



Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation for Committee | March 16, 2018

1 The typical, default judicial remedy for a legally invalid rule is to vacate the entire rule,
2 despite the agency's best efforts to promulgate a valid rule.¹ This can lead to substantial costs
3 and wasted effort by the agency, given that it has likely invested an extraordinary amount of
4 time, money, and resources in compiling a rulemaking record and establishing a supporting
5 enforcement apparatus, among other things. This risk is particularly great in those instances
6 where the legal, scientific, and economic bases for the rule may not have been previously tested
7 in court.

8 Agencies can use various techniques before, during, or after promulgation to mitigate the
9 risk of courts striking down their rules.² Employing these techniques may enable agencies to
10 minimize their costs and reduce the likelihood of any wasted effort. For instance, agencies can
11 solicit input from stakeholders on procedural issues and conduct litigation risk assessments early
12 in the rule drafting process. They can also include severability clauses in their rules, which will
13 minimize the costs of judicial review insofar as they increase the probability that one part of a
14 rule will survive. Agencies may also wish to divide up their rules based on subject matter, which
15 would further ensure that the various aspects of a regulation are independent. Another approach
16 is to ensure that a rule's text and structure reflect the logical and practical relationships between a
17 rule's provisions, even in the absence of a severability clause. This may increase the likelihood
18 that courts will cleave off the offending portion of the rules while leaving the rest intact, which
19 will avoid many of the costs of total vacatur.

¹ Admin. Conf. of the U.S., Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272 (Dec. 5, 2013).

² Charles W. Tyler and E. Donald Elliott, Mitigating the Costs of Remediating Legally Infirm Rules (Feb. 27, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/research-projects/minimizing-cost-judicial-review>.



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20 Another way that agencies can mitigate the risk of incurring the costs of vacatur is to
21 include fallback provisions in their rules. For example, when the legality of an agency's
22 preferred regulatory course is not well established, the agency may know what its preferred
23 second-best alternative would be, in the event that a reviewing court determines that its preferred
24 course is unlawful. The agency could approach this scenario by taking both courses of action
25 through the notice-and-comment process, then promulgating a rule that imposes its preferred
26 course of action and specifies that the second-best alternative will take effect if a reviewing court
27 holds its preferred action to be unlawful. Agencies could also promulgate smaller, less costly
28 rules as test cases in some instances, particularly where agencies wish to regulate in areas where
29 their authority to do so is not well established.

30 Once agencies promulgate their rules, they have additional ways to mitigate the risks of
31 courts striking them down. Where appropriate, agencies can proactively argue to courts that they
32 should issue a limited remedy, in the event that a court finds the rule to be invalid. Agencies
33 could argue that the provisions of a rule should be severed; that an infirmity was harmless error;
34 or that the court should remand the rule without vacating it.³ Agencies might also benefit from a
35 briefing policy that allows them to submit briefing on remedies separately from briefing on the
36 merits, thus ameliorating the fear that a judge will infer that an agency is uncertain about its
37 positions on the merits. The briefing policy could allow agencies to submit supplemental
38 briefing in cases where the courts believe they will likely hold a rule unlawful, or it could require
39 agencies to submit any plausible arguments on remedies in their opening briefs on the merits.

40 This recommendation offers best practices and factors for agencies to consider as they
41 seek to mitigate the risk of a court striking down their rules. It is intended to suggest a menu of
42 available options. Not every rule will lend itself to these sorts of mechanisms. Agencies should
43 not deploy these mechanisms, such as severability clauses, in a *pro forma* fashion, as a court may
44 only heed agencies' efforts to ensure separable rules if they reflect a conscious effort to divide
45 the rules into conceptually distinct components. This recommendation also recognizes that all

³ Recommendation 2013-6, *supra* note 1.



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46 agencies are subject to unique programming and financial constraints, and that the
47 distinctiveness of agencies' respective regulatory schemes limits the development of workable
48 standardized practices. Agencies may not have the resources to employ the suggested options in
49 every case. Nevertheless, to the extent agencies are required to expend additional resources in
50 implementing this recommendation, any upfront costs incurred may be accompanied by
51 offsetting benefits.

RECOMMENDATION

Before Promulgation

- 54 1. Agencies should solicit input from stakeholders on approaches to designing rules that are
55 logically divisible into component parts, such that part of the rule can survive judicial
56 review if another part is held invalid by a court.

During Promulgation

- 58 2. Where appropriate, policy experts, compliance experts, litigators in the Department of
59 Justice (or in the agency itself, if it possesses independent litigating authority), and rule
60 drafters should collaborate while the regulatory text is being drafted to assess litigation
61 risk. Agencies should then take this information into account in determining whether to
62 deploy some mechanism for dividing the rule into conceptually distinct parts.
- 63 3. Agencies should consider including severability clauses in their rules, particularly where
64 the agency has determined that the rule's provisions would function independently.
- 65 4. Agencies should consider whether it is appropriate to divide regulations into multiple
66 rules. For example, it may prove useful to do so based on subject matter.
- 67 5. Agencies should ensure that a rule's text and structure reflect the logical and practical
68 relationships between a rule's provisions. It is a best practice for an agency to make clear
69 when it intends for features of a rule to function independently by dividing those features



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70 into separate parts and sections and indicating in the rule’s text that those features are
71 supported by independent justifications and evidence.

72 6. Agencies should consider including fallback provisions in their rules. This option is
73 particularly useful when the legality of an agency’s preferred regulatory course is not
74 well established, and the agency may know what its preferred second-best alternative
75 would be, in the event that a reviewing court determines that its preferred course is
76 unlawful.

77 7. Agencies should consider whether it is appropriate to promulgate a narrower, less costly
78 rule as a form of “test case”—i.e., a rule that will allow the agency to test its legal theory
79 in court without incurring the large costs of a new regulatory program. This approach
80 may be useful when an agency intends to regulate in areas where its authority to do so is
81 not well established. In other cases, however, this approach may not be feasible because
82 the amount of time that it takes for a “test case” to be promulgated and reach final
83 judgment in court may be too long for an agency to wait before rolling out its intended
84 program.

85 **After Promulgation**

86 8. When appropriate, agencies involved in ongoing litigation should proactively seek
87 remedies other than total vacatur for rules that may potentially be invalid.

88 **Briefing Policies and Local Rules on Remedies**

89 9. The Judicial Conference should recommend a briefing policy that would encourage
90 agencies to submit briefing on remedies.