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Administrative Procedure Act Litigation: The Changing Regulatory Landscape, the Role of Industry, and Emerging Issues

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As the Trump Administration concludes its fifth month, industry is facing a changing regulatory landscape that offers both opportunities and challenges. In this period of transition, litigation under the Administrative Procedure Act (APA) has played, and will continue to play, a more important role than ever in shaping the burdens facing regulated industries. The lawyers in WilmerHale's Administrative Law Practice have been litigating cases, advising clients, and closely tracking developments in this changing environment. We offer below some thoughts on (1) the changing regulatory landscape, (2) the role of industry at this time, and (3) the emerging administrative law issues that will be important for our clients in the months and years ahead.

I. THE CHANGING REGULATORY LANDSCAPE

Transitions between administrations often result in a period of significant regulatory upheaval. The current transition is no exception. The outgoing Obama Administration finalized a number of regulations in its final months. Now, under the Trump Administration, agencies are reconsidering their approaches to many critical regulatory and policy questions. All of this has already generated—and will continue generating—a significant amount of APA litigation. Some of that litigation in the future may address the degree to which agencies have met their obligations under the APA to explain adequately changes in agency policy and to allow the public to comment on those changes.

Litigation Over Obama Administration Actions

A number of the regulations promulgated by the Obama Administration in its final months were successfully blocked in APA litigation. For example, in January 2017, a team of WilmerHale lawyers obtained a preliminary injunction against a new "interim final" regulation promulgated by the Department of Health and Human Services (HHS) without notice and comment that would have interfered with the relationship between patients with end-stage renal disease and their health insurers.[1] In December 2016, a district court preliminarily enjoined HHS regulations enacted under the Affordable Care Act prohibiting discrimination based on gender identity and termination of pregnancy.[2] And in November 2016, a district court preliminarily enjoined the Department of Labor's new overtime regulations that would have increased the minimum wage.[3]

[1] *See Dialysis Patient Citizens v. Burwell*, 2017 WL 365271 (E.D. Tex. Jan. 25, 2017).

[2] *See Franciscan All., Inc. v. Burwell*, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016).

[3] *See Nevada v. U.S. Dep't of Labor*, 2016 WL 6879615167 (E.D. Tex. Nov. 22, 2016).

In some cases, courts have stayed challenges to permit the Trump Administration to reconsider the regulations at issue. On March 22, 2017, the district court hearing the challenges to the Obama Administration's deferred action immigration program stayed the litigation.[4] On April 27, 2017, the DC Circuit granted the Trump Administration's motion to stay the challenge to the EPA's rule limiting mercury and other toxic emissions from coal-fired power plants.[5] And on April 28, 2017, the DC Circuit granted the Trump Administration's motion to hold the litigation challenging the "Clean Power Plan" in abeyance.[6] But not all challenges have been stayed. The U.S. Supreme Court, for example, declined to stay proceedings in the challenge to EPA's "Waters of the United States" rule.[7]

Policy Reversals by the Trump Administration

Meanwhile, the Trump Administration has begun to reconsider numerous regulatory regimes. Some agencies have already taken actions to reverse Obama Administration policies. For example, the State Department has changed course and issued a permit for the Keystone pipeline, and the Departments of Education and Justice have withdrawn their prior guidance document addressing gender-identity discrimination.

But many of the most significant changes will come in the months ahead as agencies review existing regulations governing a wide range of industries. The executive orders issued by President Trump create a roadmap for much of this change. One early executive order pronounced that "whenever an executive department or agency … publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."[8]

Other orders address particular regulations. For example, one executive order requires the Secretary of the Treasury to review regulations governing the financial services industry.[9] Another calls on all executive agencies to "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law."[10] The same order specifically requires EPA to review the "Clean Power Plan" and regulations governing oil and gas development.[11] A separate order requires EPA to review the "Waters of the United States" rule.[12] The Trump Administration has also announced that EPA will reopen its consideration of automobile fuel economy standards.[13] And finally, President Trump has directed the Department of Labor to review the Fiduciary Duty Rule.[14]

Agency Obligations When Changing Course

In light of the policy reversals already under way and expected in the months ahead, it is important to consider the obligations the APA imposes on administrative agencies seeking to change course.

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[4] Order, *Texas v. United States*, No. 14-cv-254 (S.D. Tex. Mar. 22, 2017), ECF No. 439.

[5] Order, *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. Apr. 27, 2017).

[6] Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

[7] Order, *National Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299 (U.S. Apr. 3, 2017).

[8] Exec. Order No. 13,771 (Jan. 30, 2017), § 2, 82 Fed. Reg. 9339.

[9] Exec. Order No. 13,772 (Feb. 3, 2017), 82 Fed. Reg. 9965.

[10] Exec. Order No. 19,783 (Mar. 28, 2017), § 1(c), 82 Fed. Reg. 16,093.

[11] *Id.* §§ 4, 7.

[12] Exec. Order No. 13,778 (Feb. 28, 2017), 82 Fed. Reg. 12,497.

[13] https://www.epa.gov/newsreleases/epa-reexamine-emission-standards-cars-and-light-duty-trucks-model-years-2022-2025.

[14] Presidential Mem. on Fiduciary Duty Rule (Feb. 3, 2017), 82 Fed. Reg. 9675.

To alter regulations previously finalized, an agency typically must follow the notice and comment procedures set forth in the APA.[15] Although an agency does not bear a heightened burden to justify the change, it must nevertheless provide a reasoned explanation for its decision.[16] And where a new policy rests on factual findings that contradict prior findings by the agency or where the "prior policy has engendered serious reliance interests," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[17] As in all cases, an agency must consider the relevant factors and address the important aspects of the problem it faces, "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'"[18]

In some cases, a notice of proposed rulemaking has been published but final regulations have yet to be issued. In that situation, the final rule promulgated by the agency "need not be identical" to what was proposed in the notice of proposed rulemaking.[19] But significant changes require a new notice of proposed rulemaking because the final rule must still be the "logical outgrowth" of what was proposed.[20]

As agencies seek to alter prior regulatory approaches, they will need to keep these important limitations in mind.

II. THE ROLE OF INDUSTRY

In the coming months, industry will likely find itself supporting many deregulatory efforts while simultaneously opposing other agency actions. In either case, there is an important role for industry to play.

Helping Agencies Engage in Reasoned Decisionmaking

When industry supports a proposed change, it should be prepared to help agencies engage in reasoned decisionmaking. Agencies considering a dramatic change to complex regulations face a daunting task. They must thoroughly grapple not only with comments opposing the change but also with the agency's own prior statements. There is often a need to move quickly. But early in an administration, agencies are not fully staffed and are overwhelmed with all the work to be done. In addition, outside groups are poised to bring APA challenges. In these circumstances, any shortcuts taken by an agency could doom a critical regulatory change.

Industry groups that support proposed regulatory changes can take a number of steps to help the relevant administrative agency:

- *Submitting Written Comments*: Industry associations or interested companies should submit thorough, well-reasoned comments laying out the rationale for changing course and addressing prior agency statements, contrary evidence, and anticipated counter arguments. The comments should contain a full analysis of any difficult legal questions.

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[15] *See* 5 U.S.C. § 553; *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (noting that "§ 1 of the APA [mandates] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

[16] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[17] *Id.*

[18] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[19] *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009).

[20] *Id.*; *see also id.* at 1081 ("[O]ur cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position.").

- *Meeting with the Agency*: Agencies are often willing to meet with members of the public during the comment period, so long as the meeting is noted on the public record. Industry should consider using those meetings to urge the agency to proceed carefully.

- *Meeting with Interested Policymakers Outside the Agency*: Policymakers outside the agency may be encouraging the agency to proceed expeditiously. It is important for these policymakers to understand the need to move forward responsibly as well.

Intervening or Participating as an Amicus to Help Defend Actions Beneficial to the Industry

When industry supports a regulatory change that has occurred, it should consider intervening or participating as an amicus curiae in litigation challenging the agency action at issue. Interested parties frequently intervene in APA challenges brought by others. For example, WilmerHale represented the ethanol industry when it intervened to help defend a decision by the EPA to permit the sale of gasoline with increased volumes of ethanol.[21] Intervening in a case provides a greater opportunity to affect the outcome than other means of participation. Intervenors generally receive argument time and are able to work with the government more easily than non-participating parties can. As an alternative, industry groups routinely file amicus curiae briefs in APA cases of interest. Thoughtful industry participation can give courts comfort that the challenged agency action was reasonable.

Bringing Challenges to Adverse Agency Regulations and Decisions

On the other hand, when industry opposes a new agency action, it should be prepared to bring APA litigation when warranted. Even in a period of generally deregulatory agency action, some proposed and finalized agency regulations and orders will adversely affect either an industry or particular members of an industry. Deregulation of competitors, for example, can have significant adverse impacts, and it is well recognized that competitors have standing to challenge such deregulatory efforts. Likewise, in a deregulatory environment, some industries will nevertheless be regulated more stringently. Adversely affected industries should submit thorough and well-reasoned comments and then be prepared to bring suit, often on an expedited basis, to try to enjoin new regulations before they take effect.

III. EMERGING ADMINISTRATIVE LAW ISSUES

During this time of regulatory upheaval and significant APA litigation, it is important to stay abreast of emerging ssues in the area of administrative law. We describe below just a few of the many important issues likely to be addressed in the coming years.

***Chevron* Deference**

It is well settled that where a statutory provision is ambiguous, courts generally must defer to a reasonable interpretation of the provision by the administrative agency charged with implementing the statute, so long as the interpretation is set forth in a regulation or a sufficiently formal agency decision. This deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a foundational part of administrative law. But the contours of the doctrine continue to be refined.

The scope of *Chevron* deference has been the subject of two recent Supreme Court decisions that cut in opposite directions. In *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), the Supreme Court held that a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's own jurisdiction. In *King v. Burwell*, 135 S. Ct. 2480 (2015), however, the Supreme Court declined to defer to the IRS's interpretation of the Affordable Care Act, reasoning that if Congress had intended to assign the issue to the IRS, it would have done so expressly given the significance of the issue and the IRS's lack of expertise regarding health insurance policy.

[21] *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (2012).

More recently, there have been legislative efforts to overturn *Chevron*. In January of this year, the House passed a bill that includes a provision requiring courts reviewing agency actions to decide all legal questions de novo.[22] Whether and how to push for the narrowing or abandonment of *Chevron* thus presents industry with important strategic and legal questions in APA litigation.

Auer Deference

Another important form of judicial deference is often called "*Auer* deference." Under *Auer*, courts defer to an agency's interpretation of an ambiguous provision in its own regulation.[23] Unlike *Chevron* deference, *Auer* deference does not require that the agency act with a particular degree of formality—for example, even an interpretation set forth for the first time in a brief may suffice.[24] In recent years, however, some members of the Supreme Court have begun to question the appropriateness of *Auer* deference.[25] In *Gloucester County School Board v. G.G.*, 137 S. Ct. 369 (2016), the Supreme Court granted certiorari to consider whether *Auer* deference should "extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought."[26] The Court later remanded the case without a decision after the agency guidance at issue was withdrawn.[27] The continuing breadth of *Auer* deference therefore remains in limbo, and industry should consider appropriate opportunities in litigation to preserve challenges to *Auer* deference for eventual reconsideration by the Supreme Court.

Nationwide Injunctions in APA Cases

There is an ongoing debate about whether district courts may enter nationwide injunctions in APA challenges. During the Obama Administration, district courts entered nationwide injunctions blocking, for instance, both the Department of Homeland Security's deferred action immigration policy and the gender identity guidance published by the Departments of Education and Justice.[28] The Fifth Circuit upheld the nationwide reach of the injunction in the immigration case.[29] More recently, two panels of the Ninth Circuit relied on the Fifth Circuit's decision in declining to narrow nationwide injunctions against President Trump's initial and revised "travel ban" executive orders, noting that nationwide injunctions are more appropriate in the immigration context.[30] The Fourth Circuit similarly upheld a nationwide injunction against the revised "travel ban" executive order.[31]

The Department of Justice, however, has consistently taken the position that nationwide injunctions are generally impermissible and that preliminary injunctions, including under the APA, must be narrowly tailored to address the harm to the plaintiff bringing suit. A number of decisions may provide some support for the government's view in certain circumstances.[32]

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[22] *See* H.R. 5, 115th Cong. § 202 (as passed by House, Jan. 11, 2017).

[23] *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

[24] *Id.* at 462.

[25] *See, e.g., Mortgage Bankers Ass'n*, 135 S. Ct. at 1210-11 (Alito, J., concurring); *id.* at 1213 (Scalia, J., concurring); *id.* at 1213-25 (Thomas, J., concurring).

[26] Pet'r's Br. i, *id.* (No. 16-273).

[27] *See* 137 S. Ct. 1239 (2017).

[28] *See Texas v. United States,* 2015 WL 1540022, at *6-7 (S.D. Tex. Apr. 7, 2015); *Texas v. United States*, 2016 WL 7852331, at *1-3 (N.D. Tex. Oct. 18, 2016).

[29] *See Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015).

[30] *See Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017); *Hawaii v. Trump*, --- F.3d ---, 2017 WL 2529640, *27-*28 (9th Cir. June 12, 2017).

[31] *See International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

[32] *See, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011) (collecting authority).

Standing of States to Bring Challenges

The law regarding the standing of states to bring APA challenges is also evolving. In its lawsuit to enjoin the Obama Administration's immigration action, Texas argued that it was harmed because it would have to issue driver's licenses to aliens afforded deferred action. The Fifth Circuit accepted that argument, notwithstanding the contention by the United States that Texas had chosen to inflict this harm on itself.[33] In the recent challenges to President Trump's travel ban, states have asserted standing based in part on their role as proprietors of public universities affected by the ban. Two panels of the Ninth Circuit have accepted that argument, again over the objection of the United States.[34] The Ninth Circuit panel addressing the challenge to the revised executive order also found that the State of Hawaii had standing in light of its sovereign interest in carrying out its refugee policies.[35] These decisions may support continued efforts by states to expand their standing to bring APA challenges.

Intervention

Affected parties often intervene in APA litigation. Despite the frequency of intervention in APA cases, however, important questions about the law governing intervention remain unresolved. For example, the circuits have long been split on whether would-be-intervenors must demonstrate that they have Article III standing (in addition to a protectable interest under Federal Rule of Civil Procedure 24(a)). The Supreme Court's recent decision in *Town of Chester, N.Y. v. Laroe Estates, Inc.* partially resolved this question. The Court held that an intervenor must have Article III standing if it seeks relief that is distinct from that sought by the party it is supporting..[36] Whether an intervenor who does not seek different relief must have Article III standing remains an open issue.

There is also some question, at least in the DC Circuit, whether an intervenor can raise an argument not made by the original parties. The DC Circuit has barred intervenors from raising new arguments in certain circumstances.[37] There are good reasons for limiting this rule to situations in which intervention is used to raise an issue the intervenor failed to assert in a timely petition for review. But the DC Circuit has yet to clarify the precise scope of its ban on new arguments by intervenors.

Challenging Executive Orders

Recently there have been a number of high-profile challenges to executive orders issued by President Trump. The APA does not provide a cause of action against the President.[38] But the Supreme Court has made clear that "the President's actions may still be reviewed for constitutionality."[39] Instead of bringing claims against the President under the APA, parties must therefore bring their claims directly under the Constitution. In contrast, APA challenges can be filed against the agencies directed to carry out the executive order, and unlike the executive order itself, implementation by an agency may be challenged on non-constitutional grounds—for example, as arbitrary and capricious or contrary to a federal statute.

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[33] *See Texas*, 809 F.3d at 155-60.

[34] See *Washington*, 847 F.3d at 1159-61; *Hawaii*, 2017 WL 2529640, at *8.

[35] *Hawaii*, 2017 WL 2529640, at *9.

[36] *See Town of Chester v. Laroe Estates, Inc.*, No. 16-605, --- S.Ct. ---, 2017 WL 2407473, *5 (U.S. June 5, 2017) ("In sum, an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.").

[37] *E.g., Core Communications, Inc. v. FCC*, 592 F.3d 139, 145-46 (D.C. Cir. 2010).

[38] *See Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992).

[39] *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

Exhaustion

Questions of "exhaustion" are often important in APA cases. This is not an emerging issue, but it is a critical one to understand in order to preserve the right to obtain judicial review. There are different kinds of exhaustion requirements as described below.

Jurisdictional vs. non-jurisdictional

As the DC Circuit has explained, a jurisdictional exhaustion requirement is present when "Congress requires resort to the administrative process as a predicate to judicial review."[40] Such a requirement is mandatory. Non-jurisdictional exhaustion is "a judicially created doctrine" that is subject to exceptions[41]

Issue exhaustion vs. exhaustion of administrative remedies

Courts also distinguish between exhaustion of administrative remedies and "issue" exhaustion.[42] Exhausting administrative remedies means availing yourself of the procedures available for relief from the agency—such as filing a petition with the agency asking for review or seeking agency reconsideration. Issue exhaustion means raising before the agency the issue you wish to raise in court. The Supreme Court held in *Sims* that where issue exhaustion is not mandated by statute, a court must consider whether to require it for prudential reasons.[43] Given the uncertainty regarding when issue exhaustion will be required under *Sims,* as well as certain case law requiring issue exhaustion in challenges to notice-and-comment rulemakings,[44] industries that would be affected by proposed agency action should submit comprehensive comments drafted with any eye toward eventual APA litigation.

IV. CONCLUSION

The changing regulatory environment offers both opportunities and hazards. Industry should give careful consideration to what role it can play at this critical time. WilmerHale's Administrative Law Practice stands ready to offer assistance, both behind the scenes and in litigation where necessary.

[40] *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

[41] *Id*.

[42] *See, e.g., Sims v. Apfel*, 530 U.S. 103, 107-08 (2000).

[43] *See Sims*, 530 U.S. at 109-110.

[44] *See, e.g.*, *Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148-50 (D.C. Cir. 2005).

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