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I. Administrative Law

I. ADMINISTRATIVE LAW

A. *Federal Coal Mine Health & Safety Act of 1969*

Congress enacted the Federal Coal Mine Health & Safety Act of 1969 (the Act) for the express purpose of protecting the health and safety of coal miners.[1] Consistent with the purpose of the Act, Congress passed section 843 to decrease the incidence and development of black lung disease.[2] Prevention of black lung disease is the primary objective of the section and the federal coal mine legislation in general.[3] Specifically, section 843(b)(2) provides that any miner who shows symptoms of black lung has the option of transferring from his present position in the mine to a position where the concentration of respirable dust is lower.[4] Moreover, section 843(b)(3) provides that if a miner chooses to transfer, the mine operator must compensate him at the regular rate of pay the miner received immediately prior to his transfer.[5] The transfer provisions encourage miners showing the first signs of the possible development of

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[1] Federal Coal Mine Health & Safety Act of 1969 (the Act), Pub. L. No. 91-173, § 2(a), 83 Stat. 742 (1969) (codified at 30 U.S.C. § 801(a) (Supp. II 1978)). *See* Westmoreland Coal Co. v. Federal Mine Safety and Health Review Comm'n, 606 F.2d 417, 419-20 (4th Cir. 1979) (purpose of Act is to promote safety of miner); District 6, UMW v. Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1267 (D.C. Cir. 1977) (safety of miner is most crucial motivation behind Act); H.R. REP. No. 91-563, 91st Cong., 1st Sess. 1, *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 2503, 2503 [hereinafter cited as H.R. REP. No. 563] (purpose of Act is to protect health and safety of coal miners).

[2] *See* 30 U.S.C. § 843 (1976); H.R. REP. No. 563, *supra* note 1, at 2522-23 (explaining importance of § 843 for decreasing incidence and development of black lung disease). Black lung disease (pneumonconiosis) is a chronic chest disease caused by the accumulation of coal dust particles in the lung. H.R. REP. No. 563 *supra* note 1, at 2517-18. Upon continued exposure of the victim to air with a high concentration of respirable dust, the disease will become increasingly disabling and dangerous to the miner. *Id.* at 2518. Physicians classify black lung disease from simple to complicated depending upon the degree of evidence in an X-ray examination. *Id.* Simple black lung, the earliest stage, seldom produces significant ventiliatory impairment. *Id.* The pinpoint type, a later stage, may reduce the ability to transfer oxygen into the blood. *Id.* Complicated black lung is a more serious stage of the disease. *Id.* The patient with complicated black lung incurs progressive massive fibrosis, an abnormal increase in the amount of fibrous connective tissue in an organ, which may include tuberculosis and other infections. *Id.* Complicated black lung usually produces marked pulmonary impairment and considerable respiratory disability. *Id.* The only effective preventive procedures to inhibit the development of black lung are adequate environmental dust controls, use of respirators, and removing affected miners from the dustier areas of the mine as soon as doctors detect the disease. *Id.* at 2518-19. The fact that virtually no probability exists of a miner contracting a more severe case of black lung if the miner transfers to an area of the mine where the amount of respirable dust in the air is below 2.2 milligrams per cubic meter emphasizes the effectiveness of removing the affected miners from dustier areas of a mine. *Id.* at 2521.

[3] *See* H.R. REP. No. 563, *supra* note 1, at 2520 (nothing short of total prevention of black lung is acceptable objective of coal mine legislation).

[4] 30 U.S.C. § 843(b)(2) (1976).

[5] *Id.* § 843(b)(3).

black lung to transfer into an area of the mine which will reduce or eliminate the chances that they will contract black lung disease.[6] In addition, section 938 of the Act provides that a mine operator cannot discriminate against any miner employed by him because the miner is suffering from black lung disease.[7] In *Matala v. Consolidation Coal Co.*,[8] the Fourth Circuit recently interpreted the phrase "regular rate of pay received by him immediately prior to his transfer" of section 843(b)(3).[9] The court construed the phrase to include only the dollar amount the transferred miner received immediately prior to his transfer and not to include any pay increases subsequently granted to miners in the transferred miner's prior job classification.[10]

In *Matala*, the plaintiff was a miner employed as a continuous mine operator at a Consolidation Coal Company mine.[11] In March 1975, after doctors diagnosed Matala as having symptoms of black lung, Matala exercised his right to transfer under section 843(b)(2) to a less dusty area of the mine.[12] Consolidation then reclassified Matala as a general inside laborer.[13] In accordance with section 843(b)(3), the company paid Matala the same daily base rate he received under his prior job classification, a dollar amount higher than his new job classification rate.[14] Nevertheless, Matala filed a complaint with the Department of Labor contending that Consolidation's failure to grant him the wage increases subsequently granted to miners in his old job classification constituted discrimination against him in violation of section 938(a).[15]

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[6] *See* note 2 *supra* (explaining black lung disease and available preventive measures).

[7] 30 U.S.C. § 938(a), (b) (1976). Section 938(b) provides the miner with review of the alleged discrimination by the Secretary of Health and Human Services. *Id.*

[8] 647 F.2d 427 (4th Cir. 1981).

[9] *Id.* at 429.

[10] *Id.*

[11] *Id.* at 428.

[12] *Id.* Under § 843(a), miners must under go chest examinations at intervals prescribed by the Secretary of Health and Human Services. *See* 30 U.S.C. § 843(a) (1976). The intervals may not exceed five years in length. *Id.*

[13] 647 F.2d at 428.

[14] *Id.* Matala received a higher dollar amount than other miners in his new job classification immediately after his transfer. *Id.* at 428-29 n.4. At the time Matala filed suit, however, two years and seven months after his transfer, he was receiving $8.08 a day less than miners were receiving in his old job classification. *Id.* In addition, Matala did not receive the wage increases subsequently granted to miners in his new job classification until the daily base rate for the miners in Matala's new, lower-paying job classification equalled Matala's daily base rate upon transfer. *Id.* Thus, Matala's protection against loss of compensation upon transfer proved illusory almost immediately. *Id.*

[15] *Id.* at 428. At the time of Matala's transfer, the National Bituminous Coal Wage Agreement of 1974 governed the hours, wages, job classifications and other working conditions at Consolidation's No. 2 mine. *Id.* at 428 n.3. Matala continued to receive a monthly $.07 per hour cost of living adjustment under the 1974 agreement. *Id.* Matala contended that he should continue to receive the pay increases scheduled under the 1974 industry-wide agreement as the increases became effective for miners in Matala's prior job classification. *Id.* at 428. Further, Matala argued that a court should construe the act liberally so as not to

The Secretary of Labor concluded that Consolidation had not discriminated against the plaintiff since the company compensated Matala at the same dollar amount he received immediately prior to transferring positions in the mine.[16] The Secretary interpreted the "regular rate of pay" language in section 843(b)(3) not to include the wage increases subsequently granted to miners in Matala's prior job classification.[17] Matala appealed to the district court for review of the Secretary's decision.[18] The district court reversed the Secretary's decision and granted Matala's motion for summary judgment against the Secretary and Consolidation.[19] The court held that a miner who transfers under section 843 is entitled to the rate of pay associated with his prior job classification rather than the strict dollar amount and thus is entitled to any future increases associated with his prior job classification.[20] Both defendants appealed and the Fourth Circuit reversed the district court's decision.[21]

The Fourth Circuit stated that in questions of statutory interpretation, a court initially should discern congressional intent from the language of the statute itself and should give the language its ordinary meaning unless the legislative history or other evidence clearly indicate a different usage.[22] The court found that the ordinary meaning of "rate"

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frustrate Congress' intent that miners who transfer should suffer no loss in compensation. *Id.* at 429-30. *See* Higgins v. Marshall, 584 F.2d 1035, 1042 (D.C. Cir. 1978) (Wright, C.J., dissenting), *cert. denied*, 441 U.S. 931 (transfer provision to insure miners afflected with black lung suffer no loss in compensation); S. REP. No. 411, 91st Cong., 1st Sess. 49 (1969) (same). Finally, Matala argued that a plain meaning interpretation of § 843(b)(3) may cause a miner to suffer substantial pay losses shortly after transferring if miners in his prior job classification are granted subsequent pay raises. 647 F.2d at 430.

[16] 647 F.2d at 429.

[17] *Id.*

[18] *Id.*

[19] Matala v. Marshall, 483 F. Supp. 1332, 1333 (N.D. W.Va. 1980).

[20] *Id.* The district court granted Matala's summary judgment motion under rule 56(c) of the Federal Rules of Civil Procedure after finding that the parties stipulated to all of the material facts. *Id.* at 1332-33. Moreover, the court determined that the Secretary's interpretation of § 843(b)(3) was plainly erroneous as a matter of law. *Id.* at 1333.

[21] 647 F.2d at 429.

[22] *Id.* at 429-30. *See* State Water Control Bd. v. Train, 559 F.2d 921, 924-25 n.20 (4th Cir. 1977) (statutory language is most persuasive indication of congressional intent and court should reject statutory language only on substantial unambiguous evidence supporting contrary interpretation); United States v. Snider, 502 F.2d 645, 651 (4th Cir. 1974) (Congress presumed to have used words according to ordinary meaning, unless different signification clearly indicated). The rule of statutory construction that a court should give the language of a statute its ordinary meaning unless a different usage clearly is indicated is known as the "plain meaning" rule. *See* Murphy, *Old Maxims Never Die: The "Plain Meaning" Rule and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975). The plain meaning rule is not a rule of law, but a rule of statutory construction. *See* F. FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 22-24 (1947) (discussing history of plain meaning rule of statutory construction); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 403 (1950) (listing plain meaning rule as

is dollar amount.[23] Further, the *Matala* court determined that a court should interpret the phrase "regular rate of pay" in conjunction with the rest of section 843(b)(3).[24] The Fourth Circuit reasoned that when the phrase "regular rate of pay" is interpreted with the rest of section 843(b)(3), the plain meaning of "rate," that is, dollar amount, is confirmed by the modifying phrase "received by him immediately prior to his transfer."[25] The court further opined that to interpret "rate" to mean classification rate would render the phrase "received by him" meaningless since "rate" then would include subsequent raises given to those in the old job classification.[26] The Fourth Circuit refused to interpret "rate" to mean classification rate because the interpretation would violate a basic canon of statutory construction that courts should give effect to all words in a statute.[27] Instead, the Fourth Circuit applied the rule of

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canon of statutory construction). Although many courts recognize the plain meaning rule, the variations of the rule are considerable and courts have differed in justifying a departure from the rule. *See, e.g.*, Burns v. Alcala, 420 U.S. 575, 580-81 (1975) (courts are to give language of statute its ordinary meaning in absence of persuasive reasons to contrary); United States v. Campos-Serrano, 404 U.S. 293, 298 (1971) (if literal reading of statutory language is irreconcilable with congressional purpose, court must consider less literal construction).

[23] 647 F.2d at 429-430. *See* Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978) (court held "regular rate of pay" in § 843(b)(3) does not include subsequent pay raises given to miners in transferred miner's prior job classification); notes 40 & 44 *infra* (explaining *Higgins* decision).

[24] 647 F.2d at 429. *See* United States v. American Trucking Assn's., 310 U.S. 534, 542-43 (1940) (words taken from context do not contribute greatly to determining purpose of draftsmen of statute); United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974) (court must read all parts of statute together, neither taking specific words out of context nor interpreting one part so as to render another meaningless). *See* note 50 *infra* (*Matala* court improperly narrowed rule of construction applied in *Snider*).

[25] 647 F.2d at 429.

[26] *Id.* The *Matala* court's reasoning regarding § 843(b)(3) appears to be that if "rate" means classification rate, which includes the subsequent pay raises, then the phrase "received by him immediately prior to his transfer" has no meaning because the miner did not actually receive the subsequent raises immediately prior to his transfer. *See* 647 F.2d at 429; 30 U.S.C. § 843(b)(3) (1976). The court's reliance on the word "immediately" is misplaced, however, because when the Senate wrote an analogous provision in 1977 which clearly specified protection of a miner's compensation based on the miner's classification rate, the Senate again used the words "immediately prior to this transfer" as a reference point. *See* 30 U.S.C. § 811(a)(7) (Supp. III 1979); S. Rep. No. 95-181, 95th Cong., 1st Sess. 23 (1977) [hereinafter cited as S. Rep. No. 95-181]. According to the *Matala* court classification rate refers to the schedule of wage increases for each job classification under the provisions of the National Bituminous Coal Wage Agreement of 1974. 647 F.2d at 429; see Higgins v. Marshall, 584 F.2d 1035, 1040 (D.C. Cir. 1978) (classification rate refers to schedule wage increases under provisions of National Bituminous Wage Agreement of 1971); note 15 *supra* (explaining National Bituminous Coal Wage Agreement of 1979); notes 40 & 44 *infra* (*Higgins* decision).

[27] 647 F.2d at 429. *See* Helvering v. Morgan's Inc., 293 U.S. 121, 126 (1934) (a court cannot interpret single section of statute in settling as complex as that of revenue acts apart from related sections); United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974) (a court must read all parts of statute together, neither taking specific words out of context nor interpreting one part so as to render another meaningless).

statutory construction that a court should not reject the plain meaning of a statute unless there is substantial unambiguous evidence supporting a contrary interpretation.[28] Thus, the Fourth Circuit concluded that *Matala*'s interpretation of section 843(b)(3) was at odds with the plain meaning of the section and held that a transferred miner is entitled only to receive the dollar amount he received immediately prior to transfer.[29]

Although the *Matala* court found that resort to the legislative history was not necessary, the court discussed and found the available legislative history inconclusive regarding an alternative interpretation.[30] The court concluded that the legislative history contained no evidence that Congress intended "regular rate of pay" to mean classification rate.[31] Thus, the Fourth Circuit concluded that its plain meaning interpretation of section 843(b)(3) was not contrary to congressional intent in enacting the section.[32] The *Matala* court determined that, under its interpretation of the section, a transferred miner would incur no loss in compensation upon transfer because he would receive the same dollar amount he received prior to his transfer.[33] In addition, the Fourth Circuit determined that a court cannot use the legislative history to create an ambiguity in the plain meaning of the language of the section.[34] Because the court found no substantial unambiguous evidence that a plain mean-

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[28] 647 F.2d at 429-30.

[29] *Id.* at 430. *See* State Water Control Bd. v. Train, 559 F.2d 921, 924-25 n.20 (4th Cir. 1977). In *Train*, the court held that the words of a statute remain the most persuasive indication of congressional intent, and a court should reject their apparent meaning only on substantial, unambiguous evidence supporting a contrary interpretation. *Id.* The *Train* court, however, also stated that most courts have agreed that a court cannot disregard available extrinsic aids. *Id.* When a court will refuse to apply the plain meaning rule is uncertain. *See* note 22 *supra* (cases reaching conflicting decisions regarding when courts will disregard plain meaning rule). Some courts have held that a court should interpret statutes to effectuate the congressional intent in enacting the statute even if the plain meaning of the statute would require a different result. *See, e.g.*, Stafford v. Briggs, 444 U.S. 527, 536 (1980) (analysis does not stop with language of statute, court must look to objects and policy of law to give Act construction that will carry into execution will of legislature); In re United States, 563 F.2d 637, 642 (4th Cir. 1977) (unnecessary to follow plain meaning of statutory language where to do so would not effectuate purpose of federal legislation and would produce absurd or nugatory results).

[30] 647 F.2d at 430; *see* note 15 *supra* (Matala's arguments based on Act's legislative history).

[31] 647 F.2d at 430 n.6. The *Matala* court, in support of its argument that Congress did not intend "regular rate of pay" to mean classification rate, looked at the 1977 amendments to the Act that applied only to non-coal mining industries. *Id.* The court emphasized that Congress did not adopt a suggestion to change the wording of § 843(b)(3) to make clear that Congress intended "regular rate of pay" to include subsequent pay increases granted to miners in a transferred miner's prior job classification. *Id. See* S. REP. No. 95-181, [1977] U.S. CODE CONG. & AD. NEWS 3401, 3435 (legislative history of 1977 Amendments to Act).

[32] 645 F.2d at 430.

[33] *Id.* For two periods in which Matala received less than the dollar amount he received prior to transferring positions in the mine, the Fourth Circuit ruled that Matala was entitled to back pay to make up the difference between the dollar amount he received prior to transfer and what he was actually paid for the two periods. *Id.* at 430 n.7.

[34] 647 F.2d at 430.

ing construction of the section is incorrect, the court found no need to resort to the legislative history in interpreting the statute.[35] The *Matala* court thus held that the language of section 843(b)(3) is clear and unambiguous, and that the court's plain meaning construction of the section is not contrary to the purpose of the Act.[36]

Judge Sprouse dissented, contending that the language of section 843(b)(3) is ambiguous because use of language peculiar to the mining industry causes conflicting notions regarding the plain meaning of the section.[37] The dissent argued, therefore, that the majority should have resorted to statutory interpretive aids to determine the correct meaning of the section.[38] Judge Sprouse further contended that the congressional intent of section 843(b)(3) is explicit in the purpose of the Act set out in section 801(a) which states that the first concern of all in the coal mining industry must be the health and safety of miners.[39] In addition, the dissent noted that the Senate emphasized without qualification that a transferring miner was to suffer no loss of compensation.[40] Thus, the dis-

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[35] *Id.*

[36] *Id.*

[37] *Id.* at 431 (Sprouse, J., dissenting). Judge Sprouse relied heavily on the dissenting opinion in *Higgins v. Marshall*, 584 F.2d 1035 (D.C. Cir. 1978) (Wright, C.J., dissenting), for evidence to support his conclusion that the language of § 843(b)(3) is ambiguous and that the congressional intent of § 843(b)(3) is explicit in the purpose of the Act. *See* note 40 *infra* (*Higgins* action).

[38] 647 F.2d at 431 (Sprouse, J., dissenting). Contrary to the majority, Judge Sprouse concentrated on the purpose of the Act and the 1969 legislative history, contending that the intent of the 1977 Congress provided little guidance regarding the intent of the 1969 Congress. 647 F.2d at 431. *See* 30 U.S.C. § 801(a) (Supp. II 1978) (purpose of Act); note 1 *infra* (cases explaining purpose of Act). *See* note 31 *supra* (majority relied on 1977 amendments to demonstrate court's interpretation was consistent with congressional intent).

[39] 647 F.2d at 432 (Sprouse, J., dissenting). *See* 30 U.S.C. § 801(a) (Supp. II 1978); note 1 *supra* (cases explaining purpose of Act).

[40] 647 F.2d at 432 (Sprouse, J., dissenting). *See* note 14 *supra* (Matala's loss of wages); Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978). The majority in *Matala* relied heavily on *Higgins* to support the holding that "regular rate of pay" in § 843(b)(3) does not include subsequent pay raises given to miners in the transferred miner's prior job classification. 647 F.2d at 429. *Higgins* involved three plaintiff-coal miners who transferred pursuant to § 843(b)(1) of the Act. 584 F.2d at 1036. Each miner continued to receive the same wages of $41.50 per day as the miners received in their prior job classification, even though miners in the transferred miners' new job classification ordinarily received only $37.25 per day. *Id.* While miners in the transferred miners' prior job classification received scheduled increases in the daily wage rate for the job classification, the transferred miners' daily wage rate remained the same. *Id.* at 1036 n.1. By the time the plaintiff-miners brought suit, the transferred miners were losing $8.54 per day in relation to what they would have received had they never transferred. *Id.* The plaintiffs presented three arguments on appeal, two of which were similar to arguments raised by the plaintiff in *Matala*. *Id.* at 1037; *see* note 15 *supra* (Matala's arguments for interpretation of § 843(b)(3)).

The plaintiff's argument not raised in *Matala* focused on the word "regular" and proposed that since a miner's classification rate would be more regular than a miner's dollar rate, the job classification rate is the regular rate embodied in § 843(b)(3). Brief for Appellants, at 13-14, Higgins v. Marshall, 584 F.2d 1035 (D.C. Cir. 1978). Thus, the miners con-

sent concluded that the majority should have interpreted the phrase "regular rate of pay" to mean job classification rate, so that the remedial purpose of the Act would be carried out.[41]

Although neither the *Matala* court nor the D.C. Circuit has interpreted the phrase "regular rate of pay" in section 843(b)(3) to mean the job classification rate, the dissent in *Matala* raises serious questions regarding the Fourth Circuit's failure to interpret the phrase in light of the purpose of the Act, which is to protect the health and safety of miners.[42] The dissent properly argued that the majority's interpretation of the phrase "regular rate of pay" will not protect the health and safety of miners.[43] Contrary to the purpose of the Act, the great majority of miners affected with black lung are choosing to maintain their job classification rate of pay and risk their health.[44] Currently, medical science has found no specific remedy for black lung disease.[45] Moreover, the only ef-

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tended that the administrative law judge and the district court misinterpreted the plain meaning of the term "regular rate of pay," and that the proper interpretation included the disputed pay raises. Higgins v. Marshall, 584 F.2d at 1037. The *Higgins* court rejected all three arguments on the grounds that the language of § 843(b)(3) is simple and straightforward. 584 F.2d at 1037. Moreover, the court found that neither the legislative history nor other evidence contradicted the plain meaning construction of the section. *Id.*

The majority in *Higgins* stated that the sole issue was whether the disputed phrase in § 843(b)(3) means that a mine operator cannot deny a transferring miner the future pay increases he would have received had he not transferred. *Id.* at 1036-37. Over a strong dissent by Chief Judge Wright, the *Higgins* majority held that § 843(b)(3) entitled transferred miners to the same dollar amount increases applicable to the new job classification and not the increases applicable to the old job classification. *Id.* at 1037-38; 584 F.2d 1035, 1039 (Wright, C. J., dissenting). *See generally* Note, *Employee Compensation—Statutory Interpretation of "Regular Rate of Pay" in the Federal Coal Mine Health & Safety Act of 1969*—Higgins v. Marshall, *No. 77-1829* (D.C. Cir. July 25, 1978) 52 TEMP. L.Q. 121 (1979).

[41] 647 F.2d at 432 (Sprouse, J., dissenting).

[42] 647 F.2d at 431-32 (Sprouse, J., dissenting). *See* text accompanying note 1 *supra* (purpose of Act). *Accord*, Higgins v. Marshall, 584 F.2d 1035, 1039 (D.C. Cir. 1978) (Wright, C. J., dissenting). *See* notes 40 *supra* & 44 *infra* (explanation of *Higgins*).

[43] 647 F.2d at 432 (Sprouse, J., dissenting). *See* Higgins v. Marshall, 584 F.2d 1035, 1039-40 (D.C. Cir. 1978) (Wright, C.J., dissenting).

[44] *See* Higgins v. Marshall, 584 F.2d 1035, 1038 n.4 (D.C. Cir. 1978) (because mine operators refuse to pay transferees' wage increases according to their prior job classifications, less than one-fourth of those entitled to transfer have done so); H.R. REP. NO. 563, *supra* note 1, at 2518-19 (transfer provisions of § 843 equal in importance to dust control sections of Act as measure to fulfill public policy of total prevention of black lung disease); *see* text accompanying note 2 *supra* (black lung disease and importance of preventive measures). The dissenting opinion in *Higgins* noted that the appellant miners were receiving 17% less compensation in 1977 than they would have been receiving had they chosen continued exposure to coal dust. 584 F.2d 1035, 1040 n.5 (Wright, C. J., dissenting). Further, the *Higgins* dissent stated that the loss in compensation has increased steadily over time, both absolutely and as a percentage of wages paid. *Id.* Within eight months after Matala transferred he was already losing $2.20 per day. 642 F.2d at 428 n.4; *see* note 14 *supra* (Matala's losses due to transfer); Higgins v. Marshall, 584 F.2d 1035, 1036 n.1 (when appellant miners transferred in November, 1972, by December 1976, transferred miners were making $8.54 per day less than they would have been had they not transferred).

[45] H.R. REP. NO. 563, *supra* note 1, at 2518 (no specific therapy for black lung in either simple or complicated form).

fective preventive measures are adequate environmental dust controls, use of respirators, and removal of minors from the dusty environment as soon as they show minimal effects of black lung disease.[46] Under the *Matala* court's interpretation of "regular rate of pay," miners effectively are faced with a choice between their health or a certain loss of pay. In addition, courts repeatedly have interpreted the Act liberally because the Act is remedial.[47] Thus, the Fourth Circuit's interpretation of the plain meaning of section 843(b)(3) is in conflict with the purpose of the Act set out in section 801(a).[48]

The *Matala* court's statement that a court need not look at the legislative history of the Act because the language of section 843(b)(3) is clear and unambiguous does not justify the court's failure to interpret section 843(b)(3) to comport with the purpose of the Act.[49] A basic rule of statutory construction states that a court must read all parts of a statute together.[50] Congress expressly stated the purpose of the Act in section 801(a) of the Act.[51] Thus, the Fourth Circuit need not turn to the legislative history to find an ambiguity in the language of section 843(b)(3).[52] Instead, the court should have interpreted section 843(b)(3) in

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[46] *Id.* at 2518-19. *See* text accompanying note 2 *supra* (black lung disease and importance of preventive measures).

[47] *See, e.g.*, Westmoreland Coal Co. v. Federal Mine Safety & Health Review Comm'n., 606 F.2d 417, 420 (4th Cir. 1979) (courts must interpret Act liberally to effect purpose of protecting safety and health of miners); Paluso v. Mathews, 562 F.2d 33, 36 (10th Cir. 1977) (remedial nature of Act compels courts to give Act liberal construction); Morris v. Mathews, 557 F.2d 563, 570 (6th Cir. 1977) (federal courts and administrative agencies must interpret provisions of Act to effectuate congressional purpose); Ziegler Coal Co. v. Kleppe, 536 F.2d 398, 405 (D.C. Cir. 1976) (remedial nature of Act mandates liberal construction rather than literal interpretation that would impair effectiveness of statute); UMW v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 858 (duty to interpret Act in light most favorable to miners since legislation is remedial safety statute).

[48] *See* 30 U.S.C. § 801(a) (Supp. II 1978); text accompanying note 1 *supra* (purpose of Act).

[49] *See* United States v. Campos-Serrano, 404 U.S. 293, 398 (1971) (if court cannot reconcile literal reading of statute with congressional purpose, court must consider less literal construction); Caruth v. United States, 566 F.2d 901, 905 (5th Cir. 1978) (plain meaning of statutory language is determinative of congressional intent unless to do so is inconsistent with purpose of law).

[50] *See* Helvering v. Morgan's Inc., 293 U.S. 121, 126 (1934) (court cannot interpret section of statute apart from related sections in setting as complex as that of revenue acts); United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974) (court must read all parts of statute together, neither taking specific words out of context not interpreting one part so as to render another meaningless). The *Matala* court improperly cited *Snider* for the proposition that all parts of a *section* must be read together. 647 F.2d at 429. *Snider* stated that all parts of a statute must be read together and thus the Fourth Circuit too narrowly interpreted the rule of statutory construction applied in *Snider*. United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974).

[51] *See* 30 U.S.C. § 801(a) (Supp. II 1978). *See* text accompanying note 1 *supra* (purpose of Act).

[52] *See* note 50 *supra* (rule of statutory construction that all parts of statute must be read together).

conjunction with section 801(a).[53] If the Fourth Circuit had interpreted "regular rate of pay" in conjunction with section 801(a), the court would have found an ambiguity in section 843(b)(3) because the *Matala* plain meaning interpretation of section 843(b)(3) is clearly contrary to the purpose of the Act. Furthermore, transferred miners have brought two other actions regarding the meaning of the disputed language in section 843(b)(3), indicating that the language of the section is ambiguous.[54] Finally, the Fourth Circuit's holding that the ordinary meaning of "rate" is dollar amount is questionable.[55] The term "rate" is a flexible term whose meaning depends upon its use in a particular context.[56] Moreover, courts have distinguished the terms "rate" and "amount."[57] Therefore, the

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[53] *See, e.g.*, State Water Control Bd. v. Train, 559 F.2d 921, 924 (4th Cir. 1977) (interpreting § 301(b)(1) of Federal Water Pollution Control Act to comport with rest of Act); United States v. Snider, 502 F.2d 645, 652-55 (4th Cir. 1977) (interpreting § 7205 of Internal Revenue Code (IRC) to comport with IRC as whole and to comport with use of statutory language used throughout history of revenue acts); note 24 *supra* (explaining rule of statutory construction that courts should read all parts of statute together). Generally, the word "act" refers to the entire statute enacted, rather than to a section. *See* Board of Trustees of Fireman's Relief & Pension Fund v. Templeton, 184 Okla. 281, ____; 86 P.2d 1000, 1002 (Okla. 1939); BLACK'S LAW DICTIONARY 24 (5th ed. 1979).

[54] *See* Mullins v. Andrus, No. 77-1086, slip op. at 1 (D.C. Cir. Dec. 31, 1980); Higgins v. Marshall, 584 F.2d 1035, 1036 (D.C. Cir. 1978); note 40 *supra* (explanation of *Higgins* action). In *Mullins*, the transferred miner's job classification was that of a general inside laborer, even though the mine operator often gave the miner temporary assignments as a roof bolter. No. 77-1086, slip op. at 5. The miner, Mullins, exercised his right to transfer under § 843. *Id.*; slip op. at 5-6. After the transfer, the mine operator compensated Mullins at a dollar amount accorded Mullins' job classification immediately prior to Mullins' transfer. *Id.* Mullins brought an action against his employer contending that he deserved a higher rate of compensation because he had worked and had been paid at the higher level wage accorded to the roof bolter job classification during more than 70% of the five months preceding his transfer. *Id.*, slip op. at 6. Relying on the D.C. Circuit's earlier decision in *Higgins*, the court noted that a transferred miner takes with him his regular dollar rate of pay, and not the job classification rate for his prior position. *Id.*, slip op. at 23. Therefore, the court held that the statute entitled a transferred miner to the rate of compensation he actually and regularly received immediately prior to his transfer. *Id.*, slip op. at 29. Because Mullins received pay at two different rates at different times before transfer, neither the period which is "immediately prior to transfer" nor the "regular rate of pay received" during that period were concepts precise enough for the court to fix the amount due. *Id.*, slip op. at 30 n.117. Therefore, the *Mullins* court remanded the case to the Secretary of Health and Human Services for computation of the amount due Mullins. *Id.*

[55] 647 F.2d at 429. *See* Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978); text accompanying notes 56 and 57 *infra* (explaining flexible meaning of word "rate").

[56] *See, e.g.*, Central Nat'l Bank v. City of Lynn, 259 Mass. 1, ____, 156 N.E. 42, 47 (1927) (regarding revenue acts, "rate" is flexible term having different meanings dependent upon context and result legislature intended to accomplish); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 44, 1082 (New College Ed. 1979) ("rate" defined as both cost per unit of commodity or service and placing in particular rank or grade).

[57] *See, e.g.*, E.C. Miller Cedar Lumber Co. v. United States, 86 F.2d 429, 434 (C.C.P.A. 1936) (court found Congress did not intend "rate of duty" to include "amount of duties"); Naylor v. Board of Educ., 216 Ky. 766, ____, 288 S.W. 690, 692 (Ky. Ct. App. 1926) (words "amount" and "rate" have different meanings).

language of section 843(b)(3) is ambiguous, and the court would be justified in turning to the legislative history of the Act and other statutory interpretative aids to determine the meaning of section 843(b)(3) and the intent of Congress in enacting the section.[58] Consequently, there is no justification for the *Matala* court's failure to interpret section 843(b)(3) to comport with the purpose of the Act.[59]

An interpretation of section 843(b)(3) in light of the express purpose of the Act clearly comports with legislative intent and furthers achievement of the Act's goals.[60] Conversely, the *Matala* court's plain meaning interpretation of "regular rate of pay" chills a miner's exercise of his rights to preserve his health by transferring positions in a mine under section 843.[61] Contrary to prior Fourth Circuit decisions, the *Matala* decision ignores the remedial nature of the Act by giving a restrictive interpretation to provisions designed to promote the health and safety of miners.[62] In a circuit which contains half of the underground coal mining operations in the United States, the *Matala* decision will retard progress toward achieving a reduction in the incidence of black lung disease and frustrate the Act's purpose of promoting the health and safety of coal miners.[63]

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[58] *See* United States v. Oregon, 366 U.S. 643, 648 (1961) (court should look at legislative history in construing statute only if meaning of statute is unclear); United States v. Public Utilities Comm'n., 345 U.S. 295, 315 (1953) (where statute is ambiguous, judiciary may properly use legislative history to determine congressional purpose).

[59] *See* text accompanying notes 40-47 *supra* (explaining *Matala* court's failure to interpret § 843(b)(3) to comport with purpose of Act).

[60] *See* text accompanying notes 40-47 *supra* (disincentives involved in inadequacies of not construing "regular rate of pay" to mean job classification rate).

[61] *See* note 44 & 47 *supra* (chilling effect of plain meaning interpretation on exercise of rights under § 843).

[62] *See* Rose v. Clinchfield Coal Co., 614 F.2d 936, 939 (4th Cir. 1980) (Congress intended courts to interpret Act liberally in favor of miner and his dependents); Westmoreland Coal Co. v. Federal Mine Safety & Health Review Comm'n., 606 F.2d 417, 420 (4th Cir. 1979) (courts must interpret Act liberally to effect purpose of protecting safety and health of miners); note 47 *supra* (listing cases from other circuits standing for same proposition).

[63] *See* United States Department of Labor, Mine Safety & Health Administration, Injury Experience In Coal Mining (1980) (draft copy) (50% of the 2,341 underground bituminous coal mining operations in U.S. are located in states of Virginia and West Virginia); notes 40-47 *supra* (explaining disincentives involved in *Matala* decision construing "regular rate of pay" to mean dollar amount).

B. Reverse—FOIA Litigation

In 1966, Congress passed the Freedom of Information Act (FOIA) to alleviate the problem of government agencies arbitrarily withholding information from the public.[1] The FOIA requires government agencies to release information unless the information sought falls within one of the Act's nine exemptions listed in section 552(b).[2] The exemptions include information relating to state secrets, internal agency rules and practices, trade secrets and confidential or privileged financial or commercial information, agency personnel files, and medical files.[3] An individual requesting access to governmental information (requester) may bring a FOIA suit to force an agency to release gathered information after the agency determines that the information requested falls within one of the exemptions and makes a discretionary decision to withhold the information.[4] The term "reverse-FOIA" suit describes an action in which an in-

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[1] Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552) (1976). *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979) (Congress passed FOIA in response to concern about secrecy in Governmental abuse of power); H.R. REP. No. 1497, 89th Cong., 2d Sees. 4-5, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2421-2422 [hereinafter cited as H.R. REP. No. 1497] (examples of improper denials to disclose government information). *See* S. REP. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* Subcomm. on Administrative Practice & Procedure of the Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book* 36 (Comm. Print 1974) [hereinafter cited as *1974 Source Book*] (FOIA enacted to make clear that disclosure statute, not withholding statute, intended by Congress). *See generally* Campbell, *Reverse Freedom of Information Act Litigation: The Need For Congressional Action*, 67 GEO. L. J. 103 (1978) [hereinafter cited as Campbell].

[2] 5 U.S.C. § 552(b) (1976). *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 291-92 (1979) (FOIA is exclusively disclosure statute whose exemptions do not rule out disclosure, but only demarcate limits of agency's obligation to disclose information); Department of Air Force v. Rose, 425 U.S. 352, 360-61 (1976) (FOIA's limited exemptions from disclosure do not obscure basic policy of Act that disclosure is Act's dominant objective).

[3] 5 U.S.C. § 552(b) (1976).

[4] 5 U.S.C. § 552(a)(4)(B) (1976). *See* Chrysler Corp. v. Brown, 441 U.S. 281, 290-94 (1979) (nine exemptions to FOIA do not prohibit disclosure of information falling within exemptions, but merely permits agencies, in their discretion, to withhold information); Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt., 508 F.2d 945, 950 (4th Cir. 1974) (FOIA does not forbid disclosure of any records, and government officials may disclose information exempt from mandatory disclosure under FOIA). A number of agencies have promulgated regulations providing for disclosure of exempt information whenever disclosure appears to further the public interest. *See, e.g.*, Department of Justice, 28 C.F.R. § 16.1(a) (1980) (Department will disclose information exempt under FOIA if disclosure is in pulic interest); Nuclear Regulatory Commission, 10 C.F.R. § 9.9(a) (1981) (Commission will disclose exempt information if disclosure not contrary to public interest and will not adversely affect rights of any person); Department of Interior, 43 C.F.R. § 2.13(d) (1980) (Department will refuse to disclose exempt information only if disclosure prohibited by statute or Executive Order or sound grounds exist for refusal); Office of Secretary of Labor, 29 C.F.R. § 70.11(b) (1981) (Secretary will disclose exempt information if in public interest and will not impede discharge of functions of Labor Department). H.R. REP. No. 1497, *supra* note 1, at 2423 (FOIA strikes balance considering right to public to know, need of government to keep in-

dividual who has submitted information to the government (submitter) later sues to prevent an agency from releasing the information.[5] Although the FOIA provides a cause of action for requesters to force disclosure of information,[6] the Act does not provide expressly for reverse-FOIA suits to prevent disclosure.[7] The majority of reverse-FOIA suits involve business documents that submitters contend are confidential and, therefore, exempt from mandatory disclosure under the trade secrets exemption provided by section 552(b)(4) of the FOIA.[8] Con-

formation in confidence, and individual's right to privacy and to confide in government). *See generally* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 173 (R. Bouchard & J. Franklin ed. 1980) [hereinafter cited as GUIDEBOOK].

[5] *See, e.g.*, Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1198 (7th Cir. 1978), *vacated*, 441 U.S. 918 (1979) (court denied Sears' request for injunction to prevent Labor Department from disclosing Equal Employment Opportunity Reports (EEO's) and Affirmative Action Program Reports (AAP's) submitted to Department); Planning Research Corp. v. Federal Power Comm'n, 555 F.2d 970, 971, 974 (D.C. Cir. 1977) (court dismissed Planning Research Corp.'s suit to prevent FPC disclosure of methodology for development of computer system submitted to FPC with contract bid); Parkridge Hosp., Inc. v. Blue Cross & Blue Shield, 430 F. Supp. 1093, 1094-95 (E.D. Tenn. 1977), *vacated*, 625 F.2d 719 (6th Cir. 1979) (court granted Parkridge Hospital's request for temporary injunction to prevent Blue Cross from disclosing Provider Cost Report submitted to Blue Cross as financial intermediary engaged in administration of Medicare Program under contract with Department of Health, Education and Welfare). *See generally* Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEXAS L. REV. 587, 589-90 (1977) [hereinafter cited as Clement]; *Campbell*, *supra* note 1.

[6] 5 U.S.C. § 552(a)(4)(B) (1976). Agencies ordinarily must determine whether to disclose particular records within 10 days of a request for information. 5 U.S.C. § 552(a)(6)(A)(i) (1976). Upon an agency refusal to disclose requested information, the requester may sue for disclosure in the district courts and the court's determination must be *de novo* rather than on the agency record. *Id.* § 552(a)(4)(B); *see* text accompanying notes 49-51 *infra* (de novo review and review on administrative records). Courts must hear FOIA suits on an expedited basis. 5 U.S.C. § 552(a)(4)(C), (D) (1976). In addition, successful FOIA plaintiffs may recover attorney's fees and, upon a judicial finding of arbitrary withholding, the government employee responsible may be disciplined. *Id.* § 552(a)(4)(E), (F).

[7] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979) (FOIA is disclosure statute exclusively and affords submitters no private right of action to enjoin agency disclosure).

[8] *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 286-88, 318-19 (action to prevent release of information about Chrysler's affirmative action programs and general composition of work forces because information was confidential remanded to consider whether contemplated disclosures would violate Trade Secrets Act); GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n., 598 F.2d 790, 794, 815 (3d Cir. 1979) (court granted GTE's request for injunction to prevent release of information relating to safety of television sets because information is misleading for purposes of informing public and misleading information is confidential and would damage GTE's competitive position); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1195 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (court granted Westinghouse's request for temporary injunction to prevent disclosure of affirmative action program and equal opportunity reports on grounds that information is confidential). *See Clement*, *supra* note 5, at 589 n.7 (cases involving submitters attempting to prevent disclosure of business information); GUIDEBOOK, *supra* note 4, at 174 (majority of reverse FOIA cases involve business documents).

In *National Parks and Conservation Ass'n. v. Morton*, the court set out the test for

sequently, whether or not a submitter has a cause of action to prevent disclosure has been the thereshold question in reverse-FOIA suits.[9]

Until recently, submitters relied on three different theories as a basis for reverse-FOIA suits.[10] The first theory implied a cause of action from the nine categories exempted from disclosure under section 552(b) of the FOIA.[11] The submitters argued that the exemptions require the agency to withhold information falling within the exemptions.[12] The second theory inferred a private cause of action to prevent disclosure of information that is exempt under the FOIA through section 1905 of the Trade Secrets Act (TSA).[13] Section 1905 is a criminal statute that imposes fines against federal officials who disclose certain categories of business information "unless authorized by law."[14] Because section 1905

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determining what is "confidential" information within the meaning of the trade secrets exemption of the FOIA. 498 F.2d 765, 770 (D.C. Cir. 1974). The D.C. Circuit held that information is confidential within the scope of the trade secrets exemption if the information is likely to impair the government's ability to obtain information in the future or cause substantial harm to the competitive position of the person who submitted the information. 498 F.2d at 770.

[9] *See* text accompanying notes 10-17 *infra* (different theories supporting cause of action for submitters to prevent disclosure).

[10] *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 288 (submitter advanced three theories in support of injunction against agency disclosure of submitted information); Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1198 & n.4, 1202 (7th Cir. 1978), *vacated*, 441 U.S. 918 (1979) (same); Note, Chrysler Corp. v. Brown: *Seeking a Formula For Responsible Disclosure Under the FOIA*, 29 CATH. L. REV. 159, 167 (1979) [hereinafter cited as *Responsible Disclosure*] (listing three theories relied on by submitters).

[11] *See, e.g.*, Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1211 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (court reasoned that § 552(b) granting private party protection from disclosure implies right of court to invoke equity jurisdiction to assure that protection, and FOIA exemptions constitute mandatory bar to disclosure); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629 (5th Cir. 1976) (court rejected producer's argument that FOIA's exemptions are mandatory bar to disclosure of information falling within one of exemptions); 5 U.S.C. § 552(b) (1976).

[12] *See* note 11 *supra* (decisions explaining claims that FOIA exemptions are mandatory bars to disclosure).

[13] *See, e.g.*, Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1202 n.15 (7th Cir. 1978), *vacated on other grounds*, 441 U.S. 918 (1979) (court rejected submitter's contention that § 1905 should be interpreted to imply private cause of action because section's criminal penalties are inadequate); Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1188 (3d Cir. 1977), *vacated on other grounds*, 441 U.S. 281 (1979) (rejecting submitter's contention that courts should interpret § 1905 to provide submitters with private cause of action); 18 U.S.C. § 1905 (1976).

[14] 18 U.S.C. § 1905 (1976). In *Chrysler Corp. v. Brown*, the Supreme Court explained the meaning of the phrase "unless authorized by law" of § 1905. 441 U.S. 281, 295-316 (1979). The Court held that for an agency regulation to have the force and effect of law, the regulation must be a substantive regulation as opposed to a procedural regulation. *Id.* at 301. A substantive regulation affects individual rights and obligations while a procedural regulation is only a general statement of policy or procedural rules. *Id.* at 302. Furthermore, an agency must enact substantive regulations pursuant to the procedural limitations found in the Administrative Procedure Act (APA). *Id.* at 303. *See* 5 U.S.C. §§ 551-706 (1976). Finally, a nexus must exist between the substantive agency regulation providing for disclosure of in-

applies only to business information, it was used as a basis for reverse-FOIA actions only by business information submitters.[15] The third theory relied upon section 702 of the Administrative Procedure Act (APA) as the basis for reverse-FOIA actions.[16] Section 702 provides that a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review of the action.[17] The submitters contended that diclosure by the agency is an agency action under section 702, and that the adverse consequences of the agency's action provide the submitter with a cause of action to prevent disclosure.[18]

In *Chrysler Corp. v. Brown*,[19] the Supreme Court held that a court cannot imply a private cause of action for submitters from the exemptions in section 552(b) of the FOIA.[20] The Supreme Court further held that, although section 1905 applies to the disclosure of an individual's business documents, the section does not supply a private cause of action for submitters.[21] The Court, however, did use the trade secrets exemption in section 552(b)(4) of the FOIA, section 1905 of the TSA, and section 702 of the APA to find judicial review of an agency's decision to disclose an individual's business information available under the APA.[22] The

formation within the FOIA's nine exemptions and some delegation by Congress of legislative authority to disclose the exempted information to the public. 441 U.S. at 304. The *Chrysler* Court explained that the nexus requirement means only that a reviewing court reasonably be able to conclude that the congressional grant of authority contemplates the regulations issued. *Id.* at 306. The Court also held that the FOIA cannot serve as the congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions. *Id.* at 303-04.

[15] *See* 18 U.S.C. § 1905 (1976).

[16] 5 U.S.C. § 702 (1976). *See* note 18 *infra* (decisions using § 702 as basis for reverse-FOIA actions).

[17] 5 U.S.C. § 702 (1976).

[18] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 941 n.6, 942 (D.C. Cir. 1975) (§ 702 provides normal method of reviewing agency action and is sufficient to protect any interests § 1905 is supposed to protect). *See* note 22 *infra* (application of § 702 of APA in *Chrysler*). The plaintiff-submitter obtains standing to sue under § 702 by alleging an injury in fact and that the alleged injury has affected an interest arguably within the zone of interests to be protected or regulated by the statute governing the agency action. Sierra Club v. Morton, 405 U.S. 727, 733 (1972). In the case of a submitter of confidential business information, the requirements of *Sierra Club v. Morton* are met by the alleged harm to the submitter's competitive position, which Congress included within the FOIA's zone of interests. Chrysler Corp. v. Brown, 441 U.S. at 317-18. *See* National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 768-69 (D.C. Cir. 1974).

[19] 441 U.S. 281 (1979).

[20] *Id.* at 292.

[21] *Id.* at 295-301, 317-18.

[22] *Id.* at 317-18. In *Chrysler*, the Supreme Court held that § 1905 and any "authorization by law" contemplated by § 1905 place substantive limits on agency action, and, therefore, an agency's decision to disclose exempt information is reviewable agency action and the submitter of the information is a person adversely affected or aggrieved within the meaning of § 702 of the APA. *Id. See* note 18 *supra* (explanation of submitter attempts to obtain standing to sue under APA).

Chrysler Court did not decide the proper scope of the review, nor the relative scopes of the trade secrets exemption and section 1905.[23] Instead, the Court remanded the case to the Third Circuit for a determination of whether the contemplated disclosure would violate the prohibition against disclosure of section 1905 of the TSA.[24]

Recently, in *General Motors Corp. v. Marshall*,[25] the Fourth Circuit considered the proper scope of review in reverse-FOIA cases under the APA and the relative scope of the trade secrets exemption and section 1905 that the Supreme Court did not decide in *Chrysler*.[26] To receive approval of their government contract bids, two Federal contractors submitted business information to the Department of Defense pursuant to two executive orders.[27] The Department of Defense subsequently notified the contractor-plaintiffs that the Department had received a request for certain parts of the information and intended to release the information requested.[28] The plaintiffs objected to the disclosures, contending that the information was confidential and that their competitive positions would be harmed severely by the disclosure of the information they had submitted.[29] In making their objections, the plaintiffs relied on

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[23] 441 U.S. at 318-19. The *Chrysler* Court noted that the pertinent provisions of the APA regarding the scope of review in reverse-FOIA cases are § 706(2)(A) and (F). *Id.* at 318. *See* 5 U.S.C. § 706(2)(A), (F) (1976). *See* text accompanying notes 49 and 50 *infra* (explanation of § 706(2)(A)); text accompanying note 51 *infra* (explanation of § 706(2)(F)). Because the Supreme Court found that the determination of the scope of § 1905 necessarily would have some effect on the proper form of judicial review pursuant to § 706(2), the Court opined that to decide the issue regarding the scope of § 1905 would be both unnecessary and unwise. 441 U.S. at 319.

[24] *Id.* at 318-19. In the *Chrysler* action, on remand, the Third Circuit found that the determination of the applicability of § 1905 to the requested information should be made in the first instance by the agency form which the information was requested. Chrysler Corp. v. Schlesinger, 611 F.2d 439, 440 (3d Cir. 1979). The court therefore remanded the case to the district court with directions to order the agency to make a new determination in light of the Third Circuit's prior opinion and the opinion of the Supreme Court. *Id.*

[25] 654 F.2d 294 (4th Cir. 1981).

[26] *Id.* at 297-98.

[27] *Id.* at 295 & n.1. *General Motors* consists of a consolidation on appeal of two similar actions, one of which has not been reported. *Id. See* Burroughs Corp. v. Brown, 501 F. Supp. 375 (E.D. Va. 1980); text accompanying notes 28-30 *infra* (explanation of Burroughs).

[28] 654 F.2d at 295. The request to one contractor by the Department of Defense was for information relating to plaintiff's affirmative action program, equal opportunity employment, complaint investigation and compliance review reports, and related work force data concerning plaintiff's plants. Burroughs Corp. v. Brown, 501 F. Supp. 375, 377 (E.D. Va. 1980). The record is not clear concerning what information the Department sought from the second contractor.

[29] 501 F. Supp. 375, 379 (E.D. Va. 1980). The district court in *Burroughs* concluded that plaintiff would be harmed either because a competitor could use the information to reduce its costs; or a competitor would utilize the information in bidding against plaintiff. *Id.* at 380. Moreover, disclosure of information could result in the transfer of technology to domestic and foreign competitors and to foreign governments; or competitors could use information to conduct raiding of plaintiff's employees. *Id.* at 381. In addition, release of the information could damage plaintiff's employee moral. *Id.*

section 1905 of the TSA and the trade secrets exemption in section 552(b)(4) of the FOIA contending that the acts provide protection for submitters against disclosures of the confidential business information they supplied to the government.[30] The Department denied plaintiffs' objections on the grounds that section 1905 does not apply to disclosures authorized by law.[31] The Department also stated that unless enjoined the Department intended to release the disputed information after ten days.[32] The plaintiffs each filed actions in district court asserting an implied private right of action to prevent disclosure of the information under section 1905 and the FOIA, as well as a right to judicial review under the APA.[33] Plaintiffs in each case agreed to a stay of proceedings awaiting the decision in *Chrysler*, then pending in the Supreme Court.[34]

After the Supreme Court decided *Chrysler*, the Department of Defense filed a motion requesting the court to remand both cases to the Department for review of the plaintiffs' objections to disclosure in light of the *Chrysler* decision.[35] The plaintiffs in turn filed for summary judgment.[36] The district court denied defendant's motions to remand, and, after a hearing based on the undisputed facts, granted the plaintiffs' motions for summary judgment.[37] The Department of Defense appealed to the Fourth Circuit.[38]

After consolidating the actions, the Fourth Circuit determined that the *General Motors* action turned on the scope of the Supreme Court's decision in *Chrysler*.[39] The Fourth Circuit noted that neither the FOIA nor any regulations issued pursuant to the FOIA could serve to fill the

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[30] *Id.* at 383. *See* text accompanying notes 10-14 *supra* (theories which base a private cause of action for submitters to prevent government disclosure of confidential business information on TSA, § 1905 and trade secrets exemption of FOIA).

[31] 654 F.2d at 295. The Department of Labor found the authorization by law required by § 1905 in regulations issued by the Office of Federal Contract Compliance (OFCCP) of the Department of Labor and in regulations issued under § 301 of the APA. *Id. See* 5 U.S.C. § 301 (1976). The OFCCP regulations generally concern the categories of information accessible to the public, the types of records subject to prohibitions or restrictions on disclosure and the procedures governing where and how the public may obtain access to the information. 41 C.F.R. §§ 60-40.1 to -40.8 (1980). Section 301 is a general agency housekeeping statute allowing an agency head to prescribe regulations for the government of his department, including the custody, use, and preservation of its records, papers, and property. 5 U.S.C. § 301 (1976). In *Chrysler*, the Supreme Court specifically rejected § 301 and the OFCCP regulations as fulfilling the "unless authorized by law" requirement of § 1905. 441 U.S. at 306, 309-10. *See* note 14 *supra* (requirements of "unless authorized by law" language of § 1905).

[32] 654 F.2d at 295.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 296.

[36] *Id.*

[37] *Id. See* Burroughs Corp. v. Brown, 501 F. Supp. 375, 384 (E.D. Va. 1980).

[38] 654 F.2d at 296.

[39] *Id.*

"unless authorized by law" exception of section 1905 when the material in dispute falls within any exemption to the FOIA.[40] Because the Department determined that the trade secrets exemption applied to the information the Department sought to disclose,[41] the court considered whether section 1905 also was applicable to the information.[42] Since *Chrysler* did not determine the scope of section 1905, the Fourth Circuit turned to one of its earlier reverse-FOIA decisions for guidance.[43] The court found that the Fourth Circuit previously held that the scope of section 1905 and the trade secrets exemption are coextensive.[44] The Fourth Circuit reasoned that given its prior judicial precedent and the *Chrysler* holding that the FOIA cannot serve to fill the "unless authorized by law" requirement of section 1905, any information falling within the trade secrets exemption is within the prohibition against disclosure of section 1905.[45] Thus, the *General Motors* court held that if the trade secrets ex-

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[40] *Id.* at 296-97. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 303-04 (1979); note 14 *supra* (regulations that can serve to fill "unless authorized by law" requirement of § 1905). Because disclosure of government information is mandatory under the FOIA unless the information falls within one of the FOIA's nine exemptions in § 552(b), an agency can issue regulations pursuant to the FOIA to govern only discretionary disclosures of exempt information by the agency. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 292-93 (1979) (exemptions enacted to allow agencies discretion to withhold exempted information); note 2 *supra* (FOIA does not apply to information falling within exemptions of § 552(b)).

[41] 654 F.2d at 295. The Department denied the submitters objections to disclosure finding that the disclosures were authorized by law within the meaning of the exception to § 1905's prohibition against disclosure. *Id.* Authorization by law is necessary only when the information falls within the trade secrets exemption and when § 1905 applies. *See Department of Justice Memorandum: Current and Future Litigation Under* Chrysler Corp. v. Brown, *reprinted in* [1979] 435 PATENT, TRADEMARK AND COPYRIGHT J. (BNA) D-1, D-2 (June 28, 1979) [hereinafter cited as *Justice Dep't Memo*] (when trade secrets exemption or § 1905 or both are raised by submitters, agency should first determine whether information falls within trade secrets exemption); note 68 *infra* (means available to submitter to prevent disclosure once court finds disclosure to be authorized by law).

[42] 654 F.2d at 297. *See Justice Dep't Memo supra* note 42, at D-2 (after agency determines that trade secrets exemption applies, agency should determine applicability of § 1905 to disputed information).

[43] 654 F.2d at 297 (citing Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977)).

[44] 654 F.2d at 297. *See* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1204 n.38 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). In *Westinghouse*, the Fourth Circuit relied on three decisions originating from the D.C. Circuit to conclude that the scopes of the trade secrets exemption and § 1905 are coextensive. *Id. See* Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941-42 n.7 (D.C. Cir. 1975) (trade secrets exemption is broader than § 1905 and encompasses § 1905); Pharmaceutical Mfr's. Ass'n. v. Weinberger, 401 F. Supp. 444, 446 (D.D.C. 1975) (parties agreed scope of § 1905 and trade secrets exemption coextensive for purposes of case); Ditlow v. Volpe, 362 F. Supp. 1321, 1324 (D.D.C. 1973), *rev'd sub nom.*, Ditlow v. Bunegar, 494 F.2d 1073 (D.C. Cir. 1975), *cert. denied*, 419 U.S. 974 (1974) (type of information protected from disclosure by § 1905 is same as information protected from disclosure by trade secrets exemption).

[45] 654 F.2d at 297. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 303-04 (FOIA cannot serve to fill "unless authorized by law" requirement of § 1905 in regard to information falling within FOIA's nine exemptions).

emption applies to the information the agency seeks to disclose, section 1905 similarly applies insofar as the FOIA cannot fulfill the "unless authorized by law" requirement of the exception to section 1905's prohibition against disclosure.[46]

After the Fourth Circuit determined that the trade secrets exemption and section 1905 both are applicable to the information in dispute, the court recognized that *Chrysler* provides a submitter with a right to judicial review under section 706(2)(A) and (F) of the APA.[47] Consequently, the *General Motors* court considered the question of the proper scope of review under section 706.[48] Section 706(2)(A) provides that a court reviewing agency action may hold unlawful and set aside agency action that the court finds to be arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law.[49] Moreover, the section requires a reviewing court to conduct judicial review on the administrative record only.[50] Section 706(2)(F) provides that a reviewing court may hold unlawful and set aside agency action that the court finds to be unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.[51] The Fourth Circuit noted the Supreme Court's holding in *Chrysler* that any disclosure which violates section 1905 is not in accordance with law as required under section 706(2)(A).[52] The Fourth Circuit thus found implicit in *Chrysler*'s holding that judicial

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[46] 654 F.2d at 297. The *General Motors* court's conclusion that any information within the trade secrets exemption is within the prohbition against disclosure of § 1905 follows because, if § 1905 and the trade secrets exemption are coextensive, information within the trade secrets exemption can only avoid § 1905's prohibition if disclosure of the information is "authorized by law" within the meaning of the exception to § 1905's prohibition. Further, the FOIA cannot serve to fulfill the "unless authorized by law" requirement of § 1905 in regard to information which falls within one of the FOIA's exemptions. Chrysler Corp. v. Brown, 441 U.S. at 303-04. Nevertheless, another statute or regulation not issued pursuant to the FOIA could satisfy § 1905's exception requirement. *See* note 14 *supra* (interpretation of "unless authorized by law" language of § 1905).

[47] 654 F.2d 298-300. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 (1979) (pertinent provisions of APA regarding proper scope of review in reverse-FOIA cases are § 706(2)(A) and (F)); 5 U.S.C. § 706(2)(A), (F) (1976).

[48] 654 F.2d at 297.

[49] 5 U.S.C. § 706(2)(A) (1976).

[50] 5 U.S.C. § 706(2)(A). *See* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (section 706(2)(A) contemplates review on administrative record only and reviewing court is not allowed to substitute its judgment for that of agency). Courts also have interpreted § 706(2)(A) to require that an agency decision reviewed under § 706(2)(A) can be upheld only on the reasons stated by the agency. *See* Pennzoil Co. v. Federal Power Comm'n., 534 F.2d 627, 631 (5th Cir. 1976); 5 U.S.C. § 706(2)(A) (1976).

[51] 5 U.S.C. § 706(2)(F) (1976). Section 706(2)(F) contemplates *de novo* review only where the action is adjudicatory in nature and the agency factfinding procedures are inadequate or where there are issues that were not before the agency in a proceeding to enforce nonadjudicatory agency action. *Id. See* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[52] 654 F.2d at 298. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979); 5 U.S.C. § 706(2)(A) (1976).

review is available the requirement that an agency, in dismissing an objection to disclosure, must set forth a reasoned and detailed basis for the decision so that the reviewing court adequately can review the agency action under section 706(2)(A).[53] The court stated that where the administrative record is sufficient and the facts are undisputed the review could be conducted and a decision reached under section 706(2)(A) as a question of law, and thus *de novo* review under section 706(2)(F) would not be warranted.[54] Because the administrative records were not sufficient and the administrative remedies were not exhausted the *General Motors* court remanded the actions to the district court with directions to remand to the Department so that the agency can make administrative determinations in light of the *Chrysler* opinion.[55]

Courts which have considered the question of the relative scopes of section 1905 and the trade secrets exemption are in accord with the Fourth Circuit that the scopes of section 1905 and the trade secrets exemption are coextensive.[56] The Fourth Circuit's decision is open to ques-

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[53] 654 F.2d at 298. Because a court must conduct judicial review only on the administrative record and cannot substitute its judgment for that of the agency's under § 706(2)(A), a reasoned and detailed basis for the agency's decision is a practical necessity if the reviewing court is to adhere to the standards of § 706(2)(A) for judicial review. *See* Federal Power Comm'n. v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) (if agency decision is not sustainable on administrative record, court must vacate decision and remand matter to agency for further consideration); Camp v. Pitts, 411 U.S. 138, 143 (1973) (same); Asarco, Inc. v. OSHA, 647 F.2d 1, 2 (9th Cir. 1981) (same); 5 U.S.C. § 706(2)(A) (1976).

[54] 654 F.2d at 298-99. The Fourth Circuit noted that the *Chrysler* Court found that *de novo* review ordinarily is not necessary to decide whether a contemplated disclosure violates § 1905. 654 F.2d at 298. *See* Chrysler Corp. v. Brown, 411 U.S. at 318.

[55] 654 F.2d at 299-300. Consequently, the *General Motors* court drew a distinction between the scope of review under subsections (2)(A) and (2)(F) of § 706 of the APA. 654 F.2d at 298-99. The Fourth Circuit stated that judicial review under (2)(A) is under a standard of "abuse of discretion or not otherwise in accordance with law" and normally is subjected to review on the administrative record only. *Id.* at 298. *See* 5 U.S.C. § 706(2)(A) (1976); text accompanying notes 49 and 52 *supra* (meaning of § 706(2)(A)). Alternatively, the court stated that (2)(F) allows trial *de novo* in certain circumstances. 654 F.2d at 298. *See* § 706(2)(F) (1976); text accompanying note 50 *supra* (explanation of § 706(2)(F)). Therefore, the Fourth Circuit interpreted the Supreme Court's *Chrysler* opinion to recognize that circumstances suggested in § 706(2)(F) may arise where the district court might decide that trial *de novo* is necessary and that the Court did not wish to preclude the district court from using the right to conduct *de novo* review. 654 F.2d 298. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 (1979). The *General Motors* court reasoned that because *de novo* review ordinarily is not necessary to determine the applicability of § 1905 to a contemplated disclosure, any decision regarding the propriety of *de novo* review should await the issuance of the agency's decision. 654 F.2d at 298. After the agency's decision, the court should make a decision only on a careful review of the administrative decision and record. *Id.*

[56] *See* Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941-42 n.7 (D.C. Cir. 1975) (trade secrets exemption broader than § 1905 and encompasses § 1905); Pharmaceutical Mfr's. Ass'n. v. Weinberger, 401 F. Supp. 444, 446 (D.D.C. 1975) (litigants agreed that scopes of § 1905 and trade secrets exemption are coextensive for purposes of case); Ditlow v. Volpe, 362 F. Supp. 1321, 1324 (D.D.C. 1973) (type of information protected from disclosure by § 1905 is protected from disclosure by trade secrets exemption).

tion, however, because the legislative history of section 1905 arguably differs from the court's interpretation that the trade secrets exemption is coextensive with section 1905.[57] According to the legislative history, because section 1905 originally was enacted in the 1948 recodification of Title 18 to consolidate three prior nondisclosure statutes, section 1905 should be interpreted to coincide with the narrow scope of the prior statutes.[58] In addition, two Supreme Court opinions have held that Congress did not intend to make substantive changes in predecessor statutes through the 1948 recodification of Title 18 and, therefore, seeming substantive changes should not be given effect.[59] Thus, although the legislative history arguably conflicts with the broad language actually enacted by Congress in section 1905,[60] the Fourth Circuit's holding that

[57] *See* Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683 (codified at 18 U.S.C. § 1905 (1976)); H.R. REP. No. 304, 80th Cong., 1st Sess. A127-A128 (1947), text accompanying note 58 *infra* (legislative history of § 1905).

[58] *See* H.R. REP. No. 304, 80th Cong., 1st Sess. A127-A128 (1947) (§ 1905 consolidates three prior nondisclosure statutes appearing in 1940 edition of United States Code). The House Report explained that "consolidation" means the consolidation of similar sections without making fundamental changes in the offenses involved. *Id.* The three prior statutes which subsequently caused Congress to enact § 1905 involved the Internal Revenue Service, the Tariff Commission and the Commerce Department. *See* 15 U.S.C. § 176(a) (1940) (originally enacted as Act of Jan. 27, 1938, ch. 11, 52 Stat. 8); 18 U.S.C. § 216 (1940) (originally enacted as Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223); 19 U.S.C. § 1335 (1940) (originally enacted as Revenue Act of 1916, Ch. 463, § 708, 39 Stat. 756). Section 216 prohibited disclosure of the operations, style of work, or apparatus of any taxpayer visited by the disclosing federal officer or employee, and financial information contained in an income tax return except as provided by law. 18 U.S.C. § 216 (1940). Section 1335 prohibited any federal officer or employee from disclosing in any manner not provided for by law any trade secrets or processes embraced in any examination or investigation undertaken by the Tariff Commission. 19 U.S.C. § 1335 (1940). Section 176(a) prohibited any employee of the Bureau of Foreign and Domestic Commerce from disclosing statistical information furnished in confidence to the Bureau. 15 U.S.C. § 176(a) (1940). *See Clement supra* note 5, at 602-26 (discussion of legislative history of § 1905); Note, *Protecting Confidential Business Information From Federal Agency Diclosure After* Chrysler Corp. v. Brown, 80 COLUM. L. REV. 109, 118-19 (1980) [hereinafter cited as *Protecting Confidential Business Information*] (legislative history of § 1905).

[59] *See* Muniz v. Hoffman, 422 U.S. 454, 474 (1975) (House and Senate Reports repeatedly caution against reading substantive changes into 1948 revision and recodification of Title 18, Criminal Code); United States v. Cook, 384 U.S. 257, 260 (1966) (1948 revision of Title 18, including changes made in phraseology, disclosed no intention of making any change in substantial content or coverage of law).

[60] Section 1905 applies in part to any information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the indentity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, corporation or association and to any officer or employee of the United States. The section thus is not restricted to the three agencies involved under the three prior statutes or to the limited categories of information listed in the prior statutes. *See* note 58 *supra* (scope of three prior statutes); Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 AD. L. REV. 1, 10 (1976) (discussion of broad language of § 1905); Note, *Administrative Investigation—Preventing Agency Disclosure of Confidential Business Information*, 28 UNIV. KAN. L. REV. 467, 477 (1980) (courts' broad interpretation of term "trade secrets" in § 1905).

the scopes of section 1905 and the trade secrets exemption are coextensive may be improper in light of the conflicting evidence regarding the proper scope of section 1905.[61]

The Fourth Circuit's decision that the scopes of section 1905 and the trade secrets exemption are coextensive requires that an agency demonstrate that disclosure of the disputed information is authorized by law to avoid section 1905's prohibition against disclosure.[62] An agency can meet the section's "unless authorized by law" exception either by statute or by substantive agency regulations issued pursuant to the procedural limitations of the APA and having a sufficient nexus with some delegation by Congress of legislative authority to disclose the exempt information to the public.[63] Although the "unless authorized by law" requirement may appear difficult for an agency to meet, two circuit courts since *Chrysler* have considered whether an agency qualifies under the section 1905 exception and have found the requirement satisfied.[64] The Fourth

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[61] 654 F.2d at 297. In a memorandum to other government agencies, the Department of Justice has expressed the Department's intention to argue in the future for a narrow interpretation of § 1905 on the basis of the legislative history of the section and two prior Supreme Court decisions which held that the 1948 recodification of Title 18 should not be interpreted to make any substantive changes in the predecessor statutes. *Justice Dep't Memo, supra* note 41, at D-2, D-5; *see* notes 56-58 *supra* (cases interpreting scopes of § 1905 and trade secrets exemption to be coextensive and explanation of legislative history of § 1905). The Supreme Court in *Chrysler* implied, however, that the Court would agree with court decisions that the scopes of § 1905 and the trade secrets exemption are coextensive. Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979). The *Chrysler* Court stated that although the theoretical possibility exists that information might be outside the trade secrets exemption yet within § 1905, the possibility is of limited significance because of the similarity of language between the trade secrets exemption and § 1905. *Id.* Nevertheless, no court has considered the legislative history of § 1905 in determining the scope of the section's application. *See Clement supra* note 5, at 606 (courts have uniformly failed to consider legislative history of § 1905 in applying § 1905 to reverse-FOIA disclosure cases). G. English, *Protecting the Stakeholder: Defense of the Government Agency's Interests During Reverse FOIA Lawsuits*, 31 AD. L. REV. 151, 165 (1979) (same).

[62] 18 U.S.C. § 1905 (1976). In response to an FOIA request or otherwise section 1905 is an independent prohibition against release of information within its scope if such release is not authorized by law. *Id.* The FOIA cannot fulfill the "unless authorized by law" exception to § 1905's prohibition against disclosure. Chrysler Corp. v. Brown, 441 U.S. 281, 303-04 (1979). Therefore, if a court finds that § 1905 applies to information exempt under the FOIA, any disclosure of the information would be an abuse of discretion by the agency under § 706(2)(A) of the APA. Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941-42 (D.C. Cir. 1975).

[63] *See* note 14 *supra* (requirements of "unless authorized by law" exception to § 1905's prohibition against disclosure); Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979) (same).

[64] *See* Humana of Virginia, Inc. v. Blue Cross, 622 F.2d 76, 78-79 (4th Cir. 1980); St. Mary's Hosp. Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979). Both the *Humana* and *St. Mary's Hospital* courts upheld a regulation requiring disclosures of cost reports on the grounds that the regulation had a sufficient nexus with the congressional grant of authority in 42 U.S.C. § 1306(a) (1976). 622 F.2d at 78-79; 604 F.2d at 410. Section 1306(a) prohibits disclosure of any information by the Department of Health, Education and Welfare except as the Secretary of the Department might prescribe by regulations. 622 F.2d at 78-79; 604 F.2d at 410; 42 U.S.C. § 1306(a) (1976).

and Fifth Circuits have construed the nexus requirement to mean only that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.[65] Because courts have interpreted the nexus requirement to mean only that a statute must contemplate the regulations issued, courts can more easily find the requirement fulfilled than if the statute had to directly address an agency's authority to disclose confidential business information.[66] If courts continue to accept the lenient interpretation of the "unless authorized by law" exception to section 1905, disclosure regulations generally will be upheld since disclosure of confidential business information is arguably consistent with a variety of regulatory purposes.[67] The overall effect of the lenient interpretation of the section 1905 exception requirements may be to limit the ability of submitters to prevent agency disclosure of confidential business information.[68]

The Fourth Circuit's decision to remand the *General Motors* action to the district court with directions to remand to the agency for additional administrative determinations in light of *Chrysler* is consistent with past judicial deference to an agency's experience and expertise.[69]

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[65] *See* Humana of Virginia v. Blue Cross of Virginia, 622 F.2d 76, 78 (4th Cir. 1980); St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979).

[66] *See* Brookwood Medical Center, Inc. v. Califano, 470 F. Supp. 1247, 1250 (N.D. Ga. 1979), *aff'd*, 614 F.2d 1295 (1980). The Brookwood court held that something less than an express grant of authority to exempt informtion from the prohibition of disclosure of § 1905 is sufficient to meet *Chrysler*'s nexus requirement. *Id. See Protecting Confidential Business Information, supra* note 58, at 121 (less rigorous interpretation of nexus requirement will result in more disclosure regulations being upheld than would be upheld under stricter interpretation).

[67] *See Protecting Confidential Business Information supra* note 58, at 121 (examples of when disclosure of confidential business information arguably may be consistent with regulatory purposes). Disclosure of confidential business information arguably is consistent with a congressional grant of authority to collect the information. *See Clement supra* note 5, at 623 (regulation providing for disclosure of exempt business information probably bears reasonable relationship to enabling legislation authorizing collection of information); Westinghouse Elec. Corp. v. Nuclear Regulatory Comm'n., 555 F.2d 82, 85-88 (3d Cir. 1977). The court implied from general enabling legislation and agency authority to collect confidential business information the authority to promulgate regulations requiring disclosure of confidential business information when the disclosure is in the public interest. *Id.*

[68] *See* Humana of Virginia, Inc. v. Blue Cross, 622 F.2d 76, 79 (4th Cir. 1980); St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979). Once a court determines that an agency decision to disclose is authorized by law, a submitter can prevent disclosure of the information only if the agency did not promulgate the regulation in question based on a consideration of the relevant factors. *See* Pennzoil Co. v. Federal Power Comm'n., 534 F.2d 627, 631 (5th Cir. 1976); 5 U.S.C. § 706(2)(A) (1976). If the agency did not consider relevant factors, the regulation is arbitrary and capricious under § 706(2)(A) of the APA. 622 F.2d at 79; 604 F.2d at 410. *See* Pennzoil Co. v. Federal Power Comm'n., 534 F.2d 627, 631-32 (5th Cir. 1976) (relevant factors agency must consider to decide whether to disclose confidential business information); 5 U.S.C. § 706(2)(A) (1976); text accompanying note 49 *supra* (defining § 706(2)(A)).

[69] 654 F.2d at 300. *See* text accompanying notes 70-72 *infra* (discussing doctrine of exhaustion of administrative remedies and purpose to provide for complete administrative resolution of controversy prior to judicial review).

The concept of judicial deference to an agency's expertise is embodied in the doctrine of exhaustion of administrative remedies.[70] The purpose of the doctrine is to allow an agency to perform functions within its special competence, such as making a factual record, applying its expertise and correcting its own errors so as to moot judicial controversies.[71] Thus, the doctrine provides for complete administrative resolution of a controversy prior to judicial review.[72] The Fourth Circuit properly concluded, therefore, that when the Supreme Court through its judicial decisions alters the rules controlling an agency's determination of issues properly before the agency after the initial decision but before judicial review, an appellant cannot fully claim he has exhausted his administrative remedies.[73] Finally, similar to the *General Motors* court's decision, in three post-*Chrysler* decisions concerning reverse-FOIA actions in which courts have found the administrative record to be inadequate, the courts have remanded the action to the agency for futher administrative determinations in light of *Chrysler*.[74]

The Fourth Circuit's holding that section 1905 of the TSA is coextensive with the trade secrets exemption of the FOIA will result in the trade secrets exemption being a complete bar to disclosure unless the "unless authorized by law" exception of section 1905 is met by the agency.[75] The Fourth Circuit has given, however, the section 1905 exception

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[70] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (long settled rule of judicial administration that no one is entitled to judicial relief until he has exhausted prescribed remedies); Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1061-62 (7th Cir. 1978) (same). The purpose of the doctrine regarding the exhaustion of administrative remedies is to provide for complete administrative resolution of a controversy prior to judicial review. *See id.* at 1064.

[71] *See* Parisi v. Davidson, 405 U.S. 34, 37 (1972) (basic purpose of exhaustion doctrine to let agency perform basic functions of making factual record, applying its expertise and correcting its own errors so as to moot judicial controversies); Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064 (7th Cir. 1978) (doctrine affords parties and courts benefit of agency's experience, expertise and complete factual record adequate for judicial review).

[72] *See* Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064 (7th Cir. 1978) (doctrine provides complete administrative resolution prior to judicial review).

[73] 654 F.2d at 299. Whether to require a party to exhaust its administrative remedies is discretionary. *See* United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1974). Thus, if pursuing an administrative remedy would be futile, a court may waive the requirement. *Id.* Pursuing the administrative remedy in *General Motors* would not be futile because of the changes made by the *Chrysler* opinion in the relevant considerations to be taken into account by the agency in making an administrative decision in reverse-FOIA cases. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 319 (1979).

[74] *See* Chrysler Corp. v. Schlesinger, 611 F.2d 439, 439-40 (3d Cir. 1979) (on remand from Supreme Court); General Dynamics Corp. v. Marshall, 607 F.2d 234, 235-36 (8th Cir. 1979); Sears, Roebuck & Co. v. Eckerd, 600 F.2d 1237, 1237 (7th Cir. 1979). *But see* General Motors Corp. v. Marshall, 654 F.2d 294, 299 (4th Cir. 1981) (citing Gulf Oil Corp. v. Marshall, (D.D.C. Nov. 29, 1979), appeal pending, No. 80-1127 (D.C. Cir.) for opposite viewpoint).

[75] *See* text accompanying note 62 *supra* (operation of § 1905 in regard to request for information under FOIA falling within trade secrets exemption). The FOIA does not apply to information falling within one of its exemptions. Chrysler Corp. v. Brown, 441 U.S. 281, 303 (1979). Therefore, if § 1905 and the trade secrets exemption are coextensive, § 1905 is the