

UNIVERSITY OF MARYLAND
FRANCIS KING CAREY
SCHOOL OF LAW

ADMINISTRATIVE LAW

THREE (3) HOURS

Day Division
Professor Percival

Monday, December 10, 2012
1:30 pm – 4:30 pm

No. _____

Signature: _____

Print Name: _____

Submitted Electronically Yes____ **No**____

INSTRUCTIONS:

1. **Honor Code.** Student conduct, during exams and at all other times, is governed by the Student Honor Code.

2. **Your Name, Your Exam Number and Exam Submission.** Sign and print your name in the blanks above. Put the exam number, course title and instructor name on the examination envelope. Indicate whether you are submitting this exam electronically. Submit these examination questions at the conclusion of the examination; do not put the examination questions in the examination envelope.

3. **Time.** Submit your examination answers within the announced time for the examination. If you submit your answers late, you likely will be subject to penalty.

4. **Computer Exams.** Computers [*may / may not*] be used on this exam. (If *may not*, the rest of instruction 4 need not be included in your examination instructions; continue on with instruction 5. If *may*, continue with one of the options below)

- Option 2 - Open Mode – access to Exam4 and student computer-based notes - no Internet access

If you use a computer on this examination, you must use the Exam4 examination-taking software provided by the law school. You must provide your own computer and must have downloaded a copy of the Fall 2012 version of the Exam4 software to your computer. You should have completed this download, tested the software, and be sure the computer is in working order well before the date of this exam.

At the end of the examination, choose the "Submit Electronically" function on the Exam4 software. The software will request your Exam ID (Examination Number). Put the course name on your answer as instructed in the handout, but do not put your name anywhere on your answer. Submit your answer within the time limits for the examination; no allowance for additional time will be given for equipment failure. After submitting your answer electronically, note on the envelope the name of the course, your exam number, check "Submitted Electronically," and turn in the exam envelope and your examination questions to the proctor. (The administration will print your Exam4 answers and insert them in the exam envelope.)

Technological Problems: If you experience a technological problem during the examination period, consider the amount of time remaining and decide whether you should continue (or restart) the examination in blue books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time electronically lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission, as long as there is no evidence of tampering with either your computer or the examination file.

5. Handwritten Exams. If you submit handwritten answers to the examination, put the number found above on each of your blue book answers to the examination. Both the envelope and your answers should contain your examination number, the course name, and the instructor's name. Do not put your name anywhere on the envelope or on the blue book answers.

Upon completion of the examination, put your answers in the envelope and hand in the envelope to the examination proctor. Be sure to enclose all of your answers in the envelope—you will be graded on only what is inside the envelope. Do not put the examination questions in the envelope. Hand in the questions separately to the examination proctor. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.

6. Exam Question Clarity. In response to the recommendations of the Ad Hoc Committee to Review Exam Administration, faculty are encouraged (but not required) to include one of the following statements, another variation or may decide not to include such a statement, in their exam instructions.

- A) "If any facts are not clear, or if there is information you deem critical that is not stated explicitly, identify those facts or missing information and explain how they affect your legal analysis."
- B) "If in reading any of the questions you reasonably believe there is an ambiguity, error, or inconsistency, please identify this issue in your answer and specify any reasonable assumptions you are making in answering this question, and then proceed to answer the question. This approach should be used with caution. The mere assertion of an ambiguity, error, or inconsistency, if not well justified, particularly if it appears that such assertion might have been intended to justify your avoiding difficult and/or significant substantive issues in the examination, will not excuse your failure to address such issues."

QUESTION ONE (30 points)

Martha Wright-Reed, a blind 86-year-old former nurse, is a resident of Washington, D.C. whose grandson Ulandis Forte was incarcerated for manslaughter in 1994. She regularly received collect telephone calls from her grandson in prison. These calls were extremely expensive – nearly \$20 per 15 minutes. Upset by the high cost of these calls, Ms. Wright-Reed signed a petition that was submitted to the Federal Communications Commission (FCC) in March 2003. The petition asks the FCC to require carriers serving prisons to reduce their rates on interstate collect phone calls from prisons to no more than 25 cents per minute. Today, nearly 3,500 days after the “Wright petition” was filed, the FCC still has not responded officially to it. When contacted by a reporter from the Washington Post, Neil Derek Grace, a spokesman for FCC Chairman Julius Genachowski, stated that “the FCC is working with all interested parties — including the families of inmates, prison pay phone providers, public interest groups, and the states — to address the question of rates for interstate phone calls by inmates and their families, and we are preparing next steps.”

The FCC is directed by five commissioners appointed by the President of the United States and confirmed by the U.S. Senate. Only three commissioners can be of the same political party at any given time. All commissioners, including the chairman, have five-year terms. Under the Communications Act of 1934, which created the FCC, the agency has the authority to regulate interstate telecommunications, but it has not regulated the price of interstate phone calls from prisons. Once a private phone company wins a contract to serve a prison it effectively has no competition.

Securus, a company that provides phone service to 2,200 prison facilities in 44 states, claims that it charges high rates because of the technology required to monitor prison phone calls and the need for further research and development of new technology. It also notes that all but seven states require the company to pay high commissions on prison phone calls. In Virginia prisons the commissions represent 35% of the price of a phone call. In Maryland the commission can be up to 60% of the cost, which generated \$5.2 million in revenue for the state in 2010.

1. (6 points) Is the FCC an “independent agency”? Why or why not? What are the principal legal consequences of an agency being considered “independent”?
2. (6 points) What legal action under the Administrative Procedure Act (APA) could Ms. Wright-Reed take to try to force the FCC to regulate the rates charged for prison phone calls? How likely is it that she would succeed in getting the Commission to Act?
3. (6 points) If the FCC decides to take action, should it proceed by informal rulemaking or by conducting a formal adjudicatory proceeding? Discuss the advantages and disadvantages of each procedure. If Ms. Wright-Reed is unhappy with the agency’s choice of procedure, how likely is it that she could get a court to order the agency to use a different procedure?
4. (6 points) Suppose prison authorities wish to take away Mr. Forte’s phone privileges as a disciplinary measure. Mr. Forte believes that this action is being taken in retaliation for his

grandmother's activism on the phone rate issue. What process, if any, would the due process clause require prison authorities to follow before imposing this discipline?

5. (6 points) After 19 years in prison Ms. Wright-Reed's grandson was released on probation in July 2012. Would she still have standing to sue the FCC? Would her case against the FCC now be moot?

QUESTION TWO (30 points)

Since the 1930s the U.S. Securities and Exchange Commission (SEC) by regulation has prohibited companies from advertising to solicit investments in order to prevent fraudsters from duping unsophisticated investors. On April 5, 2012 President Obama signed into law the "Jumpstart Our Business Startups (JOBS)" Act, Pub. L. 112-106. The law is designed to make it easier for small companies to raise capital directly from the public by exempting registered securities offerings of less than \$1 million from the SEC's ban on soliciting investments through advertising in the media. Section 201 of the JOBS Act requires the SEC by July 4, 2012 to amend its existing Rules 506 and 144A(d)(1) that currently prohibit such advertising to conform to the new law.

In May 2012, the SEC's Division of Corporate Finance, working with the agency's Office of General Counsel, concluded that the best way for the agency to implement Section 201 of the JOBS Act was to promulgate an interim final rule instead of issuing a proposed rule and soliciting public comment. Meredith Cross, director of the division, had concluded that issuing a proposed rule and soliciting public comment was impractical in light of the statutory deadline and unnecessary in light of Congress's "clear and straightforward" directions for amending the rules.

Although the SEC missed the July 4 deadline, work on the interim final rule continued and it was expected to be issued after a vote of the commissioners on August 22. However, on August 7, 2012, the chief of staff to SEC Chairman Mary Shapiro received an email from Barbara Roper, a lobbyist for the Consumer Federation of America (CFA). In the email Roper voiced "strong objections" and vowed that the CFA would galvanize public opposition to the rule if the SEC adopted it without first issuing a proposed rule and soliciting public comment. Describing herself as "very worried" about the CFA's potential opposition, Shapiro directed the SEC's legal staff to scrap the interim final rule and to prepare a proposed rule and a solicitation for public comment. She emailed a fellow SEC commissioner that the CFA isn't "really asking for much" and stated "I don't want to be tagged with an Anti-Investor legacy." When he learned of this, Republican Commissioner Daniel Gallagher emailed Shapiro that he was "furious" and accused her of acting in bad faith, noting that public comments could have been gathered months before.

On August 29, 2012, the SEC commissioners approved the issuance of the proposed rule and solicitation of public comment. The public comment period closed on October 5, 2012. Commission staff are now considering the public comments and drafting responses to them. Despite the July 4 deadline contained in Section 201 of the JOBS Act, the rule has yet to be promulgated in final form. On November 30, 2012, Congressman Patrick McHenry (R-N.C.)

sent Chairman Shapiro a letter criticizing the SEC for not issuing an interim final rule. The letter stated: “The decision to proceed with a proposed rule appears to have prioritized a well-connected special interest group’s preference and concern over how your legacy would be perceived over faithful compliance with the law.” He urged Chairman Shapiro to finalize the rule before she leaves office on December 14.

1. (6 points) Has the SEC or Chairman Shapiro violated the Administrative Procedure Act (APA)? Why or why not? Have they violated any other law?

2. (6 points) Could the SEC legally have promulgated an interim final rule without issuing a proposed rule and soliciting public comment? What would the agency have had to do legally to justify dispensing with advance notice and an opportunity for public comment? How likely is it that the SEC could have done so?

3. (6 points) Suppose that the SEC in its proposed rule would have exempted advertising in all media, including the internet, but in response to public comments it decides not to exempt internet advertising. Could the agency legally promulgated a final rule that does not exempt internet advertising from its existing ban without first issuing a new proposed rule? Why or why not?

4. (6 points) Suppose that the SEC adopts a final rule exempting from its advertising ban all securities offerings of less than \$1 million. In the preamble of the final regulation, the SEC states that the rule is intended to “preempt all state regulation of advertising” of such offerings. A state securities regulator then later successfully sues a company in state court for deceptive advertising of a securities offering of less than \$1 million. The company argues that the lawsuit is preempted by the SEC regulation. How would you analyze this claim and what result would you predict that the court would reach on the preemption claim?

5. (6 points) Would the JOBS Act rule have been an appropriate candidate for regulatory negotiation? Why or why not? If the SEC convened a regulatory negotiation, would it trigger the requirements of the Federal Advisory Committee Act? If it did, what would FACA require the SEC to do?

QUESTION THREE (30 points)

The European Union (EU) has extended to civil aviation its cap-and-trade program to control emissions of greenhouse gases. EU regulations require all airlines flying to and from EU member states to pay emissions charges based on the entire length of the flights commencing in 2013. These charges can be offset if the flights are subject to reciprocal emissions charges imposed by their home countries. Non-EU airlines and their governments, including the U.S., China, Russia, and India, have vehemently protested the charges and threatened not to pay them.

To strengthen the hand of U.S. airlines opposing the fees, Congress last month enacted the “European Union Emissions Trading Scheme Prohibition Act.” Despite pressure from environmental groups to veto the legislation, President Obama quietly signed it into law on November 27, 2012. The signing was not even reported on the White House website. The law

provides that the U.S. Secretary of Transportation “shall prohibit” U.S. airlines from paying the emissions charges “in any case in which the Secretary determines the prohibition to be . . . in the public interest, taking into account: (1) the impact on U.S. consumers, U.S. carriers, and U.S. operators; (2) the impacts on the economic, energy, and environmental security of the United States; and (3) the impacts on U.S. foreign relations, including existing international commitments.” The law also provides that “After determining that a prohibition under this section may be in the public interest, the Secretary must hold a public hearing at least 30 days before imposing any prohibition.” The Act also requires the Secretary of Transportation “to reassess such a determination” if the EU amends its regulations, an international agreement on aviation emissions is reached, or the emissions are regulated under U.S. law or regulation.

1. (6 points) Is the European Union Emissions Trading Scheme Prohibition Act unconstitutional as a delegation of legislative power to the executive branch?

2. (6 points) Suppose that the Secretary of Transportation wishes to use the authority granted by European Union Emissions Trading Scheme Prohibition Act to prohibit U.S. airlines from paying the EU emissions fees. Stung by criticism from environmental group who had asked him to veto the legislation, President Obama does not want the Secretary to take such action. Can the President legally require the Secretary not to grant the exemption?

3. (6 points) Suppose that the Secretary of Transportation imposes the prohibition on airlines paying the emissions charges to the EU without holding any hearings. Has he violated the Administrative Procedure Act? What legal action, if any, could environmental groups take to challenge the Secretary’s action and how likely is it that they would succeed in such an action?

4. (6 points) Suppose that the Secretary’s determination that it is “in the public interest” to prohibit airlines from paying the EU emissions charges is challenged in court. How much deference, if any, should a reviewing court afford to the Secretary’s determination of what constitutes the “public interest”?

5. (6 points) In November 2012 the EU announced that it would suspend for one year the collection of greenhouse gas (GHG) emissions fees from foreign airlines in order to give the International Civil Aviation Organization an opportunity to negotiate a global agreement to control GHG emissions from aviation. Would this action render a lawsuit challenging the Secretary’s determination that it is “in the public interest” to prohibit airlines from paying the EU emissions charges unripe for review?