Comment from Senior Fellow Ronald M. Levin on *Choice of Forum for Judicial Review of Agency Rules*
April 7, 2024

During the Judicial Review Committee's meeting on April 3, it seemed to me that we got bogged down on the issue of whether the proposed statutory changes governing forum selection in judicial review of rulemaking should apply to proceedings in which the challenged rule is statutorily exempt from notice and comment obligations. No immediate consensus was in sight. I have given further thought to the issue and have written up a set of principles that the committee might want to consider adopting, or at least using as a basis for deliberation, at its next meeting on the Choice of Forum project. I have, in some respects, modified my previous views so as to come closer to other committee members' thinking, and this shift may set the stage for development of a consensus position.

The suggested framework is set forth below. Reactions and suggestions for possible modifications are of course welcome.

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1. INCLUDE in the recommendation to provide for direct review in a court of appeals:

    a. Rules for which notice and comment was required by statute. This is the core premise of the draft recommendation.

    b. Rules as to which the agency has a statutory exemption but has waived it (e.g., by regulation). Such a waiver amounts to voluntarily opting into the § 553(b)-(c) regime, so the rule should be appealable on the same basis as non-exempt rules.

    c. Rules as to which the agency voluntarily used notice and comment on an ad hoc basis. I tend to think these rules should also go to the court of appeals. They do have a typical record for review. One might argue that this forum choice might discourage the agency from using notice and comment at all, but I would question whether the incentive effect would be very strong. (The agency might care a lot about whether voluntary notice and comment would result in making the rule *reviewable*, but would probably be less concerned, or not at all concerned, about the question of where the appeal would be taken.) There might also be a question about how to characterize a voluntary outreach that does not fully meet the §§ 553(b)(c) requirements; I'd like the committee's advice on whether that possibility is likely to prove troublesome.)

    d. Rules that would have been subject to notice and comment requirements if the agency had not invoked the § 553(b)(B) good cause exemption for rules as to which rulemaking procedure would be impracticable or contrary to the public interest. By definition, these are rules that the agency considers urgent, and their importance militates in favor of initial court of appeals review. The strongest case would be one in which the agency used interim final rulemaking and assembled a post hoc record that is

substantially equivalent to a regular rulemaking record (at least in the view of the Court in the Little Sisters case). Such a record helps make the rule especially "fit" for the appellate court's review. The situation becomes more debatable if the agency invoked the exemption without offering any opportunity for post-promulgation comment, or if it has initiated the interim final rulemaking at the time of the appeal but has not completed it (and all too often will never complete it). Even though the record is not as fleshed-out as in the previous IFRM illustration, I tend to think the court of appeals should get the case immediately because of the public importance factor.

2. EXCLUDE from the recommendation to provide for direct review in a court of appeals:

a. Rules that the agency that the agency issued without notice and comment by invoking the exemption for interpretative rules and policy statements. Several arguments support this exclusion: (a) As discussed in the committee, the question of whether a purported guidance document is actually a legislative rule can be quite difficult, and we should try to avoid making a court's *jurisdiction* turn on how that question is resolved in a given case. (b) The question of when guidance documents are reviewable at all can also be difficult, so the same manageability concern arises in that context. (c) Relatedly, inclusion of guidance documents in a statute granting court of appeals jurisdiction could be interpreted as implying that such documents *should* be judicially reviewable, and I doubt that Congress should appear to send that signal. (d) The question of whether to treat a purported guidance document as a legislative rule often turns on fact questions about how the agency uses the document or is likely to use it; that type of question is best suited to the fact-finding capabilities of a district court. (e) The absence of a notice and comment record is also a negative factor here.

b. Rules that the agency issued without notice and comment by invoking the exemption for military or foreign affairs, agency management or personnel, or public property, loans, grants, benefits, or contracts. I have changed my mind about rules in these categories. During our recent committee meeting, I argued that rules in those categories seldom result in any appeals at all, and therefore immediate court of appeals review wouldn't be very burdensome. I am now persuaded that my reasoning was backwards. Given the rarity of cases that turn on applicability of the exemptions in these categories, we have no strong reason to depart from the status quo. The fact that the record for review in these cases will typically be scanty also supports a cautious approach.

c. Procedural rules. Although the exemption for procedural rules is codified in the same APA provision as the exemptions for interpretive rules and policy statements, procedural rules differ from guidance because they typically have the force of law. Thus, the reasoning of ¶ 2.a doesn't apply -- but the reasoning of ¶ 2.b does apply.

d. Rules that the agency adopted without rulemaking procedure by relying on the "unnecessary" branch of the good cause exemption (whether or not the agency resorted to the direct final rules procedure). Unlike rules adopted pursuant to the other branches of the good cause exemption, these rules are by definition not very socially

important, and also are rarely the subject of judicial review. Both points indicate that there is no particular reason to alter the existing jurisdictional rules for rules in this category.