April 25, 2016

To: ACUS Rulemaking Committee
From: Ronald M. Levin
Re: APA Definition of "Rule"

This is a response to Cynthia Farina's memorandum of April 18, 2016, regarding the ABA's proposals, in the recently adopted House of Delegates Resolution 106B, to revise the Administrative Procedure Act. Specifically, I write in defense of ABA proposal #4, which would revise the APA definition of "rule," 5 U.S.C. § 551(4), by striking the words "or particular" and "and future effect" from the introductory clause. (Proposal #4 also endorses other minor drafting changes to which Cynthia does not object.) Cynthia calls the proposal "sneaky," which is a pretty harsh appraisal. I respectfully submit that a better appraisal would be "well justified and about seventy years overdue." Complaints about this ineptly drafted definition have been prominent since 1947, and ACUS has already been on record in favor of revising it since 1973. It should adhere to that position.

It's true that the ABA background report on 106B did not discuss the justifications for #4 at length. However, I wrote a full defense of the definitional changes in an article that I would commend to the attention of Cynthia and anyone else who may take an interest. Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule*," 56 Admin. L. Rev. 1077 (2004). Without rehearsing the entire analysis here, I will reply briefly to her critique.

First, with regard to her critique of the deletion of "or particular," I agree with her that the reason Congress inserted that language was to "acknowledge[e]" that the actions listed in the last half of the definition, such as ratemaking for a single company, were to be treated as rulemaking for APA purposes. (In concrete terms, this means that, in *formal* proceedings, such actions are not governed by separation of functions, evidence can be submitted in written form, and a recommended decision by the ALJ is optional.) However, the insertion was a blunder. It was unnecessary, because the last half of the definition would *itself* be sufficient to ensure that such actions would be treated as rulemaking. Moreover, the idea of generally defining statements of "particular applicability" as rules is completely counterintuitive. Under a literal reading of the definition, an NLRB bargaining order, an ICE deportation order, or an FTC cease-and-desist order directed at a single company is rulemaking, because it is a statement of (general or) particular applicability that implements law or policy (and also has exclusively future effect). Surely Cynthia doesn't believe these implications can be correct. That's because she, like everyone else, justifiably ignores what the plain language of § 551(4) says.

If the words "or particular" and "and future effect" were deleted from the current § 551(4), the APA would define a "rule" as

> the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices,

> facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

I see no room for doubt that this revised definition would, indeed, continue to treat individualized ratemaking, etc., as rulemaking. The last clause of the revised definition would leave no ambiguity on that score. I suppose the Conference could recommend changing the opening words of that clause to "and *also* includes," but to me that change would be superfluous.

As for the "future effect" language of § 551(4), Cynthia's main point seems to be this language isn't doing any harm. I tried to show in my article that it has indeed caused mischief when jurists have taken it seriously. I mentioned Justice Scalia's concurring opinion in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the panel opinion below in that same case, and Justice Harlan's separate opinion in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Admittedly, the phrase "and future effect" isn't causing *much* harm – but, again, that's because everyone ignores it. If administrative lawyers did adhere to it, a retroactive regulation (issued under express legislative authority, as *Georgetown* requires) could be promulgated without notice and comment procedure, because the APA prescribes that procedure only for "rules." Indeed, such an agency action would have to be classified as an "order," because the APA defines an order as a final disposition "in a matter other than rule making." 5 U.S.C. § 551(6).

In summary, one argument for ABA proposal #4 is that the present text invites confusion and mischief from anyone who reads it at face value. To me, however, the best argument for this technical amendment is that it would repair a drafting error and bring the definition into conformity with ordinary usage.