Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation for Committee | March 16, 2018

The typical, default judicial remedy for a legally invalid rule is to vacate the entire rule, despite the agency’s best efforts to promulgate a valid rule.¹ This can lead to substantial costs and wasted effort by the agency, given that it has likely invested an extraordinary amount of time, money, and resources in compiling a rulemaking record and establishing a supporting enforcement apparatus, among other things. This risk is particularly great in those instances where the legal, scientific, and economic bases for the rule may not have been previously tested in court.

Agencies can use various techniques before, during, or after promulgation to mitigate the risk of courts striking down their rules.² Employing these techniques may enable agencies to minimize their costs and reduce the likelihood of any wasted effort. For instance, agencies can solicit input from stakeholders on procedural issues and conduct litigation risk assessments early in the rule drafting process. They can also include severability clauses in their rules, which will minimize the costs of judicial review insofar as they increase the probability that one part of a rule will survive. Agencies may also wish to divide up their rules based on subject matter, which would further ensure that the various aspects of a regulation are independent. Another approach is to ensure that a rule’s text and structure reflect the logical and practical relationships between a rule’s provisions, even in the absence of a severability clause. This may increase the likelihood that courts will cleave off the offending portion of the rules while leaving the rest intact, which will avoid many of the costs of total vacatur.

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Another way that agencies can mitigate the risk of incurring the costs of vacatur is to include fallback provisions in their rules. For example, when the legality of an agency’s preferred regulatory course is not well established, the agency may know what its preferred second-best alternative would be, in the event that a reviewing court determines that its preferred course is unlawful. The agency could approach this scenario by taking both courses of action through the notice-and-comment process, then promulgating a rule that imposes its preferred course of action and specifies that the second-best alternative will take effect if a reviewing court holds its preferred action to be unlawful. Agencies could also promulgate smaller, less costly rules as test cases in some instances, particularly where agencies wish to regulate in areas where their authority to do so is not well established.

Once agencies promulgate their rules, they have additional ways to mitigate the risks of courts striking them down. Where appropriate, agencies can proactively argue to courts that they should issue a limited remedy, in the event that a court finds the rule to be invalid. Agencies could argue that the provisions of a rule should be severed; that an infirmity was harmless error; or that the court should remand the rule without vacating it. Agencies might also benefit from a briefing policy that allows them to submit briefing on remedies separately from briefing on the merits, thus ameliorating the fear that a judge will infer that an agency is uncertain about its positions on the merits. The briefing policy could allow agencies to submit supplemental briefing in cases where the courts believe they will likely hold a rule unlawful, or it could require agencies to submit any plausible arguments on remedies in their opening briefs on the merits.

This recommendation offers best practices and factors for agencies to consider as they seek to mitigate the risk of a court striking down their rules. It is intended to suggest a menu of available options. Not every rule will lend itself to these sorts of mechanisms. Agencies should not deploy these mechanisms, such as severability clauses, in a pro forma fashion, as a court may only heed agencies’ efforts to ensure separable rules if they reflect a conscious effort to divide the rules into conceptually distinct components. This recommendation also recognizes that all

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3 Recommendation 2013-6, supra note 1.
agencies are subject to unique programming and financial constraints, and that the
distinctiveness of agencies’ respective regulatory schemes limits the development of workable
standardized practices. Agencies may not have the resources to employ the suggested options in
every case. Nevertheless, to the extent agencies are required to expend additional resources in
implementing this recommendation, any upfront costs incurred may be accompanied by
offsetting benefits.

RECOMMENDATION

Before Promulgation

1. Agencies should solicit input from stakeholders on approaches to designing rules that are
   logically divisible into component parts, such that part of the rule can survive judicial
   review if another part is held invalid by a court.

During Promulgation

2. Where appropriate, policy experts, compliance experts, litigators in the Department of
   Justice (or in the agency itself, if it possesses independent litigating authority), and rule
   drafters should collaborate while the regulatory text is being drafted to assess litigation
   risk. Agencies should then take this information into account in determining whether to
   deploy some mechanism for dividing the rule into conceptually distinct parts.

3. Agencies should consider including severability clauses in their rules, particularly where
   the agency has determined that the rule’s provisions would function independently.

4. Agencies should consider whether it is appropriate to divide regulations into multiple
   rules. For example, it may prove useful to do so based on subject matter.

5. Agencies should ensure that a rule’s text and structure reflect the logical and practical
   relationships between a rule’s provisions. It is a best practice for an agency to make clear
   when it intends for features of a rule to function independently by dividing those features
into separate parts and sections and indicating in the rule’s text that those features are supported by independent justifications and evidence.

6. Agencies should consider including fallback provisions in their rules. This option is particularly useful when the legality of an agency’s preferred regulatory course is not well established, and the agency may know what its preferred second-best alternative would be, in the event that a reviewing court determines that its preferred course is unlawful.

7. Agencies should consider whether it is appropriate to promulgate a narrower, less costly rule as a form of “test case”—i.e., a rule that will allow the agency to test its legal theory in court without incurring the large costs of a new regulatory program. This approach may be useful when an agency intends to regulate in areas where its authority to do so is not well established. In other cases, however, this approach may not be feasible because the amount of time that it takes for a “test case” to be promulgated and reach final judgment in court may be too long for an agency to wait before rolling out its intended program.

After Promulgation

8. When appropriate, agencies involved in ongoing litigation should proactively seek remedies other than total vacatur for rules that may potentially be invalid.

Briefing Policies and Local Rules on Remedies

9. The Judicial Conference should recommend a briefing policy that would encourage agencies to submit briefing on remedies.