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Confidentiality Agreements in the Administrative State

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ABSTRACT

Employers often use broad language in employee confidentiality agreements to protect company information. Recently, several administrative agencies have proactively regulated language in these agreements to protect various employee rights, including the right to communicate with agencies, bring claims against their employers, and discuss employment conditions amongst each other. While necessary, this recent attention to confidentiality provisions creates a unique regulation issue. With so many agencies involved, regulation has the potential to undermine legitimate employer interests in protecting proprietary information and push employers to find other problematic ways to control their employees. This comment explores interagency coordination as a solution to the potential problems this regulatory issue creates. It notes the inefficiencies that current independent regulation creates, and common coordination tools that agencies have used in the past to resolve difficult regulatory questions. Given the unusual difficultly of regulating agreement language, this comment finds that flexible coordination tools like joint rulemaking and interagency adjudication are feasible solutions.

INTRODUCTION

In 2015, the Securities and Exchange Commission (SEC) sanctioned KBR Inc., an international construction and energy-services firm, with a $130,000 civil penalty.[1] The SEC found that KBR's employee confidentiality agreements explicitly prevented employees from whistleblowing to outside agencies, in direct violation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[2]

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1 Dave Michaels, *First Case Against Muzzling Whistle-Blowers*, BLOOMBERG (Apr. 1, 2015, 1:26 PM CDT), http://www.bloomberg.com/news/articles/2015-04-01/sec-sanctions-kbr-in-first-case-against-muzzling-whistle-blowers.

2 Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

Some commentators argue that KBR's agreements were problematic and merited the SEC's swift response.[3] Others in the financial services industry wonder if the SEC went too far. After all, it sanctioned KBR for agreements that the firm had not enforced against its employees.[4] In any case, the SEC is setting an enforcement trend for agencies troubled by overly broad confidentiality provisions.[5]

As agencies like the Commodity Future Trading Commission (CFTC) and the Occupational Safety & Health Administration (OSHA) bolster their respective whistleblower policies to match the SEC's pace, other agencies have also been critical of these agreements.[6] Notably, the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) have increased their scrutiny of employee confidentiality provisions. The NLRB has recently taken on the financial services industry, while the EEOC has asserted its right to sue employers without receiving a complaint of discrimination.[7]

This comment attempts to find a balance between the interests employers have in confidentiality agreements and the various interests agencies have in regulating them. Agencies are right to push against broad agreement language that has become an industry standard.[8] As zealous as enforcement may seem, however, agencies recognize that these agreements serve legitimate employer needs. Yet, because these agencies have different regulatory interests and enforcement mechanisms, there is a danger that these agencies will establish guidelines that are unclear, or overly restrictive when applied in the aggregate.

As no industry is exempt from the regulations of any one agency, a workable interagency policy or enforcement mechanism is a preferable

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[3] John A. Chanin & John S. Cutler, *Whistleblower Carve-Outs to Confidentiality Agreements: Why Attorneys Should Revisit Past Agreements or Risk Liability*, 45 COLO. LAW. 15, 16 (2016).

[4] Eugene Scalia, *Blowing the Whistle on the SEC's Latest Power Move*, WALL STREET J. (Apr. 5, 2015), http://www.wsj.com/articles/eugene-scalia-blowing-the-whistle-on-the-secs-latest-power-move-1428271250 [https://perma.cc/4ASA-Z2NF].

[5] Ed Ellis et al., *OSHA Joins the SEC in Attacking Confidentiality and Other Provisions in Private Settlement Agreements*, LITTLER LLP (Sep. 19, 2016), https://www.littler.com/publication-press/publication/osha-joins-sec-attacking-confidentiality-and-other-provisions-private [https://perma.cc/VZ66-RN7Q]; Gina LaMonica, *CFTC Proposes Rules to Align with SEC Whistleblower Program*, WHITE COLLAR BRIEFLY (Sep. 13, 2016), https://www.whitecollarbriefly.com/2016/09/13/cftc-proposes-rules-to-align-with-sec-whistleblower-program/ [https://perma.cc/APE6-HU8J].

[6] *See* Ellis et al., *supra* note 5.

[7] *See* Complaint and Notice of Hearing, Bridgewater Associates, LP and [Redacted], NLRB No. 01-CA 169426 (Jun. 30, 2016); EEOC v. CVS Pharmacy, Inc., 809 F.3d 335 (7th Cir. 2015); *see also* 42 U.S.C. § 2000e–e-17.

[8] *See* Robert P. Haney & Cynthia Soohoo, *The Dangers of Confidentiality Pacts*, COVINGTON & BURLING (Feb. 14, 2000), https://www.cov.com/-/media/files/corporate/publications/2000/02/oid6364.pdf [https://perma.cc/EQ4E-XCWG].

solution to individual agency action. This comment argues that coordinated agency activity is a feasible response to this issue given the diversity of agency interests involved, and the current inefficiency of independent regulation. Agencies already take cues from each other's policies, and broader coordination can help agencies create regulations and enforce them more efficiently.[9] If each individual agency, however, continues to take a strong, singular stance against confidentiality provisions, employer confidentiality protections could suffer a death by a thousand administrative cuts.

I. ADMINISTRATIVE AND PRIVATE INTERESTS IN CONFIDENTIALITY PROVISIONS

In the abstract, administrative agencies regulate and enforce discrete aspects of the public sphere, often under an eponymous congressional act. In reality, these administrative mandates often bleed into each other, as one regulatory issue implicates multiple agencies' distinct directives. Confidentiality provisions in employee agreements are a recent example, as many agencies have grown concerned about employers impeding their employees' rights to disclose information to outside agencies or amongst each other.[10]

A. Employers Rely on Confidentiality Provisions to Protect Proprietary Information and Remain Competitive

Confidentiality agreements are contracts between parties prohibiting one or both parties from disclosing confidential information.[11] This comment refers to confidentiality provisions as the specific clauses found in these and other agreements, such as settlement and severance agreements.

Companies have legitimate interests in keeping their business models, client lists, and proprietary information secret. Much of this knowledge inevitably rests with their employees. As two commentators note, "[t]oday, much of a company's value exists in employees' minds," as trade secrets, intellectual property, and general company activity.[12]

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[9] *See* Ellis et al., *supra* note 5. With the recent change in administration, it is unclear if enforcement will continue to rise, but the problem may present itself again in a future administration.

[10] *See* Chanin & Cutler, *supra* note 3.

[11] Rebecca K. Myers, *Confidentiality, Nondisclosure and Secrecy Agreements*, LEXISNEXIS (Nov. 30, 2015), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2015/11/30/confidentiality-nondisclosure-and-secrecy-agreements.aspx [https://perma.cc/22RZ-DCY5].

[12] William G. Porter II & Michael C. Griffaton, *Using Noncompete Agreements to Protect Legitimate Business Interests*, 69 DEF. COUNS. J. 194, 202 (2002).

While maximizing a business's industry performance involves keeping its activities secret from competitors, the opposite is true for an employer's relationship with its employees. Often, the easier it is for information flow within a firm or business, the more productive are its employees.[13] Confidentiality agreements encourage this flow of information within a company. The more confident an employer feels that its information is protected, the more access it is likely to grant its employees.

Confidentiality provisions are also necessary to protect information in court. For example, under the Uniform Trade Secrets Act of 1985 (UTSA)[14] and the Defend Trade Secrets Act (DTSA),[15] an employer must make reasonable efforts to keep its information secret if it wants the court to consider that information confidential.[16] The USTA defines a trade secret as "information . . . that: (1) derives independent economic value, actual or potential, from not being generally known . . . and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[17]

Some practitioners assert that these agreements are "the first thing a Court will look to in determining whether the employer used reasonable efforts."[18] Just as courts will not assume that certain information is confidential if it is not proactively defined as such, courts will similarly not assume that certain "low-level employees" have confidential relationships with their employer unless the company defines that relationship as well.[19]

Importantly, an employer's interests in its propriety information directly impact its employees and society at large. Society needs companies to remain competitive and innovative. In turn, companies need to maintain their legitimate right to protect propriety information to sustain this benefit to society. Since companies use confidentiality

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[13] *See* Myers, *supra* note 11.

[14] National Conference of Commissioners on Uniform State Laws, *Uniform Trade Secrets Act*, UNIFORM LAWS (Aug. 9, 1985), http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf [https://perma.cc/NW9W-3VLD].

[15] 18 U.S.C. § 1833 (2012).

[16] Brad D. Bosomworth, *Protecting Customer Lists - Why Have Confidentiality Agreements with Employees?*, SWEENY, MASON, WILSON & BOSOMWORTH, http://www.smwb.com/corporate-low-confidentiality-agreements-with-employees [https://perma.cc/97CN-KG3J].

[17] National Conference of Commissioners on Uniform State Laws, *supra* note 14, at 5. The DTSA similarly defines trade secrets at 18 U.S.C. § 1839(3)(A)–(B).

[18] Bosomworth, *supra* note 16.

[19] Janette Levey Frisch, *Confidentiality Clauses in Employment Agreements: Who's Minding the Store? Part I*, LAW OFFICE OF JANETTE LEVEY FRISCH (Dec. 6, 2012), http://theemplawyerologist.com/2012/12/06/confidentiality-clauses-in-employment-agreements-whos-minding-the-store-part-i/ [https://perma.cc/X28S-23Q5].

agreements to control employee disclosure, extreme regulation could push employers to control their employees in other ways. For instance, a company may seek to protect its proprietary information through more restrictive non-compete agreements.

B. Protecting Employees: Recent Administrative Activity against Employee Confidentiality Provisions

While there are many legitimate reasons for these provisions, agencies must make sure that employers are not protecting themselves at the expense of employee rights or administrative interests in discovering illegal activity. The agencies examined in this comment have recently signaled strong policies against confidentiality provisions. While each policy alone does not completely strip an employer of proprietary protection, their aggregate effect has this potential. As discussed below, each agency has a different statute and different enforcement powers. This results in different, and sometimes conflicting, regulation that is developing at an uneven pace.

1. The SEC and Dodd-Frank's whistleblower protections

The SEC zealously regulates employee confidentiality agreements. Since Dodd-Frank created the Office of the Whistleblower in the SEC and the CFTC, the SEC has sanctioned at least three companies in widely publicized administrative cases for their suspect provisions.[20] Notably, none of these cases involve the employer enforcing these provisions against an employee. The Commission's preemptive enforcement actions have struck some as excessive and have left many scrambling to revise their agreements.[21]

Dodd-Frank amended the Securities Exchange Act of 1934[22] to add Section 21F, entitled "Securities Whistleblower Incentives and Protection." In addition to creating a bounty program for whistleblower tips to the SEC, rule 21F-17(a) provides that "no person may take any action to impede an individual from communicating directly with [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."[23] As seen in the agency's decisions against KBR, Inc., BlueLinx Holdings, Inc., and Health Net

[20] *See* KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015); BlueLinx Holdings Inc., Release No. 78528, 2016 WL 4363864 (Aug. 10, 2016); Health Net, Inc., Release No. 78590, 2016 WL 4474755 (Aug. 16, 2016).

[21] Scalia, *supra* note 4.

[22] 15 U.S.C. § 78a–78qq (2012).

[23] 17 C.F.R. § 240.21F-17.

Inc., the SEC has interpreted this provision to permit preemptive enforcement actions.

In *KBR Inc.*, the SEC sanctioned KBR for requiring employees that are involved in internal investigations to sign a problematic confidentiality statement.[24] This statement prevented employees from reporting the content of any interview related to an internal investigation without permission from KBR's legal department. In place before the promulgation of Rule 21F-17, it read in part:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.[25]

The SEC found that this language "impedes [communication with Commission Staff] by prohibiting employees from discussing the substance of their interview without clearance from KBR's law department under penalty of disciplinary action including termination of employment."[26] As a result, KBR "undermin[ed] the purpose of Section 21F and Rule 21F-17(A), which is to 'encourage individuals to report to the Commission.'"[27] KBR voluntarily agreed to amend its provisions before the SEC delivered its order, and the SEC admitted that it was "unaware of any instances in which (i) a KBR employee was in fact prevented from communicating directly with Commission Staff about potential securities law violations, or (ii) KBR took action to enforce the form confidentiality agreement or otherwise prevent such communications."[28] Despite this, the SEC enforced a civil penalty of $130,000.[29]

About a year later, the SEC released another administrative order against BlueLinx Holdings, Inc., for inappropriate confidentiality provisions in several of its employee agreements.[30] Before 2013, these provisions prevented employees from disclosing confidential information to any third party. For example, a form termination agreement required an employee to agree that: "Employee has not and in the future will not

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[24] *KBR, Inc.*, 2015 WL 1456619 at *2.

[25] *Id.*

[26] *Id.* at *3.

[27] *Id.*

[28] *Id.*

[29] *See* Michaels, *supra* note 1.

[30] BlueLinx Holdings Inc., Release No. 78528, 2016 WL 4363864 (Aug. 10, 2016).

use or disclose to any third party Confidential Information, unless compelled by law and after notice to BlueLinx."[31]

In 2013, BlueLinx amended the provisions in its severance agreement to include a carve-out for disclosures to administrative agencies. This carve-out, however, came with a caveat. It required the "Employee [to] understand and agree[ ] that Employee is waiving the right to any monetary recovery in connection with any [administrative complaint or disclosure]."[32] Unsurprisingly, the SEC found these clauses unacceptable. It noted that the 2013 amended provision "removed the critically important financial incentives that are intended to encourage a person to communicate directly with the Commission staff about possible securities law violations."[33] The Commission ordered BlueLinx to include a "protect rights provision" in its employee agreements, and imposed a $265,000 civil penalty.[34]

Only a week later, the SEC released a similar order against Health Net, Inc.[35] Health Net's agreements did not prevent employees from participating in government investigations or proceedings, but required employees to waive "any right to bring a lawsuit against the Company" and "any right to any individual monetary recovery in any [government investigation or administrative complaint or disclosure]."[36] The Commission was "unaware of any instances" in which those agreements deterred an employee from communicating with the SEC, or if Health Net enforced these agreements against its former employees.[37] Still, it found that these agreements "directly targeted the SEC's whistleblower program by removing the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff" about possible violations.[38] The SEC ordered Health Net to revise its agreement language and sanctioned it with a $340,000 penalty.[39]

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[31] *Id.* at *3; BlueLinx defined confidential information as "data and information relating to the business of BlueLinx which is or has been disclosed to the Employee or of which the Employee become aware as a consequence of or through his relationship to Bluelinx." *Id.*

[32] *Id.* at *4.

[33] *Id.*

[34] A protected rights provision reminds an employee of her right to report illegal activity and file lawsuits with administrative agencies, notwithstanding her responsibility to keep the company's information confidential. *See Alert – The Securities and Exchange Commission ("SEC") Rules that Confidentiality Provisions Cannot Impede Whistleblower Reporting*, BUCHMAN PROVINE BROTHERS SMITH LLP (Nov. 7, 2016), http://www.bpbsllp.com/663 [https://perma.cc/MA72-CNA2].

[35] Health Net, Inc., Release No. 78590, 2016 WL 4474755 (Aug. 16, 2016).

[36] *Id.* at *3.

[37] *Id.*

[38] *Id.* at *3–4.

[39] *Id.*

2. The NLRB and Section 7 employee rights

Confidentiality provisions have also provoked the NLRB. While the SEC is primarily concerned with unfettered communication between employees and Commission staff, the NLRB's scrutiny is more broadly concerned with employees' rights to communicate with outside agencies, and among each other.[40] Indeed, comparing the standards each agency uses to regulate confidentiality provisions highlights their different regulatory interests.[41]

Section 7 of the National Labor Relations Act (NLRA)[42] grants employees the:

> right to self-organization, to form, join, or assist labor organizations, or bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.[43]

In *Kinder-Care Learning Centers*,[44] the NLRB interpreted Section 7 rights to include the right of an employee to communicate with their employers' customers, government agencies, and other third parties about their employment conditions.[45] Under section 8(a)(1) of the Act, it is an unfair labor practice "for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."

Comprehensive confidentiality agreements can directly implicate an employee's ability to exercise Section 7 rights under the NLRA. For example, in April of 2016, the NLRB released a lengthy administrative decision that dissected several confidentiality provisions of an employment manual.[46] In *Quicken Loans, Inc.*, the general counsel of the NLRB sued Quicken Loans' family of corporations for their "Big Book"

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40 Chanin, *supra* note 3, at 19.

41 *Compare* Quicken Loans, Inc., No. 07-CA-145794, 2016 WL 1445983 (Apr. 7, 2016) *with* KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015).

42 29 U.S.C. § 157 (2012).

43 *Id.*

44 299 N.L.R.B. 1171 (1990).

45 *Id.* at 1172.

46 *Quicken Loans, Inc.*, 2016 WL 1445983.

employment manual.[47] Similar to the SEC proceedings, there did not have to be evidence that the employer applied these provisions against its employees for the court to find a NLRA violation.[48] As long as a provision "reasonably *would* be construed as abridging Section 7 activity," it would count as a violation.[49]

One example of a provision that the court deemed objectionable was the manual's "suggestion" that employees keep private financial information under wraps: "What shouldn't you share? Non-public financial or operational information. This includes strategies, forecasts, communication that requires a disclaimer, and anything with a dollar figure attached to it (rates, programs, quotes, client information, salaries, etc.)."[50] While Quicken Loans tried to argue that this clause was found under the Big Book's section of "helpful tips and suggestions for using social media," and, therefore, only a suggestion, the court found that "to a very real extent, the threat of discipline is *inherent* in management's suggestions of how employees' should conduct themselves" and noted that "[c]learly, employees have a right under the Act to disclose many items 'with a dollar figure attached.'"[51] The court found that because this provision was overbroad, it violated the NLRA.

On the other hand, there were several provisions in the Big Book that passed the NLRB's Section 7 test. Importantly, the court allowed provisions that could create liability with the SEC. For example, under the Big Book's "Things We Live By" section, the manual counseled employees that "[f]rom time to time, team members may have access to private Company information . . . about financial performance, strategy, forecasts, etc. Such information is confidential, and may not be shared with people or entities outside the Company."[52] The court noted that none of the information protected under this clause "is employee information or is reasonably directed to wages, hours, and other terms and conditions of employment. . . Employees would reasonably understand the rule to relate to their employers' interest in the security of its proprietary information and not to Section 7-protected information."[53]

The court also dismissed allegations against other provisions that arguably violate whistleblower statutes. The Big Book read "in a catch-

[47] *Id.* at 5.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 13.
[51] *Id.* at 14.
[52] *Id.* at 21.
[53] *Id.*

all fashion" that "'improper conduct is not limited to the actions described above, but includes any action deemed by the Company to be contrary to the Company's business interests.'"[54] Because the court was only concerned with protecting Section 7 rights, it found that this clause did not violate the NLRB, since "[t]he mere ability to mount an argument that someone could deem protected [Section 7 related] activity threatening or against the Respondent's business interests or from conducting business does not satisfy the Board's test for finding an interference with Section 7 rights."[55]

Following the *Quicken Loans* decision, on June 30, 2016, the NLRB filed an administrative complaint against Bridgewater Associates.[56] Related to an earlier sexual harassment complaint to the NLRB that has since been closed, the NLRB alleged that the firm's form employee agreements infringed on Section 7 rights.[57] The complaint cited language that advised employees that "[f]or the avoidance of doubt, your obligation not to disclose or use Bridgewater's Confidential Information without prior authorization applies in all contexts, industries, and businesses."[58] The NLRB had scheduled a hearing in December, but settled with Bridgewater in October.[59] The heavily redacted agreement between Bridgewater and the NLRB does not disclose what changes Bridgewater made to its employment policies, but this action may signal a more proactive regulatory approach as seen with the SEC.[60]

3. The EEOC and Title VII's equal opportunity protections

Not to be left out, the EEOC has also filed several lawsuits against employers with agreements that prevent employees from reporting discriminatory conduct to the EEOC.[61] The EEOC's interests in the provi-

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[54] *Id.* at 24.

[55] *Id.*

[56] *See* Alexandria Stevenson & Matthew Goldstein, *Labor Board Challenges Secrecy in Wall Street Contracts*, N.Y. TIMES (Oct. 17, 2016), http://www.nytimes.com/2016/10/18/business/deal book/bridgewater-hedge-fund-employee-contacts.html?_r=0 [https://perma.cc/8NHM-8BGF].

[57] *Id.*

[58] Complaint at 2, Bridgewater, N.L.R.B. No. 01-CA 169426; Bridgewater defined confidential information in its agreements as "any non-public information relating to the business or affairs of Bridgewater or its affiliates, or any existing or former officer, director, employee or shareholder of Bridgewater." *Id.*

[59] Stevenson & Goldstein, *supra* note 56; *see* Matthew Goldstein & Alexandria Stevenson, *Hedge Fund Settlement with Labor Board on Worker Rights Stays Secret*, N.Y. TIMES (Nov. 29, 2016), http://www.nytimes.com/2016/11/29/business/dealbook/bridgewater-associates-labor-board-employee-confidentiality-contract-settlement-.html [https://perma.cc/LFN3-EAP5].

[60] Goldstein & Stevenson, *supra* note 59.

[61] *See generally* E.E.O.C v. Doherty Enter., Inc., 126 F. Supp. 3d 1305 (S.D. Fla. 2015); EEOC

sions align with the SEC's, as both agencies seek to preserve an employee's full access to their agencies. Unlike the SEC, however, the EEOC's limited administrative powers have left it vulnerable in court.[62] Circuits currently disagree on whether the EEOC has the power to begin enforcement actions against companies for the mere threat of overly restrictive confidentiality agreements.[63] Until the courts resolve that question, the EEOC continues to construe its administrative powers broadly enough to join the administrative fray.[64]

4. OSHA and CTFC's potential for enforcement activity

Employers have yet to feel the ire of OSHA or the CFTC. OSHA recently sharpened its Whistleblower Investigations Manual to prohibit confidentiality provisions that prevent employees from participating in investigations or testifying at trial.[65] OSHA also referenced the SEC's action against BlueLinx as a standard for its enforcement actions.[66] SEC and OSHA, however, still differ in their administrative approach; while OSHA has given employers sample carve-out language, the SEC is reluctant to do the same.[67]

The CFTC has similarly revised its enforcement policies. In August, the Commission released a Notice of Proposed Rulemaking where it anticipated conforming its policies to the SEC's.[68] Changes involve "model[ing] aspects of the SEC's whistleblower program, including (1) agency enforcement of whistleblower anti-retaliation provisions; (2) prohibition of confidentiality agreements that would restrict whistleblowers from providing information to the CFTC, and (3) a reorganization of the whistleblower claims review process within the CFTC."[69] The Commission also plans to amend its rules to specifically "prohibit the

v. CVS Pharmacy, Inc., 809 F.3d 335 (7th Cir. 2015).

[62] *See CVS Pharmacy*, 809 F.3d at 11.

[63] *Doherty Enter., Inc.*, 126 F. Supp. 3d at 1310 (finding that the EEOC may bring a pattern or practice suit under Title VII without an individual or Commissioner filing a charge or discrimination or an attempt at conciliation); *cf. CVS Pharmacy*, 809 F.3d at 11 (finding that the EEOC did not have this broad power).

[64] *CVS Pharmacy*, 809 F.3d at 8.

[65] *Employers Need to Review, Revise Standard Confidentiality Agreements and Policies in Response to New Whistleblower Protections under Federal Law*, FLASTER GREENBERG (Oct. 19, 2016), http://www.flastergreenberg.com/newsroom-alerts-Employers_Need_to_Review_Revise_Standard_Confidentiality_Agreements_and_Policies.html [https://perma.cc/Q772-SM7T].

[66] Ellis et al., *supra* note 5.

[67] *Memorandum for Regional Administrators; Whistleblower Program Managers,* U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., (Aug. 23, 2016) http://www.whistleblowers.gov/memo/InterimGuidance-DeFactoGagOrderProvisions.html [https://perma.cc/8R6D-5YWC].

[68] Commodity Futures Trading Commission Notice of Proposed Rulemaking 81 Fed. Reg. 59551 (Aug. 30, 2016) (codified at 17 C.F.R Pt. 165).

[69] La Monica, *supra* note 5.

enforcement of confidentiality and pre-dispute arbitration clauses relating to actions by potential whistleblowers in any [employment related] agreements."[70]

II. THE PROBLEM OF AGREEMENT LANGUAGE AND POSSIBLE SOLUTIONS

While the current executive administration has not yet announced its policy on this issue, this sample of recent attention to confidentiality agreements suggests that more enforcement activity is likely. If so, this activity may culminate in a unique administrative issue. Unlike vague administrative guidelines, or clearly contradictory rules from different agencies imposed upon the same regulated community, the regulation of confidentiality provisions gives agencies the potential to regulate away an employer's power to protect its proprietary information. This problem is heightened since these agencies are working to regulate something as elusive as language. Regulating the air traffic of a busy airport, for instance, is not the same as regulating contract language that can change quickly or be open to misinterpretation. As a result, regulation has to remain flexible and broad enough to capture new provisions that employers might create to control their employee's communication. Regulatory flexibility, however, can lead to a lack of notice for the regulated community, worsening this issue.

On the other hand, confidentiality provisions present an opportunity for interagency coordination. These agencies want to regulate employee agreements for different reasons, but they all agree that the current, broad confidentiality standard is running afoul of administrative policies. This comment will argue that: 1) the difficulty of protecting rights by regulating agreement language creates a high potential for inefficient administrative policies, 2) independent agency enforcement is not enough to properly regulate confidentiality agreements since each agency has different interests to advance, and 3) interagency coordination is a preferable solution for future regulation of confidentiality provisions.

A. The Difficulty of Protecting Rights by Regulating Agreement Language Creates a High Potential for Inefficient Administrative Policies

At first glance, there appears to be a simple solution to confidentiality provision regulation. As the SEC required of KBR and BlueLinx,

[70] *Id.*

for example, each agency could require employers to include a "protected rights provision" in their agreement, which would remind employees of their right to communicate with a third-party agency.[71] In particular, the SEC required KBR to include a protected rights provision in its employee agreements, which read: "Nothing in this Confidentiality Statement prohibits [the employee] from reporting possible violations of federal law or regulation to any governmental agency or entity."[72] A provision addressing the whole universe of administrative authority would at least let employers feel confident that they are aware of all interested agencies.

Protected rights provisions, however, may not cover all the rights that agencies consider. While a simple protected rights provision may be adequate for agencies concerned with whistleblower rights like the SEC, CTFC and OSHA, agencies like the NLRA and the EEOC must regulate around the subtler ways that confidentiality provisions prohibit communication amongst employees and the filing of complaints.

For example, in 2014, the EEOC sued CollegeAmerica for its separation agreements that conditioned post-employment benefits on the waiver of future claims to any government agency.[73] The SEC itself is reluctant to rely on protected rights provisions, as the SEC Officer of the Whistleblower Chief Sean McKessy expressed in 2015.[74] McKessy made clear that the amended KBR provision should not be considered a "'safe harbor,'" since agreement language can seem appropriate in one context and offensive in another.[75]

The difficulty of pinning down language that works for any one agency, in any context, means that agencies must be flexible and evolve their regulations in tandem with novel agreement language. If agencies do not communicate with each other, however, regulation is likely to diverge, especially if policies are constantly reacting to new language. In turn, divergence can lead to inefficiency and make it difficult for the regulated community to comply. Of course, agencies could have no regulation or proactive enforcement to respond to this regulatory challenge. This solution, however, would leave employees extremely vulnerable, given how broad confidentiality language has become. Shifting the

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71 BlueLinx Holdings Inc., Release No. 78528, 2016 WL 4363864, at *5 (Aug. 10, 2016).

72 KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619, at *3 (Apr. 1, 2015).

73 *CollegeAmerica Sued by EEOC for Age Discrimination and Retaliation*, EEOC (Apr. 5, 2014), https://www1.eeoc.gov//eeoc/newsroom/release/5-5-14.cfm?renderforprint=1 [https://perma.cc/GD5C-6K8G].

74 Ada W. Dolph, *Aggressive Enforcement Efforts Will Continue After KBR, Per SEC Whistleblower Chief*, SEYFARTH SHAW (Apr. 4, 2015), http://www.seyfarth.com/publications/OMM042215-WB [https://perma.cc/7KZD-EJLA].

75 *Id.*

burden to employees to know and enforce their rights against employers with the usual imbalance of power in employment relationships would likely lead to less whistleblowing and labor activism. Instead, agencies must find a way to proactively contend with this regulatory issue.

B. Independent Agency Activity Is Not Enough to Efficiently Regulate This Issue, as Each Agency Has Different Interests to Advance

Each agency has a distinct agenda when it comes to regulating confidentiality provisions. This means that an agency can only offer guidelines and sanction employers in relation to the rights given under its mandate. A company caught red-handed by OSHA, for example, may be penalized and receive a specific directive that keeps it in compliance with OHSA in the future, but may still be open to sanctions from the SEC if that company does not stay abreast of SEC enforcement activity.

For example, in *Quicken Loans*, the administrative judge dismissed certain allegations of overly broad confidentiality provisions, even though the language resembled provisions that the SEC had recently sanctioned. One provision in Quicken Loans' manual cautioned employees that "[t]he unauthorized disclosure [of company information] is strictly prohibited and is a serious matter that will result in immediate separation of employment and, if necessary, criminal or civil legal action."[76] The court found no legal violation in this provision since its language would not "reasonably result in an employee understanding protected activity to be barred by this provision."[77] It is seems unlikely, however, that other agencies would allow this language, especially agencies enforcing whistleblower statutes.

Independent agency enforcement is thus unlikely to prevent future conflicts in confidentiality provision regulation. As one commentator noted, "seriatim mandates from each government and regulatory body for a carve-out . . . repeated in each related provision is both impractical and impossible."[78] Instead, there needs to be proactive regulation from each agency which, when applied together, efficiently protects employees while leaving employers reasonably free to protect their proprietary interests. As discussed below, one solution that meets these needs is interagency coordination.

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[76] Quicken Loans, Inc., No. 07-CA-145794, 2016 WL 1445983, at *25 (Apr. 7, 2016).

[77] *Id.* at *27.

[78] Nancy Morrison O'Connor, *Preventing Release from Releases as Federal Agencies Attempt to Put Separation Agreements Asunder*, THE ADVOCATE (2014), https://info.bracewelllaw.com/37/388/uploads/the-advocate.pdf [https://perma.cc/YZ3C-3KEB].

C. Interagency Coordination Is a Preferable Vehicle for Heightened Administrative Scrutiny of Confidentiality Provisions

The issue presented is a regulatory space—confidentiality provisions—that involves more agencies than a first impression would reveal. Interagency coordination could help these agencies carry out their distinct statutory directives and prevent conflicting and inefficient regulation. Specifically, an ideal coordination tool would: 1) increase notice to companies of each agencies' policy towards confidentiality provisions, 2) increase communication among these agencies so their regulators would stay informed of each agencies' policies, and 3) strike a balance between protection of employee rights and employer proprietary interests. Jody Freeman and Jim Rossi's seminal article, *Agency Coordination in Shared Regulatory Space*, provides a useful framework to understand the specific tools agencies have used to achieve these goals.[79]

1. Instances of shared regulatory space

Freeman and Rossi first propose four categories of multiple-agency delegations, or four ways that Congress delegates agency directives that create shared regulatory spaces: (1) overlapping agency functions, (2) related jurisdictional assignment, (3) interacting jurisdictional assignments, and (4) delegations requiring concurrence.[80] While not an exhaustive list of categories, this gives some of the most common causes of shared regulatory spaces that often benefit from coordination tools.

The first type of delegation, overlapping agency functions, generally occurs where "lawmakers assign essentially the same function to more than one agency."[81] Within the context of confidentiality provisions, the shared whistleblower protection directives between the SEC, CFTC and OSHA ("whistleblower agencies") closely illustrate the resulting regulatory space. The discussed regulatory conflict, however, lies less with these whistleblower agencies that have already proposed similar enforcement policies, and more with the differences between these agencies' goals and those of the NLRB and EEOC.

The second type of delegation, related jurisdictional assignment, also partially describes the problem of confidentiality provision regula-

[79] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

[80] *Id.* at 1145.

[81] *Id.*

tion. Freeman and Rossi describe this type of delegation as "where Congress assigns closely related but distinct roles to numerous agencies in a larger regulatory or administrative regime."[82]

The American food safety system provides an example of this regulatory space.[83] In this system, the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) perform the same regulatory function of "standard setting designed to ensure the safety of the food supply," although over different food products.[84] Also within this regulatory space is the Department of Homeland Security (DHS), which is responsible for food security, and the Environmental Protection Agency (EPA), which regulates pesticide levels and residue in food commodities.[85]

Like confidentiality provisions, in the American food safety example there are several agencies implicated in the same regulatory space. These agencies, however, share regulatory space because they have interrelated directives over food safety and security. Overlapping jurisdiction is much more likely. Confidentiality provisions instead is a narrow regulatory issue that happens to affect a variety of regulatory interests.

The third type of delegation examined, interacting jurisdictional assignments, most closely describes confidentiality provisions overall. Interacting jurisdictional assignments are "situations where Congress creates situational interdependence among agencies that have different and potentially incompatible primary missions."[86] Border patrol is a vivid example. While the Fish and Wildlife Service (FWS), Immigration and Customs Enforcement (ICE) within DHS, and various federal land agencies "perform different functions and have unique missions under separate statutes," border patrol implicates each agency's interests.[87]

Like confidentiality provisions, border patrol is a regulatory space that happens to implicate a variety of interests, instead of related agency directives that necessarily implicate each other. Border patrol also brings together certain agencies whose regulatory goals would otherwise seem unrelated, as seen in this comment with the SEC and NLRB.

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[82] *Id.*
[83] *Id.* at 1147.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 1148.
[87] *Id.* at 1149.

2. Common coordination tools

Administrative agencies often use a variety of coordination tools to deal with the mentioned instances of shared regulatory space. These tools, and their past application, are instructive to confidentiality provisions. Freeman and Rossi give four types of common coordination tools: (1) consultation provisions, (2) interagency agreements, (3) joint rulemaking and (4) centralized White House Review.[88]

a. Consultation provisions and memoranda of understanding

Consultation provisions and interagency agreements are the least binding types of coordination tools. Agency consultation can occur when Congress requires or expressly permits an agency to consult with other agencies whose missions are implicated in the first agency's policies.[89] Even without express legislative approval, agencies may consult each other as long as Congress does not prohibit their interaction.[90] Some agencies, however, might be reluctant to consult other agencies unless it is explicitly authorized, and consultation does not guarantee that an agency will change or modify its policy.[91] For this case, there is some evidence that the whistleblower agencies would not have an issue engaging each other in a consultative process, especially since the CFTC and OSHA are already considering the SEC's enforcement strategy.[92] The more important issue is the conflict between the NLRB and the SEC's policies regarding these provisions, which would probably need a stronger solution.

A common example of interagency agreements is the Memorandum of Understanding, or the MOU.[93] Agencies usually enter into MOUs at their own discretion, since there are no statutory or executive policies that dictate MOU provisions.[94] Freeman and Rossi give five common purposes for MOU agreements: "(1) delineating jurisdictional lines, (2) establishing procedures for information sharing or information production, (3) agreeing to collaborate in a common mission, (4) coordinating reviews or approvals where more than one agency has authority to act

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[88] *Id.* at 1157, 1161, 1165, and 1175.

[89] *Id.* at 1157.

[90] *Id.*

[91] *Id.* Agencies may be reluctant to consult other agencies without explicit legislative authorization because they would not want to be seen as overstepping the authority that Congress has granted them.

[92] *See* LaMonica, *supra* note 5; Ellis et al., *supra* note 5.

[93] Freeman & Rossi, *supra* note 79, at 1161.

[94] *Id.*

in a particular substantive area and (5) . . . agreeing on substantive policy."[95]

An MOU with the fourth type of purpose usually involves several agencies.[96] One example Freeman and Rossi give is the 2009 MOU between nine federal agencies to coordinate regulation over the siting of electric transmission lines on federal lands.[97] To reduce the delays in siting transmission projects, Congress instructed the Department of Energy ("DOE") to coordinate the process among eight other agencies.[98] These agencies signed an MOU in 2006 to clearly delineate responsibilities, with a sequential system of review.[99] As Freeman and Rossi note, however, this MOU did not do enough to galvanize a more efficient process.[100] The Obama administration still found the siting process too delayed, so the agencies signed a second MOU in 2010.[101] Federal siting has since improved, although the Obama administration issued subsequent executive directives to further expedite the process.[102]

The DOE example illustrates that MOUs would make a useful tool for agency coordination of confidentiality provisions. Congress and the executive branch consider MOUs an appropriate response to coordination issues. An MOU between the agencies highlighted in this comment could, for example, set up a system of information sharing about what provisions an agency has already deemed illegal. They could also agree to an alert system where agencies would inform each other of proceedings against an employer. The other agencies could decide to review the confidentiality provisions of that employer and issue a warning if the provisions also violate their policies. This way, while an employer is in an enforcement proceeding with one agency, it can adjust its agreement language to fit the policies of all potentially interested agencies, instead

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[95] *Id.* at 1161.

[96] *Id.* at 1163.

[97] *Id.* at 1164.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*; *see also* Mem. of Understanding Among the U.S. Dep't of Agric., Dep't of Commerce, Dep't of Def., Dep't of Energy, Envtl. Protection Agency, the Council on Envtl. Quality, the Fed. Energy Regulatory Comm'n, the Advisory Council on Historic Pres., and Dep't of the Interior Regarding Coordination in Fed. Agency Review of Elec. Transmission Facilities on Fed. Land, (2009) https://energy.gov/sites/prod/files/Transmission%20Siting%20on%20Federal%20Lands%20MOU%20October%2023%2C%202009.pdf [https://perma.cc/X8QZ-LYYA].

[102] WHITE HOUSE, MODERNIZING OUR ELECTRIC TRANSMISSION INFRASTRUCTURE AND DRIVING THE DEVELOPMENT OF CLEAN ENERGY 2 (July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/modernizingourelectrictransmission.pdf [https://perma.cc/LLB3-EYQW].

of only adjusting language to the outcome of the enforcement proceeding. This would partially resolve notice issues seen in the current regulatory approach.

While MOUs are helpful, they are not binding. Freeman and Rossi explain that "agencies may negotiate MOUs but then let them languish, sometimes for years."[103] MOUs are also not legally enforceable.[104] As seen with the DOE example, even with pressure from Congress, the agencies did not fully address the siting delays and had to renegotiate their MOU four years later.[105] Sticking with an MOU for confidentiality provisions might present a bigger challenge. There has not been legislative or executive pressure to coordinate agency activity in this area. Additionally, since the regulated community would bear most of the costs of conflicting policy, there are fewer incentives for the mentioned agencies to coordinate with each other.

b. Joint rulemaking

Joint rulemaking occurs when two or more agencies create policies together, usually through jointly issued statements or guidelines.[106] Agencies often use joint rulemaking to solve coordination problems, and Congress may sometimes mandate this type of collaboration.[107] Among joint rulemaking's benefits, it can reduce compliance costs for the regulated community and reduce conflicting policy.[108]

One major joint rulemaking example is the rules that the EPA and the National Highway Traffic Safety Administration (NHTSA) created for greenhouse gas emissions and fuel efficiency standards. If these agencies had independently set these standards, they likely would have created inconsistent regulatory regimes for three reasons.[109]

First, the two agencies have distinct missions; the EPA protects the environment and public health, while NHTSA has a duty to ensure auto and vehicle energy conservation.[110] These different mandates mean that the agencies were likely to regulate the same issue with different, and possibly conflicting, priorities in mind. Second, the agencies acting alone likely would have used different models for estimating the cost

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[103] Freeman & Rossi, *supra* note 79, at 1165.
[104] *Id.*
[105] *Id.* at 1164.
[106] *Id.* at 1165.
[107] *Id.* at 1167.
[108] *Id.* at 1165.
[109] *Id.* at 1170.
[110] Jodi Freeman, *The Obama Administration's National Auto Policy: Lesson from the "Car Deal"*, 35 HARV. ENVTL. L. REV. 343, 357–58 (2011).

and pace of technology innovation, which help them determine the standards to set for the industry. Finally, separate agency regulation would have potentially led to different enforcement schemes.[111] For example, NHTSA has the statutory power to "allow[ ] manufacturers to pay fines for non-compliance," but the EPA does not have the same to power to allow fines as an "intentional compliance strategy."[112]

NHTSA and the EPA averted these regulatory pitfalls through joint rulemaking. They set separate standards for fuel efficiency and greenhouse gases, but made sure their standards aligned so that "manufacturers could build a single fleet of vehicles to comply with both."[113] Per a Government Accountability Office (GAO) report on the agencies' partnership, the joint rulemaking process influenced a greater level of regular collaboration between each agency's staff.[114]

Joint rulemaking can create a norm of collaboration across agencies, and possibly between agencies and the regulated community. To create their emissions standards, the EPA and the NHTSA "engaged in substantial outreach to the auto industry," including "considerable consultation and exchange of information" with manufacturers.[115] It is not clear that agency coordination always leads to more engagement with the regulated community to set policy. But collaboration between agencies could lead to greater consideration of the private interests involved, since agencies have already agreed with each other that they must reach beyond their own expertise to create good policy. Industry influence on administrative policy is not always a good thing, but can be beneficial for developing complex policy.

The EPA and NHTSA, however, may be a unique example of joint rulemaking since there was a strong political will fueling the agencies' collaboration.[116] Indeed, the White House signaled a strong investment in the policy when President Obama announced the joint rulemaking plan in a Rose Garden ceremony.[117] With the President's influence, the collaboration between the EPA and the NHTSA became a major victory for the Obama administration. The joint standards "imposed a truce

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[111] *Id.* at 356–57.

[112] *Id.*

[113] *Id.* at 359.

[114] Freeman & Rossi, *supra* note 79, at 1171; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-336, VEHICLE FUEL ECONOMY: NHTSA AND EPA'S PARTNERSHIP FOR SETTING FUEL ECONOMY AND GREENHOUSE GAS EMISSIONS STANDARDS IMPROVED ANALYSIS AND SHOULD BE MAINTAINED 20 (2012).

[115] Freeman, *supra* note 110, at 362–3.

[116] *Id.* at 374.

[117] *Id.* at 368.

on[ ] a thirty-year battle over fuel efficiency standards that had played out in Congress and the courts."[118]

Confidentiality provisions seem unlikely to receive the same political attention. If political will were not a potential problem, however, the benefits of joint rulemaking would be immediate. Joint rulemaking would alert employers to rights they may be violating with their contracts in one set of guidelines, which could reduce compliance costs. A single set of guidelines, moreover, would reduce the potential for conflicting policy. Finally, a norm of collaboration between these agencies could also be valuable, especially if they find themselves in the same regulatory space for a future issue. A norm of collaboration is already developing for those agencies, including the SEC and the CFTC working to fulfill the heavy rulemaking mandate of the Dodd-Frank Act.[119]

c. Centralized White House review

The fourth coordination tool Freeman and Rossi examine is centralized White House review. White House review generally occurs through policy offices and councils that the executive can create to address a specific regulatory issue.[120] The officials that run these offices are usually members of the President's senior staff.[121] This often gives policy offices substantial political capital, as "[officials'] real or perceived proximity to the President provides them with significant influence and equips them with an impressive inventory of both formal and informal tools of persuasion."[122]

The Office of Information and Regulatory Affairs (OIRA) is one example. Under Executive Order 12,866, the OIRA had the power to "review regulatory actions for consistency with presidential priorities, statutory mandates," and other agencies' regulations.[123] With yearly reports of all agencies' policy plans, the OIRA has the power and information to encourage agencies to coordinate with each other.[124] Some argue that OIRA is, "in large part, an information aggregator" whose daily operations "largely involve interagency coordination."[125] The

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[118] *Id.* at 364.

[119] *Dodd-Frank Progress Report*, DAVIS POLK & WARDELL LLP (2016), https://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/ [https://perma.cc/KKF7-J4G9].

[120] Freeman & Rossi, *supra* note 79, at 1177.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1178.

[124] *Id.* at 1180.

[125] Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).

OIRA manages a comment and review process of proposed rules received from other agencies, but the OIRA does not submit its own comments.[126]

OIRA can greatly reduce the potential for conflicting policies over confidentiality provisions. Its information gathering function would make it easy for agencies to know which other agencies have regulatory interests in these provisions. The comment process would allow agencies to engage each other's policies before promulgation, which would weed out inconsistencies and help develop clearer policies in general. OIRA's authority, however, only explicitly covers executive agencies, and there is some debate over whether independent agencies should have to submit proposed rules.[127] Congress introduced the Independent Regulatory Agency Analysis Act of 2012 ("Act of 2012"), which would have allowed the President to issue another executive order to create a similarly centralized review process for independent agencies, but it was not enacted.[128] As most of the agencies involved in this issue are independent (CFTC, NLRB, OSHA and SEC), OIRA is not the best option for coordination unless Congress considers another bill like the Act of 2012.

Another facet of White House review is presidential management.[129] The President has influence over all agencies, although Freeman and Rossi caution that the President's directive power over independent agencies is constrained by his or her limited appointment and removal powers.[130] This is a fair point, although some scholars argue that the President has more influence over independent agencies than traditionally thought.[131] Indeed, some suggest more broadly that the distinction between executive and independent agencies is artificial, and instead agencies should be considered on a spectrum of independence from the executive branch.[132] For the purposes of this comment, these arguments show that presidential review is more of a feasible coordination tool for independent agencies than Freeman and Rossi suggest.

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[126] *Id.* at 1846.

[127] VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RESEARCH SERV., R42720, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES (2012), https://fas.org/sgp/crs/misc/R42720.pdf [https://perma.cc/LP9V-RK3G].

[128] *Id.*; *see* Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. (2012).

[129] Freeman & Rossi, *supra* note 79, at 1175.

[130] *Id.*

[131] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769 (2013).

[132] *Id.* at 769.

The traditional distinction between executive and independent agencies is for-cause removal.[133] A for-cause removal provision in an agency's statutory mandate limits the President's power to remove an agency head only for cause of "inefficiency, neglect of duty, or malfeasance in office."[134] Agencies are thought to be independent because of this statutory protection, but not every independent agency has for-cause removal; the SEC and CFTC are two examples of agencies that do not.[135] There is, in fact, no universal feature that distinguishes all independent agencies from all executive agencies.[136]

Moreover, the President still appoints the heads of most independent agencies, who ultimately control the agencies' activities and priorities.[137] The turnover of agency heads also occurs more frequently than their term limits would cause, because agency heads tend to resign when the opposing party's candidate is elected.[138] A popular administration can also have great reputational sway over agencies, and in general the President can use informal methods to control agendas.[139] Finally, interagency coordination might actually increase a president's influence over an independent agency if it is sharing regulatory space with an executive agency.[140]

d. *Interagency adjudication*

Another type of coordination tool not discussed by Freeman and Rossi is interagency adjudication. Interagency adjudication occurs when agencies coordinate to adjudicate "public benefit and penalties," usually through individually controlling different steps of an adjudicative process.[141] Asylum application processing, for example, involves this type of adjudication.[142] The DOJ and the DHS coordinate investigation and fact-finding, and issue initial and appellate-level administrative decisions.[143] Also involved is the State Department for international relations concerns, and the Department of Health and Human

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[133] *Id.* at 772.
[134] *Id.*
[135] *Id.* at 786.
[136] *Id.*
[137] *Id.* at 818.
[138] *Id.* at 821.
[139] *Id.* at 822 (internal quotations omitted).
[140] *Id.* at 823.
[141] Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 807–08 (2015).
[142] *Id.* at 815.
[143] *Id.*

Services (HHS) for fact-finding in cases involving minor or mentally incompetent applicants.[144]

Interagency adjudication has the greatest potential for coordinating confidentiality provision enforcement since the SEC, CFTC, OSHA, and the NLRB all have adjudication powers. Agency adjudication usually has two parts: fact-finding and application of the law. Interagency adjudication often involves multiple agencies separating these two roles.[145] For confidentiality provisions, we could imagine a process where agencies had the option to add their own claim against an employer's agreement language after another agency begins an enforcement proceeding. This would require information sharing at the fact-finding stage. The agency that began the enforcement proceeding would also produce the administrative decision, but the employer, aware of its violations of other agencies' policies through this multi-claim system, would be able to modify its language to address all claims. If, by the end of that proceeding, the employer did not modify its language to address all claims presented, the other agencies could bring another proceeding against that employer.

This system would prevent an employer from facing multiple proceedings without notice and would encourage agencies to communicate with each other. It would also maintain regulatory flexibility for agencies that do not want to set specific rules that crafty agreement drafters will learn to evade. This greater collaboration could also lead to more uniform policies and enforcement approaches that still allow employers effective control over proprietary information.

Interagency adjudication, like the other coordination tools discussed, has its limits. As seen with consultation and MOUs, there is no way to formally bind the agencies unless there is an executive order or statute.[146] It would also slow down the adjudication process, which can make regulation more uncertain for the regulated community. In the asylum example given, the DOJ and DHS faced a class action lawsuit when they could not agree on the terms of their "asylum clock."[147] The asylum clock helps determine if an applicant can become authorized to work if his or her application is still pending due to delays.[148]

Similarly, interagency adjudication is vulnerable to obstructionist measures. For example, an agency may be opposed to adding its claim

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[144] *Id.*

[145] *Id.*

[146] Indeed, informal interagency adjudication usually occurs through MOU agreements. *See* Jennifer Nou, *Agency Coordinators Outside of the Executive Branch*, 128 HARV. L. REV. F. 64 (2015).

[147] Shah, *supra* note 141, at 816.

[148] *Id.* at 815.

to another agency's proceedings, or might try to control that those proceedings, rendering the whole process inefficient. Just like joint rulemaking, there would have to be a strong political will to maximize the efficiency of the process. If the will were there, however, interagency adjudication would properly address the issues of the current regulatory scheme.

CONCLUSION

There are many tools available to agencies dealing with shared regulatory spaces. For the problem of confidentiality provisions, most of these tools would provide a feasible means of interagency coordination. Of them, joint rulemaking and interagency adjudication seem to be the strongest solutions, but are also the most vulnerable to low political will. Agencies must have great enough incentives to apply these tools over a sustained period and bear the initial costs of coordination. With the recent change in administration, it is difficult to gauge how enforcement trends will develop. But if Congress, the new administration, or the agencies themselves find that this issue becomes an important regulatory quagmire in the future, these are some solutions to consider.