Keynote Speaker
NOTES
Legal Challenges of
Enterprise Risk Management
How a Utility General Counsel Views Risk

David P. Falck
Executive Vice President
and General Counsel
Pinnacle West Capital Corporation
December 9, 2010

Confidential and Proprietary
The General Counsel’s Position

• The General Counsel:

  – plays a “gatekeeper” role for everything from governance to crisis management to contingency planning to ethics to regulatory compliance to [fill in the blank].

  – is a key voice in deciding what the Board of Directors sees and doesn’t see.

  – is involved in many non-legal functions that calibrate risk, including accounting judgments, M&A and corporate strategy.
Boards Focus on Risk, as do Others

• 63% of an S&P board sample ranked risk oversight within the top 3 governance topics requiring the most focus.

• More than 50 enforcement actions were filed against lawyers by DOJ/SEC in last 5 years.

• The DOJ in the November 2010 GlaxoSmithKline case:
  
  “Where the facts and law allow, we will pursue individuals ... just as vigorously as we pursue corporations.”
GCs Act in a Complex Environment

• The client is “the Company”.

• The Company is (select one):
  – the Board
  – the Lead Director
  – the CEO
  – management/employees
  – regulators
  – shareholders and lenders
  – ratepayers to whom a public service obligation is owed

• The risks must be weighed to produce a balanced outcome.
Employee-related Risks

• GCs must:
  – navigate the workplace minefield.
  – grapple with ethical lapses resulting from deficient value systems.
  – discern the true red flags in the hot line.
  – participate in functions to monitor safety (always first) and environmental compliance.

• The special challenges of nuclear.
Government-related Risks

• Government is [check all that apply]:
  – [ ] Your regulator
  – [ ] Your dependent
  – [ ] Your customer
  – [ ] Your lender
  – [ ] Your partner

• Managing government relations is a critical risk function.
Investor-related Risks

- **Earnings Guidance:**
  - What is the basis for the view?
  - Managing for the short- vs the long-term.

- S&P applies ERM to ratings.

- Proxy access raises the stakes for the investor relations function.
Reputational Risk

- In a regulated monopoly, damage to reputation translates more quickly to financial harm and management vulnerability.
- Confidence can quickly be lost by auditors, regulators and government.
- Conventional risk metrics are insufficient for the task.
- Managing reputational risk means:
  - setting a tone at the top
  - cultivating a strong internal values system
  - socializing important decisions
The Risk of Stifling Innovation and Opportunity

• What is the key long-term risk regulated utilities face?

• How will this risk be addressed?

• Both risk management and risk opportunity are necessary.

• Our ERM structures must accommodate the right risk-taking.
The Risk of Overcomplicating Risk Management

• The trend is to multiply non-line functions within the organization responsible for risk:
  – Board Committees
  – Internal Audit
  – Compliance (NERC, Env’t’l Health & Safety)
  – ERM Group
  – Finance (SOX)
  – Legal
  – Trading
  – CROs
Risk Survey Data

• Recent survey data:
  – 73% of companies have 7 or more risk functions.
  – 67% have overlaps among functions.
  – 50% of executives believe they have gaps in coverage.
  – Companies on average spend 4% of revenues on risk management.
  – 4% of boards have a risk committee.

• Can the process of risk management itself create risk?
  – What if every step in the internal process is not followed?

• The key is clarity of reporting lines and separation of functions.
How Can Outside Counsel Help?

• Share information
  – For example, quarterly risk updates.

• Offer real experts who will focus on real problems.

• Educate the GC on how enforcement will react.

• If you see a problem with the process, don’t be shy.
Energy Risk Management and Emerging Energy Business Models

Energy Bar Association Meeting
Mid-Year Meeting
December 9, 2010

Arlen Orchard
SMUD General Counsel
Overview

- Enterprise Risk Management Philosophy
- Enterprise Risk Management Approach
- Risk and Opportunity Heat Map
- Business Critical Risk Inventory and Categories
- Emerging Energy Business Models, Risks and Opportunities
Enterprise Risk Management Philosophy

An integrated and transparent process that incorporates risk assessment into decision making at SMUD:

- Identify, assess, prudently manage, monitor and report a variety of business critical risks and opportunities facing SMUD (e.g., Operational, Financial, Reputational, Legal/Regulatory/Legislative, etc.).

- Provide enterprise risk context and linkage to existing core business processes to improve our allocation of limited resources.

- Help maintain Credit Access by reinforcing confidence of investment community.
**Enterprise Risk Management Approach**

*Multi-Perspective, portfolio approach that effectively balances the trade-offs between risk and opportunities across all business functions.*

- Full executive support; CFO serves as Chief Risk Officer.
- Establish Business Critical Inventory/Register.
- Conduct Risk Identification, Assessment and determine residual risks – it’s not just about $s.
- Embed risk management into existing workflow and business processes and ensure a point of accountability for all identified risks.
- General Counsel accountable for ethics, legal and regulatory risks; ensures Board of Directors in loop.
- Establish Risk Communication using existing reporting mechanism and create early warning system for monitoring changes in and emergence of risks.
- Create a risk awareness continuous improvement culture and engage every employee to view risk management as an integral part of his/her job.
Risk & Opportunity Heat Map For Residual Risks

URGENCY (increases exponentially)

SEVERITY (increases exponentially)
### Business Critical Risk Inventory

#### SAMPLE: SMUD Enterprise Risk & Opportunity Heat Map: Residual Risks

<table>
<thead>
<tr>
<th>Financial</th>
<th>Operational</th>
<th>Strategic (con't)</th>
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<tbody>
<tr>
<td></td>
<td>People</td>
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<tr>
<td>1. Budget Planning &amp; Rate Setting</td>
<td>9. Employee Safety</td>
<td>33. Pricing/Rate Design</td>
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<tr>
<td>2. Financing</td>
<td>9a Work Environment</td>
<td>34. Public Safety</td>
</tr>
<tr>
<td>2a Accounting/Financial Rpt</td>
<td>9b Work Processes/Practices</td>
<td>35. Regulatory Compliance</td>
</tr>
<tr>
<td>2b Capital Availability</td>
<td>10. Ethics/Integrity</td>
<td>35b OSHA/Safety</td>
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<tr>
<td>2c Grants Administration</td>
<td>11. Illegal Acts/Fraud</td>
<td>35c NERC/FERC CIPS Standards 706</td>
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<tr>
<td>3. Liquidity</td>
<td>12. Institutional Knowledge</td>
<td>35d NERC/FERC Reliability Standards 693</td>
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<tr>
<td>4a Commodity</td>
<td>Workforce</td>
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<td>4b Interest Rate</td>
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<tr>
<td>5. Project Execution</td>
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<td>5a AMI Meter Installation</td>
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<td>5b East Campus</td>
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<td>5c Enterprise Project Process</td>
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<td>6. Revenue Collection/Writeoff</td>
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<tr>
<td>6a Hydro Generation</td>
<td></td>
<td>42b. R&amp;D Related Grants</td>
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<tr>
<td>6b Retail Load</td>
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<td>42c. SmartSacramento™ (AMI+Grants)</td>
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<td>8. Wholesale Credit Default</td>
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<td>Systems and Information Technology</td>
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<td>14. Applications/System Support</td>
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<td>15. Cyber Security</td>
<td>15a AVI/Smart Meter</td>
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<td></td>
<td>15b Electronic Tagging System</td>
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<td>16. Information Management</td>
<td>15c Energy Management System</td>
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<td>15d Outage Management System</td>
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<td>17. Systems Development/Integration</td>
<td>15e SAP</td>
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<td>18. Systems Infrastructure</td>
<td>15f Smart Grid</td>
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<td>16a Enterprise Content Mgmt</td>
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<td></td>
<td>16b NERC/FERC Compliance</td>
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<tr>
<td>23. Communications</td>
<td>21a Gas Pipeline Related Assets</td>
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<tr>
<td>23a External</td>
<td>21b Power &amp; Gas Contractual Assets</td>
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<tr>
<td>23b Internal</td>
<td>21c Power Generation Assets</td>
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<tr>
<td>25a. Underground Cables</td>
<td>23a External</td>
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<tr>
<td>25b. Wood Pole Assets</td>
<td>23b Internal</td>
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<tr>
<td>Infrastructure: Business Disrupt.</td>
<td>27a Customer Service Center</td>
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<td>28. Labor: Business Disruption</td>
<td>27b Energy Management Center</td>
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<td></td>
<td>27c Existing Corporation Yard</td>
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<td>27d Headquarters Building</td>
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<td></td>
<td>27e Physical Asset Security</td>
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<td>28. Litigation Liability</td>
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<td>29. Nuclear Waste Disposal</td>
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<td>30. Operational Efficiency/Effectiveness</td>
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<td>31. Payroll Disruption</td>
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<td>32. Pervasive</td>
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</table>

#### Strategic

**Models**
- 39a C&I Distributed Generation & Storage
- 39b Demand Response
- 39c Electrification of Transportation/PEV
- 39d Smart Grid Technology Convergence
- 39e Third Party/Utility Relations

**Employee**
- 40a Health & Wellness Benefits
- 40b Pension
- 40c Salary
- 40d Strategic Workforce Agility

**Delegated**
- 41. Grants

**External**
- 43a. Carbon Emission
- 43b. Energy Efficiency/Demand Response
- 43c. Load Serving Capability
- 43d. Renewable Portfolio Standard
- 44. Product/Service Development

**Other**
- 45. Economy
- 46. Labor Relations
- 47. Legislative/Political Relations
- 47a. Federal
- 47b. Local Governments
- 47c. State
- 48. Media Relations
- 49. National and Other Hazards
- 49a. Earthquake
- 49b. Flood
- 49c. Pandemic
- 49d. Terrorism
- 49e. Wildfire

**Regulatory**
- 50a. Federal Relations
- 50b. Local Government Relations
- 50c. Regulatory Litigation
- 50d. State Relations
Emerging Energy Business Models

Risk as Monopoly Provider is Changing

Historic Risk Paradigm (Open Access)

- Direct Access to customers by other utilities or 3rd party generators – Electron sellers
- Initiated through regulatory rulemaking or legislation and legislative law changes – slow change process
- State and local oversight of competition

*Net Result: Meters spin as usual, choice of provider though existing grid*

New Risk Paradigm

- New Competition: IT and communication technological improvements creating market disruption
- Minimal regulatory or legislative change required as technology provides electric customers with choice behind their meter
- Competition: venture startups through the Fortune 50 see large revenue opportunity
- Technology provides customers opportunities to optimize energy efficiency, self generate, and sell their load

*Net Result: Electric meters spin less*
### Emerging Energy Business Models

#### Electric Utility Industry Vulnerabilities
- Utility rate subsidization depending on how “cost based” you are
- Future revenue flat/decreasing - Many “smart programs” reduce revenue
- Cost of renewable energy and mandated portfolios
- Customer options: 3rd parties can profit from reducing utility revenue
- Embedded capital & debt, potential for stranded assets
- Regulatory environment challenging with push for rapid change
- SMUD equity position in private business not permitted


### Where do utilities want to be on the “Energy Provider” scale?

#### Key Strengths
- Strong customer recognition
- SMUD – high customer satisfaction trust
- Strong brand
- Low cost of capital
Emerging Business Models

Industry Trends

• Aggregation of ESCOs and load aggregators to combined energy services solution set (including DR) Ex: EnerNOC purchase Co-gen energy, Constellation purchase of CPower, etc.

• Regulatory policy momentum/utility initiatives will continue to fuel DR market growth. Ex: FERC 719; FERC admits subsidy approach.

• Consumers will increasingly use home energy management portals, just as they already use online banking and automatic bill pay applications. Ex: in-home displays showing up in retail stores.

• EV Charger-unit sales through dealer – installed at customer location: cost added to vehicle purchase. Ex: Ford to offer $1,950 option for installed charger in garage.

• Self-generation suppliers: by installing PV, Combined heat and power, and wind options, companies creating their “green energy philosophy”; meter also spins less.

• Several large company offerings in HEM (e.g. Google PowerMeter) are making “environmental stewardship” their corporate strategy.
## Potential Threats

<table>
<thead>
<tr>
<th>Threats</th>
<th>Potential Mitigation / Opportunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduced revenue due to DR-related load reduction, energy efficiency, and customer generation.</td>
<td>Unbundle rates and provide accurate cost of service. Can eliminate cherry-picking risk.</td>
</tr>
<tr>
<td>Intermittent, less reliable generation may result in higher spinning reserve requirements.</td>
<td>Potential role for DR to mitigate impacts of intermittent resources. Partnership &amp; Branding opportunity.</td>
</tr>
<tr>
<td>Transmission and affordable peaking generation becomes constrained due to difficulty in permitting.</td>
<td>Create dispatchable load with DR companies or as utility implemented service. Partnership &amp; Branding opportunity.</td>
</tr>
<tr>
<td>Evaluate FERC Transmission company as favorable permitting could occur.</td>
<td></td>
</tr>
<tr>
<td>Lack of standards yet strong regulatory push to implement. Long-term investment with high technology risk?</td>
<td>Participate in standards creation and policy making.</td>
</tr>
<tr>
<td>Shorten cost-benefit payback period – Regulator agreement?</td>
<td></td>
</tr>
</tbody>
</table>
From the Top at FERC

“There’s going to have to be some kind or relationship, association to a degree, between the utilities and the telecommunication companies, or the utilities are going to have to step back ultimately and allow these third parties to come in and provide the communication services. We may have to unbundle these services, which is another scenario that consumers can choose.”

- FERC Commissioner John Wellinghoff
## Emerging Business Models

### “What if” Scenarios

<table>
<thead>
<tr>
<th>By 2013</th>
<th>By 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Residential electric consumers can choose a “Home Energy Management” application for $7.99/month from a Verizon/Google partnership.</td>
<td>- Utilities issue RFPs to select lowest cost DR from multitude of qualified suppliers. Key fortune 50 companies dominate the bids.</td>
</tr>
<tr>
<td>- Utility C&amp;I customers, represented by large 3rd parties, receive subsidized Demand Response rate to promote FERC’s “killer app”.</td>
<td>- Utilities post dynamic prices for both energy efficiency and DR; robust DR/EE programs foster economic development.</td>
</tr>
<tr>
<td>- Smart Meters are providing many utilities with lots of data and information improving system planning and operation systems.</td>
<td>- Regulatory commission are not keen to grant rate recovery to utilities who 1st and 2nd generation smart meters become obsolete.</td>
</tr>
<tr>
<td>- PV prices continue to fall and more consumers install PV systems.</td>
<td>- Consumers push hard to continue to spin the meter backward with PV. Net metering is forcing a radical change in rates approach.</td>
</tr>
<tr>
<td>- Asia’s economy continues to rocket and which pushes oil above $200/barrel. Consumers start to buy PEV’s.</td>
<td>- Gasoline in US tops $6.50/gallon and PEV orders skyrocket. Electric grids experience rapid load growth and large re-build costs.</td>
</tr>
</tbody>
</table>
Emerging Energy Business Models

Potential Symbiotic Business Models

What is economic for consumer, yet still profitable for utility?

- Off-peak EV charging; customers save money; utility provides managed charging
- Home Energy Display helps customers own their energy usage; Utility provides special pricing and other profitable programs with 3rd parties
- Demand Response partnering can provide economic and conservation opportunities for both customers and utilities
- Utility financed/owned alternative generation could enable lower-costing green energy to meet portfolio requirements while reducing hard-to-recover peaking plant investments
- By partnering with third parties for services such as load aggregation, EV charging, and energy management, utilities don’t stray from their core business and brand, thus reducing technology risk and enabling providers who can be experts
- Decoupled rates provides customer choice and appropriate recovery of utility costs by sending accurate price signals!
Enterprise Risk Management Through Integrated Risk Assessment

November 2010
# Integrated Risk Assessment Objectives

## Role Process Output

<table>
<thead>
<tr>
<th>Role</th>
<th>Process</th>
<th>Output</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board of Directors</td>
<td>• Review &amp; assess changes and outputs</td>
<td>Improved understanding of company’s risk profile</td>
</tr>
<tr>
<td>Management Committee</td>
<td>• Perform Top Risk Assessment and Own Top Risks of the Company</td>
<td>Common vocabulary and assessment of risk Risk-based Corporate Audit plan</td>
</tr>
<tr>
<td>Risk Committees</td>
<td>• Prioritize risks in Business Unit</td>
<td>Functional Top Risks Business Unit Top Risks</td>
</tr>
<tr>
<td>Risk Management Group</td>
<td>• Measure, aggregate and report operational risks</td>
<td>Risk Capital Standard Reporting</td>
</tr>
<tr>
<td>Business Units and Functional Support</td>
<td>• Risk and Control Self Assessment • Metrics • Loss Event Data</td>
<td>Risk Register Business-Owned Risk Assessment Control Environment Action Plans</td>
</tr>
</tbody>
</table>

**Common Language of Risks & Control**

**Shared Enterprise Repository (GRC)**
Integrated Risk Framework

- Risk and control assessment of end-to-end business processes:
  - Business unit owned
  - Incorporates integrated functional input in identification and quantification of risks

- Standard libraries of risks and controls ensures consistent methodology and facilitates aggregation by common attributes:
  - Risk identification
  - Risk severity and importance ratings
  - Control effectiveness ratings

- Improved risk identification and control monitoring:
  - Facilitates risk aggregation across business units, functions and the enterprise
  - Controls evaluated once and leveraged by other linked functions and processes
  - Highlights interdependencies between risks and controls spanning numerous processes and functions
## Constellation's Risk Framework

### Liquidity
- Corporate Funding
- Collateral Requirements
- Contingency Funding

### Market
- Market Factor Sensitivity
- Volume Risk
- Market Liquidity
- Investment Performance

### Credit
- Settlement Risk
- Counterparty Performance
- Supply Chain

### Operational
- People
- Process
- Financial Reporting
- System
- External

### Environmental
- Changes in Laws & Regulations
- Non-Compliance
- Environmental Impacts
- Environmental Positioning

### Business & Strategic
- Industry Changes
- Demand Changes
- Competition
- Political Risk

### Reputational
- Unethical Behavior
- Crisis Management
- Association Risk

### Framework Definitions

- **Liquidity**
  - Corporate Funding
  - Collateral Requirements
  - Contingency Funding

- **Market**
  - Market Factor Sensitivity
  - Volume Risk
  - Market Liquidity
  - Investment Performance

- **Credit**
  - Settlement Risk
  - Counterparty Performance
  - Supply Chain

- **Operational**
  - People
  - Process
  - Financial Reporting
  - System
  - External

- **Environmental**
  - Changes in Laws & Regulations
  - Non-Compliance
  - Environmental Impacts
  - Environmental Positioning

- **Business & Strategic**
  - Industry Changes
  - Demand Changes
  - Competition
  - Political Risk

- **Reputational**
  - Unethical Behavior
  - Crisis Management
  - Association Risk

### Sub-Risk Components

- **People**
  - Employee fraud
  - Inadequate people resources
  - Employee disputes
  - Aging workforce

- **Process**
  - Contract
  - Documentation
  - Model
  - Change management
  - Client & service interaction
  - Transaction process failure
  - Physical security
  - Safety
  - Reliability
  - Compliance
  - Financial reporting
  - Privacy and confidentiality
  - Business continuity
  - Plant Assets

- **Financial Reporting**
  - Systems
  - Information security
  - Systems
  - Hardware
  - Software
  - Interfaces

- **External**
  - Disaster
  - Outsourcing/third party
  - Customer/counterparty fraud
  - Stakeholder actions (e.g., labor union, rating agency)

### These risks describe the scope of issues reviewed in the integrated risk assessment process
<table>
<thead>
<tr>
<th></th>
<th><strong>Controls Library</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1</strong></td>
<td><strong>Security and Authentication</strong> – Required badges, passwords, and PIN numbers for access to systems, facilities, and data</td>
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<tr>
<td><strong>2</strong></td>
<td><strong>Standards and Documentation</strong> – Developing, updating, monitoring, and storing of policies and standards documentation for behavior, processes, and systems</td>
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<tr>
<td><strong>3</strong></td>
<td><strong>Monitoring</strong> – Review and escalation of process steps, anomalies, and exceptions</td>
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<tr>
<td><strong>4</strong></td>
<td><strong>Roles and Responsibilities</strong> – Clear definition and delineation of roles and responsibilities to include consideration for proper segregation of duties</td>
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<tr>
<td><strong>5</strong></td>
<td><strong>Training</strong> – Information sharing on policies, processes, and systems for all stakeholders</td>
</tr>
<tr>
<td><strong>6</strong></td>
<td><strong>Validation and Reviews</strong> – Clear maker/checker structure to ensure adequate reviews of processes. Also includes change management processes and sign-offs</td>
</tr>
<tr>
<td><strong>7</strong></td>
<td><strong>Redundancy</strong> – The provision of multiple interchangeable components to perform a single function in order to provide resilience; Used to detect and recover from errors</td>
</tr>
</tbody>
</table>
## End-to-End Functional Processes

<table>
<thead>
<tr>
<th>Businesses / Functions</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
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<tbody>
<tr>
<td><strong>Legal</strong></td>
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<td>Regulatory Compliance</td>
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<td>Litigation</td>
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<td>Development and oversight of contract terms and conditions</td>
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<td>Labor relations</td>
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<td>Oversight of corporate governance and employee code of conduct</td>
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<tr>
<td>Investigate and monitor fraudulent activities</td>
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<td><strong>Finance</strong></td>
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<td>Investor relations</td>
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<tr>
<td>Budgeting, forecasting, and financial analysis</td>
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<tr>
<td>Financings &amp; capital market transactions</td>
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<td><strong>Treasury</strong></td>
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<td>Liquidity management</td>
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<td>Cash pool management/ investments</td>
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<td>Interest and exchange rate management</td>
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<td>Manage bank and rating agency relationships</td>
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<td>Capital structure management</td>
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<td><strong>Accounting and Reporting</strong></td>
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<tr>
<td>Accurate and timely quarterly external and internal reporting and end-of-month financial statement preparation/close</td>
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<td>Verify and process proper accounts payable</td>
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<td>Monitor and implement relevant accounting standards</td>
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<td><strong>Tax</strong></td>
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<tr>
<td>Federal, state and local, and international tax compliance</td>
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<tr>
<td>Tax planning and research, including M&amp;A support</td>
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<tr>
<td><strong>Risk Management</strong></td>
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<tr>
<td>Effectively manage credit risk</td>
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<td>Actively manage market risks</td>
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<tr>
<td>Price risk capital and assess adequacy of company’s net available liquidity</td>
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<td>Provide appropriate tools for operational risk management</td>
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<tr>
<td>Establish risk governance, appropriate risk controls, and effective risk reporting</td>
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<tr>
<td>Provide transaction support and independent risk assessments of new deals</td>
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<td><strong>Human Resources</strong></td>
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<tr>
<td>Perform personnel management (onboarding, reviews, terminations)</td>
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<tr>
<td>Oversee compensation management (payroll processing and disbursements)</td>
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<tr>
<td>Personnel development and succession planning</td>
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<tr>
<td>Create competitive benefits package (health, welfare, retirement, etc.)</td>
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<td><strong>Corporate Security</strong></td>
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<tr>
<td>Develop &amp; manage access</td>
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<tr>
<td>Develop plan to provide business continuity</td>
<td></td>
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<tr>
<td>Institute infrastructure for physical security</td>
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<tr>
<td><strong>Operations</strong></td>
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<tr>
<td>Maintain fuel related inventory</td>
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<tr>
<td>Capture, manage, and confirm deal components and contractual information</td>
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<tr>
<td>Set-up and maintain counterparty/customer information</td>
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<tr>
<td>Provide customer service throughout the customer life cycle</td>
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<td><strong>Control Dispatch</strong></td>
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<tr>
<td>Provide energy services to large load-serving entities (LSEs)</td>
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<tr>
<td>Consulting services around transmission management</td>
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<tr>
<td>Consulting services around supply RFP management</td>
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<tr>
<td>Provide dispatch and balancing services; conduct scheduling and balancing of physical positions</td>
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<td><strong>Environmental</strong></td>
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<tr>
<td>Establish corporate environmental policy and standards</td>
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<tr>
<td>Audit processes and performance capture/evaluate data to ensure compliance with environmental regulations</td>
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<td>Serve as support and intervention management for litigation surrounding environmental topics</td>
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<td>Participate in the development of relevant public policy</td>
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<tr>
<td>Develop and evaluate environmental disclosures (e.g., SEC, CSR)</td>
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<tr>
<td>Establish and monitor environmental performance metrics and goal-setting, including stewardship activities</td>
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<td><strong>Information Technology</strong></td>
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<td>Develop robust IT applications to enable operations through sound system implementation and change management</td>
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<tr>
<td>Institute infrastructure for information and cyber security</td>
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<tr>
<td>Create plan for prompt disaster recovery</td>
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<tr>
<td>IT architecture, strategy, and governance</td>
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<td><strong>Supply Chain</strong></td>
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<tr>
<td>Identify opportunities for sourcing material and services</td>
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<tr>
<td>Receive, store, and distribute inventory</td>
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<tr>
<td>Identify, screen, and negotiate with suppliers</td>
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<td><strong>Real Estate</strong></td>
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<td>Manage lease portfolio - current and past</td>
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<tr>
<td>Acquire, lease and divest property</td>
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<td>Manage work environments</td>
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<tr>
<td>Delete, move, add, change inventory management process</td>
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<td><strong>Corporate Audit</strong></td>
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<tr>
<td>Perform audits</td>
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<tr>
<td>Communicate audit results</td>
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<tr>
<td>Perform consultative engagements</td>
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</tbody>
</table>
Integrated Risk Assessment Process

1. Identify key business processes
2. Identify risks
3. Rate risk probability
4. Rate risk impact
5. Calculate overall risk level
6. Categorize risks as critical, radar or watch
7. Assign risk owners

- Identify current controls
- Rate control effectiveness
- Rate control importance
- Develop action plan
- Assign control action plan owner
- Assess $ impact of new investment

- Develop metric(s) to monitor effectiveness of each control
- Set threshold(s)
- Collect data
- Monitor & Report

- Define loss data
- Collect loss data
- Report

- Workshop
- Pre-work
- Business Process
### Impact Scale and Criteria

What is the potential result or effect of an event related to the risk considering management’s ability to control and mitigate the risk?

<table>
<thead>
<tr>
<th>Tangible Impact¹</th>
<th>Intangible Impact</th>
</tr>
</thead>
</table>
| 5 Critical       | - Major company reputation impact  
                   - Revocation of licenses or regulatory registrations  
                   - Major customer satisfaction impact  
                   - Inability to service customers |
| 4 Major          | - Visible adverse brand value/market share publicity  
                   - Key alliances are threatened  
                   - Loss of key customers |
| 3 Significant    | - Visible reputation/satisfaction impact  
                   - Reputation and Brand value will be affected in the short term |
| 2 Minor          | - Potential impact on market share/brand values |
| 1 Insignificant  | - No visible impact to company reputation/customer satisfaction  
                   - No potential impact on market share/brand values |

¹ Tangible Impact defined as damages, fines, loss of business, gross margin impact, etc.
**Probability Scale and Criteria**

What is the possibility of events related to the risk occurring considering management’s ability to control and mitigate the risk?

<table>
<thead>
<tr>
<th>Probability</th>
<th>Description</th>
</tr>
</thead>
</table>
| 5 Frequent  >90% | • May occur several times a year  
• Known to occur  
• Almost certain |
| 4 Likely 51-90% | • May occur sometimes  
• Could happen occasionally during a year  
• Heard that it occurs |
| 3 Moderate 11-50% | • May happen at least once a year  
• Believes it could occur |
| 2 Remote 2-10% | • Unlikely to happen  
• Doubt that it occurs |
| 1 Rare <1% | • The possibility of occurrence is so low it may never happen  
• Exceptional circumstances |
Enterprise Risk Management

December 2010
Defining a Strategic Risk Management Approach

A blueprint for building and maintaining an integrated, enterprise-wide risk framework.

By Brenda Boultwood

The average lifespan of an NYSE-listed company is 40 years, and shrinking. The credit crisis of 2008 reminded companies, once again, of the importance of risk management. All would agree that risks need to be managed closest to the point of origin, in the line of business.

Business owners know the risks and how these risks evolve over time, driven by the changing business mix, level of automation, competition, regulatory influences and the legislative regime. The responsibility of business management in the company that endures is to manage these risks strategically, rather than chase short-term profits and navigate minimum risk policy and regulatory compliance. Management is responsible for managing all risks, whether they are historically created, driven by current operations or set to evolve as the company pursues a long-dated strategy.

Closely aligned with these business managers are strategic risk managers who look to optimize risk, rather than mitigate or avoid it. Strategic risk managers use a variety of quantitative and qualitative tools and methodologies to assess risks. For example, risk capital is priced into transactions and used to evaluate capital adequacy and evaluate business performance.

Risk managers facilitate business-owned assessments of priority risks, employ risk mapping exercises at several levels in the organization and run tabletop simulations of business continuity and cyber-security risks. Strategic risk managers not only assess the risks in the business plans but also to the business plan.

Additionally, just as risk managers want to assess the full range of risks, they recognize the ever-evolving risk landscape, and, consequently, constantly adjust their view of risks. Strategic risk managers focus on the communication of these risks to their board of directors, who in their role of enterprise risk oversight must be continually informed of management’s assessment of the risks and why risks are changing.

The key to robust strategic risk management is accountability for the types and levels of risks taken. Business leaders must own their risks and maintain a high quality control environment. Senior management wants to be assured that the control environment is appropriate and that risks are optimized.

This risk approach is only successful when there is substantial cooperation between functional departments and business units. Thus, strategic risk management requires a cultural transformation — i.e., ownership of risks, responsibility for risk optimization and cohesive alignment of functional departments to support business units. However, while people often provide the greatest resistance to change and threat to risk integration, they are far more critical than technology to the success of strategic risk management.

The purpose of this article is to provide ideas about how strategic risk management can be achieved within any organization, understanding that there can be no one-size-fits-all approach. We begin by describing the key objectives in strategic risk assessment. We demonstrate how an enterprise risk management can be achieved through a cross-functional assessment across a broad framework of risks in end-to-end business processes. Data management of risk information across businesses and functions can be achieved using a governance, risk and compliance (GRC) technology platform, where a shared
enterprise repository for capturing the company’s risk framework, governance, hierarchy and loss data can be maintained.

Objectives of Strategic Risk Management
The goal of strategic risk management is to integrate risk assessment into management decision-making while simultaneously ensuring compliance with industry and company standards. Risks are managed across a broad framework and aggregated to ensure that exposures are prioritized and managed as part of a common portfolio, rather than in individual silos. Strong risk management is viewed as a competitive advantage and performance is evaluated based on the quantifiable and qualitative risks taken.

Individuals across the company take responsibility for risk management, understanding how their risks roll up and aggregate, taking the steps needed to bring risk levels to acceptable levels. Rather than putting on a price-risk hedge across the top of the company, risk should be managed in the business that creates the risk.

Enterprise risk will be improved as communication is enhanced and managers take responsibility for their risks. It requires the creation of a culture where each employee is a risk manager, taking ownership to identify, mitigate and optimize risk.

In Figure 1 (below), business unit ownership of risks is linked to communication to the board of directors about changes in the company’s risk profile. Every aspect of a company’s management and risk governance is shown to have a stake in risk management, from the individual business and functional units to the board.

Figure 1: Integrated Risk Assessment Objectives

<table>
<thead>
<tr>
<th>Role</th>
<th>Process</th>
<th>Output</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board of Directors</td>
<td>• Review &amp; assess changes and outputs</td>
<td>Improved understanding of the Company’s risk profile</td>
</tr>
<tr>
<td>Management Committee</td>
<td>• Perform Priority Risk Assessment and Own Priority Risks of the Company</td>
<td>Common vocabulary and assessment of risk. Risk-based Corporate Audit plan and Insurance evaluation</td>
</tr>
<tr>
<td>Risk Committees</td>
<td>• Prioritize risks in Business Unit</td>
<td>Functional Priority Risks Business Unit Priority Risks</td>
</tr>
<tr>
<td>Risk Management Group</td>
<td>• Measure, aggregate, and report operational risks</td>
<td>Risk Capital Standard Reporting</td>
</tr>
<tr>
<td>Business Units &amp; Functional Support</td>
<td>• Risk and Control Self Assessment and Metrics</td>
<td>Risk Register Business-Driven Risk Assessment Control Environment Action Plans</td>
</tr>
<tr>
<td></td>
<td>• Loss Event Data</td>
<td>Common Language of Risks &amp; Control Shared Enterprise Repository (GRC)</td>
</tr>
</tbody>
</table>

As depicted in Figure 1 (starting in the bottom left-hand corner), each business and functional unit performs risk and control self-assessments where they evaluate business processes and identify the critical risks that affect the success of each business process. They determine the controls and associated metrics that quantify the effectiveness of the controls. The business can collect loss-event data and evaluate the level of actual, potential and mitigated losses.

From these actions, the company yields a comprehensive risk register and a business-owned risk assessment, as well as control action plans. By establishing a level playing field whereby all risks are evaluated with the same criteria, these actions provide transparency into the priority risks of each business unit and across the company.

The strategic risk management group facilitates integrated risk assessment throughout the organization. The group measures all relevant operational risks and provides an aggregate company view of risk levels and metrics. Such analytics are further incorporated into the company’s strategic plan and risk capital evaluation. In addition, this group establishes policies, aggregates risk and communicates priority risks across the enterprise.

Company risk committees, comprised of business unit leaders, review and prioritize the risks within a business unit. They evaluate all the business units’ and functional groups’ risks and, based upon their expertise, rank each of these risks to yield a priority risk list.

The management committee, which consists of senior executive management across the company, takes the key risks identified by business units and functional groups’ risks into consideration. As a whole, they prioritize the key risks, identifying the most significant risks to the company based upon the probability of occurrence and the impact on earnings, economic value and reputation. Based upon this evaluation, they assign ownership of these priority risks and undertake initiatives to optimize them (if they are internally controllable) or to understand them thoroughly.

The resulting list of top priority risks becomes the foundation for a risk-based corporate audit plan to be executed and carried out in the company. Similarly, insurance premia paid by the company can be assessed in terms of alignment with the company’s priority risks.

The board of directors plays a significant role within the strategic risk management process. They review and assess the changes in the company’s top risk assessment to derive a clear
understanding of the company’s risk profile and to ensure their comfort with the level of risk and return in the company’s businesses.

The strategic risk process allows the company to manage unnecessary complexity out of business processes and technologies. The goal is to simplify business processes, optimizing risk levels to create higher efficiency and agility in meeting the company’s return objectives.

**Integrated Risk Assessment**

In the integrated risk framework, functional support groups play a key role in risk assessment of the end-to-end business process. Risk assessments should be owned by the business, with input from function support groups to assist in the identification and quantification of risks.

Figure 2 (below) illustrates these functional support areas, all highly involved in the management of risk. To ensure a cohesive risk process, all business units and function-support groups utilize a common risk library, control library business hierarchy and business processes. This promotes a consistent assessment methodology and facilitates aggregation by common attributes, such as risk type, control type and business. Equipped with a standard vocabulary of risks and controls, a company can achieve improved communication and risk aggregation.

**Figure 2: Business and Functional Support for Integrated Risk Assessment**

Functional support groups that are actively involved with risk management include:

- **Risk Management**, which facilitates risk management process, policy and aggregation at the business level and across the company. It performs risk analytics and supporting scenarios on market, credit, operational, collateral, liquidity, business and strategic risks.
  - **Human Resources**, which is deeply involved in the operational risk assessment of talent and people management risks.
  - **Corporate Security**, which manages operational risk associated with physical and cyber security.
  - **Regulatory Compliance**, which handles risk associated with the company’s efforts to abide by relevant laws and regulations from industry bodies and regulatory authorities.
  - **The Finance-SOX Group**, which manages both accounting standards and operational risk with the completeness, validity and accuracy of corporate disclosures pursuant to the securities laws.
  - **Corporate Audit**, which provides objective assurances to the board about the effectiveness of the company’s risk management activities, ensuring that business risks are identified and managed appropriately and that internal controls are effective.
  - **The Environmental Group**, which seeks to manage risks associated with company compliance with environmental laws and regulations, and optimizes environmental risks inherent in business processes.
  - **Information Technology**, which assists in the assessment of application and infrastructure risks, both physical and cyber.
  - **Legal**, which governs risks that focus upon litigation, legislation, compliance, politics and company reputation. Legal works closely with the compliance and environmental groups to ensure cohesive risk management on all fronts.
  - **Business Continuity**, which strives to optimize and mitigate operational risk in the event of a disaster, weather hazard, cyber attack or any type of event that may disrupt normal operations. They work with management and the entire organization, from corporate security to information technology, to minimize disruption to the business.

Functional support areas play a critical role in the company’s strategic risk management philosophy. They support the business units in managing their risks by assisting with the company’s integrated risk assessment and by participating in risk optimization and process simplification.

**Explaining ERM**

A company focused on strategic risk management constantly assesses risk factors to ensure they reflect business realities. Figure 3 (above, right) illustrates highly quantifiable risks —
such as liquidity, market and credit risks — and qualitative risk factors — such as reputational, business and strategic risks.

**Figure 3: Enterprise Risk Management Framework**

Table 1 (below) identifies and describes all of the categories for an enterprise risk framework. There are also categories of risk that impact practically all aspects underlying framework, such as legal risk, where changes from laws/regulations, settlements, and operational losses impact multiple categories in a framework.

**Table 1: Enterprise Risk Framework Categories**

<table>
<thead>
<tr>
<th>Risk Category</th>
<th>Description</th>
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<tbody>
<tr>
<td>Liquidity</td>
<td>The risk stemming from the lack of marketability of an investment that cannot be bought or sold quickly enough to prevent or minimize a loss.</td>
</tr>
<tr>
<td>Market</td>
<td>Risk of loss in trading and accrual portfolios and liquidity primarily from fluctuations in external market variables, such as commodity prices.</td>
</tr>
<tr>
<td>Credit</td>
<td>Risk of loss primarily from a counterparty's inability to meet its obligations; includes loan- and derivative settlement risk exposure.</td>
</tr>
<tr>
<td>Operational</td>
<td>Risk of loss from inadequate or failed internal processes, people, systems or from external events.</td>
</tr>
<tr>
<td>Environmental</td>
<td>Risk of loss and associated harm due to the company's interaction with the environment.</td>
</tr>
<tr>
<td>Business &amp; Strategic</td>
<td>Risk of unsuccessful performance or strategy failure due to potential threats, actions, or events that adversely affect the organization's ability to achieve its objectives.</td>
</tr>
<tr>
<td>Reputational</td>
<td>Potential of negative publicity regarding business practices, regardless of validity.</td>
</tr>
</tbody>
</table>

Within any company, there should be constant awareness of the risk management framework in order to operate and strategically manage the company successfully. By understanding such risk factors, the company can develop strategies for risk optimization, performance improvement and the reduction of negative impacts to the business.

A company focused on strategic risk management practices rigorous risk identification, but also seeks to identify potential emerging risks. Emerging risks are identified based upon new systemic, political and market factors, as well as other current events (see Figure 4, below).

**Figure 4: Emerging Risks**

To build and maintain an effective risk management framework, a company must continuously evaluate current events, evolving legislation and regulations, as well as political activities that may pose as a risk to performance. These emerging risks are then categorized according to the risk framework. Over time, these emerging risks may be included in the company's risk inventory and evaluated across business processes (as described in Figure 1, pg. 39).

**Integrated Risk Assessment Components**

The integrated risk assessment process is comprised of three components: (1) risk and control self-assessment; (2) key risk indicators; and (3) loss data. The result of this process is a risk inventory linked to each end-to-end business process, prioritization of key risks to the business process, controls associated with each risk, metrics that monitor the effectiveness of the important controls and actual loss event data that corroborates management's assessment of the controls.

The initial phase of the integrated risk assessment is risk and control self-assessment. In this phase, each business unit identifies its key processes. For each business process, management identifies the risks that impact the process and assigns a probability and impact rating.

Management then assigns the appropriate business owner to manage and optimize the risk. This is accomplished by identifying existing controls for the risk and evaluating control
Losses may be driven by a failed control or a lack of controls.

Effectiveness. Upon evaluation, if the control is not sufficient, an action plan is developed to implement new controls that will more effectively manage the risk.

The second phase of the integrated risk assessment process is defining key risk indicators. From the self assessment, the business unit has defined relevant controls to manage and monitor the identified risks. Thresholds are then set for each control to determine whether the risk is being managed appropriately and to signal when it is out of control. This information is collected and reported to management.

The third phase, loss event data, entails the description of events that cause either losses, fines or payments, near misses and missed opportunities. Losses may be driven by a failed control or lack of appropriate controls. Losses are aggregated and reported to allow management to understand the risks and the potential impact of those risks. The information is fed back iteratively to the risk assessment. For any control management deems ineffective, an action plan is created to strengthen the control to acceptable levels. Alternatively, management may deliberately choose to accept risk rather than remedy or develop the control and accept the risk of potential losses.

The Role of GRC

Earlier, in Figure 2 (see pg. 40), we described the role of business support functions in risk identification. GRC is the technology glue that ties the common framework of risks and controls, a common description of the business hierarchy and business processes.

GRC as a single integrated platform that eliminates redundant systems and duplicative efforts, which ensures that each functional support unit is leveraging the same processes and data sets.

When a GRC platform is in place, risk identification can occur in any area, mapped back to each business process. It allows you to see across the company if the right controls are in the right places. It also enables sharing of processes, risks and controls information across different groups.

In Table 2 (above, right), we illustrate the benefits resulting from GRC for different groups throughout the organization, ranging from risk assessment to aggregation, reporting, testing and optimization.

Table 2: GRC Benefits

<table>
<thead>
<tr>
<th>Business Unit/Support function</th>
<th>GRC Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning Reporting</td>
<td>Consolidation of financial reporting risks for SOX 404. Ability to perform control testing and evaluation, and to issue action plan management.</td>
</tr>
<tr>
<td>Regulatory Compliance</td>
<td>Risk aggregation of risk and controls for regulatory reporting.</td>
</tr>
<tr>
<td>IT</td>
<td>Risk assessment for applications and infrastructure/Disaster recovery/cyber security.</td>
</tr>
<tr>
<td>Environmental</td>
<td>Identification and documentation of environmental risks and exposures. Consolidated metrics reporting.</td>
</tr>
<tr>
<td>Corporate Audit</td>
<td>Leverage risk assessment results to plan reviews for completeness of risk identification and adequacy of plans to enhance controls or the risk acceptance.</td>
</tr>
<tr>
<td>Risk Management</td>
<td>Risk identification, issue action plan management, risk event data management.</td>
</tr>
<tr>
<td>Overall Business Units/Functions</td>
<td>Automates manual processes and disparate systems/websites. Also reduces inefficient communication traffic.</td>
</tr>
</tbody>
</table>

Key Takeaways

Great risk management starts with the goal to make business management the owners of risks across their end-to-end business process, with help from the business support functions. Responsibility for identification, mitigation and communication of risks rests with these business owners. The business support functions help; for example, IT can build the desired level of automation, finance can support testing of critical SOX controls and HR can assist with workforce planning and talent management.

A strategic risk management group can not only develop consistent risk policy, vocabulary, risk monitoring and standard risk reporting but also facilitate a complete risk assessment by business management. Internal audit plays a key role in assessing the prioritization of risks and the effectiveness of control design, as well as in testing key controls. A central repository for this risk data reduces redundancy in risk assessment processes and ensures knowledge sharing about the risk issues deemed most critical by business management. It is important to remember that strategic risk management can only be achieved when business management is driven by risk assessment.

In the October issue of Risk Professional, we'll continue this article with a risk assessment example. More specifically, we'll provide a description of how risk information can be integrated into a company's strategic planning process and linked to risk capital management to influence the way management decisions are made. We'll also take a brief look at challenges to strategic risk management in the energy sector.

Branda Boulwood is senior vice president and chief risk officer of Constellation Energy. She leads risk management activities at Constellation and its businesses, and her responsibilities include defining and assessing enterprise-wide business risks. Prior to joining Constellation, she was the global head of strategy, Alternative Investment Services, at J.P. Morgan Chase. She's also held senior management positions at Bank One and PricewaterhouseCoopers.

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Defining a Strategic Risk Management Approach: Part 2

Financial institutions seeking an effective, enterprise-wide approach to risk management must develop comprehensive risk identification and risk assessment strategies.

By Brenda Boulwood

In the August issue of Risk Professional, we established a framework for an integrated approach to strategic risk assessment and offered ideas about how strategic risk management can be achieved within any organization, emphasizing that there can be no one-size-fits-all approach.

In this article, we provide an example of risk identification for an end-to-end business process across a broad risk framework. We describe an illustrative business process within an SEC segment reporting framework for a typical energy company, noting that this approach can be applied to any financial reporting framework. We also explain how risk information derived from a risk assessment can be integrated into a company’s strategic planning process and linked to risk capital management to influence the way decisions are made.

When business management is motivated to self-assess key risks and integrate conclusions into the business planning and strategy process, then strategic risk management has been achieved.

Business Processes and Risk Identification: A Closer Look

Financial planning and customer solicitation to general ledger feeds of operating results, risks occur throughout the business process. In the integrated risk assessment process, each business leader identifies the primary business processes to describe the unit succinctly. With each business unit, the unit digs deeper to break each business process down into detailed end-to-end processes. A high-level, end-to-end business process for a business unit is depicted in Figure 1 (see above).

The business processes and detailed end-to-end identification phase of the risk and control self-assessment is a critical step toward providing visibility to the business and toward evaluating risks at each process. With these end-to-end processes, the business unit evaluates and identifies the most significant risks that could cause business process failure and impact the business unit’s performance.

Figure 2 (next page) shows an example of an end-to-end business process. As depicted in this figure, one business process identified could be “Producing Power from Fuel” (blue box), where a detailed end-to-end process could be “Planning business strategy” (orange box). Upon evaluation, one critical risk (risk #2) in the business process may be “risk from Continued Low Energy Prices and Reduced Fuel Supplies,” with a description of “risk to each flow, profitability of operations, etc.” This risk is primarily identified to affect the “planning business strategy” end-to-end process.

The process progresses through the integrated risk assessment by rating probability and impact, enabling a firm to identify key risks. After the risks are prioritized and appropriate controls are evaluated, key risk indicators are determined and loss event data is collected.

After the risks are prioritized ... key risk indicators are determined and loss event data is collected. Subject to board of director approval. It also defines what risk, how much risk, risk ownership and the timing of risk taking in support of the strategic plan.

Risk management expresses this risk appetite in a framework for each business unit, with relevant metrics, capital allocation, limits and guidelines. For example, risk appetite statements can encompass earnings volatility, capital allocation, strategy/growth, credit risk, liquidity risk, market risk, regulations and company reputation. Once defined with appropriate guidelines and limits, the strategic plan is developed with the risk appetite as the foundation, along with allocated capital and risk controls. Results are evaluated according to performance to plan and risk limits/guidelines, which are iteratively routed through the assessment process to refine risk appetite and the strategic plan. Figure 3 (below) illustrates this idea.

Functional groups play an essential role in the integrated risk assessment process. They are actively engaged in risk identification and optimization in each business process. For instance, the risk management group can contribute to the Generation business risk and control self-assessment, advising the business unit with its market risk expertise on the potential impact of commodity prices and dark spreads. The risk management group can also provide its operational risk analytics to assess the effectiveness of controls linked to each risk.

Integrating Risk and Performance Management

Risk management integration into the planning and strategy development process begins by defining the risk appetite of the company commensurate to strategic goals. The management committee defines the company’s appetite for risk exposures and the amount of risk, risk ownership and the timing of risk taking in support of the strategic plan.

Risk management should be integrated in every phase of the strategic management process, from development to execution to amendment to evaluation. It plays the significant role of defining a company’s risk appetite and evaluating the impact of business plan risks on the company’s earnings, liquidity and economic value. As shown in Figure 4 (see pg. 50), the business planning/budgeting process includes risk assessments of the budget and impact on key risk metrics, such as liquidity availability and...
A company focused upon strategic risk management (SRM) employs a unique set of capabilities, beyond that of traditional risk management, to effectively integrate risks into the decision-making process. The concept of risk capital is simply defined as the level of capital required to offset the risks taken and identify portfolio synergies, it can successfully deploy the appropriate level of capital over investments and maximize gains by making the right decisions and smartly managing risk.

Understanding the risks taken by/allocated to each group can make risk assessment more like taming an elephant than moving strategically forward. Each group can make risk assessment more like taming an elephant than moving strategically forward. Each group needs to understand management’s readiness and potential use in discussions and strategic planning. This is especially important in an energy company that is in part regulated, energy may be priced differently in a region, the state in which it is produced and the state in which it is consumed. One action results in a different financial impact on the company.

Energy Sector Challenges

There are several challenges and risks that are unique to the energy sector, which are typically based upon market and credit risks. SRM looks to assess other factors, such as contingent liabilities, safety risk, cyber-security risks, generation, and price risk. Energy companies face a unique set of risks, including the volatility of the commodity prices, geopolitical risks, regulatory risks, and climate change risks. The challenges faced by energy companies are unique and require a dedicated approach to risk management.

Strategy Development includes an analysis of the risk profile of the company, as well as the risk profile of the industry. Corporate officers, strategy specialists, and other management groups can take part in this analysis. As the political, economic, and market environments continue to change, risk capital helps companies better understand the potential impact of these changes. Without a strong risk management infrastructure in place, it is difficult to properly assess the risk profile of the company and make strategic decisions.

Risk capital allows a firm to determine whether risks in balance sheet and off-balance sheet risk are consistent with the firm’s risk appetite. It helps firms better manage their capital and optimize the value-at-risk in concert with strategy. A significant component of risk management is to determine the level of risk taken. It is a core component of successful strategic management and performance, as shown in Figure 4. Risk capital is used to not only measure investment/pricing returns, but also to assess and incorporate the risk capital benefits of business units or individuals relative to the level of risk taken.
Managing Regulatory Risks

Energy Bar Association’s Mid-Year Meeting

December 9, 2010
There are certain types of risks that are common to all organizations. For example: creditworthiness of key customers; catastrophic losses; and various types of financial risks, including access to capital markets and attracting and maintaining key employees.

Businesses also face risks that are unique to their specific industry. For example, an interstate pipeline faces a wide range of regulatory risks from several different agencies, operating risks, increased credit risks based on current FERC policies, and market risks that are driven primarily by competitors that are subject to different regulatory schemes (e.g., interstate v. intrastate).
While risks can be present in each aspect of the organization, the CFO and General Counsel are often responsible for (i) developing programs that address these risks; (ii) monitoring the effectiveness of those programs; and (iii) keeping senior management, the Board of Directors, and the Audit Committee informed on the company’s efforts in this area.
The CFO and General Counsel, working with the company’s Audit Committee, develop a corporate risk profile.

Working with the company’s outside auditors and senior management, financial/regulatory controls and oversight mechanisms are established. Once established, these controls are tested.

Risk committees (either formal or informal) review certain ongoing corporate risks/transactions to ensure they are consistent with the established risk profiles and controls.
Every organization must deal with regulatory-related risks. Over the last several years, managing these risks has had a greater effect on how businesses operate.

A key challenge organizations face today is operating a profitable business while complying with the applicable regulations. This has become increasingly more difficult, especially given the current political environment, where bank failures, foreclosures, and bad behavior by a limited number of corporate executives has created an anti-business environment. These actions have created a “rush to regulation” political environment (For example, the Dodd-Frank Act, the offshore drilling moratorium, and proposed new rules from the EPA on greenhouse gases).
The following agencies regulate certain aspects of a publicly-traded interstate pipeline’s business:

- Federal Energy Regulatory Commission (FERC)
- Pipeline and Hazardous Materials Safety Administration (PHMSA)
- Environmental Protection Agency (EPA)
- Occupational Safety and Health Administration (OSHA)
- Securities and Exchange Commission (SEC)
- Commodities Futures Trading Commission (CFTC)
- Various state agencies (DEQ, DNR, state historic preservation agencies)

Over the last several years, each of these agencies has stated publicly that it will have a stronger enforcement presence.
One of the challenges businesses must manage is that compliance with one agency’s regulations can create issues under another agency’s regulatory scheme.

- Example: The posting of information on an interstate pipeline’s web site does not meet the SEC’s disclosure requirements. Depending on the materiality of the issue, a FERC-required posting could require a publicly-traded pipeline to issue a press release or file an 8K.

- Pipeline web sites can also present issues when financial analysts ask questions based upon a FERC-required posting and whether responding to those questions, without taking the appropriate SEC action, could put a company at risk of being out of compliance with the SEC’s disclosure requirements.
Active Enforcement Groups

- Over the last several years, a number of agencies’ enforcement divisions have become more active.
- Each agency has its own approach; however, most agencies encourage companies to self-report.
- Self-reports, especially if the matter could be viewed as potentially material, can trigger SEC filings or other public disclosures.
  - Example: A self-report to FERC could trigger an 8K and/or disclosure in the company’s 10K or 10Qs.
  - Delays by FERC in officially closing such an issue can result in disclosure inquiries and create lingering questions related to the ultimate resolution of the issue and the potential materiality of the issue on a company’s financial statements.
Creation of a culture of compliance

- What does that really mean?
- Involvement of senior management
- Employee communications/training
- Internal reviews
- Involvement of the Audit Committee/Board of Directors
Common Approaches to Mitigating Regulatory Risks

- Development of regulatory compliance plans
  - Examples of pipeline compliance
    - FERC
    - PHMSA/DOT

- Corporate risk assessments may include:
  - A company’s overall risk tolerance
  - Ranking regulatory risks versus other business risks
  - Steps the company may take to mitigate these risks
  - How is information communicated to senior management, the Board of Directors, and employees?
Examples of Regulatory Risks That Keep a Pipeline’s General Counsel Awake at Night

- New rulemakings or regulations that fundamentally change how business is done or existing business relationships

- The threat of rate or tariff review by FERC

- Someone else’s bad facts making bad law that affects your company’s operations or business model

- Changes in administration

- The “new cop on the beat” mentality of enforcement agencies

- One agency’s set of regulations conflicting with another agency’s regulations
NOTES
The Evolving Role of Natural Gas – Legal and Regulatory Implications
The Future of Natural Gas

AN INTERDISCIPLINARY MIT STUDY

INTERIM REPORT
Natural gas has moved to the center of the current debate on energy, security and climate. This study examines the role of natural gas in a carbon-constrained world, with a time horizon out to mid-century.

The overarching conclusions are that:

- Abundant global natural gas resources imply greatly expanded natural gas use, with especially large growth in electricity generation.

- Natural gas will assume an increasing share of the U.S. energy mix over the next several decades, with the large unconventional resource playing a key role.

- The share of natural gas in the energy mix is likely to be even larger in the near to intermediate term in response to CO\textsubscript{2} emissions constraints. In the longer term, however, very stringent emissions constraints would limit the role of all fossil fuels, including natural gas, unless capture and sequestration are competitive with other very low-carbon alternatives.

- The character of the global gas market could change dramatically over the time horizon of this study.

The physical properties of natural gas, the high degree of concentration of the global resource and the history of U.S. energy policy have profoundly influenced the use of natural gas and the market structure governing its trade:

- the substantially lower carbon footprint of natural gas relative to other fossil fuels, combined with the development of North American unconventional natural gas supply and the high cost and slow pace of lower carbon alternatives, has focused attention on natural gas as a “bridge” to a low-carbon future;

- there are regionalized markets in North America, Europe and industrialized Asia, each with a different market structure; and

- “feast or famine” expectations for U.S. natural gas supply, associated with price swings and policy changes, have often led to costly investment decisions.
The confluence of these factors is central to today’s energy and climate change policy debate. The primary motivation for this study is to provide integrated, technically grounded analysis that will inform this debate. The analysis must deal with multiple uncertainties that can profoundly influence the future of natural gas:

- the extent and nature of greenhouse gas mitigation (GHG) measures that will be adopted in the U.S. and abroad;
- the ultimate size and production cost of the natural gas resource base in the U.S. and in other major supplier countries;
- the technology mix, as determined by relative costs of different technologies over time and by emissions policy; and
- the evolution of international gas markets, as dictated by economics, geology and geopolitics.

This study analyzes various possibilities for the last three of these, principally by application of a well-tested global economic model, for different GHG policy scenarios.

Our audience is principally U.S. government, industry and academic leaders and decision-makers interested in the interrelated set of technical, economic, environmental and political issues that must be addressed in seeking to limit GHG emissions materially. However, the study is carried out with an international perspective.

**FINDINGS**

**Supply**

Globally, there are abundant supplies of natural gas, much of which can be developed at relatively low cost. The current mean projection of remaining recoverable resource is 16,200 Trillion cubic feet (Tcf), 150 times current annual global gas consumption, with low and high projections of 12,400 Tcf and 20,800 Tcf, respectively. Of the mean projection, approximately 9,000 Tcf could be economically developed with a gas price at or below $4/Million British thermal units (MMBtu) at the export point.

Unconventional gas, and particularly shale gas, will make an important contribution to future U.S. energy supply and carbon dioxide (CO₂) emission reduction efforts. Assessments of the recoverable volumes of shale gas in the U.S. have increased dramatically over the last five years. The current mean projection of the recoverable shale gas resource is approximately 650 Tcf, with low and high projections of 420 Tcf and 870 Tcf, respectively. Of the mean projection, approximately 400 Tcf could be economically developed with a gas price at or below $6/MMBtu at the well-head.
The environmental impacts of shale development are manageable but challenging. The largest challenges lie in the area of water management, particularly the effective disposal of fracture fluids. Concerns with this issue are particularly acute in those regions that have not previously experienced large-scale oil and gas development. It is essential that both large and small companies follow industry best practices, that water supply and disposal are coordinated on a regional basis, and that improved methods are developed for recycling of returned fracture fluids.

**Policy Effects**

In a carbon-constrained world, a level playing field — a CO\textsubscript{2} emissions price for all fuels without subsidies or other preferential policy treatment — maximizes the value to society of the large U.S. natural gas resource.

Even under the pressure of an assumed CO\textsubscript{2} emissions policy, total U.S. natural gas use is projected to increase in magnitude up to 2050.

Under a scenario with 50% CO\textsubscript{2} reductions to 2050, using an established model of the global economy and natural gas cost curves that include uncertainty, the principal effects of the associated CO\textsubscript{2} emissions price are to lower energy demand and displace coal with natural gas in the electricity sector. *In effect, gas-fired power sets a competitive benchmark against which other technologies must compete in a lower carbon environment.* A major uncertainty that could impact this picture in the longer term is technology development that lowers the costs of alternatives, in particular, renewables, nuclear and carbon capture and sequestration (CCS).

A more stringent CO\textsubscript{2} reduction of, for example, 80%, would probably require the complete de-carbonization of the power sector. This makes it imperative that the development of competing low-carbon technology continues apace, including CCS for both coal and gas. It would be a significant error of policy to crowd out the development of other, currently more costly, technologies because of the new assessment of gas supply. Conversely, it would also be a mistake to encourage, via policy and long-term subsidy, more costly technologies to crowd out natural gas in the short to medium term, as this could significantly increase the cost of CO\textsubscript{2} reduction.

Some U.S. regions that have not traditionally been gas producers do have significant shale gas resources and the development of these resources could change patterns of production and distribution of gas in the U.S.

To the degree that economics is allowed to determine the global gas market, trade in this fuel is set to increase over coming decades, with major implications for investment and for possible U.S. gas imports in a couple of decades and beyond.
Demand & Infrastructure

There is a degree of resilience in overall gas use in that less use in one of the three major sectors (power, heating, industry) will lead to lower gas prices and more use in another sector.

The electricity sector is the principal growth area for natural gas under CO\textsubscript{2} emission constraints.

The scale-up of intermittent electricity sources, wind and solar, significantly affects natural gas capacity and use in the electricity sector because of variability and uncertainty. The impacts are quite different in the short term, during which the response is through the dispatch pattern, and in the long term, during which capacity additions and retirements will be responsive to large-scale introduction of intermittent sources.

- In the short term, the principal impact of increased intermittent generation is displacement of generation with highest variable cost, which is natural gas in most U.S. markets.

- In the long term, increased intermittent generation will have two likely outcomes: more installed capacity of flexible plants, mostly natural gas, but typically with low utilization; and displacement of capacity of and production from baseload generation technologies. There will be regional variation as to how such effects are manifested.

In the U.S., there are opportunities for more efficient use of natural gas (and other fuels), and for coal to gas fuel switching for power generation. Substitution of gas for coal could materially impact CO\textsubscript{2} emissions in the near term, since the U.S. coal fleet includes a significant fraction of low-efficiency plants that are not credible candidates for carbon capture retrofit in response to carbon emissions prices, and since there is significant underutilized existing Natural Gas Combined Cycle (NGCC) capacity.

Development of the U.S. vehicular transportation market using compressed natural gas (CNG) powered vehicles offers opportunities for expansion for natural gas use and reduction of CO\textsubscript{2} emissions, but it is unlikely in the near term that this will develop into a major new market for gas or make a substantial impact in reducing U.S. oil dependence. However, significant penetration of the private vehicle market before mid-century emerges in our carbon-constrained scenario. Liquefied natural gas (LNG) does not currently appear to be economically attractive as a fuel for long-haul trucks because of cost and operational issues related to storage at minus 162 degrees Centigrade.

The conversion of natural gas to methanol, for which there is already large-scale industrial use and a well-established cost basis, is an option for providing a cost-competitive, room temperature liquid transportation fuel and reducing oil dependence. However, it would not materially affect carbon emissions relative to gasoline.
The expansion of shale gas development in areas that have not previously seen significant gas production will require expansion of the related pipeline, storage and processing infrastructure. Infrastructure limitations need to be taken into account in decisions to advance coal substitution with natural gas.

**Markets & Geopolitics**

There are three distinct regional gas markets — North America, Europe and Asia — resulting from the degree of market maturity, the sources of supply, the dependence on imports and the significant contribution of transportation to the total delivered cost.

The U.S. natural gas market functions well and, given even-handed treatment of energy sources, needs no special policy help to contribute materially to CO$_2$ emissions mitigation.

International natural gas markets are in the early stages of integration, with many impediments to further development. If a more integrated market evolves, with nations pursuing gas production and trade on an economic basis, there will be rising trade among the current regional markets and the U.S. could become a substantial net importer of LNG in future decades.

Greater international market liquidity would be beneficial to U.S. interests. U.S. prices for natural gas would be lower than under current regional markets, leading to more gas use in the U.S. Greater market liquidity would also contribute to security by enhancing diversity of global supply and resilience to supply disruptions for the U.S. and its allies. These factors moderate security concerns about import dependence.

As a result of the significant concentration of conventional gas resources globally, policy and geopolitics play a major role in the development of global supply and market structures. Consequently, since natural gas is likely to play a greater role around the world, natural gas issues will appear more frequently on the U.S. energy and security agenda. Some of the specific security concerns are:

- Natural gas dependence, including that of allies, could constrain U.S. foreign policy options, especially because of the unique American international security responsibilities.
- New market players could introduce impediments to the development of transparent markets.
- Competition for control of natural gas pipelines and pipeline routes is intense in key regions.
- Longer supply chains increase the vulnerability of the natural gas infrastructure.
Research, Development and Demonstration

New science and technology, particularly in the case of unconventional resources, can significantly contribute to the long-term economic competitiveness of domestic supplies of natural gas with imports, by helping to optimize resource use, to lower costs, and to reduce the environmental footprint of natural gas.

Some government and quasi-government RD&D programs have had important successes in the development of unconventional gas resources. These programs, combined with short-term production tax incentives, were important enablers of today’s unconventional natural gas business.

HIGH-LEVEL RECOMMENDATIONS

1. To maximize the value to society of the substantial U.S. natural gas resource base, U.S. CO₂ reduction policy should be designed to create a “level playing field,” where all energy technologies can compete against each other in an open marketplace conditioned by legislated CO₂ emissions goals. A CO₂ price for all fuels without long-term subsidies or other preferential policy treatment is the most effective way to achieve this result.

2. In the absence of such policy, interim energy policies should attempt to replicate as closely as possible the major consequences of a level-playing-field approach to carbon emissions reduction. At least for the near term, that would entail facilitating energy demand reduction and displacement of some coal generation with natural gas.

3. Notwithstanding the overall desirability of a level playing field, and in anticipation of a carbon emissions charge, support should be provided through RD&D and targeted subsidies of limited duration, for low-emission technologies that have the prospect of competing in the long run. This would include renewables, carbon capture and sequestration for both coal and gas generation, and nuclear power.

4. Coal generation displacement with NGCC generation should be pursued as a near-term option for reducing CO₂ emissions.

5. In the event of a significant penetration of intermittent renewable electricity production, policy and regulatory measures should be developed (e.g. ancillary services compensation) or adapted (e.g. capacity mechanisms) to facilitate adequate levels of investment in natural gas generation capacity.

6. Regulatory and policy barriers to the development of natural gas as a transportation fuel (both CNG and natural gas conversion to liquid fuels) should be removed, so as to allow it to compete with other technologies. This would reduce oil dependence, and CNG would reduce carbon emissions as well.
7. For reasons of both economy and global security, the U.S. should pursue policies that encourage an efficient integrated global gas market with transparency and diversity of supply, and governed by economic considerations.

8. Since natural gas issues will appear more frequently on the U.S. energy and security agenda as global demand and international trade grow, a number of domestic and foreign policy measures should be taken, including:
   
   - integrating energy issues fully into the conduct of U.S. foreign policy, which will require multiagency coordination with leadership from the Executive Office of the President;
   
   - supporting the efforts of the International Energy Agency (IEA) to place more attention on natural gas and to incorporate the large emerging markets (such as China, India and Brazil) into the IEA process as integral participants;
   
   - sharing know-how for the strategic expansion of unconventional resources;
   
   - advancing infrastructure physical- and cyber-security as the global gas delivery system becomes more extended and interconnected; and
   
   - promoting efficient use of natural gas domestically and encouraging subsidy reduction for domestic use in producing countries.

9. There is a legitimate public interest in ensuring the optimum, environmentally sound utilization of the unconventional gas resource. To this end:

   - Government-supported research on the fundamental challenges of unconventional gas development, particularly shale gas, should be greatly increased in scope and scale. In particular, support should be put in place for a comprehensive and integrated research program to build a system-wide understanding of all subsurface aspects of the U.S. shale resource. In addition, research should be pursued to reduce water usage in fracturing and to develop cost-effective water recycling technology.

   - The United States Geological Survey (USGS) should accelerate efforts to improve resource assessment methodology for unconventional resources.

   - A concerted coordinated effort by industry and government, both state and Federal, should be organized so as to minimize the environmental impacts of shale gas development through both research and regulation. Transparency is key, both for fracturing operations and for water management. Better communication of oil- and gas-field best practices should be facilitated. Integrated regional water usage and disposal plans and disclosure of hydraulic fracture fluid components should be required.
10. The Administration and Congress should support RD&D focused on environmentally responsible, domestic natural gas supply, through both a renewed Department of Energy (DOE) program weighted towards basic research and a synergistic “off-budget” industry-led program weighted toward technology development and demonstration and technology transfer with relatively shorter-term impact. Consideration should also be given to restoring a public-private “off-budget” RD&D program for natural gas transportation and end use.
Implications of Greater Reliance on Natural Gas for Electricity Generation

Energy Bar Association Mid-Year Meeting
Washington, D. C.
December 9, 2010

Catherine Elder
Aspen Environmental Group
Study Looks at Switching Coal-Fired Fleet to Natural Gas

- Comments from EPA that switching all or most coal-fired generation to gas is easy
- Rulings on permits increasingly requiring look at natural gas as BACT
- Utilities finding cost of complying with Transport rule, Hg, coal ash greater than building new NatGas CC
- Sponsored by APPA and UARG
Bottom Line: Isn’t as Easy as it Looks

- Takes a LOT of Gas to replace coal-fired units
- Is a LOT of new Pipeline and Storage
- Natural gas delivery/interface SOPs not designed for hourly changes in gas burn
- Reliability different than for coal
Replacing All Coal Requires 14 Tcf

335,000 MW * 7 MMBtu/MWh * 24 hours * .72 * 365 days = 14.1 Trillion Cubic Feet

Replacing 1/3 of the coal fleet means burning 4.5 Tcf more per year
Study Scenarios Show Large Gas Burn to Reach Carbon Targets

<table>
<thead>
<tr>
<th>Resource Mix Alternatives</th>
<th>1</th>
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<td>23%</td>
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<td>Coal</td>
<td>31%</td>
<td>35%</td>
<td>28%</td>
<td>13%</td>
<td>5%</td>
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<td>2%</td>
<td>3%</td>
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<td>NatGas</td>
<td>33%</td>
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<td>100%</td>
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<td>Emissions in 2030</td>
<td>2,669</td>
<td>2,082</td>
<td>1,912</td>
<td>1,574</td>
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<td>Gas Burn for EG in 2036 (Tcf)</td>
<td>13.8</td>
<td>5.1</td>
<td>7.7</td>
<td>12.5</td>
<td>15.1</td>
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<td>Gas Burn for EG in 2030 (Tcf)</td>
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<td>4.1</td>
<td>6.8</td>
<td>11.0</td>
<td>13.8</td>
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<tr>
<td>Total US Gas Demand</td>
<td>29.8</td>
<td>21.1</td>
<td>23.7</td>
<td>28.5</td>
<td>31.1</td>
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</table>

Implications of Greater Reliance on Natural Gas
Industry Has Never Really Done More than Today

Even 4.5 Tcf higher production is a large increase versus maximum natural gas has ever done before.

4.5 Tcf more is equivalent of 12 new pipelines delivering 1 Bcf/day.
More Balanced View on Shale Gas

- Hyperbolic decline + liquids revenue allow quicker ROI despite higher capital cost
- Concerns:
  - Uses lots of water and pressure to fracture rock
  - Proppant chemicals may reach drinking water
  - Claimed higher carbon emissions from higher Btu content of the gas and higher fugitive emissions
  - More truck trips = more dust, noise, and emissions
  - Need to drill 19,000 wells to replace depletion of 3 Tcf ... depletion + growth means drilling lots of wells
The Evolving Role of Natural Gas – Legal and Regulatory Implications

Donald F. Santa
President & CEO
Interstate Natural Gas Association of America

Energy Bar Association
Mid-Year Meeting
Ronald Reagan Building and International Trade Center
Washington, DC
December 9, 2010

1) The supply and demand picture for natural gas in North America is evolving rapidly.

   a) Unconventional natural gas (e.g., shale gas) has greatly affected the supply outlook.

   b) Due to a number of factors (e.g., price competitiveness, increasingly stringent environmental regulation affecting coal-fired generation), natural gas-fired electric power generation is expected to be the most significant driver of natural gas demand growth.

   c) The shift in sources of natural gas supply has created demand for new interstate natural gas pipeline capacity.

2) The interstate natural gas pipeline industry has a proven track record for developing market responsive infrastructure.

   a) Between 2000 and 2009, the industry constructed approximately 15,000 miles of new interstate pipeline. (Most of this was built in the latter half of the decade in response to the unconventional gas boom). During the same period, interstate natural gas storage capacity increased by about 25 percent.

   b) This success is attributable in significant part to a supportive legal and regulatory framework.

      i) The NGA section 7 certificate process provides a great advantage compared to the legal framework for other kinds of energy infrastructure. (In contrast, less than 700 miles of high voltage interstate electric transmission lines was built during the same period.)
ii) In addition to the section 7 siting authority, the stability associated with the proven framework for open access interstate natural gas transportation provides certainty that makes it possible to attract capital investment. For example, incremental pricing and negotiated rates allow the developers of new pipeline capacity to avoid controversy and delay associated with litigating or negotiating cost allocation.

3) Still, the interstate natural gas pipeline industry faces some challenges associated with the rapidly shifting supply and demand picture, new regulations and other issues.

a) Shifting supply and demand patterns mean that some transportation corridors will experience declining throughput. As already seen in some pending rate cases, this will have consequences.

b) Pipelines will be affected by increasingly stringent environmental regulation. For example, pipeline compressor engines are affected by some of the same Clean Air Act regulations that are creating challenges for other parts of the economy.

c) What issues might be associated with increased demand for natural gas to fuel electric power generation? How will pipeline services be affected when natural gas is utilized more frequently for base load generation? Will there be special challenges for pipeline and storage service providers in serving gas-fired generators that firm up intermittent renewable generators (e.g., wind power).

d) What new pipeline safety mandates might be imposed as a consequence of the San Bruno tragedy? In addition to the authority that PHMSA possesses under current law, the Pipeline Safety Act is up for reauthorization.

e) Building the “last mile” of pipeline needed to reach a market often can be particularly challenging. There is the potential that a FERC-certificated pipeline can be frustrated by the inability to obtain other permits required before construction can commence.

4) Natural gas within U.S. energy policy. Has the shale gas revolution changed the perception sufficiently so that natural gas will be viewed as an energy source that should be promoted as a pillar of U.S. energy policy?
Shale Gas Development – Beyond the Hydraulic Fracturing Debate

A. Scott Anderson
Senior Policy Advisor, Energy Program
Environmental Defense Fund

1. How Significant Are the Reputed Environmental Advantages of Natural Gas?

2. What Does It Take To Do Hydraulic Fracturing Safely?

3. If Hydraulic Fracturing Isn’t the Issue, What Is?
   a. Chemical Disclosure … and Industry Credibility
   b. Subsurface Issues other than Hydraulic Fracturing
   c. Health Concerns
   d. Surface Impacts
   e. Air and Climate Impacts
   f. Lots of Mistakes: the Need for Improved Corporate Risk Control Management

4. What Needs to Happen Now?
NOTES
Technology and the Ethical Attorney
Legal Ethics and Social Networking -- Draft

Presentation to the Energy Bar Association

David I. Bloom
Partner
(202) 263-3204
dbloom@mayerbrown.com

December 9, 2010
What Are Social Media?

• Blogs
• Web sites
• Facebook, MySpace, etc.
• LinkedIn, Plaxo and business-oriented tools
• Listserves and on-line discussion groups
• Twitter
Why Do These Raise Legal Ethics Questions?

• Rules Relevant to Lawyer Advertising – ABA Model Rule 7.1
• Practice in Other Jurisdictions – ABA Model Rule 5.5
• Lawyers’ Supervisory Obligations – ABA Model Rule 5.1
• Obligation of Confidentiality – ABA Model Rule 1.6
• Truthfulness in Statements to Others – ABA Model Rule 4.1
• Communications with Persons Represented by Counsel – ABA Model Rule 4.2
• Conflicts of Interest – ABA Model Rule 1.7
• Protection of Confidential Information – ABA Model Rule 1.18
• Respect for Judiciary
• Zealous Representation of Clients
Social Networking Does Not Raise “New” Issues

• The typical issues involve traditional ethical questions.
• Only the media are new.
• But the new media raise difficult issues of application of traditional ethical requirements.
What Can Go Wrong?

• Lawyer Criticizes Judge on Blog – Florida proceeding: disciplinary action and $1220 fine

• Lawyer-Juror Posts Jury Proceedings – As a lawyer, subject to professional penalties: 45 day suspension, $14,000 in legal fees, and loss of job

• Ninth Circuit Judge: Criticized for posting rowdy humor on private Web site which was not safeguarded

• Facebook Posting – Lawyer requests delay for family crisis; Facebook page shows partying instead
What Can Go Wrong?

• On-line Discussion – Lawyer, seeking assistance, reveals enough information to identify client, issues and weaknesses in case

• Pretexting – Lawyer joins a Facebook site under false pretenses to obtain information from adverse party

• Inadvertent Creation of Attorney-Client Relationship

• “Friending” a Judge

• Uploading of Contacts to Social Networking Site
Advertising & Client Solicitation

• Most States Regulate Advertising and Client Solicitation
• Substantive and Technical Requirements
• Identification as Advertising
• Use of Identifiers – Bankruptcy Experts – Rather Than Firm Name
• Search Engine Optimizing
On-Line Practice of Law

- Inadvertent Creation of Attorney-Client Relationship
- Failure to Disclose Jurisdictional Limitations
- Disclosure of Confidential Information Prior to Attorney-Client Relationship
- Disclaimers
- Directory Listings
- The Line Between Providing Legal Information and Legal Advice
Pretexting

• Obtaining information from a “public” Facebook page is similar to obtaining information from publicly accessible online or print media – NY Comm. On Prof’s Ethics, Op. 843 (September 2010)

• A lawyer may not deceptively “friend” a potential witness in order to gain access to information – Phil. Prof’s Guidance Comm., Op. 2009-02 (March 2009)

• Even if lawyer is open and the party is represented in pending litigation, attempts to friend to obtain private information is prohibited by existing ethical rules – NYC Comm. On Prof’l Ethics, Formal Op. 2010-2
Websites

• ABA Formal Opinion 10-457 (August 5, 2010) provides guidance on lawyer websites

• Query: Is it permissible to post public briefs and opinions without client approval?
Legal Ethics, Social Networking and the First Amendment

• What is the line between activity subject to the rules of legal ethics and the First Amendment?

• Parallel issues arise under the Hatch Act – http://www.osc.gov/documents/hatchact/federal/2010-08-10%20FAQs%20Re%20Social%20Media.PDF
The Practical World Questions

• A.  A lawyer regularly provides commentary on current legal issues – she blogs on a case involving a client (but doesn’t know).

• B.  Same as A, but the case does not involve a client, but the issues are important to the client.

• C.  A lawyer joins a social networking site and uploads his contacts. Some of the contacts suggest that litigation is coming, while others contain the lawyer’s notes on those contacts.
The Practical World Questions

• D. A lawyer participates in a web site that provides commentary on legal issues and responds to questions. Where is the line between commentary and legal advice?

• E. A lawyer posts a legal question to fellow lawyers, concerning the application of the law to “hypothetical” facts. When does the posting (1) reveal client confidences, and (2) disclose the lawyer’s legal strategy and uncertainties?

• F. A lawyer participates in a civic-oriented blog in her “private” capacity, but identifies herself as a partner at XYZ LLP. Can conflicts and other issues arise as a result?
The Practical World Questions

• G. A lawyer includes on a web site or blog the type of biographical information usually contained on the firm’s web site. Are there issues?

• H. A lawyer and a judge are social friends and “friend” each other on Facebook.
Ethics in E-Discovery

Daniel J. Crothers, Justice
North Dakota Supreme Court

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The Case

- Big Bore Oil v. Little Squirt Refining Co.
  - Lawsuit over an "all requirements" contract
  - Bore wants to serve requests for production of documents regarding reasons for Squirt's decreased refinery production
    - Identify the ethical considerations for lawyer's representing both parties

Professional Conduct Rule: Competency

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"

ABA Model R. Prof. Conduct 1.1
Federal Discovery Rules

• Civil Rule 26 Initial disclosure must include “a copy — or a description by category and location — of all…electronically stored information…that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses”

Federal Discovery Rules

• Civil Rule 34 request for production may seek “any designated documents or electronically stored information …stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form”

Federal Discovery Rules

• Civil Rule 34 request “may specify the form or forms in which electronically stored information is to be produced”
  – “The response may state an objection to a requested form for producing electronically stored information
  – If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use”
Professional Conduct Rule: Communication

• A lawyer shall:
  – inform the client of any decision or circumstance with respect to which the client's informed consent is required
  – reasonably consult with the client about the means by which the client's objectives are to be accomplished
  – keep the client reasonably informed about the status of the matter

ABA Model R. Prof. Conduct 1.4

Communication

• “[C]ounsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced”

Zubulake v. UBS Warburg, 229 FRD 422, 439 (S.D.N.Y. 2004)

Professional Conduct Rule: Confidentiality

• “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [this rule]”

ABA Model R. Prof. Conduct 1.6
Professional Conduct Rule: Confidentiality

• “A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision”

  ABA Model R. Prof. Conduct 1.6, cmt 16

Professional Conduct Rule: Confidentiality

• “When transmitting …information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients”

  ABA Model R. Prof. Conduct 1.6, cmt 17

Professional Conduct Rule: Rights of Third Persons

• “A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender”

  ABA Model R. Prof. Conduct 4.4(b)
Professional Conduct Rule: Fairness to Opposing Party

• “A lawyer shall not:
  – unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act”

  ABA Model R. Prof. Conduct 3.4(a)

Professional Conduct Rule: Fairness to Opposing Party

• “A lawyer shall not:
  – Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law”

  ABA Model R. Prof. Conduct 3.4(b)

Professional Conduct Rule: Fairness to Opposing Party

• “A lawyer shall not:
  – In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party”

  ABA Model R. Prof. Conduct 3.4(d)
NOTES
Smart Grid Developments:
Practical Pointers for Lawyers and Their Clients
Smart Grid Privacy Developments

Megan J. Hertzler
Assistant General Counsel and Director of Data Privacy
Xcel Energy
Xcel Energy Inc.

Diversified, Fully Regulated, Operating in 8 States

Combination Utility
Electric 85% of Net Income*
Gas 15% of Net Income*

Customers
3.4 million electric
1.9 million gas

2009 Financial Statistics
NI Ongoing: $690 million
NI GAAP: $681 million
EPS Ongoing: $1.50
EPS GAAP: $1.48
Dividend Payout: 65%
Assets $25.5 billion
Equity Ratio: 45%

* Percentages based on 2009 Ongoing Earnings
SmartGridCity™

- Located in Boulder, Colorado
- Test smart grid technology in real world setting
  - 47,000 premises connected
- Living laboratory to determine:
  - Energy-management / conservation tools customers prefer
  - Which technologies improve power delivery
  - How to roll out smart-grid components on wider scale
SmartGridCity™ Status

- Project reviewed and deemed to be prudent by:
  - Colorado PUC Staff
  - Colorado Governor’s Energy Office
  - Administrative Law Judge
- Colorado PUC final prudence determination expected in coming weeks
- Field and IT infrastructure and systems complete
- Reporting and follow-on activities are ongoing
Overall Smart Grid Goals

- Operational efficiency
- Reliability
- Conservation
- Renewable power

Delivering on these goals requires customer trust, which is predicated on an effective privacy regime!
What Makes Smart Meter Data Private?

- Customer-specific Energy Usage Data (CEUD) reveals personal details about the lives of consumers:
  - Daily Schedules/Number of Occupants
  - Behavioral Patterns
  - Equipment Use
- CEUD from smart meters raises new issues:
  - Privacy
  - Security
  - Access
- Current regulatory structure does not fully contemplate these issues
Smart Grid Regulatory Paradigm

Federal
- DOE: “Data Access and Privacy Issues of Smart Grid Technologies”
- NIST: “Guidelines for Smart Grid Cyber Security: Vol. 2, Ch. 5”
- e-KNOW Act: H.R. 4860 (111th Cong. 2nd Sess.)

Smart Grid Regulatory Paradigm

State
- Existing Statutes
- Public Utility Commissions (CPUC NOPR)
- Colorado Smart Grid Taskforce

Privacy
- DOE: “Communications Requirements of Smart Grid Technologies”
- NIST: “Guidelines for Smart Grid Cyber Security”
- DHS: “Critical Infrastructure Protection”

Security
- Future Legislation?
- Colorado Smart Grid Taskforce
Balancing Access/Security

“Customers and their authorized third-party service providers should be able to access home energy consumption data at any time ...”

NPB RFI: Data Access, Comments of Google at 18 (July 12, 2010)

“[W]e know that cyber intruders have probed our electric grid and that in other countries cyber attacks have plunged entire cities into darkness.*** [I]t’s now clear this cyber threat is one of the most serious economic and national security challenges facing us as a nation.”

May 29, 2009 remarks by President Obama regarding “Security of Our Nation’s Infrastructure”
Colorado (Re)Actions

Smart Grid Taskforce
- Created by Colorado Legislature (S.B. 10-180)
- Eleven members, mixture of executive and legislative appointees (no CPUC representation)

CPUC NOPR
- Reaction to comments provided in three existing dockets:
  - Issues Related to Smart Grid and Advanced Metering Technologies (10M-099EG)
  - Smart Grid Technology and its Potential Impact on Consumer Privacy (09I-593EG)
  - Review of SmartGridCity™ as a pilot project (10I-099EG)
Smart Grid Taskforce: Focus and Membership

"Provide technical expertise and strategic policy recommendations to the CPUC and Legislature"
## Smart Grid Taskforce: 2011 Colorado Smart Grid Draft Report

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<tr>
<th>Data Management</th>
<th>Technical Specifications</th>
<th>Workforce Development</th>
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<td>Consumer Protection and Privacy</td>
<td>Communication and Technical Standards</td>
<td>Workforce and Economic Development Issues</td>
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<td>Energy Efficiency and Demand Response</td>
<td>Integration of Demand Response Programs</td>
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**Xcel Energy**
**Responsible by Nature**

12
Smart Grid Taskforce: Timeline and Recommendations

- Report expected in January 2011
- Privacy recommendations will likely focus on:
  - Access (both customer and third party)
  - Ownership
  - Informed consent and notice
  - Costs
- Colorado PUC has indicated it will consider these recommendations in its rulemaking
CPUC NOPR: Background and Objectives

- Draws heavily from previous Colorado PUC Smart Grid docket
- Investigation into issues related to Smart Grid and Advanced Metering Technologies (10M-099EG)
- Smart Grid Technology and its Potential Impact on Consumer Privacy (09I-593EG)
- Review of SmartGridCity™ as a pilot project (10I-099EG)
- Stated policy objectives
- Additional privacy protections
- Privacy policy needs to be thoughtful and pro-active
CPUC NOPR: Framework

- Customer-centric model that gives customers almost complete control over CEUD and other account data
- Intended to mirror existing rules governing non-smart meter CEUD
  - In reality, would greatly limit utility’s use of CEUD
  - Creates parallel regimes – one for traditional meter data and one for CEUD from smart meters
- Concentrates almost exclusively on customer-utility relationship with minimal focus on third-party controls
CPUC NOPR: Key Provisions for Utilities

- Consent required to collect CEUD from Smart Meters
- Separate consent required to use, disclose, or permit access to CEUD
- Default position: without consent, utility can only use CEUD for billing purposes
- Consent to use must be renewed every 12 months
- Customers have free access to CEUD, but utilities can charge for authorized third party access
Colorado (Re)Actions: Summary

- Regulation proceeding on dual tracks – PUC and Legislature
  - PUC has indicated it will consider the Smart Grid Taskforce Report before finalizing rules
- NOPR could substantially complicate utility operations
## Xcel Energy’s Actions To Date

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<tr>
<td>Customer Data Taskforce</td>
<td>Formed cross-disciplinary body to addresses CEUD/Smart Meter data issues</td>
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<tr>
<td>Director of Data Privacy</td>
<td>Made one individual responsible for development, implementation, maintenance of and adherence to Xcel Energy’s privacy policies</td>
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<tr>
<td>Participate in Regulatory Discussions</td>
<td>Submitted comments to DOE, Colorado and Minnesota State Public Utilities Commissions on privacy issues for CEUD</td>
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<tr>
<td>Privacy Principles</td>
<td>Renovated Privacy Principles governing internal conduct for use as basis for state specific privacy tariffs or public advocacy</td>
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<tr>
<td>Contracting Procedures</td>
<td>Implemented provisions requiring partners to guard CEUD</td>
</tr>
<tr>
<td>NIST Security Guidelines</td>
<td>SmartGridCity™ designed to meet or exceed applicable NIST standards as we know them today</td>
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On the Horizon...

- Continuing regulatory evolution
- New state and federal legislation
- Increasing interest in access to CEUD/Smart Grid data
- Plaintiffs Bar
- CIP / NERC compliance in Smart Grid world
What Will Change: Consent

- Currently, consent requirements to release customer energy usage data are inconsistent (or non-existent)
- As smart grid technology becomes more ubiquitous, standardized consent requirements will develop
- Consent requirements will likely be based on informed consent principles:
  - Identification of data collected and released
  - Allowable uses
  - Duration
  - Revocation

Xcel Energy®
RESPONSIBLE BY NATURE™
What **Will** Change: Contracting

- Contracting practices will need to accommodate the heightened privacy risks in a smart grid world
- Parties that share customer energy usage data with vendors or partners should incorporate contractual protections for:
  - Data security
  - Breach notification
  - Limitations of use
- Contracting practices for customer energy usage data will begin to mirror those implemented to protect Personally Identifiable Information (PII)
What **Will** Change: Access

- Technological advances will result in greater interest in access to customer energy usage data
- Utilities and regulators will need to decide whether providing data access is a standard utility function
- Increasing access can deliver substantial benefits, but only if the difficult questions are addressed up front:
  - Privacy
  - Security
  - Costs
Questions?
PG&E’s Smart Grid
Foundation for a Sustainable Electric System

Christopher J. Warner
Chief Counsel
Pacific Gas and Electric Company
Energy Bar Association December 9, 2010
# Smart Grid – Toward A Legal and Commercial Framework

## PG&E’s Smart Grid Building Blocks
- SmartMeter projects – 2005-2012
- Calif Senate Bill 17 & CPUC Smart Grid policy rulemaking 2008-2011
- Smart Grid Deployment Plans 2011-

## PG&E’s Smart Grid Plans and Programs
- Use of Smart Grid deployment plans and standards for review
- Smart Grid standards and metrics
- Role of ARRA and R&D projects
- Customer-side programs e.g. Demand Response

## Lessons Learned
- Customer feedback on electric rates & SmartMeters
- Technology assessment and cost-benefit evaluation
- Cyber-security, privacy and customer choice
Pacific Gas and Electric Company

Energy services to 15 MM people:
- 5.1 MM Electric customer accounts
- 4.3 MM Natural Gas accounts

70,000 square miles with diverse topography and climate zones

20,000 employees

A regulated investor-owned utility

Ranked the greenest utility in the United States in 2009 and 2010
# Smart Grid Building Blocks

## Federal Policy

| 2007 EISA | “It is the policy of the United States to support the modernization of the Nations’ electricity transmission and system to maintain a reliable and secure electricity infrastructure…” |
| Dept of Energy | Goal 1.3: “Create a more flexible, more reliable, and higher capacity U.S. Energy Infrastructure.” |

## CA State Policy

| AB 32 | “Reducing our greenhouse gas emissions by 80 percent will require California to develop new technologies that dramatically reduce dependence on fossil fuels, and shift into a landscape of new ideas, clean energy and green technology …” |
| SB17 | Utilities are required to file Smart Grid deployment plans by 7/1/11 |

## Regulatory Policy

| CPUC | Renewable Portfolio Standard |
| CEC | Smart Grid workshops examining potential demand-side management benefits |
| | Smart Grid 2020 Research |
### SmartMeter™ Program

**CPUC Rulemaking and PG&E Project Approvals 2005-2009**

Automated meter reading for all PG&E gas and electric customers
- 7 million advanced meters installed
- 10 million by mid-2012

**Frequent meter reads**
- Hourly intervals for electricity
- Daily intervals for gas

**Customer benefits today and a platform for future innovation**
Advanced Electric Meter

Solid-state technology

Integrated remote connect / disconnect, load-limiting switch

In-premise network gateway
**SmartMeter™ Program Benefits**

**Customer Service**
- Convenient meter reading
- **Faster power restoration**
- Faster startup of service after moving
- Faster problem resolution
- Better billing

**Choice and Control**
- Energy usage information
- Proactive Energy Alerts
- **New pricing options**, including SmartRate

**Enable the Future**
- Options for customers to automatically reduce energy use
- **Distributed generation and storage**
- Support demand from electric vehicles

*Energy use feedback can help households reduce electricity consumption by 4 to 12 percent*

American Council for an Energy Efficient Economy
Customers Can View Their Energy Use

Secure customer access through PGE.com

Energy use by hour or day

View by billing cycle, month, or week

For SmartRate customers, colors designate critical peak, peak, and off-peak

Temperature overlay
Energy Alerts

Provide customers early warning of high usage

• When actual usage-to-date crosses Tier 3, 4, 5
• When usage is forecast to cross Tier 3, 4, 5 by end of billing period

Delivered via:

• Email
• Text message
• Outbound phone call
SmartRate Residential Pricing Plan

Recruitment

10,000 voluntary participants in 2008; 24,000 in 2009

Experience

2008: Across 9 called events, the average residential customer achieved a reduction of 16.6%

2009: Across 15 called events, the average residential customer achieved a reduction of 15%

Retention

90% of 2008 customers remained on the plan in 2009

95% of 2009 customers intend to remain on the plan in 2010
Peak Day Pricing (PDP)

Overview

New time-variable pricing plan for all customers

Mandatory for most business customers

• May 2010 rollout to largest business customers

• Option to opt out if sign up for DR program or Time-of-Use rate

Optional for residential customers beginning one year later, May 2011

How it Works

Time-of-Use pricing all year

In addition, during May through October summer months

• An additional surcharge during peak hours on between 9 and 15 days

• Lower mid-day electric rates
PG&E’s Smart Grid Plan

Overlay with intelligence and automation

Sense
Communicate
Compute
Control

Power Plants
Transmission Networks
Substations
Distribution Networks
Consumers
California’s Renewable Energy Transmission Initiative (RETI) has:

- Identified Competitive Renewable Energy Zones (CREZ)
- Prepared detailed transmission plans for future development

CPUC has identified the need for 11 major new transmission lines at a cost of $16 billion. Three are underway.
Smart Grid Efforts Are Incremental and Will Include Customer Education

- Deploy foundational communications and IT infrastructures (e.g. SmartMeter™)
- Define industry standards to ensure interoperability
- Conduct pilot programs to prove out Smart Grid applications
- Deploy integrated Smart Grid applications

Today
Smart Grid Is A Journey

**Near Term**
*Transform existing services*

- Automated home energy management
- Plug-in hybrid electric vehicle SmartCharge™
- Integrated local generation and storage
- Deep penetration of Demand Side Management

**Future**
*Enable future services and foster innovation*

**Today**
*Integrate existing services to new platform*

- Automated meter reading
- Electric field vehicles
Leading Industry Work on Smart Grid Standards

Required by Energy Independence and Security Act (EISA) of 2007

A standard architecture to enable “plug and play” capability

Create markets

Industry-led effort coordinated by NIST and supported by EEI
Technology Lifecycle and Deployment

Mature, saturating market
Rapid market growth, dominant design
early adopters, niche markets

R&D

Market Size
Time

PG&E’s Smart Grid Principles
- Customer value and business needs drive strategies
- Pragmatic technology deployment
- Security and privacy

Source: Utterback, 1996

T&D Equipment 40+ years
Wireless Devices 48 months
Computer Software 24 months
iPhone Apps 30 days
Significant Smart Grid Benefits

Customers
- Energy awareness
- Choice and Control
- Savings opportunities

Society
- Address global warming challenge
- Cleaner air, environment
- New economic opportunities

Utility
- Grid efficiency
- Grid reliability
- Long term fuel price stability
- Enhanced value / service opportunities
Distributed generation and electric vehicles impact the distribution grid

Variability and two-way electric flows

Distribution protection systems can trip off PV systems at their maximum production

Smart distribution equipment will monitor and manage EV charging and DG exports to the grid

Reduce the need for infrastructure upgrades, significantly reducing capital costs

Emerging energy storage technologies hold promise
Smart Transmission Grid: Real-Time Management

**Synchrophasors:**

- Measure electrical waves in near real time
- Devices throughout the grid
- Synchronized to an absolute time reference

**Applications:**

- Enhance reliability by detecting faults early to prevent power outages
- Increase power quality through precise analysis and automation
- Manage variability of renewable resources at scale
Smart Grid deployment plans should be source of information and policy direction, but not binding in individual proceedings.

Each utility is at different starting point, so Commission should retain flexibility to review projects and investments on incremental basis.

Smart Grid standards still be developed at national level, so premature for deployment plans to include specific timelines and cost estimates.

Commission should encourage variety and flexibility in the marketplace, and avoid “top down” plans and goals.

Describe costs and benefits – not all benefits are financial.

Connect deployment to supporting policy goals (i.e. GHG, RPS, Pricing).
The Smart Grid Deployment Plans are one of the tools to use to achieve the Smart Grid Objectives.
States should continue to defer to national standard setting, such as by NIST.

National standards ensure backward compatibility and avoid “balkanizing” the development of Smart Grid products and services.

Joint IOU-proposed metrics are a start, but should be refined to focus on current consensus functionality and inter-operability standards and avoid prejudging standards yet to be approved.
Utilities will need to play role as system integrators of Smart Grid devices and services, particularly in regard to distribution grid reliability and renewable resource integration.

Consumer-focused smart grid programs, incentives and outreach should be closely coordinated with market developments and customer choice.
ARRA Project: Regional Synchrophasor Demonstration

Collaborate with transmission system operators across the Western Interconnection

Evaluate benefits of phasor monitoring for managing grid reliability
Goal: Utility-scale Storage

Pumped Hydro

Compressed Air

Sodium-Sulfur (NAS) Battery

Zinc Bromine Flow Batteries

Flywheel
Project: Utility-scale Battery Pilot

4 MW / 32 MWh sodium sulfur (NaS) battery

Goal to improve reliability and power quality

Test ability to provide ancillary services
- Load-following
- Frequency regulation

Test ability to cost-effectively integrate intermittent renewable resources

The NAS battery installation at Tokyo Electric Power Co.’s Ohito Substation is rated at 6 MW/48 MWh
ARRA Project: Compressed Air Energy Storage

300 MW, up to 10 hours of storage

5-7 years, in 3 phases:
- Permitting, transmission interconnection, plant design
- Plant construction
- Monitoring

- Integrate intermittent renewables
- Store off-peak energy
- Provide ancillary services
- Manage peak demand
- Relieve grid congestion
PG&E Customer Side Programs

**Programs**

- Price-responsive
- Reliability

**Sample Program Components**

- kW load reduction
- Contract period
- Eligibility (e.g. size, meter)
- Curtailment window
- Event trigger
- Notification time
- Incentive payment
- Non-compliance penalties
- Enabling technology

**Business Programs**

- Peak Choice
- Aggregator (retail, bilateral)
- Optional Bidding Mandatory Curtailment
- Scheduled Load Reduction
- Base Interruptible
- Critical Peak Pricing

**Residential Programs**

- Smart AC

**Enabling Technology Programs**

- Technology Incentive
- Automated Demand Response
- Permanent Load Shift
Demand Response Opportunities

Large Commercial and Industrial (>200 kW)
- Air Conditioning
- Lighting
- Refrigeration
- Process

Medium Commercial and Industrial (20 kW-200kW)
- Air Conditioning
- Lighting
- Refrigeration
- Process

Residential and Small Commercial (<20 kW)
- Air Conditioning
- Plug-in EV
Expanding Customer Technologies

Automated in-premise energy management

On-site generation and storage

Smart charging for electric vehicles
SmartAC: Automated AC Cycling

Customers:
- Volunteer for the program
- Receive a free load management device
- Have the option of opting out for the day

Results in 2009:
- Clear reductions in customer loads
- Customers highly satisfied and stay with the program
Automated Demand Response (DR)

Conducted two pilots in 2009

- Successfully demonstrated that DR load reductions at large industrial customers can be bid into the CAISO wholesale market using open protocol communications

- Demonstrated that customer AC load control can provide very rapid reductions in load

In 2010, ongoing work to integrate automated DR into wholesale energy markets as a resource

- Regulator frameworks, technical systems, processes, rules, and customer acceptance research
Customer Generation

Cumulative Capacity of NEM (MW, CEC AC) Interconnected with PG&E Grid
Projected Adoption Of Plug-in Electric Vehicles

Cumulative PG&E Service Territory PEV Market Adoption Scenarios

- High (845)
- Average (532)
- HEV Historical
- Low (219)

* Shifted 10 years forward
Plug-in Electric Vehicle Energy Demand

Customers will prefer a 240V charge to shorten recharge times

PEV charging is a large load for PG&E customers, comparable to average peak summer load of a single home

Rate of charge

16 hours
8 hours
4 hours

120V/12A
240V/15A
240V/30A

BEV Recharge time

San Francisco
Berkeley
Vacaville
Fresno
Rocklin
San Ramon

BEV @ 240V/30A

Source: http://www.nissanusa.com/leaf-electric-car/#/charging, August 14, 2009
Integrated Demand-Side Programs

Advanced Energy Information, Analysis

Smart Energy Efficiency

Time-variable Pricing

Demand Response

Voluntary Load Control

Automated Energy Management

On-site Generation and Storage

Electric Vehicle Charging
Customer understanding and “buy in” are essential.

It’s the bill, stupid.

Customers value their privacy and security, particularly when electronic or internet communication is involved.

New technologies must be proven to be commercially scalable AND cost-effective from the customer’s perspective. New commercial risk equations are needed.

Cyber-security issues are cost-drivers.

“Old fashioned” rate cases will still dominate the approval process for Smart Grid investments and projects.
Summary

A Smart Grid is an essential component of a modern electric system that is reliable, efficient, and sustainable.

The Smart Grid will take years to build – we are on a journey.

The SmartMeter program lays the foundation for PG&E’s Smart Grid.

Technology standards are a needed starting point for the Smart Grid.

PG&E is actively piloting a range of Smart Grid technologies:

- Customer energy management
- Distributed renewables integration
- Electric vehicle smart charging
- Automated demand response
- Microgrids
- Utility-scale storage
- Transmission monitoring
At PG&E, We Are Committed To Sustainability
NOTES
FERC and NERC: The Struggle for Balance
NERC-FERC Syllabus - Selected Readings

1. Federal Power Act Section 215
   Attached.

   (Certification of NERC as the Electric Reliability Organization.)

   (Approval of initial reliability standards.)

4. Order 743; *Revision to Electric Reliability Organization Definition of Bulk Electric System*, 133 FERC ¶ 61,150 (2010)
   (FERC-directed revision to BES definition – Final Rule. Attached.)


   (Order directing NERC to develop procedures assuring that FERC directives for submission of standards will be honored. Attached.)

   (Rescinds application of Penalty Guidelines to review of NERC Penalties)

Federal Power Act Section 215 - Electric Reliability

(a) Definitions
For purposes of this section:
(1) The term “bulk-power system” means—
(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and
(B) electric energy from generation facilities needed to maintain transmission system reliability.
The term does not include facilities used in the local distribution of electric energy.
(2) The terms “Electric Reliability Organization” and “ERO” mean the organization certified by the Commission under subsection (c) of this section the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.
(3) The term “reliability standard” means a requirement, approved by the Commission under this section, to provide for reliable operation of the bulk-power system. The term includes requirements for the operation of existing bulk-power system facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the bulk-power system, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.
(4) The term “reliable operation” means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.
(5) The term “Interconnection” means a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control.
(6) The term “transmission organization” means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.
(7) The term “regional entity” means an entity having enforcement authority pursuant to subsection (e)(4) of this section.
(8) The term “cybersecurity incident” means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communication networks including hardware, software and data that are essential to the reliable operation of the bulk power system.

(b) Jurisdiction and applicability
(1) The Commission shall have jurisdiction, within the United States, over the ERO certified by the Commission under subsection (c) of this section, any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 824 (f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.
(2) The Commission shall issue a final rule to implement the requirements of this section not later than 180 days after August 8, 2005.

(c) Certification
Following the issuance of a Commission rule under subsection (b)(2) of this section, any person may submit an application to the Commission for certification as the Electric Reliability Organization. The Commission may certify one such ERO if the Commission determines that such ERO—
(1) has the ability to develop and enforce, subject to subsection (e)(2) of this section, reliability standards that provide for an adequate level of reliability of the bulk-power system; and
(2) has established rules that—
(A) assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure;
(B) allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section;
(C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) of this section (including limitations on activities, functions, or operations, or other appropriate sanctions);
(D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties; and
(E) provide for taking, after certification, appropriate steps to gain recognition in Canada and Mexico.

(d) Reliability standards
(1) The Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission.
(2) The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard on competition. A proposed standard or modification shall take effect upon approval by the Commission.
(3) The Electric Reliability Organization shall rebuttably presume that a proposal from a regional entity organized on an Interconnection-wide basis for a reliability standard or modification to a reliability standard to be applicable on an Interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest.
(4) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part.
(5) The Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.
(6) The final rule adopted under subsection (b)(2) of this section shall include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization. Such transmission organization shall continue to comply with such function, rule, order, tariff, rate schedule or agreement accepted, approved, or ordered by the Commission until—
(A) the Commission finds a conflict exists between a reliability standard and any such provision;
(B) the Commission orders a change to such provision pursuant to section 824e of this title; and
(C) the ordered change becomes effective under this subchapter.
If the Commission determines that a reliability standard needs to be changed as a result of such a conflict, it shall order the ERO to develop and file with the Commission a modified reliability standard under paragraph (4) or (5) of this subsection.

(e) Enforcement
(1) The ERO may impose, subject to paragraph (2), a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission under subsection (d) of this section if the ERO, after notice and an opportunity for a hearing—
(A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d) of this section; and
(B) files notice and the record of the proceeding with the Commission.
(2) A penalty imposed under paragraph (1) may take effect not earlier than the 31st day after the ERO files with the Commission notice of the penalty and the record of proceedings. Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty filed within 30 days after the date such notice is filed with the Commission. Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (1), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the ERO and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside, reinstate, or modify the penalty, and, if appropriate, remand to the ERO for further proceedings. The Commission shall implement expedited procedures for such hearings.

(3) On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

(4) The Commission shall issue regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards under paragraph (1) if—

(A) the regional entity is governed by—

(i) an independent board;

(ii) a balanced stakeholder board; or

(iii) a combination independent and balanced stakeholder board.

(B) the regional entity otherwise satisfies the provisions of subsection (c)(1) and (2) of this section; and

(C) the agreement promotes effective and efficient administration of bulk-power system reliability.

The Commission may modify such delegation. The ERO and the Commission shall rebuttably presume that a proposal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power system reliability and should be approved. Such regulation may provide that the Commission may assign the ERO's authority to enforce reliability standards under paragraph (1) directly to a regional entity consistent with the requirements of this paragraph.

(5) The Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.

(6) Any penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.

(f) Changes in Electric Reliability Organization rules
The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports
The ERO shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

(h) Coordination with Canada and Mexico
The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the ERO in the United States and Canada or Mexico.
(i) Savings provisions

(1) The ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

(2) This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the ERO.

(5) The Commission, after consultation with the ERO and the State taking action, may stay the effectiveness of any State action, pending the Commission’s issuance of a final order.

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have more than one-half of their electric load served within the region. A regional advisory body shall be composed of one member from each participating State in the region, appointed by the Governor of each State, and may include representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

(k) Alaska and Hawaii

The provisions of this section do not apply to Alaska or Hawaii.
ORDER DENYING REHEARING, DENYING CLARIFICATION, DENYING RECONSIDERATION, AND DENYING REQUEST FOR A STAY

(Issued September 16, 2010)

1. In the March 18, 2010 order in this proceeding, the Commission directed the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), to propose revisions to its Rules of Procedure that pertain to the development of Reliability Standards. Specifically, the Commission directed NERC to propose revisions that address a conflict between its Standards Development Process and its obligation as the ERO to submit to the Commission a new or modified Reliability Standard pursuant to a directive under section 215(d)(5) of the Federal Power Act (FPA). In addition, the Commission ordered NERC to fully comply with a previous Commission directive to develop modifications to Reliability Standard FAC-008-1, which governs Bulk-Power System facility ratings. The Commission took these actions because the current Standards Development Process can prevent the ERO from complying with a Commission directive under section 215(d)(5), and has in fact prevented the ERO from fully complying with the Commission’s directive to modify FAC-008-1.


2 See NERC Rules of Procedure, Section 300 (Reliability Standards Development), and Appendix 3A (Reliability Standards Development Procedure). These two provisions of NERC’s Rules of Procedure are referred to, collectively, as the “Standards Development Process” throughout this order.

2. NERC and other entities request rehearing and/or clarification of the March 18 Order. NERC also requests that the Commission reconsider and withdraw the directive to develop modifications to FAC-008-1, stay the directives in the March 18 Order, and convene a public conference to consider general issues pertaining to the Commission’s prospective implementation of section 215 of the FPA and technical issues specific to FAC-008-1.

3. The rehearing requests in this proceeding reflect concern that the Commission intends to effect a fundamental change in its relationship to the ERO. NERC and others characterize the Commission’s directive requiring NERC to propose revisions to its Rules of Procedure as requiring revisions that will allow the Commission to dictate the specific content of a Reliability Standard. These entities argue that such a directive violates the language and intent of section 215 of the FPA, marks a departure from Commission precedent, and threatens to undermine NERC’s ability to function as an international ERO.

4. As explained in more detail below, we deny rehearing, reconsideration, and the request for a stay. Contrary to the arguments on rehearing, the March 18 Order does not require NERC to change its rules so that the Commission can dictate the specific content of Reliability Standards; instead, it requires NERC to develop and propose for Commission review an affirmative mechanism designed to ensure that NERC can comply with its obligation as the ERO to submit to the Commission a new or modified Reliability Standard pursuant to a directive under section 215(d)(5) of the FPA. Thus, the March 18 Order is intended to prevent the Standards Development Process from effectively negating a Commission directive, not to preclude the ERO from exercising its freedom to respond to Commission directives with alternative approaches that address the Commission’s underlying concern or goal in an equally effective and efficient manner.

5. We also reject the claim that either section 215 of the FPA or Commission precedent permits the ERO to decide not to comply with a final Commission directive under section 215(d)(5) of the FPA, provided that the directive is considered through the Standards Development Process. NERC and industry stakeholders can exercise their technical expertise as part of the Standards Development Process; intervene in Reliability Standard rulemakings; comment on Commission proposals to direct new or modified Standards pursuant to section 215(d)(5); request rehearing of Commission directives they

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4 Although the request for stay is denied, we note that we granted, collectively, a 180-day extension of time past the original deadline for NERC to submit a proposed modification to its Rules of Procedure. See North American Electric Reliability Corp., 131 FERC ¶ 61,237 (2010) and Notice of Extension of Time, Docket No. RR09-6-000, (August 19, 2010).
judge to be misguided, overly prescriptive, technically unsound, or ultra vires; seek judicial review if the Commission confirms the directives; and develop equivalent alternatives that address the concerns or goals underlying the directives as efficiently and effectively as the directives themselves. They cannot, however, treat Commission directives under section 215(d)(5) as if those directives require no response other than consideration during the Standards Development Process. The ERO is not required to develop a modification or new Reliability Standard that rigidly adheres to the technical approach specified in a final Commission directive, but it must develop and submit to the Commission some proposal that affirmatively responds to the concern or goal underlying the directive and an adequate technical analysis if it decides to take a different approach. The ERO has a statutory obligation to comply with Commission directives under section 215(d)(5); it is not absolved of that obligation by merely considering a Commission directive in the Standards Development Process.

I. **Background**

6. In the March 18 Order, the Commission expressed a growing concern that the current voting rules in NERC’s Standards Development Process can be used to prevent NERC from complying with its obligation as the ERO to submit to the Commission a new or modified Reliability Standard pursuant to a directive under section 215(d)(5) of the FPA.\(^5\)

7. Section 215(d)(5) of the FPA authorizes the Commission to direct the ERO to submit to the Commission a new or modified Reliability Standard that addresses a specific matter if the Commission considers the new or modified Standard appropriate to carry out section 215. Under the current Standards Development Process, however, a draft Reliability Standard cannot be presented to the NERC board of trustees for consideration unless approved by a two-thirds majority of the stakeholder ballot body.\(^6\) Consequently, if just more than one-third of a ballot pool votes against a Reliability Standard drafted to comply with a Commission directive, the Standard will be rejected and will not be presented to the NERC board of trustees for a vote or to the Commission for review – even in circumstances where the Standard would have complied with the Commission’s directive. Thus, under current ERO rules, the ballot body can delay or prevent NERC’s compliance with its statutory obligation.

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\(^5\) March 18 Order, 130 FERC ¶ 61,203 at P 2.

\(^6\) For a more complete discussion of the current Standards Development Process, *see id*. P 8-11.
8. As the Commission explained in the March 18 Order, this situation occurred with respect to its directive to the ERO to modify Reliability Standard FAC-008-1. The Commission approved FAC-008-1 in Order No. 693. It also required NERC to submit three modifications. One of these modifications was the addition of a requirement that, “for each facility, [each transmission owner and generator owner must] identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting.” In other words, for certain transmission interconnections, the Commission required that transmission and generator owners determine how much more transfer capability would be available if the weakest element was improved so that it no longer limited the rest of the interconnection facilities.

9. When the Commission proposed this modification in the notice of proposed rulemaking (NOPR), several commenters objected on the basis that it “promotes commercial use of the grid . . . and relates more to transmission access [than to reliability].” In Order No. 693, the Commission rejected this argument and explained that the modification addresses a reliability objective:

When the transmission operators know which component within the transmission element is limiting they have more information to inform their decisions about how to provide for the Reliable Operation of the Bulk-Power System. Our . . . modification does not require any entity to invest in equipment to increase ratings of any facility; it simply requires the next limiting component [sic] of each facility to be identified in order to understand what components are causing the limits that are to be used in reliability mitigation assessments. The identification of the first limiting component is already an inherent requirement in the existing rating process.

No entity sought rehearing of this directive regarding FAC-008-1.

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7 See id. P 13-18.


10 Id. P 757.

11 Id.
10. NERC initiated the process of complying with the Commission’s directive by approving a Standard Authorization Request to develop revisions to FAC-008-1. An industry drafting team developed FAC-008-2, which addressed the three modifications directed by the Commission in Order No. 693. Requirement R7 of the revised Reliability Standard addressed the Commission’s directive that the ERO develop a modification requiring transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed.

11. In November 2008, the ballot body approved FAC-008-2 with a 70.01 percent affirmative (weighted segment) vote in the initial ballot. Although this percentage exceeded the two-thirds majority of the weighted segment votes required for passage, because negative votes with comments were received, NERC’s Standards Development Process required a recirculation ballot. Some of the comments that accompanied the negative votes pertained to Requirement R7 of the draft Reliability Standard. These comments argued that Requirement R7 did not address a reliability concern, but rather a business concern better addressed in the context of a tariff. The NERC drafting team responded to these comments by stating that:

if FERC issues a directive and the time for a rehearing has passed, the drafting team is to comply with the directive provided the directive is not detrimental to reliability, regardless of the opinion of the drafting team or the industry as to its perceived reliability benefit. …. In the case of FERC Order 693, NERC did not ask for rehearing during the 30-day period….12

12. In December 2008, NERC held the recirculation ballot. FAC-008-2 was voted down, receiving only a 57.37 percent affirmative vote, less than the two-thirds affirmative vote necessary for approval. Pursuant to NERC’s rules, the project ended after the failed recirculation ballot. On January 15, 2009, NERC’s Standards Committee approved the posting of a new Standard Authorization Request for FAC-008-2, which included the draft Reliability Standard without Requirement R7. The NERC board of trustees approved this draft of Reliability Standard FAC-008-2 at its May 2010 meeting.

13. In the March 18 Order, the Commission cited the FAC-008-2 development process as an example of the conflict between NERC’s rules and NERC’s obligation as the ERO

to comply with a Commission directive to submit a new or modified Reliability Standard. The Commission explained that once a Commission directive is final, the participants in NERC’s Standards Development Process do not have the discretion to simply ignore the directive or develop a response that clearly contradicts the plain understanding of the directive. The Commission noted that the ERO may respond with an equivalent alternative approach that addresses the Commission’s underlying concern or goal as efficiently and effectively as the Commission’s proposal, but that the ERO does not have discretion to choose not to comply with a final Commission directive.\footnote{March 18 Order, 130 FERC ¶ 61,203 at P 23.}

14. These considerations led the Commission to find that it is not in the public interest or consistent with the intent of section 215 of the FPA to allow continuation of a process that does not allow the ERO to meet its statutory obligation.\footnote{Id. P 21.} Consequently, the Commission exercised its authority under section 215(f) of the FPA\footnote{16 U.S.C. § 824o(f) (2006). Section 215(f) of the FPA provides that the Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule change “shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just and reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of [section 215(c)].”} and directed the ERO to propose revisions to its Standards Development Process that will ensure that the ERO can comply with a Commission directive to develop a new or modified Reliability Standard. The Commission gave the ERO discretion in developing the proposed revisions,\footnote{March 18 Order, 130 FERC ¶ 61,203 at P 1, 26.} requiring only that the rules satisfy the requirements of section 215(c)(2)(D) of the FPA by providing for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards.”\footnote{See section 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D) (2006).} The Commission stated that it will notice the proposed revisions and issue an order on them after considering comments. The Commission directed the ERO to file the proposed revisions no later than 90 days from the date of the March 18 Order.\footnote{As noted previously, the Commission has subsequently extended the compliance deadline to 270 days from the date of the March 18 Order.} The Commission also directed the ERO to fully comply with the Commission’s directive to modify Reliability Standard FAC-008-1 no later than 90 days from the date of the Commission’s future order on NERC’s proposed revisions.
II. Responsive Pleadings

A. Motions to Intervene and Comments

15. In addition to NERC, the Trade Associations,\(^{19}\) the Georgia Corporations,\(^{20}\) and the Canadian Electricity Association (CEA)\(^ {21}\) submitted motions to intervene and requests for clarification or rehearing of the March 18 Order. Several other entities submitted motions to intervene and either comments supporting the rehearing requests filed by NERC and/or the Trade Associations and CEA or requests for rehearing adopting as their own NERC’s requests for rehearing.\(^ {22}\)

16. In general, the entities seeking to intervene recognize that intervention is typically not permitted at the rehearing stage. They argue, however, that intervention should be permitted in this proceeding because: (1) the Commission issued the March 18 Order in a new docket, precluding earlier intervention; (2) they intervened in the proceedings that resulted in Order Nos. 672\(^ {23}\) and 693, which are closely related to this proceeding, and denial of intervention in this proceeding would effectively frustrate their rights as parties.

\(^{19}\) The Trade Associations consist of: the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, the Canadian Electricity Association, the Large Public Power Council, the Transmission Access Policy Study Group, and the Electricity Consumers Resource Council.

\(^{20}\) The Georgia Corporations consist of: Georgia Transmission Corporation and Georgia System Operations Corporation.

\(^{21}\) Although it joined the Trade Associations’ filing, CEA filed a separate pleading emphasizing the possibility that the March 18 Order will undermine NERC’s ability to function in Canada.

\(^{22}\) These entities are: Dominion Resources Services Inc., Exelon Corporation, the Independent Electricity System Operator, the Regional Entities (ReliabilityFirst Corporation, Midwest Reliability Organization, Florida Reliability Coordinating Council, Texas Regional Entity, Northeast Power Coordinating Council, Inc., Western Electricity Coordinating Council, SERC Reliability Corporation, and Southwest Power Pool Regional Entity), Tampa Electric Company, and the Wisconsin Electric Power Company.

to those proceedings; (3) nothing in the FPA envisions the Commission directing NERC to change its Rules of Procedure without an opportunity for public comment; and (4) while the motions should not be deemed out-of-time, the Commission’s rules permit late interventions for good cause.

**B. Commission Determination**

17. In the context of this proceeding, which the Commission initiated *sua sponte*, there was no prior opportunity for any entity to intervene. Consequently, we will consider the motions to intervene filed in this proceeding as timely. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

**III. Discussion**

18. NERC, the Georgia Corporations, and the Trade Associations request rehearing of the Commission’s directive requiring NERC to propose revisions to its Rules of Procedure. In general, they argue that the directive conflicts with multiple provisions of section 215 of the FPA. NERC also claims that the directive is not justified by its overall track record in responding to Commission directives. In addition, NERC requests reconsideration of the directive requiring it to develop a modification to Reliability Standard FAC-008-1 that will require transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed. NERC argues that this directive serves commercial, rather than reliability goals. Finally, NERC requests that the Commission stay its directives and convene a public conference to discuss general issues related to how the Commission intends to prospectively implement section 215 and technical issues specific to Reliability Standard FAC-008-1. As we explain more fully below, we deny rehearing, deny reconsideration, and deny the request for a stay.

**A. Requests for Rehearing and Clarification of Rules Change Directive**

19. The rehearing and clarification requests in this proceeding indicate a general misunderstanding of the March 18 Order. The Commission did not, as they claim, require NERC to change its Rules of Procedure so that the Commission can dictate the specific content of Reliability Standards. As a result of this misunderstanding, NERC,

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25 The Trade Associations request that the Commission clarify the nature of its directive. The Trade Associations recognize that the Commission must have assurances that NERC is capable of complying with a Commission directive to submit a new or modified Reliability Standard addressing a specific matter. See Trade Associations’
the Georgia Corporations, and the Trade Associations argue that the Commission’s directive conflicts with sections 215(d)(5), 215(c)(2)(D), 215(d)(2),\textsuperscript{26} and 215(c)(2)(E)\textsuperscript{27} of the FPA. We are not persuaded by these arguments and deny the requests for rehearing, as discussed below.

1. **The Commission’s Directive Does Not Conflict With Section 215(d)(5) of the FPA**

   a. **Rehearing Requests**

20. Section 215(d)(5) of the FPA authorizes the Commission to direct the ERO to submit to the Commission a new or modified Reliability Standard that addresses a specific matter if the Commission considers the new or modified Standard appropriate to carry out section 215. NERC, the Georgia Corporations, and the Trade Associations argue that the directive in the March 18 Order, which they characterize as requiring NERC to allow the Commission to dictate the specific content of a Reliability Standard required under section 215(d)(5), marks a shift in how the Commission understands its authority under section 215(d)(5), and signals a departure from Congressional intent and Commission precedent concerning the nature and purpose of Commission directives under section 215(d)(5).

21. NERC, the Georgia Corporations, and the Trade Associations quote extensively from the legislative history behind the language that ultimately became section 215 of the FPA to show that the Commission lacks authority to dictate the specific content of Reliability Standards. According to NERC and the Trade Associations, this history began in 1998, when a United States Department of Energy task force (DOE Task Force) recommended legislation authorizing a self-regulatory reliability organization, rather than the Commission, to develop mandatory and enforceable reliability standards that the


\textsuperscript{27} Id. § 824o(c)(2)(E).
Commission would then either approve or remand, but not modify.\textsuperscript{28} The Trade Associations add that when President Clinton proposed such legislation, the Secretary of Energy testified before a House Subcommittee that the legislation would authorize the Commission to oversee a self-regulatory organization that would prescribe and enforce mandatory Reliability Standards.\textsuperscript{29}

22. NERC, the Georgia Corporations, and the Trade Associations further argue that the 2002 Senate debate over the “Daschle Bill” and “Thomas Amendment” is evidence that section 215 of the FPA contemplates that NERC, as the presumptive self-regulatory reliability organization, would develop mandatory and enforceable reliability standards through a consensus-based process. They explain that Senator Daschle sponsored legislation proposing to authorize the Commission to develop Reliability Standards, while Senator Thomas offered an amendment—the language of which is almost identical to what was eventually enacted three years later as section 215 of the FPA—proposing to vest the authority in a participant-run ERO. The Trade Associations quote Senator Bingaman, who supported the Daschle Bill, and Senator Thomas to show that Senators perceived the choice between the Daschle Bill and Thomas Amendment as a choice between whether NERC or the Commission would be responsible for developing Reliability Standards. Senator Thomas argued that NERC, rather than the Commission, had the technical expertise, consensus building experience, and existing mechanisms necessary to develop technically sound reliability standards that account for regional and international differences. At the conclusion of the debate, the Senate adopted the Thomas amendment.\textsuperscript{30}

23. In light of this history, and the language of sections 215(d)(2) and 215(d)(4)\textsuperscript{31} of the FPA, NERC, the Georgia Corporations, and the Trade Associations argue that the

\textsuperscript{28} NERC Request for Rehearing and Reconsideration, Motion for Stay, and Request for Public Conference at 7-8 (NERC); Trade Associations at 14-16.

\textsuperscript{29} Trade Associations at 15-16.

\textsuperscript{30} NERC at 5-6, 9; Georgia Corporations’ Rehearing Request at 9-10 (Georgia Corporations); Trade Associations at 16-20.

\textsuperscript{31} 16 U.S.C. § 824o(d)(4) (2006). Section 215(d)(4) directs the Commission to remand any proposed Reliability Standard or modification that it disapproves of in whole or in part. Section 215(d)(2), \textit{inter alia}, authorizes the Commission to approve a Reliability Standard or a modification to a Reliability Standard proposed by the ERO if the Commission determines that it is just, reasonable, not unduly discriminatory or preferential, and in the public interest.
Commission is limited to either approving or remanding a Reliability Standard developed by NERC, and is without authority to develop a Standard, dictate the contents of a new or modified Standard, or re-write a proposed Standard by directing an overly prescriptive modification. The Trade Associations further argue that, given the statute’s clear language and legislative history, the Commission cannot rely on *Chevron* deference\(^{32}\) to support a reading of section 215 that would permit a Commission directive that requires NERC to let the Commission dictate the specific technical content of a Reliability Standard.\(^{33}\) The Trade Associations add that the Commission recognized these limits in Order Nos. 672 and 672-A, when it acknowledged its statutory obligation to give due weight to the technical expertise of the ERO\(^{34}\) and clarified that it did not intend to prescribe the text or substance of any Reliability Standard.\(^{35}\)

24. NERC, the Georgia Corporations, and the Trade Associations also claim that the Commission’s directive marks a significant shift in the how the Commission understands the nature and purpose of its authority under section 215(d)(5) of the FPA. They point out that the Commission carefully addressed this subject in Order No. 693, where it explained, *inter alia*, that: (1) “a direction for modification [under section 215(d)(5)] should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO’s Reliability Standards development process;”\(^{36}\) (2) “where a directive for modification appears to be determinative of the outcome, the Commission provides flexibility by directing the ERO to address the underlying issue through the Reliability Standards development process without mandating a specific change to the Reliability Standard;”\(^{37}\) (3) “where the Final Rule identifies a concern and offers a specific approach to address that concern, [the Commission] will consider an equivalent alternative approach provided that the ERO demonstrates that the alternative will adequately address the Commission’s underlying concern or goal as efficiently and effectively as the


\(^{33}\) Trade Associations at 24-25.

\(^{34}\) *Id.* at 20 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 344).

\(^{35}\) *Id.* (citing Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 34).

\(^{36}\) NERC at 12; Trade Associations at 20 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 185).

\(^{37}\) NERC at 12; Georgia Corporations at 11 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 186).
Commission’s proposal;”38 (4) “any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC’s Reliability Standards development process;”39 and (5) “the Commission [must] provide sufficient guidance so that the ERO has an understanding of the Commission’s concerns and an appropriate, but not necessarily exclusive, outcome to address those concerns.”40

25. Against this backdrop, NERC argues that the Commission’s assertion in the March 18 Order that the ERO lacks discretion with respect to whether it should comply with a Commission directive directly contradicts Order No. 693.41 The Georgia Corporations and the Trade Associations make similar arguments. In particular, the Georgia Corporations maintain that the Commission made the unqualified statement in Order No. 693 that, with respect to Commission directives pursuant to section 215(d)(5) of the FPA, the Commission “does not direct any outcome other than that [the Commission’s] comments receive consideration.”42 In a footnote, the Trade Associations assert that NERC drafting teams “must be free to make an informed judgment, from a reliability perspective, on whether [the Commission’s] guidance as to the technical content of a standard should be adopted.”43

b. Commission Determination

26. We deny rehearing. NERC, the Georgia Corporations, and the Trade Associations misunderstand the requirements in the March 18 Order. The Commission did not require NERC to change its Rules of Procedure so that the Commission can dictate the specific content of Reliability Standards; instead, it ordered NERC to develop and propose for

38 NERC at 12 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 186).

39 NERC at 12; Georgia Corporations at 11; Trade Associations at 21 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 187).

40 NERC at 12; Georgia Corporations at 11; Trade Associations at 20-21 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 185).

41 NERC at 11 (“According to the Commission, the ERO does not have discretion not to comply with the Commission’s directive [to modify FAC-008-1]. The position the Commission has asserted . . . with respect to directives directly contravenes its pronouncements in Order No. 693 as to the nature and purpose of directives.”).

42 Georgia Corporations at 11-12 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 188).

43 Trade Associations at n.10.
Commission review an affirmative mechanism designed to prevent the Standards Development Process from negating a Commission directive to submit a new or modified Standard. Additionally, the Commission has not changed how it views its authority under section 215(d)(5) of the FPA; we continue to adhere to the explanation of our authority set forth in Order No. 693 and in relevant parts of Order Nos. 672 and 672-A.  

27. NERC, the Georgia Corporations, and the Trade Associations do not explain the basis for their conclusion that the Commission’s directive requires NERC to let the Commission dictate the specific content of Reliability Standards. To the contrary, in the March 18 Order the Commission explicitly acknowledged that it lacks authority to prescribe the specific content of a Reliability Standard. For example, the Commission recognized that the statutory paradigm in section 215 differs significantly from the rest of Part II of the FPA precisely because it authorizes an independent ERO to develop Reliability Standards through a stakeholder process that represents a balance of interests. The Commission also confirmed its longstanding position that when a Commission directive to submit a new or modified Reliability Standard offers a specific approach, the ERO has the freedom and flexibility to develop an equally efficient and effective alternative. Moreover, the Commission made clear that, apart from requiring the ERO to propose a solution that addresses the problem identified in the March 18 Order, it was not requiring the ERO to submit any specific type of revision to its Rules of Procedure.

28. Equally as important, the facts set forth in the March 18 Order demonstrate that the Commission’s directive was driven by specific circumstances that gave rise to a specific type of problem. It was not our intention then, nor now, to take on the role of the Standards Development Process. The Commission explained the need for its directive by pointing to the failure of FAC-008-2 in December 2008, which demonstrated the potential that the Standards Development Process could effectively block attempts to comply with a Commission directive. As the Commission explained in the March 18 Order, and as NERC confirms on rehearing, the stakeholders’ rejection of FAC-008-2 resulted in a new draft Reliability Standard that does not include any attempt to comply

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44 See, e.g., Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 185-187; Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 424; Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 34.

45 March 18 Order, 130 FERC ¶ 61,203 at P 2.

46 Id. P 23.

47 Id. P 1, 26.
with the directive at issue, thereby delaying, if not blocking NERC’s ability to respond. The March 18 Order merely points out that the stakeholder process must not prevent the ERO from complying with a critical aspect of the statutory model in which it operates—its obligation to comply with a Commission directive pursuant to section 215(d)(5) of the FPA—and requires the ERO to propose revisions to its Rules of Procedure that will prevent a failure to fulfill such a Commission directive.

29. Additionally, the Commission has previously expressed concern about the possibility that the Standards Development Process could be used to block compliance with a Commission directive. In the order certifying NERC as the ERO, the Commission expressed concern that the super-majority voting requirement in the Standards Development Process could allow a small portion of industry to veto a draft Reliability Standard designed to improve reliability or remedy flaws in an existing Standard, and directed NERC to address this possibility in a compliance filing. In the compliance filing, NERC defended the super-majority requirement and argued that industry had repeatedly demonstrated its willingness to adopt Reliability Standards even if they did not enjoy universal support. In its subsequent order, the Commission noted that while the super-majority voting requirement was not required for accreditation by the American National Standards Institute (ANSI), it appeared to have worked well for independent system operators and regional transmission organizations. The Commission weighed these observations against the fact that the ERO and industry were then in the midst of changing from the old regime of voluntary Reliability Standards to the current regime of mandatory and enforceable Reliability Standards backed by the possibility of significant penalties for violations. With these considerations in mind, the Commission concluded that it would not, at that time, direct the ERO to reduce the super-majority voting

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48 See id. P 13-23.

49 NERC’s rehearing request gives no indication of when, or if, NERC intends to comply with the directive.


51 See ERO Certification Compliance Order, 118 FERC ¶ 61,030 at P 12.

52 Id. P 18.
requirement. However, the Commission reserved the right to revisit the issue if future voting patterns, such as the balloting down of a Reliability Standard in order to subsequently approve a less stringent version, signaled the need for an improvement in the voting process.\textsuperscript{53} Consequently, NERC and industry have long had notice of the Commission’s concerns in this area.

30. Nevertheless, to clarify our intention, we state that the Commission is not changing course from Order Nos. 672 and 693 and is not denying the ERO the opportunity to develop Reliability Standards using its technical expertise. We stand by Order Nos. 672 and 672-A, where we explained that the Commission does not intend to prescribe the text or substance of Reliability Standards\textsuperscript{54} and confirmed that the ERO alone can change a Standard.\textsuperscript{55} We also stand by our comprehensive explanation in Order No. 693 of the relationship between Commission directives under section 215(d)(5) of the FPA and the ERO’s statutory right to develop new and modified Reliability Standards using its technical expertise. As we explained in Order No. 693, and confirm today, when the Commission issues a directive pursuant to 215(d)(5) of the FPA, the ERO has the flexibility to respond with an alternative that is an equally effective and efficient means of addressing the Commission’s underlying goal or concern.\textsuperscript{56}

31. NERC, the Georgia Corporations, and the Trade Associations also appear to argue that either Order No. 693 or section 215 of the FPA, or both, permit or require the ERO to decide whether it will comply with a Commission directive under section 215(d)(5) of the FPA. For example, NERC argues that the Commission’s statement that the ERO lacks discretion to decide whether to comply with a Commission directive contradicts Order No. 693.\textsuperscript{57} Similarly, the Georgia Corporations quote Order No. 693 to attempt to show that, with respect to Commission directives pursuant to section 215(d)(5), the Commission “‘does not direct any outcome other than that [the Commission’s] comments receive consideration.’”\textsuperscript{58}

\textsuperscript{53} Id.

\textsuperscript{54} Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 34.

\textsuperscript{55} Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 416, 424.

\textsuperscript{56} See Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 31, 185-187.

\textsuperscript{57} NERC at 11.

\textsuperscript{58} Georgia Corporations at 11-12 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 188).
32. In Order No. 693, the Commission made clear that the ERO has discretion in how it responds to a Commission directive to submit a new or modified Reliability Standard—but the discretion exists in how the ERO chooses to affirmatively respond, not in whether the ERO will affirmatively respond. Order No. 693 explains that when the Commission issues a final directive pursuant to section 215(d)(5), the ERO is free to comply by developing a response that addresses the concern or goal underlying the directive rather than by simply transcribing the directive into the new or modified Reliability Standard or adopting the Commission’s technical analysis without subjecting it to stakeholder evaluation—but Order No. 693 also requires that the ERO respond with a proposal.\(^{59}\) Thus, while Order No. 693 recognizes the Commission’s need to provide the ERO with detailed and specific information about its directives, and the ERO’s statutory right (or, from a different perspective, obligation) to exercise its technical expertise to develop new and modified Reliability Standards through an open and collaborative stakeholder process, Order No. 693 always contemplates that the ERO will, at the conclusion of the Standards Development Process, submit some affirmative response to the Commission’s directive.

33. The Georgia Corporations attempt to persuade the Commission that Order No. 693 requires NERC only to consider a Commission directive in the Standards Development Process and that such a directive can be satisfied even if NERC decides to submit nothing in response. The Commission never set forth such a policy in Order No. 693. The language quoted by the Georgia Corporations in support of their argument is taken out of context and, as a result, does not support their conclusion.

34. Specifically, the Georgia Corporations quote the Commission as stating that it “does not direct any outcome other than that [the Commission’s] comments receive consideration.” This quote is inaccurate, however, because of the addition of the words “the Commission’s” to the original language. Rather than providing clarity for the reader, this bracketed addition actually changes the entire meaning of the original language. Read outside of its original context, the quote with the additional bracketed language can be read to suggest that NERC complies with its obligation as the ERO by simply considering a Commission directive, even if it ultimately decides to reject it. However, when the quoted language is read in its original context, without the bracketed language, it carries a much different meaning. In context, the quotation refers to NOPR comments submitted by various parties on the multiple Reliability Standards under

\(^{59}\) Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 31 (“We emphasize that we are not, at this time, mandating a particular outcome by way of these directives, but we do expect the ERO to respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is as effective as or more effective than the Commission’s example or directive.”) (emphasis added); see also id. P 185-187.
consideration in Order No. 693; it does not refer to the Commission’s directives with respect to the Reliability Standards.\textsuperscript{60} The Commission was stating that in circumstances where commenters offered suggestions to improve or otherwise modify a Reliability Standard, and the suggestions pertained to issues not raised in the NOPR, it was directing the ERO to consider the comments rather than directing any specific outcome related to them.\textsuperscript{61} This point is entirely different from a statement by the Commission that NERC need only consider directives to develop a new or modified Reliability Standard pursuant to section 215(d)(5). In Order No. 693, the Commission explored in great detail the relationship between the ERO’s statutory right and obligation to develop new and modified Reliability Standards through a stakeholder process, and its obligation to comply with Commission directives pursuant to section 215(d)(5). The Commission recognized that the ERO is free to deviate from the specifics of a Commission directive, provided that it responds to the directive with an equivalent alternative that addresses the directive’s underlying concern or goal as efficiently and effectively as the directive itself.\textsuperscript{62}

35. Section 215(d)(5) provides that the Commission “may order the [ERO] to submit to the Commission a proposed reliability standard or modification to a reliability standard that address a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out [section 215].” There are at least two reasons why this language precludes the notion that the ERO has discretion to disregard a final Commission directive. First, the statute provides that the Commission “may order the [ERO] to submit” a new or modified Reliability Standard. The only reasonable reading of this language is that if the Commission has authority to order the ERO to submit a Reliability Standard, then the ERO is legally obligated to submit it. This seems particularly true in the case of section 215, which contains no language that qualifies or

\textsuperscript{60} In fact, such a reading would render that part of the paragraph unintelligible. \textit{See id.} P 188 (“As noted throughout the standard-by-standard analysis that follows, various commenters provide specific suggestions to improve or otherwise modify a Reliability Standard that address issues not raised in the NOPR. In such circumstances, the Commission directs the ERO to consider such comments as it modifies the Reliability Standards during the three-year review cycle contemplated by NERC’s Work Plan through the ERO Reliability Standards development process. The Commission, however, does not direct any outcome other than that the comments receive consideration.”).

\textsuperscript{61} \textit{Compare id.} P 420, 439, 471, 508, 540, 566, 583 (directing a modification to a Reliability Standard pursuant to section 215(d)(5) of the FPA) \textit{with id.} P 462, 470, 515, 523, 539 (directing the ERO to “consider” in the Standards Development Process issues raised by commenters).

\textsuperscript{62} \textit{See, e.g.,} Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 31, 185-186.
creates exceptions to the ERO’s obligation to comply. Second, the Commission can require a new or modified Reliability Standard “if the Commission considers such a new or modified reliability standard appropriate to carry out [section 215 of the FPA].” While section 215 vests the ERO with the responsibility to develop Reliability Standards, and requires the Commission to give “due weight” to the ERO’s technical expertise in that context, it conditions the Commission’s authority to direct a new or modified Standard on the Commission’s judgment that the subject of the new or modified Standard needs to be addressed. In other words, the Commission, not the ERO, is the entity responsible for determining the need for a section 215(d)(5) directive. Once the Commission determines that a new or modified Reliability Standard is “appropriate to carry out [section 215 of the FPA]” and issues a final directive to that effect, the ERO is not free to substitute its judgment for the Commission’s judgment by concluding through the Standards Development Process that the directive is technically unsound or unnecessary. The ERO is free to respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is at least as effective and efficient as the Commission’s approach. Once the Commission has made a final determination that addressing the concern or goal identified by the Commission is technically justified, the ERO must comply with the Commission’s directive.

36. Of course, the ERO and other industry participants have multiple opportunities to challenge Commission directives before they become final. For example, if the directive appears in the context of a NOPR, the ERO and other entities may submit comments explaining, among other things, why the Commission’s proposal is unnecessary, technically unsound, or does not enhance reliability. If the Commission decides against them, they may seek rehearing, and if necessary, judicial review. The Commission benefits from the active participation of stakeholders in these circumstances.

63 Id. P 31, 186.

64 Thus, the ERO could conclude that the Commission’s specific approach to addressing an underlying concern is not the best approach because it could pose a risk to reliability. In this circumstance, the appropriate response would be for the ERO to develop an equivalent alternative that addresses the Commission’s concern in a way that does not pose the same risk, not to veto the directive in the Standards Development Process.

65 In the example of the Commission directive discussed in the March 18 Order, Order No. 693 provided multiple opportunities for comment, first on a Commission staff assessment of the proposed NERC standards, then a NOPR, then opportunity for rehearing on a final rule. Moreover, the issue regarding FAC-008 was in fact raised by entities in their NOPR comments. Having failed to seek rehearing, NERC and stakeholders cannot refuse to respond to the Commission’s final directive.
However, once a Commission directive becomes final, either because the Commission confirmed it on rehearing and no entity sought judicial review, the Court upheld the directive after a challenge, or no entity sought rehearing in the first place, the ERO must comply with the directive pursuant to the guidance set forth in Order No. 693.66

37. Most importantly, section 215 of the FPA does not include a mechanism that allows the ERO to register disapproval and rejection of a Commission directive through the Standards Development Process. In the absence of any express statutory language to the contrary, we read section 215 of the FPA against the backdrop of the long-established rules of administrative law codified in section 313 of the FPA,67 as well as in the Administrative Procedure Act.68 These rules require any party aggrieved by a Commission order to seek rehearing of the order and, failing success at that stage, judicial review. These are the only avenues through which the ERO or any other entity can attempt to reverse a Commission section 215(d)(5) directive to submit a new or modified Reliability Standard. Nothing in the legislative history or language of section 215 suggests otherwise, much less that the ERO can use its Standards Development Process in lieu of seeking rehearing and judicial review of a Commission directive.

2. The Commission’s Directive Does Not Conflict With Section 215(c)(2)(D) of the FPA

a. Rehearing Requests

38. Section 215(c)(2)(D) of the FPA requires the ERO to develop Reliability Standards according to a process that provides for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.” NERC claims that these requirements are the hallmarks of a consensus-based process, by which it appears to refer specifically to a consensus-based process as understood by the ANSI. According to ANSI’s website, which NERC quotes: (1) a standards development process can be ANSI-certified if it meets ANSI’s requirements for “openness, balance, consensus and other due process safeguards;” (2) “openness” “has many elements, but basically refers to a collaborative, balanced and consensus-based approval process;” and (3) the “hallmarks” of an ANSI-accredited process include requirements that representatives from materially affected and interested parties reach consensus and that standards are subjected to public review and comment, receive a good-faith response, and are subject to


appeal. NERC argues that the Senate debate over the Thomas Amendment confirms that Congress intended section 215 to require a consensus-based approach to developing Reliability Standards, and it appears to suggest that Congress intended this approach to either coincide with or refer to ANSI’s requirements. NERC states that its current Standards Development Process is accredited by ANSI as a consensus-based process.

NERC acknowledges that section 215(d)(5) of the FPA authorizes the Commission to require the ERO to submit a new or modified Reliability Standard; however, NERC argues that this provision does not negate the requirements in section 215(c)(2)(D). NERC acknowledges that the Commission required NERC to develop and submit revisions to its Rules of Procedure that still allow for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests,” but NERC claims that:

It is to no avail for the Commission to tell NERC that in making the required changes to its standards process, NERC must still have a process that assures reasonable notice and opportunity for public comment, due process, openness, and balance of interests. It is as if the Commission said, ‘When dealing with our directives, you cannot use a consensus-based process, but whatever you come up with must still be a consensus-based process.’

The Georgia Corporations approach section 215(c)(2)(D) of the FPA from the point of view of a completed Reliability Standard. They maintain that the content of each Reliability Standard must represent a balance of stakeholder interests expressed through an industry-based consensus process. They argue that the Commission’s directive would circumvent NERC’s balloting procedures and undercut what the Commission previously determined was a reasonable way for the ERO to balance stakeholder interests.

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70 Id. For example, after quoting the requirements for an ANSI-accredited consensus based process, NERC states that “During the legislative process that led to adoption of Section 215, Congress was fully aware that the standard-setting process required in Section 215 was a consensus-based process, and that is what Congress intended.” Id.

71 Id. at 6.
41. The Georgia Corporations further argue that the directive is inconsistent with how the Commission addressed the interest-balancing requirement of section 215 of the FPA in Order Nos. 672 and 672-A. They claim that the Commission appropriately recognized the requirement when it concluded that: (1) the Standards Development Process must be open to public participation and include consideration of a wide range of viewpoints;\(^{72}\) (2) the ERO is responsible for establishing procedures to ensure balanced decision-making;\(^{73}\) and (3) there are many ways that the ERO can provide for balanced decision-making.\(^{74}\) The Georgia Corporations point out that the Commission allowed ERO candidates to propose a Standards Development Process that would include a mechanism for implementing the statute’s interest-balancing requirement, and that NERC proposed and the Commission approved the current stakeholder balloting procedure. The Georgia Corporations argue that the Commission’s directive in the March 18 Order conflicts with Order Nos. 672 and 672-A because it would compel a specific, Commission dictated approach to ERO governance that would not satisfy section 215’s interest-balancing requirement.

b. **Commission Determination**

42. We deny rehearing. Most of the arguments made by NERC and the Georgia Corporations proceed from the incorrect premise that the March 18 Order abandoned Order Nos. 672 and 693 and required NERC to change its rules so that the Commission can dictate the specific content of Reliability Standards. As we discuss above, this is not the case. Thus, to the extent that NERC and the Georgia Corporations argue that the Commission’s directive forecloses a consensus-based process or makes it impossible to balance interests because it requires NERC to let the Commission dictate the specific content of Reliability Standards, these arguments are without merit.

43. In addition to these arguments, NERC appears to suggest that Congress intended section 215(c)(2)(D) of the FPA to require a consensus-based Standards Development Process that either mirrors or coincides with ANSI’s guidelines. For example, NERC seems to argue that the term “openness” in section 215(c)(2)(D) must be interpreted to refer to the definition of “openness” on ANSI’s website. This definition states that “openness” “basically . . . refers to a consensus-based approval process.” Thus, it seems

\(^{72}\) Georgia Corporations at 7 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172, 258, and 417).

\(^{73}\) Id. (citing Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 16).

\(^{74}\) Id.
that NERC reads “openness” as the term in section 215(c)(2)(D) that requires the ERO to employ a consensus-based Standards Development Process.

44. We disagree with NERC that Congress intended to mandate a consensus-based Standards Development process that meets ANSI guidelines. The Commission has never interpreted section 215(c)(2)(D) of the FPA to require an ANSI-certified process. On the contrary, the Commission has always maintained that employing an ANSI-certified process is one reasonable way of satisfying the requirements in section 215(c)(2)(D). We continue to maintain that it is possible for the ERO to employ a Standards Development Process that is not ANSI-certified but still provides for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.” NERC has not directed us to anything in the language or legislative history of section 215 to persuade us otherwise.

45. Similarly, we are not persuaded by NERC’s apparent argument that “openness” in section 215(c)(2)(D) of the FPA signals that NERC must adopt an ANSI-certified consensus-based process. It is not clear to us that the term “openness” as used in the statute means “openness” as defined by ANSI. For example, the legislative history behind the National Technology Transfer and Advancement Act of 1995 suggests that “openness” in the context of a consensus-based standards development process simply means that “participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question.” Nothing in the March 18 Order is intended or could reasonably be read to preclude such openness.

75 Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 269; see also ERO Certification Compliance Order Rehearing, 119 FERC ¶ 61,046 at P 13 (explaining that any process that provides “reasonable notice and opportunity for comment, due process, openness, and balance of interests,” whether ANSI-accredited or not, could satisfy a Commission directive requiring NERC to specify the process it will use to meet a deadline established by the Commission for submitting a new or modified Reliability Standard).

76 To be clear, we do not suggest that the ERO must or should abandon an ANSI-certified process to comply with our directive in the March 18 Order.

77 Section 12(d) of the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 §12(d) (15 U.S.C. 272 note), requires federal agencies to use standards developed by voluntary consensus bodies as a means of carrying out policy objectives or other activities determined by the agencies, unless the use of these standards would be inconsistent with applicable law or otherwise impractical. In discussing the amendment that added this provision to the legislation, Senator Rockefeller explained that “openness” was an attribute of, rather than a synonym for, a consensus-based (continued…)
46. Second, the Commission’s directive does not conflict with section 215(c)(2)(D) of the FPA and may not conflict with ANSI’s guidelines. As we have indicated, section 215(c)(2)(D) provides more flexibility for the ERO to determine the structure of the Standards Development Process than NERC appears to acknowledge on rehearing. The Commission’s directive, does not impede the ERO in providing “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.” The Standards Development Process can satisfy each of these requirements and still provide a mechanism to guarantee that NERC can comply with a Commission directive to submit a new or modified Reliability Standard. As we discuss above, it did not require NERC to let the Commission dictate the specific content of Reliability Standards, but simply to propose revisions that would let NERC comply with final Commission directives under section 215(d)(5) of the FPA.  

We would expect that, in most circumstances, the existing Standards Development Process would result in a new or modified Standard responsive to a Commission directive. However, in those instances where this does not happen, such as the case of Reliability Standard FAC-008-2, the Commission needs assurance that the ERO has the authority, in conjunction with or in addition to the current structure, to deliver a Standard or modification as directed.

47. Additionally, the March 18 Order was not the first time that the Commission directed revisions to NERC’s ANSI-certified Standards Development Process. In the ERO Certification Order, the Commission required changes to NERC’s ANSI-certified Standards Development Process once it determined that the process failed to adequately address the Commission’s authority under section 215. The Commission identified three shortcomings, each of which related to the Commission’s authority to remand a process, and that openness simply means that “participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question:”

Consensus standards are standards which are developed by voluntary, private sector, consensus standards bodies. These organizations are established explicitly for the purpose of developing such standards through a process having three characteristics—First, openness, defined as meaning that participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question[.]


78 March 18 Order, 130 FERC ¶ 61,203 at P 26.

79 ERO Certification Order, 116 FERC ¶ 61,062 at P 253.
Reliability Standard or otherwise require the ERO to develop a Standard, and directed NERC to develop changes similar to the revisions required by the March 18 Order in that they too were necessary to ensure that the Commission could fully exercise its authority and the ERO could adequately comply with its obligations. For example, one of the required revisions concerned NERC’s lack of authority to set specific deadlines for action by standards development committees and ballot bodies, even in circumstances where the Commission mandated action on a remand by a date certain. 80 Just as the current Standards Development Process can prevent NERC from complying with its obligation to submit a new or modified Reliability Standard in response to a Commission directive, this procedural gap identified by the Commission in the ERO Certification Order could have prevented NERC from complying with its obligation to respond to a remand by a date certain. Consequently, the Commission directed NERC to develop a process that would allow it to comply with its obligation.

48. As noted above, in the ERO Certification Order, the Commission required three changes to NERC’s ANSI-certified Standards Development Process. Each of these changes related to the Commission’s authority to remand a Standard or otherwise require the ERO to develop a Standard. None of these changes resulted in NERC losing its ANSI-accreditation. Thus, revisions to the Standards Development Process that guarantee that NERC can comply with a Commission directive should not threaten ANSI accreditation. Similarly, it appears that the current Standards Development Process includes requirements that are not required by ANSI. For example, the Commission has previously noted that NERC’s super-majority voting requirement is not required for ANSI certification. 81

49. Finally, we reject the Georgia Corporations’ assertion that the Commission’s directive in the March 18 Order conflicts with Order Nos. 672 and 672-A because it would compel a specific, Commission-dictated approach to ERO governance. The Georgia Corporations misquote Order Nos. 672 and 672-A. They cite Order No. 672-A to make it appear as if the Commission disclaimed any right to influence how the ERO governs itself. This is not the case. In the paragraph they cite, 82 the Commission explained that because there are many ways that a potential ERO could provide for balanced governance and decision-making, the Commission would not, during the period when it was accepting applications for certification as the ERO, dictate any specific governance procedures. Instead, the Commission allowed ERO applicants to propose

80 Id.

81 ERO Certification Compliance Order, 118 FERC ¶ 61,030 at P 18.

82 Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 16.
their own procedures. This determination is not the same as the Commission stating that it will allow the ERO’s procedures to essentially invalidate a final Commission directive. That said, in the March 18 Order, the Commission did not direct the ERO to adopt any specific revisions to its Rules of Procedure. On the contrary, the Commission explained that, in the first instance, NERC has discretion to develop the details of the modifications required by the Commission.

3. **The Commission’s Directive Does Not Conflict With Section 215(d)(2) of the FPA**

   a. **Rehearing Requests**

50. Section 215(d)(2) of the FPA requires the Commission to give “due weight” to the technical expertise of the ERO with respect to the content of a new or modified Reliability Standard. NERC and the Trade Associations argue that the March 18 Order effectively precludes the ERO from exercising its technical expertise because it requires NERC to allow the Commission to dictate the content of a modified Reliability Standard. For example, the Trade Associations argue that the Commission cannot possibly give due weight to NERC’s technical expertise if NERC is not permitted to deviate (with a detailed technical explanation that supports its action) from the Commission’s recommendations as to the Reliability Standard’s contents. NERC also claims that the March 18 Order conflicts with Order No. 693, because in that order the Commission: (1) confirmed that the ERO can exercise its technical expertise; (2) explained that the Commission cannot dictate the contents of a Reliability Standard; and (3) confirmed that the ERO can respond to a Commission directive to develop a new or modified Reliability Standard by proposing an alternative approach that produces equally effective and efficient results. NERC argues that the Commission’s directive in the March 18 Order attempts to accomplish indirectly what the Commission cannot do directly.

   b. **Commission Determination**

51. We deny rehearing. As we noted previously, the March 18 Order does not require NERC to let the Commission dictate the specific content of Reliability Standards and that the ERO remains free to develop equivalent alternatives to Commission directives. Thus, the Commission’s directive does not conflict with section 215(d)(2) of the FPA or Order No. 693, because it does not foreclose the ERO from exercising its technical expertise during the Standards Development Process.

52. We also elaborate on two points of concern related to these arguments. In this way, we intend to clarify important aspects of the relationship between the Commission

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83 March 18 Order, 130 FERC ¶ 61,203 at P 1, 26.
and the ERO. First, while we respect the role of NERC as the ERO in developing and enforcing Reliability Standards, our task in reviewing proposed Reliability Standards is to ensure that they satisfy the statutory criteria for approval and provide for reliable operation of the Bulk-Power System. Thus, while the statute provides that the Commission shall give due weight to the technical expertise of the ERO with respect to the content of a proposed Reliability Standard or modification, “we will not hesitate to remand a proposed Standard if we are convinced that it is not adequate to protect reliability.”

53. We recognize that concerns about whether the Commission gives “due weight” to the ERO’s technical expertise emerge most often in the context of Commission directives to submit new or modified Reliability Standards—specifically, in relation to whether the Commission has accorded the ERO due weight in determining whether a modification is necessary or by directing an overly prescriptive modification. Section 215 does not define “due weight,” and the Commission has not provided much guidance on what it means to give “due weight” to the ERO, except to clarify that it does not require a rebuttable presumption that a Reliability Standard the ERO proposes is just, reasonable, not unduly discriminatory or preferential, and in the public interest. Further, the Commission stated in Order No. 672 that the ERO “must justify to the Commission its contention that the proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.” We do not need to elaborate on the definition of “due weight” here to emphasize that the ERO must provide an adequate explanation regarding the reliability benefits and technical considerations behind a proposed Reliability Standard or modification to a Standard. In the absence of such an explanation, there will be nothing in the record for the Commission to give due weight to. By the same token, when the Commission issues a specific directive pursuant to section 215(d)(5), it should be supported by a clear technical rationale that explains how the directive is related to Bulk-Power System reliability. Further, the Commission is committed to providing, when necessary, additional procedures to develop a complete record.

54. Second, the discussion we provide with our directives is for the purpose of providing guidance to assist the ERO in exercising its technical expertise during the Standards Development Process, not for the purpose of excluding that expertise. In the final analysis, the Commission is interested in ensuring the reliability of the Bulk-Power System.

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84 Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 329.

85 Id. P 345.

86 Id.
System. As we have explained, if the Commission confirms a directive on rehearing and the ERO still disagrees, the appropriate remedy is to seek judicial review, not veto the directive through the Standards Development Process.

4. The Commission’s Directive Does Not Conflict with Section 215(c)(2)(E) of the FPA

a. Rehearing Requests

55. Section 215(c)(2)(E) of the FPA requires the ERO to attempt to gain recognition in Canada and, as appropriate, in Mexico. NERC, the Trade Associations, and CEA argue that what they describe as the Commission’s directive requiring NERC to allow the Commission to dictate the specific content of Reliability Standards undermines effective Canadian participation in the NERC Standards Development Process. They explain that the DOE Task Force recommended that a self-regulatory organization, rather than the Commission, develop mandatory and enforceable Reliability Standards in part because it recognized that transmission grid reliability is a North American issue that requires reliability relationships with Canada and Mexico.\(^{87}\) They quote language from the DOE Task Force’s 1998 report that recognizes the international nature of the transmission grid and emphasizes the need for a single entity that can represent each country while respecting jurisdictional sovereignty.\(^{88}\) They also quote statements from Senator Thomas during the 2002 Senate debate over the Thomas Amendment. In his remarks, Senator Thomas raised concerns similar to those raised by the DOE Task Force and stressed the potential negative consequences of Canada and Mexico withdrawing from international reliability efforts.\(^{89}\) The Trade Associations and CEA suggest that these considerations were responsible for leading at least one senator to support the Thomas Amendment.\(^{90}\)

56. The Trade Associations and CEA assert that Order Nos. 672 and 693 recognized the importance of a structure that allows the ERO to operate on an international basis. They cite the Commission’s assertion in Order No. 672 that, “for the ERO to be effective in maintaining Bulk-Power System reliability across national borders, it must be able to

\(^{87}\) NERC at 8; Trade Associations at 15; Canadian Electricity Association Rehearing Request (CEA) at 10.

\(^{88}\) NERC at 8; Trade Associations at 15; CEA at 10.

\(^{89}\) NERC at 9; Trade Associations at 18-19; CEA at 12-13.

\(^{90}\) Trade Associations at 19; CEA at 13.
operate in an international arena.”91 They also cite Order No. 693, where the Commission explained that one reason supporting its conclusion that any modification to a Reliability Standard must be developed and fully vetted through the Standards Development Process is that it allows the ERO to account for the international nature of Reliability Standards and incorporate any modifications requested by the Commission’s counterparts in Canada and Mexico.92

57. CEA also states that the Commission expressed its commitment to an international approach to reliability in 2005 when the Commission joined the Bilateral Electric Reliability Oversight Group (Bilateral Group) and agreed to Terms of Reference that recognize the importance of governmental entities on opposite sides of the border coordinating and cooperating on reliability issues related to the international transmission grid.93 CEA further observes that in Order No. 672 the Commission relied on the statement of Bilateral Principles94 developed by Canadian governmental entities and the United States Department of Energy to address multiple issues pertaining to the criteria for approving an ERO. CEA states that when a Reliability Standard is remanded, the Bilateral Principles provide that the ERO should notify all relevant regulatory agencies and work to ensure that their concerns are addressed before the Standard is re-submitted to the Commission or Canadian authorities. CEA argues that the Commission’s March directive would prevent NERC from implementing this Bilateral Principle.95

58. NERC, the Trade Associations, and CEA are concerned that the changes the Commission is requiring NERC to make could seriously erode the acceptance of NERC Reliability Standards in Canada and could result in one set of Reliability Standards for the United States and a different set for Canada.96 NERC states that it has made great progress in achieving recognition in Canada, which vests jurisdiction over electricity matters in provincial governments rather than a central authority, and that it has achieved

91 Trade Associations at 20; CEA at 14 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 126).

92 Trade Associations at 21; CEA at 15 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 187).

93 CEA at 18.

94 Id. at 18-19 (discussing the Principles for an Electric Reliability Organization that Can Function on an International Basis (Bilateral Principles)).

95 CEA at 18-9.

96 NERC at 10; Trade Associations at 24; CEA at 19.
formal recognition through agreements, memoranda of understanding, and other documentation with the provinces of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, and with the National Energy Board of Canada (which has jurisdiction limited to international power lines). NERC adds that the British Columbia Utilities Commission recently adopted all of NERC’s Reliability Standards as mandatory within that province. NERC argues that the development of Reliability Standards in an international industry forum has been critical to achieving its current level of recognition in Canada. NERC is concerned that the changes directed by the Commission could undermine Canadian acceptance of NERC Reliability Standards and jeopardize NERC’s status as an international ERO. NERC explains that Canadian federal and provincial officials have made clear to NERC that when they signed on to the Bilateral Principles they did not envision a process whereby the Commission could dictate the specific content of Reliability Standards.97

59. CEA contends that the Reliability Standard-setting model established in section 215 of the FPA allows all North American stakeholders to participate effectively in the Standards Development Process while respecting jurisdictional sovereignty. CEA credits the remand provision in section 215 with being especially important in assuring that no governmental authority has the ability to unilaterally modify Reliability Standards that would apply to the system and with giving public authorities the confidence that Reliability Standards will reflect their concerns.98 CEA asserts that, to have an effective international ERO, government authorities must be able to trust the ERO Standards Development Process when it comes to both developing and modifying Reliability Standards. CEA argues, however, that the directive requiring NERC to allow the Commission to dictate the content of modified Reliability Standards violates the spirit of NERC’s international standard-setting process.99

b. Commission Determination

60. We deny rehearing. The concerns raised by NERC, the Trade Associations, and CEA rely on the mistaken understanding that the Commission’s directive requires NERC to let the Commission dictate the specific content of Reliability Standards. This is not the case and the ERO remains free to develop and submit to the Commission equivalent alternatives to Commission directives made pursuant to section 215(d)(5). Thus, the March 18 Order does not attempt to prevent the ERO from employing an open and balanced Standards Development Process that includes the full and voluntary

97 NERC at 10.

98 CEA at 18.

99 Id. at 19.
participation of Canadian and Mexican entities. Instead, the March 18 Order directs the 
ERO to propose revisions to its Rules of Procedure that maintain such a Standards 
Development Process while preventing stakeholders from vetoing Commission directives 
or otherwise preventing NERC from complying with its statutory obligation.

61. We understand the North American expanse of the interconnected power grid and 
the need for an international ERO. Thus, we reaffirm our statements in Order Nos. 672 
and 693 recognizing the importance of a structure that allows the ERO to operate on an 
international basis. The Commission and its staff reconfirm our commitment to consult 
regularly with Canadian and Mexican regulators on topics of mutual interest, including 
the Standards Development Process through existing forums such as the reliability tri-
lateral meetings and technical conferences.

5. The Commission’s Directive Is Justified and Is Consistent with 
Section 215(f) of the FPA

a. Rehearing Request

62. In addition to the statutory arguments, NERC claims that allowing the 
Commission to dictate the specific content of a Reliability Standard is not justified or 
supported by the record in the March 18 Order. NERC observes that the Commission 
cited a “growing concern” that the current Standards Development Process can be used to 
prevent compliance with a Commission directive. NERC points out, however, that the 
basis for this concern is the single instance related to the Commission’s directive to 
modify FAC-008-1. NERC argues that this single instance does not justify the 
Commission’s directive. NERC maintains that the current Standards Development 
Process works and has addressed approximately 175 of the Commission’s approximately 
550 non-VRF/VSL related directives.\(^{100}\) NERC adds that it expects a modified 
Reliability Standard addressing two of the Commission’s three directives regarding FAC- 
008-1 to be approved by the NERC Board in May 2010.\(^{101}\)

\(^{100}\) NERC states that over 100 non-Violation Risk Factor /Violation Severity Level 
directives are currently being addressed in the Standards Development Process, and that 
it expects work on them to be completed in 2010 or early fall 2011. NERC adds that it 
has also completed work on 130 VRF/VSL directives. NERC states that it has completed 
work on 45 percent of all Commission directives (Reliability Standard directives and 
VRF/VSL directives).

\(^{101}\) NERC at 14. (According to the NERC Board of Trustees Meeting Summary 
May 17, 2010 the trustees did approve FAC-008-2 at that meeting. Available at 
b. **Commission Determination**

63. We deny rehearing. NERC argues that the Commission’s “growing concern” that the current Standards Development Process can be used to prevent compliance with a Commission directive is not justified by the single instance related to the Commission’s directive to modify FAC-008-1. As we have explained, however, the Commission has been concerned about the possibility that the Standards Development Process may block improvements to reliability since raising the issue in the ERO Certification and ERO Certification Compliance Orders. The balloting down of FAC-008 is a clear example of what the Commission has long recognized as a possibility. We do not believe that it is reasonable or in the public interest to wait for more instances where NERC is unable to comply with Commission directives before the Commission takes action.

64. Moreover, the Commission’s directive that NERC propose revisions to its Standards Development Process is consistent with our authority under section 215(f) of the FPA. Neither NERC nor any of the other parties that sought rehearing challenged the Commission’s right under section 215(f) to propose a change to the rules of the ERO “upon its own motion or complaint.”

B. **Reconsideration of the Directive to Modify FAC-008-1**

65. In addition to directing NERC to propose revisions to its Rules of Procedure, the March 18 Order requires NERC to submit, no later than 90 days from the date the Commission issues an order on NERC’s proposed rule changes, modifications to Reliability Standard FAC-008-1 that fully comply with the Commission’s directive in Order No. 693. As explained in greater detail in Order No. 693, NERC must submit modifications to FAC-008-1 that require each transmission owner and generator owner to: (1) document the underlying assumptions and methods used to determine normal and emergency facility ratings; (2) develop facility ratings consistent with industry standards developed through an open, transparent and validated process; and (3) identify, for each facility, the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting.

66. As we have explained here and in the March 18 Order, industry opposition to identifying the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed resulted in the failure of NERC’s first attempt to fully comply with the Commission’s directive. At its May 2010 meeting, the NERC board of

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103 Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 755-762.
trustees approved a draft Reliability Standard that omits this modification but addresses the other required modifications.

1. **Arguments for Reconsideration**

67. NERC requests that the Commission reconsider its directive requiring transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed. NERC argues that the directive serves a commercial purpose rather than a reliability purpose, as evidenced by the Commission justifying the directive in terms of “transparency,” which NERC claims is a market or competition term rather than a reliability term. NERC does not dispute that the information required by the directive can aid the marketplace in identifying cost-effective ways to increase the available transfer capability of the system; its objection is that Reliability Standards, backed by the possibility of significant financial penalties for violations, are not the appropriate vehicles for promoting market efficiency. NERC suggests that the Commission has authority under other sections of the FPA to achieve this result.

68. Although it recognizes that the time to seek rehearing of Order No. 693 has long passed, NERC argues that the Commission should reconsider its directive because circumstances have changed since Order No. 693. NERC explains that in Order No. 729 the Commission recognized a line between reliability and markets, and stated that it would not broaden the ERO’s focus beyond its statutorily prescribed focus on reliability. NERC points out that the Commission rejected a NOPR proposal to direct the ERO to modify Reliability Standard MOD-001-1 to expand the availability of implementation documents associated with the Standard because it determined that expanding availability to entities beyond those “with a demonstrated reliability need to access such information” could “stretch the role of the ERO beyond ensuring the reliability of the Bulk-Power System.” NERC argues that requiring transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed is similar to the proposal rejected in Order No. 729 in that neither relate to reliability. NERC contends

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104 NERC at 16.

105 Id. at 15 (citing Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System, Order No. 729 129 FERC ¶ 61,155, at P 109 (2009)).

106 Id. (citing Order No. 729 129 FERC ¶ 61,155 at P 147).
that the Commission should apply the principles it developed in Order No. 729 in this proceeding and grant reconsideration.\(^\text{107}\)

2. **Commission Determination**

69. We deny reconsideration. Although NERC styles its argument as a request for reconsideration, it is actually an untimely request for rehearing.\(^\text{108}\) Therefore we reject it.\(^\text{109}\) Additionally, as we elaborate below, NERC has not persuaded us that a change in our directive is warranted.

70. NERC attempts to portray Order No. 729 as creating a change of circumstances that distinguishes its request for reconsideration from an untimely request for rehearing. NERC argues that the Commission’s decision in Order No. 729 to reject a NOPR proposal to make certain implementation documents more widely available, a proposal the Commission initially justified as advancing transparency, signals a new recognition by the Commission that there is a line between reliability and markets.

71. Contrary to NERC’s claim, the Commission did not, in Order No. 729, discern for the first time a distinction between markets and competition on one hand, and reliability on the other. In Order No. 672, the Commission acknowledged the difficulties in distinguishing between reliability concerns and competition concerns and declined to adopt a generic test to balance these interests.\(^\text{110}\) The Commission, when reviewing a proposed Reliability Standard or modification, including when it has proposed the modification, considers the relationship between reliability and competition to determine whether, on the specific facts at issue, the proposed Standard or modification actually serves a reliability goal. Order No. 729 did not introduce this analysis—the Commission examined the proposed modifications in Order No. 693 under the same criteria. One

\(^{107}\) Id. at 16.

\(^{108}\) The Georgia Corporations also argue that the modification is overly prescriptive and places the Commission in the position of dictating the substantive content of the modified Reliability Standard. We also reject this argument as an untimely request for rehearing.

\(^{109}\) The Commission routinely declines to consider requests for reconsideration that are the equivalent of an untimely request for rehearing. See *Critical Energy Infrastructure Information*, Order No. 683-A 119 FERC ¶ 61,029, at P 1, 6, n.2, n.8 (2007); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P10 (2005); and *Golden Valley Power Co.*, 114 FERC ¶ 61,212, at P6 (2006).

\(^{110}\) Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 376-378.
difference is that in Order No. 729, the Commission was addressing the scope of its authority to direct audits of available transfer capability, capacity benefit margin and transfer reliability margin implementation documents, not of its authority to direct modifications to the Reliability Standards themselves. NERC is correct that in that Order No. 729, the Commission clarified that the audits are not intended to address the competitive effects of the MOD Reliability Standards, and that the ERO’s statutory functions are properly focused on the reliability of the Bulk-Power System. However, the Commission did not consider, nor was it asked to consider, limiting the scope of Reliability Standards to areas that have no interaction with markets. A second difference is that in Order No. 693 the Commission determined that the FAC-008 limiting element proposal had a reliability objective, while in Order No. 729 it found that the MOD-001-1 documents proposal relating to audits did not.

72. Additionally, we are not persuaded that the limiting element directive should be reversed on the merits. Although NERC correctly observes that the directive has commercial use, the mere fact that a directive has a market-improving component does not preclude it from also having a reliability component.

73. In Order No. 693, the Commission directed NERC to modify FAC-008-1 to require that transmission owners and generator owners calculate the increase in capacity if the first-limiting element is removed only for those facilities for which thermal ratings cause: (1) an Interconnection Reliability Operating Limit; (2) a limitation of Total Transfer Capability; (3) an impediment to generation deliverability; or (4) an impediment to service to major cities or load pockets. These are examples where knowledge of the first and second limiting components and their ratings are critical to ensuring the reliable transfer of power from generation sources to major areas of the country. The Commission did not require calculation and communication about next limiting elements for other facilities.

74. The directive to modify FAC-008-1 to require that transmission owners and generator owners identify the second-most limiting element, and the resulting increase in capacity if the first-limiting element is removed, as affirmed in the March 18 Order, serves important reliability goals. Accurate facility ratings (i.e., the megawatt, voltage, or stability limit of transmission lines, transformers and other transmission-related facilities) are critical to the reliable operation of the Bulk-Power System. Facility ratings are used to assess the performance of the transmission system against planned and actual loading conditions for all time frames and contingencies. These assessments allow entities to determine the appropriate reliability actions to take in a variety of time frames. Ratings


112 Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 756.
information may be applied to real time, next day, and seasonal operation, and can enable pre-contingency action that will ensure continued reliable operation of the Bulk-Power System or reduce future risks to reliable operation. This is particularly true with respect to knowledge of most limiting elements (i.e., the weakest link in a chain), as well as with respect to next-limiting elements (i.e., the second weakest link in that chain).

75. As discussed in detail below, identification of the most limiting component(s) and the increase in rating if the first-most limiting component is no longer the most limiting component serves a reliability purpose by enhancing or improving: (i) operator knowledge, (ii) planning for real-time operation, (iii) information sharing and coordination, and (iv) long-term planning.

76. In order to determine facility ratings, entities must identify the most limiting component that comprises the facility, based on a validated methodology that considers the specific characteristics and ratings of all of the components to determine their limits for a range of ambient conditions, including if and for what duration these limits can be exceeded. This is, in part, because the limiting element upon which a facility rating is based can change under different operating conditions. For example, an underground high voltage cable may be the limiting element for continuous ratings, but a disconnect switch may be the limiting element for a four-hour emergency rating. With heavy power flows from generators through critical facilities to load, contingency conditions could reveal a thermal overload above the normal rating of the first limiting component of one of these facilities. However, that component also likely has a documented short time rating that could sustain the overload. If the second-most limiting component does not afford much increase in rating above the first, and its overload can result in the unintended removal of the facility from service (i.e., a relay or other protection system component that trips a facility out of service due to the overload), the prior identification of this second limiting component could alter the mitigation plans and avoid relay operations that trip facilities out-of-service, and thus potentially prevent a cascading event.

77. Information about the increase in rating if the first-most limiting component of a facility is removed allows operation planners to better assess the risks associated with circuit loadings and to take appropriate action prior to real time operation. Operators can directly input these limiting component ratings into their real-time contingency analyses and around-the-clock monitoring, helping the operators to understand what

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113 Id.

114 See Blackout Report at 162.

components are causing the limits. Operators can use this information to identify appropriate measures to mitigate contingencies. When a contingency does occur, operation planners and operators are required to immediately identify and assess the new worst contingencies, and make any adjustments necessary to maintain a reliable system given the new operating conditions. An operator’s assessment of new operating conditions is improved by identifying the next limiting component and factoring that limitation into contingency analysis and developing reliable operating plans. These adjustments may be made for real-time operations, or for whatever period the contingency is expected to exist.

As the Final Blackout Report recognized, there is a lack of adequate criteria for identifying critical facilities whose operating status could affect the reliability of neighboring systems, causing uncertainty about which facilities should be monitored. Identifying and documenting both the second-most limiting component and the increase in rating if the first-most limiting component is removed will help reliability coordinators identify the facilities that need to be monitored by the reliability coordinator for the region in which the facility is located as well as by one or more neighboring reliability coordinators, across a range of ambient conditions, where the second-most limiting component’s rating could affect the coordinated operation and monitoring needs of the critical facility.

116 Numerous events can occur that are not in an entity’s long range plan, such as long term forced outages of generation, droughts that threaten to limit or eliminate the output from multiple generators, or sudden transmission or generation failures or retirements. Identifying the first and second most limiting components ahead of time allows for appropriate analysis and contingency planning to be conducted either before an event, or very promptly following events that were unanticipated.

Reliability entities must ensure that if a contingency occurs, the system will remain operational and safe, and where it can once again withstand the next-worst single contingency without violating thermal, voltage, or stability limits. See Reliability Standard TPL-002-0 (pertaining to system performance following the loss of a single bulk electric system element); see also Blackout Report at 9.

118 See Blackout Report at 163.

119 Several approved Reliability Standards address the communication and consideration of ratings information. Among others, FAC-009-1 requires the communication of ratings information, IRO-003-2 requires reliability coordinators to maintain wide area view including of neighboring reliability coordinator areas, and IRO-005-2 requires reliability coordinators to monitor parameters that impact their own and neighboring reliability coordinator areas.
79. In Order No. 693, the Commission stated that requiring the most limiting component(s) to be identified and the increase in rating if the first most limiting component was no longer limiting would provide additional transparency thus enhancing reliability by providing operators information that will allow them to better assess the risks associated with circuit loadings. Order No. 693 further clarified that the directive is not for the purpose of requiring entities to invest in new facilities or share market information. As we stated then, “When the transmission operators know which component within the transmission element is limiting they have more information to inform their decisions about how to provide for the Reliable Operation of the Bulk-Power System.” For example, when unanticipated seasonal needs can be met at lowest cost to preserve beneficial reliability margins, the information required to support that decision-making process (i.e., identification of the limiting component(s) and the increase in rating if the first-most limiting component is no longer the most limiting component) serves a fundamental reliability purpose.

80. As we have explained here and in Order No. 693, our directive requiring NERC to modify FAC-008-1 to require that transmission owners and generator owners identify the second-most limiting component, and the resulting increase in capacity if the first-limiting component is removed, serves a reliability goal. In developing a modification to comply with this directive, the ERO has discretion, to the extent possible, to develop the modification in such a way that it efficiently and effectively achieves the reliability purposes we have described here without unnecessarily placing commercial information at risk.

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120 Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 755, 761.

121 Id. P 757.

122 Id.

123 In real time or next day operations, there may be other events that cause operators in one area to become short of transmission capabilities, including any of the four reasons identified in Order No. 693. In all cases, knowledge of the limiting element and the additional capability that could be available is essential to identify plans that limit or eliminate the need to shed firm load. For example, a transmission operator may know that the first-most limiting component on a line is an easily replaceable component with a de minimis replacement cost and which will not fail even if the line is loaded above its published rating. However, if that component will suffer some reduction in strength or life of the asset as a result of being overloaded, depending on the specific circumstances, the transmission operator may still choose to operate the line above its rating to gain additional capability during a peak season; i.e., summer, and then replace the limiting component when maintenance is easier to schedule.
C. **Rehearing of the Deadline to Comply with the Commission’s Directive**

1. **Request for Rehearing**

81. The Georgia Corporations request rehearing of the March 18 Order on the basis that the time limit established by the Commission for fully complying with the directive to modify FAC-008-1—no later than 90 days from the date that the Commission issues an order on NERC’s proposed revisions to its Rules of Procedure—fails to provide NERC with an opportunity to meaningfully evaluate the modification or to balance stakeholder interests, as required by Order No. 672. The Georgia Corporations further argue that the deadline fails to give the appropriate deference to NERC’s technical expertise, as required by section 215(d)(2) of the FPA.\(^{124}\)

2. **Commission Determination**

82. We deny rehearing and reject the Georgia Corporations’ claim that the time limit established by the Commission for fully complying with the directive to modify FAC-008-1 fails to provide NERC with an opportunity to meaningfully evaluate the modification, exercise its technical expertise, or balance stakeholder interests. The Commission required the modifications in Order No. 693, which was over three years ago. Additionally, NERC has already examined the issues involved with all three required modifications through its Standards Development Process during its attempt to comply in December 2008. That stated, in recognition of the issues that the ERO was required to consider, and of the technical conference held on July 6, 2010, the Commission extended the time to comply by a total of 180 days, so that the total time allowed for compliance with this directive is now 360 days from the date of the March 18 Order.\(^{125}\)

D. **Request for a Stay and Technical Conference**

1. **NERC’s Petition**

83. In the March 18 Order, the Commission directed NERC to propose changes to its Rules of Procedure and to fully comply with a previous Commission directive to modify FAC-008-1. NERC requests that the Commission stay both directives and convene a public conference to consider general issues pertaining to the Commission’s prospective implementation of section 215 of the FPA and technical issues associated with the Commission’s directive to modify Reliability Standard FAC-008-1.

\(^{124}\) Georgia Corporations at 12.

\(^{125}\) See *North American Electric Reliability Corp.*, 131 FERC ¶ 61,237 and *Notice of Extension of Time*, Docket No. RR09-6-000, (August 19, 2010).
84. NERC claims that an outside reader of the reliability-related orders approved at the March 2010 Commission meeting would conclude that the Commission “intends a significant shift in the way it implements Section 215 and relates to NERC as the ERO.” NERC explains that the Commission issued orders directing fundamental changes to the Standards Development Process and the penalty assessment process, requiring NERC to complete changes to two Reliability Standards in short timeframes, proposing to remand Reliability Standards, and proposing to reject NERC’s interpretation of a Reliability Standard. NERC states that there has been little discussion about the fundamental issues pertaining to how the Commission expects to relate to NERC as the ERO, and that the Commission should convene a technical conference to provide the Commission, NERC, and stakeholders with the opportunity to discuss these matters. NERC states that if the Commission does not intend to work a significant shift in the way it relates to NERC, a conference would still be beneficial because it would provide an opportunity for all interested parties to reach a common understanding or at least recognize and understand their differences.

85. In addition to requesting a public conference, NERC requests that the Commission stay its directives in the March 18 Order. NERC states that the test for determining whether to grant a stay is whether: (1) the moving party will suffer irreparable injury without the stay; (2) issuing the stay will substantially harm other parties; and (3) the stay is in the public interest.

86. NERC claims that it will suffer irreparable injury without the stay because the Commission is “narrowly-prescribing directives that exempt any alternative means of compliance” and therefore “essentially undermining NERC’s ability to serve as the ERO under Section 215.” NERC adds that the Commission’s directive “directly challenges NERC’s authority to write standards” and could undermine the acceptance of NERC Reliability Standards in Canada.

87. NERC argues that issuing the stay will not substantially harm any other party, but will, instead, provide NERC and other parties with the opportunity to evaluate the Commission’s required modification to FAC-008-1 to determine if it is in the best

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126 NERC at 17.

127 Id.

128 Id. at 18. The Georgia Corporations agree with NERC’s request for a public conference and suggest public workshops similar to those utilized in the Commission’s development of the Penalty Guidelines as an alternative or supplement.

129 Id.
interest of continent-wide reliability. NERC states that, in its technical judgment, granting the motion for a stay and agreeing to a public conference to discuss the technical issues related to the Commission’s required modification will not pose a risk to Reliable Operation of the Bulk-Power System, as it is defined in section 215(a)(4) of the FPA.

88. Finally, NERC argues that granting a stay is in the public interest because the Commission’s required modification to FAC-008-1 conflicts with Order No. 729 and NERC should have the opportunity to consider the modification and develop a proposal that is best for the Reliable Operation of the Bulk-Power System.

2. Commission Determination

89. NERC’s request for a conference is moot as a result of the Commission’s July 6, 2010 reliability technical conference in Docket No. AD10-14-000. We deny NERC’s request for a stay. The Commission respects NERC’s authority to develop Reliability Standards and its ability to serve as the ERO.130 However, we are requiring that NERC ensure that it can effectively serve as the ERO by directing it to propose a mechanism designed to ensure that it can comply with Commission directives to submit a new or modified Reliability Standard pursuant to section 215(d)(5) of the FPA. Thus, we disagree with NERC’s claim that it will suffer irreparable injury without a stay. We also find that NERC has not carried its burden of showing that a stay is in the public interest. As we explain above, the Commission’s required modification does not conflict with Order No. 729. The Commission initially required the modifications in Order No. 693 and NERC has already examined the issues in the Standards Development Process. Additionally, the deadline for NERC to submit a proposed modification to FAC-008 is 90 days after the Commission issues an order acting on NERC’s proposed revisions to the Standards Development Process. Given that NERC is first required to submit to the Commission a petition with proposed revisions to its Standards Development Process in December 2010, and such petition will be subject to notice and comment before the Commission issues an order on the petition, we are not persuaded that NERC needs more time to consider the Commission’s required modifications to FAC-008-1. While we deny NERC’s request for a stay, we recognize the need for a continued dialogue between NERC, the Commission, international regulators, and the industry with respect to our shared responsibilities to provide for the reliable operation of the Bulk-Power System. We commit to maintaining an open dialogue and look forward to future discussions.

130 Indeed, in the order on the ERO’s three-year performance assessment, being issued concurrently with this order in Docket No. RR09-7-000, the Commission found that NERC continues to satisfy the statutory and regulatory criteria for ERO certification.
The Commission orders:

(A) The requests for rehearing and clarification are hereby denied.

(B) The request for a stay is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,
Secretary.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FREE ENTERPRISE FUND ET AL. v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08–861. Argued December 7, 2009—Decided June 28, 2010

Respondent, the Public Company Accounting Oversight Board, was created as part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002. The Board is composed of five members appointed by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Unlike these organizations, the Board is a Government-created entity with expansive powers to govern an entire industry. Every accounting firm that audits public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. The Board may inspect registered firms, initiate formal investigations, and issue severe sanctions in its disciplinary proceedings. The parties agree that the Board is “part of the Government” for constitutional purposes. Lebron v. National Railroad Passenger Corporation, 513 U. S. 374, 397, and that its members are “Officers of the United States” who “exercise[e] significant authority pursuant to the laws of the United States,” Buckley v. Valeo, 424 U. S. 1, 125–126. While the SEC has oversight of the Board, it cannot remove Board members at will, but only “for good cause shown,” “in accordance with” specified procedures. §§7211(e)(6), 7217(d)(3). The parties also agree that the Commissioners, in turn, cannot themselves be removed by the President except for “inefficiency, neglect of duty, or malfeasance in office.” Humphrey’s Executor v. United States, 295 U. S. 602, 620.

The Board inspected petitioner accounting firm, released a report critical of its auditing procedures, and began a formal investigation.
The firm and petitioner Free Enterprise Fund, a nonprofit organization of which the firm is a member, sued the Board and its members, seeking, *inter alia*, a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers. Petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring executive power on Board members without subjecting them to Presidential control. The basis for petitioners' challenge was that Board members were insulated from Presidential control by two layers of tenure protection: Board members could only be removed by the Commission for good cause, and the Commissioners could in turn only be removed by the President for good cause. Petitioners also challenged the Board's appointment as violating the Appointments Clause, which requires officers to be appointed by the President with the Senate's advice and consent, or—in the case of "inferior Officers"—by "the President alone, ... the Courts of Law, or ... the Heads of Departments," Art. II, §2, cl. 2. The United States intervened to defend the statute. The District Court found it had jurisdiction and granted summary judgment to respondents. The Court of Appeals affirmed. It first agreed that the District Court had jurisdiction. It then ruled that the dual restraints on Board members' removal are permissible, and that Board members are inferior officers whose appointment is consistent with the Appointments Clause.

*Held:*

1. The District Court had jurisdiction over these claims. The Commission may review any Board rule or sanction, and an aggrieved party may challenge the Commission's "final order" or "rule" in a court of appeals under 15 U. S. C. §78y. The Government reads §78y as an exclusive route to review, but the text does not expressly or implicitly limit the jurisdiction that other statutes confer on district courts. It is presumed that Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "wholly "collateral"" to a statute's review provisions"; and if the claims are "outside the agency's expertise." *Thunder Basin Coal Co. v. Reich*, 510 U. S. 200, 212–213.

These considerations point against any limitation on review here. Section 78y provides only for review of Commission action, and petitioners' challenge is "collateral" to any Commission orders or rules from which review might be sought. The Government advises petitioners to raise their claims by appealing a Board sanction, but petitioners have not been sanctioned, and it is no "meaningful" avenue of relief, *Thunder Basin, supra*, at 212, to require a plaintiff to incur a sanction in order to test a law's validity, *MedImmune, Inc. v. Genentech, Inc.*, 549 U. S. 118, 129. Petitioners' constitutional claims are
Syllabus

also outside the Commission’s competence and expertise, and the statutory questions involved do not require technical considerations of agency policy. Pp. 7–10.


(a) The Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” Art. II, §1, cl. 1. Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary. See generally Myers v. United States, 272 U. S. 52. This Court has determined that this authority is not without limit. In Humphrey’s Executor, supra, this Court held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. And in United States v. Perkins, 116 U. S. 483, and Morrison v. Olson, 487 U. S. 654, the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. However, this Court has not addressed the consequences of more than one level of good-cause tenure. Pp. 10–14.

(b) Where this Court has upheld limited restrictions on the President’s removal power, only one level of protected tenure separated the President from an officer exercising executive power. The President—or a subordinate he could remove at will—decided whether the officer’s conduct merited removal under the good-cause standard. Here, the Act not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested in other tenured officers—the Commissioners—who are not subject to the President’s direct control. Because the Commission cannot remove a Board member at will, the President cannot hold the Commission fully accountable for the Board’s conduct. He can only review the Commissioner’s determination of whether the Act’s rigorous good-cause standard is met. And if the President disagrees with that determination, he is powerless to intervene—unless the determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.” Humphrey’s Executor, supra, at 620.

This arrangement contradicts Article II’s vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he can oversee, the President is no longer the judge of the Board’s conduct. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith. If this dispersion of re-
sponsibility were allowed to stand, Congress could multiply it further by adding still more layers of good-cause tenure. Such diffusion of power carries with it a diffusion of accountability; without a clear and effective chain of command, the public cannot determine where the blame for a pernicious measure should fall. The Act’s restrictions are therefore incompatible with the Constitution’s separation of powers. Pp. 14–17.

(c) The “‘fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.’ Bowsher v. Synar, 478 U. S. 714, 736. The Act’s multilevel tenure protections provide a blueprint for the extensive expansion of legislative power. Congress controls the salary, duties, and existence of executive offices, and only Presidential oversight can counter its influence. The Framers created a structure in which “[a] dependence on the people” would be the “primary control on the government,” and that dependence is maintained by giving each branch “the necessary constitutional means and personal motives to resist encroachments of the others.” The Federalist No. 51, p. 349. A key “constitutional means” vested in the President was “the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Congress 463. While a government of “opposite and rival interests” may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” Bowsher, supra, at 730. Pp. 17–21.

(d) The Government errs in arguing that, even if some constraints on the removal of inferior executive officers might violate the Constitution, the restrictions here do not. There is no construction of the Commission’s good-cause removal power that is broad enough to avoid invalidation. Nor is the Commission’s broad power over Board functions the equivalent of a power to remove Board members. Altering the Board’s budget or powers is not a meaningful way to control an inferior officer; the Commission cannot supervise individual Board members if it must destroy the Board in order to fix it. Moreover, the Commission’s power over the Board is hardly plenary, as the Board may take significant enforcement actions largely independently of the Commission. Enacting new SEC rules through the required notice and comment procedures would be a poor means of micro-managing the Board, and without certain findings, the Act forbids any general rule requiring SEC preapproval of Board actions. Finally, the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of good-cause removal. Pp. 21–27.
Syllabus

3. The unconstitutional tenure provisions are severable from the remainder of the statute. Because “[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions,” Champlin Refining Co. v. Corporation Comm’n of Okla., 286 U. S. 210, 234, the “normal rule” is “that partial . . . invalidation is the required course,” Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 504. The Board’s existence does not violate the separation of powers, but the substantive removal restrictions imposed by §§7211(e)(6) and 7217(d)(3) do. Concluding that the removal restrictions here are invalid leaves the Board removable by the Commission at will. With the tenure restrictions excised, the Act remains “‘fully operative as a law,’” New York v. United States, 505 U. S. 144, 186, and nothing in the Act’s text or historical context makes it “evident” that Congress would have preferred no Board at all to a Board whose members are removable at will, Alaska Airlines, Inc. v. Brock, 480 U. S. 678, 684. The consequence is that the Board may continue to function as before, but its members may be removed at will by the Commission. Pp. 27–29.

4. The Board’s appointment is consistent with the Appointments Clause. Pp. 29–33.

(a) The Board members are inferior officers whose appointment Congress may permissibly vest in a “Hea[d] of Departmen[t].” Inferior officers “are officers whose work is directed and supervised at some level” by superiors appointed by the President with the Senate’s consent. Edmond v. United States, 520 U. S. 651, 662–663. Because the good-cause restrictions discussed above are unconstitutional and void, the Commission possesses the power to remove Board members at will, in addition to its other oversight authority. Board members are therefore directed and supervised by the Commission. Pp. 29–30.

(b) The Commission is a “Departmen[t]” under the Appointments Clause. Freytag v. Commissioner, 501 U. S. 868, 887, n. 4, specifically reserved the question whether a “principal agenc[y], such as” the SEC, is a “Departmen[t].” The Court now adopts the reasoning of the concurring Justices in Freytag, who would have concluded that the SEC is such a “Departmen[t]” because it is a freestanding component of the Executive Branch not subordinate to or contained within any other such component. This reading is consistent with the common, near-contemporary definition of a “department”; with the early practice of Congress, see §3, 1 Stat. 234; and with this Court’s cases, which have never invalidated an appointment made by the head of such an establishment. Pp. 30–31.

(c) The several Commissioners, and not the Chairman, are the Commission’s “Hea[d].” The Commission’s powers are generally vested in the Commissioners jointly, not the Chairman alone. The
Commissioners do not report to the Chairman, who exercises administrative functions subject to the full Commission’s policies. There is no reason why a multimember body may not be the “Head” of a “Department” that it governs. The Appointments Clause necessarily contemplates collective appointments by the “Courts of Law,” Art. II, §2, cl. 2, and each House of Congress appoints its officers collectively, see, e.g., Art. I, §2, cl. 5. Practice has also sanctioned the appointment of inferior officers by multimember agencies. Pp. 31–33. 537 F. 3d 667, affirmed in part, reversed in part, and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and SOTOMAYOR, JJ., joined.
Chief Justice Roberts delivered the opinion of the Court.

Our Constitution divided the “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” INS v. Chadha, 462 U.S. 919, 951 (1983). Article II vests “[t]he executive Power . . . in a President of the United States of America,” who must “take Care that the Laws be faithfully executed.” Art. II, §1, cl. 1; id., §3. In light of “[t]he impossibility that one man should be able to perform all the great business of the State,” the Constitution provides for executive officers to “assist the supreme Magistrate in discharging the duties of his trust.” 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. See generally Myers v. United States, 272 U.S. 52 (1926). This Court has determined, however, that this authority is not without limit. In Humphrey’s Executor v. United
States, 295 U. S. 602 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in United States v. Perkins, 116 U. S. 483 (1886), and Morrison v. Olson, 487 U. S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President. The President cannot “take Care that the Laws be faithfully executed” if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President’s determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President’s “constitutional obligation to ensure the faithful execution of the laws.” Id., at 693.
Opinion of the Court

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private “nonprofit corporation,” and Board members and employees are not considered Government “officer[s] or employee[s]” for statutory purposes. 15 U. S. C. §§7211(a), (b). The Board can thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale. See §§7211(f)(4), 7219.¹

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission’s rules, its own rules, and professional accounting standards. §§7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm’s practice, including hiring and professional

¹The current salary for the Chairman is $673,000. Other Board members receive $547,000. Brief for Petitioners 3.
development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and “such other requirements as the Board may prescribe.” §7213(a)(2)(B).

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§7213–7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §78a et seq.—a federal crime punishable by up to 20 years’ imprisonment or $25 million in fines ($5 million for a natural person). §§78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm’s registration, a permanent ban on a person’s associating with any registered firm, and money penalties of $15 million ($750,000 for a natural person). §7215(c)(4).

Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is “part of the Government” for constitutional purposes, Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 397 (1995), and that its members are “Officers of the United States” who “exercis[e] significant authority pursuant to the laws of the United States,” Buckley v. Valeo, 424 U.S. 1, 125–126 (1976) (per curiam) (quoting Art. II, §2, cl. 2); cf. Brief for Petitioners 9, n. 1; Brief for United States 29, n. 8.

The Act places the Board under the SEC’s oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). §§7217(b)–(c). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are sub-
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stantially insulated from the Commission’s control. The Commission cannot remove Board members at will, but only “for good cause shown,” “in accordance with” certain procedures. §7211(e)(6).

Those procedures require a Commission finding, “on the record” and “after notice and opportunity for a hearing,” that the Board member

“(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;
“(B) has willfully abused the authority of that member; or
“(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.” §7217(d)(3).

Removal of a Board member requires a formal Commission order and is subject to judicial review. See 5 U. S. C. §§554(a), 556(a), 557(a), (c)(B); 15 U. S. C. §78y(a)(1). Similar procedures govern the Commission’s removal of officers and directors of the private self-regulatory organizations. See §78s(h)(4). The parties agree that the Commissioners cannot themselves be removed by the President except under the Humphrey’s Executor standard of “inefficiency, neglect of duty, or malfeasance in office,” 295 U. S., at 620 (internal quotation marks omitted); see Brief for Petitioners 31; Brief for United States 43; Brief for Respondent Public Company Accounting Oversight Board 31 (hereinafter PCAOB Brief); Tr. of Oral Arg. 47, and we decide the case with that understanding.

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and
began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers. App. 71.

Before the District Court, petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. Id., at 67–68. Petitioners also challenged the Act under the Appointments Clause, which requires “Officers of the United States” to be appointed by the President with the Senate’s advice and consent. Art. II, §2, cl. 2. The Clause provides an exception for “inferior Officers,” whose appointment Congress may choose to vest “in the President alone, in the Courts of Law, or in the Heads of Departments.” Ibid. Because the Board is appointed by the SEC, petitioners argued that (1) Board members are not “inferior Officers” who may be appointed by “Heads of Departments”; (2) even if they are, the Commission is not a “Department”; and (3) even if it is, the several Commissioners (as opposed to the Chairman) are not its “Hea[d].” See App. 68–70. The United States intervened to defend the Act’s constitutionality. Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents. App. to Pet. for Cert. 110a–117a.

A divided Court of Appeals affirmed. 537 F.3d 667 (CADC 2008). It agreed that the District Court had jurisdiction over petitioners’ claims. Id., at 671. On the merits, the Court of Appeals recognized that the removal issue was “a question of first impression,” as neither that court nor this one “ha[d] considered a situation where a restriction on removal passes through two levels of control.” Id.,
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at 679. It ruled that the dual restraints on Board members’ removal are permissible because they do not “render the President unable to perform his constitutional duties.” Id., at 683. The majority reasoned that although the President “does not directly select or supervise the Board’s members,” id., at 681, the Board is subject to the comprehensive control of the Commission, and thus the President’s influence over the Commission implies a constitutionally sufficient influence over the Board as well. Id., at 682–683. The majority also held that Board members are inferior officers subject to the Commission’s direction and supervision, id., at 672–676, and that their appointment is otherwise consistent with the Appointments Clause, id., at 676–678.

Judge Kavanaugh dissented. He agreed that the case was one of first impression, id., at 698, but argued that “the double for-cause removal provisions in the [Act] . . . combine to eliminate any meaningful Presidential control over the [Board].” Id., at 697. Judge Kavanaugh also argued that Board members are not effectively supervised by the Commission and thus cannot be inferior officers under the Appointments Clause. Id., at 709–712.

We granted certiorari. 556 U. S. __ (2009).

II

We first consider whether the District Court had jurisdiction. We agree with both courts below that the statutes providing for judicial review of Commission action did not prevent the District Court from considering petitioners’ claims.

The Sarbanes-Oxley Act empowers the Commission to review any Board rule or sanction. See 15 U. S. C. §§7217(b)(2)–(4), (c)(2). Once the Commission has acted, aggrieved parties may challenge “a final order of the Commission” or “a rule of the Commission” in a court of appeals under §78y, and “[n]o objection . . . may be consid-
ered by the court unless it was urged before the Commiss-
section or there was reasonable ground for failure to do so.” §§78y(a)(1), (b)(1), (c)(1).

The Government reads §78y as an exclusive route to review. But the text does not expressly limit the jurisdic-
tion that other statutes confer on district courts. See, e.g., 28 U. S. C. §§1331, 2201. Nor does it do so implicitly. Provisions for agency review do not restrict judicial review unless the “statutory scheme” displays a “fairly discerni-
ble” intent to limit jurisdiction, and the claims at issue “are of the type Congress intended to be reviewed within th[e] statutory structure.” Thunder Basin Coal Co. v. Reich, 510 U. S. 200, 207, 212 (1994) (internal quotation marks omitted). Generally, when Congress creates proce-
dures “designed to permit agency expertise to be brought to bear on particular problems,” those procedures “are to be exclusive.” Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U. S. 411, 420 (1965). But we presume that Congress does not intend to limit jurisdiction if “a finding of preclusion could foreclose all meaningful judicial review”; if the suit is “wholly col-
lateral to a statute’s review provisions”; and if the claims are “outside the agency’s expertise.” Thunder Basin, supra, at 212–213 (internal quotation marks omitted). These considerations point against any limitation on review here.

We do not see how petitioners could meaningfully pur-
sue their constitutional claims under the Government’s theory. Section 78y provides only for judicial review of Commission action, and not every Board action is encapsu-
lated in a final Commission order or rule.

The Government suggests that petitioners could first have sought Commission review of the Board’s “auditing standards, registration requirements, or other rules.” Brief for United States 16. But petitioners object to the Board’s existence, not to any of its auditing standards.
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Petitioners’ general challenge to the Board is “collateral” to any Commission orders or rules from which review might be sought. Cf. McNary v. Haitian Refugee Center, Inc., 498 U. S. 479, 491–492 (1991). Requiring petitioners to select and challenge a Board rule at random is an odd procedure for Congress to choose, especially because only new rules, and not existing ones, are subject to challenge. See 15 U. S. C. §§78s(b)(2), 78y(a)(1), 7217(b)(4).

Alternatively, the Government advises petitioners to raise their claims by appealing a Board sanction. Brief for United States 16–17. But the investigation of Beckstead and Watts produced no sanction, see id., at 7, n. 5; Reply Brief for Petitioners 29, n. 11 (hereinafter Reply Brief), and an uncomplimentary inspection report is not subject to judicial review, see §7214(h)(2). So the Government proposes that Beckstead and Watts incur a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony. Brief for United States 17. If the Commission then affirms, the firm will win access to a court of appeals—and severe punishment should its challenge fail. We normally do not require plaintiffs to “bet the farm . . . by taking the violative action” before “testing the validity of the law,” MedImmune, Inc. v. Genentech, Inc., 549 U. S. 118, 129 (2007); accord, Ex parte Young, 209 U. S. 123 (1908), and we do not consider this a “meaningful” avenue of relief. Thunder Basin, 510 U. S., at 212.

Petitioners’ constitutional claims are also outside the Commission’s competence and expertise. In Thunder Basin, the petitioner’s primary claims were statutory; “at root . . . [they] ar[ose] under the Mine Act and f[e]ll squarely within the [agency’s] expertise,” given that the agency had “extensive experience” on the issue and had “recently addressed the precise . . . claims presented.” Id., at 214–215. Likewise, in United States v. Ruzicka, 329 U. S. 287 (1946), on which the Government relies, we reserved for the agency fact-bound inquiries that, even if
“formulated in constitutional terms,” rested ultimately on “factors that call for [an] understanding of the milk industry,” to which the Court made no pretensions. Id., at 294. No similar expertise is required here, and the statutory questions involved do not require “technical considerations of [agency] policy.” Johnson v. Robison, 415 U. S. 361, 373 (1974). They are instead standard questions of administrative law, which the courts are at no disadvantage in answering.

We therefore conclude that §78y did not strip the District Court of jurisdiction over these claims, which are properly presented for our review.2

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.

A

The Constitution provides that “[t]he executive Power shall be vested in a President of the United States of

2The Government asserts that “petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.” Brief for United States 22. The Government does not appear to dispute such a right to relief as a general matter, without regard to the particular constitutional provisions at issue here. See, e.g., Correctional Services Corp. v. Malesko, 534 U. S. 61, 74 (2001) (equitable relief “has long been recognized as the proper means for preventing entities from acting unconstitutionally”); Bell v. Hood, 327 U. S. 678, 684 (1946) (“It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution”); see also Ex parte Young, 209 U. S. 123, 149, 165, 167 (1908). If the Government’s point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.
America.” Art. II, §1, cl. 1. As Madison stated on the floor of the First Congress, “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong. 463 (1789).

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that “prevailed, as most consonant to the text of the Constitution” and “to the requisite responsibility and harmony in the Executive Department,” was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not “expressly taken away, it remained with the President.” Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). “This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution’s meaning since many of the Members of the First Congress had taken part in framing that instrument.” Bowers v. Synar, 478 U.S. 714, 723–724 (1986) (internal quotation marks omitted). And it soon became the “settled and well understood construction of the Constitution.” Ex parte Hennen, 13 Pet. 230, 259 (1839).

The landmark case of Myers v. United States reaffirmed the principle that Article II confers on the President “the general administrative control of those executing the laws.” 272 U.S., at 164. It is his responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase. As we explained in Myers, the President therefore must have some “power of removing those for whom he can not continue to be responsible.” Id., at 117.

Nearly a decade later in Humphrey’s Executor, this Court held that Myers did not prevent Congress from conferring good-cause tenure on the principal officers of
certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for “inefficiency, neglect of duty, or malfeasance in office.” 295 U. S., at 620 (quoting 15 U. S. C. §41). The Court distinguished *Myers* on the ground that *Myers* concerned “an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is.” 295 U. S., at 627. By contrast, the Court characterized the FTC as “quasi-legislative and quasi-judicial” rather than “purely executive,” and held that Congress could require it “to act . . . independently of executive control.” *Id.*, at 627–629. Because “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will,” the Court held that Congress had power to “fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime.” *Id.*, at 629.

*Humphrey’s Executor* did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers*, *supra*, at 119, 127; *Hennen*, *supra*, at 259–260. This Court has upheld for-cause limitations on that power as well.

In *Perkins*, a naval cadet-engineer was honorably discharged from the Navy because his services were no longer required. 116 U. S. 483. He brought a claim for his salary under statutes barring his peacetime discharge except by a court-martial or by the Secretary of the Navy “for misconduct.” Rev. Stat. §§1229, 1525. This Court adopted verbatim the reasoning of the Court of Claims, which had held that when Congress “‘vests the appointment of infe-
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rior officers in the heads of Departments[,] it may limit and restrict the power of removal as it deems best for the public interest.” 116 U. S., at 485. Because Perkins had not been “dismissed for misconduct . . . [or upon] the sentence of a court-martial,” the Court agreed that he was “still in office and . . . entitled to [his] pay.” Ibid.3

We again considered the status of inferior officers in Morrison. That case concerned the Ethics in Government Act, which provided for an independent counsel to investigate allegations of crime by high executive officers. The counsel was appointed by a special court, wielded the full powers of a prosecutor, and was removable by the Attorney General only “for good cause.” 487 U. S., at 663 (quoting 28 U. S. C. §596(a)(1)). We recognized that the independent counsel was undoubtedly an executive officer, rather than “‘quasi-legislative’” or “‘quasi-judicial,’” but we stated as “our present considered view” that Congress had power to impose good-cause restrictions on her removal. 487 U. S., at 689–691. The Court noted that the statute “give the Attorney General,” an officer directly responsible to the President and “through [whom]” the President could act, “several means of supervising or controlling” the independent counsel—“most importantly . . . the power to remove the counsel for good cause.” Id., at 695–696 (internal quotation marks omitted). Under

3When Perkins was decided in 1886, the Secretary of the Navy was a principal officer and the head of a department, see Rev. Stat. §415, and the Tenure of Office Act purported to require Senate consent for his removal. Ch. 154, 14 Stat. 430, Rev. Stat. §1767. This requirement was widely regarded as unconstitutional and void (as it is universally regarded today), and it was repealed the next year. See Act of Mar. 3, 1887, ch. 353, 24 Stat. 500; Myers v. United States, 272 U. S. 52, 167–168 (1926); see also Bowers v. Synar, 478 U. S. 714, 726 (1986). Perkins cannot be read to endorse any such restriction, much less in combination with further restrictions on the removal of inferiors. The Court of Claims opinion adopted verbatim by this Court addressed only the authority of the Secretary of the Navy to remove inferior officers.
those circumstances, the Court sustained the statute. *Morrison* did not, however, address the consequences of more than one level of good-cause tenure—leaving the issue, as both the court and dissent below recognized, “a question of first impression” in this Court. 537 F. 3d, at 679; see *id.*, at 698 (dissenting opinion).

B

As explained, we have previously upheld limited restrictions on the President’s removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer’s conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President’s review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board’s conduct, to the same extent that he may hold the
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Commission accountable for everything else that it does. The Commissioners are not responsible for the Board’s actions. They are only responsible for their own determination of whether the Act’s rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.” Humphrey’s Executor, 295 U.S., at 620 (internal quotation marks omitted).

This novel structure does not merely add to the Board’s independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II’s vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he can oversee, the President is no longer the judge of the Board’s conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith. This violates the basic principle that the President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,” because Article II “makes a single President responsible for the actions of the Executive Branch.” Clinton v. Jones, 520 U. S. 681, 712–713 (1997) (Breyer, J., concurring in judgment). 4

4 Contrary to the dissent’s suggestion, post, at 12–14 (opinion of Breyer, J.), the second layer of tenure protection does compromise the
Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even five layers between the President and the Board would be too many. Tr. of Oral Arg. 47–48. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people’s name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see Freytag v. Commissioner, 501 U. S. 868, 879–880 (1991), nor on whether “the encroached-upon branch approves the encroachment,” New York v. United States, 505 U. S. 144, 182 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” Art. II, §2, cl. 2. They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” The Federalist No. 72, p.

President’s ability to remove a Board member the Commission wants to retain. Without a second layer of protection, the Commission has no excuse for retaining an officer who is not faithfully executing the law. With the second layer in place, the Commission can shield its decision from Presidential review by finding that good cause is absent—a finding that, given the Commission’s own protected tenure, the President cannot easily overturn. The dissent describes this conflict merely as one of four possible “scenarios,” see post, at 12–13, but it is the central issue in this case: The second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so.
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Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that “those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.” 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive’s oversight, this Act subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts. The Act’s restrictions are incompatible with the Constitution’s separation of powers.

C

Respondents and the dissent resist this conclusion, portraying the Board as “the kind of practical accommodation between the Legislature and the Executive that should be permitted in a ‘workable government.’” *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276 (1991) (MWAA) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)); see, e.g., *post*, at 6 (opinion of BREYER, J.). According to the dissent, Congress may impose multiple levels of for-cause tenure between the President and his subordinates when it “rests agency independence upon the need for technical expertise.” *Post*, at 18. The Board’s mission is said to demand both “technical competence” and “apolitical expertise,” and its powers may only be exercised by “technical professional experts.” *Post*, at 18 (internal quotation marks omitted). In this respect the statute creating the
Board is, we are told, simply one example of the “vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, [that] provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives.” Post, at 8.

No one doubts Congress’s power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the “fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,” for “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.” Bowscher, 478 U. S., at 736 (quoting Chadha, 462 U. S., at 944).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people. This concern is largely absent from the dissent’s paean to the administrative state.

For example, the dissent dismisses the importance of removal as a tool of supervision, concluding that the President’s “power to get something done” more often depends on “who controls the agency’s budget requests and funding, the relationships between one agency or department and another, . . . purely political factors (including Con-
gness’ ability to assert influence),” and indeed whether particular unelected officials support or “resist” the President’s policies. Post, at 11, 13 (emphasis deleted). The Framers did not rest our liberties on such bureaucratic minutiae. As we said in Bowsher, supra, at 730, “[t]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress.”

In fact, the multilevel protection that the dissent endorses “provides a blueprint for extensive expansion of the legislative power.” MWAA, supra, at 277. In a system of checks and balances, “[p]ower abhors a vacuum,” and one branch’s handicap is another’s strength. 537 F. 3d, at 695, n. 4 (Kavanaugh, J., dissenting) (internal quotation marks omitted). “Even when a branch does not arrogate power to itself,” therefore, it must not “impair another in the performance of its constitutional duties.” Loving v. United States, 517 U. S. 748, 757 (1996). Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that “the Legislature has no right to diminish or modify.” 1 Annals of Cong., at 463 (J. Madison).

The dissent quotes Buckley v. Valeo, 424 U. S. 1, 138 (1976) (per curiam), for the proposition that Congress has ‘broad authority to ‘create’ governmental “offices” and to structure those offices ‘as it chooses.’” Post, at 2. The Buckley Court put “offices” in quotes because it was actually describing legislative positions that are not really offices at all (at least not under Article II). That is why the very next sentence of Buckley said, “But Congress’ power . . . is inevitably bounded by the express language” of the Constitution. 424 U. S., at 138–139 (emphasis added).

The dissent attributes to Madison a belief that some executive officers, such as the Comptroller, could be made independent of the President. See post, at 17–18. But Madison’s actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office
The Framers created a structure in which “[a] dependence on the people” would be the “primary control on the government.” The Federalist No. 51, at 349 (J. Madison). That dependence is maintained, not just by “parchment barriers,” id., No. 48, at 333 (same), but by letting “[a]mbition . . . counteract ambition,” giving each branch “the necessary constitutional means, and personal motives, to resist encroachments of the others,” id., No. 51, at 349. A key “constitutional means” vested in the President—perhaps the key means—was “the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong., at 463. And while a government of “opposite and rival interests” may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” Bousher, supra, at 730.

Calls to abandon those protections in light of “the era’s perceived necessity,” New York, 505 U. S., at 187, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a “pressing national problem,” but “a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.” Id., at 187–188. Neither respondents nor the dissent explains why the Board’s task, unlike so many others, requires more than one layer of insulation from the President—or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situa-

for a term of “years, unless sooner removed by the President”; he would thus be “dependent upon the President, because he can be removed by him,” and also “dependent upon the Senate, because they must consent to his [reappointment] for every term of years.” 1 Annals of Cong. 612 (1789).
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The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to "persuad[ing]" his unelected subordinates "to do what they ought to do without persuasion." Post, at 11 (internal quotation marks omitted). In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

The United States concedes that some constraints on the removal of inferior executive officers might violate the Constitution. See Brief for United States 47. It contends, however, that the removal restrictions at issue here do not.

To begin with, the Government argues that the Commission's removal power over the Board is "broad," and could be construed as broader still, if necessary to avoid invalidation. See, e.g., id., at 51, and n. 19; cf. PCAOB Brief 22–23. But the Government does not contend that simple disagreement with the Board's policies or priorities could constitute "good cause" for its removal. See Tr. of Oral Arg. 41–43, 45–46. Nor do our precedents suggest as much. Humphrey's Executor, for example, rejected a removal premised on a lack of agreement "'on either the policies or the administering of the Federal Trade Commission,'" because the FTC was designed to be "'independent in character,'" "'free from 'political domination or control,'" and not "'subject to anybody in the government'" or "'to the orders of the President.'" 295 U. S., at 619, 625. Accord, Morrison, 487 U. S., at 693 (noting that "the congressional determination to limit the removal power of the Attorney General was essential . . . to establish the neces-
sary independence of the office”); *Wiener v. United States*, 357 U. S. 349, 356 (1958) (describing for-cause removal as “involving the rectitude” of an officer). And here there is judicial review of any effort to remove Board members, see 15 U. S. C. §78y(a)(1), so the Commission will not have the final word on the propriety of its own removal orders. The removal restrictions set forth in the statute mean what they say.

Indeed, this case presents an even more serious threat to executive control than an “ordinary” dual for-cause standard. Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. §7217(d)(3); see §78y(a). The Act does not even give the Commission power to fire Board members for violations of other laws that do not relate to the Act, the securities laws, or the Board’s authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under §7217(d)(3).7

The rigorous standard that must be met before a Board member may be removed was drawn from statutes con-

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7 The Government implausibly argues that §7217(d)(3) “does not expressly make its three specified grounds of removal exclusive,” and that “the Act could be construed to permit other grounds.” Brief for United States 51, n. 19. But having provided in §7211(e)(6) that Board members are to be removed “in accordance with [§7217(d)(3)], for good cause shown,” Congress would not have specified the necessary Commission finding in §7217(d)(3)—including formal procedures and detailed conditions—if Board members could also be removed without any finding at all. Cf. PCAOB Brief 6 (“Cause exists where” the §7217(d)(3) conditions are met).
Concerning private organizations like the New York Stock Exchange. Cf. §§78s(h)(4), 7217(d)(3). While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Alternatively, respondents portray the Act’s limitations on removal as irrelevant, because—as the Court of Appeals held—the Commission wields “at-will removal power over Board functions if not Board members.” 537 F. 3d, at 683 (emphasis added); accord, Brief for United States 27–28; PCAOB Brief 48. The Commission’s general “oversight and enforcement authority over the Board,” §7217(a), is said to “blunt[t] the constitutional impact of for-cause removal,” 537 F. 3d, at 683, and to leave the President no worse off than “if Congress had lodged the Board’s functions in the SEC’s own staff,” PCAOB Brief 15.

Broad power over Board functions is not equivalent to the power to remove Board members. The Commission may, for example, approve the Board’s budget, §7219(b), issue binding regulations, §§7202(a), 7217(b)(5), relieve the Board of authority, §7217(d)(1), amend Board sanctions, §7217(c), or enforce Board rules on its own, §§7202(b)(1), (c). But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.

Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents’ premise that the Commission’s power in this regard is plenary. As described above, the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. See supra, at 3–4. Its powers are, of course, subject to some latent Commission control. See supra, at 4–5. But the Act
nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.

The Government and the dissent suggest that the Commission could govern and direct the Board’s daily exercise of prosecutorial discretion by promulgating new SEC rules, or by amending those of the Board. Brief for United States 27; post, at 15. Enacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging the Board’s affairs. See §§78s(c), 7215(b)(1), 7217(b)(5); cf. 5 U. S. C. §553, 15 U. S. C. §7202(a), PCAOB Brief 24, n. 6. So the Government offers another proposal, that the Commission require the Board by rule to “secure SEC approval for any actions that it now may take itself.” Brief for United States 27. That would surely constitute one of the “limitations upon the activities, functions, and operations of the Board” that the Act forbids, at least without Commission findings equivalent to those required to fire the Board instead. §7217(d)(2). The Board thus has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction.

Finally, respondents suggest that our conclusion is contradicted by the past practice of Congress. But the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes “good

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8 Contrary to the dissent’s assertions, see post, at 15–16, the Commission’s powers to conduct its own investigations (with its own resources), to remove particular provisions of law from the Board’s bailiwick, or to require the Board to perform functions “other” than inspections and investigations, §7211(c)(5), are no more useful in directing individual enforcement actions.
cause, and rigorous procedures that must be followed prior to removal.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. See, e.g., PCAOB Brief 43. As Judge Kavanaugh noted in dissent below:

“Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.” 537 F. 3d, at 669.

The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. Post, at 23–31. The dissent itself, however, stresses the very size and variety of the Federal Government, see post, at 7–8, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board. See post, at 28–31.

For example, many civil servants within independent agencies would not qualify as “Officers of the United States,” who “exercis[e] significant authority pursuant to the laws of the United States,” Buckley, 424 U. S., at 126. The parties here concede that Board members are executive “Officers,” as that term is used in the Constitution.

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9One “may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its office[r].” United States v. Germaine, 99 U. S. 508, 509 (1879). The applicable proportion has of course increased dramatically since 1879.
See *supra*, at 4; see also Art. II, §2, cl. 2. We do not decide the status of other Government employees, nor do we decide whether “lesser functionaries subordinate to officers of the United States” must be subject to the same sort of control as those who exercise “significant authority pursuant to the laws.” *Buckley, supra*, at 126, and n. 162.

Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board. Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, see 5 U. S. C. §§2302(a)(2)(B), 3302, 7511(b)(2), and members of the Senior Executive Service may be reassigned or reviewed by agency heads (and entire agencies may be excluded from that Service by the President), see, e.g., §§3132(c), 3395(a), 4312(d), 4314(b)(3), (c)(3); cf. §2302(a)(2)(B)(ii). While the full extent of that authority is not before us, any such authority is of course wholly absent with respect to the Board. Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.\(^{10}\)

Finally, the dissent wanders far afield when it suggests that today’s opinion might increase the President’s author-

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\(^{10}\) For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges. See, e.g., 5 U. S. C. §§556(c), 3105. Whether administrative law judges are necessarily “Officers of the United States” is disputed. See, e.g., *Landry v. FDIC*, 204 F. 3d 1125 (CADC 2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§554(d), 3105, or possess purely recommendatory powers. The Government below refused to identify either “civil service tenure-protected employees in independent agencies” or administrative law judges as “precedent for the PCAOB.” 537 F. 3d 667, 699, n. 8 (CADC 2008) (Kavanaugh, J., dissenting); see Tr. of Oral Arg. in No. 07–5127 (CADC), pp. 32, 37–38, 42.
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ity to remove military officers. Without expressing any view whatever on the scope of that authority, it is enough to note that we see little analogy between our Nation’s armed services and the Public Company Accounting Oversight Board. Military officers are broadly subject to Presidential control through the chain of command and through the President’s powers as Commander in Chief. Art. II, §2, cl. 1; see, e.g., 10 U. S. C. §§162, 164(g). The President and his subordinates may also convene boards of inquiry or courts-martial to hear claims of misconduct or poor performance by those officers. See, e.g., §§822(a)(1), 823(a)(1), 892(3), 933–934, 1181–1185. Here, by contrast, the President has no authority to initiate a Board member’s removal for cause.

There is no reason for us to address whether these positions identified by the dissent, or any others not at issue in this case, are so structured as to infringe the President’s constitutional authority. Nor is there any substance to the dissent’s concern that the “work of all these various officials” will “be put on hold.” Post, at 31. As the judgment in this case demonstrates, restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might some day be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer’s continuance in office. The only issue in this case is whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot.

IV

Petitioners’ complaint argued that the Board’s “freedom from Presidential oversight and control” rendered it “and all power and authority exercised by it” in violation of the
Constitution. App. 46. We reject such a broad holding. Instead, we agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.

“Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,” severing any “problematic portions while leaving the remainder intact.” Ayotte v. Planned Parenthood of Northern New Eng., 546 U. S. 320, 328–329 (2006). Because “[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions,” Champlin Refining Co. v. Corporation Comm’n of Okla., 286 U. S. 210, 234 (1932), the “normal rule” is “that partial, rather than facial, invalidation is the required course,” Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 504 (1985). Putting to one side petitioners’ Appointments Clause challenges (addressed below), the existence of the Board does not violate the separation of powers, but the substantive removal restrictions imposed by §§7211(e)(6) and 7217(d)(3) do. Under the traditional default rule, removal is incident to the power of appointment. See, e.g., Sampson v. Murray, 415 U. S. 61, 70, n. 17 (1974); Myers, 272 U. S., at 119; Ex parte Hennen, 13 Pet., at 259–260. Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board’s actions, which are no less subject than the Commission’s own functions to Presidential oversight.

The Sarbanes-Oxley Act remains “fully operative as a law” with these tenure restrictions excised. New York, 505 U. S., at 186 (quoting Alaska Airlines, Inc. v. Brock, 480 U. S. 678, 684 (1987)). We therefore must sustain its remaining provisions “[u]nless it is evident that the Legislature would not have enacted those provisions . . . inde-
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pendently of that which is [invalid].” Ibid. (internal quotation marks omitted). Though this inquiry can sometimes be “elusive,” Chadha, 462 U. S., at 932, the answer here seems clear: The remaining provisions are not “incapable of functioning independently,” Alaska Airlines, 480 U. S., at 684, and nothing in the statute’s text or historical context makes it “evident” that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will. Ibid.; see also Ayotte, supra, at 330.

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board’s responsibilities so that its members would no longer be “Officers of the United States.” Or we could restrict the Board’s enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.

V

Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.

First, petitioners argue that Board members are principal officers requiring Presidential appointment with the Senate’s advice and consent. We held in Edmond v. United States, 520 U. S. 651, 662–663 (1997), that “[w]hether one is an ‘inferior’ officer depends on whether he has a superior,” and that “‘inferior officers’ are officers whose work is directed and supervised at some level” by other officers appointed by the President with the Senate’s
consent. In particular, we noted that “[t]he power to remove officers” at will and without cause “is a powerful tool for control” of an inferior. *Id.*, at 664. As explained above, the statutory restrictions on the Commission’s power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission’s other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a “Head of Department.”

But, petitioners argue, the Commission is not a “Department” like the “Executive departments” (e.g., State, Treasury, Defense) listed in 5 U. S. C. §101. In *Freytag*, 501 U. S., at 887, n. 4, we specifically reserved the question whether a “principal agency[, such as . . . the Securities and Exchange Commission,]” is a “Department” under the Appointments Clause. Four Justices, however, would have concluded that the Commission is indeed such a “Department,” see *id.*, at 918 (SCALIA, J., concurring in part and concurring in judgment), because it is a “free-standing, self-contained entity in the Executive Branch.” *id.*, at 915.

Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, see Brief for United States 37–39; PCAOB Brief 30–33, and we do. Respondents’ reading of the Appointments Clause is consistent with the common, near-contemporary definition of a “department” as a “separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.” 1 N. Webster, American Dictionary of the English Language (1828) (def. 2) (1995 facsimile ed.). It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint “an assistant, and deputy postmasters,
at all places where such shall be found necessary,” §3, 1 Stat. 234—thus treating him as the “Hea[d] of [a] Dep­artmen[t]” without the title of Secretary or any role in the President’s Cabinet. And it is consistent with our prior cases, which have never invalidated an appoint­ment made by the head of such an establish­ment. See Freytag, supra, at 917; cf. Burnap v. United States, 252 U. S. 512, 515 (1920); United States v. Germaine, 99 U. S. 508, 511 (1879). Because the Commission is a freestanding com­ponent of the Executive Branch, not subordinate to or con­tained within any other such component, it constitutes a “Departmen[t]” for the purposes of the Appointments Clause.\(^\text{11}\)

But petitioners are not done yet. They argue that the full Commission cannot constitutionally appoint Board members, because only the Chairman of the Commission is the Commission’s “Hea[d].”\(^\text{12}\) The Commission’s powers, however, are generally vested in the Commissioners jointly, not the Chairman alone. See, e.g., 15 U. S. C. §§77s, 77t, 78u, 78w. The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission’s policies. See

\(^{11}\)We express no view on whether the Commission is thus an “execu­tive Departmen[t]” under the Opinions Clause, Art. II, §2, cl. 1, or under Section 4 of the Twenty-Fifth Amendment. See Freytag v. Commissioner, 501 U. S. 868, 886–887 (1991).

\(^{12}\)The Board argued below that petitioners lack standing to raise this claim, because no member of the Board has been appointed over the Chairman’s objection, and so petitioners’ injuries are not fairly trace­able to an invalid appointment. See Defendants’ Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaint in Civil Action No. 1:06–cv–00217–JR (DC), Doc. 17, pp. 42–43; Brief for Appellees PCAOB et al. in No. 07–5127 (CADC), pp. 32–33. We cannot assume, however, that the Chairman would have made the same appointments acting alone; and petitioners’ standing does not require precise proof of what the Board’s policies might have been in that counterfactual world. See Glidden Co. v. Zdanok, 370 U. S. 530, 533 (1962) (plurality opinion).
Reorg. Plan No. 10 of 1950, §1(b)(1), 64 Stat. 1265. The Chairman is also appointed from among the Commissioners by the President alone, id., §3, at 1266, which means that he cannot be regarded as “the head of an agency” for purposes of the Reorganization Act. See 5 U. S. C. §904. (The Commission as a whole, on the other hand, does meet the requirements of the Act, including its provision that “the head of an agency [may] be an individual or a commission or board with more than one member.”)\(^\text{13}\)

As a constitutional matter, we see no reason why a multimember body may not be the “Head[...]” of a “Department[...]” that it governs. The Appointments Clause necessarily contemplates collective appointments by the “Courts of Law,” Art. II, §2, cl. 2, and each House of Congress, too, appoints its officers collectively, see Art. I, §2, cl. 5; id., §3, cl. 5. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere, including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember agencies. See Freytag, supra, at 918 (SCALIA, J., concurring in part and concurring in judgment); see also Classification Act of 1923, ch. 265, §2, 42 Stat. 1488 (defining “the head of the department” to mean “the officer or group of officers . . .

\(^{13}\)Petitioners contend that finding the Commission to be the head will invalidate numerous appointments made directly by the Chairman, such as those of the “heads of major [SEC] administrative units.” Reorg. Plan No. 10, §1(b)(2), at 1266. Assuming, however, that these individuals are officers of the United States, their appointment is still made “subject to the approval of the Commission.” Ibid. We have previously found that the department head’s approval satisfies the Appointments Clause, in precedents that petitioners do not ask us to revisit. See, e.g., United States v. Smith, 124 U. S. 525, 532 (1888); Germaine, 99 U. S., at 511; United States v. Hartwell, 6 Wall. 385, 393–394 (1868).
who are not subordinate or responsible to any other officer of the department” (emphasis added)); 37 Op. Atty. Gen. 227, 231 (1933) (endorsing collective appointment by the Civil Service Commission). We conclude that the Board members have been validly appointed by the full Commission.

In light of the foregoing, petitioners are not entitled to broad injunctive relief against the Board’s continued operations. But they are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive. See Bowsher, 478 U. S., at 727, n. 5 (concluding that a separation of powers violation may create a “here-and-now” injury that can be remedied by a court (internal quotation marks omitted)).

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority “would greatly diminish the intended and necessary responsibility of the chief magistrate himself.” The Federalist No. 70, at 478.

While we have sustained in certain cases limits on the President’s removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and
reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 08–861

FREE ENTERPRISE FUND AND BECKSTEAD AND WATTS, LLP, PETITIONERS v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 28, 2010]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, dissenting.

The Court holds unconstitutional a statute providing that the Securities and Exchange Commission can remove members of the Public Company Accounting Oversight Board from office only for cause. It argues that granting the “inferior officer[s]” on the Accounting Board “more than one level of good-cause protection . . . contravenes the President’s ‘constitutional obligation to ensure the faithful execution of the laws.’” Ante, at 2. I agree that the Accounting Board members are inferior officers. See ante, at 28–29. But in my view the statute does not significantly interfere with the President’s “executive Power.” Art. II, §1. It violates no separation-of-powers principle. And the Court’s contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

I

A

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes “necessary and proper” to the exercise of its specifically enumerated
constitutional authority. Art. I, §8, cl. 18. As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers’ efforts to create a Constitution that would “endure for ages to come.” McCulloch v. Maryland, 4 Wheat. 316, 415 (1819). It embodies their recognition that it would be “unwise” to prescribe “the means by which government should, in all future time, execute its powers.” Ibid. Such “immutable rules” would deprive the Government of the needed flexibility to respond to future “exigencies which, if foreseen at all, must have been seen dimly.” Ibid. Thus the Necessary and Proper Clause affords Congress broad authority to “create” governmental “offices” and to structure those offices “as it chooses.” Buckley v. Valeo, 424 U. S. 1, 138 (1976) (per curiam); cf. Lottery Case, 188 U. S. 321, 355 (1903). And Congress has drawn on that power over the past century to create numerous federal agencies in response to “various crises of human affairs” as they have arisen. McCulloch, supra, at 415 (emphasis deleted). Cf. Wong Yang Sung v. McGrath, 339 U. S. 33, 36–37 (1950).

On the other hand, the opening sections of Articles I, II, and III of the Constitution separately and respectively vest “all legislative Powers” in Congress, the “executive Power” in the President, and the “judicial Power” in the Supreme Court (and such “inferior Courts as Congress may from time to time ordain and establish”). In doing so, these provisions imply a structural separation-of-powers principle. See, e.g., Miller v. French, 530 U. S. 327, 341–342 (2000). And that principle, along with the instruction in Article II, §3 that the President “shall take Care that the Laws be faithfully executed,” limits Congress’ power to structure the Federal Government. See, e.g., INS v. Chadha, 462 U. S. 919, 946 (1983); Freytag v. Commissioner, 501 U. S. 868, 878 (1991); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U. S. 50, 64 (1982); Commodity Futures Trading Comm’n v. Schor, 478
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U. S. 833, 859–860 (1986). Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will. Myers v. United States, 272 U. S. 52 (1926).

But neither of these two principles is absolute in its application to removal cases. The Necessary and Proper Clause does not grant Congress power to free all Executive Branch officials from dismissal at the will of the President. Ibid. Nor does the separation-of-powers principle grant the President an absolute authority to remove any and all Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President’s authority to remove an officer from his post. See Humphrey’s Executor v. United States, 295 U. S. 602 (1935), overruling in part Myers, supra; Morrison v. Olson, 487 U. S. 654 (1988).

And we must here decide whether the circumstances surrounding the statute at issue justify such a limitation.

In answering the question presented, we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied in other separation-of-powers cases. See, e.g., Chadha, supra, at 946; Buckley, supra, at 124–125. That is because, with the exception of the general “vesting” and “take care” language, the Constitution is completely “silent with respect to the power of removal from office.” Ex parte Hennen, 13 Pet. 230, 258 (1839); see also Morrison, supra, at 723 (SCALIA, J., dissenting) (“There is, of course, no provision in the Constitution stating who may remove executive officers . . .”).

Nor does history offer significant help. The President’s power to remove Executive Branch officers “was not discussed in the Constitutional Convention.” Myers, supra, at 109–110. The First Congress enacted federal statutes
that limited the President’s ability to oversee Executive Branch officials, including the Comptroller of the United States, federal district attorneys (precursors to today’s United States Attorneys), and, to a lesser extent, the Secretary of the Treasury. See, e.g., Lessig, Readings By Our Unitary Executive, 15 Cardozo L. Rev. 175, 183–184 (1993); Teifer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B. U. L. Rev. 59, 74–75 (1983); Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 240–241 (1989) (hereinafter Casper); H. Bruff, Balance of Forces: Separation of Powers in the Administrative State 414–417 (2006). But those statutes did not directly limit the President’s authority to remove any of those officials—“a subject” that was “much disputed” during “the early history of this government,” “and upon which a great diversity of opinion was entertained.” Hennen, supra, at 259; see also United States ex rel. Goodrich v. Guthrie, 17 How. 284, 306 (1855) (McLean, J., dissenting); Casper 233–237 (recounting the Debate of 1789). Scholars, like Members of this Court, have continued to disagree, not only about the inferences that should be drawn from the inconclusive historical record, but also about the nature of the original disagreement. Compare ante, at 11; Myers, supra, at 114 (majority opinion of Taft, C. J.); and Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021 (2006), with, e.g., Myers, supra, at 194 (McReynolds, J., dissenting); Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 369 (1927); Lessig & Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 25–26 (1994) (hereinafter Lessig & Sunstein); and L. Fisher, President and Congress: Power and Policy 86–89 (1972).

Nor does this Court’s precedent fully answer the question presented. At least it does not clearly invalidate the provision in dispute. See Part II–C, infra. In Myers,
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supra, the Court invalidated—for the first and only time—a congressional statute on the ground that it unduly limited the President’s authority to remove an Executive Branch official. But soon thereafter the Court expressly disapproved most of Myers’ broad reasoning. See Humphrey’s Executor, 295 U. S., at 626–627, overruling in part Myers, supra; Wiener v. United States, 357 U. S. 349, 352 (1958) (stating that Humphrey’s Executor “explicitly ‘disapproved’” of much of the reasoning in Myers). Moreover, the Court has since said that “the essence of the decision in Myers was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power.’” Morrison, supra, at 686 (emphasis added). And that feature of the statute—a feature that would aggrandize the power of Congress—is not present here. Congress has not granted itself any role in removing the members of the Accounting Board. Cf. Freytag, 501 U. S., at 878 (“separation-of-powers jurisprudence generally focuses on the danger of one branch’s aggrandizing its power at the expense of another branch” (emphasis added)); Buckley, 424 U. S., at 129 (same); Schor, 478 U. S., at 856 (same); Bowsher v. Synar, 478 U. S. 714, 727 (1986) (same). Compare Myers, supra, (striking down statute where Congress granted itself removal authority over Executive Branch official), with Humphrey’s Executor, supra, (upholding statute where such aggrandizing was absent); Wiener, supra (same); Morrison, supra (same).

In short, the question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles. And no text, no history, perhaps no precedent provides any clear answer. Cf. Chicago v. Morales, 527 U. S. 41, 106 (1999) (Thomas, J., joined by Rehnquist, C. J., and Scalia, J., dissenting) (expressing the view that “this Court” is “most vulnerable” when “it deals with judge-made constitutional law” that lacks “roots in the
language” of the Constitution (internal quotation marks omitted)).

B

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. Thus, in *Crowell v. Benson*, 285 U. S. 22, 53 (1932), a foundational separation-of-powers case, the Court said that “regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required.” The Court repeated this injunction in *Schor* and again in *Morrison*. See *Schor*, supra, at 854 (stating that the Court must look “‘beyond form to the substance of what’ Congress has done”); *Morrison*, 487 U. S., at 689–690 (“The analysis contained in our removal cases is designed *not to define rigid categories* of those officials who may or may not be removed at will by the President,” but rather asks whether, given the “functions of the officials in question,” a removal provision “interfere[s] with the President’s exercise of the ‘executive power’” (emphasis added)). The Court has thereby written into law Justice Jackson’s wise perception that “the Constitution ... contemplates that practice will integrate the dispersed powers into a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (opinion concurring in judgment) (emphasis added). See also *ibid.* (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context”).

It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line rules. For one thing, that approach embodies the intent of the Framers. As Chief Justice Marshall long
ago observed, our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and “exigencies,” which at the time of the founding could be seen only “dimly,” and perhaps not at all. *McCulloch*, 4 Wheat., at 415.


Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides. Those statutes create a host of different organizational structures. Sometimes
they delegate administrative authority to the President directly, e.g., 10 U. S. C. §2031(a)(1); 42 U. S. C. §5192(c); sometimes they place authority in a long-established Cabinet department, e.g., 7 U. S. C. §1637b(c)(1); 12 U. S. C. §5221(b)(2) (2006 ed., Supp. II); sometimes they delegate authority to an independent commission or board, e.g., 15 U. S. C. §4404(b); 28 U. S. C. §994; sometimes they place authority directly in the hands of a single senior administrator, e.g., 15 U. S. C. §657d(c)(4); 42 U. S. C. §421; sometimes they place it in a sub-cabinet bureau, office, division or other agency, e.g., 18 U. S. C. §4048; sometimes they vest it in multimember or multiagency task groups, e.g. 5 U. S. C. §§593–594; 50 U. S. C. §402 (2006 ed. and Supp. II); sometimes they vest it in commissions or advisory committees made up of members of more than one branch, e.g., 20 U. S. C. §42(a); 28 U. S. C. §991(a) (2006 ed., Supp. II); 42 U. S. C. §1975; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators, e.g., 5 U. S. C. §9902(a) (2006 ed., Supp. II); 7 U. S. C. §136i–1(g); and sometimes they permit state or local governments to participate as well, e.g., 7 U. S. C. §2009aa–1(a). Statutes similarly grant administrators a wide variety of powers—for example, the power to make rules, develop informal practices, investigate, adjudicate, impose sanctions, grant licenses, and provide goods, services, advice, and so forth. See generally 5 U. S. C. §500 et seq.

The upshot is that today vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government’s work, it is not surprising that administrative
units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens’ song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official’s regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Neither is power always susceptible to the equations of elementary arithmetic. A rule that takes power from a President’s friends and allies may weaken him. But a rule that takes power from the President’s opponents may strengthen him. And what if the rule takes power from a functionally neutral independent authority? In that case, it is difficult to predict how the President’s power is affected in the abstract.

These practical reasons not only support our precedents’ determination that cases such as this should examine the specific functions and context at issue; they also indicate that judges should hesitate before second-guessing a “for cause” decision made by the other branches. See, e.g., Chadha, 462 U. S., at 944 (applying a “presumption that
the challenged statute is valid”); Bowscher, 478 U.S., at 736 (STEVENS, J., concurring in judgment). Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration, and the manner in which power, including and most especially political power, operates in context.

There is no indication that the two comparatively more expert branches were divided in their support for the “for cause” provision at issue here. In this case, the Act embodying the provision was passed by a vote of 423 to 3 in the House of Representatives and a by vote of 99 to 0 in the Senate. 148 Cong. Rec. 14458, 14505 (2002). The creation of the Accounting Board was discussed at great length in both bodies without anyone finding in its structure any constitutional problem. See id., at 12035–12037, 12112–12132, 12315–12323, 12372–12377, 12488–12508, 12529–12534, 12612–12618, 12673–12680, 12734–12751, 12915–12960, 13347–13354, 14439–14458, 14487–14506. The President signed the Act. And, when he did so, he issued a signing statement that critiqued multiple provisions of the Act but did not express any separation-of-powers concerns. See President’s Statement on Signing the Sarbanes-Oxley Act of 2002, 30 Weekly Comp. of Pres. Doc. 1286 (2002). Cf. ABA, Report of Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 15 (2006), online at http://www signingsstatementsaba_final_signing_statements_recommendations-report_7-24-06.pdf (all Internet materials as visited June 24, 2010, and available in Clerk of Court’s case file) (noting that President Bush asserted “over 500” “constitutional objections” through signing statements “in his first term,” including 82 “related to his theory of the ‘unitary executive’”).

Thus, here, as in similar cases, we should decide the constitutional question in light of the provision’s practical functioning in context. And our decision should take account of the Judiciary’s comparative lack of institutional
II

A

To what extent then is the Act’s “for cause” provision likely, as a practical matter, to limit the President’s exercise of executive authority? In practical terms no “for cause” provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency’s budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress’ ability to assert influence) are more likely to affect the President’s power to get something done. That is why President Truman complained that “the powers of the President amount to” bringing “people in and try[ing] to persuade them to do what they ought to do without persuasion.” C. Rossiter, The American Presidency 154 (2d rev. ed. 1960). And that is why scholars have written that the President “is neither dominant nor powerless” in his relationships with many Government entities, “whether denominated executive or independent.” Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 583 (1984) (hereinafter Strauss). Those entities “are all subject to presidential direction in significant aspects of their functioning, and [are each] able to resist presidential direction in others.” Ibid. (emphasis added).

Indeed, notwithstanding the majority’s assertion that the removal authority is “the key” mechanism by which the President oversees inferior officers in the independent agencies, ante, at 20, it appears that no President has ever
actually sought to exercise that power by testing the scope of a “for cause” provision. See Bruff, Bringing the Independent Agencies in from the Cold, 62 Vanderbilt L. Rev. En Banc 63, 68 (2009), online at http://vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf (noting that “Presidents do not test the limits of their power by removing commissioners . . . ”); Lessig & Sunstein 110–112 (noting that courts have not had occasion to define what constitutes “cause” because Presidents rarely test removal provisions).

But even if we put all these other matters to the side, we should still conclude that the “for cause” restriction before us will not restrict presidential power significantly. For one thing, the restriction directly limits, not the President’s power, but the power of an already independent agency. The Court seems to have forgotten that fact when it identifies its central constitutional problem: According to the Court, the President “is powerless to intervene” if he has determined that the Board members’ “conduct merit[s] removal” because “[t]hat decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control.” Ante, at 14–15. But so long as the President is legitimately foreclosed from removing the Commissioners except for cause (as the majority assumes), nullifying the Commission’s power to remove Board members only for cause will not resolve the problem the Court has identified: The President will still be “powerless to intervene” by removing the Board members if the Commission reasonably decides not to do so.

In other words, the Court fails to show why two layers of “for cause” protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the President’s powers than one layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to
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keep a Board member in office. Neither layer is relevant.

2. The President and the Commission both want to dismiss a Board member. Layer Two stops them both from doing so without cause. The President’s ability to remove the Commission (Layer One) is irrelevant, for he and the Commission are in agreement.

3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President’s contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.

4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two helps the President, for it hinders the Commission’s ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority’s decision to eliminate only Layer Two accomplishes virtually nothing. And that is because a removal restriction’s effect upon presidential power depends not on the presence of a “double-layer” of for-cause removal, as the majority pretends, but rather on the real-world nature of the President’s relationship with the Commission. If the President confronts a Commission that seeks to resist his policy preferences—a distinct possibility when, as here, a Commission’s membership must reflect both political parties, 15 U.S.C. §78d(a)—the restriction on the Commission’s ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to implement his policy preferences, Layer One is irrelevant, for the Presi-
dent and Commission see eye to eye.

In order to avoid this elementary logic, the Court creates two alternative scenarios. In the first, the Commission and the President both want to remove a Board member, but have varying judgments as to whether they have good “cause” to do so—*i.e.*, the President and the Commission both conclude that a Board member should be removed, but disagree as to whether that conclusion (which they have both reached) is *reasonable*. *Ante*, at 14–15. In the second, the President wants to remove a Board member and the Commission disagrees; but, notwithstanding its freedom to make reasonable decisions independent of the President (afforded by Layer One), the Commission (while apparently telling the President that it agrees with him and would like to remove the Board member) uses Layer Two as an “excuse” to pursue its actual aims—an excuse which, given Layer One, it does not need. *Ante*, at 15, n. 4.

Both of these circumstances seem unusual. I do not know if they have ever occurred. But I do not deny their logical possibility. I simply doubt their importance. And the fact that, with respect to the President’s power, the double layer of for-cause removal sometimes might help, sometimes might hurt, leads me to conclude that its overall effect is at most indeterminate.

But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the statute provides the Commission with full authority and virtually comprehensive control over all of the Board’s functions. Those who created the Accounting Board modeled it, in terms of structure and authority, upon the semiprivate regulatory bodies prevalent in the area of financial regulation, such as the New York Stock Exchange and other similar self-regulating organizations. See generally Brief for Former Chairmen of the SEC as *Amici Curiae* (hereinafter Brief
for Former SEC Chairmen). And those organizations—which rely on private financing and on officers drawn from the private sector—exercise rulemaking and adjudicatory authority that is pervasively controlled by, and is indeed “entirely derivative” of, the SEC. See National Assn. of Securities Dealers, Inc. v. SEC, 431 F. 3d 803, 806 (CADC 2005).

Adhering to that model, the statute here gives the Accounting Board the power to adopt rules and standards “relating to the preparation of audit reports”; to adjudicate disciplinary proceedings involving accounting firms that fail to follow these rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal obligations. See 15 U.S.C. §§7211–7216. But, at the same time,

- No Accounting Board rule takes effect unless and until the Commission approves it, §7217(b)(2);
- The Commission may “abrogat[e], delet[e] or ad[d] to” any rule or any portion of a rule promulgated by the Accounting Board whenever, in the Commission’s view, doing so “further[s] the purposes” of the securities and accounting-oversight laws, §7217(b)(5);
- The Commission may review any sanction the Board imposes and “enhance, modify, cancel, reduce, or require the remission of” that sanction if it find’s the Board’s action not “appropriate,” §§7215(e), 7217(c)(3);
- The Commission may promulgate rules restricting or directing the Accounting Board’s conduct of all inspections and investigations, §§7211(c)(3), 7214(h), 7215(b)(1)–(4);
- The Commission may itself initiate any investigation or promulgate any rule within the Accounting Board’s purview, §7202, and may also remove any
Accounting Board member who has unreasonably “failed to enforce compliance with” the relevant “rule[s], or any professional standard,” §7217(d)(3)(C) (emphasis added);

- The Commission may at any time “relieve the Board of any responsibility to enforce compliance with any provision” of the Act, the rules, or professional standards if, in the Commission’s view, doing so is in “the public interest,” §7217(d)(1) (emphasis added).

As these statutory provisions make clear, the Court is simply wrong when it says that “the Act nowhere gives the Commission effective power to start, stop, or alter” Board investigations. Ante, at 23–24. On the contrary, the Commission’s control over the Board’s investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself: It controls the Board’s budget, §§7219(b), (d)(1); it can assign to the Board any “duties or functions” that it “determines are necessary or appropriate,” §7211(c)(5); it has full “oversight and enforcement authority over the Board,” §7217(a), including the authority to inspect the Board’s activities whenever it believes it “appropriate” to do so, §7217(d)(2) (emphasis added). And it can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act, §7217(d)(3). Cf. Shurtleff v. United States, 189 U. S. 311, 314–319 (1903) (holding that removal authority is not always “restricted to a removal for th[e] causes” set forth by statute); Bowscher, 478 U. S., at 729 (rejecting the “arguable premiss[e]” “that the enumeration of certain specified causes of removal excludes the possibility of removal for other causes”). Contra, ante, at 22, n. 7. See generally Pildes, Putting Power Back into Separation of Powers Analysis: Why the SEC-PCAOB Structure is Constitu-
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What is left? The Commission’s inability to remove a Board member whose perfectly reasonable actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of the President’s serious concern about such a matter? Everyone concedes that the President’s control over the Commission is constitutionally sufficient. See Humphrey’s Executor, 295 U. S. 602; Wiener, 357 U. S. 349; ante, at 1–2. And if the President’s control over the Commission is sufficient, and the Commission’s control over the Board is virtually absolute, then, as a practical matter, the President’s control over the Board should prove sufficient as well.

B

At the same time, Congress and the President had good reason for enacting the challenged “for cause” provision. First and foremost, the Board adjudicates cases. See 15 U. S. C. §7215. This Court has long recognized the appropriateness of using “for cause” provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. Humphrey’s Executor, supra, at 623–628; see also Wiener, supra, at 355–356; Morrison, 487 U. S., at 690–691, and n. 30; McAllister v. United States, 141 U. S. 174, 191–201 (1891) (Field, J., dissenting). Indeed, as early as 1789 James Madison stated that “there may be strong reasons why an” executive “officer” such as the Comptroller of the United States “should not hold his office at the pleasure of the Executive branch” if one of his “principal dut[ies]” “partakes strongly of the judicial character.” 1 Annals of Congress 611–612; cf. ante, at 19, n. 6 (noting that the statute Congress ulti-
mately enacted limited Presidential control over the Comptroller in a different fashion); see supra, at 4. The Court, however, all but ignores the Board’s adjudicatory functions when conducting its analysis. See, e.g., ante, at 17–18. And when it finally does address that central function (in a footnote), it simply asserts that the Board does not “perform adjudicative . . . functions,” ante, at 26, n. 10 (emphasis added), an assertion that is inconsistent with the terms of the statute. See §7215(c)(1) (governing “proceeding[s] by the Board to determine whether a registered public accounting firm, or an associated person thereof, should be disciplined”).

Moreover, in addition to their adjudicatory functions, the Accounting Board members supervise, and are themselves, technical professional experts. See §7211(e)(1) (requiring that Board members “have a demonstrated” technical “understanding of the responsibilities” and “obligations of accountants with respect to the preparation and issuance of audit reports”). This Court has recognized that the “difficulties involved in the preparation of” sound auditing reports require the application of “scientific accounting principles.” United States v. Anderson, 269 U. S. 422, 440 (1926). And this Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise. See Humphrey’s Executor, supra, at 624–626; see also Breger & Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1131–1133 (2000) (explaining how the need for administrators with “technical competence,” “apolitical expertise,” and skill in “scientific management” led to original creation of independent agencies) (hereinafter Breger & Edles); J. Landis, The Administrative Process 23 (1938) (similar); Woodrow Wilson, Democracy and Efficiency, 87 Atlantic Monthly 289, 299 (1901) (describing need for insulation of experts from political influences).
Here, the justification for insulating the “technical experts” on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection. See, e.g., 148 Cong. Rec. 12036, 12115, 13352–13355. It did so for good reason. See ante, at 3 (noting that the Accounting Board was created in response to “a series of celebrated accounting debacles”); H. R. Rep. No. 107–414, pp. 18–19 (2002) (same); Brief for Former SEC Chairmen 8–9. And historically, this regulatory subject matter—financial regulation—has been thought to exhibit a particular need for independence. See e.g., 51 Cong. Rec. 8857 (1914) (remarks of Sen. Morgan upon creation of the Federal Trade Commission) (“[I]t is unsafe for an . . . administrative officer representing a great political party . . . to hold the power of life and death over the great business interests of this country. . . . That is . . . why I believe in . . . taking these business matters out of politics”). And Congress, by, for example, providing the Board with a revenue stream independent of the congressional appropriations process, §7219, helped insulate the Board from congressional, as well as other, political influences. See, e.g., 148 Cong. Rec. 12036 (statement of Sen. Stabenow).

In sum, Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal. Cf. Civil Service Comm’n v. Letter Carriers, 413 U. S. 548, 565 (1973) (“[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent”). And in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear-power production, the Court’s assertion that we should simply learn to get by “without being” regulated “by ex-
"experts" is, at best, unrealistic—at worst, dangerously so. Ante, at 18.

C

Where a “for cause” provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality. First, in considering a related issue in *Nixon v. Administrator of General Services*, 433 U. S. 425 (1977), the Court made clear that when “determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.” Id., at 443. The Court said the same in *Morrison*, where it upheld a restriction on the President's removal power. 487 U. S., at 691 (“[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light”). Here, the removal restriction may somewhat diminish the Commission's ability to control the Board, but it will have little, if any, negative effect in respect to the President's ability to control the Board, let alone to coordinate the Executive Branch. See Part II–A, supra. Indeed, given *Morrison*, where the Court upheld a restriction that significantly interfered with the President's important historic power to control criminal prosecutions, a “‘purely executive’” function, 487 U. S., at 687–689, the constitutionality of the present restriction would seem to follow *a fortiori*.

Second, as previously pointed out, this Court has repeatedly upheld “for cause” provisions where they restrict the President's power to remove an officer with adjudicatory responsibilities. Compare *Humphrey's Executor*, 295 U. S., at 623–628; *Wiener*, 357 U. S., at 355; *Schor*, 478
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U. S., at 854; Morrison, supra, at 691, n. 30, with ante, at 17–18 (ignoring these precedents). And we have also upheld such restrictions when they relate to officials with technical responsibilities that warrant a degree of special independence. E.g., Humphrey’s Executor, supra, at 624. The Accounting Board’s functions involve both kinds of responsibility. And, accordingly, the Accounting Board’s adjudicatory responsibilities, the technical nature of its job, the need to attract experts to that job, and the importance of demonstrating the nonpolitical nature of the job to the public strongly justify a statute that assures that Board members need not fear for their jobs when competently carrying out their tasks, while still maintaining the Commission as the ultimate authority over Board policies and actions. See Part II–B, supra.

Third, consider how several cases fit together in a way that logically compels a holding of constitutionality here. In Perkins, 116 U. S., at 483, 484—which was reaffirmed in Myers, 272 U. S., at 127 and in Morrison, supra, at 689, n. 27—the Court upheld a removal restriction limiting the authority of the Secretary of the Navy to remove a “cadet-engineer,” whom the Court explicitly defined as an “inferior officer.” The Court said,

“We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.” Perkins, supra, at 485 (emphasis added; internal quotation marks omitted).

See also Morrison, supra, at 723–724 (SCALIA, J., dissenting) (agreeing that the power to remove an “inferior offi-
cer” who is appointed by a department head can be restricted). Cf. ante, at 30–33 (holding that SEC Commissioners are “Heads of Departments”).

In Humphrey’s Executor, the Court held that Congress may constitutionally limit the President’s authority to remove certain principal officers, including heads of departments. 295 U.S., at 627–629. And the Court has consistently recognized the validity of that holding. See Wiener, supra; United States v. Nixon, 418 U.S. 683, 706 (1974); Buckley, 424 U.S., at 133–136; Chadha, 462 U.S., at 953, n. 16; Bowscher, 478 U.S., at 725–726; Morrison, supra, at 686–693; Mistretta v. United States, 488 U.S. 361, 410–411 (1989).

And in Freytag, 501 U.S., at 921, JUSTICE SCALIA stated in a concurring opinion written for four Justices, including JUSTICE KENNEDY, that “adjusting the remainder of the Constitution to compensate for Humphrey’s Executor is a fruitless endeavor.” In these Justices’ view, the Court should not create a separate constitutional jurisprudence for the “independent agencies.” That being so, the law should treat their heads as it treats other Executive Branch heads of departments. Consequently, as the Court held in Perkins, Congress may constitutionally “limit and restrict” the Commission’s power to remove those whom they appoint (e.g., the Accounting Board members).

Fourth, the Court has said that “[o]ur separation-of-powers jurisprudence generally focuses on the danger of one branch’s aggrandizing its power at the expense of another branch.” Freytag, supra, at 878 (emphasis added); accord, Buckley, supra, at 129; Schor, supra, at 856; Morrison, supra, at 686; cf. Bowscher, supra. Indeed, it has added that “the essence of the decision in Myers,” which is the only one of our cases to have struck down a “for cause” removal restriction, “was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove.’” Morrison, supra, at 686 (quoting
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Myers, supra, at 161; emphasis added). Congress here has “drawn” no power to itself to remove the Board members. It has instead sought to limit its own power, by, for example, providing the Accounting Board with a revenue stream independent of the congressional appropriations process. See supra, at 19; see also Brief for Former SEC Chairmen 16. And this case thereby falls outside the ambit of the Court’s most serious constitutional concern.

In sum, the Court’s prior cases impose functional criteria that are readily met here. Once one goes beyond the Court’s elementary arithmetical logic (i.e., “one plus one is greater than one”) our precedent virtually dictates a holding that the challenged “for cause” provision is constitutional.

D

We should ask one further question. Even if the “for cause” provision before us does not itself significantly interfere with the President’s authority or aggrandize Congress’ power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President’s central constitutional role? Cf. Strauss 625–626. The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this “for cause” provision might bring about.

The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding—an uncertainty that the Court’s opinion both reflects and generates. The Court suggests, for example, that its rule may not apply where an inferior officer “perform[s] adjudicative . . . functions.” Cf. ante, at 26, n. 10. But the Accounting Board performs adjudicative functions. See
*FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BD.*

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*supra,* at 17–18. What, then, are we to make of the Court’s potential exception? And would such an exception apply to an administrative law judge who also has important administrative duties beyond pure adjudication? See, *e.g.,* 8 CFR §1003.9, 34 CFR §81.4 (2009). The Court elsewhere suggests that its rule may be limited to removal statutes that provide for “judicial review of an effort to remove” an official for cause. *Ante,* at 22; *ante,* at 25. But we have previously stated that all officers protected by a for-cause removal provision and later subject to termination are entitled to “notice and [a] hearing” in the “courts,” as without such review “the appointing power” otherwise “could remove at pleasure or for such cause as [only] it deemed sufficient.” *Reagan v. United States,* 182 U.S. 419, 425 (1901); *Shurtleff,* 189 U.S., at 314; cf. *Humphrey’s Executor,* *supra* (entertaining civil suit challenging removal). But cf. *Bowsher,* *supra,* at 729. What weight, then, should be given to this hint of an exception?

The Court further seems to suggest that its holding may not apply to inferior officers who have a different relationship to their appointing agents than the relationship between the Commission and the Board. See *ante,* at 22, 24–26. But the only characteristic of the “relationship” between the Commission and the Board that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal. See, *e.g.,* *ante,* at 23 (“Broad power over Board functions is not equivalent to the power to remove Board members”). Why then would any different relationship that also includes two layers of for-cause removal survive where this one has not? Cf. Part II–A, *supra* (describing the Commission’s near absolute control over the Board). In a word, what differences are relevant? If the Court means to state that its holding in fact applies only where Congress has “enacted an unusually high standard” of for-cause removal—and does not otherwise render two layers of “‘ordinary’ for-cause re-
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removal unconstitutional—I should welcome the statement. Ante, at 22 (emphasis added); see also ante, at 24–25, 15, 22, (underscoring this statute’s “sharply circumscribed definition of what constitutes ‘good cause’” and its “rigorous,” “significant and unusual [removal] protections”). But much of the majority’s opinion appears to avoid so narrow a holding in favor of a broad, basically mechanical rule—a rule that, as I have said, is divorced from the context of the case at hand. Compare Parts III–A, III–B, III–C, ante, with Parts II–A, II–B, II–C, supra. And such a mechanical rule cannot be cabined simply by saying that, perhaps, the rule does not apply to instances that, at least at first blush, seem highly similar. A judicial holding by its very nature is not “a restricted railroad ticket, good for” one “day and train only.” Smith v. Allwright, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

The Court begins to reveal the practical problems inherent in its double-for-cause rule when it suggests that its rule may not apply to “the civil service.” Ante, at 26. The “civil service” is defined by statute to include “all appointive positions in . . . the Government of the United States,” excluding the military, but including all civil “officer[s]” up to and including those who are subject to Senate confirmation. 5 U. S. C. §§2101, 2102(a)(1)(B), 2104. The civil service thus includes many officers indistinguishable from the members of both the Commission and the Accounting Board. Indeed, as this Court recognized in Myers, the “competitive service”—the class within the broader civil service that enjoys the most robust career protection—“includes a vast majority of all the civil officers” in the United States. 272 U. S., at 173 (emphasis added); 5 U. S. C. §2102(c).

But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, cf. ante, at 26 (leaving this question open), the exclusion would be insufficient. This is because the Court’s
“double for-cause” rule applies to appointees who are “inferior officer[s].” Ante, at 2. And who are they? Courts and scholars have struggled for more than a century to define the constitutional term “inferior officers,” without much success. See 2 J. Story, Commentaries on the Constitution §1536, pp. 397–398 (3d ed. 1858) ("[T]here does not seem to have been any exact line drawn, who are and who are not to be deemed inferior officers, in the sense of the constitution"); Edmond v. United States, 520 U. S. 651, 661 (1997) ("Our cases have not set forth an exclusive criterion for [defining] inferior officers"); Memorandum from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause, p. 3 (Apr. 16, 2007) (hereinafter OLC Memo), online at http://www.justice.gov/olc/2007/appointmentsclausev10.pdf ("[T]he Supreme Court has not articulated the precise scope and application of the [Inferior Officer] Clause's requirements"); Konecke, The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office, 5 Seton Hall Const. L. J. 489, 492 (1995) (same); Burkoff, Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335, 1347, 1364 (1976) (describing our early precedent as “circular” and our later law as “not particularly useful”). The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority’s new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court’s opinion) threatens serious harm.

The problem is not simply that the term “inferior officer” is indefinite but also that efforts to define it inevitably
conclude that the term’s sweep is unusually broad. Consider the Court’s definitions: Inferior officers are, *inter alia*, (1) those charged with “the administration and enforcement of the public law,” *Buckley*, 424 U. S., at 139; *ante*, at 2; (2) those granted “significant authority,” 424 U. S., at 126; *ante*, at 25; (3) those with “responsibility for conducting civil litigation in the courts of the United States,” 424 U. S., at 140; and (4) those “who can be said to hold an office,” *United States v. Germaine*, 99 U. S. 508, 510 (1879), that has been created either by “regulations” or by “statute,” *United States v. Mouat*, 124 U. S. 303, 307–308 (1888).

Consider the definitional conclusion that the Department of Justice more recently reached: An “inferior officer” is anyone who holds a “continuing” position and who is “invested by legal authority with a portion of the sovereign powers of the federal Government,” including, *inter alia*, the power to “arrest criminals,” “seize persons or property,” “issue regulations,” “issue . . . authoritative legal opinions,” “conduct civil litigation,” “collect revenue,” represent “the United States to foreign nations,” “command” military force, or *enter into “contracts”* on behalf “of the nation.” OLC Memo 1, 4, 12–13, 15–16 (internal quotation marks omitted; emphasis added).

And consider the fact that those whom this Court has *held* to be “officers” include: (1) a district court clerk, *Hennen*, 13 Pet., at 258; (2) “thousands of clerks in the Departments of the Treasury, Interior and the other[]” departments, *Germaine*, *supra*, at 511, who are responsible for “the records, books, and papers appertaining to the office,” *Hennen*, *supra*, at 259; (3) a clerk to “the assistant treasurer” stationed “at Boston,” *United States v. Hartwell*, 6 Wall. 385, 392 (1868); (4 & 5) an “assistant-surgeon” and a “cadet-engineer” appointed by the Secretary of the Navy, *United States v. Moore*, 95 U. S. 760, 762 (1878); *Perkins*, 116 U. S., at 484; (6) election monitors, *Ex
parte Siebold, 100 U. S. 371, 397–399 (1880); (7) United States attorneys, Myers, supra, at 159; (8) federal marshals, Sieblod, supra, at 397; Morrison, 487 U. S., at 676; (9) military judges, Weiss v. United States, 510 U. S., 163, 170 (1994); (10) judges in Article I courts, Freytag, 501 U. S., at 880–881; and (11) the general counsel of the Department of Transportation, Edmond v. United States, 520 U. S. 651 (1997). Individual Members of the Court would add to the list the Federal Communication Commission’s managing director, the Federal Trade Commission’s “secretary,” the general counsel of the Commodity Futures Trading Commission, and more generally, bureau chiefs, general counsels, and administrative law judges, see Freytag, supra, at 918–920 (SCALIA, J., concurring in part and concurring in judgment), as well as “ordinary commissioned military officers,” Weiss, supra, at 182 (Souter, J., concurring).

Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court’s holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus and other agencies whose heads are by statute removable only “for cause.” I have found 48 such agencies, which I have listed in Appendix A, infra. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only “for cause.” I have identified 573 such high-ranking officials, whom I have listed in Appendix B, infra. They include most of the leadership of the Nuclear Regulatory Commission (including that agency’s executive director as well as the directors of its Office of Nuclear Reactor Regulation and Office of Enforcement), virtually all of the leadership of the Social Security Administration, the
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effective directors of the Federal Energy Regulatory Commission and the Federal Trade Commission, as well as the general counsels of the Chemical Safety Board, the Federal Mine Safety and Health Review Commission, and the National Mediation Board.

This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES), see 5 U. S. C. §§2101a, 3132(a)(2), a group of high-ranking officials distinct from the “competitive service,” see §2101(a)(1)(C), who “serve in the key positions just below the top Presidential appointees,” Office of Personnel Management, About the Senior Executive Service, online at http://www.opm.gov/SES/about_ses/index.asp; §2102(a)(1)(C), and who are, without exception, subject to “removal” only for cause. §§7542–7543; see also §2302(a)(2) (substantially limiting conditions under which “a career appointee in the Senior Executive Service” may be “transfer[red], or reassign[ed]”). SES officials include, for example, the Director of the Bureau of Prisons, the Director of the National Drug Intelligence Center, and the Director of the Office of International Monetary Policy in the Treasury Department. See Senate Committee on Homeland Security and Government Affairs, United States Government Policy and Supporting Positions (2008), pp. 99, 103, 129 (hereinafter Plum Book). And by virtually any definition, essentially all SES officials qualify as “inferior officers,” for their duties, as defined by statute, require them to “direct the work of an organizational unit,” carry out high-level managerial functions, or “otherwise exercis[e] important policy-making, policy-determining, or other executive functions.” §3132(a)(2) (emphasis added). Cf. ante, at 2 (describing an “inferior officer” as someone who “determines the policy and enforces the laws of the United States”); ante, at 26 (acknowledging that career SES appointees in independent agencies may be rendered unconstitutional in future cases). Is the SES exempt from today’s rule or is it
not? The Court, after listing reasons why the SES may be different, simply says that it will not "address[s]" the matter. Ante, at 27. Perhaps it does not do so because it cannot do so without revealing the difficulty of distinguishing the SES from the Accounting Board and thereby also revealing the inherent instability of the legal rule it creates.

The potential list of those whom today's decision affects is yet larger. As Justice Scalia has observed, administrative law judges (ALJs) "are all executive officers." Freytag, 501 U. S., at 910 (opinion concurring in part and concurring in judgment) (emphasis deleted); see also, e.g., id., at 881 (majority opinion) ("[A] [tax-court] special trial judge is an 'inferior Officer'"); Edmond, supra, at 654 ("[M]ilitary trial and appellate judges are [inferior] officers"). But cf. ante, at 26, n. 10. And ALJs are each removable "only for good cause established and determined by the Merit Systems Protection Board," 5 U. S. C. §§7521(a)-(b). But the members of the Merit Systems Protection Board are themselves protected from removal by the President absent good cause. §1202(d).

My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies. See Appendix C, infra; see also Memorandum of Juanita Love, Office of Personnel Management, to Supreme Court Library (May 28, 2010) (available in Clerk of Court's case file). These ALJs adjudicate Social Security benefits, employment disputes, and other matters highly important to individuals. Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional? Cf. ante, at 26, n. 10 ("[O]ur holding also does not address" this question).

And what about the military? Commissioned military officers "are 'inferior officers.'" Weiss, 510 U. S., at 182 (Souter, J., concurring); id., at 169–170 (majority opinion). There are over 210,000 active-duty commissioned officers
currently serving in the armed forces. See Dept. of Defense, Active Duty Military Personnel by Rank (Apr. 30, 2010), online at http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1004.pdf. Numerous statutory provisions provide that such officers may not be removed from office except for cause (at least in peacetime). See, e.g., 10 U. S. C. §§629–632, 804, 1161, 1181–1185. And such officers can generally be so removed only by other commissioned officers, see §§612, 825, 1187, who themselves enjoy the same career protections.

The majority might simply say that the military is different. But it will have to explain how it is different. It is difficult to see why the Constitution would provide a President who is the military’s “commander-in-chief,” Art. II, §2, cl. 1, with less authority to remove “inferior” military “officers” than to remove comparable civil officials. See Barron & Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 941, 1102–1106 (2008) (describing President’s “superintendence prerogative” over the military). Cf. ante, at 26–27 (not “expressing any view whatever” as to whether military officers’ authority is now unconstitutional).

The majority sees “no reason . . . to address whether” any of “these positions,” “or any others,” might be deemed unconstitutional under its new rule, preferring instead to leave these matters for a future case. Ante, at 27. But what is to happen in the meantime? Is the work of all these various officials to be put on hold while the courts of appeals determine whether today’s ruling applies to them? Will Congress have to act to remove the “for cause” provisions? Cf. Buckley, 424 U. S., at 142–143. Can the President then restore them via executive order? And, still, what about the military? A clearer line would help avoid these practical difficulties.

The majority asserts that its opinion will not affect the Government’s ability to function while these many ques-
tions are litigated in the lower courts because the Court’s holding concerns only “the conditions under which th[e]se officers might some day be removed.” Ante, at 27. But this case was not brought by federal officials challenging their potential removal. It was brought by private individuals who were subject to regulation “‘here-and-now’” and who “object to the” very “existence” of the regulators themselves. Ante, at 33, 8 (emphasis added). And those private individuals have prevailed. Thus, any person similarly regulated by a federal official who is potentially subject to the Court’s amorphous new rule will be able to bring an “implied private right of action directly under the Constitution” “seeking . . . a declaratory judgment that” the official’s actions are “unconstitutional and an injunction preventing the” official “from exercising [his] powers.” Ante, at 10, n. 2, 6; cf., e.g., Legal Services Corporation v. Velázquez, 531 U. S. 533, 546 (2001) (affirming grant of preliminary injunction to cure, inter alia, a separation-of-powers violation); Youngstown Sheet & Tube Co., 343 U. S. 579 (same). Such a plaintiff need not even first exhaust his administrative remedies. Ante, at 7–10.

Nor is it clear that courts will always be able to cure such a constitutional defect merely by severing an offending removal provision. For a court’s “ability to devise [such] a judicial remedy . . . often depends on how clearly” the “background constitutional rules at issue” have been “articulated”; severance will be unavailable “in a murky constitutional context,” which is precisely the context that the Court’s new rule creates. Ayotte v. Planned Parenthood of Northern New Eng., 546 U. S. 320, 329, 330 (2006). Moreover, “the touchstone” of the severability analysis “is legislative intent,” id., at 330, and Congress has repeatedly expressed its judgment “over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service,” Civil Service Comm’n,
413 U. S., at 557; see also Bush v. Lucas, 462 U. S. 367, 380–388 (1983) (describing the history of “Congressional attention to the problem of politically-motivated removals”). And so it may well be that courts called upon to resolve the many questions the majority’s opinion raises will not only apply the Court’s new rule to its logical conclusion, but will also determine that the only available remedy to certain double for-cause problems is to invalidate entire agencies.

Thus, notwithstanding the majority’s assertions to the contrary, the potential consequences of today’s holding are worrying. The upshot, I believe, is a legal dilemma. To interpret the Court’s decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive.

III

One last question: How can the Court simply assume without deciding that the SEC Commissioners themselves are removable only “for cause”? See ante, at 5 (“[W]e decide the case with the understanding” “that the Commissioners cannot themselves be removed by the President except” for cause (emphasis added)). Unless the Commissioners themselves are in fact protected by a “for cause” requirement, the Accounting Board statute, on the Court’s own reasoning, is not constitutionally defective. I am not aware of any other instance in which the Court has similarly (on its own or through stipulation) created a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional. Cf. Alabama v. North Carolina, 560 U. S. —, — (2010) (opinion for the Court by SCALIA, J.) (slip op., at 20) (“We do not—we cannot—add provisions to a federal statute . . . especially [if] . . . separation-of-powers concerns . . . would [thereby] arise”); The Anaconda v. American Sugar Refining Co., 322 U. S. 42, 46 (1944) (describing parties’ inabil-
It is certainly not obvious that the SEC Commissioners enjoy “for cause” protection. Unlike the statutes establishing the 48 federal agencies listed in Appendix A, infra, the statute that established the Commission says nothing about removal. It is silent on the question. As far as its text is concerned, the President’s authority to remove the Commissioners is no different from his authority to remove the Secretary of State or the Attorney General. See Shurtleff, 189 U. S., at 315 (“To take away th[e] power of removal . . . would require very clear and explicit language. It should not be held to be taken away by mere inference or implication”); see also Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, to the Principal Deputy Counsel to the President: Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects, p. 2 (Oct. 23, 2009), online at http://justice.gov/olc/2009/gas-transport-project.pdf (“[W]here Congress did not explicitly provide tenure protection . . . the President, consistent with . . . settled principles, may remove . . . without cause”); The Constitutional Separation of Powers Between the President and Congress, 20 Op. Legal Counsel 124, 170 (1996) (same).

Nor is the absence of a “for cause” provision in the statute that created the Commission likely to have been inadvertent. Congress created the Commission during the 9-year period after this Court decided Myers, and thereby cast serious doubt on the constitutionality of all “for cause” removal provisions, but before it decided Humphrey’s Executor, which removed any doubt in respect to the constitutionality of making commissioners of independent agencies removable only for cause. In other words, Congress created the SEC at a time when, under this Court’s precedents, it would have been unconstitutional to make the Commissioners removable only for cause. And, during

The fact that Congress did not make the SEC Commissioners removable “for cause” does not mean it intended to create a dependent, rather than an independent agency. Agency independence is a function of several different factors, of which “for cause” protection is only one. Those factors include, inter alia, an agency’s separate (rather than presidentially dependent) budgeting authority, its separate litigating authority, its composition as a multi-member bipartisan board, the use of the word “independent” in its authorizing statute, and, above all, a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause. See generally Breger & Edles 1135–1155.

The absence of a “for cause” provision is thus not fatal to agency independence. Indeed, a “Congressional Research Service official suggests that there are at least 13 ‘independent’ agencies without a removal provision in their statutes.” Id., at 1143, n. 161 (emphasis added) (citing congressional testimony). But it does draw the majority’s rule into further confusion. For not only are we left without a definition of an “inferior officer,” but we are also left
to guess which department heads will be deemed by the majority to be subject to for-cause removal notwithstanding statutes containing no such provision. If any agency deemed “independent” will be similarly treated, the scope of the majority’s holding is even broader still. See Appendix D, infra (listing agencies potentially affected).

The Court then, by assumption, reads into the statute books a “for cause removal” phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite. See Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case” (internal quotation marks omitted)); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (“[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available”).

I do not need to decide whether the Commissioners are in fact removable only “for cause” because I would uphold the Accounting Board’s removal provision as constitutional regardless. But were that not so, a determination that the silent SEC statute means no more than it says would properly avoid the determination of unconstitutionality that the Court now makes.

*    *    *

In my view the Court’s decision is wrong—very wrong. As Parts II–A, II–B, and II–C of this opinion make clear, if the Court were to look to the proper functional and contextual considerations, it would find the Accounting Board provision constitutional. As Part II–D shows, insofar as the Court instead tries to create a bright-line rule, it fails to do so. Its rule of decision is both imprecise and overly
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broad. In light of the present imprecision, it must either narrow its rule arbitrarily, leaving it to apply virtually alone to the Accounting Board, or it will have to leave in place a broader rule of decision applicable to many other “inferior officers” as well. In doing the latter, it will undermine the President’s authority. And it will create an obstacle, indeed pose a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create—in provisions this Court is sworn to uphold.

With respect I dissent.
APPENDIXES

A

There are 24 stand-alone federal agencies (i.e., “departments”) whose heads are, by statute, removable by the President only “for cause.” Moreover, there are at least 24 additional offices, boards, or bureaus situated within departments that are similarly subject, by statute, to for-cause removal provisions. The chart below first lists the 24 departments and then lists the 24 additional offices, boards, and bureaus. I have highlighted those instances in which a “for-cause” office is situated within a “for-cause” department—i.e., instances of “double for-cause” removal that are essentially indistinguishable from this case (with the notable exception that the Accounting Board may not be statutorily subject to two layers of for-cause removal, cf. Part III, supra). This list does not include instances of “double for-cause” removal that arise in Article I courts, although such instances might also be affected by the majority’s holding, cf. ante, at 26, n. 10. Compare 48 U. S. C. §§1424(a), 1614(a), with 28 U. S. C. §§631(a), (i), and 18 U. S. C. §§23, 3602(a).

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<tr>
<th>Department</th>
<th>Statutory Removal Provision</th>
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<tr>
<td>1 Chemical Safety Board</td>
<td>“Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office.” 42 U. S. C. §7412(r)(6)(B)</td>
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<td>2 Commission on Civil Rights</td>
<td>“The President may remove a member of the Commission only for neglect of duty or malfeasance in office.” 42 U. S. C. §1975(e)</td>
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<tr>
<td>3 Consumer Product Safety Commission</td>
<td>“Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” 15 U. S. C. §2053(a)</td>
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<tr>
<th>Department</th>
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<td>4  Federal Energy Regulatory Commission</td>
<td>“Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 42 U.S.C. § 7171(b)(1)</td>
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<td>5  Federal Labor Relations Authority</td>
<td>“Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 7104(b)</td>
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<td>6  Federal Maritime Commission</td>
<td>“The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office.” 46 U.S.C. § 301(b)(3)</td>
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<td>7  Federal Mine Safety and Health Review Commission</td>
<td>“Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 30 U.S.C. § 823(b)(1)</td>
</tr>
<tr>
<td>8  Federal Reserve Board</td>
<td>“[E]ach member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.” 12 U.S.C. § 242</td>
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<td>9  Federal Trade Commission</td>
<td>“Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 15 U.S.C. § 41</td>
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<tr>
<td>10 Independent Medicare Advisory Board</td>
<td>“Any appointed member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.” Pub. L. 111–148, §3403.</td>
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<td>11 Merit Systems Protection Board</td>
<td>“Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d)</td>
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<td>12 National Labor Relations Board</td>
<td>“Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” 29 U. S. C. §153(a)</td>
</tr>
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<td>13 National Mediation Board</td>
<td>“A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.” 45 U. S. C. §154</td>
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<tr>
<td>14 National Transportation Safety Board</td>
<td>“The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.” 49 U. S. C. §1111(c)</td>
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<td>15 Nuclear Regulatory Commission</td>
<td>“Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 42 U. S. C. §5841(e)</td>
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<td>16 Occupational Safety and Health Review Board</td>
<td>“A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” 29 U. S. C. §661(b)</td>
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<td>17 Office of Special Counsel</td>
<td>“The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.” 5 U. S. C. §1211(b)</td>
</tr>
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<td>18 Postal Regulatory Commission</td>
<td>“The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause.” 39 U. S. C. §502(a)</td>
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Appendix A to opinion of Breyer, J.

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<th>Department</th>
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<td>19 Postal Service*</td>
<td>“The exercise of the power of the Postal Service shall be directed by a Board of Governors composed of 11 members . . . . The Governors shall not be representatives of specific interests using the Postal Service, and may be removed only for cause.” 39 U. S. C. §202</td>
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<tr>
<td>20 Social Security Administration</td>
<td>“[The] Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.” 42 U. S. C. §902(a)(3)</td>
</tr>
<tr>
<td>21 United States Institute of Peace*</td>
<td>“A member of the Board appointed under subsection (b)(5) . . . may be removed by the President . . . in consultation with the Board, for conviction of a felony, malfeasance in office, persistent neglect of duties, or inability to discharge duties.” 22 U. S. C. §4605(f)</td>
</tr>
<tr>
<td>22 United States Sentencing Commission</td>
<td>“The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.” 28 U. S. C. §991(a)</td>
</tr>
<tr>
<td>23 Legal Services Corporation*</td>
<td>“A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause.” 42 U. S. C. §2996(c)</td>
</tr>
<tr>
<td>24 State Justice Institute*</td>
<td>“A member of the Board may be removed by a vote of seven members for malfeasance in office, persistent neglect of, or inability to discharge duties, or for any offense involving moral turpitude, but for no other cause.” 42 U. S. C. §10703(b)</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Office Within Department</th>
<th>Statutory Removal Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Agriculture: National Appeals Division</td>
<td>“The Division shall be headed by a Director, appointed by the Secretary from among persons who have substantial experience in practicing administrative law. . . . The Director shall not be subject to removal during the term of office, except for cause established in accordance with law.” 7 U.S.C. §§6992(b)(1)–(2)</td>
</tr>
<tr>
<td>Department of Agriculture: Regional Fishery Management Councils</td>
<td>“The Secretary may remove for cause any member of a Council required to be appointed by the Secretary . . . .” 16 U.S.C. §1852(b)(6)</td>
</tr>
<tr>
<td>Department of Commerce: Corporation for Travel Promotion†</td>
<td>“The Secretary of Commerce may remove any member of the board [of the Corporation] for good cause.” 124 Stat. 57</td>
</tr>
<tr>
<td>Department of Defense: Office of Navy Reserve</td>
<td>“The Chief of Navy Reserve is appointed for a term determined by the Chief of Naval Operations, normally four years, but may be removed for cause at any time.” 10 U.S.C. §5143(c)(1)</td>
</tr>
<tr>
<td>Department of Defense: Office of Marine Forces Reserve</td>
<td>“The Commander, Marine Forces Reserve, is appointed for a term determined by the Commandant of the Marine Corps, normally four years, but may be removed for cause at any time.” 10 U.S.C. §5144(c)(1)</td>
</tr>
<tr>
<td>Department of Defense: Office of Air Force Reserve</td>
<td>“The Chief of Air Force Reserve is appointed for a period of four years, but may be removed for cause at any time.” 10 U.S.C. §8038(c)(1)</td>
</tr>
<tr>
<td>Department of Defense: Joint Staff of the National Guard Bureau</td>
<td>“[A]n officer appointed as Director of the Joint Staff of the National Guard Bureau serves for a term of four years, but may be removed from office at any time for cause.” 10 U.S.C. §10505(a)(3)(A)</td>
</tr>
</tbody>
</table>

†See Lebron, supra.
Appendix A to opinion of Breyer, J.

<table>
<thead>
<tr>
<th>Office Within Department</th>
<th>Statutory Removal Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Defense: Board of Actuaries</td>
<td>“A member of the Board may be removed by the Secretary of Defense only for misconduct or failure to perform functions vested in the Board.” 10 U.S.C.A. §183(b)(3) (2010)</td>
</tr>
<tr>
<td>Department of Defense: Medicare-Eligible Retiree Health Care Board of Actuaries</td>
<td>“A member of the Board may be removed by the Secretary of Defense for misconduct or failure to perform functions vested in the Board, and for no other reason.” 10 U.S.C. §1114(a)(2)(A)</td>
</tr>
<tr>
<td>Department of Education: Performance-Based Organization for the Delivery of Federal Student Financial Assistance</td>
<td>“The Chief Operating Officer may be removed by . . . the President; or . . . the Secretary, for misconduct or failure to meet performance goals set forth in the performance agreement in paragraph (4).” 20 U.S.C. §1018(d)(3)</td>
</tr>
<tr>
<td>Federal Labor Relations Authority: Foreign Service Labor Relations Board (see supra, row 5)</td>
<td>“The Chairperson [of the FLRA, who also chairs the Board] may remove any other Board member . . . for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions . . . .” 22 U.S.C. §4106(e)</td>
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<tr>
<td>General Services Administration: Civilian Board of Contract Appeals (see supra, row 11)</td>
<td>“Members of the Civilian Board shall be subject to removal in the same manner as administrative law judges, [i.e., only for good cause established and determined by the Merit Systems Protection Board.]” 41 U.S.C. §438(b)(2) (emphasis added)</td>
</tr>
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<td>Department of Health and Human Services: National Advisory Council on National Health Service Corps</td>
<td>“No member shall be removed, except for cause.” 42 U.S.C. §254j(b)</td>
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<td>Office Within Department</td>
<td>Statutory Removal Provision</td>
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<tr>
<td>Department of Health and Human Services:</td>
<td>“The Chief Actuary may be removed only for cause.” 42 U. S. C. §1317(b)(1)</td>
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<tr>
<td>Medicare &amp; Medicaid Office of the Chief Actuary</td>
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<tr>
<td>38 Department of Homeland Security:</td>
<td>“An officer may be removed from the position of Director for cause at any time.” 14 U. S. C. §53(c)(1)</td>
</tr>
<tr>
<td>Office of the Coast Guard Reserve</td>
<td></td>
</tr>
<tr>
<td>39 Department of the Interior:</td>
<td>“A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.” 25 U. S. C. §2704(b)(6)</td>
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<tr>
<td>National Indian Gaming Commission</td>
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<tr>
<td>40 Library of Congress:</td>
<td>“The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h), misconduct, neglect of duty, or any disqualifying physical or mental disability.” 17 U. S. C. §802(i)</td>
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<tr>
<td>Copyright Royalty Judgeships</td>
<td></td>
</tr>
<tr>
<td>41 Postal Service:</td>
<td>“The Inspector General may at any time be removed upon the written concurrence of at least 7 Governors, but only for cause.” 39 U. S. C. §202(e)(3)</td>
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<tr>
<td>Inspector General (see supra, row 19)</td>
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<tr>
<td>42 Securities and Exchange Commission:</td>
<td>“A member of the Board may be removed by the Commission from office . . . for good cause shown . . . .” 15 U. S. C. §7211(e)(6)</td>
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<tr>
<td>Public Company Accounting Oversight Board</td>
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<tr>
<td>43 Social Security Administration:</td>
<td>“The Chief Actuary may be removed only for cause.” 42 U. S. C. §902(c)(1)</td>
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<td>Office of the Chief Actuary (see supra, row 20)</td>
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<td>Office Within Department</td>
<td>Statutory Removal Provision</td>
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<tr>
<td>Department of State:</td>
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<td>Foreign Service</td>
<td>written notice, remove a Board</td>
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<td>Grievance Board</td>
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<td>of duty, malfeasance, or</td>
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<td>demonstrated incapacity to</td>
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<td>perform his or her functions,</td>
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<td>established at a hearing (unless</td>
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<td>the right to a hearing is</td>
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<td>waived in writing by the</td>
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<td>Board member).” 22 U. S. C. §4135(d)</td>
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<td>Department of Transportation:</td>
<td>“Any member of the</td>
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<td>Air Traffic Services Committee</td>
<td>Committee may be</td>
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<td></td>
<td>removed for cause by the</td>
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<td>Secretary.” 49 U. S. C. §106(p)(6)(G)</td>
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<td>Department of Transportation:</td>
<td>“The President may remove a</td>
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<tr>
<td>Surface Transportation Board</td>
<td>member for</td>
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<td>inefficiency, neglect of</td>
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<td>duty, or malfeasance</td>
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<td>in office.” 49 U. S. C. §701(b)(3)</td>
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<tr>
<td>Department of Veterans Affairs:</td>
<td>“The Chairman may be</td>
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<tr>
<td>Board of Veterans Appeals</td>
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<td>President for misconduct,</td>
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<td>inefficiency, neglect of</td>
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<td>duty, or engaging in the</td>
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<td>practice of law or for physical</td>
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<td>or mental disability which, in</td>
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<td>the opinion of the</td>
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<td>President, prevents the</td>
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<td>proper execution of the</td>
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<td>Chairman’s duties. The</td>
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<td>Chairman may not be</td>
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<td>removed from</td>
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<td>office by the President on any</td>
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<td>other grounds.” 38 U. S. C. §7101(b)(2)</td>
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</table>
The table that follows lists the 573 career appointees in the Senior Executive Service (SES) who constitute the upper level management of the independent agencies listed in Appendix A, supra. Each of these officials is, under any definition—including the Court’s—an inferior officer, and is, by statute, subject to two layers of for-cause removal. See supra, at 25–30.

The data are organized into three columns: The first column lists the “office” to which the corresponding official is assigned within the respective agency and, where available, the provision of law establishing that office. Cf. supra, at 27 (citing Mouat, 124 U. S., at 307–308; Germaine, 99 U. S., at 510). The second and third columns respectively list the career appointees in each agency who occupy “general” and “reserved” SES positions. A “general” position is one that could be filled by either a career appointee or by a noncareer appointee were the current (career) occupant to be replaced. See 5 U. S. C. §3132(b)(1). Because 90% of all SES positions must be filled by career appointees, §3134(b), “most General positions are filled by career appointees,” Plum Book 200. A “reserved” position, by contrast, must always be filled by a career appointee. §3132(b)(1). The data for the “general position” column come from the 2008 Plum Book, a quadrennial manual prepared by the congressional committees responsible for government oversight. See supra, at 29. Positions listed as vacant in that source are not included. The data for the “reserved position” column come from a list periodically published by the Office of Personnel Management and last published in 2006. See 72 Fed. Reg. 16154–16251 (2007); §3132(b)(4). Given the Federal Government’s size and the temporal lag between the underlying sources, the list that follows is intended to be illustrative, not exact.
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<table>
<thead>
<tr>
<th>Office</th>
<th>General Position</th>
<th>Reserved Position</th>
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</thead>
<tbody>
<tr>
<td>Office of the Executive Director for Operations</td>
<td>Executive Director</td>
<td>Director of Nuclear Security Projects</td>
</tr>
<tr>
<td>10 CFR §1.32 (2009)</td>
<td>Deputy Executive Director for Reactor and Preparedness Programs</td>
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<tr>
<td></td>
<td>Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance, Programs</td>
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<tr>
<td></td>
<td>Deputy Executive Director for Corporate Management</td>
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<tr>
<td></td>
<td>Assistant for Operations</td>
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<td></td>
<td>Director for Strategic Organizational Planning and Optimization</td>
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<tr>
<td>Office of the Secretary</td>
<td>Secretary</td>
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<td>10 CFR §1.25</td>
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<tr>
<td>Office of the Chief Financial Officer</td>
<td>Chief Financial Officer</td>
<td>Director, Division of Planning, Budget and Analysis</td>
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<tr>
<td>10 CFR §1.31</td>
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<td>Director, Division of Financial Services</td>
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<tr>
<td></td>
<td></td>
<td>Deputy Chief Financial Officer</td>
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<tr>
<td></td>
<td></td>
<td>Director, Division of Financial Management</td>
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<tr>
<td>Office of the Inspector General</td>
<td>Deputy Inspector General</td>
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<tr>
<td>10 CFR §1.12</td>
<td>Assistant Inspector General for Audits</td>
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<td>Assistant Inspector General for Investigations</td>
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<tr>
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<td>General Counsel</td>
<td>Director, Commission Adjudicatory Technical Support</td>
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<td>10 CFR §1.23</td>
<td>Deputy General Counsel</td>
<td>Deputy Assistant General Counsel for Rulemaking and Fuel Cycle</td>
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<td></td>
<td>Solicitor</td>
<td>Deputy Assistant General Counsel for Administration</td>
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<td></td>
<td>Associate General Counsel for Licensing and Regulation</td>
<td>Assistant General Counsel for Operating Reactors</td>
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<td></td>
<td>Assistant General Counsel for Rulemaking and Fuel Cycle</td>
<td></td>
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<tr>
<td>Office</td>
<td>General Position</td>
<td>Reserved Position</td>
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<tr>
<td>Office of the General Counsel (Continued)</td>
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<tr>
<td></td>
<td>Assistant General Counsel for Legal Counsel, Legislation, and Special Projects</td>
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<tr>
<td></td>
<td>Associate General Counsel for Hearings, Enforcement, and Administration</td>
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<tr>
<td></td>
<td>Assistant General Counsel for New Reactor Programs</td>
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<td></td>
<td>Assistant General Counsel for Operating Reactors</td>
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<td></td>
<td>Assistant General Counsel for the High-Level Waste Repository Programs</td>
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<tr>
<td>Office of Commission</td>
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<td>Director</td>
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<tr>
<td>Appellate Adjudication</td>
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<tr>
<td>10 CFR §1.24</td>
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<td>Director</td>
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<td>10 CFR §1.28</td>
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<td>Office of International Programs</td>
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<td>Office of Investigations</td>
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<td>10 CFR §1.36</td>
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<tr>
<td>Office of Enforcement</td>
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<td>10 CFR §1.33</td>
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<td>Director, Division of Administrative Services</td>
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<tr>
<td>Director, Division of Facilities and Security</td>
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<tr>
<td>Office of Human Resources</td>
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<td>10 CFR §1.39</td>
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<td>Associate Director for Training and Development</td>
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<td>Office of Information Services</td>
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<td>Director, High-Level Waste Business and Program Integration Staff</td>
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<td>Director, Business Process Improvement and Applications</td>
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<td>Director, Program Management, Policy Development and Analysis Staff</td>
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<td>Director, Infrastructure and Computer Operations</td>
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<tr>
<td>Office of Nuclear Security and Incident</td>
<td>Director</td>
<td>Deputy Director (2), Director, Program Management, Policy Development</td>
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<td>(Division of Security Policy)</td>
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<td>Project Director, Nuclear Security Operations</td>
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<td>Deputy Director for Material Security</td>
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<td>Deputy Director for Reactor Security and Rulemaking</td>
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<tr>
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<td>Director</td>
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<td>Deputy Director for Emergency Preparedness</td>
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<td>Office of Nuclear Reactor Regulation</td>
<td>Director</td>
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<td>Office</td>
<td>General Position</td>
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<td>Associate Director, Operating Reactor Oversight and</td>
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<td>(Division of New Reactor Licensing)</td>
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<td>(Division of Component Integrity)</td>
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<td>Office of New Reactors 10 CFR §1.44</td>
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<td>Assistant to the Director for Transition Management</td>
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<td>Director, Program Planning, etc.</td>
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<td>Safeguards 10 CFR §1.42</td>
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<td>(Division of Fuel Cycle Safety and</td>
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<td>Safeguards)</td>
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<td>Chief, Fuel Cycle Facilities Branch</td>
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<td>Chief, Materials Safety and Inspection Branch</td>
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### Appendix B to opinion of Breyer, J.

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#### Social Security Administration (143)

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<td>56 Fed. Reg. 15888</td>
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Appendix B to opinion of BREYER, J.

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<td>Office of Appellate Operations</td>
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### Appendix B to opinion of Breyer, J.

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Federal Energy Regulatory Commission (44)

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<tr>
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Appendix B to opinion of Breyer, J.

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<tr>
<td></td>
<td>Deputy General Counsel for Legal Counsel</td>
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<td>Bureau of Competition</td>
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<td>Assistant Director, Compliance</td>
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<tr>
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<tr>
<td></td>
<td>Associate Director for Privacy and Identity Protection</td>
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<td>Associate Director for Advertising Practices</td>
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<td>Associate Director for Planning and Information</td>
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## Appendix B to opinion of BREYER, J.

### Consumer Product Safety Commission (16)

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<td></td>
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<td></td>
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<tr>
<td>Office of Compliance and Field Operations 16 CFR §1000.21</td>
<td>Deputy Director</td>
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<td>Office of Hazard Identification and Reduction 16 CFR §1000.25</td>
<td></td>
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<tr>
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<td></td>
<td>Associate Executive Director for Economic Analysis</td>
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<td></td>
<td>Associate Executive Director for Epidemiology</td>
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<tr>
<td>Directorate for Health Sciences 16 CFR §1000.27</td>
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<tr>
<td>Directorate for Laboratory Sciences 16 CFR §1000.30</td>
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<tr>
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Appendix B to opinion of BREYER, J.

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<tr>
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<td>5 CFR §2421.7</td>
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<td>Federal Services Impasses Panel</td>
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**National Transportation Safety Board (14)**

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<td>Office of the General Counsel</td>
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<td>49 CFR §800.2(c)</td>
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<tr>
<td>Office of Administration</td>
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<td>Director</td>
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<tr>
<td>60 Fed. Reg. 61488</td>
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<td>Office of Research and Engineering</td>
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<td>49 CFR §800.2(g)</td>
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<td>49 CFR §800.2(k)</td>
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### Performance-Based Organization for the Delivery of Federal Student Financial Assistance (13)

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<td></td>
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<td>Audit Officer</td>
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<td>Director, Budget Group</td>
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<tr>
<td></td>
<td>Deputy Chief Information Officer</td>
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<td></td>
<td>Director, Application Development Group</td>
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<td></td>
<td>Internal Review Officer</td>
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<tr>
<td></td>
<td>Director, Strategic Planning and Reporting Group</td>
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### Merit Systems Protection Board (11)

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Appendix B to opinion of Breyer, J.

<table>
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<tr>
<th>Office</th>
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<td>Associate Special Counsel, Planning and Oversight</td>
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<td>Associate Special Counsel for Legal Counsel and Policy</td>
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<th>Postal Regulatory Commission (10)*</th>
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<td>Assistant Director, Auditing and Costing Division</td>
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<tr>
<td>Office of Public Affairs and Governmental Relations 39 CFR §3002.15</td>
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</table>

*The officers in this agency are part of the “excepted service,” but enjoy tenure protection similar to that enjoyed by career SES appointees. See 5 U.S.C. §2302(a)(2)(B); Plum Book, p. v (distinguishing “excepted service” from “Schedule C”); id., at 202 (describing schedule C positions).
<table>
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<th>Office</th>
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<th>Reserved Position</th>
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<td>39 CFR §3002.16</td>
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<td><strong>Federal Maritime Commission</strong> (8)</td>
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<td>46 CFR §501.3(c)</td>
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<td>Deputy General Counsel for Reports, Opinions and Decisions</td>
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<td>46 CFR §501.3(d)</td>
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<td>46 CFR §501.3(b)(6)</td>
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<td>Bureau of Trade Analysis</td>
<td>Director</td>
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<td>46 CFR §501.3(b)(6)</td>
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<td>46 CFR §501.3(b)(7)</td>
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<td>Director of Public Assistance, Governmental Affairs and Compliance</td>
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Appendix B to opinion of BREYER, J.

<table>
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<td>Reserved Position</td>
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<td>Reserved Position</td>
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</table>
According to data provided by the Office of Personnel Management, reprinted below, there are 1,584 administrative law judges (ALJs) in the Federal Government. Each of these ALJs is an inferior officer and each is subject, by statute, to two layers of for-cause removal. See supra, at 30. The table below lists the 28 federal agencies that rely on ALJs to adjudicate individual administrative cases. The source is available in the Clerk of Court’s case file. See ibid.

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<th>TOTAL NUMBER OF ALJs</th>
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<td>Department of Agriculture</td>
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<td>Department of Education</td>
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<tr>
<td>(Departmental Appeals Board)</td>
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<td>(Food and Drug Administration)</td>
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<tr>
<td>(Office of Medicare Hearings and Appeals)</td>
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<td>Department of Homeland Security</td>
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<td>Department of Justice</td>
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<td>(Drug Enforcement Administration)</td>
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Appendix C to opinion of Breyer, J.

<table>
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<tr>
<th>AGENCY</th>
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<td><strong>TOTAL</strong></td>
<td><strong>1,584</strong></td>
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The table below lists 29 departments and other agencies the heads of which are not subject to any statutory for-cause removal provision, but that do bear certain other indicia of independence.

The table identifies six criteria that may suggest independence: (1) whether the agency consists of a multi-member commission; (2) whether its members are required, by statute, to be bipartisan (or nonpartisan); (3) whether eligibility to serve as the agency’s head depends on statutorily defined qualifications; (4) whether the agency has independence in submitting budgetary and other proposals to Congress (thereby bypassing the Office of Management and Budget); (5) whether the agency has authority to appear in court independent of the Department of Justice, cf. 28 U. S. C. §§516–519; and (6) whether the agency is explicitly classified as “independent” by statute. See generally Breger & Edles 1135–1155; supra, at 35–36. Unless otherwise noted, all information refers to the relevant agency’s organic statute, which is cited in the first column. The list of agencies is nonexhaustive.

<table>
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<tr>
<th>Department or Agency</th>
<th>Multi-Member</th>
<th>Bi-partisan</th>
<th>Statutory Eligibility Criteria</th>
<th>OMB Bypass</th>
<th>Litigation Authority</th>
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<td>Yes §653(a)(1)</td>
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<td>Yes §2244(c)</td>
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<td>Yes §401(b)</td>
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<td>Yes</td>
<td>Yes (citizenship; related experience)</td>
<td>Yes §250</td>
<td>Yes §1819(a)</td>
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*See Lebron, 513 U.S. 374.
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†See Lebron, supra.
Appendix D to opinion of Breyer, J.

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</table>

‡ See Lebron, supra.
The FERC-NERC Relationship: Toward a More Stable Institutional Balance

John S. Moot
Skadden, Arps, Slate, Meagher & Flom, LLP

December 2010
Growing pains

What does it mean for NERC to be a “strong” organization?

Do aggressive FERC actions strengthen or weaken NERC?

Growing pains

Reliability without unnecessary regulatory intervention

A stable institutional relationship that enhances

The goal

Goals and Growing pains
The current tensions are due in part to differences in perspective and expectations

- Did section 215 adopt a strong self-regulatory model with limited FERC oversight and intervention?
- Or did section 215 correct failures in self-regulation by authorizing strong government oversight?

The political climate in Washington does not help

- Self-regulation is bad
- Government agencies are incompetent
A strong NERC?

- Who wants a strong NERC?
  - The industry?
    - More control of standards development?
    - More intervention in regional enforcement?
  - FERC?
    - Deferring to a subsidiary organization?
    - Isn’t FERC the national spokesperson for reliability?
NERC is pulled hard in two directions

FERC wants NERC to “be strong” and, by that, it means saying “no” to industry

Industry wants NERC to “be strong” and, by that, it means saying “no” to FERC
FERC’s dilemma

- Congress expects FERC to be “strong” and correct the shortcomings of self-regulation
  - What does that mean? No blackouts?
  - FERC will be blamed if something goes wrong; deferring to industry therefore poses real risks to FERC
- The self-regulatory model is not FERC’s first choice
  - FERC would prefer to write its own rules
- How should FERC treat NERC?
  - As a “partner” or just another regulated entity (e.g., RTO)
The current tensions

- Growing tension since Order No. 693
  - Tension in standards development (particularly over implementing Order No. 693’s many directives)
  - Fears that enforcement will be punitive
  - The pot boiled over in March 2010

- But there are bright spots
  - More open communications since March 2010
  - Good people in all sectors who want the same thing—a reliable electric grid
  - Enforcement is finding a more stable institutional balance
Enforcement

- Enforcement is far closer to finding a stable institutional balance than standards development
  - *FERC* limits investigations to major disturbances or outages and defers to *NERC* on most NOPs
  - *NERC* focuses primarily on consistency among regions and adequate explanation of outcomes
  - *Regional entities* remain the “front line” for enforcement and balance penalties and mitigation to encourage and upgrade compliance
But growing pains remain in enforcement

- Ambiguous standards
  - Industry: “we know what they mean; we wrote them!”
  - FERC: “we know what they mean; we approved them!”
- Consistency
  - How to increase consistency across regions?
  - How much consistency do we really want?
- Priorities and objectives
  - Which standards are most important?
  - Finding a balance between civil penalties and mitigation
- Measuring success
  - Are hundreds of self-reports a good thing?
Standards development

- Standards development is not a bright spot
  - (This is a polite understatement)
  - Recurring conflicts over roles, process and outcomes
- Partially understandable—growing pains in a new self-regulatory system
  - But nonetheless harmful to FERC, NERC and society
- The current dysfunction needs to be fixed
What are the causes?

- A glass half empty or half full?
  - FERC tends to view the current standards as not overly rigorous
  - The industry tends to view them as adequate, mostly needing to be clarified and streamlined

- Incomplete information?
  - Does FERC hear mostly failures, not successes?
  - Does FERC understand the volume of work created by Order No. 693?

- Lack of trust in stakeholder process (ANSI)?
  - FERC values compromise more in an RTO setting—e.g., recognizing there is no one right answer on cost allocation
  - But it is more suspicious of “voting” on reliability standards
A few examples

A few examples will help illustrate the struggle for a more stable institutional balance.

These examples reveal three separate dimensions to the current conflict over standards development:

- Has FERC assumed an appropriate *institutional role*?
- Did FERC *execute* that role through the appropriate *process*?
- Did FERC make the right *substantive decision*?

To heal the current rift, we need to focus primarily on institutional roles—and the rest will become less difficult to solve.
Where we started

- **Order No. 693**
  - The good news on institutional roles
  - FERC deferred to NERC on key transition issues (BES/BPS, enforcement grace period, small entity registration)
  - No remands; the focus was on prospective improvements
- The not so good news
  - In retrospect, too many directives coupled with too little guidance on priorities
  - An unexpected legacy that lead to March 2010
The pot boils over

- **The March 2010 Orders**
  - The good news on institutional roles
    - FERC focused on certain areas that most would agree are critical to reliability
  - Frequency response; transmission planning
  - The not so good news
    - Priorities should be set *ex ante*, not *ex post*
    - Backed into a corner or picking a fight?
      - Was FAC-008 worth a showdown over Section 215(d)(5)?
      - Was BES definition a regional issue, not a national one?
    - Micromanaging implementation re BES exceptions
More recent examples

- FERC remands WECC BAL-002 standard
  - FERC finds that WECC failed to provide sufficient evidence to support extending reserve restoration period
  - Was it really a lack of evidence or did FERC simply disagree with WECC’s position?
    - The analogy to judicial deference
- BES Final Order
  - FERC reaffirms decision to adopt bright line test for BES definition
  - But it agrees to eliminate the FERC-managed (or, some would say, micromanaged) exemption process
The Future

- Priorities
  - “If everything is a priority, nothing is a priority”
  - Prioritization means taking things off the list, not just making a list
- Too many directives? Too many requirements?
- Objectives
  - The need for constructive dialogue on fundamental issues
    - Performance-based versus command and control
    - Reliability versus cost
    - Adequate level of reliability
  - These issues should not be debated only after individual standards are developed that incorporate these choices
An institutional path forward for NERC

- Establish an independent vision
  - NERC cannot succeed solely by “triangulating”
- Be direct with FERC
  - If FERC has made a mistake, NERC should say so clearly albeit politely
- Strengthen the ANSI process
  - NERC may have to exert more oversight to protect the benefits of ANSI
  - ANSI is at risk if there is another regional blackout
An institutional path forward for FERC

- FERC should focus on policy objectives and priorities in standards development, not micromanaging process or results
  - FERC’s stature and influence declines as the number of remands and directives increase
- FERC should provide greater deference
  - If NERC provides a rational explanation, FERC should accept it, even if it does not agree with the outcome
  - “We defer when we agree” is not deference
  - Comparison to standard for judicial deference
    - Expertise; delegation; process; and political accountability
Conclusion

- The current tensions will slowly subside
- This is not market design—with tensions driven by philosophical differences
- All sectors and institutions want the same thing—a reliable electric grid
- The primary problem is one of sorting out institutional roles. Over time, we will find a more stable institutional balance
  - FERC gradually will assume a less intrusive role
  - NERC gradually will assume a more significant role
FERC and NERC: The Struggle for Creative Institutional Balance

Energy Bar Association Mid-Year Meeting
December 9, 2010
Allen Mosher
American Public Power Association
Statutory Framework: Industry Consensus

• Independent but industry driven ERO
• Industry-based standards development
• NERC/Regional monitoring and enforcement
• FERC regulatory oversight to make the framework mandatory and enforceable with financial penalties
Statutory Framework: Section 215

- Independent FERC-Certified ERO
- ERO develops standards for reliable interconnected operation of the BPS
- Due weight to technical expertise of the ERO
- FERC authority to direct ERO development of a standard on specific matter under 215(d)(5)
- Enforcement – ERO may delegate to regions
- Independent FERC enforcement authority
APPAn’s Interpretation of the ERO Model

• Independent self-regulatory organization
• Balance between industry and regulators
• ERO enterprise concept
  – Expert NERC staff
  – Effective regional delegation
  – Active stakeholder engagement
  – Industry technical expertise through committees and drafting teams
  – *Much more than just Standards and Compliance*
  – *Much more than just NERC and the regions*
Competing Visions of BES Reliability?

• Industry: Interconnected planning and operations to avoid the Big Three:
  – Cascading outages
  – Instability
  – Uncontrolled separation

• FERC: The Big Three . . . And More?
  – Loss of major load centers
  – Smart Grid impact on “Local Distribution”

• The Public: will the BES Vision change with new customer expectations?
NERC as a Learning Organization

• Experience-based learning and improvement
  – Root cause analysis of System Events
  – Measure Performance Trends - BES, region, entity
  – Analyze Compliance Violations

• Active engagement among registered entities, NERC staff, committees and SMEs

• Timely NERC Alerts, lessons learned, CANS

• Compliance monitoring and enforcement

• Long Term: Feedback to standard development
Systematic Approach to Standards Development: Learn From Experience
NERC Reliability Standards Program

- Demonstrate Results-Based Standards
- Ensure quality and clarity
- Streamline standards process
- Guidance and training for drafting teams
- Prioritize development based on reliability benefit
- Positive relationships and trust – FERC, NERC, industry
What is a Results-Based Standard?

- Who (applicability)
- Shall perform what action
- To achieve what reliability result or outcome, e.g.
  - bulk power system target performance/response
  - risk reduction
  - essential competency
- Under what conditions, if any
Preferred Types of Reliability Standards

• Performance-based
  – Defined target for bulk power system performance
  – Measures
    ▪ Periodic reporting of system data/results
    ▪ Event-triggered response data/analysis
    ▪ System testing/simulation

• Risk-based
  – Necessary when consequences of failure or performance-based measures are too costly
  – Based on defined risk strategies and objectives
  – Measures
    ▪ Bulk power system performance trends
    ▪ Defined risk targets achieved
    ▪ Performance records, logs, interviews, etc.

• Competency-based
  – Defined competencies necessary to ensure reliable performance
  – Measures
    ▪ Observe/test functionality
    ▪ Records, logs, interviews, etc.
Reliability Standards We Don’t Like

• Prescriptive (how to)
• Administrative (document something)
• Commercial (business practice)

What We Are Not Proposing

• Get down to the 10 key reliability requirements
• Reduce obligations for a reliable bulk power system
• Water down standards to least common denominator
• Reduce number of requirements for sake of reducing the number
# High Priority NERC Standards Projects

## High Priority Projects Under Development

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<th>Project Description</th>
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<td>Assess Transmission and Future Needs</td>
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<td>2006-06</td>
<td>Reliability Coordination</td>
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<td>2007-01</td>
<td>Underfrequency Load Shedding (ready to move to &quot;near completion&quot;)</td>
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<td>Operating Personnel Communications Protocols</td>
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<td>Real-time Transmission Operations</td>
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## Additional Priority Projects (near completion)

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<td>Certifying System Operators</td>
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Standards Project Prioritization

The Issues:

• What are our Top 5 – 6 Priority Standards Projects under active development, ranked based on reliability impact?

• Resource allocation: How do we manage NERC and Industry Bandwidth?

• Managing Expectations: identifying Top Priorities means other projects will be deferred or phased.

• Will FERC support NERC prioritization decisions?
Case in Point: Cyber-Security

• Policy consensus on what we’re protecting against
• Balanced portfolio of responsible protection, mitigation, and recovery actions
• Better information sharing to/from government
• NERC Initiatives:
  – CIP Standards: Bright-Line Criteria for Critical Assets
  – ES-ISAC Alert Capabilities
  – Aurora, VPN Tunneling, and Stuxnet
  – Research and Action: High Impact, Low Freq. Events
Questions?
Final Meeting Minutes
Standards Committee

Thursday, February 25, 2010 | 1–3 p.m.

Administrative
A special conference call meeting of the Standards Committee was held on Thursday February 25, 2010 at 1:00 p.m. The agenda, attendance list, and meeting announcement are affixed as Exhibits A, B, and C respectively.

Introductions and Quorum
Standards Committee Chair Allen Mosher led the introduction of committee members and observers and determined there was a quorum.

NERC Antitrust Compliance Guidelines
Maureen Long reviewed the NERC Antitrust Compliance Guidelines with the committee.

Meeting Agenda
There were no changes to the published agenda.

Standards Committee Priority Projects for 2010

High Priority Projects for 2010
The following projects were identified as the “top 10” to monitor during 2010:

- Project 2006-06 Reliability Coordination
- Project 2007-01 Underfrequency Load Shedding
- Project 2007-02 Operating Personnel Communications Protocols
- Project 2007-03 Real-time Operations
- Project 2007-07 Vegetation Management
- Project 2007-12 Frequency Response
- Project 2007-17 Protection System Maintenance & Testing
- Project 2008-01 Voltage and Reactive Control
- Project 2008-06 Cyber Security — Order 706
- Project 2009-01 Disturbance and Sabotage Reporting
Standards Committee High Priority Goals for 2010

The following activities were selected as “High Priority” goals for the Standards Committee in 2010:

1. **Results Based Standards.** This is a top initiative for 2010. See Report to the MRC and Board of Trustees for full description of project work plan, and outline of success factors.

2. **New Standards Process Manual.** Completion of industry, BOT and FERC approval, as well as Standards Committee development of revised guidance documents for drafting teams and industry education.

3. **Execution of the Standards Committee’s New Charter.** The Standards Committee must reach consensus on criteria and processes that we will implement for:
   - Active prioritization and management of project workload in the Reliability Standards Development Plan based on industry, BOT and regulatory priorities, and resource limitations we all face
   - Criteria for standards quality and clarity to ensure ambiguous standards are corrected during the development process
   - Tracking development progress (throughput) and quality
     - Try to develop metrics for standards development and track progress for top 10 projects in 2010

4. **Interpretations Process.** Develop a more effective, faster and less resource-intensive alternative to formal standards interpretations. Must be based on the input, views and subject-matter expertise of all NERC programs, Regional Entities, NERC committees, provide due process to Registered Entities and be capable of addressing both ambiguities in the standards and compliance issues. Regulatory buy-in is required.

5. **NERC as a Learning Organization/Enterprise.** Create more effective feedback loops back to standards development (both prioritization and standards content) from:
   - Compliance and enforcement statistics and advisories
   - Reliability metrics (particularly adequate level of reliability)
   - Events analysis and other performance trends
   - Registered entity complaints and questions

6. **Communication**
   - Hold a workshop that reviews new/revised standards
   - Identify activities from standing committees that can feed into standards
   - Improved relationship with all regulators and “the hill”
   - Database for standards

Adjourn
1. Administrative Items
   a. Introductions and Quorum — A. Mosher (Attachment 1a)
   b. NERC Antitrust Compliance Guidelines — M. Long (Attachment 1b)
   c. Meeting Agenda [Approve] — A. Mosher
   d. Waiver of 5-day rule [Approve] — A. Mosher

2. Standards Committee Priority Projects for 2010 — A. Mosher
   a. High Priority Projects for 2010 [Select] (Attachment 2a)
   b. High Priority Activities for 2010 [Select] (Attachment 2b)
   c. Projects for Application of Results-based Approach [Select] (Attachment 2c)

3. Adjourn
1. Administrative Items
   
a. **Introductions** — Chair Allen Mosher will lead the introduction of committee members and determine if there is a quorum.

b. **NERC Antitrust Compliance Guidelines** — Maureen Long will review the NERC Antitrust Compliance Guidelines provided in Attachment 1b. It is NERC’s policy and practice to obey the antitrust laws and to avoid all conduct that unreasonably restrains competition. This policy requires the avoidance of any conduct that violates, or that might appear to violate, the antitrust laws. Among other things, the antitrust laws forbid any agreement between or among competitors regarding prices, availability of service, product design, terms of sale, division of markets, allocation of customers or any other activity that unreasonably restraints competition. It is the responsibility of every NERC participant and employee who may in any way affect NERC’s compliance with the antitrust laws to carry out this commitment.

c. **Meeting Agenda** — A. Mosher
   Allen Mosher will review the meeting agenda and ask for modifications before the agenda is approved.

d. **Waiver of 5-day rule** — If there are items submitted to the Standards Committee for action with less than 5 days notice, those items cannot be added to the agenda without the unanimous consent of the members present. If any items fall into this category Scott Henry will ask the Standards Committee to vote on waiving the 5-day rule.

2. Standards Committee Priority Projects for 2010 — A. Mosher
   
a. **High Priority Projects for 2010 — Select**
   The table provided in Attachment 2a shows which projects were identified as candidates for the Standards Committee’s selection of a list of “high priority” projects to monitor more closely throughout 2010.

   The committee will discuss the candidate projects and make final selections for the list of projects to closely monitor during 2010.

b. **High Priority Activities for 2010 — Select**
   The table provided in Attachment 2b shows which activities were identified as candidates for the Standards Committee’s selection of a list of “high priority” activities to accomplish more closely throughout 2010.

   The committee will discuss the candidate activities and make final selections for the list of activities for the Standards Committee to accomplish during 2010.

c. **Projects for Application of Results-based Approach — Select**
   David Taylor proposed a list of projects for application of the results-based approach. Committee members were invited to offer alternatives. The list provided by David will be reviewed with a goal of selecting a final set of standards for application of the results-based approach to developing a standard.

3. Adjourn
<table>
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<tr>
<th>Segment</th>
<th>Name</th>
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<td>Chairman</td>
<td>Allen Mosher</td>
<td>American Public Power Association</td>
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<td>John A. Anderson</td>
<td>Electricity Consumers Resource Council</td>
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<td>Gerry Adamski</td>
<td>Maureen Long</td>
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<td>David Taylor</td>
<td>Al McMeekin</td>
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<td>Ed Dobrowolski</td>
<td>Lauren Koller</td>
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<td>Pat Huntley, SERC</td>
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<td>Sarah Hensley and John Jones, Texas RE</td>
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<td>Keith O’Neal, FERC</td>
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<td>Ross Kovacs, GA Power</td>
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Meeting Agenda
Standards Committee

Thursday, February 25, 2010 | 11 a.m.–1 p.m. Eastern
Dial-in Number: 866-740-1260
Conference Code: 4685998

Agenda and attachments now available at: http://www.nerc.com/filez/scmin.htm

Lauren Koller
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You are currently subscribed to sac_plus as: Lauren.Koller@nerc.net
To unsubscribe send a blank email to leave-1213464-155631.2f076f16b86b589a6065
POST-CONFERENCE COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

Pursuant to the Commission’s July 7, 2010 Notice Soliciting Comments in the above-captioned docket, the American Public Power Association ("APPA") submits its post-conference comments in response to the issues discussed at the July 6, 2010 Technical Conference held in the above-noted docket. APPA appreciates the opportunity to supplement the prepared statements and oral testimony offered by its panelists, Mr. Mark Crisson¹ and Mr. Allen Mosher,² at the July 6, 2010 technical conference.

APPA’s supplemental comments will address opportunities and reasons for improved communications between the Commission, the North American Electric Reliability Corporation ("NERC") and industry stakeholders, at both the executive and policy-making levels and at the technical/program staff levels. These opportunities for improved communications center around several different types of activities falling within NERC’s mission as the Commission-certified Electric Reliability Organization ("ERO"): (i) recurring NERC activities, such as development of the NERC Annual Business Plan and Budget and the Three-year Reliability Standards Development Plan;

¹ Mr. Crisson’s Opening Statement is posted at: http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=13830424
² Mr. Mosher’s Opening Statement is posted at: http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=13830429
(ii) emerging public policy issues, such as those raised during the July 6 Technical Conference; and (iii) reliability standards projects, and in particular, earlier communication of the Commission’s and its staff’s technical and policy concerns and objectives with respect to such projects.

I.

INTERESTS OF APPA

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour (“kWh”) sales to ultimate customers, and do business in every state except Hawaii. Approximately 1,840 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. APPA utility members are Load-Serving Entities (“LSEs”), with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve 45 million people. Public power systems own about eight percent of the nation’s higher-voltage lines (138 kilovolts (“kV”) or greater), although many of these lines are configured to deliver energy to their own load centers, and not to provide transmission service in interstate commerce.

APPA participated in a coalition of industry trade associations that helped to develop the statutory language that eventually became Section 215 of the Federal Power Act (“FPA”) upon the passage of the Energy Policy Act of 2005. APPA has since
participated actively in reliability-related industry activities on behalf of the nation’s publicly owned electric utilities, including numerous dockets before this Commission implementing the Commission’s and NERC’s responsibilities under the mandatory reliability regime set out in FPA Section 215. Approximately 330 APPA members are currently shown on the NERC compliance registry.

II. NOTICES AND COMMUNICATIONS

Notices and communications regarding this filing may be addressed to:

Susan N. Kelly  Allen Mosher
Senior Vice President of Policy Analysis  Senior Director of Policy Analysis
and General Counsel  and Reliability
American Public Power Association  American Public Power Association
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Suite 1200  Suite 1200
Washington, D.C. 20009  Washington, D.C. 20009
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skelly@appanet.org  amosher@appanet.org

III. COMMENTS

A. Leadership Forum

Seemingly without exception, Commissioners and panelists at the July 6 technical conference highlighted the need for improved communication and a more collaborative relationship between the Commission, NERC and the industry. Indeed, Chairman Wellinghoff noted:

You’re all saying we need to collaborate more, we need to open a dialogue, we need to move forward to better understanding of our respective positions and ways that we can work together, and I hear that and we’re going to do that. I commit to that. 3

3 Transcript, pp. 48–49, lines 24–25 and 1–3 (Chairman Wellinghoff).
APPA is gratified by the Chairman’s commitment and is confident that the rest of the industry feels the same way about the prospect of increased collaboration and dialogue. There was no consensus at the conference, however, on exactly how such communications should take place in the future and whether a formal committee or task force structure is required. Many participants were comfortable with the creation of a “leadership forum” that might include industry CEOs, NERC leadership, and FERC Commissioners, as well as Canadian regulatory authorities. Others were rightfully concerned that the leadership forum would be duplicative of other ongoing committee and task force activities, such as the NERC Member Representatives Committee. APPA intends to work with NERC and industry stakeholders to craft a consensus proposal that can be presented to the Commission and Canadian regulatory authorities in the very near future. The NERC Member Representatives Committee and Board of Trustees will discuss potential arrangements for improved coordination at their August 4–5 meetings in Toronto.4

APPA believes that the design and formation of a specific vehicle (or vehicles) for increased collaboration should be based on the specific reasons that executives, policy-makers and their respective staffs need to communicate. These reasons include: (i) recurring NERC activities, (ii) emerging technical and policy issues, and (iii) specific standards development activities.

B. Recurring NERC Activities

NERC has a number of recurring activities that would benefit from public collaborative meetings. These include development of the NERC Annual Business Plan and Budget, as well as NERC’s Reliability Standards Development Plan (“RSDP”),

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4 See Member Representatives Committee Meeting Agenda Item 7.c., posted at: http://www.nerc.com/docs/mrc/agenda_items/AgendaItem_7_c.pdf
which identifies and prioritizes standards development project work for the next three calendar years. The bulk of the work that goes into development of NERC’s Business Plan and the RSDP constitute detailed work that is best addressed at the staff levels. Nonetheless, executive and policy-level buy-in to the concepts and priorities reflected in these plans is sorely needed—because they reflect a commitment by industry, NERC, the Commission and Canadian authorities of significant financial resources, not just to develop and approve reliability standards, but also to make changes to electric utility bulk electric system planning and operations. As was repeatedly stated during the conference, the industry, NERC and regulatory authorities need to prioritize competing uses of NERC and industry resources, particularly with respect to reliability standards development. Prioritization is needed to ensure that scarce subject matter experts devote their time to standards-related projects that address the areas that pose the greatest risks to reliable operations and planning of the bulk electric system. Thus, the industry, NERC and regulatory authorities must compare the reliability benefits associated with completing each project, against the time and effort required to reach consensus on clear, technically excellent standards.

C. **Special Topic Reliability Summits**

APPA also suggests that regulators, NERC and the industry need to hold what might be called “Reliability Summits” to address specific emerging topics of concern to the industry and policy-makers. In some cases, these summits should be convened by the Commission, where the issues are largely confined to its FPA jurisdiction. One such example might be a Commissioner-led technical conference on the NERC Three-Year Assessment of its performance as the Commission-certified ERO under FPA
Section 215(c). However, as noted by Commissioners and panelists, there is a daunting list of emerging challenges to the industry that would benefit from the participation of Canadian authorities, state regulators and other federal agencies. A partial list of challenges that may require policy-level resolution—and significant technical research by NERC, the Commission, other agencies and industry—includes:

- The proper balance between reliability and cost to customers, including the trade-offs between increased investment at the bulk power and local levels;
- Strategic objectives and design basis threats with regard to protecting the physical and cyber security of our critical electric and other infrastructures;
- Integration of large quantities of renewable generation with variable output patterns and locations that are remote from load;
- Reliability and operational impacts of major transmission upgrades associated with greater reliance on remote resources;
- Cost-effective deployment of demand-side management and SmartGrid devices into both distribution systems and the bulk electric system;
- Planning for increased electric industry reliance on conventional and non-conventional sources of natural gas;
- Impacts on utility reserve margins and operations of new environmental regulations; and
- Impact on reliability of limits on greenhouse gas emissions through legislation or regulation.

Each of these areas could be the subject of future technical conferences. Many, but not all, could lead to new or revised NERC standards and to significant changes in how the bulk electric system is designed and operated. However, no one set of industry CEOs or subject-matter experts would be qualified to speak to all of these issues. Rather, APPA suggests that the Commission work with other governmental entities, NERC and industry stakeholders to hold a series of special topic technical conferences and workshops on emerging issues over the next two to three years. The workshops would be designed to
present complex technical issues to policy-makers and the public and seek the views and guidance of a diverse group of industry CEOs and government officials. NERC has developed a series of special topic assessments of policy issues in conjunction with its long-term reliability assessments and the work of its standing committees on various technical issues. These special reports could provide the technical foundation for future reliability summits.

D. Standards Project-Specific Workshops and Conferences

As discussed by Mr. Mosher during the technical conference (Tr. page 126), NERC staff, Commission staff, and industry stakeholders meet and discuss standards-related issues on an ongoing basis. These discussions take place through monthly meetings between NERC and Commission reliability standards staff, through meetings with standard drafting teams, and through Commission staff attendance at monthly NERC Standards Committee meetings. Nonetheless, a number of recent orders issued by the Commission appear to indicate a disconnect between the industry’s view of the timeliness and quality of proposed NERC standards and the Commission’s expectations.  

Billy Ball of Southern Company, speaking at the Technical Conference on behalf of the Edison Electric Institute (“EEI”), suggested a variety of ways to facilitate improved communications that would hopefully prevent such disconnects on a going-forward basis, as standards come to the Commission for its review:

5 Such disconnects were apparent in a number of the Commission’s March 18, 2010 orders, where the Commission appeared to have much different expectations with respect to interconnection frequency response, the need for time error correction, the definition of cascading and cascading outages with respect to BES equipment failures versus customer load shedding, and redundant relay protection equipment requirements implying that the bulk electric system should be planned to withstand n-2 simultaneous contingencies.
To this end, the EEI believes that the Commission should consider adopting new avenues for communicating its technical concerns and questions about a draft standard before there’s a NOPR. There are several ways that I think you could do this. The Commission or its staff could convene a technical conference or a workshop on a draft standard, to review Commission concerns. Pre-filing of proposed standards may be a way to facilitate this. The Commission could issue a preliminary staff report on a proposed standard, as you did prior to the issuance of Order 693. I think that process worked very well in getting some ideas and issues on the table, before the NOPR was issued.\(^6\)

APPA supports pursuing these communication avenues, but suggests that technical concerns and objectives should be communicated even earlier in the process of reliability standards development. One of the fundamental principles of results-based standards is that the drafting team must have a clear vision of the reliability goals and objectives to be accomplished. In that vein, it would be helpful for the Commission staff to articulate its vision of the reliability objectives of a proposed standard early in the development process, \(e.g.,\) when Standard Authorization Requests are initially formulated. These recommendations could be supported by technical research or reliance upon industry studies, such as those developed by NERC, IEEE, the Electric Power Research Institute (‘‘EPRI’’), and the national energy laboratories. APPA encourages the Commission to permit its technical staff to submit its recommendations in written form as part of the standards development process, where they can be discussed on the merits and fully vetted with industry subject matter experts. Again, these staff recommendations—particularly where fundamental differences of opinion are identified—should be aired and resolved early in the standards development process. The alternative is a protracted standards development process where Commission approval is conditioned upon

\(^6\) Transcript, pp. 143–144, lines 23–25 and 1–10 (Billy Ball).
directives to make additional changes to proposed standards, necessitating “return trips” to NERC for further action.

IV.

CONCLUSION

WHEREFORE, APPA respectfully requests the Commission to consider these comments as it formulates new policy initiatives in the area of reliability standards and the assessment of NERC’s performance as the Commission-certified Electric Reliability Organization.

Respectfully submitted,

AMERICAN PUBLIC POWER ASSOCIATION

______________________________
/s/ Allen Mosher

Susan N. Kelly, Senior Vice President of Policy Analysis and General Counsel
Allen Mosher, Senior Director of Policy Analysis and Reliability
Nathan Mitchell, Director of Reliability Standards and Compliance

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July 26, 2010
Standards Committee Report

Action Required
None

Background
This report summarizes key activities of the Standards Committee (SC) and its associated subcommittees to accomplish six “High Priority Goals for 2010” adopted by the SC in February 2010, in support of the NERC mission and corporate goals. The report also addresses issues of policy concern to the Board of Trustees (board) and industry stakeholders that may be discussed during the November Member Representatives Committee (MRC) and board meetings.

The SC comprises two representatives from each of the 10 industry segments who are elected by the Registered Ballot Body segment they represent. Up to two additional members may be added to represent Canadian interests. SC oversees the development of NERC reliability standards and develops standard process improvements to ensure timely and efficient development of industry consensus in support of technically excellent reliability standards.

SC meeting minutes are posted at: http://www.nerc.com/filez/scmin.html. The Standards program home page, which includes links to currently effective standards, standards under development, and extensive resource documents, is located at: http://www.nerc.com/page.php?cid=2. See in particular the tabs located under About Standards.

Standards Committee High Priority Goals for 2010
The SC adopted six high priority goals at a special meeting in late February 2010:

- Demonstration and implementation of Results-Based Standards;
- Approval and implementation of the new Standard Processes Manual;
- Execution of the SC’s new charter;
- Development of effective alternatives to the formal interpretations process;
- Ensuring that reliability standards reflect NERC’s commitment to becoming a learning organization; and
- Enhanced communications with stakeholders, regulators, and others.

Results-Based Standards
The NERC board, at its August 2010 meeting, handed off responsibility for implementing Results-Based Standards from the Ad-hoc Team to the SC. NERC staff coordinators and several drafting teams have been fully trained in the results-based process for developing reliability standards, and a two-hour industry webinar on this subject is scheduled for October 20. Two ongoing standards projects, Project 2007-07 Vegetation Management and Project 2009-01 Disturbance and Sabotage Reporting, have already applied the results-based concepts to develop draft standards.
Standard Processes Manual
The SC is pleased to report that the new *Standard Processes Manual* (SPM) was approved by FERC on September 3, 2010, subject to the submission of a compliance filing that addresses one specific concern identified by FERC regarding the enforceable elements of a Reliability Standard. A proposed modification to the SPM to address FERC’s September 3 order is now under industry review and ballot, and should be timely completed for approval by the board on November 19. Implementation of the SPM may entail changes to several SC Resource Documents, such as the Drafting Team Guidelines and the Roles and Responsibilities Document. Further, as ongoing standards projects come before the SC for additional action, such as moving from drafting to formal comment and balloting, the SC will arrange a smooth transition from the old Reliability Standards Development Procedure, Version 7 to the new SPM.

Execution of the Standards Committee Charter
The SC’s revised charter requires it to actively manage project workloads in the Reliability Standards Development Plan (RSDP) based on industry, board, and regulatory priorities, subject to NERC and industry resource limitations, and to ensure that standards quality and clarity issues are corrected during the standard development process. For example, the SC actively monitors ongoing high priority standards projects and authorizes various steps to help drafting teams get back on schedule.

Earlier this year, the SC Process Subcommittee developed a project “filter tool” that was refined and used to prioritize proposed projects in the *Reliability Standards Development Plan: 2011-2013* that is being presented for board approval at this meeting. The SC intends to refine the prioritization criteria and post them for industry comment during 2011. These criteria may be used to help make resource allocation choices, such as choosing which standards project to initiate next when an existing project is completed and whether development work on one project must be deferred in order to ensure timely completion of one or more other projects.

The SC has begun implementing a quality review process prior to posting of draft standards for formal stakeholder comment. Pre-posting quality review helps ensure industry understanding of the draft standard and may avoid subsequent rework of the standard during the balloting process. Reviewers drawn from NERC and regional entity staff and the Compliance and Certification Committee are trained to use a quality “check sheet” to ensure the standard meets FERC criteria for approval and NERC’s characteristics of an Excellent Reliability Standard. The SC Process Subcommittee is developing a procedure that provides for SC member oversight of the review process.

Interpretations Processes
The SC understands but has had some difficulty following the board’s direction that the standards program should focus its resources on developing permanent standards, rather than allocating industry and staff resources to respond to numerous requests to develop formal interpretations. Earlier this year, the SC placed a temporary hold on development work associated with new and ongoing requests for interpretation, to explore whether an informal standards guidance process or Compliance Application Notices would provide an adequate and timely substitute for formal standard interpretations. This temporary hold has proved to be unworkable for a variety of reasons associated with the number and complexity of the questions
being asked by the industry and regional entities on both standards and compliance issues, posing the same types of resource burdens on NERC as formal interpretations.

For these reasons, the Standards Committee has adopted criteria for processing existing formal interpretation requests, to move ahead first with pending requests that have completed or nearly completed industry ballot with strong industry support, followed by projects that have completed initial development. The SC will manage this project queue to ensure that no more than three or four interpretations are presented to the industry for comment at the same time. Further, in light of pressing industry concerns, Critical Infrastructure Protection interpretation requests of potentially broad applicability will be given priority over other requests.

The SC has also found that the relatively unstructured process used to develop Interpretations under the RSDP Version 7 does need to be transitioned to the more fully developed “Process for Developing an Interpretation” found in the new SPM, to ensure consistent outcomes during the interpretation development process and to support development of an adequate record for regulatory approval. For example, the membership and meeting minutes of the interpretation drafting team should be publicly posted and the drafting team should be chaired by a stakeholder rather than NERC staff.

A determination also needs to be made on the documents on which an interpretation drafting team may rely to develop the interpretation. Drafting teams have been directed to follow a “strict construction” approach to interpretations, as directed by the board at its November 2009 meeting. A key unresolved issue is whether the drafting team is limited to the text of the Requirements or if other sections of the reliability standard (such as Applicability and Compliance) may be taken into account? To what extent can supporting documents such as white papers or prior versions of the standard be used to understand the intent of a Requirement? This uncertainty has become an issue in recent interpretation reviews.

**NERC as a Learning Organization/Enterprise**

The SC continues to look for opportunities to create feedback loops from other NERC program areas and the standing technical committees to improve on both the prioritization of standards development and the content of proposed standards. For example, compliance and enforcement program concerns have been given significant weight in the prioritization of proposed projects, while many specific compliance issues have been included in the standards development issues database. The priority afforded by NERC to its cyber-security and system protection initiatives has elevated the importance of associated standards projects. The SC has also met with NERC staff to assess whether and how various reliability metrics can provide meaningful indicators of the need for new or revised requirements. See also the link to the Risk-Informed Approach for Prioritizing Development of Standards found in the 2011-13 RSDP. Finally, the SC leadership is exploring with other committees whether a longer-term standards development planning cycle could be used to identify technical research that can and should be initiated now, to support standards development projects that may only be started in the 2013-15 time frame.
Communications
Each of the strategic initiatives outlined above, as well as the ongoing work of the SC and Standards Program, entails ongoing communications with a variety of industry stakeholders, subject matter experts, utility executives, and regulators. The SC Communication and Planning Subcommittee and NERC staff have developed training materials and conducted webinars and workshops on Results-Based Standards, the new Standards Processes Manual, the draft Reliability Standards Development Plan for 2011-2013, as well as the technical content of specific standards. Over 200 industry stakeholders attended a Standards and Compliance Workshop held on October 5-6 in St. Louis. A webinar on the latest version of the CIP standards was attended by 733 people. On October 12, the SC held a Leadership Retreat with the chairs, vice chairs, and staff coordinators of NERC’s standard drafting teams, to identify standard development process and quality improvements. Finally, the SC is working with NERC staff to identify ways of improving the look and feel of the standards-related areas on NERC’s website.

Issues of Policy Concern to the Standards Committee
During its October 13-14, 2010 meeting in Houston, the SC identified a number of standards policy-related issues that may be raised at the November 2010 NERC MRC and board meetings in Atlanta. Unfortunately, the timing for posting of the MRC and board agendas precludes a full discussion of SC views concerning certain issues outlined below.

Available Transfer Capability Violation Risk Factors
In board agenda Item 11.f, NERC staff recommends board approval of the staff’s proposed Available Transfer Capability Violation Risk Factors. The SC agrees that NERC staff has properly applied the NERC Violation Risk Factor (VRF) definitions contained in the NERC Rules of Procedure, but nonetheless believes that application of the NERC VRF criteria produces an unreasonable result. The NERC VRF criteria state in part that:

A requirement assigned a “Lower” VRF is administrative in nature and is one that, if violated, would not:

- Be expected to affect the electrical state or the capability of the bulk power system (BPS);
- Be expected to affect the ability to effectively monitor and control the BPS; or
- In a planning time frame, under emergency, abnormal, or restorative condition:
  - Directly affect the electrical state or the capability of the BPS; or
  - Directly affect the ability to effectively monitor and control the BPS.

In effect, only administrative requirements with no impact on BPS operations qualify as Lower VRFs. If there is any potential adverse impact on reliable operations, NERC staff must assign a Medium VRF. Thus, there is a systemic upward bias in VRFs for requirements that pose a low BPS risk if violated, particularly in comparison with other requirements that if violated, do pose a medium level of risk to reliable operations.
NERC Three-Year ERO Performance Assessment
The SC was generally pleased by the discussion of standards-related issues in FERC’s September 16 Order on the NERC Three-Year ERO Performance Assessment. The SC is ready to work with NERC staff to develop appropriate standards program initiatives and submit a responsive informational filing as directed in the Order. The SC leadership is already working with NERC staff to develop a new triage plan to address outstanding FERC reliability standards directives.

FERC Order on NERC Rules of Procedure
The SC also discussed FERC’s September 16 order denying rehearing and directing NERC to propose changes to its Rules of Procedure that ensure that NERC will submit a standard in response to a regulatory directive, even if the standard developed in response to the directive does not receive support from the NERC ballot pool. The SC is concerned that actions that NERC may be required to take to comply with FERC’s order may be fundamentally at odds with NERC’s industry-based, ANSI-approved standards development process.

Formation of a Board of Trustees Technology and Standards Oversight Committee
Unfortunately, the draft mandate for the proposed board Technology and Standards Oversight Committee (TSOC) was not posted prior to the SC’s October meeting. The SC Chair did outline to the SC his understanding of the scope of standards oversight responsibilities and duties in the proposed mandate. Regardless of the board’s decisions concerning the TSOC mandate, the SC welcomes the policy oversight, guidance, and direction provided by the board.
NOTES
Southern Company – Overview

Market Cap. $30.1B

Revenues $15.7B

Customers 4.4M

Premier Regulated Utility Franchises

Unsecured Rating | Georgia Power
---|---
S&P | A
Moody’s | A3
Fitch | A+

Constructive Regulation
Healthy Capital Spending
High Reliability
Low Prices
High Customer Satisfaction
Plant Vogtle 3 & 4

- Located at existing 2 unit site
- Westinghouse AP1000 Design
- 2 units, approximately 2,200 MWs
- EPC Consortium of Westinghouse & Shaw
- 3,500 construction jobs, 800 permanent operational jobs
- 2016 & 2017 Expected Commercial Operation
## Risk Mitigations

### 1. Regulatory

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>A) Georgia House Bill 29</td>
<td>B) PSC Certification Process</td>
</tr>
<tr>
<td></td>
<td>C) CMP in Rate Base D) Construction Monitoring</td>
</tr>
<tr>
<td></td>
<td>Legislation and PSC Approval - 2009 Semi-Annual Review - Ongoing</td>
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</tbody>
</table>

### 2. Firm EPC Contract

### 3. Extensive Management Review Process

### 4. Upfront COL Certification Process
Vogtle 3 & 4 Construction Schedule

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>ESP Preparation</td>
</tr>
<tr>
<td>2006</td>
<td>ESP Preparation, ESP and LWA Review (08-15-06)</td>
</tr>
<tr>
<td>2007</td>
<td>ESP and LWA Received (8-26-09)</td>
</tr>
<tr>
<td>2008</td>
<td>PSC Certification Process (complete)</td>
</tr>
<tr>
<td>2009</td>
<td>EPC Contract Signed (4-8-08)</td>
</tr>
<tr>
<td>2010</td>
<td>PSC Certification received (3-17-09)</td>
</tr>
<tr>
<td>2011</td>
<td>COLA Preparation, COLA Submitted (3-31-08)</td>
</tr>
<tr>
<td>2012</td>
<td>NRC COL Review</td>
</tr>
<tr>
<td>2013</td>
<td>COL Received (expected) (Fall 2011)</td>
</tr>
<tr>
<td>2014</td>
<td>Construction</td>
</tr>
<tr>
<td>2015</td>
<td>Construction</td>
</tr>
<tr>
<td>2016</td>
<td>COD U3 2016</td>
</tr>
<tr>
<td>2017</td>
<td>COD U4 2017</td>
</tr>
</tbody>
</table>
Loan Guarantee Process

1. Application – Fall 2008
2. Preliminary Selection/Invitation – Fall 2008
3. Due Diligence – 2009
   • Engineering
   • Finance
   • Legal
   • Marketing
5. Loan Definitive Documentation - Current
6. Loan Closing – Prior to COL
## Conditional Commitment Offer

<table>
<thead>
<tr>
<th>Ownership (%)</th>
<th>Conditional Commitment ($BBs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia Power</td>
<td>45.7</td>
</tr>
<tr>
<td>Oglethorpe Power</td>
<td>30.0</td>
</tr>
<tr>
<td>Municipal Electric Aut. of GA</td>
<td>22.7</td>
</tr>
<tr>
<td>Dalton Utilities</td>
<td>1.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>
Conditional Commitment Disclosures

- $3.4 billion or 70% of eligible cost
- Full recourse to Ga Power
- First priority lien on Vogtle 3 & 4
- Federal Financing Bank Funding
- Loan subject to receipt of COL
- GPC customers estimated savings of $15 million - $20 million per year
Top Ten Lessons Learned

10. DOE Loan Guarantee Office is professional and dedicated
9. DOE interested in credit risk and project completion
8. OMB, Dep. of Treasury, Congress, Administration and others involved
7. Credit subsidy cost is truly a reflection of risk of Borrower
6. Loan Guarantee Office more familiar with project finance structures
5. While not required by law, DOE will require a first lien
4. No FMB Indenture simplifies DOE first lien requirement
3. Interpretation of all Program Rules still developing
2. Corporate Communication effort is extensive
1. Resources, patience and fees are required
NOTES
BIOGRAPHIES
Scott Anderson
Senior Policy Advisor
Climate & Air Program
Texas Office

Work
Since 2005, Scott has served as Environmental Defense’s point person on policies relating to the geological sequestration of carbon dioxide.

He works on a broad array of issues in the Texas legislature, and advises multiple levels of government on issues such as:

- wind energy,
- oil and gas operations,
- power plants and
- air quality.

Background
Mr. Anderson spent many years in the oil and gas industry prior to joining Environmental Defense Fund. He is the former Executive Vice President and General Counsel of the Texas Independent Producers and Royalty Owners Association (TIPRO). He was the long-time Secretary of the LIAISON Committee of Cooperating Oil and Gas Associations and was previously a member of the governing Council of the State Bar of Texas Oil, Gas and Mineral Law Section.

Professional Activities

- Member, State Bar of Texas, 1979-present
- Member, Ground Water Protection Council CO2 Sequestration Committee
- Member, World Resources Institute Stakeholder Group on CCS
- Member, Interstate Oil and Gas Compact Commission Carbon Capture and Storage Task Force
- Member, Federal Advisory Committee on Unconventional Resources Technology
- Member, Interstate Oil and Gas Compact Commission, 1986-87, 1990-present
- Member, Texas Oilfield Cleanup Fund Advisory Committee, 2001-2003
- Council Member, State Bar of Texas Oil, Gas & Mineral Law Section, 1990-1993
- Member, State Bar of Texas Standing Advisory Committee on Administrative Law, 1982-88
- Former editor of the Texas International Law Journal

Education

- J.D., University of Texas School of Law.
- B.S., University of Texas at Austin, Phi Beta Kappa.
Charles A. Berardesco
Senior Vice President, General Counsel,
Corporate Secretary & Chief Compliance Officer,
Constellation Energy

Charles A. Berardesco serves as Constellation Energy’s Senior Vice President, General Counsel, Corporate Secretary and Chief Compliance Officer. He has primary responsibility for the company’s legal strategies and policies, including corporate governance, legal compliance and ethics, corporate finance activities, mergers and acquisitions and litigation.

Mr. Berardesco formerly served as Vice President and Deputy General Counsel, a position he held since September 2006. He joined Constellation Energy in January 2003 as Associate General Counsel and was appointed Chief Compliance Officer and Corporate Secretary in 2005.

Prior to joining Constellation, Mr. Berardesco had practiced law for nearly 20 years, both in-house and with law firms. He served as Vice President, General Counsel & Corporate Secretary of Fusura, a consortium of AIG, Kemper and Prudential, and Senior Vice President, General Counsel & Corporate Secretary of HCIA, a publicly held health care information company. He was Counsel with the national law firm of Piper Rudnick (now DLA Piper), where he focused on corporate finance and mergers and acquisitions, and a partner in the law firm of Whiteford, Taylor & Preston, where he chaired the firm’s corporate department and served as a member of its executive committee.

Charlie is a member of the Board of Directors of Constellation Energy Nuclear Group, the joint venture between Constellation and Electricite de France to operate nuclear power plants in the United States. He is also a member of Constellation’s Investment Committee for its pension and employee savings plans and its Diversity Council, for which he serves as Chair.

Mr. Berardesco is also active in a number of charitable organizations, including having served as Chairman of the Board of the Woodbourne Center, President of the Presbyterian Home of Maryland, Chair of the Church Council of Foundry United Methodist Church and a member of the Board of Directors of the Baltimore Choral Arts Society and the Hippodrome Foundation. He is also a member of the Business Council of the Human Rights Campaign.

Charlie was named one of the top 10 “GC’s to Watch” by Corporate Board Magazine in May 2010 and in November 2010 Constellation was named as having the corporate governance team of the year in the small to mid-capital market segment by Corporate Secretary Magazine. In 2009 he received the first Inspiration Ribbon for his service to the annual Concert for Life in Washington, D.C. and in 2010 was awarded the Out and Proud Corporate Counsel award by the National LGBT Bar Association.

Mr. Berardesco received his Juris Doctor (with high honors) in 1983 from The George Washington University, where he was the Managing Editor of The George Washington Law Review, and his Bachelor of Arts (magna cum laude) in 1980 from Duke University.
David I. Bloom
Partner

Experience

Since joining Mayer Brown in 1978, David Bloom has earned widespread recognition as a skilled and knowledgeable regulatory attorney who concentrates his practice on transactions in the energy sector. His counsel is sought by some of the nation’s leading sector-focused investors, lenders, energy producers, and large-scale energy consumers.

David advises clients across a broad spectrum of industry issues, providing informed counsel on matters of investment and funding, acquisitions, complex purchase and service agreements, and federal and state regulatory concerns. Particular areas of activity include investments in the energy sector, natural gas and power marketing, natural gas storage, and transportation and electric generation.

In the course of his practice, David represents:

- Financial institutions (commercial banks, investment banks, and hedge funds) relative to equity investments in the energy sector and investment-related federal and state regulations. Representation includes pre-acquisition review of regulatory issues, negotiation of purchase agreements, preparation of regulatory filings, and development of post-acquisition compliance plans.
- Natural gas shippers in the negotiation of long-term transportation agreements with pipeline projects.
- Lenders engaged in financing oil and natural gas pipeline projects, natural gas storage projects, and electric generating facilities.
- Commercial companies in the negotiation of energy purchase contracts, including electricity and natural gas.
- Utility and corporate entities in proceedings before the Federal Energy Regulatory Commission, the US Department of Energy, and other government agencies.
- Clients aiming to develop energy-related legislation and legislative strategies.

Notable Engagements

- Advised a major financial institution in the acquisition of an energy marketing company from a large energy producer/supplier; handled the acquisition’s energy regulatory issues and established requisite compliance programs.
- Represented a global investment firm in its pending acquisition of a portfolio of electricity-generating facilities, provided comprehensive advice regarding regulatory considerations, and prepared the requisite regulatory filings.
- Counseled a large energy producer during its negotiation of a complex agreement for natural gas pipeline services as the anchor tenant of a new pipeline project.

Education

Yale Law School, JD, 1978 • Brown University, AB, magna cum laude, 1975; Phi Beta Kappa

Admitted

- District of Columbia, 1978
Speaker Bio

Daniel J. Crothers is a Justice on the North Dakota Supreme Court, which sits in Bismarck. He was born in 1957 in North Dakota and grew up in Fargo, American Samoa and Albuquerque. Crothers graduated from the University of North Dakota in 1979 and from the University of North Dakota School of Law in 1982, both with distinction. After law school he clerked for the New Mexico Court of Appeals and also engaged in private practice in Santa Fe. He returned to North Dakota where he served as an assistant state's attorney. In 1986 he moved to Fargo and practiced commercial litigation until being appointed to the Supreme Court in 2005. In 2007 Crothers was elected to fill the unexpired four year term on the Court.

Crothers taught undergraduate law courses at Minnesota State University-Moorhead for 6 years and for more than 20 years has trained lawyers and judges across the United States. Since 2006 he has served as adjunct faculty at The National Judicial College in Reno, Nevada. Crothers taught at the Pacific Judicial Council Conference on the island of Guam in 2007 and returned to Guam in 2010 to train Guam’s trial and appellate judges. In 2009 he taught at the Judicial Conference for the Court of Appeals for the Armed Forces in Washington D.C. and also presented a seminar in 2009 to the Virgin Islands Bar Association in St. Croix. In 2010 he was honored to join a team at the National Judicial College teaching appellate judges from the Kingdom of Thailand.

Crothers currently presents training to judges and lawyers on ethics and technology, discovery of electronically stored information, adjudicative independence, ethics for judges and their families and judicial disqualification.

Crothers is a former president of the State Bar Association of North Dakota. He is serving his second term as Chair of the American Bar Association’s Standing Committee on Client Protection and he is a member of the North Dakota Joint Committee on Judiciary Standards. He is a past member of the North Dakota Judicial Ethics Advisory Committee, which provides ethics opinions to judges, and past member and chair of the North Dakota Joint Committee on Attorney Standards.
Catherine Elder joined Aspen Environmental Group in October 2009 as a Senior Associate in the Integrated Electricity and Resource Analysis Division. Her career spans nearly 25 years, including policy work on federal and state level natural gas industry restructuring while at Pacific Gas and Electric Company, where she gained a deep understanding of gas utility operations and planning. She now helps clients evaluate and address energy policy and resource planning issues, including application of carbon regulation and incorporation of reasonable natural gas and other strategic assumptions into electricity modeling. She served as R. W. Beck’s Chief Gas Price Forecaster, has reviewed fuel plans and advised lenders for more than 40 different gas-fired power projects across the U.S. and Canada, and provides support to the natural gas staff at the California Energy Commission. In 2007 and 2008, she led a team that built a model for the Northern California Power Agency and Northwest Public Power Association demonstrating changes to the electricity resource mix that would meet state, federal and regional carbon targets, recognizing alternative allowance allocation mechanisms and calculating the rate impacts to individual utilities in California and the WECC.

Ms. Elder is the primary author of “Implications of Greater Reliance on Natural Gas for Electricity Generation,” released in July 2009 on behalf of the American Public Power Association. The study evaluates a variety of electricity resource scenarios and associated gas burns, highlighting operational mismatches between electricity scheduling and natural gas operations, and demonstrates that switching large portions of the coal-fired fleet to natural gas is not as easy as we often think. She has provided expert witness testimony relating to gas and electric regulatory policy, underground gas storage market power, marginal cost rates, and is a frequent speaker at industry conferences. Ms. Elder earned an undergraduate degree in Political Economy from the University of California, Berkeley with honors and holds a Master in Public Policy from the Kennedy School of Government at Harvard University.
DAVID P. FALCK  
Executive Vice President, General Counsel and Secretary  
Pinnacle West Capital Corporation and Arizona Public Service Company

David Falck is executive vice president, general counsel and secretary of Pinnacle West Capital Corporation and its primary subsidiary, Arizona Public Service Company (APS). APS is Arizona’s largest electric company. The companies are headquartered in Phoenix.

Mr. Falck is responsible for overseeing all facets of the company’s legal affairs as well as the company’s state and federal Public Affairs groups.

Mr. Falck joined Pinnacle West in 2009 and has more than 30 years of experience as a legal advisor to the energy industry. Prior to joining APS, he was Senior Vice President-Law for New Jersey-based Public Service Enterprise Group Inc., and served as a member of its executive officer group.

Before his employment with PSEG, Mr. Falck was a partner in the New York office of national law firm Pillsbury Winthrop Shaw Pittman LLP. His practice concentrated in mergers and acquisitions, financing and strategic advice for a range of clients in regulated industries in the U.S. and abroad. Mr. Falck served on the Managing Board of Pillsbury and as co-head of its national corporate and securities practice group.

Mr. Falck is a member of the planning committee of the Edison Electric Institute Legal Committee and a frequent speaker on legal issues affecting utility companies. He is a member of the Board of Directors of NAU Ventures LLC, a subsidiary of the Northern Arizona University Foundation, and serves on the boards of a number of Pinnacle West subsidiaries.

Mr. Falck is a magna cum laude graduate of Colgate University, and earned his law degree summa cum laude from Washington & Lee University School of Law in Virginia. He is a member of Phi Beta Kappa and Order of the Coif.
Dr. Peter Fox-Penner is a consulting executive and internationally recognized authority on energy and electric power industry issues. He is a Principal and Chairman Emeritus of The Brattle Group, a leading international economic consulting firm.

In his consulting practice, Dr. Fox-Penner advises energy companies, government agencies, and their counsels on energy regulatory and market policy issues. Dr. Fox-Penner is most often recognized for his long history of specialization in electricity market policies and regulation. Although his work has spanned most areas within the energy field, his current focus is on electric industry competition and structure, global climate change, and energy efficiency policies.

He is the author of numerous publications and books and a frequent speaker at conferences and meetings. His most recent book, Smart Power: Climate Change, the Smart Grid, and the Future of Electric Utilities (Island Press, 2010), examines strategies for the development of an energy efficient business model for the utility industry. He is also the author of Electric Utility Restructuring: a Guide to the Competitive Era (Public Utility Reports, 1997), a book widely considered an essential handbook to understanding deregulation of the utility industry.

From 1993 to 1996 he was a senior official in the U.S. Department of Energy and the White House Office of Science and Technology Policy; and held staff positions in the Illinois Governor’s office. He serves on the boards or advisory boards of Enviance, Gridpoint, The Solar Foundation, and other Cleantech firms and was a co-founder of Environment 2004 and the Environmental Alliance.

Dr. Fox-Penner received his B.S. in Electrical Engineering (1976) and his M.S. in Mechanical Engineering (Energy Policy, 1978) from the University of Illinois, and his Ph.D. in Economics from the Graduate School of Business, University of Chicago (1989).

February 2010
Mr. Glaser is a partner in Projects practice of Haynes and Boone, LLP and is resident in the Washington D.C. office of the Firm. His practice focuses on project finance, project restructuring and project development transactions, both international and domestic, as well as energy mergers and acquisitions transactions. In recent years, Mr. Glaser has been active in a variety of alternative and renewable energy projects including those involving wind, solar, biomass and waste to energy projects. Mr. Glaser has substantial experience in a variety of industries, including power, energy, telecommunications, and information technology, and in emerging markets throughout Latin America and the Caribbean, Asia, the Middle East, Africa, and Central and Eastern Europe.

Mr. Glaser has led transactions totaling many billions of dollars on behalf of lenders, sponsors and borrowers involving assistance from multilateral and bilateral funding and political risk insurance sources such as U.S. Eximbank, the Overseas Private Investment Corporation, the World Bank, the International Finance Corporation, the Multilateral Investment Guaranty Agency, the Japan Bank for International Cooperation and the U.K. Export Credits Guarantee Department. He has also written widely on the emerging market finance issues, including those arising from the restructuring and acquisition of troubled projects.

Mr. Glaser is an honors graduate of Kalamazoo College and the University of Michigan Law School, and is admitted to the District of Columbia Bar. He also serves as an Adjunct Professor of Law at the Georgetown University Law Center.

Further details about Mr. Glaser and the Firm can be found at www.haynesboone.com.
Mr. Guy is Chief FERC Counsel at Baltimore Gas and Electric Company, a PJM transmission owner, and gas distributor.

He is a former Partner of Bruder, Gentile & Marcoux, representing pipelines, LDCs, electric utilities, power marketers, cogens, and industrials. Previously, Mr. Guy was Assistant General Counsel for Equitable Resources. Prior to that, he was at Cullen and Dykman, primarily representing Brooklyn Union. He began in 1978, as a Presiding Officer and Attorney-Advisor at FERC.

Mr. Guy is the author of the “Biomass” chapter of *Energy Law and Transactions* (Matthew Bender) and the chapter, “Impact of Customer Choice on Local Distributor Transportation,” in *Regulation of the Gas Industry* (Matthew Bender).
Kimberly Heimert Bio

Kimberly Heimert is a lawyer with the Department of Energy’s Loan Programs Office, helping to spearhead the legal aspects of the government’s $80 billion deployment of debt financing for renewable energy projects. Ms. Heimert has over 16 years of experience as a transactional lawyer, with deep knowledge of financing energy and other infrastructure projects both domestically and abroad.

Prior to joining DOE in 2009, Ms. Heimert was a Managing Director and Counsel at GE Energy Financial Services, where she led internal and external legal teams in a variety of energy-related renewable, power, and oil and gas transactions. At GE, she also developed and implemented legal policies and procedures for the new venture capital clean-tech group, closing over 20 clean-tech investments totaling more than $80M over two years.

In private practice, Ms. Heimert spent more than 10 years representing lenders, developers, and governments on large and complex project and corporate financings of infrastructure projects throughout the world, with particular emphasis on emerging markets. She spent more than three years based in Uzbekistan and Kazakhstan with White & Case and as the head of the Mayer, Brown & Platt and Chadbourne & Parke offices there.

Before her legal career, Ms. Heimert worked as a journalist and was nominated for an Award for Cable Excellence (ACE) for her documentary entitled “A Secret to be Told”.

Kimberly earned her B.A., summa cum laude, in International Studies and Broadcast Journalism from The American University and her J.D., cum laude, from Harvard Law School.
Megan J. Hertzler is an Assistant General Counsel and Director of Data Privacy for Xcel Energy, a combination electricity and natural gas utility providing retail service in 8 Midwestern states with annual revenues in excess of $10 billion. Megan is Xcel Energy’s chief privacy officer and provides legal counsel and strategic advice to Xcel Energy on matters related to the management of data privacy and information security for the eight states in which it operates. Prior to joining Xcel Energy in 2002, Megan was with the law firm of Moss & Barnett, PA in Minneapolis, Minnesota where she represented telecommunications carriers and public utilities. Before her experience in private practice, Megan was an Assistant Attorney General in the Minnesota Office of the Attorney General, and counsel to the Minnesota Public Utilities Commission.

Megan has twice received Xcel Energy’s Individual of Excellence award for her work both internally and externally to promote inclusion in the legal profession. She is also the former president of Minnesota Women Lawyers, the women’s bar association in Minnesota.

Megan is a 1997 graduate of William Mitchell College of Law, where she served as an Associate Editor on its law review. She lives with her husband in St. Paul, Minnesota where they maintain an extensive urban garden.
G. Edison (Ed) Holland, Jr. is executive vice president, general counsel and corporate secretary of Southern Company. He also serves as Chief Compliance Officer of Southern Company. Prior to assuming his current position on May 1, 2001, he was president and chief executive officer of Savannah Electric for three-and-a-half years.

Prior to his position with Savannah Electric, he was at Gulf Power where he was vice president of Power Generation/Transmission and corporate counsel from 1995 to 1997, and vice president and corporate counsel from 1992 to 1995. From 1992 to 1995, he served concurrently as Southern Company system compliance officer. He also was previously employed as a partner in the law firms of Beggs & Lane, where he served as general counsel to Gulf Power.

Born in Rutherfordton, N.C., Holland received a bachelor's degree in political science from Auburn University and earned a Juris Doctor from the University of Virginia School of Law. He is a member of the boards of directors of First Chatham Bank Financial Corporation, Georgia Appleseed, Georgia Aquarium, Energy Insurance Mutual and Southern Golf Association, and a member of the Legal Committee of the Edison Electric Institute and the Electricity Committee of the Public Utility, Communications and Transportation Law Section of the American Bar Association.

Holland is married to the former Elizabeth (Betsy) Bird of Marietta, Ga. They have two daughters, Laura and Caroline. His hobbies include golf, boating and hunting.
SueDeen Kelly is an internationally-recognized energy industry veteran and former Commissioner with the Federal Energy Regulatory Commission (FERC). She represents a variety of clients in the electric and natural gas industries on business, regulatory, litigation and policy matters such as smart grid, renewable energy, electricity transmission, electricity and gas markets, natural gas infrastructure, natural gas quality standards, carbon emissions, clean energy technologies, energy efficiency and other issues. Ms. Kelly's knowledge of the national electricity and natural gas industries includes significant experience in infrastructure development and operation, market structures and financial products, emerging technologies, federal and state laws and regulations, impending policy changes and domestic/international market interrelations. She is an experienced litigator on energy and environmental matters in federal and state courts.

Nominated by Presidents Bush and Obama to three terms as FERC Commissioner, Ms. Kelly resolved 7,000 disputes with published Commission decisions and personally authored 100 separate statements during her tenure. She is credited with spearheading change in numerous regulatory policies, including integration of renewables into the grid, transmission interconnection and planning reform, deployment of smart grid technology to the transmission grid, the inclusion of smart grid demonstration grants in the stimulus effort, and natural gas quality standards to facilitate U.S. entry of liquefied natural gas. Ms. Kelly created a Smart Grid Collaborative between FERC and the association of state regulators to promote technology deployment and helped to grow membership to 30 states. She also pioneered internal strategic planning efforts to enable market reforms to adapt to new Congressional proposals regarding carbon emissions, demand response and efficiency, smart grid and hydrokinetic, offshore wind turbine and photovoltaic technologies.

In addition to her time at FERC, Ms. Kelly served as regulatory counsel for the California Independent System Operator and was a law professor at the University of New Mexico School of Law where she taught energy law, utility regulation, administrative law and legislative process. In 1999, Ms. Kelly worked as a legislative aide to Sen. Jeff Bingaman, then the ranking member of the Senate Energy & Natural Resources Committee. She also served as Chairwoman and Commissioner for the Public Service Commission of New Mexico, in the private practice of law in New Mexico (Modrall; Sheehan, Sheehan

SueDeen G. Kelly
Partner
Energy and Natural Resources
Smart Grid
Electricity
Energy-Related Public Policy
Natural Resources
Nuclear
Clean Technology
Litigation and Dispute Resolution
Smart Grid

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Energy

- Gilbert and Sarah Kerlin Lecturer on Energy Law, Pace Law School (2009)
- Gridwise Alliance Award for Leadership (2008)
- Chair and Commissioner, New Mexico Public Service Commission (1983-1986)
- Keleher & McLeod Professor of Law (1997-1999)
- Susan and Ronald Friedman Excellence in Teaching Award (1995-1996)

& Stelzner; Luebben, Hughes & Kelly) and Washington, DC (Ruckelshaus, Beveridge Fairbanks and Diamond) law firms, and as an attorney for the Natural Resources Defense Council.

Professional Affiliations:

- Council Member, American Bar Association Section of Administrative Law and Regulatory Practice (present)
- Council Member, American Bar Association Section on Environment, Energy and Resources (2000-2003)
- Board Member, Santa Fe Diocese Foundation (1999-2003)
- Founding Board, Albuquerque Open Space Alliance (1996-1999)
- Research Advisory Board, National Regulatory Research Institute, Ohio State University (1988-1992)

ARTICLES


www.pattonboggs.com
BIO

Mike McMahon has been the Senior Vice President and General Counsel of Boardwalk Pipelines since February 2007. Prior to that Mr. McMahon served as Senior Vice President and General Counsel of Gulf South since 2001. Mr. McMahon has been employed by Gulf South or its predecessors since 1989. Prior to joining Gulf South Mr. McMahon was in private practice in Wichita, Kansas. Mr. McMahon received his BA in economics and his law degree from Washburn University. In addition to his role with Boardwalk he also serves on the legal committees of Interstate Natural Gas Association of America and the American Gas Association.
Ernest J. Moniz is the Cecil and Ida Green Professor of Physics and Engineering Systems, Director of the Energy Initiative, and Director of the Laboratory for Energy and the Environment at the Massachusetts Institute of Technology, where he has served on the faculty since 1973. Dr. Moniz served as Under Secretary of the Department of Energy from October 1997 until January 2001. In that role, he had programmatic oversight responsibility for the offices of Science; Fossil Energy; Energy Efficiency and Renewable Energy; Nuclear Energy, Science and Technology; Environmental Management; and Civilian Radioactive Waste Management. He also led a comprehensive review of the nuclear weapons stockpile stewardship program and served as the Secretary’s special negotiator for Russia initiatives, with a particular focus on the disposition of Russian nuclear weapons materials. Dr. Moniz also served from 1995 to 1997 as Associate Director for Science in the Office of Science and Technology Policy in the Executive Office of the President, where his responsibilities spanned the physical, life, and social and behavioral sciences, science education, and university-government partnerships. He is a member of President Obama’s Council of Advisors on Science and Technology (PCAST) and of the DOE Blue Ribbon Commission on America’s Nuclear Future.

At MIT, Dr. Moniz served as Head of the Department of Physics and as Director of the Bates Linear Accelerator Center, a DOE user facility. His principal research contributions have been in theoretical nuclear physics and in energy technology and policy studies, which is his current research focus.

Dr. Moniz received a Bachelor of Science degree summa cum laude in physics from Boston College, a doctorate in theoretical physics from Stanford University, and honorary doctorates from the University of Athens, the University of Erlangen-Nurenbung, and Michigan State University. Dr. Moniz is a Fellow of the American Association for the Advancement of Science, the Humboldt Foundation, and the American Physical Society and a member of the Council on Foreign Relations. He received the 1998 Seymour Cray HPCC Industry Recognition Award for vision and leadership in advancing scientific simulation and, in 2008, the Grand Cross of the Order of Makarios III for contributions to development of research and education in Cyprus and the wider region. He serves on the Board of Directors of or as an advisor to several energy and security companies.
John S. Moot

Partner
Skadden, Arps, Slate, Meagher & Flom LLP
Energy Regulation and Litigation

John Moot has served as lead trial lawyer in complex FERC litigation, argued cases in the U.S. courts of appeal and defended companies in enforcement actions. He has represented companies in high-profile mergers and acquisitions, including hostile takeovers, merger break-up litigation and generation asset swaps. Mr. Moot also has handled high-profile matters involving market design and transmission access. According to Chambers USA 2009, Mr. Moot is “a master of strategy who commands respect.” Also, Mr. Moot’s “peers respect his thoughtful, measured and gentlemanly approach” noted Chambers USA 2010.

Mr. Moot served as General Counsel (2005-2007) and Chief of Staff (2007-2008) of FERC. During his tenure at FERC, he played a leading role in FERC’s major policy initiatives, including implementation of the Energy Policy Act of 2005, open access transmission reform, reform of organized electricity markets, creation of a reliability regulatory structure and development of a post-EPAct enforcement program.

Mr. Moot is a leading author on energy regulation, with influential articles on enforcement policy and compliance programs, transmission access reform and merger policy reform. Mr. Moot’s articles have appeared in the Energy Law Journal, The National Law Journal, the Administrative Law Review and Law360.
Donald F. Santa, Jr. is the president and chief executive officer of the Interstate Natural Gas Association of America (INGAA), the North American association representing the interstate and interprovincial natural gas pipeline industry.

Mr. Santa brings an extensive background in government and in the energy industry to his position at INGAA. He served as majority counsel to the U.S. Senate Committee on Energy and Natural Resources from 1989-1993, where he worked on enactment of the Natural Gas Wellhead Decontrol Act of 1989 and the Energy Policy Act of 1992. Mr. Santa was nominated in 1993 be a member of the Federal Energy Regulatory Commission, where he served until 1997. During his tenure as a commissioner, he worked on major FERC initiatives including Order No. 888 (open access rule for electric transmission) and implementation of Order No. 636 (the rule restructuring natural gas pipeline services).

Upon leaving the government, Mr. Santa joined LG&E Energy Corp in Louisville, KY, where he served as deputy general counsel and senior vice president for strategic planning from 1997-2001. Before joining INGAA in 2003, he was a partner in the Washington, DC office of the law firm Troutman Sanders LLP.

Mr. Santa is a graduate of the Columbia University School of Law and the Duke University Trinity College of Arts and Sciences. He resides with his wife and two children in Edgewater, MD.
Christopher J. Warner

Christopher J. Warner is Chief Counsel for CPUC proceedings at Pacific Gas and Electric Company in San Francisco, California. In this position, he is responsible for coordinating legal matters relating to ratemaking and rulemaking proceedings before the California Public Utilities Commission, as well as providing legal support and analysis on legislation before the California Legislature.

Recently, Warner has been PG&E’s lead counsel in the CPUC’s Smart Grid and Electric Vehicle OIRs and before FERC on its Smart Grid Policy Statement. He also has provided legal support to the PG&E teams that successfully obtained DOE Smart Grid investment and demonstration grant awards for compressed air energy storage and synchrophasor projects, along with ratepayer matching funds to support both projects. In 2006, he served as lead counsel for PG&E on the drafting of AB 32 and SB 1368, California’s two landmark climate change laws, and subsequently represented the utility in the implementation of both laws at the CPUC. In 2006 through 2008, he participated on the project teams that filed PG&E’s applications for approval of its first-in-California advanced metering infrastructure projects. Warner also played a major role as a lead counsel for PG&E during electric industry restructuring in the 1990s and in the 2000-2001 energy crisis, and represented the utility on its Chapter 11 settlement before the Bankruptcy Court and the Commission.
Warner joined PG&E in 1988 after serving as Deputy General Counsel and Associate General Counsel at the Federal Energy Regulatory Commission from 1985 to 1988. At FERC, he served as lead counsel on the Commission's major natural gas deregulation orders of the mid-1980's, Orders 436 and 451, and played a major role in the Commission's initial electric industry restructuring proposals. Prior to joining FERC, Warner served as a associate minority counsel on the House Energy and Commerce Committee from 1981-1983, and was a major drafter of the Nuclear Waste Policy Act of 1982. He also has served as a Deputy Assistant Secretary for Legislative Affairs at the US Department of Energy, legislative assistant to US Senator William V. Roth, Jr. (R.-Del.), and Director of the Delaware State Energy Office.

Warner also has served as commissioner on the Bay Area Conservation and Development Commission; chair of the board of the Headlands Institute, an environmental education institute in the Marin headlands; and President of the Sleepy Hollow Homes Association in San Anselmo, California. He is married to Cathryne Bennett Warner and they have two sons, Christopher and Cody.