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Rethinking Notice

By Jack M. Beermann*

APA § 553(b)(3) requires agencies engaged in informal rulemaking to provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." In most cases, agencies publish the complete text of their proposed rules, together with a preamble describing the need for the rule and the major considerations of policy and law that are raised by the proposal. Comments often convince agencies to make changes to their proposed rules. This, of course, is the whole point of the process. Difficulties arise, however, when, in reaction to comments, agencies promulgate rules that differ substantially from the initial proposal. In such cases, parties whose interests are harmed by the changes to the rule may claim that the process was unfair because they could not have anticipated the scope of the changes and thus did not have an adequate opportunity to participate in the rulemaking.

The issue addressed in this essay is the standard that reviewing courts should apply when deciding whether changes between a proposed rule and a final rule render the notice inadequate under APA § 553. I have written about this issue before, taking the position that courts should stick closely to the language of § 553 and generally allow agencies great leeway in making changes between proposals and final rules. In this essay, I raise some concerns about my earlier position that have led me to reconsider the issue. In short, I now believe there is a good instrumental case to be made against strict adherence to the text of the APA and in favor of requiring a new round of notice and comment when agencies make unanticipated changes to their proposals when promulgating final rules.

In 2007, my colleague Gary Lawson and I published an article arguing that courts had strayed too far from the APA in evaluating the degree to which agencies may make changes to rules between proposal and promulgation. (See Jack M. Beermann & Gary Lawson, Reprocessing Vermont Yankee, 75 Geo. Wash. L. Rev. 856, 896 (2007).) We concluded that the standards courts currently apply in these cases was inconsistent with language of § 553: "Because the statute permits the agency to limit its notice to 'the subjects and issues involved,' our view of the best understanding of § 553 is that no new notice and comment is required if the final rule is within the subjects and issues involved in the proposal, even if the direction of the final rule is substantially different from the direction suggested by the notice."

We also concluded that this standard was required by the spirit, if not the letter, of the Supreme Court's Vermont Yankee decision (Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978)), in which the Court held that reviewing courts do not have authority to impose procedural requirements on agencies beyond those specified in applicable statutes and rules.

In early cases, the courts were very tolerant when comments led agencies to make significant changes to proposed rules before promulgation. The courts applied the language of the APA and rejected arguments for a new round of notice and comment even when agencies made significant changes between the notice and the final rule. This attitude is exemplified by the following observation from a 1954 Court of Appeals opinion: "Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." (Logansport Broad. Corp. v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954).)

Some standard is necessary to determine whether changes between notices and final rules are so significant that interested parties did not truly have notice of the agency's proposal. Without a standard, an agency could propose a rule with no intention of actually adopting it and then promulgate something radically different. This would frustrate the entire purpose of the notice-and-comment process because affected parties would not have any opportunity to comment on the agency's true proposal.

Despite these concerns, Gary Lawson and I previously condemned the various tests courts had developed for determining whether a new round of notice and comment is required. In these tests the court have asked whether the final rule is a "logical outgrowth" of the notice (and sometimes the comments) already given; whether the agency made a "material alteration" between the notice and the final rule; and whether the final rule is "in character with" the original notice. All of the tests boil down to the same basic question: was notice specific enough to provide interested parties with a reasonable opportunity to comment to protect their interests? In our view then, the courts had not been sufficiently tolerant of agencies when changes were made between notices and final rules.

Although the Supreme Court has not weighed in definitively on the proper understanding of § 553's notice...
requirement. In its 2007 opinion in Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007), the Court cited the “logical outgrowth” test with apparent approval. However, the Court’s apparent endorsement of the “logical outgrowth” test does not establish that the lower courts have been properly applying § 553.

Long Island Health Care reviewed a Department of Labor rule concerning treatment of companion workers under the Fair Labor Standards Act (FLSA). After receiving comments critical of its proposal to continue a limited exception for some workers, the Department decided to subject all companion workers hired by third parties to the requirements of the FLSA. The Court rejected a challenge to the agency’s notice by those providers, reasoning that “[s]ince the proposed rule was simply a proposal, its presence meant that the Department was considering the matter; after that consideration the Department might choose to adopt the proposal or to withdraw it.” 551 U.S. at 175.

This reasoning raises questions concerning the application of the “logical outgrowth” test in at least some of the cases in which it has been applied. For example, one of the most well-known decisions is the Fourth Circuit’s Chocolate Mfrs. Ass’n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985). In that case, the Chocolate Manufacturers challenged the Department of Agriculture’s decision to remove flavored milk, including chocolate milk, from the list of approved foods that could be purchased by benefits recipients under a program designed to ensure adequate nutrition to pregnant women and children. The proposed rule continued the inclusion of flavored milk on the list, and a lengthy preamble discussed sugared cereal and sugar in juice but did not mention flavored milk. Despite the fact that 78 comments convinced the Department to remove flavored milk from the list, the court held that the Chocolate Manufacturers did not have adequate notice that flavored milk might be removed. While the court may be correct that the lack of mention of flavored milk in the preamble may have lulled the plaintiff into believing that removal of its product would not be considered, the Supreme Court’s reasoning in Long Island Home Care suggests that the Chocolate Manufacturers should have understood that the proposal to continue the inclusion of flavored milk on the list of approved foods might not be adopted.

Gary Lawson and I previously supported our critique of the way the courts have applied the notice requirement by relying on the Supreme Court’s Vermont Yankee rule, which prohibits courts from imposing procedural requirements on agencies not contained in any applicable statute or rule. As the Supreme Court explained, allowing courts to increase procedural requirements beyond those required by law would lead to great unpredictability — which would give agencies the incentive to overproceduralize, thus losing the benefits of the informal rulemaking process prescribed by Congress. Thus, aggressive judicial monitoring of changes between proposed and final rules under unclear standards like the “logical outgrowth” test would incentivize agencies to conduct multiple rounds of notice and comment to ensure against reversal, the exact procedural situation condemned in Vermont Yankee. Even worse, strict application of the notice requirement in this context would undercut the very purpose of the entire procedure by discouraging agencies from incorporating what they learn from the comments into their final rules.

When I teach Chocolate Manufacturers in my Administrative Law course, I urge students to think about the decision in light of the Vermont Yankee rule, and ask whether the Chocolate Manufacturers might have chosen not to comment so as not to draw attention to the flavored milk issue and perhaps to preserve the notice objection if flavored milk was removed from the list. The “punch line” is to push the argument that courts should approve any notice that meets the statutory requirement of containing “either terms or substance of the proposed rule or a description of the subjects and issues involved” — which the notice in Chocolate Manufacturers surely did.

This year during the discussion the class’s attention turned to the cost of commenting and whether each of those interested in preserving each item on the Department of Agriculture’s list should have spent the time, energy, and money to submit a comment. Was there any realistic chance that the Department of Agriculture would remove unflavored whole milk from the list of foods available in a program focusing on nutrition for women and young children? It is conceivable that some group of comments might attack the inclusion of milk — perhaps due to its fat content, the hormones used to stimulate milk production in cows, or its alleged connection in some circles to the incidence of some forms of cancer. But similar attacks could be made concerning other products on the list such as baby formula, cheese, cereal, juice, eggs, peanut butter, and numerous varieties of beans and peas, all of which were included in at least some of the food packages covered by the program. Is it cost-effective to encourage every single beneficiary of a proposed rule to comment in support of the proposal?

Class discussion suggested that, while it is costly when an agency is forced to conduct a second comment period when comments convince it to make an unanticipated change to a proposed rule, it may be more costly for all regulatory beneficiaries to feel the need to submit comments every time they have a conceivable economic interest in the outcome of a rulemaking proceeding. If the occasional additional comment period required under the “logical outgrowth” test is less costly than producing numerous additional comments under a standard allowing agencies to make more changes, continued on next page.
without an additional comment period, then — contrary to what Gary Lawson and I previously argued — the current application of the "logical outgrowth" and related tests may make economic sense. Further, additional comments impose costs on agencies that must analyze and respond to them. See Wendy Wagner, Administrative Law, Filter Failure, and Information Capture, 59 Duke L.J. 1321, 1325 (2010). If every single party whose interests could conceivably be affected by changes to a proposed rule submits comments, the agency will have to devote significantly greater resources to analyzing the comments and addressing them in the concise general statement of basis and purpose of the final rules.

I do not mean to suggest that courts should freely require agencies to conduct additional comment periods whenever their final rules differ from their proposals. Courts should do so only when the changes made were truly not foreseeable by the party whose interests were prejudiced by a change. Interested parties should be encouraged to comment whenever it appears that there is a realistic possibility that the rule might be changed to their detriment. They should not, however, be expected to comment when such changes are not reasonably foreseeable.

E-rulemaking might also ameliorate some of the problems agencies have had in the past when comments point them in an unexpected direction. If comments are quickly posted to the agency’s website in a form that is easily accessible by affected parties, those parties are more likely to be able to anticipate the need for comments during the initial comment period. What of the Vermont Yankee rule? The Vermont Yankee rule itself was built largely upon pragmatic concerns involving preserving the benefits of informal processes and not creating an incentive to overproceduralize. I still find the textualist methodology for construing § 553 that Gary Lawson and I employed to be generally more consistent with Vermont Yankee than with other alternatives. However, as I observed in Common Law and Statute Law in Administrative Law, 63 Admin. L. Rev. 1, 8 (2011), the current approach to the notice question in the federal courts may be “consistent with the traditional role of courts engaged in statutory construction, which is to apply the language and intent of the statute in a way that makes sense in light of the policies underlying the statutory scheme.” Perhaps it is unrealistic to expect the federal courts to sacrifice sound policy concerns on the altar of fidelity to the text of a statute passed by Congress nearly 70 years ago.

Remarks of Kevin M. Stack continued from page 11

result of these principles, the text of the regulation and its accompanying statement of basis and purpose stand in a unique relationship: Together they constitute the act of regulation through the notice-and-comment process. The conclusion I draw is that it does not make sense to interpret the rules independently from their statement of basis and purpose. They form a couplet.

Principle 2: Interpret regulations in accordance with their purposes.

Regulations implement statutory purposes. They are designed to direct our behavior toward some goal — cleaner air, more efficient markets, reducing the likelihood of fraud, and so on. As such, regulations are goal-oriented documents. This, too, has an implication for interpretation: They should be interpreted in light of their purposes or goals, what they seek to do.

Putting these two principles together yields a basic framework for regulatory interpretation: Interpret the text of a regulation in light of its purposes, purposes discerned from the text of the regulation itself and set forth in the regulation’s statement of basis and purpose. Thus the core idea is to treat an agency’s public and authoritative justifications for its regulations as more than an elaborate exercise necessary to survive judicial review; they also create commitments that continue to guide the meaning of the regulations. In the article, I argue that this approach is not subject to the critiques of the use of legislative history or purposivism in statutory interpretation.

I also defend this approach as practical — “out-of-the-box ready” — for use by lawyers and courts. For regulatory lawyers, this approach — use the purposes articulated in the preamble to guide interpretation of the regulation — gives concrete directions for how to handle regulatory ambiguity. It also provides a consistent and workable approach for courts to employ, whether interpreting a regulation under Chevron or under Auer/Seminole Rock or other doctrines. Under this approach, a court would ask two questions: Whether the prospective interpretation of the regulation is (1) permitted by its text and also (2) consistent with the regulation’s purposes set forth in its text and statement of basis and purpose.

At a more general level, in an era in which agencies are frequently characterized as overly political, this approach recognizes and affirms a role for law in guiding agency action. It sees regulations as more than creating a zone of agency discretion, but as launching a policy to which the agency owes allegiance. Thank you very much.