ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# Severability in Agency Rulemaking

~~Minimizing the Cost of Judicial Review~~

Commented [CMA1]: The Committee on Judicial Review voted to change the title of this Recommendation as noted.

**Committee on Judicial Review**

**Proposed Recommendation | June 15, 2018**

**Proposed Amendments**

**This document displays manager's amendments (with no marginal notes) and an additional amendment from Conference members (with the source shown in the margin).**

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

In recent years, as administrative rules have become more complex,[2] some agencies have started including provisions in some of their rules stating that if portions of the rule are held unlawful in court, other portions not held unlawful should be allowed to go into or remain in

[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 (Michael E. Herz et al. eds., 2d ed. 2015).

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

effect.[3] To date, only a handful of agencies have used these severability clauses,[4] yet many other agencies issue rules that may be good candidates for considering the possibility of severability.

This Recommendation suggests best practices for agencies in addressing severability in a rulemaking. Addressing severability is not appropriate in every rulemaking. Indeed, if agencies include severability clauses without a reasoned discussion of the rationale behind them and how severability might apply to a particular rule, the courts will be less likely to give them much weight. By contrast, addressing severability can be particularly valuable when an agency believes that some portions of its proposed rule are likely to be more vulnerable in court than others, but that the less vulnerable portions of the rule can function independently and should go into effect even if the more controversial portions are held unlawful.

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

General principles of administrative law suggest that the agency's views on severability can best be defended to the courts when: (1) the agency's initial views are included in the text of the proposed rule and ~~; (2)~~ the agency's initial rationale for severability is explained in the preamble to the proposed rule; (2) ~~and~~ these initial positions are made available for comment by

[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.

[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~~ Broads. 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).

interested parties; (3) the agency addresses its determination of severability in the text of the final rule; (4) the agency addresses the rationale for severability in the statement of basis and purpose accompanying the final rule (in the same manner as any other substantive policy issue in the rulemaking); and (5) the agency explains how specific portions of the rule would operate independently. While courts may also be willing to consider the agency's view on severability as expressed in agency briefs or at oral argument,[6] courts seem less likely to agree with the agency if the issue of severability comes up for the first time in litigation because of "'the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel.'"[7]

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

A separate but related question is how parties to a challenge to an agency rule should address the question of severability during litigation. Litigants may be reluctant to address the issue of severability in their briefs because: (1) it is often not clear in advance which portions of a rule a court may hold unlawful and on what basis; or (2) they may fear that addressing

[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).

[7] Nat'l Treasury ~~Employees~~ Emps. 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~~ Cty. 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).

severability would suggest weakness in their positions on the merits.[9] Courts should therefore invite the parties' views on severability at an appropriate time and manner.

## RECOMMENDATION

1. Early in the process of developing a rule, in addition to other programmatic considerations, agencies that anticipate litigation should consider whether a rule is divisible into portions that could and should function independently if other portions were to be held unlawful on judicial review.
    a. If the agency intends that portions of the rule should continue in effect even ~~though~~ if other portions ~~have been~~ are later held unlawful on judicial review, it should draft the rule so that it is divisible into independent portions that reflect this purpose.
    b. In order to provide members of the public an opportunity for comment, agencies should address the issue of severability in the text of the proposed rule and provide a reasoned explanation for the proposal.
    c. Agencies should likewise address their determination of severability in the text of the final rule and provide a reasoned explanation for that determination in the statement of basis and purpose. Agencies should identify which portions, if any, they intend to be severable and explain how they relate to other portions in the event a court holds some portions of the rule unlawful.
2. When severability is a potential issue on judicial review, and it has not been previously briefed, courts should solicit the parties' views on severability.

[9] Charles W. Tyler & E. Donald Elliott, Tailoring the Scope of Judicial Remedies in Administrative Law ~~Mitigating the Costs of Remedying Legally Infirm Rules 25~~22 (~~Feb~~May. ~~27~~4, 2018) (~~draft~~ report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/tailoring-scope-judicial-remedies-administrative-law-final-report. ~~https://www.acus.gov/report/mitigating-costs-remedying-legally-infirm-rules-draft-report.~~