Showdown at the Administrative Corral:
Challenging and Defending Rules in the Federal Arena
Wednesday, July 16, 2014, 10:15 a.m. – 11:45 a.m., before the
National Association of Secretaries of State (NASS)
Administrative Codes and Registers (ACR) Section

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Challenging Agency Regulations

Problem Identification

- Prepare a concise statement of the problem the agency is addressing
- Determine if there is a difference between the stated problem and the actual problem which lead to a rulemaking
- Identify, if possible, the parties in support of the rulemaking

Identify Violations in Statutory or Administrative Mandates

- Executive Order 12866—OMB Review
- Paperwork Reduction Act
- Data Quality Act
- Regulatory Flexibility Act
- Inconsistencies with International Standards

Preparation of Comments

- Comments should be concise and to the point
- A summary of the comments should precede the comments
Overkill on the breadth of analysis works to your detriment
Comments should be peer reviewed to eliminate errors and redundant statements
Filing your comments early provides a mechanism for influencing the comments of others

Coalition Building

- Distribute comments to influential stakeholders
- Request support of your comments
- Request they meet with agency officials

Press Coverage

- Submit comments to trade press and on occasion to national press
- If conditions warrant issue a press release

Meetings with Agency Officials

- Request a meeting with agency officials
- A tradeoff between meeting with working staff and their managers
- Generally a meeting should be no more than one hour
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1) The Best Defense is Preparation
   a) Learn from Your Litigators – the Issues that Could Arise in a Rule
   b) Know Your Procedural, Analytical, and Substantive Requirements

2) Negotiating the Process – The Best, Most Effective Litigation is Negotiated between Intelligent Parties in an Open, Amicable Discussion

3) Defense on the Administrative Record
   a) Trial by Record – Appellate Review
   b) Presumption of Regularity
   c) Planning – ACUS Recommendations 2013-4
      i) Advance Preparation of the Record
      ii) Complete Record of Consideration
      iii) Ex Parte Communications – ACUS Recommendation 2014-4
   d) Risk Management

4) Constitutional and Prudential Requirements – The Litigator’s Defenses & Limited State Corollaries
   a) Article III Standing – Limited Constitutional Power
   b) Jurisdiction – Limited Federal Question Jurisdiction
   c) Right to Review: The APA and Declaratory Judgment Act
   d) Ripeness and Mootness
   e) Jurisdictional Exhaustion
   f) Few State Counterparts
   g) Issues Rarely Touch on the Substance of the Rule

5) Agency Authority
   a) Statutory Authority – IRS Tax Preparers Rule
   b) Non-synergetic – HHS / FDA Orphan Drugs Rule
   c) Preemption of State Law

6) Scope of Review
   a) Contrary to Constitutional Right, Power, Privilege, or Immunity – Statutes, Rules & the First Amendment Compelled Speech and Religion
   b) Excess of Authority
c) Arbitrary & Capricious & Rationality

d) Abuse of Discretion

e) Judicial Review is Not of the Policy Decision

7) Procedural Claims

a) Notice

b) Opportunity for Public Comment
   i) Minimum Time
   ii) Interim Final Rules
   iii) Foreign Affairs & Military Exception
   iv) Organizational, Procedural & Practice Exception
   v) Good Cause: Impracticable, Unnecessary, or Contrary to the Public Interest

c) Expansive Preambles & Expansive Response to Comments

d) Logical Outgrowth Doctrine

e) Exhaustion: Statutory, Darby & Sims

8) Analytical Requirements:

a) Regulatory Flexibility Act (RFA)
   i) Certification of Non-Significant Impact
   ii) Initial Regulatory Flexibility Analysis
   iii) Final Regulatory Flexibility Analysis

b) Paperwork Reduction Act (PRA)

c) Executive Orders 12,866 & 13,563: Arbitrary & Capricious Analysis

d) Information Quality Act – not direct judicial review: Salt Institute

e) Substantive Limitations

1) Judicial Deference to Agency Action: Chevron & its Colleagues

a) Deference to Agency Interpretation of Ambiguity in its Own Statute: Chevron
   i) Statutory Jurisdiction: Chevron Step 0
   ii) Statutory Clarity: Chevron Step 1
   iii) Agency Expertise: Chevron Step 1½
   iv) Statutory Ambiguity: Chevron Step 2

b) Deference in Adjudication / Rulemaking: Mead

c) Deference to Persuasiveness: Skidmore

d) Deference to Agency Interpretation of its Own Rules: Auer / Seminole Rock

2) Remedies Are Limited

a) Hold Unlawful and Set Aside under the APA & Vacatur

b) Remand Without Vacatur – ACUS Recommendation 2013-6
c) **Allied Signal & Not Going Nuclear**

d) **Declaratory Judgment Limitations**