Recommendation 72-5

Procedures for the Adoption of Rules of General Applicability

(Adopted December 14, 1972)

The Administrative Procedure Act, 5 U.S.C. § 553 (1970), provides simple, flexible and efficient procedure for rulemaking, including publication of a notice of proposed rulemaking in the Federal Register, opportunity for submission of written comments, and opportunity in the discretion of the agency for oral presentation. This notice-and-comment rulemaking procedure is extensively used and on the whole has worked well. Each agency is of course free to provide additional procedural protection to private parties in any proceeding.

There are statutes that require procedures in addition to those required by section 553. Some require opportunity for oral arguments, some require agency consultation with advisory committees, and some require trial-type procedure.

The Administrative Conference believes that statutory requirements going beyond those of section 553 should not be imposed in absence of special reasons for doing so, because the propriety of additional procedures is usually best determined by the agency in the light of the needs of particular rulemaking proceedings. The Administrative Conference emphatically believes that trial-type procedures should never be required for rulemaking except to resolve issues of specific fact.

Recommendation

1. This recommendation applies only to rules of general applicability and not to rules of particular applicability, only to substantive rules and not to procedural rules, only to legislative rules and not to interpretative rules, and only to rulemaking governed by section 553 and not to rulemaking excepted from the requirements of section 553.

2. In future grants of rulemaking authority to administrative agencies, Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. § 553, except that when it has special reason to do so, it may appropriately require opportunity for oral argument, agency consultation with an advisory committee, or trial-type hearings on issues of specific fact.

3. Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact. Ordinarily it should not require such procedures for making rules of general applicability, except that it may sometimes appropriately require such procedures for resolving issues of specific fact. Existing statutes imposing a requirement of trial-type procedures for rulemaking of general applicability should be reexamined in light of these principles.

4. A study of proceedings conducted by the Food and Drug Administration pursuant to section 701(e) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 371(e) (1970), has demonstrated that that section should be amended so as to make clear that trial-type hearings are not required except on issues of specific fact.

5. Each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond those of section 553, such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact.

Citations:

38 FR 19792 (July 23, 1973)

__ FR _____ (2012)

2 ACUS 66