

Comment from Senior Fellow Ronald M. Levin
December 9, 2020

1. I have a suggestion regarding the proposed recommendation on Rules on Rulemaking. Paragraph 7 of the numbered recommendations currently reads as follows:

If agencies do not wish for their rules on rulemaking to be enforceable in court on judicial review, they should consider including a statement within their rules on rulemakings that such rules do not create any substantive rights or benefits.

In my view, the committee's paragraph is overbroad. The proposed language seems inconsistent with the so-called *Accardi* doctrine, under which an agency is, at least sometimes, required to comply with its own procedural rules. An agency should not be able, by its mere say-so, to exempt itself from that doctrine.

However, the *Accardi* doctrine has its limitations. I can see a potential basis for a narrower version of paragraph 7, which might serve as a mutually agreeable compromise. In that spirit, I propose for consideration the following substitute language:

Insofar as an agency considers some or all provisions in a rule on rulemaking to have been adopted for internal management reasons, making them inappropriate for private enforcement, it should consider including in the rule on rulemaking a statement that such rules or provisions do not create any substantive or procedural rights or benefits.

This text could then be incorporated into new preamble language, as follows:

This Recommendation does not seek to resolve whether, when, or on what legal bases a court might enforce a rule on rulemakings against an agency. However, some or all provisions in a rule on rulemaking may be comparable to executive orders that are “intended only to improve the internal management of the Federal Government.”^[1] Courts have given effect to language in such orders declaring that they do “not create any right or benefit, substantive or procedural.”^[2] Insofar as an agency considers some or all provisions in a rule on rulemaking to have been adopted for internal management reasons, making them inappropriate for private enforcement, it should consider including in the rule on rulemaking a statement that such rules or provisions do not create any substantive or procedural rights or benefits. The option to include such language may encourage agencies to make more extensive use of rules on rulemaking, thereby serving the purposes of this recommendation.

[1] *See, e.g.*, Exec. Order 12,866, 58 Fed. Reg. 51,735, § 10 (Oct. 4, 1993).

[2] *Id.*; *see, e.g.*, *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986); *Alliance for Natural Health US v. Sebelius*, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011). *See also* *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970) (declining to enforce a rule that was “adopted for the orderly transaction of business before” the agency and was “not intended primarily to confer important procedural benefits upon individuals”).

Under my proposal, an agency that drafts a rule on rulemaking would need to make individualized decisions about which, if any, of the provisions of its rule are sufficiently

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managerial in nature to fall within the scope of the disclaimer language. If my analysis above is correct, that particularized consideration would be a virtue, not a bug.

I referred in my proposal to “internal management reasons” because it tracks the exact language of the executive order, so precedent supports that formulation. I assumed that this would be the most salable compromise. However, the operative language could potentially be expanded—to provide, for example: “Insofar as an agency considers some or all provisions in a rule on rulemaking to have been adopted for internal management reasons, *or for other reasons that make them* inappropriate for private enforcement, it should consider. ...” Conference members may want to consider that alternative (or others).

2. Regardless of whether the above suggestion, or a reworked version thereof, proves generally acceptable, I would suggest that the drafters of the proposed recommendation took a wrong turn when they suggested, at least with their citation to the *Cement Kiln* case, that this problem can be fruitfully viewed through the lens of the distinction between legislative rules and guidance. That distinction does not have much intrinsic relationship with the disclaimer language that the committee proposed in ¶ 7. To be sure, if the agency considers the entire rule on rulemaking to be guidance, it should say so (Rec. 2017-5, ¶ 4; Rec. 2019-1, ¶ 4). However, the doctrinal question of whether a court would defer to an agency’s assertion that a rule is not a legislative rule is quite unruly. It is part and parcel of the overall question of the circumstances in which a court may properly reclassify a purported guidance document as a legislative rule. We scrupulously avoided speaking to that issue in our guidance recommendations, and I don’t think the Conference should reconsider that self-restraint here. If an agency doesn’t want to be “bound” by a provision in a rule on rulemaking, in the sense that we use that term in the guidance context, it should ideally address that desire through the waiver option in paragraph 6.

3. As a separate point, I suggest changing “are internally waivable” on line 80 to “should be made internally waivable.” This is a purely editorial change and could perhaps qualify as a manager’s amendment.