



## **Recommendation 93-4**

### **Improving the Environment for Agency Rulemaking**

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(Adopted December 9, 1993)

Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming. The Administrative Procedure Act does not reflect many of the current realities of rulemaking. The APA's cumbersome "formal rulemaking" procedures are rarely used except in some adjudicative-type rate proceedings. Meanwhile, the APA's simple "informal rulemaking" procedures (set forth in 5 U.S.C. Sec. 553) have been overlain with an increasing number of constraints: Outside constraints imposed by Congress, the President, and the courts, and internal constraints arising from increasingly complex agency management of the rulemaking process.<sup>1</sup> As a result, many federal agencies, faced with unsatisfactory rulemaking accomplishments in recent years, have turned to alternatives such as less formal policy statements or adjudicative orders to achieve regulatory compliance.<sup>2</sup>

The Conference believes the environment for agency legislative rulemaking can be improved. This recommendation sets out a coordinated framework of proposals aimed at promoting efficient and effective rulemaking by addressing constraints on the current process that derive from a variety of sources. We present an integrated approach for improving the rulemaking environment in order to relieve agencies of unnecessary pressures and disincentives relating to rulemaking. We also identify desirable revisions of section 553 relating to legislative rulemaking. In doing so, this recommendation both presents new proposals and incorporates previous Conference recommendations.

#### **Presidential Constraints**

We continue to support presidential coordination of agency policymaking as beneficial and necessary.<sup>3</sup> We are concerned, however, that, unless properly focused, this additional review may impose unnecessary costs. All recent presidents have undertaken some level of review and

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<sup>1</sup> See generally McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L. J. 1385 (1991).

<sup>2</sup> See Conference Recommendation 92-2, "Agency Policy Statements," 1 CFR 305.92-2 (1993), which distinguished "legislative" rules, normally promulgated through notice-and-comment procedures, from interpretive rules and policy statements, which are exempt from such procedures. The present recommendation addresses legislative rulemaking.

<sup>3</sup> See Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking" 1 CFR 305.88-9 (1993) (applying Presidential oversight to both executive branch and independent agencies).



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coordination of agency rulemaking. Presidential review of rules, as undertaken under various executive orders applied by the Office of Management and Budget and other White House entities, has often required agencies to submit nearly all proposed and final rules to a review process in which the rules are screened and analyzed for consistency with presidential objectives. Some of these objectives have been incorporated into analytical requirements found in separate executive orders.<sup>4</sup> This screening process can unduly slow the entire system of rulemaking; it can inhibit the growth of the promising consensus-based alternative of negotiated rulemaking;<sup>5</sup> and it can create undesirable tensions between the reviewing entities and agency policymakers. While these analytical emphases can be rationalized individually, in the aggregate, they can result in redundant requirements, boilerplate-laden documents, circumvention, delays, and clutter in the Federal Register. Although specific presidential review policies have varied among Administrations, these recommendations set forth principles that the Conference believes generally should govern presidential review of rules.

We therefore recommend that presidential oversight and review be reserved for the most important rules and that the agencies be given clear policy guidance in a directive, approved by the President, specifying what is required. In addition, the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process. The review process itself should be open to public scrutiny -- following guidelines previously developed by the Administrative Conference.<sup>6</sup> The President's policy should encourage planning and coordination of regulatory initiatives, and early dialogue between agencies and the reviewing entity. To this end, the concept of a unified agenda of regulations is a useful tool and should be preserved. We also believe that additional non-APA analytical requirements should be kept to a minimum. The cumulative impact of such requirements on the rulemaking process should be considered before existing requirements are continued or additional ones imposed. We also believe it is useful to periodically reassess the continued viability and relevance of the various presidential directives.<sup>7</sup>

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<sup>4</sup> Among the mandates reflected in these executive orders are requirements that agency rule makers include cost-benefit estimates and analyses of the proposed and final rule's impact on federalism, family values, and future litigation, of whether it effects a "regulatory taking," and of other matters. The Conference of course takes no position on the merits of the values underlying these executive orders.

<sup>5</sup> See Conference Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR 305.82-4, 305.85-5 (1993); "Negotiated Rulemaking Act of 1990, 5 U.S.C. 561-69.

<sup>6</sup> See Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR 305.88-9 (1993) at 4

<sup>7</sup> While the most recent executive order of presidential review of rules generally reflects the views set forth in this recommendation, see Executive Order 12866, 58 Fed. Reg. 51735 (1993), the Conference takes no position on the specifics of that order.



## Legislative Constraints

Congress should similarly review and rationalize legislatively mandated rulemaking procedures. Specifically, we recommend that it refrain, as it generally has done since the 1970s, from imposing program-specific rulemaking requirements that go beyond the APA's basic notice-and-comment procedures.<sup>8</sup> Statutory "on-the-record" and "hybrid" rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination, or more stringent provisions for judicial review (in particular, use of the "substantial evidence" test instead of the normal "arbitrary and capricious" test), can be unnecessarily burdensome or confusing and should be repealed.<sup>9</sup> Although additional procedures can sometimes be beneficial -- see, e.g., Section 307 of the Clean Air Act (providing additional safeguards for rulemaking with significant economic and competitive effects)<sup>10</sup> -- they should be imposed only after careful review and attention by Congress to possible unintended consequences. Otherwise, such additions generally should be left to the discretion of individual agencies.<sup>11</sup>

Similarly, legislatively-imposed time limits on rulemaking, while understandable, can be unrealistic, resulting in either hastily-imposed rules or missed deadlines that undermine respect for the rulemaking process.<sup>12</sup> Legislative deadlines backed by statutory or regulatory "hammers" (mandating, for example, that the proposed rule or some other policy change<sup>13</sup> automatically take effect upon expiration of the deadline) are particularly undesirable and often counterproductive;<sup>14</sup> they are generally less desirable than the alternative of judicial enforcement of deadlines.<sup>15</sup>

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<sup>8</sup> See Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity to Comment in Informal Rulemaking," 1 CFR 305.76-3 (1993).

<sup>9</sup> See Conference Recommendation 80-1, "Trade Regulation Rulemaking Under the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act," 1 CFR 305.80-1 (1993).

<sup>10</sup> 42 U.S.C. 7607.

<sup>11</sup> See Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR 305.76-3 (1993).

<sup>12</sup> See Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR 305.78-3 (1993).

<sup>13</sup> See, e.g., Conference Recommendation 90-8, "Rulemaking and Policymaking in the Medicaid Program," 1 CFR 305.90-8 (1993).

<sup>14</sup> Where the "hammer" applied because of a failure to meet a deadline is that a proposed rule becomes effective, the anomalous result is that a policy that has withstood no public airing will be implemented.

<sup>15</sup> Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed." See 5 U.S.C. 706(1); *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).



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Finally, legislation ancillary to the APA that creates additional rulemaking impediments should be reconsidered. Statutes such as the Regulatory Flexibility Act, which requires a special analysis of virtually all rules' effects on small business, may have laudable intentions, but their requirements are often both too broadly applicable and not sufficiently effective in achieving their goals. If such requirements are imposed, Congress should focus them more narrowly, by, for example, confining their application to significant rules or particular categories of rules.

### **Judicial Constraints**

Other constraints on rulemaking that warrant similar reconsideration have been imposed through judicial review. The APA, in section 706, provides that agency rules may be set aside if they are “arbitrary or capricious,” represent an “abuse of discretion,” or are “otherwise not in accordance with law.” The evolving scope of judicial review of agency rules, along with the timing of much such review at the pre-enforcement stage, has contributed to what is sometimes an overly intrusive inquiry. This, in turn, has led agencies to take defensive measures against such review. While some tension is an inevitable adjunct of the process of judicial review, we believe that steps can be taken to lessen some of the burdens without loss of effective outside scrutiny of agency rules.

The tendency of some courts to require extra-APA procedures in rulemaking was arrested by the Supreme Court's *Vermont Yankee* decision in 1978.<sup>16</sup> Nevertheless, while the prevailing judicial interpretation of the arbitrary-and-capricious standard of review (which became known as the “hard look doctrine”) has promoted reasoned decision making, courts have not infrequently remanded rules on the basis of an agency's failure to respond adequately to comments, consider relevant factors, or explain fully the bases for its rule. Courts should be sensitive not to require greater justification for rules than necessary; a reasoned statement that explains the basis and purpose of the rule and addresses significant issues raised in public comments should be adequate.

Pre-enforcement review, expanded by the Supreme Court in the 1967 *Abbott Laboratories* cases,<sup>17</sup> endorsed by the Conference in various recommendations,<sup>18</sup> and codified in numerous rulemaking programs, has the virtue of settling legal issues early and definitively. When

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<sup>16</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

<sup>17</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967).

<sup>18</sup> See Conference Recommendation 74-4, “Pre-enforcement Judicial Review of Rules of General Applicability,” 1 CFR 305.74-4 (1993); Conference Recommendation 91-5, “Facilitating the Use of Rulemaking by the National Labor Relations Board,” 1 CFR 305.91-5 (1993).



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overused, however, pre-enforcement review can have the negative effect of inducing precautionary challenges to most rules and the raising of as many objections to a rule as possible, including somewhat speculative challenges pertaining to the rule's potential application.

Under the *Abbott Laboratories* standard, challenges to a rule are permitted where issues are appropriate for judicial review and where the impact on a challenger is direct and immediate. The Conference believes the *Abbott Laboratories* standard strikes a sensible balance, and that pre-enforcement challenges generally are appropriate where the administrative record provides a sufficient basis for the court to resolve the issues before it. Thus, a pre-enforcement challenge to a rule based on the procedures used in the rulemaking should normally be permitted. Pre-enforcement review that involves a facial challenge to a rule's substantive validity (whether because of a conflict with a statute or the Constitution, or because of the inadequacy of the facts or reasoning on which it is based) should also generally be heard.<sup>19</sup> In contrast, challenges to a rule because it might be applied in a particular way should normally be deferred until the rule has actually been applied.

Although prompt resolution of legal issues is to be encouraged, Congress should be cautious in coupling mandated time-limited pre-enforcement review with preclusion of review at the enforcement stage. Such time-limited review should be provided for only in the situations and conditions specified in Recommendation 82-7.<sup>20</sup> Where Congress does set time limits for pre-enforcement review, it should, in the interests of consistency, generally specify that pre-enforcement review should occur within 90 days of a rule's issuance. Current statutory specifications vary. There does not seem to be any reason for variation that outweighs the benefits of uniformity in this context.

Congress should also amend any existing statutes that mandate use of the "substantial evidence" test for reviewing legislative rules, by replacing it with the "arbitrary and capricious" test. The occasional introduction of the substantial evidence test in the rulemaking context has created unnecessary confusion; some courts apply it in a manner identical to that of the "arbitrary and capricious" test; others believe that it sets a higher standard. The Conference

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<sup>19</sup> A challenge based on the facial invalidity of the rule, in this context, would normally be directed at a requirement or course of action to which the agency has clearly committed itself.

<sup>20</sup> Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR 305.82-7 (1993), sets out criteria for when judicial review should be limited at the enforcement stage, and what kinds of issues should remain reviewable at that stage.



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believes the arbitrary and capricious test provides sufficient review in the informal rulemaking context.

The intensity of judicial review directly affects the rulemaking process. For example, the scope of review of agency statutory interpretations is governed by the deferential *Chevron* test, which requires affirmation if the agency's interpretation of an ambiguous statute is permissible.<sup>21</sup> On the other hand, when reviewing the reasonableness of an agency's policy and factual justifications for its rules, courts apply the stricter "hard look" doctrine.<sup>22</sup> Deferential review of the legal issue of statutory interpretation, coupled with the rigorous review of a rule's factual and policy underpinnings that the "hard look" doctrine specifies, has been criticized as anomalous. The Conference believes, however, the review standards can be harmonized by looking beyond the labels. That is, under both of these doctrines, courts are required to determine independently the limits of the agency's statutory authority and whether the factors the agency took into account in formulating the rule were permissible. Following that determination, courts properly defer to an agency's permissible reading of its statute and to its choice of inferences from the facts in making policy decisions. Courts would help make their review more consistent and predictable if they articulated more clearly this two-step approach. Both the *Chevron* and "hard look" doctrines would then be understood as including a searching review of the range of an agency's legally permissible choices (statutory, policy, and factual), combined with, in each instance, deference to the agency's reasonable selection among such choices, once the alternatives are determined to be within the permissible range.

Finally, in order to prevent additional litigation, courts should be encouraged to address certain issues that arise in many if not most reviews of rules. Reviewing courts should, for example, specify, to the extent feasible, which portions of the rule, if any, are to be set aside, vacated, stayed or otherwise affected by the decision in the case. They should seek to ensure that portions of a rule unaffected by a finding of illegality remain in effect, unless the rule expressly or impliedly indicates that the rule is inseverable. A reviewing court should also consider the extent to which its mandate will apply retroactively. In considering the effect to be given to its decision, the court should weigh the impact of the decision on parties not before the court, and recognize their interest in being heard or adequately represented prior to any ruling that adversely affects them.

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<sup>21</sup> *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>22</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (State Farm).





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### Amendment of the APA

As we approach the fiftieth anniversary of the APA, some of its rulemaking provisions need to be updated. Section 553(c), which does not now state a length of time for the comment period, should be amended to specify that a comment period of “no fewer than at least 30 days” be provided (although a good cause exception for shorter periods should be incorporated). This would relieve agencies of the need to justify comment periods that were 30 days or longer. The thirty-day period is intended as a minimum, not a maximum; agencies would still be encouraged to allow longer comment periods and to leave the record open for the receipt of late comments.<sup>23</sup> Section 553 should also specify that a second round of notice and comment is not required where the final rule is the “logical outgrowth” of the proposed rule, thus codifying generally accepted doctrine.<sup>24</sup> A provision requiring maintenance of a public rulemaking file should be incorporated into section 553, so that those who seek access to the file are not forced to rely on the Freedom of Information Act to obtain it.<sup>25</sup> (The content of such a file is discussed further below in connection with internal agency management initiatives.)

In addition, the requirement in section 553(c) of a statement of basis and purpose for the rule should be revised to require a “reasoned statement”<sup>26</sup> (deleting the “conciseness” provision), which includes a response to significant issues raised in the public comments.<sup>27</sup> These changes are designed to codify the salutary aspects of the case law on rulemaking, discourage insubstantial arguments and objections on review, and stem the tendency to require additional, more burdensome justifications.

Another long-overdue change in the Act is elimination of section 553(a)(2)'s exemption from notice-and-comment procedures for matters relating to “public property, loans, grants, benefits, or contracts.” As the Conference recognized as early as 1969, this “proprietary

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<sup>23</sup> See Conference Statement #7, “Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act,” 1 CFR 310.7 (para. 2).

<sup>24</sup> See *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974), in which the 1st Circuit originated the “logical outgrowth” test. It was subsequently embraced by other circuits, particularly the D.C. Circuit. See *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991); *International Union, United Auto, Aerospace and Agr. Implement Workers of America v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991); *American Medical Association*, 887 F.2d 760 (7th Cir. 1989); *NRDC v. USEPA*, 824 F.2d 1258 (1st Cir. 1987); *United Steelworkers v. Schuykill Metal Corp.*, 828 F.2d 314 (5th Cir. 1987); *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2nd Cir. 1986); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985).

<sup>25</sup> Statement #7, *supra* n. 23, at 4.

<sup>26</sup> *State Farm*, *supra* n. 22, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

<sup>27</sup> Conference Statement #7, *supra* n. 23, at 5.



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exemption” is an anachronism.<sup>28</sup> The exemption for “military or foreign affairs function[s]” in section 553(a)(1) should be narrowed so that all but secret aspects of those functions are open to public comment.<sup>29</sup>

### Internal Agency Management Initiatives

Rulemaking is not just a product of external constraints. The agency’s own processes for developing rules and reviewing them internally affect the rulemaking environment. Thus, agency management initiatives can have a significant impact on the effectiveness and efficiency of rulemaking. The Conference recommends a number of steps agency managers can take to improve their internal processes.

Senior agency staff should develop management strategies to set priorities and track agency rulemaking initiatives.<sup>30</sup> Agencies should seek to involve the presidential oversight entity in the rulemaking process as early as feasible, in order to reach agreement on the significance of rules in the developmental stage, to provide greater coordination, and to speed final oversight review. Agencies should also review their existing systems for developing and reviewing regulations, to determine where problems and bottlenecks are occurring. They should seek to achieve more rapid internal clearances of proposed and final rules, and to develop reasoned analyses<sup>31</sup> and responses to significant issues raised in public comments. They should also take steps to manage the rulemaking file (and associated requests for access to it).<sup>32</sup> The file should, to the extent feasible, contain notices of the rulemaking, all written<sup>33</sup> comments submitted to the agency, and copies or an index of all written factual material, studies, or reports substantially relied on or seriously considered by the agency in formulating its proposed and final rule (except insofar as disclosure is prohibited by law). Materials substantially relied on or seriously considered need not encompass every study, report, or other document that the

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<sup>28</sup> See Conference Recommendation 69-8, “Elimination of Certain Exemptions From the APA Rulemaking Requirements,” 1 CFR 305.69-8 (1993).

<sup>29</sup> See Conference Recommendation 73-5, “Elimination of the ‘Military or Foreign Affairs Function’ Exemption from APA Rulemaking Requirements,” 1 CFR 305.73-5 (1993).

<sup>30</sup> See Conference Recommendation 87-1, “Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration,” 1 CFR 305.87-1 (1993).

<sup>31</sup> See Conference Recommendation 85-2, “Agency Procedures for Performing Regulatory Analysis of Rules,” 1 CFR 305.85-2 (1993); Conference Recommendation 88-7, “Valuation of Human Life in Regulatory Decision Making,” 1 CFR 305.88-7 (1993).

<sup>32</sup> Computerized access should be made available, preferably in a uniform system government-wide. See Conference Recommendation 88-10, “Federal Agency Use of Computers in Acquiring and Releasing Information,” 1 CFR 305.88-5 (1993).

<sup>33</sup> “Written” includes documents in electronic form.





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agency may have in its files or has otherwise used, but they should include those that exerted a significant impact on the agency's thinking, even if they represent an approach that the agency ultimately did not accept.

Agencies should also consider innovative methods for developing and getting public input on rules. Agencies should use advisory or negotiated rulemaking committees where appropriate to improve the quality and acceptability of rules.<sup>34</sup> They should also consider the use of “direct final” rulemaking where appropriate to eliminate double review of noncontroversial rules. Direct final rulemaking involves issuing a rule for notice and comment, with an accompanying explanation if the agency receives no notice during the comment period that any person intends to file an adverse comment, the rule will become effective 30 days (or some longer period) after the comment period closes.

### **Recommendation**

To improve the environment for agency legislative rulemaking, the President, Congress, and the courts should take steps to eliminate undue burdens on agency legislative rulemaking; Congress should update the Administrative Procedure Act's rulemaking provisions; and agencies should review their internal rulemaking environment and, where appropriate, implement internal management initiatives aimed at improving the effectiveness and efficiency of their efforts.

#### **I. Presidential Oversight<sup>35</sup> of Rulemaking**

A. The President's program for coordination and review of agency rules should be set forth in a directive that is reviewed periodically. The program should be sensitive to the burdens being imposed on the rulemaking process, and implementation of the program should ensure that it does not unduly delay or constrain rulemaking. The President should consider the

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<sup>34</sup> Any government-wide policy concerning the use of advisory committees should be consistent with their use as part of the process of negotiated rulemaking.

<sup>35</sup> The recommendations contained in this section apply to oversight of both executive and independent agencies. The Conference has previously recommended that presidential review of rulemaking apply to the independent agencies to the same extent it applies to the rulemaking of the Executive Branch departments and agencies. See Conference Recommendation 88-9, “Presidential Review of Agency Rulemaking,” 1 CFR 305.88-9 (1993). The term “presidential oversight entity,” as used herein, is that part of the Executive Office of the President delegated responsibility for review and oversight of agency rulemaking.



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cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones.<sup>36</sup>

B. The President's directive, as well as the explanations provided and the procedures followed by the presidential oversight entity, should, insofar as practicable:

1. Promote dialogue and coordination between the oversight entity and rulemaking agencies in the early identification and selection of rules warranting application of the review process;
2. Set forth the relevant analytical requirements that the oversight entity should apply to agency rulemaking, and provide interpretive guidance to assist agencies in complying with these requirements;
3. Ensure appropriate expedition and openness in the process, in accordance with Conference Recommendation 88-9;
4. Support a process for planning regulatory initiatives and tracking rule development; and
5. Encourage and support agency efforts to use consensual processes such as negotiated rulemaking.

### **II. Congressional Structuring of Rulemaking**

A. Section 553 of title 5, United States Code, which established the framework for legislative rulemaking, has operated most efficiently when not encumbered by additional procedural requirements. Congress generally should refrain from creating program-specific rulemaking procedures or analytical requirements beyond those required by the APA. When Congress determines additional procedures beyond those required by section 553 are justified by the nature of a particular program, such procedures should be focused on identified problems and, where possible, adopted incrementally or after experimentation.<sup>37</sup> In addition, Congress should

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<sup>36</sup> In recommending review of analytical requirements beyond those contained in the APA, we express no position on the substantive policies being mandated.

<sup>37</sup> See, for example, the development of more specific, but not necessarily more burdensome, procedures for EPA rulemaking that has significant economic and competitive effects. See 42 U.S.C. Sec. 7607 (Sec. 307 of the Clean Air Act). See also Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR 305.76-3 (1993), which encourages agency experimentation with use of oral procedures beyond simple notice and comment in some circumstances.



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repeal formal (“on-the-record”) or other adjudicative fact-finding procedures in rulemaking in any existing statutes mandating such procedures.<sup>38</sup>

B. In general, Congress should not legislate time limits on rulemaking, but should instead rely on judicial enforcement of prompt agency action under section 706(1) of the APA.<sup>39</sup> However, if Congress determines that a deadline is appropriate, it also should ensure the agency has sufficient resources to support the required rulemaking effort without distorting the agency's other regulatory functions. If Congress further determines a default rule is necessary where an agency does not meet a deadline, it should specify the terms of that rule and, in particular, should not impose “regulatory hammers” that would cause the agency's proposed rules to take effect automatically.

C. Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues.<sup>40</sup> If Congress nonetheless determines that such analytical requirements are necessary, Congress should structure its requirements more narrowly (e.g., by confining their application to the most significant rules or to rules likely to be affected by the stated concern).

### III. Timing and Scope of Judicial Review

Congress and the courts generally should be sensitive to the impact of judicial review on agency rulemaking and should seek to simplify, clarify, and harmonize provisions for judicial review of rules.

#### *A. Congress and the Courts*

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<sup>38</sup> Conference has recommended against the mandated use of cross-examination and other “adjudicative” procedures for agency fact-finding in rulemaking. See, e.g., Conference Recommendation 79-1, “Hybrid Rulemaking Procedures of the Federal Trade Commission,” 1 CFR 305.79-1 (1993). The Conference recognizes, however, that more formal procedures may be appropriate for ratemaking based on party-related facts. See *United States v. Florida East Coast RR*, 410 U.S. 224 (1973). Congress may also wish to consider whether less formal hybrid processes may be useful in contexts currently requiring formal rulemaking.

<sup>39</sup> This is not a comment on the legitimacy of congressional directives in this regard, but on their impracticality. On the other hand, agency self-imposed deadlines are encouraged, see V(D), below. For more detailed advice on time limits, see paragraph 5 of Conference Recommendation 78-3, “Time Limits on Agency Action,” 1 CFR 305.78-3 (1993).

<sup>40</sup> See, e.g., the Regulatory Flexibility Act of 1980. The Conference takes no position on the substantive issues the Act seeks to address. Insofar as possible, however, such concerns are more appropriately included in the President's oversight guidelines. See I(B)(2) above.



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In determining whether pre-enforcement challenges to rules are appropriate, courts have traditionally evaluated “both the fitness of the issues for judicial decision and the hardship to the parties of withholding its consideration.”<sup>41</sup> Adherence to this standard benefits both agencies and those affected by agency rules. Congress generally should authorize and courts should allow pre-enforcement challenges where the administrative record is a sufficient basis for resolving the issues. Thus, pre-enforcement challenges to a rule based on the procedures used in the rulemaking or on the asserted substantive invalidity of the rule, however it would be applied, should normally be permitted. Claims of substantive invalidity would include facial challenges based on statutory or constitutional grounds, or asserting the inadequacy of the facts or reasoning underlying the rule. Challenges to a rule on the basis that the rule might be applied in a particular way should normally be deferred until the application seems likely or has occurred.

### *B. Congress*

1. Congress should be cautious in mandating time-limited pre-enforcement review coupled with preclusion of review at the enforcement stage, and should rely on time limits only in the situations and conditions specified in Recommendation 82-7.<sup>42</sup> Congressional time limits on pre-enforcement review should be understood to bar later challenges in the enforcement context only to the extent specified by Congress. Where Congress mandates a time limit on pre-enforcement review, it generally should specify that such review be requested within 90 days of the issuance of the rule.<sup>43</sup> It should also provide that pre-enforcement review cases be directly reviewable in the courts of appeals, and that a stay or partial stay of the rule's effectiveness ordinarily be issued only on the demonstration of likelihood of success on the merits and the prospect of significant private harm if the rule is permitted to take effect.

2. The standards set out in section 706(2)(A) of the APA's judicial review provisions should apply in all cases involving review of rules. Specifically, Congress should not provide for the use of the “substantial evidence” test for agency rules. It should conform existing statutes to this standard by deleting the use of the “substantial evidence” test for review of agency rules.

### *C. Courts*

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<sup>41</sup> *Abbott Laboratories v. Gardner*, supra n. 17, 387 U.S. at 149.

<sup>42</sup> See Conference Recommendation 82-7, “Judicial Review of Rules in Enforcement Proceedings,” 1 CFR 305.82-7 (1993).

<sup>43</sup> Congress should likewise reevaluate existing statutes for conformity with this approach.



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1. In articulating the doctrines used in the judicial review of rulemaking, reviewing courts should more clearly harmonize the deferential *Chevron* doctrine, applied in reviewing agency interpretation of its statutory authority, with the “hard look” doctrine, used in examining an agency's justification for its rule. Courts, in applying these doctrines, should recognize that both the *Chevron* and “hard look” tests call for a searching review of the range of factors or permissible choices that may be considered by the agency, and require deference to agency application of those factors once they are shown to be legally appropriate.

2. When reviewing an agency's explanation for its rule, courts should consider the context of the entire proceeding and concern themselves principally with whether the agency's overall explanation and analysis is reasonable, including its response to the significant issues raised in public comments.

3. In reviewing challenges to agency rules, courts should, to the extent feasible and after taking into account the effect of the decision on affected persons not before the court, consider: (a) Whether any portion of a rule unaffected by a finding of illegality should remain in full force and effect; (b) which portions of the challenged rule, if any, are to be set aside, vacated, stayed, or otherwise affected by the court's decision in a case; and (c) the extent to which the court's mandate should apply retroactively.

4. Courts should continue, where appropriate, to consider whether agency action in a rulemaking is “unreasonably delayed.”<sup>44</sup>

### **IV. Amendments to the APA's Legislative Rulemaking Provisions**

Congress should update the APA and eliminate outmoded provisions. It should codify court decisions that have increased the effectiveness of public participation in the rulemaking process. In particular, Congress should consider amending section 553 of the APA to:

A. Eliminate the exemption (section 553(a)(2)) for rules relating to public property, loans, grants, benefits or contracts, and delete the exemption (section 553(a)(1)) of military and foreign affairs matters, except for secret matters;<sup>45</sup>

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<sup>44</sup> See notes 15 and 39, *supra*.

<sup>45</sup> See Conference Recommendation 69-8, “Elimination of Certain Exemptions From the APA Rulemaking Requirements,” 1 CFR 305.69-8 (1993), and Conference Recommendation 73-5, “Elimination of the ‘Military or Foreign Affairs Function’ Exemption from APA Rulemaking Requirements,” 1 CFR 305.73-5 (1993). The latter recommendation urged eliminating the APA's categorical exemption for matters pertaining to the military or



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B. Specify a comment period of “no fewer than 30 days” (section 553(c)),<sup>46</sup> provided that a good cause provision allowing shorter comment periods or no comment period is incorporated, and codify the doctrine holding that a second round of notice and comment is not required if the final rule is a “logical outgrowth” of the noticed proposed rule;

C. Require establishment of a public rulemaking file beginning no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier;

D. Restate the “concise” statement of basis and purpose requirement (Sec. 553(c)) by codifying existing doctrine that a rule must be supported by a “reasoned statement,” and that such statement respond to the significant issues raised in public comments.

To the extent permitted by law, agencies should adopt these proposed policies pending Congressional action.

### **V. Agency Management Initiatives**

In order to improve their internal rulemaking environments, agencies should develop management techniques to ensure efficient and effective administration of rulemaking. Such techniques should include:

A. Systematically setting priorities at the highest agency levels and tracking rulemaking initiatives, including identifying clearly who has the authority to ensure agency schedules and policies are followed;

B. Coordinating with the presidential oversight entity on the identification of rules warranting review as early in the process as is feasible, and establishing internal review procedures at the highest levels to ensure compliance with presidential analytical requirements;

C. Reviewing the agency's existing system for developing and reviewing regulations, to determine where problems and bottlenecks are occurring, and to improve and streamline the process;

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foreign affairs function. It does recognize, however, that a modified exemption may be appropriate for matters “specifically required by executive order to be kept secret in the interest of national defense or foreign policy.”

<sup>46</sup> The 30-day period is intended as a minimum, not a maximum. Agencies are encouraged to use longer periods for public comment.





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D. Achieving timely internal clearances of proposed and final rules, using, where feasible, publicly announced schedules for particular rulemaking proceedings;

E. Managing rulemaking files, so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review. The rulemaking file should, insofar as feasible, include (1) all notices pertaining to the rulemaking, (2) copies or an index of all written<sup>47</sup> factual material, studies, and reports substantially relied on or seriously considered by agency personnel in formulating the proposed or final rule (except insofar as disclosure is prohibited by law), (3) all written comments submitted to the agency, and (4) any other material required by statute, executive order, or agency rule to be made public in connection with the rulemaking.<sup>48</sup>

F. Making use, where appropriate, of negotiated rulemaking and advisory committees;

G. Considering innovative methods for reducing the time required to develop final rules without eliminating the opportunity for consideration and comment;

H. Taking steps to ensure that proposed rules are acted on in a reasonably timely manner or withdrawn; and

I. Evaluating and reconsidering existing rules and initiating amendments and repeals where appropriate.

### Citations:

59 FR 4670 (February 1, 1994); correction at 59 FR 8507 (February 22, 1994)

\_\_ FR \_\_\_\_ (2011)

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<sup>47</sup> "Written" includes documents in electronic form.

<sup>48</sup> See Conference Statement #7, 1 CFR 310.7 (1993), "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act."