
</tr>
<tr>
<td>Federal Reserve</td>
<td>1,382²⁴⁶⁵</td>
<td>69⁴⁶⁶</td>
<td>95%</td>
<td>4,190⁴⁶⁷</td>
</tr>
<tr>
<td>FTC</td>
<td>20²⁴⁶⁸</td>
<td>711</td>
<td>3%</td>
<td>1,200 merger notifications⁴⁶⁹</td>
</tr>
<tr>
<td>NCUA</td>
<td>886</td>
<td>31</td>
<td>97%</td>
<td>9,465 contacts⁴⁷⁰</td>
</tr>
<tr>
<td>NLRB</td>
<td>0</td>
<td>797</td>
<td>0%</td>
<td>Supervised 1,624 elections⁴⁷¹</td>
</tr>
<tr>
<td>NRC</td>
<td>1,641</td>
<td>115</td>
<td>93%</td>
<td>Continual presence, 100 plants⁴⁷²</td>
</tr>
<tr>
<td>SEC</td>
<td>1,521²⁴⁷³</td>
<td>1,331²⁴⁷⁴</td>
<td>53%</td>
<td>2,400 examinations⁴⁷⁵</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(^{476})</th>
</tr>
</thead>
<tbody>
<tr>
<td>CFPB</td>
<td>$44 million in redress(^{477})</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>FSIS</td>
<td>25,516 compliance notifications(^{478})</td>
<td>Pre-approve each meat and poultry product</td>
<td>--</td>
</tr>
<tr>
<td>FERC</td>
<td>214 recommendations, $5.3 million in refunds(^{479})</td>
<td>--</td>
<td>Charge: license revocation(^{480})</td>
</tr>
<tr>
<td>FDA</td>
<td>14,500 warning letters(^{481})</td>
<td>2,847 Recalls(^{482})</td>
<td>Investigate: penalties &amp; recommend charge(^{483})</td>
</tr>
<tr>
<td>MSHA</td>
<td>97,25 citations and orders(^{484})</td>
<td>Inspectors order mine evacuations(^{485})</td>
<td>Charge: $48 million in civil penalties(^{486})</td>
</tr>
<tr>
<td>OSHA</td>
<td>17,444 warnings;(^{487}) 65,044 violations(^{488})</td>
<td>--</td>
<td>Charge: civil fines(^{489})</td>
</tr>
<tr>
<td>FAA</td>
<td>Warning letters, pilot retraining(^{490})</td>
<td>Pre-approve aircraft design(^{491})</td>
<td>Investigate: civil penalties, license(^{492})</td>
</tr>
</tbody>
</table>

*Figures are for six-month period.*

\(^{476}\) See Quarterly Enforcement Report, supra note 288, at 1.


\(^{478}\) See Quarterly Enforcement Report, supra note 288, at 1.

\(^{479}\) See FERC Report, supra note 250, at 5.

\(^{480}\) See Enforcement Activity, supra note 288, at 1.


\(^{483}\) Regulatory Procedures Manual, supra note 218, at 5.87.


\(^{487}\) Occupational Safety & Health Admin., supra note 450, at 45.


\(^{489}\) See supra note 314.

\(^{490}\) See, e.g., Robinson, supra note 309, at 29.

\(^{491}\) See Fed. Aviation Admin., supra note 453. Prior to issuing a voluntary automobile recalls, the DOT requires monitoring groups to obtain consent from the legal department. Interview with DOT employee (Mar., 2017).
<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>FMCSA</td>
<td>35,756 Warning Letters</td>
<td>Entry permits</td>
<td></td>
</tr>
<tr>
<td>OCC</td>
<td>Non-public MOUs and Commitment Letters</td>
<td>Pre-approve branches, notified of mergers</td>
<td>Charge: civil penalties, $226 million</td>
</tr>
<tr>
<td>EPA</td>
<td>Minor citations</td>
<td>--</td>
<td>Joint charge: $5.8 billion in civil penalties</td>
</tr>
<tr>
<td>EEOC</td>
<td>--</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>FCC</td>
<td>Joint</td>
<td>Changes by licensees</td>
<td>Joint charge: license revocation</td>
</tr>
<tr>
<td>FDIC</td>
<td>Noncompliance notifications</td>
<td>Pre-approve new branches</td>
<td>Charge: civil money penalties</td>
</tr>
<tr>
<td>Federal Reserve</td>
<td>Noncompliance notifications</td>
<td>Pre-approve branches, notified of mergers</td>
<td>Charge: $2.2 billion in civil penalties</td>
</tr>
<tr>
<td>FTC</td>
<td>--</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>NCUA</td>
<td>294 actions</td>
<td>--</td>
<td>Charge: civil penalties</td>
</tr>
<tr>
<td>NLRB</td>
<td>--</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>NRC</td>
<td>715 Non-cited violations; 61 cited violations</td>
<td>Pre-approve equipment changes and construction</td>
<td>Investigate: civil money penalties &amp; recommend charge</td>
</tr>
</tbody>
</table>

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492 See Robinson, supra note 309, at 31.
494 See id. at 30.
497 See id. at 32; Off. of the Comptroller of the Currency, supra note 354, at 4-7.
499 See id.; Interview with EPA, supra note 297.
500 Interview with FCC, supra note 461.
501 Id.
502 Id.
504 Interview with FDIC, supra note 289.
506 See Nat’l Credit Union Admin., supra note 470, at 16.
507 Interview with NCUA employee (April, 2017).
<table>
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<tr>
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<th>Monitor Formal Charges(^{476})</th>
</tr>
</thead>
<tbody>
<tr>
<td>SEC</td>
<td>$60 million returned to investors in 2016(^{511})</td>
<td>Firm licenses and issuance of securities(^{512})</td>
<td>\textit{Charge:} license(^{513}) \textit{Manage:} $94 million in SRO fines(^{514})</td>
</tr>
</tbody>
</table>

\(^{511}\) See U.S. SEC. EXCH. COMM’N, supra note 475.
\(^{512}\) U.S. SEC. EXCH. COMM’N, supra note 475.
\(^{513}\) 17 C.F.R. § 240.15c3-1(c)(2)(vi)-(vii) (1990).
\(^{514}\) FIN. INDUS. REG. AUTH., supra note 200, at 3.