



Statement #3

Statement of the Administrative Conference on ABA Resolution No.1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act

(Adopted December 19, 1973)

The Conference agrees with Resolution No. 1 calling for improved definitions of "rule" and "order" so as to distinguish more clearly between the nature of rulemaking and the nature of adjudication; it endorses the recommendation of the ABA that the words "or particular" and the entire second clause be deleted from the definition of "rule" in the Administrative Procedure Act. The Conference endorses this proposal upon the express understanding that—

(a) A matter may be considered to be of "general applicability" even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased. Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant. On the other hand, a rate established for a single company on the basis of the capital requirements and credit rating of that company, and applicable only to that company, would be a matter of particular applicability and an order rather than a rule.

(b) A matter may be of "particular applicability" (and therefore an order) even though it is applicable to several persons, if the agency clearly specifies an intention to limit its applicability to the particular persons concerned.

(c) The deletion of the second clause does not imply a determination that the agency statements therein listed are not rules, but rather that they may be either rules or orders, depending upon their applicability and effect. If such statements become orders under the revised definition and are required by statute to be determined on the record after opportunity for agency hearing, the Conference believes that in the absence of a specific determination by Congress to the contrary they should be treated in the same manner as suggested for ratemaking in the next to last paragraph of this Recommendation, and that amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."



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(d) The proposed change in the definition of "rule" does not affect the precedential value of an agency's decision in a matter of particular applicability if the agency decides to proceed on a case-by-case basis rather than by rulemaking.

(e) This change is not intended to affect recommendations previously made which urge—

(1) The use of notice-and-comment procedures when considering issues of general applicability that may arise in the context of an adjudicatory proceeding. (Recommendation 71-6);

(2) The use of trial-type or similar procedures when considering issues of specific fact in the context of a rulemaking proceeding (Recommendation 72-5); and

(3) Articulation and continual review of agency policies through rules, precedents and policy statements (Recommendation 71-3).

In endorsing the proposed redefinition, the Conference does not imply that a formal proceeding fixing the permissible rates of a specific enterprise—the agency activity principally affected—should be treated in all respects like other formal adjudication. To the contrary, we believe that ratemaking, like initial licensing, should receive special treatment with respect to the separation of functions requirements of 5 U.S.C. § 554(d), as set forth in the Conference Statement concerning ABA Resolution No. 3; that ratemaking should not be subject to the mandatory initial decision requirement of 5 U.S.C. § 557(b) and should continue to be governed by the provision of 5 U.S.C. § 556(d) authorizing agencies to require that evidence be submitted in writing. Amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."

The question of appropriate procedures for informal adjudication is a subject deserving further study. Meanwhile, we recommend that agencies continue, despite the reclassification, to give informal action of particular applicability and future effect at least the same procedural protections that are now in fact accorded.

The principal purpose of the suggested changes is definitional and prospective rather than operational and retrospective. That is, they are intended to provide a clearer definitional structure that will facilitate proper allocation of procedures with respect to legislation adopted in the future or new activities undertaken under existing law; they are not aimed at the correction of what are thought to be existing abuses. Accordingly, to the extent any agency



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believes that activities currently conducted as rulemaking would be adversely affected by the conversion which the ABA proposal would effect, it would not be inconsistent with the Conference's Statement to propose special procedural provisions therefor, so long as the integrity of the definition of "rule" (as here set forth) is not affected.

Citations

39 FR 4849 (February 7, 1974)

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Notes: (1) For the original Conference action on this and other ABA Resolutions to amend the APA, see Statement #2. (2) The cross-reference in the last sentence of section (c) was probably intended to refer to "the third paragraph from the end of this Statement."