

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

Jim Tozzi
Center for Regulatory Effectiveness

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

Leland E. Beck, Esq.

*Federal Administrative Law • Litigation • Government Relations
Licensed in the District of Columbia*

1701 Pennsylvania Ave. NW – Suite 300
Washington, D.C. 20006

(202) 621-1830 (service)

(240) 674-6839 (cell)

LEBeck365@gmail.com (non-secure email)

<http://www.fedregsadvisor.com/>