

April 2017

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Recommended Citation

George E. Reed (2017) "Origin and Impact of Government Regulations," *The Catholic Lawyer*: Vol. 24 : No. 3 , Article 8.
Available at: <http://scholarship.law.stjohns.edu/tcl/vol24/iss3/8>

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ORIGIN AND IMPACT OF GOVERNMENT REGULATIONS

GEORGE E. REED

What ordinary means do we follow at the Conference to implement the recommendation, the rationale, the philosophy which has just been articulated by Father Whelan? For the last 35 years, that has been one of my principal responsibilities: involvement in the administrative process.

Let us take a look at some of the principal sources of government regulation. First, we have legislation requiring a definition of the legislative term. A classic and irritating example is section 6033, requiring the filing of Form 990 by all 501(c)(3) organizations, with certain exceptions. The first exception is "churches." The Church community currently is not inviting a definition of that term. The second exception is "integrated auxiliaries of a Church," a brand new administrative animal, or legislative animal, call it what you wish. And it has already resulted in a tremendous amount of confusion as a result of the final regulation promulgated last year.

Frequently we have ambiguous legislation requiring interpretation by administrators. A classic example of that is the Unemployment Compensation Act of 1976. Before 1976 there were certain exemptions, among them elementary and secondary schools; they were exempt from coverage. The Congress has deleted the terms "elementary and secondary schools." However, it left in the law several other basic exemptions, among them churches and certain types of religious organizations. The Department of Labor is still trying to determine whether that basic exemption relating to churches still applies to parochial schools. We submitted a brief—you will hear more about that tomorrow—a very substantial brief to the Solicitor of the Labor Department, and later to the Secretary of the Department of Labor, taking the position that parochial schools are components of the Church and covered by the church exemption. That has not been resolved. But it is one of the classic cases of ambiguous legislation requiring administrative interpretation.

Finally, you have ambiguous rulings requiring further administrative interpretation. We had, for example, the one we discussed last year, Rev. Rul. 76-323. That was not too ambiguous, it just knocked the religious out of the box completely. Also, we have Rev. Rul. 77-290, which has a degree of ambiguity, too. And it is pretty hard to determine precisely what it means at this juncture. We know it restores 80% of the ground lost as a result of Rev. Rul. 76-323, but it still is not satisfactory.

Now, what do we really do with respect to these issues? As you know, when there is a regulation contemplated by an administrative agency, it first publishes a Notice of Rulemaking, a Proposed Regulation. Obviously, we analyze that, and we submit written comments and follow it up with an appearance at a public hearing. But, generally, the USCC procedure is much more substantial than that. We start with the legislation. We work very closely with our Office of Government Liaison. We try to get a law and also develop legislative history, which will of necessity condition the type of regulation which will ultimately be developed. This has been done over and over again. For example, earlier today you heard about the limitation on the audit of a church. That had its genesis in an intense legislative battle. In 1969, the legislation that passed the House would have subjected churches to audit. Ultimately, that was clarified in the legislation, and then, after a series of conferences, we were able to impose on the Treasury certain limitations with respect to audits of churches. We got the legislation, ultimately, and then we expanded it in the regulation. As I said, we start first with the legislation and the legislative history. Then we know that there has to be a definition of the term. There has to be a regulation. So we concentrate on a series of contacts with the administrative officials. We have developed a good relationship, a very substantial degree of credibility with most of the administrative personnel.

Take, for example, the whole question of integrated auxiliaries of a church. That legislation was passed in 1969. The first thing we did in 1970 was to delete definitions of the term "church" from section 170, which would have been worse than the old 1956 regulation. It eliminated religious orders from the definition of a church. We worked very extensively with the Treasury, and the result was that we did get a tentative definition of the word "church," which, quite frankly, would have been most acceptable and which would have taken care of most of the organizations which are now subject to filing Form 990. But other religious organizations came in and objected to any definition of the term "church," and so Treasury decided not to define the term "church." Part of the history of the whole question of integrated auxiliaries involved the failure of some Protestant organizations to coordinate with us.

We had a series of conferences at the IRS level and, more particularly, at the Treasury level, trying to get a definition of the term "integrated auxiliary" which would be realistic. As a result of those contacts, we were able to hold off a regulation for seven years. Also, we were able to delete elementary and secondary schools from the ultimate regulation. Parochial schools do not file precisely because of the conferences which we had with IRS, and particularly with Treasury, emphasizing the relationship of parochial schools to our churches.

This, then, is the basic procedure. First is the legislation. Develop a good legislative history. Second, recognize the term which must be defined. Third, establish your contacts and credibility, and substantially in advance, arrange for conferences which will instruct and educate the admin-

istrative agency with respect to the relationship of some of our institutions to the Church, because that does not always carry over from the legislative history. In most of these major regulations there have been a substantial number of advance conferences. Then, when that is finished and it is time for a Notice of Rulemaking, proceed to comment. That brings me to this point. Should this organization adopt a different procedure, should we file comments on a critical regulation for the Church, or should we just indicate to the field that a Notice of Rulemaking is pending? And let the field, as well as our organization, file comments? I still have not made up my mind on that, because of an experience I had last year.

The Treasury came out with a good definition of the term "church plan" for ERISA. As a matter of fact, they picked up Congressional language which beautifully defined the term "church." It would be very helpful to us. It was language which was written back in 1956 and incorporated in the Senate Finance Committee Report, and it was passed by the Congress. One of the big church agencies elected to comment on this because its organization was interested in this definition. They sent in written comments, saying that the regulation was too sparse, that the regulation did not give a sufficient amount of instruction, and that they should revise the old "sacerdotal test," which knocked us out of the box in 1956. We had to live with that for 20 years. That was the one which adversely affected religious orders.

Fortunately, I learned about it the very day it was filed. I was able to contact the attorney who had filed it, explained the situation to him, and he withdrew it. He sent in a telegram withdrawing the comments. If we do develop a system whereby the field comments, we are going to have to have a clearance system so that we will not be working at odds with one another. That is absolutely essential.

Now, what do we do if there is a ruling that comes out of the blue? By the way, 76-323, the Rev. Rul. on the Vow of Poverty in 1976, came completely out of the blue. I was told by IRS people that the Commissioner pulled it off the back burner. There was no procedure, no Notice of Rulemaking (the IRS people do not have to have a Notice of Rulemaking on these rulings, although sometimes when they are important they do). The Revenue Procedure with respect to discrimination did have a Notice of Rulemaking. So we had an opportunity to comment. These comments have been very helpful.

What do we do when negotiations fail? I can assure you that there is a very substantial degree of negotiation. First, we have to have a policy consideration. If corrective action is needed, do we go into court immediately? When negotiation has failed completely, then consideration has to be given to legislation. In legislation you have an opportunity for a certain amount of control. If it looks like it is going to get out of hand, you can back off. Litigation is not recommended unless everything else fails. Take the classic example, where you go into court and challenge a particular regulation which involves the definition, directly or indirectly, of the

term "church." The federal court comes up with a real narrow definition of the term "church" confining it exclusively to the church building itself, with no other institutional implication. IRS and Treasury would latch on to that immediately. They do not particularly desire to define the term "church," a task with which they have had all kinds of difficulty, but they could accept a narrow definition of a court. So we are concerned about litigation in certain areas, because litigation can affect every one of you in the room. So, when litigation is possible on one of these broad issues, we feel that it should be submitted to our organization or submitted to the group for considered action. But a final decision has to be made after mature judgment concerning implications. Certainly, we know the potential for litigation is very, very pervasive. Now, on that point we have Joe Fitzgerald, who is going to take up this question of litigation, because, quite frankly, we are going to be confronted by it, we are already confronted by it in the Supreme Court in one case, and I am sure we are going to have many more in the near future.