ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Administration and Management

Minutes

September 25, 2012

Members Attending

Paul Bardos
Gov't Member, International Trade Commission

Warren Belmar
Senior Fellow, Capitol Counsel Group, LLC

John Cooney (Committee Chair)
Public Member, Venable LLP

Fred Fielding
Senior Fellow, Morgan Lewis & Bockius

Edward Keable
Gov't Member, Department of the Interior

Nina Olson
Liaison, Office of the National Taxpayer Advocate (Internal Revenue Service)

Robert S. Taylor
Gov't Member, Department of Defense

James Tozzi
Public Member, Center for Regulatory Effectiveness

ACUS Staff Attending

Gretchen Jacobs
Research Director

Stephanie Tatham
Project Advisor

Amber Williams
Law Clerk

Paul R. Verkuil
Chairman

Invited Guests Attending

Jim Chen
Consultant

Curtis Copeland

The meeting commenced at approximately 2 p.m. in the conference room of the Administrative Conference. Committee Chair John Cooney welcomed attendees. The minutes from the Committee's last meeting, held May 2, 2012, were approved on a voice vote.

Mr. Cooney introduced the project, which examines inflation based adjustments for civil monetary penalties. The Inflation Adjustment Act (IAA) requires agencies to adjust their civil monetary penalties on a periodic basis. Conference Chairman Paul Verkuil explained that the Administrative Conference has addressed similar issues before and has made seven recommendations in similar areas in the past.

Genesis of the Inflation Adjustment Act Project

Stephanie Tatham discussed the genesis of the Inflation Adjustment Act Project. She recognized Mr. Copeland for his work bringing the Conference's attention to this topic. Mr. Copeland has studied the issue for the Government Accountability Office (GAO). In the congressional hearings preceding the reinstitution of the Administrative Conference, he suggested that the Conference address this issue.

Ms. Tatham recognized that the Conference has addressed this area several times, with the most on-point recommendation being Recommendation 84-7, Administrative Settlement of Tort and Other Monetary Claims Against the Government.

Mr. Cooney turned to Professor Chen to introduce his report and describe his study.

Introduction to Inflation Adjustment Act Research Report

Professor Chen explained that the IAA has three major problems: (1) initial adjustment is capped at 10% and that creates a permanent inflation gap because whatever inflation takes place, the adjustment cannot catch up once you cap the adjustment at 10%; (2) the Act was drafted so that each adjustment must ignore six to eighteen months of known inflation data, thereby guaranteeing a Consumer Price Index (CPI) lag in adjustments; and (3) adjustments may be delayed by many years because the statute requires agencies to round according to the amount of the penalty, not according to the amount of the intermediate adjustment.

Discussion of the Issues

Mr. Cooney indicated that there seems to be a scatter pattern of which agencies have adjusted for inflation, and to what degree, and which agencies have not adjusted for inflation at all. Mr. Cooney asked whether the legislative history anticipated this outcome. Professor Chen replied that there was legislative concern that this should be handled by Congress, not the agency. There was another concern regarding the frequency of adjustment. This congressional discussion started in the mid-1980s, when CPI data could not be picked up from a web search, but had to be requested or pulled from the latest data from the Bureau of Labor Statistics. Thus, there may have been an administrative burden associated with frequent adjustments. Those concerns are reflected in the legislative history. No one suggested that the adjustment process should deviate from CPI. It was settled early on that CPI would be the measure for the cost of living and that penalties would be adjusted accordingly.

In adopting the IAA, Congress may have made an error in the language describing the referral period for cost-of-living adjustments, this phenomenon is known as CPI lag. There was a difference in the cost-of-living definitional language that was proposed and the language that was adopted. Professor Chen discussed the legislative history of the provision creating the CPI lag, and pointed to three reasons why he believes this is a simple drafting error (*see* p. 7 of the report).

Mr. Bardos asked about the timing of the recommendation. Since inflation is low right now, some people may ask: "Is this really a problem?" Professor Chen responded that because inflation has been a modest concern, empirically speaking, this is perhaps a good moment to look at the issue strictly on its merits, detached from expediency in reaction to a crisis. Ms. Tatham added that now may also be a good time for reconsideration in light of the current fiscal climate because receipts from civil penalties may be used for pay-go.

Ms. Olson indicated that her office has produced a report on civil penalties that may be instructive. She took issue with the point about the public fisc, noting that penalties are designed to deter noncompliance with regulations. She expressed the view that treating penalties as a way of raising revenue is inappropriate. Ms. Olson recommended that the report include a more foundational discussion of the purpose of penalties. Ms. Olson recommended doing empirical setting adjustments based on empirical analysis of whether penalties impact behavior. Ms. Olson indicated that the Taxpayer Advocate's Office is studying the behavioral impacts of penalties right now, and that the study will come out in a few years. Chairman Verkuil indicated that an empirical study would require an additional separate study, to which Ms. Olson agreed. Professor Chen agreed to include a brief discussion about purpose as a prefatory matter of framing.

Mr. Copeland explained that he worked on the 2003 GAO study. He agreed that the original purpose of penalties was deterrence, but suggested that we cannot turn a blind eye to the secondary purpose of revenues. He cited a 2007 GAO report indicating that if certain penalties had been adjusted, the government would have received between thirty-eight and sixty-one million dollars in additional revenue. He observed that inflation adjustment for civil penalties come into play only when someone is assessed the maximum penalty. GAO found that agencies tend not to impose penalties for first time violations, and even for second violations agencies do not impose the maximum. Maximum penalties allow agencies to punish the worst, willful, or repeat violators. Mr. Copeland also noted that the GAO report examined four, not just three, issues and recommended that other agencies, like the Social Security Administration, Occupational Safety and Health Administration (OSHA), and others should be included. Mr. Copeland recommended that this report should consider recommending a central authority to administer the Act.

Mr. Keable underscored the importance of addressing the purpose of civil monetary penalties. He provided the example of the civil penalties that will be imposed relating to the BP oil spill. The goal of those penalties is to make companies behave better than BP did in operating its rig. Mr. Keable also provided the example of the DC city government's struggle to collect civil penalties for violations caught on traffic cameras. The city government has a desire to increase revenue. The line between deterrence and revenue as a purpose for the imposition of penalties is blurred in that case.

Mr. Belmar asked how Congress reacted to the nine-year-old GAO report. Mr. Copeland responded that Congress was silent; there was not much reaction at all. It was not a congressionally-requested report; it was self-started. Mr. Belmar asked whether we have heard from agencies that this is a problem for them. Mr. Copeland responded that he had collected responses from agencies and had passed along the information to Professor Chen. There are

many *Federal Register* notices in which the Act has constrained agency adjustments in meaningful ways.

Mr. Belmar clarified his question by asking whether agencies have complained that the problems with adjusting penalties deprive them of resources necessary to carry out their mission. Mr. Copeland responded with the example that the National Highway Traffic Safety Administration (NHTSA) tried to go after Toyota and expressed frustration with the cap on the penalty amount it could impose. NHTSA indicated that companies like Toyota may consider these penalties as simply a cost of doing business. There is a problem for agencies because they haven't been able to adjust for inflation.

Mr. Cooney asked Professor Chen whether he had identified similar examples. Professor Chen indicated that he identified agencies that engaged in self-help. Agencies looked at the statute and thought that Congress couldn't have meant it to say what it says. Professor Chen provided the example of the Farm Credit Administration (FCA). FCA rounded its penalty increase according to the amount of the increase, not the amount of the underlying penalty as required by the statute. It is clear from this and other episodes that even if agencies are not overtly complaining, they're ignoring or violating the statute. These kinds of departures, even in the absence of agency complaints, provide evidence that agencies feel constrained by an unworkable statute.

Mr. Belmar asked why the statute is unworkable. Professor Chen responded that agencies have reached out to other agencies (like GAO) for help, indicating that there is a problem. Also, agencies have ignored or misconstrued the statutory language—the Department of Commerce did the same thing as the FCA. These agencies have not conspired together to misconstrue the language, but have come to the same erroneous conclusions independently.

Mr. Belmar asked whether this is a substantive or procedural issue. Chairman Verkuil responded that the Conference has taken Mr. Belmar's concerns regarding substance versus procedure seriously and is committed to staying on the procedural side. In the past, the Conference has made seven recommendations on civil money penalties and their application. Chairman Verkuil observed that it is within the Conference's statutory authority to make these kinds of recommendations.

Mr. Belmar expressed concern that the GAO report raised the same issues, and Congress chose not to do anything about it. Ms. Jacobs asked whether Mr. Belmar's concerns would be addressed if the report included more discussion of the agencies' concerns. Mr. Belmar responded that whether an agency is having a problem doing its duty should be identified.

Mr. Tozzi indicated that the report ought to say up front that the Administrative Conference is fine tuning the existing system and not conducting a *de novo* review of the penalty issue. There's a large body of literature that says that penalties should be assessed according to the Implicit Price Deflator (IPD) rather than CPI. The Conference is not addressing the CPI/IPD choice, and the report should say that. There are other things that the Conference is not reviewing *de novo*. For example, there are a number of exemptions (i.e., IRS and OSHA). If the Conference

was doing a *de novo* review, the report would address those exemptions. In addition, there's a huge degree of noncompliance by the agencies that are not updating their regulations. The Conference is not addressing the fact that the statute is self-enforcing. Therefore, there are a number of more substantive issues that the Conference is not addressing. The Conference is simply fine tuning the existing system.

Chairman Verkuil observed that there could be a litigation risk for agencies that do not follow the statute. Mr. Cooney clarified that the civil litigation risk might be a traditional Administrative Procedure Act claim for failure to engage in mandatory rulemaking. Mr. Tozzi indicated that this litigation risk is tenuous because of standing concerns. Professor Chen agreed that it would be difficult on standing, but one cannot predict the outcome of that kind of challenge, and it's not implausible that someone could bring that case. Chairman Verkuil responded that the litigation issue is that someone could say that the agency miscalculated the penalties. Professor Chen followed up on this point by indicating that the rounding provisions have a loaded spring effect. One loads the spring for a long time, perhaps even seventeen years, and when a violator crosses threshold, it could be subjected to two penalties—a small penalty for year fifteen or sixteen and a huge penalty for year seventeen. He argued that this could be viewed as a classic case of arbitrary and capricious agency action. This example could lead to a penalty-payer suit instead of a suit based on the amount of a competitor's penalties.

Mr. Copeland indicated that GAO communicated the same point in 2003. Under the rounding provision, penalties are unadjusted and then may be adjusted by more than inflation would require. This is a perverse scenario. Mr. Copeland also indicated that there was a perversity in the CPI lag feature. The more diligent an agency is, the more inflation it will lose. He thought that couldn't be what Congress intended. Congress said that it wanted to allow for adjustment of civil penalties, provide deterrence, and promote compliance with the law.

Mr. Cooney reiterated that this statute has created a scatter pattern of results that Congress neither wanted nor predicted. Thus it is a fair question for Congress: Does this statute carry out the purpose you originally envisioned?

Mr. Belmar noted that the Conference's recommendation would parallel the GAO's recommendation. He expressed concern about a recommendation to Congress. He believed that the recommendation should target agencies to administer the statute appropriately, and then perhaps recommend that Congress consider changes. Mr. Belmar asked that if agencies are not following the law, shouldn't the Conference address that?

Mr. Tozzi had another recommendation to strengthen the report. He got the impression that there are statutory requirements that are not being implemented and that need to be fixed. Mr. Tozzi indicated that the recommendation should urge agencies to comply and recommend statutory changes.

Ms. Olson noted she has been involved in making many recommendations to Congress and has seen perhaps a five percent enactment rate. When the impetus for change occurs in a particular area, a thoughtful record will have been established so that decisions will not made in

the heat of legislative activity, but based on that thoughtful record. Just because GAO made recommendations that have not been implemented, that does not mean that recommendations should stop being made.

Mr. Belmar indicated that he agreed with Mr. Tozzi that the Conference ought to identify what changes it is not choosing to address. Mr. Belmar said that we've indicated three ways to improve the statute, but we're opening up the question about how civil monetary penalties are calculated and administered. We need to identify what we haven't addressed if we do go forward with a recommendation.

Mr. Cooney provided a summation of the consensus that out to be reflected in the draft recommendation that Conference staff will prepare for the next meeting. The staff ought to include: a recommendation that agencies comply with the existing statutory framework, a recommendation that Congress consider the existing system and decide whether it's comfortable with current results or would like to consider changes, and a note about the issues that we're not addressing. In the course of the recommendation, Mr. Cooney indicated that Conference should provide examples demonstrating the problems and reach out to people on other committees in order to determine what the experience at different agencies has been. Mr. Cooney expressed the concern that we have a lot of information from 2003, but there is still the question of whether the problems persist today.

Ms. Tatham provided background regarding gaps in information regarding agency adjustments of civil monetary penalties for inflation and regarding civil monetary penalties assessed by agencies. Ms. Tatham noted that certain reports that had been required under the Act that facilitated the tracking of compliance were eliminated in 1998. Ms. Tatham also noted that there isn't a lot of information about civil monetary penalties that are assessed at the agency level. One of the things the Conference staff thought the committee would want to know is what the impact would be if inflation adjustments were made in real time. That question is difficult to answer for many different reasons. For example, of the 80 agencies the GAO report focused on, only 42 publicly report their civil monetary penalties assessed. And for those agencies who did report, the information was often incomplete. There was a lack of common nomenclature and there were variances among descriptions of penalties that were assessed, imposed, and collected. The information wasn't collected in a consistent way.

Mr. Keable indicated that agencies have different level of skills and workload pressure. He felt that the Conference telling agencies they need to do a better job without providing some sort of framework may not be very helpful. He offered to think more about how to frame the message for agencies.

Ms. Olson again noted the Taxpayer Advocate's study of penalties (which she indicated she would circulate to the Committee), which identified every IRS monetary penalty application. It was shocking to her how many civil monetary penalties had not been applied at all.

Mr. Copeland noted that earlier required reports to Congress were made by the Office of Financial Management. GAO recommended that someone needs to be in charge of administering

the Act. The agencies responded that the Office of Financial Management would not be the appropriate overseer. The Office of Management and Budget (OMB) noted that the overseer should be an entity other than OMB. Mr. Belmar noted that in the GAO report, candidates for this oversight role indicated that they would want funding to undertake it, but a recommendation to that effect was deleted from the GAO report because GAO doesn't recommend to Congress how to appropriate funds. Mr. Tozzi noted that it would be a huge undertaking to be an oversight agency because that agency would get a thousand questions from other agencies. He also indicated that there will likely not be funding provided for this kind of oversight. Mr. Keable recommended that the oversight should be funded out of civil penalties. Ms. Olson recommended the creation of a governance council.

Discussion of Committee Research Agenda

Mr. Cooney asked Ms. Jacobs to start the discussion of the committee's research agenda. Ms. Jacobs passed around a handout to serve as a "springboard of ideas." The set of ideas was drawn from two sources—the House Judiciary Committee Report and Hearing from 2006 and the Conference's first Plenary Session that generated ideas for potential projects. The handout reflected ideas for projects that would be within this committee's jurisdiction. It is included as an appendix to these minutes. Ms. Jacobs solicited the committee's ideas about projects going forward.

Ms. Olson indicated that the last three proposals on the list were related ("Practical Impediments to Technological Approaches to Record Keeping," "Federal Records Act (Generally)," and "Federal Records Requirements (Electronic Documents)"). She indicated that her group currently wrestles with electronic records. Ms. Olson indicated that agencies need to rethink record storage given electronic capabilities. Ms. Olson indicated that it would be ideal to track everything relating to a project in a universal database (i.e., e-mails, research studies, meeting minutes). Ms. Olson indicated that it would be helpful for the Conference to set forth standards and approaches for transparency and record storage.

Mr. Bardos indicated that he's in a small agency, with a small staff and a small amount of money. His agency has struggled with records management. Mr. Bardos would appreciate having access to other agencies through the Conference. He recommended that the committee consider taking up the records management project.

Mr. Keable agreed that there are tremendous challenges and he would love uniform guidance on records management. He did raise the caveat that regarding electronic record storage recommendations, as soon as an agency puts something in place, it may already be outdated. The Department of the Interior was among the first agencies to develop a cloud computing platform. He indicated that the agency is constantly learning things, and the environment is always changing, so it's difficult to say how practical it would be to give guidance in this area.

Mr. Keable also brought up the Freedom of Information Act (FOIA) project on the handout ("FOIA (Backlogs & Administration)"). He said that it would be an interesting project because of challenges agencies have with staffing and budgets. He noted that a lot of people who

work on FOIA requests also do other duties, are not well-trained in FOIA, and are not communicative with the public. FOIA is a critical area where agencies interact with the public, and agencies are not doing it well. Agencies are missing positive interactions with the public and are creating ill will. He recommended a project coming up with a best practices approach—people working in FOIA should be knowledgeable and communicate skillfully with the public. Ms. Olson noted that FOIA interacts with electronic records. Mr. Keable agreed.

Mr. Tozzi discussed the project "Practical Impediments to Technological Approaches to Record Keeping." He noted that people who work in recordkeeping are focusing on making sure they collect all the records, making the database efficient, and interacting with the users, but they do not consider cyber security as they should. Mr. Tozzi recommended the committee consider cyber security as part of recordkeeping.

Mr. Cooney agreed with Mr. Tozzi and strongly encouraged the Conference to focus on cyber security. In addition, in litigation with agencies, the process of record review is starting to crumble because information is circulated in different agencies differently. Sometimes one does not get any e-mails in the administrative record. Negotiating with an agency regarding what you'll take as the administrative record costs a lot of money and takes a long time.

Ms. Olson offered that there are technologies and programs that allow an agency to associate e-mail with a file that contains other materials related to a project, such as drafts. A study could consider this technology and recommend that agencies use it to reduce litigation about what documents are associated with the administrative record. Files could be labeled with different levels of review—some files could be labeled attorney-client, others work product, etc. The file would be electronically organized, and all the documents would be in that file for litigation. Ms. Olson indicated that her agency is attempting to design such a system.

Mr. Keable indicated that the guidance the Conference gives should be concentrated on the purpose of records management. Therefore, the agency should align the practice of recordkeeping with the practical use of the records and design a system to meet those needs. Ms. Tatham noted that the Committee on Judicial Review is considering a project regarding the administrative record. Mr. Keable suggested that there be an inter-committee group working on a project in order to leverage each other's experience and insights.

Mr. Cooney adjourned the meeting.