



Recommendation 82-7

Judicial Review of Rules in Enforcement Proceedings

(Adopted December 17, 1982)

A person adversely affected by an agency rule may ordinarily obtain judicial review of that rule either by instituting a direct review proceeding against the agency in an appropriate court (pre-enforcement review)¹ or by asserting the invalidity of the rule as a defense in a civil or criminal proceeding to apply or enforce the rule (enforcement review). Prior to the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), direct review was generally difficult to obtain because of technical defenses such as lack of ripeness or lack of standing, and most review of rules took place in the context of enforcement proceedings.

Under *Abbott Laboratories* and subsequent decisions, direct review of agency rules has become increasingly available. Congress in much recent regulatory legislation has specifically provided for immediate resort to judicial review at the conclusion of the rulemaking proceeding. As a result, direct judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding is less common. In a number of statutes, in fact, Congress has sought to encourage prompt direct review by explicitly precluding or limiting the availability of review at the enforcement stage.

At the same time, and perhaps largely as a result of the increasing importance of direct judicial review of rules, courts have intensified their scrutiny of the administrative process preceding promulgation of the rule. Whereas in the pre-*Abbott Laboratories* era challenges to rules were most frequently based on assertions of lack of agency authority or on inapplicability of the rule to the party's particular circumstances, today the issues in direct review proceedings increasingly include whether the agency made the proper procedural choices in the rulemaking proceeding and whether the rule finds adequate support in the administrative record.

¹ We use the term "direct review" to refer to judicial review of a rule of general applicability before the rule is applied to a particular person in an adjudicative proceeding. Such review may be by the court of appeals pursuant to a special statutory review procedure or by the district court in the exercise of its power under the Administrative Procedure Act to review agency action not otherwise reviewable. See ACUS Recommendations 74-4 (Pre-enforcement Judicial Review of Rules of General Applicability) and 75-3 (The Choice of Forum for Judicial Review of Administrative Action).



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The Administrative Procedure Act does not by its terms establish different standards of review for direct review proceedings and enforcement proceedings, and few courts have considered the implications for review in enforcement proceedings of the increasingly intensive standard developed in direct review proceedings. Moreover, in adopting statutory provisions precluding enforcement review Congress has not distinguished between these process-related objections and other types of objections to rules.

In Recommendation 76-4, the Conference criticized provisions precluding enforcement review in the Clean Air Act and the Federal Water Pollution Control Act. In view of the increasing reliance on direct review and the proliferation of issues concerning the adequacy of the rulemaking process rather than the agency's authority to promulgate a particular rule, however, the Conference now believes that limitations on judicial review of rules in enforcement proceedings may sometimes be appropriate. The purpose of this recommendation is twofold: to identify factors that Congress should consider in deciding whether to preclude enforcement judicial review, and to distinguish between types of challenges to rules that should ordinarily be covered by any preclusion provisions Congress decides to adopt and types of issues that should ordinarily remain available in enforcement proceedings even where preclusion provisions have been adopted.

Sound principles of administrative law favor prompt and dispositive resolution of disputed issues arising from an administrative rulemaking proceeding. Direct review in the court of appeals is more likely to afford such a resolution than later enforcement review in one or more district courts.² The uncertainty caused by the potential for conflicting court decisions and by the possibility that a rule may be overturned several years after its promulgation can be extremely disruptive of the regulatory scheme. In addition, reopening a rulemaking proceeding to correct any defects will become increasingly difficult as the original record grows stale over time and the situation of the interested parties changes.

On the other hand, those affected by a rule should have a full and fair opportunity to challenge the rule on all available grounds. These interests must be balanced in determining when limitations on enforcement review of rules are appropriate. The balance will tip in favor of limitations on enforcement review when the impact of foreclosing review on those affected by a rule is the least and when the costs of regulatory uncertainty or of declaring a rule invalid

² The recommendation is based on the assumption that, where Congress has provided by statute for direct review of rules, that review will ordinarily lie in the court of appeals rather than in the district court. See ACUS Recommendation 75-3.



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after several years are the greatest. Thus one factor favoring limitations on enforcement review is the likelihood that the groups affected by rules promulgated under a particular statute will be well represented in the agency rulemaking proceeding because, for example, those groups are well defined and/or well organized. Widespread participation in the rulemaking proceeding reduces the probability that any significant issue concerning the rule, particularly one pertaining to the rulemaking process itself, will be overlooked on direct review.

The likelihood that a rulemaking proceeding will involve complex procedures or intensive factual exploration also militates in favor of limits on enforcement review. The more elaborate and formal the administrative rulemaking proceeding (such as those required by hybrid rulemaking statutes),³ the more likely it is that the rule will be subject to challenge on the basis of a relatively narrow issue involving the procedures used or the record support for some aspect of the rule. As time passes, reopening such a complex proceeding after a court reversal will be increasingly burdensome. Encouraging the dispositive resolution of challenges to a rule on direct review (perhaps while effectiveness of the rule has been stayed) is also advisable when the costs of regulatory uncertainty are particularly high. Sometimes compliance with a rule entails substantial expense that will not be fully recoverable if the rule is later overturned. Similarly, when Congress determines that there is a need to achieve important regulatory goals promptly nationwide, or when it is particularly important that rules apply industry-wide in order to avoid unfair competitive advantage to non-complying businesses, repeated litigation over the validity of the rules in various district courts should be avoided if possible.

Even when Congress decides that limits on enforcement review are warranted, it should not foreclose all challenges to rules at the enforcement stage. Some grounds for review can be precluded with little unfairness to parties who may be unaware of the original rulemaking proceeding or are otherwise unable to seek direct review, while others raise fundamental questions about the substance of the rule or its application in circumstances that may have been unforeseen at the time of promulgation. Challenges based on asserted errors in the administrative process are those most suitable for preclusion. When objections on procedural grounds are raised early, errors may be remedied promptly and the rulemaking process recommenced with a minimum of disruption to the interests of those affected by the rule. And objections based on asserted inadequacy of the administrative record may lose their relevance as that record itself becomes dated. These objections, moreover, do not ordinarily turn on the

³ See, e.g., ACUS Recommendations 79-1 (Hybrid Rulemaking Procedures of the Federal Trade Commission) and 80-1 (Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act).



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situation of a particular individual or entity or on a particular interpretation of the rule and can be raised as well by one party as by another.

On the other hand, considerations of fairness and judicial economy may argue for retaining a right to raise in enforcement proceedings those objections based on asserted lack of statutory authority or the inapplicability or unreasonableness of the rule as applied to the facts of the case. Moreover, there may be constitutional inhibitions against precluding or restricting at any time challenges based on the asserted unconstitutionality of a rule either on its face or as applied.

The Conference recognizes that the line between issues of process and those of statutory authority may not always be a bright one. For example, the question of whether there is statutory authority to apply a rule to a particular situation may tend to converge with the issue of the adequacy of record support for the rule. However, if the distinctions suggested below are made, statutory provisions will afford the courts adequate guidance in most situations. When ambiguity nonetheless results, the well established presumption of reviewability will continue to apply.

Recommendation

1. In drafting a statute that provides for adequate pre-enforcement judicial review of rules, Congress should consider whether to limit the availability of review at the enforcement stage. In deciding whether to limit the availability of enforcement review in a particular statute, Congress should consider the following factors as favoring such a limitation:

- (a) The likelihood that the rulemaking proceeding will attract widespread participation;
- (b) The likelihood that the proceeding will involve complex procedures or intensive exploration of factual issues;
- (c) The likelihood that those affected by the rule will incur substantial and immediate costs in order to comply with it; and
- (d) The need for prompt compliance with the rule on a national or industry-wide basis.

2. When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the



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administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement actions (subject to the principles of collateral estoppel and stare decisis). Judicial review of issues relating to the statutory authority for the rule should be precluded at the enforcement stage only where Congress has concluded that there is a compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.

3. When Congress limits the availability of judicial review of rules at the enforcement stage as described in paragraph 2, it should provide that, in an exceptional case when foreclosure of issues will work a severe hardship or otherwise produce a manifestly unjust outcome, a court may either dismiss or stay the proceedings and refer the rule to the affected agency for its reconsideration.

4. Paragraph D of Recommendation No. 76-4, 1 CFR 305.76-4, Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act, is hereby superseded to the extent that it is inconsistent with this recommendation.

Citations:

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