

ADMINISTRATIVE LAW ADVISORY COMMITTEE

REPORT OF THE SUBCOMMITTEE TO STUDY INTERRUPTIONS OF THE REGULATORY PROCESS

MISSION OF THE SUBCOMMITTEE

In October of 1998, the Registrar of Regulations sent to Senator Joseph V. Gartlan, former Chairman of the Code Commission, a letter requesting clarification with respect to the procedures to be followed when agencies wish to withdraw, suspend and repropose regulations. Senator Gartlan forwarded that request to the Administrative Law Advisory Committee (ALAC). Those issues were incorporated into and became part of the overall ALAC study of the regulatory process which is still ongoing. As a result, no resolution has been obtained. More recently, the Registrar has raised similar questions with Delegate William Howell, current Chairman of the Code Commission. He has asked that ALAC give priority to these questions.

In May of 2001, John Forbes, Chairman of ALAC, appointed this subcommittee to study these issues and to report as soon as possible. The subcommittee has reviewed the questions presented, has obtained input from the Registrar, and has prepared the following report to ALAC. Because the original request consisted of questions, the subcommittee has chosen to use a question and answer format for its report. It has also drafted proposed amendments to the APA which are attached to this report.

1. Withdrawn Regulations

Question 1: What is the status of a regulation when a notice of withdrawal is filed with the Registrar's Office?

Answer: Section 9-6.14:9.4 provides that an agency can withdraw a regulation at any time prior to its effective date. After that, the repeal process is the same as the promulgation and adoption process. If a regulation is withdrawn, it is void and cannot be subject to further process under the APA. Any revision of or replacement for a withdrawn regulation is legally a new regulation and must go through the entire promulgation and adoption process anew.

Question 2: Should agencies be required to submit and/or publish a reason for withdrawal of a regulation?

Answer: No. There is no requirement for this in the APA.

Question 3: Can a regulation be temporarily withdrawn?

Answer: No. This is an inconsistency in terminology. Under the APA, a regulation can be either withdrawn or suspended, but not both (see Section 2 below).

2. Suspended Regulations

Question 1: Can a regulatory process be suspended by an agency on its own initiative after publication of a final regulation and before that regulation becomes effective? How should this be monitored by the Registrar?

Answer: While, as noted above, withdrawal and suspension are mutually exclusive, the absolute statutory authority given to an agency to withdraw a regulation necessarily implies the lesser power to suspend the same regulation.

Furthermore, § 9-6.14:7.1(K) specifically provides that any person can request suspension of a regulation if substantial changes are made to it between proposed and final publication. In addition, §§ 9-6.14:9.1 and 9.2 provide several alternatives for suspension by the Governor or by reason of a legislative objection. Section 9-6.14:9.3 gives the agency in all of these situations the authority and duty to set a new effective date for a suspended regulation. For the foregoing reasons, it is reasonable to conclude that an agency can on its own initiative suspend a regulation at any time before the latter becomes effective. In such situations, the Registrar should require the agency to file a notice of suspension prior to the date on which the regulation becomes effective, even though publication of that notice cannot occur until a later date.

In order to resolve this question authoritatively, an amendment to the APA would be appropriate. A proposed amendment is included as Amendment 1 in the attached document entitled “Draft Amendments to APA”.

Question 2: Can the regulatory process be suspended at the same time the final regulation is filed with the Registrar?

Answer: While it seems cumbersome, there is nothing to prevent this practice, provided an appropriate notice is filed as discussed in Question 1 above. It would seem to make more sense to simply postpone or extend the effective date.

Because there is no clear answer to this question, once again an amendment to the APA might be appropriate. A proposed amendment is included as Amendment 2 in the attached document.

Question 3: Can the regulatory process be suspended as to only part of a regulation, thereby allowing the remainder to become effective?

Answer: Yes. Section 9-6.14:5.1 provides that all regulations are severable if they meet certain criteria. Regulations are presumed severable unless they must operate together or they contain a non-severability provision.

Question 4: Should an agency be required to republish a suspended regulation after the suspension period if no changes are to be made?

Answer: This seems unnecessary, particularly as to lengthy regulations. However, suspension of a regulation, as well as its reinstatement cannot be done informally. The public must be informed of what has occurred. The agency should therefore be required to furnish to the Registrar for publication a notice describing the prior publication, the prior notice of suspension, the agency's decision not to change the regulation and its action setting a new effective date.

A further question necessarily arises in this context as to when the previously suspended regulation was "adopted" for purposes of appeal under the APA and Part 2A of the Rules of the Supreme Court. *See* Rule 2A:2, which states in part:

Any party appealing from a regulation . . . shall file, within 30 days after **adoption of the regulation** . . . a notice of appeal.

Thus, if an agency first adopts a final regulation on Day 1, suspends it on Day 2 and sets a new effective date on Day 35, a notice of appeal challenging it must arguably still be filed within 30 days of Day 1. Suspension of a regulation means that the regulation is not effective and never will be unless and until the agency sets a new effective date. However, a potential challenger waiting for the latter could find that he is too late to file an appeal. The agency would have through this maneuver escaped judicial review.

To avoid this result, the agency should be required to readopt the regulation when it sets a new effective date, even if no changes are made. Of course, the foregoing is much less likely to be a problem if changes **are** made to a suspended regulation because the agency must take action to readopt and/or amend the regulation.

An amendment to the APA would be helpful because the statute is currently silent on this point. Accordingly a proposed amendment is included as Amendment 3 in the attached document.

Question 5: At the conclusion of a suspension, when can a regulation take effect?

Answer: Once the process has been suspended, § 9-6.14:9.3 suggests that the regulation no longer automatically becomes effective. The agency must set an effective date. Therefore, upon filing with the Registrar and publication of a notice setting a new effective date, the regulation would take effect on the specified effective date, provided it

is after the date of publication. This tracks the usual rule on effective dates found in § 9-6.14:9.1(D).

Because the subcommittee believes the APA is not as clear as it should be on this question, a proposed amendment is included as Amendment 4 in the attached document. This proposed amendment includes the proposals set out in Amendment 1-3 above and requires agencies to set a new effective date after the original (pre-suspension) final adoption period even if no changes are made. Fifteen days after publication has been selected as a reasonable time for advance notice of a new effective date, regardless of whether substantial changes have been made. The amendment clarifies that if substantial changes are made, § 9-6.14:7.1(K) would allow petitions for further public comment and the potential for further suspension under that subsection.

3. Reproposed Regulations

Question 1: Can an agency “repropose” a regulation? This means that the agency wants to make changes to a proposed regulation after public comment under § 9-6.14:7.1(F) before it considers adoption of the regulation as final.

Answer: This is a close question. The APA requires that proposed regulations be subject to public comment for at least 60 days. However, once a proposed regulation is adopted as final, substantial changes are subject to petitions for additional comments of only 30 days. It would seem that the better legal interpretation is to require another comment period of at least 60 days in compliance with § 9-6.14:7.1(F). That is because even though the new proposal may result from public comment, the public has not had an opportunity to comment on it. On the other hand, if the proposed changes are minimal or technical in nature, this procedure would produce only needless delay.

Because there is a need to clarify what is to happen with respect to reproposed regulations, a proposed amendment to the APA is included as Amendment 5 in the attached document. Thirty days has been selected as a reasonable period of additional public comment.

4. Deferred Regulations

Question 1: Can an agency publish a portion of a regulation to become final on a certain date and defer another portion of that regulation to a later time?

Answer: This is the same as suspending a portion of a regulation. The answer is the same as set forth above in Section 2, Question 3. Provided the regulation is severable and the agency describes what it is doing, there is no legal impediment to this practice.

RECOMMENDATION AND CONCLUSION

The Subcommittee respectfully submits this report and recommends its adoption, along with the proposed amendments to the APA. If approved, ALAC should forward the report and recommendations to the Code Commission for possible legislative action.

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Attachment
Subcommittee Report.doc