

FEDERAL AGENCY PUBLICATIONS: THE AVAILABILITY OF JUDICIAL REVIEW

Assume that ABC, a federal administrative agency, publishes an evaluation of the widget industry.¹ The report lists and ranks the ten best widgets. Many widget consumers use the agency's industry evaluation in their purchasing decisions. May XYZ, the manufacturer of the agency's tenth-ranked widget seek relief from the government for decreased sales resulting from ABC's publication?² Specifically, is the agency's decision to publish the evaluation subject to judicial review?

The Administrative Procedure Act (APA or the Act)³ provides an aggrieved party⁴ the right to judicial review of a final agency action.⁵ A

1. Agencies often publicize evaluations of industries and products pursuant to statutory mandate. See, e.g., The Consumer Product Safety Commission Act § 2, 15 U.S.C. § 2051(b) (1988) (commission must "protect the public against unreasonable risks of injury" and "assist consumers in evaluating the comparative safety of consumer products"); The Public Health Service Act § 301, 42 U.S.C. § 242 (1988) (Secretary of Health, Education and Welfare must issue "information related to public health, in the form of publications or otherwise, for the use of the public," and inform the public of "other pertinent health information for the use of persons and institutions concerned with health services"); Public Health Service Act § 301, 42 U.S.C. § 241(b)(4) (1988) (the Department of Health and Human Services must classify chemicals according to their carcinogenic danger and publish an annual report containing its findings); The National Highway Traffic Safety Act § 1, 15 U.S.C. § 1381 (1988) (defect notification practices); The Federal Food, Drug and Cosmetics Act §§ 1, 705, 21 U.S.C. §§ 301, 375 (1988) ("The Secretary may cause to be disseminated information regarding food, drugs, devices or cosmetics in situations involving . . . danger to health or gross deception of the consumer").

2. The potential effects of agency publicity can be devastating. For example, shortly before Thanksgiving of 1959, the Secretary of Health, Education and Welfare (HEW), as overseer of the Food and Drug Administration (FDA), announced that cranberries from Washington and Oregon might contain a weed killer found to have caused cancer in laboratory rats. Ernest Gellhorn, *Adverse Publicity in Administrative Agencies*, 86 HARV. L. REV. 1380, 1408 (1983). However, no specific scientific evidence suggested humans similarly might suffer from eating cranberries. HEW subsequently approved almost all cranberries as safe for human consumption. The holiday had passed, however, and 99% of the year's crop went unsold. *Id.* at 1408. Congress later reimbursed the cranberry growers for most of their lost sales in response to intense industry and political pressure. *Id.* at 1409 & n.118. The Administrative Conference of the United States has recognized officially that an agency's use of the media sometimes may cause unfair injury. The Conference concluded that such adverse publicity is undesirable when it is erroneous or excessive. See *Adverse Agency Publicity*, 1 C.F.R. § 305.73-1 (1991) (Recommendation No. 73-1).

3. 5 U.S.C. §§ 551-706 (1988) (originally enacted in 1946).

4. To be "aggrieved" the party must demonstrate: 1) an injury in fact, and 2) that the party's interests are arguably within the zone of interests intended for protection by the relevant statute. See *Association of Data Processing v. Camp*, 397 U.S. 150 (1970). Lost sales resulting from adverse publicity in an agency publication may fulfill the injury requirement. See *Synthetic Organic Chem.*

party must establish two conditions before review is available.⁶ First, the agency's decision to publish must come within the Act's definition of "agency action."⁷ Second, the agency action must be final and otherwise ripe for review.⁸ Most courts refuse to review agencies' published industry evaluations despite the potential economic harm to a party in XYZ's position.⁹ Nevertheless, there is an alternative judicial analysis that allows review.¹⁰

Part I of this Note surveys traditional judicial approaches to determining the reviewability of an agency's industry evaluation. Part II presents an alternative line of reasoning that allows judicial review. Part III surveys several arguments in favor of judicial review. The Note concludes that when an agency's published industry evaluation harms a producer, that producer deserves judicial attention.

I. A SURVEY OF JUDICIAL VIEWS ON THE REVIEWABILITY OF AGENCY PUBLICATIONS

The Supreme Court has held that the APA's review provisions must be given a "hospitable interpretation."¹¹ In addition, the APA's legislative

Mfrs. Ass'n v. Secretary, Dep't of Health and Human Servs., 720 F. Supp. 1244, 1248 (W.D. La. 1989).

5. "A person suffering legal wrong because of agency action, or adversely affected or *aggrieved* by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." However, only "[a]gency action made reviewable by statute [or] final agency action . . . are subject to judicial review." 5 U.S.C. §§ 702, 704 (1988) (emphasis added).

6. The APA, however, excepts from review general statements of policy, interpretative rules, and rules of agency organization, procedure, or practice. 5 U.S.C. § 552(b)(3)(A) (1988). *See also infra* note 24.

7. "Agency action" includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . ." 5 U.S.C. § 551 (13) (1988).

8. *See infra* notes 73-82 and accompanying text for a discussion of the ripeness issues that arise when a court considers review of an agency's publication of an industry evaluation. Although not essential, finality is a primary ingredient of ripeness. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Courts hesitate to provide relief unless the controversy in question is "ripe for judicial resolution." The ripeness doctrine enables courts to avoid entangling themselves in premature adjudications. *Id.* Courts carefully must avoid deciding still-abstract issues and should "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* *See also Williamson City Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985) ("finality requirement is concerned with whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury").

9. *See infra* notes 36-46, 56-59, 61-66 and accompanying text.

10. *Synthetic Organic Chem. Mfrs. Ass'n v. Secretary, Dep't of Health and Human Servs.*, 720 F. Supp. 1244 (W.D. La. 1989). *See infra* notes 122-42.

11. *Abbott Laboratories*, 387 U.S. at 141 (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51

history impliedly favors review,¹² stating that courts should limit their review only when “clear and convincing” evidence suggests a statutory intent to withhold review.¹³ Moreover, the Supreme Court has adopted a presumption in favor of reviewability.¹⁴

In determinations of the reviewability of an agency’s published industry evaluation, however, a strong public policy favoring the dissemination of important information, i.e., the “public’s right to know,” often outweighs the presumption in favor of judicial review.¹⁵ Agency publicity may serve to warn consumers of potential industrial hazards, inform both the public and regulated parties of agency policy and goals, or deter

(1955)). See also *United States v. Interstate Commerce Comm’n*, 337 U.S. 426, 433-35 (1949) (district court has jurisdiction to review United States’ shipper’s claim against Interstate Commerce Commission denial of reparations to the government from independent wharfs); *American Friends Serv. Comm’n v. Webster*, 720 F.2d 29, 39 (D.C. Cir. 1983) (district court has jurisdiction to review agency action in connection with FBI record disposal); *Hondros v. United States Civil Serv. Comm’n*, 720 F.2d 278, 292 (3d Cir. 1981) (courts can review United States Marshal’s Service discretion to request eligibility certificates for considering reinstatement of former deputy).

12. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (“We begin with the strong presumption that Congress intends judicial review of administrative action.”); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (“our cases [show] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress”); *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970) (court recognizes strong presumption in favor of review in granting hearing to low-income tenants challenging FHA approval of rent hike).

13.

To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946). See also *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (citing *Block v. Community Nutrition Inst.*, 467, U.S. 340, 345 (1984)) (foreign association has private cause of action to challenge moratorium on commercial whaling within United States); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (no indication that Congress intended to limit or prohibit judicial review of Department of Transportation decision to build highway through park); *Abbott Laboratories*, 387 U.S. at 140 n.2 (Court granted pre-enforcement review of FDA regulations requiring that prescription drug labels carry the corresponding generic name that HEW designates); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962) (APA review available to person outside the United States denied right of citizenship); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 336-59 (1965).

14. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (“We begin with the strong presumption that Congress intends judicial review of administrative action.”).

15. Gellhorn, *supra* note 2, at 1382-83 (publicizing administrative programs and opinions achieves fairness, anticipating questions saves time, advance notice leads to increased compliance with new policies); *Illinois Citizens Comm’n for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975) (“the [Supreme] Court reaffirmed ‘the right of the public to be informed’”) (quoting *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973)).

private industry from taking unfavorable actions.¹⁶ Often, an agency exists to disseminate health and safety warnings.¹⁷ In fact, the powers of many agencies “would be crippled were those agencies not permitted to use the quick and cheap instrument of publicity.”¹⁸

The balancing of the public’s right to know against the presumption of review is important in determining whether an agency’s publication decision constitutes final agency action under the APA. The “right to know” concern supports delaying or refusing review of agency publications, thus allowing for quick dissemination of information. On the other hand, the favored status of judicial review suggests the need for immediate judicial review to protect the adversely affected party’s interests in accuracy and fairness.¹⁹

Judicial analysis of the reviewability of published administrative evaluations thus proceeds on a fact-dependent, case-by-case basis.²⁰ Judicial analyses tend to focus on factors such as the agency publication’s timing and subsequent or potential impact, the nature of the action, and the agency’s characterization of the action.²¹ Agencies may characterize

16. Gellhorn, *supra* note 2, at 1382-83.

17. See *supra* note 1 (describing agencies’ statutory mandates regarding the dissemination of important information). See also Gellhorn, *supra* note 2, at 1383. The benefits of information on health dangers are apparent. However, Gellhorn points out that problems can arise in balancing potential harm against the substantial negative effects an unfounded warning might cause. *Id.* at 1413. See *supra* note 2.

18. *Industrial Safety Equip. Ass’n v. EPA*, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

19. *Id.* at 1117. See also JACOB A. STEIN ET AL., 5 ADMINISTRATIVE LAW § 43.01 (1991). In addition to determining review of agency publication of industry evaluations, courts may confront agency press releases that affect one particular manufacturer, general agency adjudications that may injure the losing party economically, and agency proclamations that harm sales of either a particular producer or an entire industry. *Id.*

20. STEIN, *supra* note 19, at 1117.

21. Courts often vary in the weight they place on an agency’s characterization of its own actions. See generally *CBS v. United States*, 316 U.S. 407, 416 (1942) (“It is the substance of what the [agency] has purported to do and has done which is decisive.”); *United States Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1149 (5th Cir. 1984) (“[T]his court is not bound by an administrative agency’s classification of its own action. . . . [A]n agency cannot outflank either the strictures of its enabling legislation or the APA’s rulemaking framework by definitional fiat [T]he substance, not the label, is determinative”); *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) (“an announcement is not necessarily a policy statement because the agency has so labeled it”); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980) (“The administrative agency’s own label is indicative but not dispositive”); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972) (“The label that the particular agency puts upon its given exercise of administrative power is not . . . conclusive; rather it is what the agency does in fact”); *Sea-Land Serv., Inc. v. Federal Maritime Comm’n*, 402 F.2d 631, 633 (D.C. Cir. 1968) (“The Commission has termed the decision contested by appellant a ‘report.’ But its label is not conclusive, and

their publications as a rule,²² a sanction,²³ or, most often, a general policy statement.²⁴ Finally, courts emphasize different aspects of an agency's decision to publish an industry evaluation.

A. The Reviewability of Agencies' Published Recommendations and the APA's Definition of "Agency Action"

Soon after Congress enacted the APA in 1946, the United States Court of Appeals for the District of Columbia Circuit addressed the Act's definition of "agency action"²⁵ in *Hearst Radio, Inc. v. FCC*.²⁶ In *Hearst Radio*, a radio station contended that an FCC-published report contained false accusations, causing "direct damage and prejudice" to its reputation.²⁷ The court, however, took a narrow view of the APA's definition of "agency action." It held that the Act did not provide judicial review of the report at hand, because the term "agency action"²⁸ is not

what is decisive is the substance of what it has done."). *But see* *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) ("Often the agency's own characterization of a particular order provides some indication of the nature of the announcement"); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 956 (D.C. Cir. 1987) ("We consider and give some, albeit not overwhelming, deference to an agency's characterization of its statement."); *Bellarno Int'l. Ltd. v. FDA*, 678 F. Supp. 410, 413 (E.D.N.Y. 1988) ("[T]he court must give deference to an agency's own characterization of the pronouncement").

22. The APA's definition of "agency action" includes rulemaking. *See supra* note 7. The APA defines a rule as the:

whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (1988).

23. The APA's definition of "agency action" includes sanction. *See supra* note 7. The APA defines "sanction" to include "the whole or part of an agency prohibition, requirement, limitation, or other condition affecting the freedom of a person, or taking other compulsory or restrictive action." 5 U.S.C. § 551(13) (1988).

24. The APA excepts an agency's general policy statements from its definition of rulemaking, thus precluding judicial review of such statements. 5 U.S.C. § 553(b)(3)(B) (1988). This Note assumes that whether an agency's promulgation is a mere general policy statement is considered only after a judicial finding regarding reviewability.

25. *See supra* note 7.

26. 167 F.2d 225 (D.C. Cir. 1948).

27. *Id.* at 226. The FCC published a report entitled "Public Service Responsibility of Broadcast Licensees," commonly known as the "Blue Book." Parts of the Blue Book alleged that one of the plaintiff's stations, WBAL had unethically procured a broadcast channel. The plaintiff argued that the Blue Book's accusations destroyed public confidence in its station and created difficulties when the plaintiff applied for a renewal of its broadcast license. *Id.*

28. *See supra* note 7.

“all-embrasive.”²⁹ Accordingly, the court held that the FCC’s publication was not “agency action.”³⁰

The *Hearst* court’s doctrine of strict unreviewability remained undisturbed for more than thirty years.³¹ In *Impro Products, Inc. v. Block*,³² however, the court explained that courts had expanded the phrase “agency action” over the years to include situations that the *Hearst* court had not considered.³³ Thus the petitioner’s claim that a USDA report contained misleading test findings might give rise to reviewable “agency action” within the APA, even in the face of the government’s argument to the contrary.³⁴ Plaintiffs’ claims would be strong particularly when agencies publish concededly false information.³⁵

1. *The Reviewability of an Agency Publication as a “Rule” Within the APA*

Under the APA, agency rules are subject to judicial review.³⁶ Therefore, in releasing information on industries or parties, agencies often attempt to sidestep review by characterizing their actions as something

29. 167 F.2d at 227 (“The term ‘agency action’ is not a general term with the all-embracing meaning usually conveyed by those words, but is a term defined in the statute”). The *Hearst* court also emphasized the specific language of the APA in defining agency action. *Id.* See also *supra* note 7.

30. 167 F.2d at 227. Nevertheless, this finding conflicts with portions of the APA’s legislative history. “The term ‘agency action’ brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 [of the APA] and to assure the complete coverage of every form of agency power, proceeding, action, or inaction.” S. Doc. No. 248, 79th Cong., 2d Sess. 255 (1946). See also *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 n.7 (1980).

31. The District of Columbia Circuit Court of Appeals reiterated the *Hearst* rule in 1975. See *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975) (agency action is unreviewable where it does not impose obligations or fix legal rights).

32. 722 F.2d 845, 846 (D.C. Cir. 1983). The plaintiff had applied for renewal of a license to produce and ship interstate a health antibody for cows. In reviewing *Impro*’s application, the USDA tested the antibody and determined that it was ineffective. *Id.* at 847. The USDA scientists widely distributed copies of an article in which they explained their findings. *Impro* maintained that the USDA findings were false and impeded *Impro*’s ability to market its antibody. *Id.*

33. *Id.* The court referred, as an example, to *FTC v. Standard Oil Co.*, 440 U.S. 232, 238 n.7 (1980), wherein the Supreme Court held that the issuance of a complaint qualifies as “agency action” within the APA. Any doubt the court expressed about the continuing validity of the *Hearst* rationale was dictum. *Id.* (“we will defer any reexamination of *Hearst Radio* to another day”).

34. *Id.* This action was the result of long-protracted litigation. The government counterclaimed that *Impro* had sold its product interstate without the requisite license. *Id.*

35. 722 F.2d at 849. The court explained that the publication of concededly false information would be contrary to the mandate of an agency’s enacting legislation. *Id.*

36. Rules, by definition, constitute agency action within the APA. See 5 U.S.C. § 551 (13) (1988). See also *supra* note 7.

other than rules. Courts generally respect these interpretations.³⁷

For example, in *Industrial Safety Equipment Association (ISEA) v. EPA*,³⁸ the EPA cosponsored a technical report³⁹ recommending industry use of only two of thirteen federally certified asbestos protection respirators.⁴⁰ The eleven affected manufacturers argued that the report constituted an agency rule,⁴¹ charging that the report effectively “de-certified”⁴² their products and would result in significant economic hardship.⁴³

The District of Columbia Circuit held, however, that the report did not constitute rulemaking because it merely ranked and recommended respirators.⁴⁴ The court noted that the report intended only to advise, inform, and provide a model for asbestos respiration.⁴⁵ The court thus

37. Agencies often characterize their published recommendations as one of the APA’s exceptions to rulemaking, which do not constitute agency action and which are thus unreviewable. See *supra* note 6. See e.g., *Bellarno Int’l Ltd. v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988) (published “import alert” that blocked importation of pharmaceutical characterized as “interpretative rule”); *Dow Chem. v. Consumer Prods. Safety Comm’n*, 459 F. Supp. 348 (W.D. La. 1978) (action to classify allegedly carcinogenic substances called “interim regulations”). But see *Synthetic Organic Chem. Mfrs. Ass’n v. Secretary, Dep’t of Health and Human Servs.*, 720 F. Supp. 1244 (W.D. La. 1989) (criteria for classifying chemicals as carcinogenic characterized as a “report” but held reviewable as agency action); *Nader v. Civil Aeronautics Bd.*, 657 F.2d 453, 454-57 (D.C. Cir. 1981) (Board guidelines constitute agency rule subject to judicial review where guidelines, more than mere policy statement, limit agency’s future discretion) (citing *Guardian Fed. Sav. & Loan Ass’n v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978)).

38. 837 F.2d 1115 (D.C. Cir. 1988).

39. *Id.* at 1116. The Environmental Protection Agency (EPA) and the National Institute for Occupational Safety and Health (NIOSH) cosponsored the report. *Id.*

40. *Id.* at 1116-17. Federal regulations require the EPA and the Occupational Safety and Health Administration, which administers NIOSH, to safeguard employees from dangerous health hazards that asbestos exposure caused. *Id.* (citing 29 C.F.R. § 1910.1001 (1986); 40 C.F.R. § 763.21(d) (1988)). Respirators include “air purifying” types, used mostly under low-level asbestos conditions and “supplied-air” types, the most effective protection. The EPA/NIOSH report recommended only the two supplied-air respirators, despite federal certification of all thirteen devices. *Id.*

41. *Id.* at 1119. ISEA alleged that, because no notice and comment occurred prior to the EPA adopting this substantive rule, the court should hold the report invalid. *Id.*

42. The report used quite strong language in distinguishing among the respirators: “The respirator types numbered 3 through 13 above are not recommended by NIOSH or EPA for use against asbestos. However, various existing regulations allow their use. . . . [A]s a matter of public health policy, NIOSH and EPA do not recommend their use in asbestos environments.” *Id.* at 1117.

43. The petitioners alleged that the report would harm the makers of the excluded respirators. *Id.* at 1116. Furthermore, the complainants charged that the report left them vulnerable to products liability claims. Telephone interview with Jim Spooler, Manager of CB North, Charleston, S.C. (member of petitioner/association) (February 8, 1991).

44. 827 F.2d at 1119-21.

45. *Id.* The court stated that the report “emphasizes throughout that the model is an ideal [only], not a regimen presently mandated by law.” *Id.* at 1120. The court also pointed to another

dismissed ISEA's hardship claim, refusing to find "agency action" solely because the report affected petitioners' sales.⁴⁶

2. *The Reviewability of Agency Publications Based on Their Impact on Private Parties*

In determining reviewability of most agency actions, courts usually look beyond the agency's label to the substance of the action.⁴⁷ However, within the context of agency publications, courts generally defer to the agency's interpretation of its action and thus hesitate to grant judicial review.

a. *The Reviewability of an Agency Publication Based on Whether the Publication Fixes the Regulated Party's Legal Rights*

Reviewability of an administrative publication as "agency action" within the APA may turn on whether the action imposes obligations on, or fixes the legal rights of, affected parties.⁴⁸ Courts often face only two options: 1) grant review of a seemingly innocuous agency promulgation, or 2) stand by as the petitioner suffers significant losses due to the agency promulgation.

In *Brown & Williamson Tobacco Corp. (B & W) v. FTC*,⁴⁹ the FTC

section of the report in which NIOSH/EPA explicitly stated that the less efficient brands of respirators fulfill both agencies' specifications. *Id.* at 1121. *But cf.* *Synthetic Organic Chem. Mfrs. Ass'n v. Secretary, Dep't. of Health and Human Servs.*, 720 F. Supp. 1244, 1249 (W.D. La. 1989) (government report intended merely to inform and educate constitutes agency action under the APA).

46. 837 F.2d at 1121. ("We note first that this court has rejected the notion that the mere fact that an agency action has 'substantial impact' transform[s] it into a legislative rule.") (citing *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)). See *infra* notes 90-121 and accompanying text for a discussion of judicial consideration of the impact of agency promulgations on private parties and the availability of judicial review.

The court again did not address whether the intentional dissemination of false information constitutes agency action subject to review. 837 F.2d at 1121 n.10 ("Because ISEA does not attack the Guide as false or misleading, we need not decide the question."). See *supra* notes 32-35 and accompanying text.

47. STEIN, *supra* note 19, at § 43.01. See *supra* note 21.

48. STEIN, *supra* note 19, at § 43.01, n.12. See also *Illinois Citizens Comm'n for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975) (FCC fine of licensee for broadcasting obscene material fixed legal rights and obligations in its refusal to withdraw its Notice of Liability); *American Trucking Ass'n v. United States*, 755 F.2d 1292 (7th Cir. 1985) (ICC report on trucking industry deregulation did not fix legal rights or impose obligations on trucking industry members). Whether legal rights are fixed or obligations are imposed is also important in determining whether an agency action is final and ripe for review. See *infra* notes 84-89 and accompanying text.

49. 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

proposed changes in its tobacco industry report that effectively barred B & W from continuing its advertising campaign of "low-tar" cigarettes.⁵⁰ B & W sought judicial review of the FTC's proposed evaluation, which the FTC planned to publish in the Federal Register.⁵¹ The FTC argued that its proposed publication was neither an order nor a rule and thus did not constitute a reviewable agency action under the APA.⁵²

The Sixth Circuit found that this announcement was alone not subject to review.⁵³ However, it also noted that the FTC subsequently refused either to test B & W cigarettes or to publish tar levels for B & W brands, and that the FTC amended its 1981 Report to reflect this change in attitude.⁵⁴ The court found that, although the FTC may not have labeled its action an "order" or "rule," it effectively fixed B & W's rights, barring B & W from making a "low-tar" claim; the court held that this amounted to "agency action."⁵⁵

b. Reviewability of Agency Publications in Light of the Agency's Intent

Reviewability of an agency promulgation based on its impact may also

50. 710 F.2d at 1168-70. The FTC had operated a laboratory in which it performed tests on tobacco products. Since the laboratory's inception in 1967, the government had released its findings to the public in periodic reports. *Id.* at 1168. In 1971, the tobacco industry agreed to advertise the government's data so that consumers could compare fairly the tar levels of various brands. In response to a complaint by R.J. Reynolds, the FTC conducted a year-long study that concluded that the FTC's testing method did not accurately measure the tar level of B & W's cigarette brands. *Id.* The FTC refused to publish tar data for B & W cigarettes in its 1981 tobacco report and thus precluded the company from advertising its brands as "low-tar," jeopardizing its market share and causing potentially significant losses. *Id.* at 1168.

51. *Id.* at 1167. The proposed statement read:

- (1) the FTC has concluded that its present testing methodology does not accurately assess the "tar" and nicotine yields of B & W's Barclay cigarettes;
- (2) the FTC's December, 1981 Report, which stated that the "tar" yield of Barclay cigarettes is 1 mg., is inaccurate and should be corrected;
- (3) pending a revision in the test methodology, future FTC reports, if any, will not include results for Barclay cigarettes. . . .

Id.

52. The FTC analogized its action to generally unreviewable actions like the announcement of an investigation or the issuance of a complaint. *Id.* at 1170. The commission also contended that the proposed publication constituted merely a statement of future policy, and that even if it did qualify as agency action, lack of finality precluded review. *Id.* at 1169.

53. *Id.* The court subscribed to the FTC's position only in regard to the commission's release of its reservations about B & W brands.

54. *Id.*

55. *Id.* at 1170. ("it would now appear to be inappropriate for [B & W] to continue to cite the figures in the 1981 Report in its Barclay advertisements").

turn on the intent with which the agency acted. For example, in *American Trucking Association (ATA) v. United States*,⁵⁶ the plaintiffs challenged an Interstate Commerce Commission report on the economic impact of deregulation in the trucking industry during the 1970s and 1980s.⁵⁷ ATA asserted that the report would adversely affect truckers' interests.⁵⁸ The Seventh Circuit, however, found that the commission intended the report to be primarily educational or informative of the current state of affairs. The court held such a promulgation unreviewable in these circumstances.⁵⁹

c. Distinguishing Reviewability Based on the Actual Source of the Hardship on Private Parties

Agencies sometimes defend against claims of economic injury resulting from agency publications by arguing that their involvement is removed from the party's harm, blaming the independent choices of third parties, consumers, as the cause of the complainant's injury.

56. 755 F.2d 1292 (7th Cir. 1985).

57. *Id.* at 1293. In response to a regulatory shift, the ICC re-evaluated its practice of tightly controlling prices in the trucking industry. The commission decided to afford greater weight to the benefits of free competition and, in some instances, openly encouraged competition. Congress reacted to this new attitude by enacting the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. The Act codified the ICC's already-relaxed standards on motor carrier pricing. 755 F.2d at 1293. Unfortunately, the early 1980s economic recession ensued, resulting in severe price cutting and increased competition. *Id.* at 1295. An association of motor carriers petitioned the ICC for industry standards that more precisely defined predatory pricing so the ICC could more easily identify violators. Instead, the commission responded with a vague report concluding that individual motor carriers' price cuts should not be suspended pending investigation of alleged predatory competition. *Id.*

58. *Id.* The report stated that predatory pricing was difficult, if not impossible, to accomplish in the trucking industry; that the failure of some motor carriers due to increased competition was not necessarily contrary to the public interest; and that individual price cuts should not be suspended pending investigation of charges of predatory pricing. *Id.*

59. *Id.* at 1296-97. The court stated that the report intended to promote "a greater understanding . . . of the pricing techniques now being developed by the trucking industry." *Id.* at 1296 (quoting the ICC's report, PRICING PRACTICES OF MOTOR COMMON CARRIERS OF PROPERTY SINCE THE MOTOR CARRIER ACT OF 1980, EX PARTE MC-166 (1983), at 1). The court further found that the ICC did not intend the report to fix any of the association's legal rights. *Id.* at 1297. *See also* IT&T v. IBEW Local 134, 419 U.S. 428, 441 (1975) (National Labor Relations Act provision making labor union's inducement to strike an unfair labor practice not final because it failed to force anyone to do anything).

Some courts, however, have found agency action where the agency used a publication as a "regulatory pressure mechanism." *See* *Writer's Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976) (reviewable agency action where agency official gave opinion in official capacity using language intended as a "regulatory pressure mechanism").

In *Pharmaceutical Manufacturers Association (PMA) v. Kennedy*,⁶⁰ the Food and Drug Administration (FDA) contended that its comparison of generic and brand name drugs did not obligate industry members to take any action.⁶¹ The FDA asserted that it intended the guide merely to educate and inform consumers.⁶² PMA complained, however, that the comparison guide provided irrelevant and inaccurate information, and that its publication would cause consumers to switch to less expensive generic brands.⁶³ The court, however, found no agency action, stating that any effect on the sales of the brand name drugs due to the guide's dissemination resulted primarily from independent consumer decisions.⁶⁴

The *PMA* court also rejected the petitioner's analogy of their situation to "reverse-Freedom of Information Act (FOIA)" cases in which a manufacturer who has submitted required information to an agency seeks to block release of that information.⁶⁵ The *PMA* court distinguished the facts of this case from situations in which courts generally hold information release in reverse-FOIA cases reviewable as agency action.⁶⁶

d. Reviewability Based on an Agency's "Moral Suasion"

Measuring the impact of agency action to determine reviewability can be extremely subjective. A court may find that an agency report's "moral suasion" makes the report rise to the level of reviewable "agency action." The seminal case in this regard is *Air Line Pilots' Association International v. FAA*,⁶⁷ in which a pilots' association sought judicial review of an FAA determination that a proposed high-rise complex in Dal-

60. 471 F. Supp. 1224 (D. Md. 1979).

61. *Id.* at 1225. The Food and Drug Administration and the Department of Health and Human Services published the Report.

62. *Id.* at 1230-31.

63. *Id.* at 1225. PMA asserted that it would suffer because consumers would not buy drugs from PMA members with cheaper generics available. PMA members thus would lose profits they otherwise would have earned.

64. *Id.* at 1231-33. Thus the distance placed between the agency's action and the complainants' harm caused the study's failure to constitute agency action.

65. *Id.* at 1229. Courts have found that an agency's release of information in this context constitutes agency action. *Id.*

66. See *infra* notes 146-59. The court attempted to distinguish reverse-FOIA cases: 1) unlike PMA, reverse-FOIA plaintiffs submitted the information to the agency with the hope or belief that the information would remain confidential; and 2) PMA has not suffered a "legal wrong," required for review in a reverse-FOIA situation. 471 F. Supp. at 1229. See *infra* notes 146-59 and accompanying text.

67. 446 F.2d 236 (5th Cir. 1971).

las would not constitute a navigational hazard.⁶⁸ The FAA argued that its ruling did not explicitly forbid construction of the high-rise complex and thus did not fix or affect any legal rights.⁶⁹ The FAA further asserted that its ruling's power lay only in its "moral suasion" on the builders of the complex.⁷⁰ The court, however, rejected the FAA's claim, noting that "moral suasion" can have an effect sufficient to warrant immediate judicial review.⁷¹

B. *Finality Analysis of Agency Promulgations of Industry Recommendations*

If the court finds "agency action," it next examines whether the action is final and ripe⁷² for judicial review.⁷³ Availability of review to the hypothetical widget manufacturer depends, in part, on ABC's timing in promulgating the widget report and the judiciary's ability to attack the dispute at this stage of the game.

In the leading ripeness case, *Abbott Laboratories v. Gardner*,⁷⁴ the Supreme Court explained that the ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administra-

68. *Id.* at 237. The decision reversed an earlier finding that the proposed buildings would indeed constitute hazard to navigation. Specifically, the pilots' association argued that the FAA's determination afforded no opportunity for prior notice and comment. *Id.* The Federal Aviation Act of 1958, 49 U.S.C. §§ 1421-1432 (1988), empowers the FAA Administrator to regulate air navigation to ensure safety. The Administrator can review proposals to construct tall buildings and structures in and around airports. *See* 446 F.2d at 237.

69. 446 F.2d at 240. The FAA quoted the 1947 Supreme Court opinion in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 112-13 (1947): "Administrative orders are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." 446 F.2d at 240. The agency argued that their determination of whether a hazard existed had no enforceable effect. *Id.*

70. 446 F.2d at 240.

71. *Id.* at 241 ("it takes little knowledge of the goings-on about us to be aware that 'moral suasion' is a potent force in our society"). Moreover, the court followed recently relaxed ripeness tests. *Id.* at 242. *See* *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967).

72. The ripeness doctrine derives from Article III of the Constitution, which restricts the judiciary to consideration of "cases and controversies." U.S. Const. art. III, § 2, cl. 1.

73. *See supra* note 5. For a thorough discussion of the ripeness doctrine, see Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987); R. George Wright, *The Timing of Judicial Review and Administrative Decisions: The Use and Abuse of Overlapping Doctrines*, 11 AM. J. TRIAL ADVOCACY 83 (1987).

74. 387 U.S. 136 (1967).

tive decision has been formalized and its effects felt in a concrete way by the challenging parties."⁷⁵

Although a complaining manufacturer may assert that it can determine easily the report's effect on daily business,⁷⁶ courts rarely step in where they believe the eventually necessary relief may be too difficult to ascertain. Courts generally prefer to await further developments in order to render a more accurate decision.⁷⁷

Within the context of this Note, analysis of reviewability centers on two aspects of ripeness:⁷⁸ whether the issues are appropriate for judicial review,⁷⁹ and whether the parties would suffer hardship if judicial consideration were denied.⁸⁰ Determining ripeness of an agency's published evaluative study generally involves three factors: 1) whether the issues are purely legal;⁸¹ 2) whether resolution of the issues will foster judicial efficiency;⁸² and 3) whether the plaintiffs' harm from the agency action is sufficiently direct and immediate to warrant review at the publication

75. *Id.* at 148-49.

76. *Id.* at 153. See also *Cowdin v. Young*, 681 F. Supp. 366 (W.D. La. 1987) (veterinarians allege that FDA policy guide "constitutes an unauthorized intrusion in [their] day-to-day practice"); Plaintiff's Complaint for Declaratory and Injunctive Relief, *Pharmaceutical Mfrs. Ass'n v. Kennedy*, 471 F. Supp. 1224 (D. Md. 1979) (No. 4-78-2449).

77. See ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW PROCESS IN A NUTSHELL*, 384 (1990); KENNETH C. DAVIS, *4 ADMINISTRATIVE LAW* 405 (2d ed. 1983); G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971). But see *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1170-71 (6th Cir. 1983) (cigarette manufacturer's pre-enforcement challenge to FDA's proposed changes in tar-level testing are immediately reviewable), *cert. denied*, 465 U.S. 1100 (1984).

78. *Abbott Laboratories*, 387 U.S. at 149.

79. *Id.* This question often turns on whether an action is sufficiently definite or final to warrant review. *Continental Air Lines v. Civil Aeronautics Bd.*, 522 F.2d 113, 125 (D.C. Cir. 1975) (en banc) ("The interest in postponing review is strong if the agency position . . . is not in fact the agency's final position. If the position is likely to be abandoned or modified before [becoming effective] then its review wastes the court's time and interferes with the process by which the agency is attempting to reach a final decision."); *Louisiana v. Dep't of Energy*, 507 F. Supp. 1365, 1371 (W.D. La. 1981) ("An agency position is clearly final agency action . . . where it will not be the subject of any further proceedings at the agency.") (parenthesis omitted) (citing *Ecee, Inc. v. FERC*, 611 F.2d 554, 557 (5th Cir. 1980), *aff'd*, 690 F.2d 180 (Temp. Emer. Ct. App. 1982), *cert. denied*, 460 U.S. 1069 (1983)).

80. 387 U.S. at 149. See also *Continental Air Lines*, 522 F.2d at 124-25 (ripeness requires "that the interests of the court and the agency in postponing review . . . be outweighed by the interests of those who seek relief from the challenged action's 'immediate and practical impact' upon them") (quoting *Frozen Foods Express v. United States*, 351 U.S. 40, 41 (1956)). Accord *Cowdin v. Young*, 681 F. Supp. 366, 367 (W.D. La. 1987).

81. *Abbott Laboratories*, 387 U.S. at 149.

82. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163-64 (1967).

stage.⁸³

1. *Whether the Agency's Decision to Publish is a Purely Legal Matter*

In situations similar to that of the hypothetical widget-maker, statutes often require that agencies publish.⁸⁴ Thus, reviewability may turn on how a court interprets the agency's enabling statute. In practice, courts vary considerably in the weight they place on statutory construction. Some treat it only as a threshold issue,⁸⁵ others treat it as a determinative issue.⁸⁶ For example, in *Brown & Williamson Tobacco Corp. v. FTC*,⁸⁷ the petitioner alleged that the FTC failed to follow APA rulemaking procedure when it announced the end of testing and publication of tar-level figures for the tobacco company's cigarettes.⁸⁸ The court found the matter purely legal in nature, requiring no further fact-finding, because the agency intended no further consideration of the announcement before

83. *Abbott Laboratories*, 387 U.S. at 152-53.

84. *See supra* note 1.

85. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) (Supreme Court refuses to review concededly "legal" issue on lack of ripeness grounds); *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978) ("Although appellants' challenges to the regulations can be considered as raising issues which are for the most part 'legal,' that characterization does not end the inquiry.").

86. *See Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217 (D.C. Cir. 1984) ("If, however, 'the issue is a purely legal one,' in which no further facts need be developed to facilitate a proper judicial decision, a *final* agency action may be fit for judicial review even though it has never been applied or enforced by the agency in a concrete setting.") (emphasis added) (citing *Toilet Goods Ass'n*, 387 U.S. at 164); *Assiniboine & Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 789 (9th Cir. 1986) ("Review is not premature if the agency action is . . . 'purely legal.'"). *See also Federal/Postal/Retiree Coalition A.F.G.E. v. Devine*, 751 F.2d 1424, 1426 (D.C. Cir. 1985) (Office of Personnel Management publication of intent to promulgate guidelines for dissemination to administrative agencies reviewable, despite no actual publication of the manual, because the matter "squarely presented for resolution the legal issue 'whether OPM has authority to issue the policy guidelines as a whole'"); *Texas v. United States Dep't of Energy*, 764 F.2d 278, 283-84 (5th Cir.) (challenged action not ripe because issues not solely legal and action does not have requisite direct and immediate impact on petitioners), *cert. denied*, 474 U.S. 1008 (1985).

In *Credit Union Nat'l Ass'n v. National Credit Union Admin. Bd.*, 573 F. Supp. 586 (D.D.C. 1983), the plaintiff contended that the Board failed to comply with the APA's notice-and-comment requirements for informal rulemaking. *Id.* at 588. The Board had issued a statement describing its priorities in setting a payout schedule for involuntarily insolvent credit unions. *Id.* The court held that whether the Board should have followed APA procedure presented purely legal issues because it entailed only an interpretation of the Board's statutory authority to issue such statements. *Id.* at 590. Therefore, the petitioner's claim merited immediate review. *Id.*

87. 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

88. *Id.* at 1171.

the report would affect B & W.⁸⁹

2. *Reviewability Analysis and the Effect on Efficiency*

Courts also focus on whether review of the agency's publication action will interfere with judicial efficiency.⁹⁰ Like the "purely legal" aspect of the ripeness debate, judicial efficiency alone does not often determine reviewability for two reasons. First, courts generally proceed on a case-by-case basis when determining whether to review an agency's publication of an industry evaluation.⁹¹ Thus, review of a single promulgation generally will not chill an agency from making further promulgations because judicial analysis of the reviewability of the agency's actions will be fact-specific. Second, courts hesitate to interfere prematurely if the issues are not purely legal in nature.⁹² Forbearance can allow courts to balance the need for judicial deference to administrative primacy against the aggrieved party's need for relief. Courts that wait to measure the promulgation's concrete effects will not be forced to theorize about the existence, cause, or degree of impact, particularly when the harm results from third-party actions,⁹³ such as consumers' choices.

3. *The Effect of the Directness and Immediacy of Harm to Private Parties from Agency Publications*

The most contentious aspect of finality analysis centers on whether the regulated party's injury is sufficiently direct, immediate, and substantial to warrant immediate review.⁹⁴ Two general perspectives exist: some courts emphasize the complainant's suffering,⁹⁵ while others focus on the speculative nature of the complainant's injury.⁹⁶

The former group generally takes a more sympathetic view of the in-

89. *Id.*

90. *See* *FTC v. Standard Oil*, 449 U.S. 232, 239-43 (1980) (immediate judicial review of complaint would serve neither efficiency nor enforcement of the act); *Credit Union Nat'l Ass'n*, 573 F. Supp. at 590 (resolving the validity of Board's decision at once rather than waiting to rule in subsequent specific situations serves efficiency); *Sea-Land Serv., Inc. v. Federal Maritime Comm'n*, 402 F.2d 631, 633 (judicial efficiency is a primary aspect in ripeness analysis).

91. *See supra* note 19 and accompanying text.

92. *See supra* note 86.

93. *See* *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978). In the widget-maker hypothetical, the agency may allege that XYZ's harm results solely from the independent decisions of consumers. *See supra* note 64.

94. *See supra* notes 46, 53-55, 61-62 and accompanying text.

95. *See supra* notes 67-71 and *infra* notes 135-44 and accompanying text.

96. *See supra* notes 46, 60-64 and accompanying text.

jured party's situation and the consequences of the agency's action on that party's day-to-day business.⁹⁷ This view takes note that an agency promulgation may force a party to alter her behavior or anticipate significant changes to her business status.⁹⁸

As noted earlier,⁹⁹ in *Brown & Williamson Tobacco Corp. v. FTC*,¹⁰⁰ the agency's decision essentially precluded B & W from advertising its "low-tar" brands.¹⁰¹ The promulgation forced the manufacturer into a Hobson's choice of either expending resources to alter market strategy and thus lose the "low-tar" market share, or possibly facing an enforcement proceeding for failing to comply with the FTC's decision.¹⁰² Thus, a court may review agency action when a manufacturer, like the hypothetical widget-maker, suffers from an agency's evaluation of its product.¹⁰³

On rare occasions, a court may be unusually willing to find sufficient ripeness.¹⁰⁴ In *Air Line Pilots' Association International v. FAA*,¹⁰⁵ the Fifth Circuit held that subtle agency pressure alone, without any actual consequences to the claimant's position, satisfied the hardship prong.¹⁰⁶ The FAA claimed that its "no hazard" finding regarding the construction of a high-rise complex merely influenced the builder through "moral

97. See *Assiniboine & Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 790 (9th Cir. 1986) ("Existence of the Cooperative Agreement forces the Tribes to alter their behavior in significant ways.").

98. *Id.* at 790 (hardship prong of the ripeness test satisfied where tribes' land trustee's wrongful delegation of authority over placement of oil and gas wells on tribal lands significantly changed the tribes' relationship with the Bureau of Land and Management).

99. See *supra* notes 49-55 and accompanying text.

100. 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

101. *Id.* at 1172.

102. *Id.*

103. In *B&W*, the court said that the plaintiff's hardship compared favorably with that of the drug companies in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1987), wherein the Supreme Court granted pre-enforcement review because the challenged action placed the party in a no-win dilemma. In *Abbott Laboratories*, an FDA promulgation required that brand-name drug labels display the name of their generic equivalent. *Id.* at 152-53. The Court stated:

These regulations [have] a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma. . . . If petitioners wish to comply they must change all their labels, advertisements and promotional materials. . . . The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation—may be even more costly. That course would risk serious criminal and civil penalties.

Id.

104. See *supra* notes 67-71 and accompanying text.

105. 446 F.2d 236 (5th Cir. 1971).

106. *Id.* at 241.

suasion.”¹⁰⁷ Nevertheless, the court held the effects direct and immediate because such persuasion is “a considerably potent force in our society.”¹⁰⁸ The builders certainly felt the announcement’s power, despite the indirect nature of the decision’s effects. Thus, almost any agency evaluation publication potentially constitutes “moral suasion” when the impact upon petitioner’s business is substantial.

However, courts more often refrain from review when an agency does not act in a concrete fashion.¹⁰⁹ In *Alascom, Inc. v. FCC*,¹¹⁰ the District of Columbia Circuit stated, “[i]f no substantial hardship to the parties will result from deferral, a court generally will review an order only when it can be tested in a concrete factual setting.”¹¹¹ Thus, absent substantial hardship to the parties, a court generally will defer its review of agency action.¹¹² A significant hurdle to review may thus exist where one’s hardship is not easily defined.

In *Industrial Safety Equipment Association v. EPA*,¹¹³ the District of Columbia Circuit stated that even had it determined that an agency-published evaluation constituted agency action, ripeness considerations still would have precluded review.¹¹⁴ The court characterized the study as a discretionary agency policy, which courts should leave untouched until the agency actually applies the policy to a specific fact situation.¹¹⁵

Reviewability also turns on courts’ difficulty in analyzing potential injury.¹¹⁶ In *Pharmaceutical Manufacturers Association v. Kennedy*,¹¹⁷ brand-name drug manufacturers challenged an FDA comparative study

107. *Id.*

108. *Id.* The court said that an agency’s final “no-hazard” finding would constitute a stumbling block sufficient to warrant immediate review. *Id.*

109. *See supra* notes 73-85.

110. 727 F.2d 1212, 1216-17 (D.C. Cir. 1984).

111. *Id.* at 1217.

112. *Id.* When agency action is purely legal, and involves no further fact development, however, the action “may be fit for judicial review even though it has never been applied or enforced by the agency in a concrete setting.” (emphasis added). *Id.*

113. 837 F.2d 1115 (D.C. Cir. 1988).

114. *Id.* at 1119, n.8. The evaluative report’s nonbinding nature made it unripe for review. *Id.* (citing *Office of Communication of United Church of Christ v. FCC*, 826 F.2d 100, 105-06 (D.C. Cir. 1987)). A likely key to the court’s ripeness determination was the report’s express disclaimer that the EPA did not “desire to impose on the industry [its] recommendations,” but only intended “to urge the public to be more attentive to the asbestos hazard.” *Id.*

115. *Id.* The report would not alter the agencies’ behavior toward the industry members or the private parties’ behavior toward the agencies.

116. *See, e.g., Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217. (“The mere *potential* for future injury . . . is insufficient to render an issue ripe for review”) (emphasis added).

117. 471 F. Supp. 1224 (D. Md. 1979).

that found proximate equivalence between brand name and generic drugs.¹¹⁸ Petitioners claimed that consumers, armed with the guide, would "follow the bargain" and refuse to buy their more expensive, brand-name products.¹¹⁹ The court countered that consumers purchase items for various reasons,¹²⁰ and refused to accept the claimants' undefined potential injury as creating a ripe, reviewable agency action.¹²¹

Thus, reviewability of a published federal agency's industry evaluation turns primarily on four factors: 1) judicial fear of interfering with administrative autonomy; 2) courts' reluctance to grant relief where the alleged injury is speculative; 3) courts' fear that judicial economy and agency efficiency would suffer if the reviewed agency action does not impose legal obligations, fix legal rights, or cause behavioral alterations; and 4) the degree to which review might affect the agency's ability to function in the future. Thus a court probably would preclude review of the report in the widget industry hypothetical based on one or more of the above factors.

II. ALTERNATIVE JUDICIAL ANALYSES ALLOWING REVIEW OF ADMINISTRATIVE AGENCY PUBLICATIONS

An alternative judicial approach advances a strong argument in favor of granting immediate review. In *Synthetic Organic Chemical Manufacturers Association (SOCMA) v. Secretary, Department of Health & Human Services (HHS)*,¹²² a group of sellers and manufacturers challenged HHS' classification as carcinogenic¹²³ of a component of the chlorobenzene-based products they made. The government proposed to publish the new criteria in its Fifth Annual Report on Carcinogens (the Report).¹²⁴ The plaintiffs alleged that publication of the Report would

118. *Id.* at 1232. See *supra* notes 60-64 and accompanying text.

119. See Plaintiff's Complaint for Declaratory Judgement and Injunction at 11, *Pharmaceutical Mfrs. Ass'n v. Kennedy*, 471 F. Supp. 1224 (D. Md. 1979) (No. 4-78-2449).

120. 471 F. Supp. at 1232 ("Quite obviously a finding of therapeutic equivalence between two drugs will not automatically mean that the higher priced drug commodity will no longer be purchased. For example, the average shopper is no doubt aware of the difference between brand name cereals and the generally cheaper generic labels, . . . but not all consumers automatically opt for the cheaper version. . . . Consumers purchase items for all sorts of reasons, although . . . price sensitivity is increasingly becoming a more prominent factor").

121. *Id.* at 1233. See also *Cowdin v. Young*, 681 F. Supp. 366, 370 (W.D. La. 1987) ("the mere potential for future injury is insufficient to render the issues presented ripe for review").

122. 720 F. Supp. 1244 (W.D. La. 1989).

123. Petitioners' products ranged from toilet bowl cleaners to moth balls. *Id.* at 1248.

124. *Id.* at 1247. HHS acted pursuant to The Public Service Health Act § 301, 42 U.S.C.

result in significant harm to sales of their products.¹²⁵ The District Court for the Western District of Louisiana granted review, holding that publication of the Report constituted agency action within the APA.¹²⁶

The *SOCMA* court framed its analysis in light of the strong congressional presumption in favor of review¹²⁷ and the Supreme Court's determination that courts must construe "agency action" broadly.¹²⁸ In finding that the Report merited review, the court employed two separate lines of argument: 1) the Secretary's promulgation of the Report implemented law—by definition constituting a rule subject to judicial review; and 2) the Report constituted agency action because of its potential impact.¹²⁹

The court focused first on Congress' intent in enacting the Public Health Service Act.¹³⁰ The Act requires the Secretary to identify carcinogenic substances and inform the appropriate agency.¹³¹ The court interpreted the Secretary's fulfillment of this mandate as an implementation of law. Thus the action amounts to the Secretary making a rule.¹³² The APA subjects rules to judicial review.¹³³ The court focused on the substance of the action rather than the label the agency gave it.¹³⁴

The *SOCMA* court's second line of analysis rejected the agency's contention that its Report did not constitute agency action within the APA.¹³⁵ The court relied on *Dow Chemical, USA v. Consumer Product*

§ 241(b)(4)(A) (1988). The Act requires the Secretary to publish an Annual Report on Carcinogens containing a list of chemicals that "either are known to be carcinogens or may reasonably be anticipated to be carcinogens . . . to which a significant number of persons residing in the United States are exposed."

125. 720 F. Supp. at 1247. *SOCMA* sought declaratory and injunctive relief, claiming that the Secretary's criteria for classifying these substances were arbitrary and capricious. *Id.*

126. *Id.* at 1249.

127. *Id.* at 1248. See *supra* note 12 and accompanying text.

128. 720 F. Supp. at 1249. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 255 (1946)). See *supra* note 25. But see *supra* note 29.

129. *SOCMA* had standing because the agency's publication would create adverse publicity about *SOCMA* members' chemicals and thus would lead to lost profits. *Id.* at 1247.

130. See *supra* note 1.

131. 720 F. Supp. at 1249.

132. *Id.* See *supra* note 21 for definition of a rule within the APA. See also *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1151 (5th Cir. 1984) (revised inspection procedure of DOL constitutes agency action because it was designed to implement law and "an agency act designed to implement law is by definition a rule").

133. See *supra* notes 5 and 7.

134. See *supra* note 21 and accompanying text.

135. 720 F. Supp. at 1249-50.

Safety Commission,¹³⁶ which held the Report reviewable "even though it is never to have any formal effect."¹³⁷ The *Dow Chemical* court recognized that courts have "become sensitive to the need . . . for judicial review of federal administrative actions[s] even though [they impose] no direct obligation [and have no] enforcement effect."¹³⁸ The *Dow Chemical* court dismissed the contention that it could not review an interim agency action as having "the hollow ring of another era."¹³⁹

Furthermore, the *SOCMA* court compared the Report to the "no hazard" determination in *Air Line Pilots' Association*,¹⁴⁰ in which "moral suasion" sufficed to warrant immediate judicial review.¹⁴¹ Recognizing what it saw as a recent trend toward judicial pragmatism, the *SOCMA* court determined that although HHS intended the Report only to educate, the plaintiffs deserved judicial review because publication involved potentially substantial economic hardship for SOCMA members.¹⁴²

III. COURTS SHOULD GRANT IMMEDIATE REVIEW OF AGENCY PUBLICATIONS

Courts should reject the analysis that denies review of an agency's published industry evaluation and adopt the line of analysis in *SOCMA*. Three basic arguments support reviewability: 1) these "evaluation" cases strongly resemble reverse-FOIA cases in which courts usually review agency publications;¹⁴³ 2) the harm to an affected party from agency promulgations is often quite direct, immediate, and potentially substan-

136. 459 F. Supp. 378 (W.D. La. 1978).

137. *Id.* at 386.

138. *Id.* See also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-69 (1963) (censorship scheme struck even where state did not enforce it); *Strauss Communications, Inc. v. FCC*, 530 F.2d 1001 (1976) (FCC rule on radio station's libelous attack ripe for review even though it imposed no sanction on the licensee); *Continental Air Lines v. Civil Aeronautics Bd.*, 522 F.2d 107, 124 (D.C. Cir. 1974) ("The action may be reviewable even though . . . the agency has not yet put [it] into effect. . . . [A]gency action may be reviewable *even though it is never to have any formal, legal effect*") (emphasis added).

139. 459 F. Supp. at 386 (citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

140. 720 F. Supp. at 1249. See *supra* notes 67-73.

141. 720 F. Supp. at 1249-50 (citing *Dow Chemical, USA v. Consumer Prods. Safety Comm'n*, 459 F. Supp. 378, 386-87 (W.D. La. 1978)).

142. *Id.* at 1249-50.

143. See *supra* notes 65-66 and accompanying text.

tial;¹⁴⁴ and 3) the underlying presumption of review within the APA itself.¹⁴⁵

A. Reverse-FOIA Suits

In a reverse-FOIA¹⁴⁶ suit, a party who has submitted information to an agency seeks to block disclosure of that information to a third party or to the public.¹⁴⁷ In the leading reverse-FOIA case, *Chrysler Corp. v. Brown*,¹⁴⁸ the Supreme Court held, *inter alia*, that a Department of Defense decision to disclose data on Chrysler's affirmative action plan, against Chrysler's wishes, constituted reviewable agency action under the APA.¹⁴⁹

The similarity to the hypothetical widget-maker's predicament is clear. In both settings, a private party anticipates economic harm from the government's release of certain information. Nevertheless, courts usually construe the agency's decision to publish as "agency action" within the APA only in the reverse-FOIA cases.¹⁵⁰

The *PMA* court spelled out the distinctions between reverse-FOIA cases and situations like that facing the hypothetical widget-maker:¹⁵¹ 1) in reverse-FOIA suits the plaintiff seeking to block release of the infor-

144. See *supra* notes 49-55 and 67-71 and accompanying text.

145. See *supra* note 12 and accompanying text.

146. The Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (1988)).

147. JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, A GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 4.04 (2d ed. 1991). See also William Higgs, *Reverse-FOIA Litigation*, 39 WASHINGTON & LEE L. REV. 435, 445 (1982); Eileen J. Berkman, Note, *The Reverse-FOIA Lawsuit: Routes to Nondisclosure After Chrysler*, 46 BROOK. L. REV. 269 (1980). The Freedom of Information Act (FOIA) was the result of Congress' effort to prevent agencies from arbitrarily withholding information from the public. Recognizing that the release of certain information could harm either government or private parties, FOIA exempts some information from mandatory disclosure, including trade secrets and confidential financial information. 5 U.S.C. § 552(b)(4) (1988).

148. 441 U.S. 281 (1979).

149. *Id.* at 316-18. The Court determined that the Trade Secrets Act, § 7(b), 18 U.S.C. § 1905 (1988), limits agency action. An agency decision to disclose FOIA-exempt material is reviewable under APA § 702, which provides for judicial review for "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702 (1988). See *supra* note 5.

150. Since *Chrysler*, the matter has been settled. See *Humana of Virginia v. Blue Cross*, 622 F.2d 76, 78 (4th Cir. 1980) (*Chrysler* permits disclosure of medicare program provider's cost reports).

151. *Pharmaceutical Mfrs. Ass'n v. Kennedy*, 471 F. Supp. 1224, 1229-31 (D. Md. 1979). This is the only case in which a court has compared and contrasted the two situations.

mation originally submitted the information to the agency,¹⁵² and 2) only in the reverse-FOIA situation is the harm sufficiently direct and immediate to warrant immediate judicial review.¹⁵³ Because these distinctions are unconvincing, courts should grant review in cases in which an agency publishes industry recommendations on the same terms as they would in reverse-FOIA cases.

The distinctions fail to convince because courts view them individually. By addressing these distinctions separately, courts over-emphasize the private party's original mistake in submitting the information to the agency.¹⁵⁴ At the same time, separate analysis downplays the party's subsequent injury from the data's dissemination.¹⁵⁵ Taken together, however, the plaintiff does not care where the agency obtains its data. Rather, the widget-manufacturer's key concern is that consumer access to the data will lead it to suffer significant losses.¹⁵⁶ The affected private party suffers equally in both reverse-FOIA cases and published agency evaluation situations.

The court in *Pharmaceutical Manufacturers Association* downplays the harm plaintiff suffers by saying that in the agency evaluation case all the information was publicly available through FOIA request. In reverse-FOIA suits the data at issue was previously exempt from public review.¹⁵⁷ However, in many other cases a plaintiff may not have had a choice in the matter. In reverse-FOIA cases, statutes often require that the plaintiffs submit information to the agency in the first place.¹⁵⁸ Similarly, the widget-maker may have played no role if the agency gathered its information from in-house study.¹⁵⁹

B. *Effect of Agency Publications on Private Parties*

The private party's potential loss resulting from an agency publication may well be considerable. In *PMA*, the court described the comparison

152. *Id.* at 1229.

153. *Id.* at 1229-31.

154. *Id.* at 1229. ("Nowhere does PMA allege that it supplied the information proposed for release in . . . the Drug List . . .").

155. *Id.* ("there is nothing to indicate that the Drug List and Price Guide do any more than list or compile data . . .").

156. See *supra* notes 2 and 17 and accompanying text.

157. 471 F. Supp. at 1230. The information the agency sought to publish was available in the manufacturer's catalogs and from other public sources. *Id.*

158. Berkman, *supra* note 147, at 270.

159. See *supra* note 100.

study as purely educational and informational.¹⁶⁰ However, as exhibited in *SOCMA*,¹⁶¹ *Brown & Williamson*,¹⁶² and *Industrial Safety Equipment Association*,¹⁶³ reports that agencies intend as educational and informative often can cause devastating and immediate harm.

Courts sometimes blame a publication's effect on independent consumer decisions, thus denying review and effectively absolving agencies of liability.¹⁶⁴ This analysis fails to account adequately for the agency's responsibility as the prime cause of the party's injury. The agency promulgation acts as the catalyst; indeed, agencies sometimes attempt to alter an industry's make-up without the threat of judicial intervention.¹⁶⁵ If taken to extremes, the analysis allows an agency to promulgate a "blacklist," totally isolating an industry or particular manufacturer.¹⁶⁶

C. *Presumption of Review*

A further persuasive argument in favor of granting review lies in the APA's presumption of review: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."¹⁶⁷ In denying review to most complainants in the hypothetical widget-maker's situation, courts insufficiently weigh this basic tenet of the APA's review provisions. While judicial deference to administrative autonomy and the quick dissemination of information are important concerns, courts should recognize the potentially serious effects on private parties that can result from an agency publication. Courts that grant

160. 471 F. Supp. at 1231.

161. See *supra* notes 124-42 and accompanying text.

162. See *supra* notes 49-55, 87-89 and 100-02 and accompanying text.

163. See *supra* notes 38-46, 113-15 and accompanying text. See also *supra* note 2.

164. See 471 F. Supp. at 1233.

165. See *id.* at 1225 (plaintiff alleged that the publication of a drug guide was a government sponsored effort to "remake the existing competitive structure of the prescription drug industry"); Telephone interview with Jim Spooler, Manager, CB North, Charleston, S.C. (member of association/petitioner) (February 8, 1991) (alleging that agency attempted to alter makeup of industry while avoiding judicial review).

166. See, e.g., *Kukatash Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962). A Canadian corporation brought suit to require the SEC to strike names of corporations from "Canadian Restricted List." The list, a public press release available to financial publications and newspapers, contained names of Canadian corporations whose securities the SEC believed to have been distributed in the United States in violation of SEC registration requirements. Petitioners described the list as a "blacklist." However, the court found the list purely informational, and not ripe for review until disputed in an actual case. *Id.*

167. H.R. REP. NO. 1980, 79th Cong., 2d. Sess. 41 (1946).

review of an agency's published industry recommendations will protect the widget maker from unwarranted government publications.

IV. CONCLUSION

Agency promulgations of product evaluations carry with them potentially devastating consequences. Traditionally, courts hesitate to review such publications, and often industry members suffer dramatically. However, some courts allow judicial review before the parties feel the sting of agency action. An analogy to reverse-FOIA suits buttresses this conclusion, as does the APA's underlying presumption of review.

Future judicial consideration should determine that an agency's published industry evaluation fits within the APA's definition of "agency action," and, despite the admittedly uncertain nature of a complaining party's injury, should hold these publications ripe for review.

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