

ADMINISTRATIVE LAW AND REGULATORY PRACTICE

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



Committee Newsletter | Summer 2017

TABLE OF CONTENTS

Message from the Chair.....2

ARTICLES

The ABCs of Alcohol Beverage Control

By Hannah Becker

An overview of the complex regulatory schemes governing the United States alcohol beverage industry.....3

Congressional Review Act—a New Way to Legislate?

By Adam Barton

A discussion of the key provisions of the Congressional Review Act.....4

NEWS AND ANNOUNCEMENTS.....6

ENDNOTES.....7

MESSAGE FROM THE CHAIR

Greetings ABA YLD Administrative Law and Regulatory Practice Committee members!

It pains me to admit that, after two years, my time as chair of this committee is at an end. Thank you so much for continuing your membership and participation with the committee. After all, without you there is no committee! I want to give another big thank you to all of you who have reached out to me over the past two years, whether it was about serving on a teleconference panel, writing an article for the committee newsletter, or getting more involved with the committee in any other way. I also want to take a moment to thank Adam Barton, the committee Vice Chair, and Edwin Wu, the committee YLD scholar, for all of their help this year running the committee.

By now you've already heard from the committee's next leadership team, who I'm sure, with your help, will continue to build this committee into something great. Please do feel free to reach out to them, whether it is to offer to write an article for an upcoming newsletter, host an administrative law related event in your city on behalf of the committee, organize and moderate a teleconference, or just to say hi!

I also encourage you to keep exploring and learning about administrative law and regulatory practice. If you haven't already done so, I recommend subscribing to the following two great administrative law blogs: The Regulatory Review (www.theregreview.org) and the Notice & Comment blog (<http://yalejreg.com/nc/>). Both are filled with great articles, written by very qualified and experienced individuals, discussing current issues in administrative law and regulatory practice. If you feel like getting a refresher on the fundamentals of administrative law, or if you simply never took administrative law in law school, I recommend reading a great book that, despite its title, is a very interesting read: Principles of Administrative Law (2nd Ed.) by Keith Werhan. Of course, for additional interesting reads, check out the great articles in this newsletter from Hannah Becker and our own Adam Barton.

Thank you so much again for your continued time and interest in the ABA YLD Administrative Law and Regulatory Practice Committee.

I wanted to end this on a pithy note, but as they say in admin law, let's try to keep this informal. I guess in retrospect it was more appropriate that I ended it with a really bad admin law joke.

I hope our paths may cross in the future--

But until then you have my best regards,

Tyler Scandalios, Committee Chair

ARTICLES

The ABCs of Alcohol Beverage Control

By Hannah Becker

The United States alcohol beverage industry is heavily regulated and complex. The federal, state, and local governments regulate the production, importation, distribution, marketing, possession, and sale of alcohol beverages. The Twenty-First Amendment grants each state virtually complete authority to regulate the alcohol beverage industry within their borders, which has resulted in state administration and enforcement that is regularly inconsistent. Every state statutorily vests its own alcohol beverage control government agency with the authority, subject to certain federal laws, to regulate alcohol beverages within the state. Across all fifty states, state agencies have comprehensively regulated alcohol beverage activities because the control of alcohol beverage distribution is an essential state interest.

Larger alcohol beverage industry members have historically dominated the small alcohol beverage industry members, leading state legislatures to create some form of a “three-tier system” for alcohol distribution. This system places a middle tier, consisting of licensed wholesale distributors, between the top tier licensed manufacturers and importers, and the bottom tier licensed retailers. The majority of the states have adopted an “open” system that authorizes private individuals and entities to apply for licenses to manufacture, distribute, or sell at retail alcohol beverage products. A minority of the states, and some counties within open states, like Montgomery County in Maryland, have adopted a “control” system in which the states themselves play a role at some level, either as the distributor, retailer, or both, in the sale of distilled spirits and/or wine.

As a regulatory body, each state’s alcohol beverage control agency operates in accordance with the state’s alcohol beverage control laws and regulations, as well as with its own established policies. Each state’s alcohol beverage control agency is an administrative decision maker with the authority to interpret and apply state alcohol beverage legislation. These agencies are given a large degree of latitude to craft alcohol beverage rules and regulations. In some instances, a state agency may delegate its broad power to municipalities. Consequently, the licensing qualifications, licensing process, enforcement posture, and trade practice regulations can differ significantly from state-to-state or even county-to-county. Thus, it is very important to consult federal, state, and local laws, regulations, and ordinances.

While many state alcohol beverage control laws and regulations appear robust, the alcohol beverage industry is innovative and fast-changing, often resulting in new products and practices that are unregulated or under-regulated by existing laws and regulations. Alcohol beverage control agencies respond to such situations by reviewing existing policy, if any, and the legislative intent of the state’s alcohol beverage laws in order to amend or create agency policy accordingly. Though not legally binding, agency policy not only provides alcohol beverage industry members with necessary information to ensure its business remains in compliance with relevant alcohol beverage control laws and regulations, it also provides the guidelines that direct agency personnel

actions in applying the state's alcohol beverage control laws and regulations consistently and equitably regarding the licensees of the state's alcohol beverage three-tier system. The decisions made by the state's alcohol beverage control agency relating to enforcement actions and the denial, suspension, or revocation of alcohol beverage licenses can have serious consequences for licensees.

Before any individual or entity embarks in an alcohol beverage endeavor, it is important to understand the historical implications, regulatory scheme, and enforcement postures of each state and local agency that will regulate such party's alcohol beverage business in any capacity. The administrative regulation of alcohol is more decentralized than virtually any area of the law and requires broad expertise of alcohol laws, regulations, and policies.

***Hannah Becker** is an associate attorney with GrayRobinson P.A.'s Alcohol Beverage Industry Team. Hannah's practice concentrates on advising companies and entrepreneurs on compliance with federal, state, and local statutes and regulations governing the alcohol beverage industry and other regulated products. She counsels members from all tiers of America's three-tier system of alcohol distribution concerning licensing, business and trade practice issues.*

Congressional Review Act - a New Way to Legislate?

By Adam Barton

Much has been made in the political world recently over a little-known piece of legislation named the Congressional Review Act, 5 U.S.C. §§ 801–808 (the "CRA"). Enacted in 1996, this seemingly innocuous bill has garnered increased attention as Republicans in Congress seek to use the CRA to effect their agenda and reduce regulation. In simplest terms, the CRA provides Congress with a mechanism to reverse or abolish a rule or regulation promulgated by an executive branch agency. To do this, a "joint resolution of disapproval" must be passed by both houses of Congress within sixty (60) session days of the final regulation being submitted to it.¹ Under the Act, all federal agencies must submit a copy of newly adopted regulations to Congress and the Government Accountability Office along with a report detailing the reasons for its promulgation before it may take effect.²

To be clear, the ability to override such regulations is already well within the normal legislative powers of Congress.³ What distinguishes the CRA and gives it teeth is the expedited process through which Congress can exercise this power. For example, one of the CRA's more powerful provisions allows joint resolutions for major rules⁴ introduced in the Senate to circumvent the committee process where bills often get bogged down or die altogether. As with other legislation, regulations submitted and introduced in the Senate are referred to the appropriate Senate committee. However, under the CRA, if the receiving committee has not reported out a disapproval resolution within twenty days of a major rule being submitted, the resolution can be taken out of the committee's hands and placed on the Senate's legislative calendar upon petition of at least thirty Senators.⁵ Furthermore, to ensure the resolution is acted upon

quickly, the CRA prohibits certain procedural tactics that can be used to delay action. Actions prohibited by the Act include attaching amendments, making motions and, possibly most important, setting time limits for debate thereby eliminating the filibuster—a tactic increasingly employed by both political parties in recent years.⁶ Another important procedure mandated by the CRA requires that resolutions be enacted as stand-alone measures, using a template provided in the statute.⁷ This streamlines the process by ensuring that unrelated bills cannot be attached and, because the bill enacted by the House and Senate will be identical, the resolution may proceed to the President’s desk without need for a conference report.⁸

After 21 years of limited use, the CRA has been rediscovered as a powerful albeit limited tool to overturn regulations deemed most undesirable by Congress. While some have coined this discovery a “regulatory game changer,”⁹ its ultimate impact is likely more modest. That said, the success of this Congress in rolling back regulations approved during the prior administration will almost certainly ensure that the CRA continues to be a powerful and potent tool for this and future Congresses.

***Adam Barton** is corporate counsel at a finance and technology company in Silicon Valley. His practice is primarily concentrated on structured finance and capital markets transactions.*

Summer 2017

NEWS AND ANNOUNCEMENTS

Announcements:

The American Bar Association [Commission on Women in the Profession](#) recognized five women lawyers with its 2017 Margaret Brent Women Lawyers of Achievement Award during a luncheon ceremony on Sunday, Aug.13, at the ABA Annual Meeting in New York

Take advantage of these upcoming resources for YLD Members (for those events that have past, recordings of the event may be available and accessed via the event link):

:

8/4 Career Choice Series: [Judicial Law Clerks](#)

8/8 [Resolving Commercial Property Disputes: A Primer for Real Estate Attorneys](#)

8/11 Career Advice Series: [How to Become a Freelance Lawyer: Rates, Contracts, Legal Ethics and More](#)

8/16 [Why Lawyers Are Flocking to Office 365: Special Focus on its 'Groups' Collaboration Feature](#)

8/17 [Flying Through Government Thunder Clouds: Navigating Cloud Procurements, Cybersecurity, & Regulatory Issues in the Public Sector](#)

8/21 [Burning Down the House: The Myths Around Youth Homelessness in America](#)

8/23 #AlmostALawyer Twitter chat @ 1PM ET: Join us for last minute bar tips, first year associate fails, and @ABAYLD opportunities.

8/24 [Dividing the Assets: What Attorneys Should Know about Marital Settlement and Separation Agreements](#)

8/29 [Lawyer Ethics: E-Communications, Social Media, and the Internet \(Part 2\)](#)

Events:

[Why Lawyers Are Flocking to Office 365: Special Focus on its 'Groups' Collaboration Feature](#)

Aug. 16, 2017

Web

[Flying Through Government Thunder Clouds: Navigating Cloud Procurements, Cybersecurity, & Regulatory Issues in the Public Sector](#)

Aug. 17, 2017

Web

[Jumping into Politics Without Being a Politician](#)

Aug. 17, 2017

Teleconference

[ABA-IPL Landslide Webinar Series: Tips and Tactics for Protecting Life Sciences Innovations in the Current Legal Climate](#)

Aug. 22, 2017

Web

Job Opportunities:

- Check out the Career Advice Series, watch interesting webcasts, and browse the ABA Job Board for thousands of job postings – go to <http://www.abalcc.org/>
- Also check out the ABA Administrative Law and Regulatory Practice Committee's [Careers in Administrative Law](#) web page, featuring personalized guidance from top Administrative Law practitioners on how to succeed in the numerous Administrative Law career paths.

Get Involved: The ABA YLD Administrative Law and Regulatory Practice Committee is accepting, on an ongoing basis, submissions to be considered for publication in our next newsletter or as “101” or “201” articles, which are featured on our committee webpage and may also be featured in the newsletter. Articles should be from 200 to 600 words and discuss issues or news of interest to young lawyers who are involved in administrative law and/or regulatory practice. Topics may, for example, report on or discuss recent events, case decisions, news, emerging trends, or general topics of interest to young lawyers. Please send submissions or inquiries to Tyler Scandalios (tylerscandalios@gmail.com), and cc: Adam Barton (adam.d.barton@gmail.com) and Edwin Wu (edwinjwu@gmail.com).

ENDNOTES

¹ 5 U.S.C. §801.

² 5 U.S.C. § 801(a)(1)(A).

³ 25 U.S.C. §§ 551–559, 701–706. The Administrative Procedure Act has since 1946 required final rules be published at least thirty days before their effective date, during which period Congress is free to use the ordinary legislative process to overturn any regulation before it is effective.

⁴ 5 U.S.C. § 804(2). A major rule is one likely to result in (1) an annual effect on the economy of \$100 million or more (2) a major increase in costs or prices to consumers, industries, government (3) significant adverse effects on competition, investment, productivity or ability of U.S. companies to compete with foreign entities.

⁵ 5 U.S.C. § 802(c).

⁶ 5 U.S.C. § 802(d).

⁷ 5 U.S.C. §802(a).

⁸ See 142 Cong. Rec. 8197 (1996) (statement of Sens. Nickles, Reid, and Stevens).

⁹ K. Strassel, *A GOP Regulatory Game Changer*, THE WALL STREET JOURNAL, Jan. 26, 2017.