



Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation | June 15, 2018

Commented [S1]: The Committee on Judicial Review voted to change the title of this Recommendation to “Severability in Agency Rulemaking.”

1 If a court holds portions of a rule unlawful, and the agency has been silent about
2 severability, then the default remedy is to vacate the entire rule, including those portions that the
3 court did not hold unlawful.¹ This outcome can impose unnecessary costs on the agency, if it
4 chooses to re-promulgate the portions of the rule that the court did not hold unlawful but
5 nonetheless set aside, and on the public, which would forgo any benefits that would have accrued
6 under those portions of the rule.

7 In recent years, as administrative rules have become more complex,² some agencies have
8 started including provisions in some of their rules stating that if portions of the rule are held
9 unlawful in court, other portions not held unlawful should be allowed to go into or remain in
10 effect.³ To date, only a handful of agencies have used these severability clauses,⁴ yet many other
11 agencies issue rules that may be good candidates for considering the possibility of severability.

12 This Recommendation suggests best practices for agencies in addressing severability in a
13 rulemaking. Addressing severability is not appropriate in every rulemaking. Indeed, if agencies

¹ Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,269, 76,272 (Dec. 5, 2013); Ronald M. Levin, *Judicial Remedies*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 251, 251–52 (2d ed. 2015).

² Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. __ (forthcoming 2018).

³ A recent article on 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).

⁴ The Federal Trade Commission and Environmental Protection Agency have generated the largest volume of severability clauses. *Id.* at 2318–19.



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14 include severability clauses without a reasoned discussion of the rationale behind them and how
15 severability might apply to a particular rule, the courts will be less likely to give them much
16 weight. By contrast, addressing severability can be particularly valuable when an agency
17 believes that some portions of its proposed rule are likely to be more vulnerable in court than
18 others, but that the less vulnerable portions of the rule can function independently and should go
19 into effect even if the more controversial portions are held unlawful.

20 It is not entirely clear how much weight the courts will give to an agency's expression of
21 its views on severability. The Supreme Court has never addressed the issue, and the lower courts
22 have reached different results in the context of particular rulemakings; nonetheless, some courts
23 have given substantial weight to agencies' expressions of intent through severability clauses.⁵

24 General principles of administrative law suggest that the agency's views on severability
25 can best be defended to the courts when: (1) the agency's initial views are included in the text of
26 the proposed rule; (2) the agency's rationale for severability is explained in the preamble to the
27 proposed rule and made available for comment by interested parties; (3) the agency addresses its
28 determination of severability in the text of the final rule; (4) the agency addresses the rationale
29 for severability in the statement of basis and purpose accompanying the final rule (in the same
30 manner as any other substantive policy issue in the rulemaking); and (5) the agency explains how
31 specific portions of the rule would operate independently. While courts may also be willing to
32 consider the agency's view on severability as expressed in agency briefs or at oral argument,⁶
33 courts seem less likely to agree with the agency if the issue of severability comes up for the first

⁵ See, e.g., *Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP*, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deferring 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 . . .”); cf. *MD/DC/DE Broadcasters v. FCC*, 253 F.3d 732, 734–36 (D.C. Cir. 2001) (declining to honor an agency's severability clause because the agency did not adequately explain how the remaining portion of the rule would have served the goals for which the rule was designed).

⁶ *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).



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34 time in litigation because of “the fundamental principle that agency policy is to be made, in the
35 first instance, by the agency itself—not by courts, and not by agency counsel.”⁷

36 Sometimes courts have concluded that an agency’s intentions are sufficiently clear to
37 support severability, despite the absence of a severability clause or discussion of the issue in the
38 rulemaking.⁸ This outcome is more likely, however, if the agency includes a severability clause
39 in the proposed regulatory text; invites comment; and includes in the rule’s statement of basis
40 and purpose a reasoned explanation for why the agency believes some portions of the rule can
41 and should function independently.

42 A separate but related question is how parties to a challenge to an agency rule should
43 address the question of severability during litigation. Litigants may be reluctant to address the
44 issue of severability in their briefs because: (1) it is often not clear in advance which portions of
45 a rule a court may hold unlawful and on what basis; or (2) they may fear that addressing
46 severability would suggest weakness in their positions on the merits.⁹ Courts should therefore
47 invite the parties’ views on severability at an appropriate time and manner.

RECOMMENDATION

48 1. Early in the process of developing a rule, in addition to other programmatic
49 considerations, agencies that anticipate litigation should consider whether a rule is
50 divisible into portions that could and should function independently if other portions were
51 to be held unlawful on judicial review.

⁷ 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 is an application of the *Chenery* doctrine, which holds that a reviewing court may not affirm an agency decision on different grounds from those adopted by the agency. See SEC v. Chenery Corp., 318 U.S. 80, 92–94 (1943).

⁸ See, e.g., Virginia v. EPA, 116 F.3d 499, 500–01 (D.C. Cir. 1997); Davis County Solid Waste Mgmt., 108 F.3d 1454, 1455–56, 1459–60 (D.C. Cir. 1997); Nat’l Ass’n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 62 (D.D.C. 2012), *aff’d in part, rev’d in part*, 717 F.3d 947 (D.C. Cir. 2013).

⁹ Charles W. Tyler & E. Donald Elliott, *Mitigating the Costs of Remediating Legally Infirm Rules 25* (Feb. 27, 2018) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/mitigating-costs-remediating-legally-infirm-rules-draft-report>.



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- 52 a. If the agency intends that portions of the rule should continue in effect even
53 though other portions have been held unlawful on judicial review, it should draft
54 the rule so that it is divisible into independent portions that reflect this purpose.
- 55 b. In order to provide members of the public an opportunity for comment, agencies
56 should address the issue of severability in the text of the proposed rule and
57 provide a reasoned explanation for the proposal.
- 58 c. Agencies should likewise address their determination of severability in the text of
59 the final rule and provide a reasoned explanation for that determination in the
60 statement of basis and purpose. Agencies should identify which portions, if any,
61 they intend to be severable and explain how they relate to other portions in the
62 event a court holds some portions of the rule unlawful.
- 63 2. When severability is a potential issue on judicial review, and it has not been previously
64 briefed, courts should solicit the parties' views on severability.