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Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation for Committee | April 25, 2018

In recent years, as administrative rules have become more complex, agencies have started increasingly including provisions in some of their rules stating that if portions of the rule are declared invalid in court, other portions that were not found by the court to be invalid should be allowed to go into effect. These provisions have been generally called “administrative severability clauses,” by analogy in contrast to the severability clauses that Congress includes in legislation. To date, only a handful of agencies have used administrative severability clauses, yet many other agencies issue rules that may be good candidates for considering the possibility of severability. The purpose of this Recommendation

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2 A recent article on administrative severability clauses identified fifty-nine instances in which agencies had included severability clauses in their rules as of October 2014. Charles W. Tyler & E. Donald Elliott, Administrative Severability Clauses, 124 YALE L.J. 2286, 2349–52 (2015). Of course, an administrative severability clause does not limit in any way restrict the power of a court to declare any or all portions of the rule invalid.
3 According to recent academic research, the Federal Trade Commission and Environmental Protection Agency have generated the largest volume of severability clauses. Tyler & Elliott, supra note 2, at 2318–19.
is to make available to other agencies best practices for dealing with the issue of severability in rulemaking.

It is not entirely clear how much weight the courts will give to the agency’s expression of its views on severability. The Supreme Court has never addressed the issue, and the lower courts have reached different results in the context of particular rulemakings. In certain instances, courts have declined to defer to honor [or follow] administrative severability clauses. For example, a panel of the D.C. Circuit declined to defer to an administrative severability clause in an FCC order, holding that the remaining portions of the rule would not sensibly fulfill the agency’s purposes. On the other hand, several other courts have given substantial weight to agencies’ expressions of intent through severability clauses.

A prominent rule with a severability clause was the EPA’s included a severability clause in the preamble to its so-called Clean Power Plan. See Environmental Protection Agency: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,662 (October 23, 2015). The final rule set carbon emissions standards for the states based on three “building blocks”: (1) increasing the operational efficiency of existing coal-fired power plants; (2) shifting electricity generation from higher emitting fossil fuel-fired power plants to lower emitting natural gas-fired power plants; and (3) relying more heavily on renewable energy resources for electricity generation. Id. at 64,667. In the preamble, EPA noted that it “intended for the individual building blocks to be severable, such that if a court were to deem building block 2 or 3 defective, the emissions target would be based on “the remaining building blocks.”” Id. at 64,751, 64,758, 64,812-13. In February 2016, the Supreme Court stayed the enforcement of the Clean Power Plan pending a decision on resolution of the merits. Chamber of Commerce v. EPA, 136 S. Ct. 999 (2016). The Court did not address the Clean Power Plan’s severability clause and, given the rule’s proposed repeal, it is unlikely that the courts will ever have the occasion to pass on the rule’s merits due to its proposed repeal to do so. See Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (proposed Executive Order to repeal the Clean Power Plan).

See, e.g., MD/DC/DE Broadcasters v. FCC, 253 F.3d 732, 734 (D.C. Cir. 2001) (declining to follow defer to an agency’s severability clause because the remaining portion of the rule would not have sensibly served the goals for which the rule was designed).

See, e.g., Int’l Refugee Assistance Project v. Trump, 883 F.3d 233, 306 n.28 (4th Cir. 2018) (“It is particularly appropriate to review the Proclamation’s specific restrictions given the Proclamation’s severability clause, to which courts should give effect if possible.”); Consumer Fin. Prot. Bureau v. The Mortgage Law Grp., LLP, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deerring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); High Country Conservation Advocates v. U.S. Forest Serv., No. 13-CV-01723-RBJ, 2014 WL 4470427, at *4 (D. Colo. Sept. 11, 2014) (“I conclude that the severability clause creates a presumption that the North Fork Exception is severable . . .”). Commentary on Provisions of The Mortgage Law Grp., LLP, 182 F. Supp. 3d 806, 804-95 (W.D. Wis. 2016) (referring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); see also Int’l Refugee Assistance Project v. Trump, 883 F.3d 233, 306 n.28 (4th Cir. 2018).
Administrative severability clauses are more likely to be followed given effect by the courts when: (1) they are included in the text of the proposed rule; (2) the agency’s rationale for severability is explained in the preamble and made available for comment by interested parties; (3) the rationale for severability is addressed in the statement of basis and purpose (in the same manner as any other substantive policy issue in the rulemaking); and (4) the agency explains how specific provisions of the rule would operate independently. While courts are often also willing to consider the agency’s view on severability as expressed in agency briefs or at oral argument, they are less likely to defer to agree with the agency if the issue of severability comes up for the first time in briefing or oral argument because of “‘the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel.’”

This Recommendation suggests factors for agencies to consider in deciding whether it is appropriate to discuss severability in a particular rulemaking. Discussing severability is not appropriate in every rulemaking, as doing so imposes additional costs on both the agency and commenters. In addition, if agencies include administrative severability clauses routinely without reasoned discussion of the rationale behind them and how severability might apply to a particular rule, the courts will be less likely to give them much weight. As with many other aspects of rules, agencies should only include administrative severability clauses when they conclude that the expected net benefit to the public will exceed the costs. The benefits of discussing the issue of severability in a particular rulemaking may exceed the costs if

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1 Am. Petroleum Inst. v. EPA, 862 F.3d 50, 72 (D.C. Cir. 2017) (“If EPA, or any party, wishes to disabuse us of our substantial doubt with a petition for rehearing, we will of course reconsider as necessary.”), decision modified on reh’g, 883 F.3d 918 (D.C. Cir. 2018). (If EPA, or any party, wishes to disabuse us of our substantial doubt with a petition for rehearing, we will of course reconsider as necessary.”).  
2 Nat’l Treasury Employees Union v. Chertoff, 452 F.3d 839, 867 (D.C. Cir. 2006) (quoting Harmon v. Thornburgh, 878 F.2d 484, 494 (D.C. Cir. 1989)). This principle is also reflected in an application of the Chenery doctrine, which holds that a reviewing court may not affirm an agency decision on different grounds than those adopted by the agency. See SEC v. Chenery Corp., 318 U.S. 80, 92-94 (1943), holding that a reviewing court may not affirm an agency decision on a ground different from that adopted by the agency to justify its action; SEC v. Chenery Corp., 318 U.S. 80, 92-94 (1943) (same).
an agency concludes that its rules are likely to be litigated and that it is important for some portions of the rule to go into effect, even if some other portions are stuck down. Considering severability can be particularly important when an agency believes that some portions of its proposed rule are likely to be more vulnerable in court than others, but that the less vulnerable portions of the rule can function independently and should go into effect even if the more controversial portions are vacated.

If a court finds portions of an administrative rule arbitrary and capricious or not supported by the record, and the agency has been silent about severability, then the default remedy is to vacate the entire rule, including those portions of it that the court did not find invalid. This outcome can impose unnecessary costs on the agency, which must and the public either to re-promulgate the portions of the rule that the court did not find invalid but struck down nonetheless, and on the public, which must or to forego the benefits that would have accrued under those portions of the rule.

Sometimes courts have concluded that an agency’s intentions regarding severability are sufficiently clear to support severability, despite the absence of an administrative severability clause or discussion of the issue in the rulemaking. It is more likely, however, that any unnecessary costs from vacating portions of rules that the court did not find invalid will be avoided if the agency includes a severability clause in the proposed regulatory text, invites comment, and includes a reasoned explanation for why it believes some portions of the rule can and should function independently in its statement of basis and purpose.

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A separate but related question is how parties to a challenge to an agency rule should address the question of severability during litigation. Litigants may be reluctant to address the issue of severability in their briefs because: (1) it is often not clear in advance which portions of a rule a court may vacate and on what basis (2) many parties, including but not limited to agencies, may fear that addressing severability would convey doubts to the courts about the validity of their rules. Courts should therefore invite the parties’ views on severability at an appropriate time and manner in litigation, as for example when it appears likely that portions of a rule may be vacated but that other portions of the rule are not in and of themselves invalid and could conceivably remain in effect without the invalid portions.

### RECOMMENDATION

1. Early in the process of developing a rule, in addition to other programmatic considerations, agencies that anticipate litigation should consider whether a rule is divisible into segments that can function independently.

2. The agency should first determine whether it intends that portions of the rule should be separable severable or whether some parts should function independently even if other parts are struck down as legally invalid. If so, it should draft the rule such that it is divisible into independent segments.

3. Agencies should address the issue of severability in the regulatory text of the proposed rule and provide a reasoned explanation in the preamble as to why portions of the rule are or are not severable. The agency should identify which segments, if any, should survive if other portions are struck down and explain how they relate to other segments in the event a court holds some portions of the rule invalid.

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4. When severability is a potential issue on judicial review and the question has not otherwise been previously briefed, the courts should solicit the parties’ views on severability at the appropriate time.

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