

June 14, 2013

Dear Subcommittee Members,

Thank you for thinking about the "point of adoption for purposes of appeal" issue. I received three sets of comments/recommendations from members of our subcommittee:

1) Karen Perrine is wondering if the "effective date" might be a better solution than the "final adoption date". She believes it is a more certain date, with the only outlier being those regulations that can become effective upon filing with the Registrar; for those, the notice of appeal could be 30 days after publication in the Register. She proposes the following:

Rule 2A:2:

(a) Any party appealing from a regulation or case decision shall file with the agency secretary, a notice of appeal signed by the appealing party or that party's counsel. The notice of appeal must be filed within 30 days after ~~adoption of the date on which, subject only to any readoption required pursuant to § 2.2-4015 (B), the agency takes final action to adopt~~ the regulation or after service of the final order in the case decision, ~~a notice of appeal signed by the appealing party or that party's counsel~~. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency.

Section 2.2-4012 new subsection F:

F. In the event that final adoption of a regulation will not occur at a public meeting, the agency must provide notice of final adoption to the public prior to actual adoption of the regulation. The notice must specify (i) the date on which the agency intends to adopt the regulation, (ii) that public comment will be received, and (iii) an agency contact person. The notice must be published in the Virginia Register and posted on Virginia Regulatory Town Hall at least 15 days before adoption.

She noted that, under current publication schedules, this would create an additional 19-day period before adoption. For example, the cut-off date for submission of items for publication is August 7 for the August 26th issue of the Register. Also, the date of a board meeting at which final adoption may occur is not published in the Register (although public hearings on regulations are), so one could argue that it would not be necessary to publish this notice in the Register.

2) Roger Chaffe suggested the following amendment to Rule 2A:2:

(a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after the date on which the agency takes final action to adopt or if required pursuant to § 2.2-4015 (B) to readopt ~~adoption~~ ~~of~~ the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency.

Accompanied by the addition of this definition to § 2.2-4001:

“Adoption” or “readoption” of a regulation shall occur when an agency takes final action with respect to that regulation if such action is taken at a publicly held meeting. If such action is taken other than at such a meeting the agency shall publish notice no less than ___ days in advance of the date on which it intends to take such action.

3) Cindy Berndt suggested the following amendment to § 2.2-4012:

E. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.

F. At least five days before final adoption of the regulation, the agency shall announce the date on which final adoption of the regulation is to occur. Such announcement may be made through posting on the Virginia Regulatory Town Hall, publication in the Virginia Register of Regulations or such other means as the agency deems appropriate.

G. Immediately upon the adoption by any agency of any regulation in final form, a copy of (i) the regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. ~~A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.~~

With that, Roger's proposed definition could be modified to say that adoption is when the agency takes final action.

Also, Melanie West of DPB helpfully noted that the way the current Executive Branch Review process works, if a Director/Commissioner approves a final adopted regulation, it could still be modified without public comment during the time it is under review by OAG, DPB, the Cabinet Secretary, and the Governor's office. It is only at the time the final adopted regulation is submitted to the Register's office for publication & public comment that the agency is truly done with it. Which may provide a further complication.

I suggest that we meet to determine the preferred path forward. Please provide Andrew with your availability to meet over the next couple of weeks, and we will try to juggle vacation schedules. We could meet at lunch time, as we usually do, to keep this simple.

Thanks,

Elizabeth

<p><u>Option 1:</u> Point where agency director or board makes decision to adopt regulation as final</p>	<p><u>Option 2:</u> Point where regulation is published in the VA Register (or, end of 30-day final adoption period)</p>	<p><u>Option 3:</u> Effective date of regulation (end of 30-day final adoption period or later date specified by agency - VAPA Sec. 2.2-4015A)</p>
<p>PRO: - Enables the regulated community to appeal ASAP, before having to invest to achieve compliance. - Agency is done with the regulation at this point; any significant changes after that made in response to executive review should trigger new public comment period & readoption.</p>	<p>PRO: - Avoids the problem of regulations being held up in executive review and potentially being changed long after appeal has been filed. - Avoids the need to publicize when agency directors adopt regulations, since that no longer would be the point of adoption for appeal purposes.</p>	<p>PRO: - Avoids the problem of regulations being held up in executive review and potentially being changed long after appeal has been filed. - The regulation has the full force of law (see definition of "regulation" in VAPA Sec. 2.2-4001).</p>
<p>CON: - Per EO 14 and current procedures, a regulation sometimes stays in executive review for a prolonged period of time after the agency decides to adopt a final version, and then it could be changed as a result of executive review; in the meantime, time may have been wasted on needless appeals. - Standing and ripeness issues since the regulation is not yet effective. There is no one "affected by" the regulation yet (VAPA Sec. 2.2-4026), and the regulation does not have the force of law (see definition of "regulation" in VAPA Sec. 2.2-4001). [But a regulation can always be appealed at the time of its enforcement (VAPA Sec. 2.2-4026).] - Less public notice of adoption date for regulations adopted by agency directors (versus boards, at public meetings).</p>	<p>CON: Regulations with delayed effective dates have standing and ripeness issues since the regulation is not yet effective. There is no one "affected by" the regulation yet (VAPA Sec. 2.2-4026), and the regulation does not have the force of law (see definition of "regulation" in VAPA Sec. 2.2-4001). [But a regulation can always be appealed at the time of its enforcement (VAPA Sec. 2.2-4026).]</p>	<p>CON: At this point, it is too late for the regulated community to invest in necessary changes before the regulation becomes effective; so an appellant risks being found non-compliant and becoming the subject of an enforcement action.</p>
<p>HOW TO ACHIEVE: - Add definition of "adoption" to VAPA Sec. 2.2-4001 and amend Rule 2A:2 (see Roger's and Karen's suggested language). BUT this needs to be cross-checked with all uses of the term</p>	<p>HOW TO ACHIEVE: - Amend VAPA Sec. 2.2-4013D as follows (note: this is a new suggestion): "A thirty-day final adoption period for regulations shall commence upon the publication</p>	<p>HOW TO ACHIEVE: - Amend VAPA Sec. 2.2-4013D, similar to what is suggested for Option 2. (See, e.g., Model APA, which provides that appeals based on procedural grounds can be brought within 2 years of</p>

<p>"adoption" in the VAPA; potential confusion/conflict, particularly with Sec. 2.2-4013. - Amend VAPA Sec. 2.2-4012 to require agencies to announce the date a director will adopt a regulation (see Cindy's and Karen's suggested language).</p>	<p>of the final regulation in the Register, and such date of <u>publication shall serve as the date of adoption for purposes of appeal except for suspended regulations pursuant to 2.2-4007.06, 2.2-4013(D), and 2.2-4014(B), and emergency regulations as described in 2.2-4011.</u> The Governor may review the final regulation..."</p>	<p>the effective date of the regulation.)</p>
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VAPA references to "adoption"

[Note: § 2.2-4007.01 and § 2.2-4010 omitted because irrelevant]

§ 2.2-4006. Exemptions from requirements of this article.

A. The following agency actions otherwise subject to this chapter and § 2.2-4103 of the Virginia Register Act shall be exempted from the operation of this article:

4. Regulations that are:

c. Necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing. Notice of the proposed **adoption** of these regulations and the Registrar's determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation.

§ 2.2-4007.1. (Effective until July 1, 2014) Regulatory flexibility for small businesses; periodic review of regulations.

...

B. In addition to the requirements of §§ 2.2-4007 through 2.2-4007.06, prior to the **adoption** of any proposed regulation, the agency proposing a regulation shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small businesses. ...

C. Prior to the **adoption** of any proposed regulation that may have an adverse effect on small businesses, each agency shall notify the Joint Commission on Administrative Rules, through the Virginia Regulatory Town Hall, of its intent to adopt the proposed regulation. The Joint Commission on Administrative Rules shall advise and assist agencies in complying with the provisions of this section.

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C. Prior to the **adoption** of any proposed regulation that may have an adverse effect on small businesses, each agency shall notify the Joint Commission on Administrative Rules, through the Virginia Regulatory Town Hall, of its intent to adopt the proposed regulation. The Joint Commission on Administrative Rules shall advise and assist agencies in complying with the provisions of this section.

§ 2.2-4012. Purpose; **adoption; effective date; filing; duties of Registrar of Regulations.**

...

B. Subject to the provisions of §§ 2.2-4013 and 2.2-4014, all regulations, including those that agencies, pursuant to § 2.2-4002, 2.2-4006, or 2.2-4011, may elect to dispense with the public procedures provided by §§ 2.2-4007.01 and

2.2-4009, may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation or a noncontroversial regulation promulgated pursuant to § 2.2-4012.1 shall be effective until the expiration of the applicable period as provided in § 2.2-4015. In the case of an emergency regulation filed in accordance with § 2.2-4011, the regulation shall become effective upon its **adoption** and filing with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. They, or facsimiles thereof, shall be made available for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as required by other laws.

E. Immediately upon the **adoption** by any agency of any regulation in final form, a copy of (i) the regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final **adoption** of the regulation.

§ 2.2-4013. Executive review of proposed and final regulations; changes with substantial impact.

...

B. Upon final **adoption** of the regulation, the agency shall forward a copy of the regulation to the Registrar of Regulations for publication as soon as practicable in the Register. All changes to the proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed regulation shall be explained in the final regulation.

C. If the Governor finds that one or more changes with substantial impact have been made to the proposed regulation, he may require the agency to provide an additional thirty days to solicit additional public comment on the changes by transmitting notice of the additional public comment period to the agency and to the Registrar within the thirty-day **adoption** period described in subsection D, and publishing the notice in the Register. The additional public comment period required by the Governor shall begin upon publication of the notice in the Register.

D. A thirty-day final **adoption** period for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final regulation during this thirty-day final **adoption** period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014, or both.

If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar and agency prior to the conclusion of the thirty-day final **adoption** period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 during the thirty-day final **adoption** period. The Governor's objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.

A regulation shall become effective as provided in § 2.2-4015.

§ 2.2-4014. Legislative review of proposed and final regulations.

A. After publication of the Register pursuant to § 2.2-4031, the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable or the Joint Commission on Administrative Rules may meet and, during the promulgation or final **adoption** process, file with the Registrar and the promulgating agency an objection to a proposed or final adopted regulation. The Registrar shall publish any such objection received by him as soon as practicable in the Register. Within 21 days after the receipt by the promulgating agency of a legislative objection, that agency shall file a response with the Registrar, the

objecting legislative committee or the Joint Commission on Administrative Rules, and the Governor. If a legislative objection is filed within the final **adoption** period, subdivision A 1 of § 2.2-4015 shall govern.

B. In addition or as an alternative to the provisions of subsection A, the standing committee of both houses of the General Assembly to which matters relating to the content are most properly referable or the Joint Commission on Administrative Rules may suspend the effective date of any portion or all of a final regulation with the Governor's concurrence. The Governor and (i) the applicable standing committee of each house or (ii) the Joint Commission on Administrative Rules may direct, through a statement signed by a majority of their respective members and by the Governor, that the effective date of a portion or all of the final regulation is suspended and shall not take effect until the end of the next regular legislative session. This statement shall be transmitted to the promulgating agency and the Registrar within the 30-day **adoption** period, and shall be published in the Register.

If a bill is passed at the next regular legislative session to nullify a portion but not all of the regulation, then the promulgating agency (i) may promulgate the regulation under the provision of subdivision A 4 a of § 2.2-4006, if it makes no changes to the regulation other than those required by statutory law or (ii) shall follow the provisions of §§ 2.2-4007.01 through 2.2-4007.06, if it wishes to also make discretionary changes to the regulation. If a bill to nullify all or a portion of the suspended regulation, or to modify the statutory authority for the regulation, is not passed at the next regular legislative session, then the suspended regulation shall become effective at the conclusion of the session, unless the suspended regulation is withdrawn by the agency.

C. A regulation shall become effective as provided in § 2.2-4015.

§ 2.2-4015. Effective date of regulation; exception.

A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ 2.2-4100 et seq.) shall become effective at the conclusion of the thirty-day final **adoption** period provided for in subsection D of § 2.2-4013, or any other later date specified by the agency, unless:

1. A legislative objection has been filed in accordance with § 2.2-4014, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the expiration of the applicable twenty-one-day extension period provided in § 2.2-4014;
2. The Governor has exercised his authority in accordance with § 2.2-4013 to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the period for which the Governor has provided for additional public comment;
3. The Governor and (i) the appropriate standing committees of each house of the General Assembly or (ii) the Joint Commission on Administrative Rules have exercised their authority in accordance with subsection B of § 2.2-4014 to suspend the effective date of a regulation until the end of the next regular legislative session; or
4. The agency has suspended the regulatory process in accordance with § 2.2-4007.06, or for any reason it deems necessary or appropriate, in which event the regulation, unless withdrawn by the agency, shall become effective in accordance with subsection B.

§ 2.2-4016. Withdrawal of regulation.

Nothing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the **adoption** of regulations.

ALAC Regulation Adoption Date - Relevant Statutes in Other States

Alabama	Code of Alabama §41-22-5	(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall: (1) Give at least 35 days' notice of its intended action. Date of publication in the Alabama Administrative Monthly shall constitute the date of notice....
Arizona	Arizona Revised Statutes §41-1092.06	<p>A. Except as provided in subsection D of this section, an agency shall serve notice of an appealable agency action or contested case pursuant to section 41-1092.04. The notice shall:</p> <ol style="list-style-type: none"> 1. Identify the statute or rule that is alleged to have been violated or on which the action is based. 2. Identify with reasonable particularity the nature of any alleged violation, including, if applicable, the conduct or activity constituting the violation. 3. Include a description of the party's right to request a hearing on the appealable agency action or contested case. 4. Include a description of the party's right to request an informal settlement conference pursuant to section 41-1092.06. <p>B. A party may obtain a hearing on an appealable agency action or contested case by filing a notice of appeal or request for a hearing with the agency within thirty days after receiving the notice prescribed in subsection A of this section. The notice of appeal or request for a hearing may be filed by a party whose legal rights, duties or privileges were determined by the appealable agency action or contested case. A notice of appeal or request for a hearing also may be filed by a party who will be adversely affected by the appealable agency action or contested case and who exercised any right provided by law to comment on the action being appealed or contested, provided that the grounds for the notice of appeal or request for a hearing are limited to issues raised in that party's comments...</p>
California	California Government Code §11340.7	(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

ALAC Regulation Adoption Date - Relevant Statutes in Other States

Delaware	29 Delaware Code §10141	<p>In Delaware a complaint must be filed within 30 days of the order being published in the Register of Regulations.</p> <p>(a) Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief.</p> <p>(b) No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken.</p> <p>(c) When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.</p> <p>(d) Except as provided in subsection (c) of this section, no judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the Register of Regulations.</p> <p>(e) Upon review of regulatory action, the agency action shall be presumed to be valid and the complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner and that the complainant suffered prejudice thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful. The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted.</p>
Georgia	Georgia Statutes §50-13-9	<p>An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the petition in writing, stating its reasons for the denial, or shall initiate rule-making proceedings in accordance with Code Section 50-13-4.</p>
Idaho	Idaho Statutes §67-5224 (2)	<p>A petition for judicial review of a temporary or final rule may be filed at any time, except as limited by section 67-5231, Idaho Code. Idaho Code 67-5273(1).</p> <p>A proceeding, either administrative or judicial, to contest any rule on the ground of noncompliance with the procedural requirements of this chapter must be commenced within two (2) years from the effective date of the rule. Idaho Code 67-5231(2).</p>

ALAC Regulation Adoption Date - Relevant Statutes in Other States

		<p>Effective date of final rule: A rule adopted by an agency is considered a pending rule until the rule has been submitted to the Idaho Legislature for review. The rule becomes final and effective upon the conclusion of the legislative session at which the rule was submitted for review. See Idaho Code 67-5224(5) below. Idaho Code 67-5224(5) (a) Except as set forth in sections 67-5226 and 67-5228, Idaho Code, <u>a pending rule shall become final and effective upon the conclusion of the legislative session at which the rule was submitted to the legislature for review</u>, or as provided in the rule, but no pending rule adopted by an agency shall become final and effective before the conclusion of the regular or special legislative session at which the rule was submitted for review. A rule which is final and effective may be applied retroactively, as provided in the rule. (b) When the legislature approves, amends or modifies a pending rule pursuant to section 67-5291, Idaho Code, the rule shall become final and effective upon adoption of the concurrent resolution or such other date specified in the concurrent resolution. (c) Except as set forth in sections 67-5226 and 67-5228, Idaho Code, no pending rule or portion thereof imposing a fee or charge of any kind shall become final and effective until it has been approved, amended or modified by concurrent resolution.</p>
Model State APA	§503	<p>SECTION 503. TIME TO SEEK JUDICIAL REVIEW OF AGENCY ACTION; LIMITATIONS. (a) Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time. (b) Judicial review of an order or other final agency action other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action. (c) The time for seeking judicial review under this section is tolled during any time a party pursues an administrative remedy before the agency which must be exhausted as a condition of judicial review.</p>
Nevada	Nevada Revised Statutes §233B.0617	<p>Limitation on objections to regulation. No regulation adopted after July 1, 1965, is valid unless adopted in substantial compliance with this chapter but no objection to any regulation on the ground of noncompliance with the procedural requirements of NRS 233B.060 to 233B.0617,</p>

ALAC Regulation Adoption Date - Relevant Statutes in Other States

		inclusive, may be made more than 2 years after its effective date.
New Hampshire	New Hampshire Revised Statutes §541-A: 24	<p>Under New Hampshire's APA (RSA 541-A), adoption must precede filing, and filing is necessary to make a rule effective. Most rules are effective at 12:01 a.m. the day after they are filed as adopted rules with the NH Office of Legislative Services (OLS). The agency may specify a different date and time for the effective date and time, provided that they are not earlier than the date and time of filing. The one exception is emergency rules, which are effective immediately upon filing. Although the Director of the OLS may refuse a rule for filing, the grounds are limited. If there were an unresolved dispute with the agency about the filing, it would be up to a court to decide if the rule were legally valid. Effective dates are indicated on the OLS website and in the <i>NH Rulemaking Register</i> as well as in the published rule. The APA requires notice of adopted rules to be printed in the <i>Register</i>.</p> <p>Appeals for procedural violations of the rulemaking process under the APA must be made to the Superior Court in Merrimack County (trial court for the state capital city region) within one year of the effective date of the rule (RSA 541-A:23, IV). However, declaratory judgments may be brought in the same court at any time against a rule [as defined in RSA 541-A:1, XV], even if the rule is oral and has never been filed under the APA, "if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." (RSA 541-A:24)</p>
New Jersey	New Jersey Statutes §52:14B-1	<p>The New Jersey APA, N.J.S.A. 52:14B-1 et seq., provides at N.J.S.A. 52:14B-4(d) that, "A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of P.L.1968, c.410 (C.52:14B-1 et seq.) shall be commenced within one year from the effective date of the rule." There is no time frame for challenges to a rule's validity on other grounds, such as the rule's exceeding the promulgating agency's statutory authority or that the rule is "arbitrary or capricious."</p> <p>A rules is generally effective on the date of publication of its notice of adoption in the New Jersey Register; exceptions that are effective upon the date of the submission of an adoption</p>

ALAC Regulation Adoption Date - Relevant Statutes in Other States

		<p>to the Office of Administrative Law (OAL) for Register publication include emergency rules, organizational rules, a readoption of rules (to avoid “sunset”), and the adoption of a concurrent proposal of an emergency rule. (See N.J.A.C. 1:30-6.6.) The adoption date of a rule is the date of official approval of a rule by the promulgating agency, authorizing its effectiveness through submission to the OAL for Register publication. (See N.J.A.C. 1:30-1.2, definitions of “adopt,” “effective,” and “promulgate.”) Both the date of adoption and the effective date of a rule appear in the rule’s notice of adoption. (See N.J.A.C. 1:30-6.1(b)6 and 9.) In some instances where a rule is effective upon submission to the OAL, the date of adoption and the effective date will be coincide, but such occurrence is up to the promulgating agency.</p>
New Mexico	New Mexico Statutes §14-4-5	<p>New Mexico does not have a mechanism for filing an appeal. The only recourse is to sue in court.</p> <p>14-4-5. Filing and compliance required for validity. (1995) Statute text No rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act [Chapter 14, Article 4 NMSA 1978]. Unless a later date is otherwise provided by law, the effective date of a rule shall be the date of publication in the New Mexico register. Emergency regulations may go into effect immediately upon filing with the records center, but shall be effective no more than thirty days unless they are published in the New Mexico register.</p>
North Carolina		<p>North Carolina requires most rules to be adopted according to the NC Administrative Procedure Act (APA). Before a rule can take effect it must be formally adopted by the agency after notice, hearing, and comments. But then it must also be approved by the NC Rules Review Commission. If it is not approved by the commission, it (the rule) cannot be entered in the NC Administrative Code (NCAC) and does not take effect. Generally a rule takes effect and is considered entered in the NCAC the first of the month following approval – usually 10 – 15 days later.</p> <p>Review and approval of the rule includes establishing that there is authority for the rule, the rule is clear and unambiguous, the rule is necessary, and – I believe, most pertinent to Andrew’s question – whether the proper procedure was followed.</p>

ALAC Regulation Adoption Date - Relevant Statutes in Other States

		<p>G.S. 150B-21.9(a1) states that “[e]ntry of a rule in the [NCAC] after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with [the APA].” There is no limitation in the APA on how long a person has to challenge the procedure followed in adopting a rule. It also seems to me that there is no limitation on the legal ability of someone to mount whatever action they might find available to slow down or stop a rule during the process prior to adoption.</p> <p>In North Carolina it is fair to say that a rule remains open to procedural attack both before and after adoption and anytime after publication.</p> <p>The rule is also open to challenges on substantive grounds (lack of authority or necessity, ambiguity, arbitrary and capricious, unconstitutionality) its entire life. This can be by way of a contested case defense to an agency enforcement action, a declaratory judgment action, an appeal of an agency decision in a declaratory ruling action, or any other way an inventive attorney can dream.</p> <p>In NC one must be an “aggrieved party” to challenge a rule, but there is no readily apparent limitation on when that challenge can or must be started.</p>
Oklahoma	Oklahoma Statutes §75-308.2	<p>Oklahoma's APA stipulates that challenges to rules based on "noncompliance with the procedural requirements of Article 1 of the [APA] must be commenced within two (2) years from the effective date of the promulgated rule." (Note: Article 1 sets out the requirements for notice, adoption, legislative/gubernatorial review, final adoption, promulgation in the <i>Oklahoma Register</i>, and subsequent publication in the <i>Oklahoma Administrative Code</i>. Also, permanent rules cannot be effective until at least 10 days after publication of the finally adopted rules in the <i>Register</i>.)</p> <p>Here's the actual statute</p> <p>§75-308.2. Rules - Necessity of promulgation - Interpretations not to change - Prospective effect only - Limitation period on contest proceedings - Force of law and prima facie evidence.</p> <p>A. No agency rule is valid or effective against any person or party, or may be invoked by the agency for any purpose, until it has been promulgated as required in the Administrative Procedures Act.</p> <p>B. A proceeding to contest any promulgated rule on the</p>

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		<p>ground of noncompliance with the procedural requirements of Article I of the Administrative Procedures Act must be commenced within two (2) years from the effective date of the promulgated rule.</p> <p>C. Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as otherwise provided by law, rules shall be prima facie evidence of the proper interpretation of the matter to which they refer.</p>
Tennessee	Tennessee Code §4-5-322	<p>4-5-322. Judicial review.</p> <p>(a) (1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.</p> <p>(2) A state agency is considered to be an aggrieved person for the purpose of judicial review when the order is from a board, commission or other entity independent of the aggrieved agency. In such instances, judicial review under this chapter is permitted upon the request of the agency head and the approval of the attorney general and reporter.</p> <p>(b) (1) (A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.</p>
Texas		<p>Texas: An adoption can <i>take effect</i> only after an agency has FILED it with the secretary of state. This applies to emergency (temporary) and permanent rules alike. The secretary of state is obligated to publish, but the filing date rather than publication date starts the clock on a rule becoming effective. Of course, adoption is an action performed by the rulemaking authority (typically a commission or board for an agency). I am uncertain if the effective date matters necessarily when a rule is challenged. Or at least I'm not sure that you would need to wait until the effective date to challenge the agency in court.</p>

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When Must a Person Appealing an Administrative Agency Regulation under the Administrative Process Act File the Notice of Appeal in Order to Appeal Timely?

By Norman H. Lamson

Virginia's Administrative Process Act, Ch. 40, Title 2.2, of the Code of Virginia, includes § 2.2-4026 which states:

Any person affected by and claiming the unlawfulness of any regulation, ... shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court

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PJM's Implementation of FERC Order 1000 Passes Its First Milestone

By Kenneth A. Barry

Although the term "transformative" may be a bit overused, few would debate its applicability to Order No. 1000, the Federal Energy Regulatory Commission's (FERC's) most recent effort to revamp transmission planning. Coming on the heels of Order No. 890 (issued in 2007) -- which stepped up coordination of transmission planning among stakeholders and neighboring utilities as part of a general overhaul of the OATT¹ -- Order 1000, issued in the summer of 2011,² took things up another notch. Its signature elements were: (1) formalizing the obligation of all transmission-owning utilities to craft a "regional transmission plan" through a transparent and open

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of Virginia.

Va. Supreme Court Rule 2A:2(a) states:

Any party appealing from a regulation... shall file with the agency secretary, within 30 days after adoption of the regulation..., a notice of appeal signed by the appealing party or that party's counsel.

In *Russell v. Virginia Bd. of Agriculture*, 59 Va.App. 86, 717 S.E.2d 413 (2011), wherein the author of this article represented Russell, a panel of the Court of Appeals held he filed the notice of appeal to a regulation untimely, that is, filed it late.

It would unduly tax the reader's attention to elaborate on the arguments as to why undersigned filed timely. The purpose of this article is to demonstrate the difficulties that counsel may face in determining when to file as to a regulation in order to file timely, as well as the possible ramifications that a timely filing results in counsel's filing before his client is "affected" under § 2.2-4026, before there is "final agency action," before his client has standing, and before there is ripeness, resulting in a dismissal for any of those reasons. Finally, I intend to offer suggestions as to how counsel can file timely, but at the same time attempt to avoid dismissals for those other reasons.

CASE BACKGROUND AND OPINION

In *Russell*, the agency, the Board of Agriculture and Consumer Services ("the Board"), voted in favor of the regulation, a regulation for the Eradication of Scrapie from Sheep and Goats, 2VAC5-206, on March 20, 2008, as a final regulation (scrapie is a disease of sheep and goats). That regulation includes a section regulating intrastate trafficking in sheep and goats, 2VAC5-206-20, requiring the affixing of a government issued tag bearing a unique animal identification number to the animal prior to its transfer (even as applied to small farmers, and, say, a gift of one goat from a father to his son). In an apparent effort to comply with Governor Tim Kaine's Executive Order 36 (2006), *Development and Review of Regulations Proposed by State Agencies*, pp. 6-7, the Board posted the regulation online on April 17, 2008, for review by the Department of Planning and Budget ("DPB") (which did not disapprove the regulation); it then submitted such to the Office of the Attorney General (which certified it as not conflicting with law on May 29, 2008);

it then submitted such to the Secretary of Agriculture (who approved it on June 12, 2008); and it then submitted such to the Governor (who approved it on July 24, 2008).¹ The agency then filed the regulation with the Registrar of Regulations ("the Registrar") on July 30, 2008, for the purpose of publication in the Virginia Register of Regulations ("the Register"), specifying an October 3, 2008, effective date.

The Registrar published the regulation in the Register on August 18, 2008, as a final regulation, Vol. 24, Issue 25, pp. 3526-31, including notice of the effective date of October 3, 2008. Nothing on the face of the publication states a date of "adoption" of the regulation, as no law requires it to state such. Kathryn Russell ("Russell") filed her notice of appeal to the circuit court on October 30, 2008, 27 days after the published effective date.

In that court, the Board moved to dismiss, contending the "adoption of the regulation" under Rule 2A:2(a) occurred with the March 20, 2008, vote, so that the appeal was untimely. While the Board did not elaborate, it is evident their position was simply by analogy to how a natural person "adopts" a position, idea, etc., namely, by verbally saying, "I adopt X," or raising a hand, or otherwise signifying his mental assent to the position, idea, etc.. That is, the Board contended the "adoption" for an artificial person such as the Board occurred when a majority of the Board members as a collective body at a meeting said, "yea," or raised their hands, or pushed an electronic button, or otherwise signified their vote in favor of the regulation.

The author opposed the motion, contending (1) that, to determine the meaning of the word "adoption," one had to look to dictionaries extant when the Virginia Supreme Court first employed the language of the Rule in 1971 (the language has been unchanged from that time); (2) that, looking to the edition of *Black's Law Dictionary* then in effect, namely, the 4th edition of 1968, we see

adopt. To accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally.

To adopt a route for the transportation of the mail means to take the steps necessary to cause the mail to be transported over that route. *Rhodes v. U.S. Dv.Ct. Cl.* 47...

To accept, consent to, and put into effective

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operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law. *Real v. People*, 42 N.Y. 282; *People v. Norton*, 59 Barb. (N.Y.) 191. A. Code. *City of Albany v. Nix* 21 Ala. App. 164, 106 So. 199, 200....

(3) that the situation thus is one of the word “adoption” having both an ordinary meaning (sometimes referred to as the “popular” meaning or the “layman’s” meaning), which appears in the first paragraph, “To accept, appropriate, choose, or select; to make that one’s own (property or act) which was not so originally,” as well as a strict judicial meaning, which appears in the last paragraph, “To accept, consent to, and put into effective operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law,” making it “a word of definite legal signification,” also known as a “legal term of art” or a “term of art” or a “technical term”; (4) that in such a situation the rule is well-settled, such rule spanning all written instruments including wills, trusts, deeds, contracts and statutes, that the meaning is the strict judicial meaning unless the context indicates an intent to employ the ordinary meaning or some other meaning; (5) that the context here does not indicate an intent to employ the ordinary meaning or some other meaning; (6) that the meaning is hence the strict judicial meaning; (7) that the regulation was “accepted, consented to and put into effective operation” on the effective date of October 3, 2008; (8) that the regulation was thus “adopted” in the strict judicial sense of the term on October 3, 2008; and hence (9) that the October 30, 2008, filing, being 27 days after October 3, 2008, was within 30 days after adoption of the regulation, and hence timely.² The trial court granted the motion to dismiss.

Russell appealed to the Court of Appeals which affirmed the trial court, but not adopting the position of either litigant, instead carving out its own view of “adoption.” The Court looked to Va. Code § 2.2-4013, which states in pertinent part,

A. ... Not less than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03, the agency may (i) **adopt** the proposed regulation if the Governor has no objection to the regulation; (ii) **modify and adopt** the proposed regulation after considering and incorporating the Governor’s objections or suggestions, if any; or (iii)

adopt the regulation without changes despite the Governor’s recommendations for change.

B. Upon **final adoption of the regulation**, the agency shall forward a copy of the regulation to the Registrar of Regulations for publication as soon as practicable in the Register. All changes to the proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed regulation shall be explained in the final regulation.

D. A **thirty-day final adoption period** for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final regulation during this thirty-day final adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014, or both.

If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 during the thirty-day final adoption period. The Governor’s objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.

A regulation shall become effective as provided in § 2.2-4015.

Commenting on this statute, the Court said,

The problem with determining the date of adoption for the purpose of Rule 2A:2 is that the APA uses the term “adoption” at several different points and in different contexts. For example, Code § 2.2-4013 is the statute which is relevant to this analysis, and it references “adoption” in three different ways.

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Under subsection A, “adoption” first occurs when the agency decides to adopt a regulation following public comment.

Id. at 91, 415. The Court then noted that subsection B references a “final adoption” that “relates back to the initial adoption.” *Id.* The Court then noted that subsection D’s statement of a “final adoption period” “arguably implies that the ‘final adoption’ referred to” in subsection B “is not actually ‘final’ at all until the conclusion of the 30-day adoption period.” *Id.* at 92, 415-16.

The Court stated,

This “final adoption” [subsection D “final adoption”] occurs thirty days after the publication of the final regulation in the Register, whereas the “final adoption” in subsection B is the agency action that triggers the publication of the final regulation in the Register in the first place. Thus, logic dictates that the “final adoption” referred to in subsection D must be separate and distinct from the “final adoption” in subsection B.

The Court then continued,

So the question then arises, at which point of “adoption” does Rule 2A:2 contemplate that the 30-day period commence within which to note an appeal? Put another way, does “final adoption” of a regulation occur when the agency votes to implement it and forwards the regulation to the Registrar of Regulations for publication or after the expiration of the 30-day public comment period during which the Governor can suspend or suggest changes to the regulation? Procedural due process considerations and the principle that appellate courts may generally only consider issues on appeal which involve lower court judgments, or as in this case, agency decisions which are final, weigh in favor of using the later date as the point at which the period for noting an appeal commences. However, an application of either definition of “adoption” to the record before us results in a conclusion that

Russell’s appeal was not timely filed.

Id. at 93, 416. The consequence was that the Court refused to say whether “adoption” under Rule 2A:2 meant § 2.2-4013(B) “final adoption” or § 2.2-4013(D) “final adoption.” The Virginia Supreme Court denied a petition for appeal.

PROBLEMS CREATED BY THE OPINION

At first blush, it would appear that the panel has merely left lawyers in Virginia in doubt over whether the appeal clock starts ticking on either of but two dates: (1) on the date of filing with the Registrar (here, July 30, 2008) or (2) the date which is 30 days after the date of publication in the Register (here 30 days after the August 18 date of publication is September 17, 2008). The fact that there appears to be only two possible dates comes from the language pertaining to § 2.2-4013(B) “when the agency votes to implement it [the Regulation] and forwards the Regulation to the Registrar of Regulations for publication” because when the agency here “voted to implement it” occurred on March 20, 2008, but the date they “forwarded” it for publication occurred on July 30, 2008, and thus the date in the singular on which they did both acts is July 30, 2008. Also, “the agency action that triggers the publication of the final regulation in the Register” is both the vote on March 20 and the filing on July 30, and hence the “agency action that triggers” must have occurred on July 30. In the panel’s discussion of subsection D, the panel explicitly states September 17 as the date on which the clock starts to tick if Rule 2A:2 “adoption” is subsection D “final adoption.” Hence, again, it appears at first blush there is but one possible date of subsection B “final adoption,” July 30, and a second possible date of subsection D “final adoption,” September 17. We are apparently supposed to wait until the legal system chews up its next victim who guesses at the wrong date in order for the courts to reveal to us what is the real date of Rule 2A:2 “adoption.”³

But in undersigned’s view it really isn’t clear from the opinion whether the choices are July 30 versus September 17, or instead March 20 versus July 30 versus September 17, thus actually leaving lawyers in doubt as to which of 3 dates is the date when the appeal clock starts ticking. First, although the Court quotes from undersigned’s assignment of error which stated the filing with the Registrar occurred on July 30, the Court itself nowhere explicitly states the filing occurred July 30. Thus, the court never explicitly

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tells us that if Rule 2A:2 “adoption” means § 2.2-4013(B) “final adoption,” then the appeal time expired on August 29, 2008. Since they explicitly say that under subsection D “final adoption” the clock started ticking on September 17, 2008, and that the appeal period under such view expired on October 17, 2008, why didn’t they explicitly say when it started ticking and when the time expired for subsection B “final adoption”?

Second, the court states, “An amended final proposed regulation was adopted by the Board at a March 20, 2008, meeting.” Plainly, the panel reads the APA as *in pari materia* (“on the same subject matter”) as the Rules of Court, looking to APA § 2.2-4013 to determine the meaning of the rules, and Rule 2A:2 of course speaks of “adoption” of a regulation, not “final adoption” of a regulation. Yet the court never explains why the “adoption” did not occur on March 20, 2008, as contended by the Board, or why it rejected the Board’s position. Nor did the Court even attempt to explain the obvious, that it was redrafting Rule 2A:2 from “adoption” to “final adoption,” when the Court of Appeals lacks power to redraft a rule of court.

Third, subsection B states, “Upon final adoption the agency shall forward...,” and it is evident from this plain language that “final adoption” must precede the forwarding, that is, there is in time first the “final adoption,” and then after the final adoption “the agency shall forward.” And we cannot conceive what that action is before forwarding other than the vote, here on March 20. So if Rule 2A:2 “adoption” is subsection B “final adoption,” then Rule 2A:2 “adoption” must be the vote because subsection B “final adoption” is the vote. Yet, as noted, the court speaks of subsection B final adoption as occurring at the moment where there is both the vote and the forwarding (“this action [in the singular] by the agency [is] the ‘final adoption’”), that is, “final adoption” occurs with the forwarding. The court never explains how a “final adoption” under subsection B, which textually occurs before forwarding, can occur on forwarding.

Fourth, the opinion, assuming Rule 2A:2 “adoption” is subsection D “final adoption,” states, “[O]n September 17, 2008, the regulation was ‘adopted’ and became effective.” *Id.* at 93, 416. Yet the opinion also states, “The regulation had an effective date of October 3, 2008[.]” *Id.* at 90, 415, and nowhere explains how a regulation can become “effective” on a date earlier than its “effective date.” Such failure

to explain is especially problematic in light of Va. Code § 2.2-4015, a Code section which the panel never quotes from and which states,

A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ 2.2-4100 et seq.) **shall become effective** at the conclusion of the thirty-day final adoption period provided for in subsection D of § 2.2-4013, **or any other later date specified by the agency**, unless: [there is legislative or gubernatorial objection, or agency suspension].

Since the October 3, 2008, date is a “later date specified by the agency,” then that is the date it became effective, not September 17, 2008.

In sum, if a client comes to counsel within 30 days after the vote, it is difficult to see how one can safely tell him, “Under authority of *Russell*, let us wait until the date of forwarding to the Registrar, and then file within 30 days thereafter,” or “Let us wait until the date that is 30 days after the date of publication and then file within 30 days after that date regardless of whether the agency has specified a later effective date.” And of course the precedent itself may get overruled. Given that the panel rejected undersigned’s position that Rule 2A:2 “adoption” is the dictionary strict judicial meaning, then, until the matter is straightened out, the date of the vote urged by the Attorney General still appears as much a possibility as the other two possible dates.

Let us now demonstrate the additional problems that arise whether the Courts ultimately rule the date on which the appeal clock starts to tick is (1) the date of the vote, (2) the date of forwarding, or (3) the date which is 30 days after the day which is 30 days after publication (hereinafter “the 3 possible dates”).

THE PANEL’S CHOICE OF POSSIBLE DATES FOR WHEN THE APPEAL CLOCK STARTS TO TICK MAY LEAVE COUNSEL HAVING TO FILE WHEN HIS CLIENT IS NOT “AFFECTED” UNDER VA. CODE § 2.2-4026 AND HENCE WHEN THE SOVEREIGN HAS NOT CONSENTED TO BE SUED.

Preliminarily, if the Court of Appeals ultimately decides that the date of adoption is subsection D “final adoption,” then the hereinafter problems only face counsel representing

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a client for whom the agency has designated an effective date later than the default effective date of 30 days post publication. The reason is because where no later effective date is specified, the effective date is 30 days post publication, and an appeal filed within 30 days after such date will necessarily be filed while the regulation is effective. However, if the court ultimately determines that the date of adoption is the date of subsection B "final adoption," and that such date is the date of the vote, or that it is the date of subsection B "final adoption" and such is the date of forwarding, then the hereinafter described problems necessarily confront him.

APA suits are suits against the sovereign, and it is axiomatic that such suits may be conducted only with the consent of the sovereign. Furthermore, such consent can only be manifested by a statute of the legislature, and, where the statute fixes terms and conditions of the suit, those terms and conditions must be complied with, or else a defense of sovereign immunity will be sustained. Va. Code § 2.2-4026 grants a right to sue only to "a person affected," and thus the issue of whether the person suing is a person affected under § 2.2-4026 is interwoven with the sovereign immunity issue. As we intend now to demonstrate, had Russell filed commencing on any of the 3 possible dates, she would have filed when she was not a "person affected" and hence without authority under § 2.2-4026 and without the consent of the sovereign.

The Scrapie Regulation simply did not affect Russell in any way prior to the effective date of October 3, 2008. Prior to that date, she could sell a goat or sheep, or lease one, or buy one or otherwise transact without having to affix an ear tag or other identifying number. It was only after the effective date that if she made such a transfer without affixing the tag that she could be criminally prosecuted.

Ironically, at a hearing before the Joint Commission on Administrative Rules on January 8, 2008, in opposing the efforts of Russell and other small farmers acting under the Virginia Independent and Consumer Farmers' Association ("VICFA"), the State Veterinarian, Dr. Richard Wilkes, stated in response to questioning by Delegate Hull, "However, no one is required to have identification until the sheep enter commerce." (<http://dls.state.va.us/GROUPS/jcar/meetings/010808/sm010808.pdf>) If a person simply owned sheep or goats, and never formulated an intent to sell or otherwise transfer the animals, the regulation would never affect him at all. In our case, Russell had an intent to

transact, but it was as of the effective date, and so she came to be affected as of that date, not affected prior to it.

One can envision a legislative schema and regulation under which a person could be "affected" prior to the effective date. For example, if the Board had no power to withdraw or amend its regulation prior to the effective date, so that upon the vote there is nothing to prevent the regulation from becoming effective save the mere passage of time, and the Board had voted to require all sheep and goat owners to have a building which, under the state of the art then existing, required 7 months to build, then, immediately upon the March 20 vote, Russell would for all practical purposes have been affected. The reason is that the March 20 vote would have forced her immediately to commence construction of a building so as to be compliant on the effective date. But, as we intend to demonstrate and discuss below, in Virginia agencies do have a power to withdraw their regulations at any time prior to the effective date, and the requirement of tagging an animal prior to a sale required no action prior to the effective date.

Note that the requirement there be consent to sue the sovereign by a statute of the legislature, and, if the legislature grants consent on terms and conditions, that those terms and conditions must be met, pertains to the subject matter jurisdiction of the court. *Afzall ex rel. Afzall v. Com.*, 273 Va. 226, 639 S.E.2d 279 (2007). If the requirements are not met, then the courts lack subject matter jurisdiction, *Id.*, with the consequence that the mere failure of the Attorney General timely to defend on grounds that the plaintiff is not affected cannot prevent him from later raising that defense. *Id.*; See also *Com. v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 877 (2000). Indeed, in the total absence of the Attorney General raising the defense, the court may raise the issue *ex mero motu* (of its own accord), and, indeed, has a duty to raise the issue *ex mero motu*. *Afzall ex rel. Afzall v. Com.*, at 230, 282 ("[T]he want of such jurisdiction of the trial court [subject matter jurisdiction] will be noticed by this court *ex mero motu*.")

PANEL OPINION MAY REQUIRE A FILING PRIOR TO "FINAL AGENCY ACTION."

It is also axiomatic that an appeal from an agency regulation lies only at the conclusion of "final agency action," and that any appeal prior thereto must be dismissed as premature.

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Mr. Justice Scalia gave the classic formulation of final agency action in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

First, the action must mark the “consummation” of the agency’s decisionmaking process -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.”

Regarding the first prong, when the “consummation” of the agency’s decision-making process occurs in Virginia, of significance is Va. Code § 2.2-4016, another Code section which the *Russell* panel fails to mention, and which states,

Nothing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the adoption of regulations.

It is evident the statute creates a situation where, upon the vote by the agency in favor of any regulation as a “final regulation,” it is as if there is appended to the regulation the words, “But we reserve the right to withdraw this regulation at any time prior to the effective date.” Since the effective date was October 3, 2008, the Board had a power to withdraw the regulation at any time prior thereto, and the question arises, “When does the ‘consummation’ of the agency’s decisionmaking process occur given the power to withdraw under § 2.2-4016?”

To answer such question, we must look to the opinion of a U.S. Supreme Court Justice, then federal court of appeals judge, Ruth Ginsburg, in *National Treasury Employees Union v. Federal National Labor Authority*, 712 F.2d 669 (D.C. Cir. 1983):

An agency’s order becomes “final” or “effective” for appellate review purposes when the agency arrives at a terminal, complete resolution of the case before it. An order lacks finality in this sense while it remains tentative, provisional, or contingent, subject to recall, revision, or reconsideration by the issuing agency.

Id. at 670-71 (emphasis added). Referring to prior cases, she stated, “[A]nd in *Cardin* and *Windom*, there was nonfinal, interlocutory agency action, because a RIF notice, prior to the specified effective date, can be amended or cancelled.” *Id.* at 675. In a footnote, she wrote,

RIF notices, because they are conditional--they may be withdrawn, altered, or amended--can be compared to class action certifications in civil litigation. See Fed.R.Civ.P. 23(c)(1). Such certifications are interlocutory and may not be appealed as a matter of right.

Id. at 675, n. 14.⁴ Since the Board had a power to withdraw the regulation on any of the 3 possible dates, it follows there was then no consummation of the decision-making process, and hence then no final agency action, and hence an appeal at such time would have been premature.

Regarding the second prong, first, as noted above, § 2.2-4026 grants a right of judicial review to a person affected by and claiming the unlawfulness of a “regulation.” Va. Code § 2.2-4001 defines “regulation” as follows:

“Rule” or “regulation” means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.

Hence, a right of judicial review does not arise until there is “force of law,” and there cannot be force of law until the arrival of the effective date. Since that is the date on which rights or obligations have been determined, then that is the date of final agency action, and that is the date on which a right to seek judicial review arises.

Second, Va. Code § 2.2-4027 authorizes judicial review of “agency action”, and Va. Code § 2.2-4001 defines such as follows:

“Agency action” means either an agency’s regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or

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denial of relief or of a license, right, or benefit by any agency or court.

Since, as noted above, Russell could not be sanctioned for any conduct occurring on any of the 3 possible dates, there was then no “agency action” under § 2.2-4027, and hence at that time no authority for judicial review.

Also, the requirement there be final agency action before a complainant may appeal has also been characterized as jurisdictional. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 857 (4th Cir. 2002) (“Because we conclude that the Report was not final agency action, and therefore, that the district court lacked subject matter jurisdiction to hear plaintiffs’ claims [citation omitted], we do not reach the standing issue.”); *Tomer v. Maine Human Rights Comm.*, 962 A.2d 335, 338 (Me. 2008) (“The authority granted to courts pursuant to the APA allowing judicial review of ‘final agency actions’ is a jurisdictional issue.”); *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (C.A.D.C., 1996) (“The requirement of a final agency action has been considered jurisdictional.”)

THE PANEL’S OPINION MAY CAUSE COUNSEL TO FILE APPEAL BEFORE THE CLIENT HAS STANDING AND THERE IS RIPENESS.

An analysis similar to the above could be made demonstrating that *Russell* may require counsel to note appeal at a time when his client lacks standing because, as noted above, on any of the 3 possible dates *Russell* was not affected, and hence not injured, and hence did not suffer “particularized injury” as is required to show standing. And *Russell* may require counsel to note appeal prior to there being ripeness because ripeness requires the plaintiff to plead that he felt the effects of the regulation in a concrete way, and, *Russell* not feeling the effects at all on any of the 3 possible dates, could not have felt them in a concrete way on any of the 3 possible dates. As with sovereign immunity and final agency action, standing and ripeness are issues that the circuit court and court of appeals are duty-bound to raise *sua sponte*.

SUGGESTIONS TO COUNSEL IN DEALING WITH RUSSELL

Because of the language of Rule 2A:2, “within thirty

days after adoption of the regulation,” merely noting appeal before the adoption is not ultimately an option for attempting to appeal timely because such an appeal, being filed too early, is as untimely as one filed too late. *Western Union Telegraph v. Federal Communications Commission*, 773 F.2d 375 (D.C. Cir. 1985) (Scalia, Judge). Given the confusion generated by *Russell*, undersigned’s suggestion is for counsel to attempt *seriatim* filings of the notice of appeal and petition for appeal, referencing *Russell* in each of the documents. Thus, if the client comes to you within 30 days after the vote, file the notice of appeal within 30 days after the vote, stating therein you are filing because under the precedent it is not clear when you should file. Then, file your petition for appeal within 30 days thereafter, again referencing *Russell* and the uncertainty it creates as to when to file. Be as honest as you can in your petition as to how your client is affected or may come to be affected.

Presumably, the agency will still post the regulation online for DPB, circulate it to the Attorney General, then to the appropriate Secretary of the Department, and then to the Governor, and, upon obtaining the requisite approvals, then forward to the Registrar for publication, which will publish, noting the agency filing (forwarding) date. Then, within 30 days after the forwarding, re-file your notice of appeal and then your petition for appeal, again referencing *Russell* in each document.

Then, after publication in the Register, and within 30 days after 30 days post publication, re-file your notice of appeal, again referencing *Russell*. Then file your third petition for appeal, again referencing *Russell*. With respect to whatever date the courts ultimately determine is the date the clock starts to tick, it will regard your notice of appeal and petition for appeal filed with reference to that date, and disregard as nullities the notice of appeal and petition for appeal filed with reference to the other two possible dates.

SUGGESTIONS FOR CHANGE TO RULE 2A:2(a).

The legislature should change § 2.2-4026 to state,

shall have a right to the direct review thereof by a court action against the agency or its officers or agents. **The person affected shall file notice of appeal within thirty days after first being affected by the regulation.**

Such language preserve the idea of a 30 day limitations period, but will make clear that the time when the appeal clock

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starts ticking isn't ultimately dependent on actions taken by the agency at all, but on when a person is first affected. Thus it will effectuate the legislature's intention that *any* person affected have judicial recourse even if he is not first affected until years after a regulation's effective date. *

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(Endnotes)

1. The pertinent language of EO 36 (2006) is substantially identical to the analogous provisions of Governor McDonnell's Executive Order 14 (2010), *Development and Review of Regulations Proposed by State Agencies*.

2. In *Kole v. City of Chesapeake*, 247 Va. 51, 439 S.E.2d 405 (1994), the Court held that a municipality's "decision to adopt" an ordinance within the meaning of a statute occurred on the date which was 30 days after the vote, such being its effective date. Also, the following authorities hold that the word "adoption" is a legal term of art, such that the "adoption" does not occur until the ordinance, regulation, etc., is put into effective operation: *American Federation of State, County and Municipal Employees v. Philadelphia*, 83 Pa. D. & C. 537, 552 (Ct. of Common Pleas, 1952) ("The primary and natural signification of the word adoption ... includes both take effect and in force"; *People v. Norton*, 59 Barb. 169[.] quoting from Bouvier's Law Dictionary; *City of Columbus v. Rudd*, 193 S.E.2d 11, 13 (Ga. 1972) ("Accordingly, the proper construction of the word 'adoption' here requires that it be construed as 'effective date' of the charter..."); *Langevin v. Begin*, 683 A.2d 357, 358 (R.I. 1996) ("The word 'adopt' is defined as 'to accept, consent to, and put into effective operation.' Black's Law Dictionary 49 (6th ed. 1990).").

Stating that the appeal clock starts ticking on the date of adoption, but construing such as adoption in the strict legal sense, amounts to the same thing as saying the clock starts ticking on the effective date because the regulation can't be consented to so as to be put into effective operation prior to the effective date. The framers of the Model State Administrative Procedure Act selected the "effective date" as the date when the clock starts to tick with respect to complaints of agency procedural violations, but chose no limitations period for complaints based on other grounds: "Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time." Sec. 503(a), *Revised Model State Administrative Procedure Act* (2010).

3. The panel hints that, when called upon to decide, it will rule in favor of subsection D "final adoption" because that date is a date which avoids due process problems which may confront subsection B "final adoption." ("Procedural due process considerations... weigh in favor of using the later date...")

4. Judge Ginsburg's rule, that a regulation which the agency may still withdraw is merely interlocutory and not final, has been adhered to in the following cases: *Bellarno Intern, Ltd. v. Food and Drug Admin.*, 678 F.Supp. 410, 416 (E.D. N.Y. 1988); *City of Park Hills v. Public Svc. Comm. of the State of Mo.*, 26 S.W.3d 401 (Mo. App. W.D. 2000); *Essex County v. Zagata*, 672 N.Y.S.2d 281, 284-85, 695 N.E.2d 232 (Ct. App. N.Y. 1998); *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (D.C. Cir. 1996).