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Administrative Conference of the United States

The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements

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Administrative Conference of the United States

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I. INTRODUCTION

The Administrative Procedure Act, 5 USC §553, contains the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section does provide for several specific exceptions. Under subsection (b)(A), for example, the requirements for notice and comment do not apply "to interpretative rules, general statements of policy, or **rules of agency organization, procedure, or practice** . . . ." An even broader exception is provided for "a matter relating to agency management or personnel . . . . "[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule[3] has no clear answer. The issue is currently in a state of flux, in part as a result of the decision of the Court of Appeals for the District of Columbia Circuit in *Air Transport Association v. Department of Transportation*.[4] In that case, the court held that rules establishing the procedures for adjudicatory hearings under the Federal Aviation Administration's administrative civil penalty program were not exempt as procedural rules from the APA's notice-and-comment requirements. Stating that the procedural rule exception applied to "housekeeping" rules and was reserved for rules organizing an agency's "*internal* operations",[5] the court held that the FAA regulations "encoded a substantive value judgment" by "substantially affect[ing] a civil penalty defendant's *right to an administrative adjudication*."[6] Abjuring the distinction between "procedure" and "substance," the court distinguished instead among "rules affecting different *subject matters* -- 'the rights or interest of regulated' parties, . . . and agencies' 'internal operations'. . . ."[7] A strong dissent decried the majority's "abandon[ment]" of the "procedural/substantive" dichotomy, and instead proposed a test of whether the rule regulates "primary conduct."[8] The Supreme Court accepted the government's petition for *certiorari* in the case, but subsequently vacated the lower court's decision and remanded it for consideration of the issue of mootness. Thus, the questions remain unsettled.[9]

The Conference has already addressed the scope of most of the other major exceptions to the APA rulemaking requirements.[10] Because the procedural rule exception is increasingly a subject of

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[1]5 USC §553 (a)(2). This provision exempts such rules not only from notice-and-comment requirements, but from all of section 553, including its requirement to publish with a statement of basis and purpose.

[2]*Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

[3]The term "procedural rule" as used here refers generally, as do most courts that have considered the subject, to "rules of agency organization, procedure or practice."

[4]900 F.2d 369 (D.C. Cir. 1990), *cert. granted*, 111 S.Ct. 669 (1991), *judgment vacated and remanded*, 111 S. Ct. 944 (1991). The case was remanded to the court of appeals for a determination of mootness. The court of appeals vacated the opinion and dismissed the petition for review as moot. 1991 U.S. App. Lexis 11400 (June 4, 1991).

[5]*Id.* at 376. (Emphasis in original.)

[6]*Id.* (Emphasis in original.)

[7]*Id.* at 378.

[8]*Id.* at 382 (Silberman, J.).

[9]While the opinion was vacated and the case dismissed on mootness grounds, the D.C. Circuit's decision on the merits may continue to have precedential weight. *See, e.g., Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) (decision vacated on other grounds continues to have precedential weight on other issues in absence of contrary authority); *Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 & n.5 (D.C. Cir. 1990); *Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir.), *cert. denied*, 110 S. Ct. 81 (1989) ("although vacated, the decision stands as the most comprehensive source of guidance available on the . . . questions at issue in this case"); *U.S. ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 107 S. Ct. 3240 (1987) (decision vacated by the Supreme Court remains persuasive precedent so long as the Court did not reject its underlying reasoning).

[10]Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR §305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR §305.73-5; Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR §305.83-2.

controversy, this would be an appropriate time for the Conference to consider filling this gap in its recommendations.

II. THE APA REQUIREMENTS

As noted, section 553 (b)(A) of the APA exempts from notice-and-comment requirements "rules of agency organization, procedure or practice." The statute does not define those terms explicitly. It does, however, in a separate subsection of section 553, exempt from the entire section rules involving "matters of agency management or personnel."[11] Because agency "housekeeping rules" would seem to fall within this latter, broader exemption for rules involving agency management, it does not seem consistent with either logic or grammar to limit the procedural rule exemption to housekeeping rules.

Furthermore, the Attorney General's Manual on the APA, a document whose importance in understanding the APA has long been recognized, treats "rules of agency organization, procedure, or practice" as coextensive with the rules required to be published in section 552(a)(1), stating: "[T]he rules of organization and procedure which an agency must publish pursuant to section [552](a)(1) and (2) are not ordinarily subject to the requirements of section [553](a) and (b)."[12] Section 552(a), at the time it was enacted, applied to:

> (1) descriptions of [an agency's] central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; [and] (2) statements of the general course and method by which its functions are channeled and determined, including the *nature and requirements of all formal or informal procedures available* as well as forms and instructions as the scope and contents of all papers, reports, or examinations.[13]

Thus, as originally enacted and interpreted, the APA's procedural rule exemption appears to cover a much broader range of rules than only "housekeeping" rules. Procedural rules of the type at issue in the *ATA* case (i.e., rules governing adjudicatory procedures) would seem to fit within the terms of the statutory exemption.

III. JUDICIAL INTERPRETATIONS

There are a relatively small number of significant cases on the scope of the procedural rule exemption, and they are not particularly consistent. The problem in this area, as in other areas of law, is that the boundaries of what is procedure and what is substance are not always clear. Most courts have recognized the difficulty of the analysis, and some courts, such as the D.C. Circuit in the *ATA* case, have substituted other (and to us, nonstatutory) tests. Some of the different ways that courts have sought to analyze the issue are summarized below.

A. "Procedural means procedural"

A literal analysis of whether a particular rule comes within the "procedural rule" exemption is to determine whether it addresses some sort of agency procedure. The Ninth Circuit took this approach in *Southern California Edison Co. v. FERC*,[14] when it reviewed FERC rules establishing procedures for approving certain types of rates. Rejecting an argument that the rules should be subject to notice-

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[11] 5 USC §553(a)(2).

[12] Attorney General's Manual on the Administrative Procedure Act (1947) at 30, *reprinted in* ACUS FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK. Sections 553(a) and (b) contain the requirements for notice and for opportunity for public comment in informal rulemaking.

[13] Emphasis added. Section 552 has since been amended. The original provision in section 3 of the APA (section 552) is, however, instructive in determining the original intention.

[14] 770 F.2d 779 (9th Cir. 1985).

and-comment requirements because they had a "substantive effect," the court held that the exemption extended to "technical regulation of the form of agency action and proceedings." Since the regulations "pertain[ed] to the procedural aspects of FERC's approval of . . . rates: intervention, requests for refunds for interim rates and for final confirmation and approval,"[15] the court found that they fell within the APA exemption.

B. "Substantial impact"

Other courts, recognizing that substance can wear a procedural face in some circumstances, and that certain rules that appear or are called procedural can affect substantive rights, have developed a "substantial impact" standard for determining whether a rule should be exempt from notice and comment. This test, which apparently first surfaced in *National Motor Freight Association v. United States*,[16] would subject a rule otherwise covered by one of the APA exemptions to notice-and-comment procedures if it has a "substantial impact" on the regulated community or their rights and interests.[17] The focus of this test is on the *magnitude* of a rule's impact, not on the *nature* of that impact. If that magnitude passed some undefined threshold, a procedural rule would required notice and comment prior to promulgation.[18] Although several courts have used the substantial impact test, it has generally lost favor, at least as the sole criterion for determining whether notice and comment should be required, although it has still not been completely abandoned.[19]

C. "Encoding a substantive value judgment"

Perhaps recognizing that a test based totally on magnitude of impact is unsatisfactory in analyzing whether a rule was a "procedural rule," several D.C. Circuit cases have used a test that involves a determination whether the particular rule "encodes a substantive value judgment." This test originated in *American Hospital Association v. Bowen*.[20] The court there noted that exceptions to the notice-and-comment requirements are narrow ones, and should be confined narrowly in light of the purposes of notice and comment. Those purposes are "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies" and to "assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."[21] In the context of the procedural rule exception, the court noted a shift from the "substantial impact" test toward determining whether "the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[22]

In *AHA*, the court approved as "procedural" a number of agency directives and transmittals relating to the operation of the Medicare program's peer review organization system. These documents contained a "wide variety of instructions, guidelines and procedures covering aspects of the PRO program."[23] Many of them related to enforcement strategy, and contained fairly specific standards for what kinds of activity by hospitals would result in PRO review.[24] The court did not

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[15] *Id.* at 783.

[16] 268 F. Supp. (D.D.C. 1967)(three-judge panel), *aff'd mem.*, 393 U.S. 18 (1968).

[17] E.g., *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979).

[18] The test has also been applied in the context of interpretive rules, *e.g., Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

[19] In fact, the majority in *ATA* noted that the FAA rules of practice "substantially affect a civil penalty defendant's right to an administrative adjudication." 900 F.2d at 376.

[20] 834 F.2d 1037 (D.C. Cir. 1987).

[21] *Id.* at 1044, quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), and *Guardian Federal Savings & Loan Corp. v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978).

[22] *Id.* at 1047. The court gave no citation for the origin of this test.

[23] *Id.* at 1043.

[24] The court noted that agency enforcement plans warrant considerable deference. *Id.* at 1050.

explain how the "encodes a substantive value judgment" test it had just developed should be applied, but rather simply concluded that new substantive burdens would not result from the rules.

Shortly thereafter, the D.C. Circuit applied the *AHA* "encoding" test, but with a different result, in *Reeder v. FCC*.[25] That case involved FCC procedures for allowing radio stations to request channel upgrades. The court held that amended procedures, which related to the timing of applications, had the effect of changing the substantive criteria for substituting (and thereby upgrading) channel allotments assigned to license holders. Because the "procedures" were determined to have a substantive effect, the court insisted on notice and comment.

The *Air Transport Association*, or *ATA* case, discussed above, is perhaps the most recent "encoding" case. As described, the case involved the FAA's rules of practice for the formal adjudications of administrative civil penalties in cases involving violations of air safety regulations. The rules addressed such matters as discovery, briefing, and evidentiary issues. While the content of some of the rules was fairly controversial, they were clearly a set of practice rules relating to the enforcement proceedings themselves. The rules did not address the air safety regulations that were being enforced through civil penalties.

Nonetheless, the court eschewed any attempt to distinguish whether the rules were "procedural" or "substantive," opting instead for what it termed a "functional analysis."[26] The court's primary ground for holding that the rules at issue fell outside of the exemption was that "they substantially affect a civil penalty defendant's *right to an administrative adjudication*."[27] The court held that the FAA, in drafting these rules of practice, made choices concerning what process civil penalty defendants were due. "Each one of these choices 'encode[d] a substantive value judgment' . . . on the appropriate balance between a defendant's *rights* to adjudicatory procedures and the agency's interest in efficient prosecution."[28] The court stated that in using the terms "rules of agency organization, procedure or practice," Congress "intended to distinguish not between rules affecting different *classes of rights*--'substantive' and 'procedural'--but rather to distinguish between rules affecting different *subject matters*--'the rights or interests of regulated' parties, . . . and agencies' 'internal operations.'"[29]

D. "Regulating primary conduct"

The dissent in the *ATA* case strongly disagreed with the appropriateness of eliminating the procedure/substance distinction. While recognizing its difficulty of application, the dissent noted that it was Congress that had established the distinction, and that Congress did not say that rules become less procedural simply because they are significant.

The dissent proposed the following distinction as consistent with the APA: "If a given regulation purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute, it is not procedural, it is substantive."[30] Recognizing that agency rules must fall somewhere on a continuum from procedural to substantive, the dissent took the view that the FAA's rules of practice, "which deal with enforcement or adjudication of claims of

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[25]865 F.2d 1298 (D.C. Cir. 1989).

[26]900 F.2d at 376.

[27]*Id.* (emphasis in original). The court cited as its authority for this rationale its earlier opinion in *National Motor Freight Traffic Ass'n v. United States*, *supra* n.16. The *ATA* court cited it for the proposition that a rule that affects the right to avail oneself of an administrative adjudication is not within the express terms of section 553(b)(A). However, *National Motor Freight* involved a situation where the agency created a reparations scheme without any statutory authorization. Moreover, the language quoted by the *ATA* case was not part of *National Motor Freight's* holding; it was simply an observation that a shipper's right to avail itself of the reparation proceeding was not trivial "simply because it is optional." 268 F.Supp. at 96.

In the *ATA* case, there was express statutory authority for administrative adjudication.

[28]900 F.2d at 376 (emphasis in original).

[29]*Id.* at 378. The court also held that the FAA could not rely on the "good cause" exemption because (1) a statutory deadline does not automatically confer good cause, and (2) the agency's "own delay" in taking action undercut its invocation of that exemption. *Id.* at 379.

[30]*Id.* at 382.

violations of the substantive norm but do not *purport* to affect the substantive norm[,] . . . are . . . clearly procedural."[31]

IV. DEVELOPING A WORKABLE TEST

While there is general agreement on the need for a line between what is covered by the exemption and what is not, the cases discussed above demonstrate the difficulty in drawing such a line.

The "procedure is procedure" test is ultimately unhelpful in many cases because, as noted, substance can be masked as procedure. An agency's label cannot always be relied on, in this area as in others.[32] On the other hand, when a rule deals with the processes an agency uses or intends the public to use in its rulemaking or adjudications, these appear to have been generally (until the *ATA* case) considered procedural for the purposes of the APA exemption.

The "encodes a substantive value judgment" test is problematic at best. As it has been applied, courts have either not engaged in useful analysis, or they have used the test in a way that could effectively eliminate the statutory distinction between procedural and substantive rules. In *Reeder*, the test was applied without substantial discussion, although the result was probably correct because the assertedly procedural rule did modify the substantive regulatory program. In contrast, the D.C. Circuit in *ATA* applied the test by looking not at whether the procedural rule affected the substance of the behavior the agency is charged with enforcing in civil penalty proceedings (i.e., aviation safety),[33] but at the way the rule balanced interests in procedural due process. Under such an application, no agency rules of practice would likely qualify as exempt, because all procedures that in *any way* involve the public's interaction with an agency necessarily involve a balance between agency interests and those of the public.[34] Moreover, the *ATA* court's rejection of the procedure/substance dichotomy in favor of a "functional analysis" clearly undercuts the APA's statutory distinction between "rules of procedure" and "substantive rules."[35]

The "substantial impact" test is similarly flawed. It focuses not on the nature of a rule's impact, but solely on its magnitude. Such a distinction ignores the Congressional intent to treat procedural rules differently from substantive rules. A rule does not become less procedural merely because it affects a large number of people. Moreover, the test ultimately provides little guidance, since the "substantiality" of a rule's impact can often only be judged in retrospect; this would require prudent agencies to put rules out for notice and comment even where such notice and comment should not be required.

The "primary conduct" test proposed by the *ATA* dissent seems to be as close to an appropriate test as currently exists. It looks at "primary conduct," namely, the type of activity that is subject to the agency's regulation. To the extent that an agency "procedural rule" meaningfully affects such behavior, it is--regardless of its label--"substantive" and therefore should be subject to notice-and-comment requirements. A similar test would apply in the context of government programs[36] (where

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[31] *Id.* (emphasis in original).

[32] *See, e.g., General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464 (D.C. 1980).

[33] It seems unlikely that the procedures that would apply in an adjudicatory hearing on penalties would have much impact on industry compliance with air safety regulations.

[34] *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976). As Judge Silberman's dissent in *ATA* put it, "[I]t will be impossible for any agency general counsel, in the future, safely to advise agency heads that a given set of proposed rules are procedural." 900 F.2d at 381.

[35] Although the term "substantive rule" does appear in section 553(d), the clearest distinction appears in the publication section (now section 552(a)(1)(C) and (D), formerly section 3(a) of the original APA). The Attorney General's Manual, *supra* n. 12, also makes great use of the term "substantive rules." *Id.* at 22.

[36] The term program as used here is intended to be interpreted broadly, to include, among other things, those involving benefits, grants, contracts, permits, licenses, and loan guarantees. Rules relating to grants and benefits are exempt from notice and comment, 5

regulation is often directed not at conduct or behavior, but at eligibility); if the procedure meaningfully affects the standards for eligibility, it would likewise cease to be "procedural" and become "substantive."[37] This test creates a relatively bright line, and has the advantage of emphasizing whether the rule has a *substantive* effect rather than a *substantial* effect, thus placing the focus on the nature of the impact and retaining the distinction between procedure and substance.

It should also be remembered that the fact that a procedural rule may be issued without notice and comment does not preclude challenges to the rule's contents. The provisions of such a rule must be consistent with the applicable statute, APA requirements, and the due process clause of the Constitution. The rule must also not be arbitrary, capricious, or an abuse of discretion. Moreover, someone interested in putting their views before the agency on a procedural rule may at any point file a petition for rulemaking requesting a change in the rule.[38]

We therefore recommend the Conference to urge agencies (and reviewing courts) to employ the following standards when deciding whether rules are procedural and, thus, legally exempt from notice-and-comment requirements: a rule is within the procedural rule exemption and, thus, exempt from notice and comment only if (a) the rule relates to agency procedures (either internal operations or agency methods of interacting with the public), and (b) the rule does not meaningfully affect (i) conduct, activity, or a substantive interest that is the subject of agency regulation, or (ii) the standards for eligibility for government programs.[39]

That this proposed recommendation would interpret the procedural rule exemption to take certain types of rules, such as rules governing conduct of formal adjudication or ex parte rules, outside the mandatory notice-and-comment requirements does not mean that agencies should not be encouraged to consider voluntarily using such procedures in their promulgation. The Conference is on record as generally favoring the use of notice and comment because of its recognized advantages;[40] among those are (1) providing the agency with valuable input from the public, including information about the impacts of the rule and other information the agency may not have at its disposal, and (2) providing enhanced legitimacy and public acceptance of rules that comes from having public participation in the process.

The Conference should therefore recommend that agencies voluntarily provide an opportunity for notice and comment with respect to certain types of procedural rules. When considering promulgating procedural rules, agencies should weigh the benefits of notice and comment against the costs. This proposal recognizes that there can be substantial costs associated with notice-and-comment rulemaking. Although the section 553 procedures are not onerous, there is a cost (of approximately $400 per page) for FEDERAL REGISTER publication. Notice-and-comment procedures also occupy additional time and energy of agency personnel. The benefits of notice and comment,

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USC §553(a)(2). However, the Conference has recommended eliminating this exemption, Recommendation 69-8, *supra* n.10, and many agencies have voluntarily waived their use of it. *E.g.*, 24 CFR §10.1 (DHUD) (1990); 29 CFR §2.7 (DOL) (1990).

[37]*See Fugere v. Derwinski*, 119 DAILY WASH. L. REP. 289 (Feb. 11, 1991) (C.V.A. 1990)(Departmental veterans benefits manual provision affecting eligibility for disability held to be substantive); *Air Transport Ass'n v. DOT*, *supra* n.4, 900 F.2d at 382-83 (Silberman, J., dissenting). *Cf. Batterton v. Marshall*, 648 F.2d 694, 702-03, 707-08 (D.C. Cir. 1980). In some cases agencies, with court approval, have invoked the procedural rule exemption for enforcement manuals issued for the purposes of setting out the agency's policies in prosecuting enforcement actions. *See, e.g., American Hospital Ass'n v. Bowen*, *supra* n. 20; *Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984)(OSHA inspection targeting plan). While enforcement manuals can be analyzed as to whether they are or are not "procedural" as suggested by this memorandum, it is likely that the more salient claim would be that such manuals fall within the exemption for "interpretative rules [or] general statements of policy." *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.)(MSHA inspectors' guidelines held to be policy statement).

[38]See 5 USC §553(e). See also Recommendation 86-6, "Petitions for Rulemaking," 1 CFR §305.86-6 (1991); Luneberg, *Petitions for Rulemaking, Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS RECOMMENDATIONS & REPORTS 493; *reprinted in revised form*, 1988 WIS. L. REV. 1 (1988).

[39]The Committee on Rulemaking has chosen to use the term "significantly" rather than "meaningfully." The authors prefer "meaningfully", which they believe focuses more on the qualitative rather than the quantitative aspects of the impact. However, "significantly" is an acceptable substitute. The authors recognize that the precise meaning of both words is difficult to articulate.

[40]*E.g.*, Recommendation 69-8, *supra* n.10.

however, can be substantial. Particularly where the rules at issue involve procedures to be used in administrative adjudication (formal or informal) of new programs or major modifications of existing procedures, providing notice and comment will offer the advantages mentioned above. Where minor or technical changes to rules of practice are involved, notice-and-comment rulemaking would not appear to be called for. The most difficult, of course, are those that are minor to some and more significant to others. Here, agencies should err on the side of openness, and provide an opportunity for advance comment unless the cost-benefit ratio becomes disproportionate. In fact, it appears that agencies generally do provide opportunity for notice and comment for rules of procedure or practice.[41]

Adding a proposal stage to the rulemaking could also have the potential of producing additional review by the Office of Management and Budget. Under Executive Order 12,291, which provides the authority and framework for OMB review of agency rulemaking, rules "describing the procedure or practice requirements of an agency" are not exempt from review.[42] The Executive Order provides for submission to and clearance by OMB of agency rules at both the proposed and final stages, and such review can be timeconsuming. It is possible that agencies may be discouraged from voluntarily using notice and comment because its use could produce additional delays at the review stage.

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[41]We have had the opportunity to review agency responses to an American Bar Association questionnaire on the extent to which agencies use notice-and-comment procedures in promulgating rules of procedure and practice. We have also reviewed comments from agency general counsels on the Committee's proposed recommendations. The responses indicate that most agencies do generally use notice and comment for such rules, although not for rules of agency organization. This may explain why there are relatively few cases addressing the applicability of the APA exemption.

The responses to the questionnaire indicate that agencies do, however, wish to retain their discretion to use the statutory exemption in appropriate situations.

[42]The Order does exempt from its coverage rules "related to agency organization, management, or personnel." OMB officials have acknowledged in conversations with the authors of this memorandum that the Executive Order, by its terms, covers procedural rules exempt from notice and comment, but they also stated that OMB generally refrains from exercising its review over rules that are solely procedural in scope.

Because it generally would be counterproductive to discourage the use of notice-and-comment rulemaking in the case of procedural rules, the Conference should recommend that the Office of Management and Budget refrain from reviewing proposed rules fitting within the definition of rules of procedure or practice where an agency has voluntarily chosen to use the notice-and-comment process.