



Recommendation 92-1

The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements

(Adopted June 18, 1992)

The Administrative Procedure Act, 5 U.S.C. 553, establishes the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section also provides for a number of specific exemptions. One of these exemptions in subsection (b)(A), provides that the requirements for notice and comment do not apply to "rules of agency organization, procedure, or practice * * *."¹

The scope of APA exceptions has been described as "enshrouded in considerable smog"² and the question of what is a procedural or practice rule has no clear answer.³ The issue is in a state of flux.⁴ Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. Over the years the Conference has addressed the scope of most of the other exceptions to the APA rulemaking requirements.⁵ Because the procedural rule exception is a subject of increasing controversy, it is appropriate for the Conference to fill this gap.

The Conference has long advocated the value of notice and comment in rulemaking,⁶ and this recommendation encourages agencies to use such processes voluntarily in promulgating

¹ The term procedural rule will be used herein to refer to rules of agency practice and procedure. Other exemptions from notice-and-comment rulemaking requirements cover interpretive rules, policy statements, and situations where good cause exists. See section 553(b). Section 553(a) completely exempts from notice-and-comment rulemaking rules involving military or foreign affairs, agency management or personnel, grants, loans, benefits, or contracts.

² *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); see also *Community Nutrition Institute v. Young*, 818 F. 2d 943, 946 (D.C. Cir. 1987).

³ There has been less debate about what are rules of agency organization.

⁴ *Air Transport Association v. Department of Transportation*, 900 F.2d 369 (D.C. Cir. 1990), cert. granted, 111 S. Ct. 669 (1991). judgment vacated and remanded, 111 S. Ct. 944 (1991), opinion vacated and petition dismissed on mootness grounds, 933 F.2d 1043 (D.C. Cir. 1991), has recently focused attention on the scope of the exemption.

⁵ Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements," 1 CFR 305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR 305.73-5; Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR 305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR 305.83-2.

⁶ See, e.g., Recommendation 69-8, supra n.5



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rules of procedure or practice. Notice and comment can provide the agency with valuable input from the public as well as furnish enhanced public acceptance of the rules. On the other hand, there can be costs to the agency in using notice-and-comment procedures including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.

The Conference believes, however, that the procedural and practice rule exemption can in appropriate circumstances serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The Conference therefore recommends, as a guide to agencies in determining when a rule is procedural, that agencies should establish first that the rule relates to an agency's internal operations⁷ methods of interacting with the public and second that the rule has no substantive impact because it neither significantly affects conduct, activity or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs.⁸ Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure. Examples of rules that would be procedural under this standard include rules governing conduct of formal hearings or appeals, ex parte rules, and rules concerning the business hours of the agency. Examples of nonexempt rules include rules relating to the criteria for determining the severity of enforcement sanctions, levels of civil money penalties, or application requirements that serve to limit eligibility for a government benefit program.

In order to encourage agencies voluntarily to use notice and comment, the Conference also recommends that the Office of Management and Budget refrain from exercising its jurisdiction

⁷ It is likely that some rules relating to agency internal operations will also fall within a category of rules exempt from all of section 553's requirements (including publication of a statement of basis and purpose and delayed effective date) as a "matter relating to agency management or personnel." 5 U.S.C. 553(a)(2).

⁸ The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. In this connection, it should be noted that many agencies, following Recommendation 69-8, have voluntarily waived the exemption from notice-and-comment rulemaking for matters relating to loans, grants, benefits, or contracts.



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to review rules fitting within the definition of rules relating to an agency's procedure or practice when an agency voluntarily publishes them.

Recommendation

1. Federal agencies should exercise restraint in invoking the Administrative Procedure Act's statutory exceptions to the notice-and-comment rule-making procedures. Thus, the Administrative Conference has consistently urged agencies voluntarily to use notice-and-comment procedures when issuing rules that fall within the terms of most of the exemptions under 5 U.S.C. 553.⁹

2. For rules falling within the "procedure or practice" exception in 5 U.S.C. 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.

3. In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.¹⁰

4. To assist agencies in implementing this recommendation, the Office of Management and Budget should refrain from exercising jurisdiction under Executive Order 12291 with respect to

⁹ In some cases, the Conference has recommended agencies generally use notice and comment, Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR 305.76-5, Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR 305.83-2. In the case of some other exemptions, the Conference has also recommended eliminating them altogether. Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR 305.69-8; Recommendation 73-5, "Elimination of the "Military or Foreign Affairs Function" exemption from APA Rulemaking Requirements," 1 CFR 305.73-5.

¹⁰ The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. See footnote 7, *supra*.



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rules relating to an agency's procedure or practice that an agency voluntarily publishes for notice and comment.

Citations:

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