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Administrative Conference of the United States

MITIGATING THE COSTS OF REMEDYING LEGALLY INFIRM RULES

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INTRODUCTION

This study examines the techniques that federal agencies employ or have considered employing to mitigate the costs of remedying legal infirmities in agency rules in order to identify best practices.[1]

Rulemaking remains procedurally treacherous terrain as the result of a series of challenges built into the structure of administrative law.

1. An agency seeking to promulgate a new substantive rule faces inherent and substantial uncertainty about whether a court will ultimately deem the rule to be a valid exercise of its authority. This is especially so for an agency attempting to introduce a new regulatory program, where the legal, scientific, and economic bases for the rule may not have been previously reviewed in court.

2. When a reviewing court determines that an administrative rule is legally infirm—despite the agency's best efforts to promulgate a valid rule—the typical, default remedy is vacatur of the entire rule.

3. Compiling a rulemaking record and establishing a supporting enforcement apparatus almost always requires extraordinary investments of time and money. As a consequence of these challenges, the legal uncertainty associated with virtually any major rulemaking is potentially very costly.

In addressing these challenges, the scholarly literature mostly focuses on what *courts* can do to minimize the collateral costs of judicial review of agency actions. For example, a common theme in the scholarly literature urges federal courts to review agency actions under deferential

[1] The proposed title of this study was "Minimizing the Costs of Judicial Review." After conducting several interviews with agency officials, it became clear that this title was too broad. The title has been modified to reflect the study's central subject—namely, techniques that agencies use or have considered using to mitigate the costs of remedying legal infirmities identified during litigation.

standards of review.[2] This study, by contrast, asks what *agencies* can do to reduce the costs of remedying legal defects in their rules.

To explore this topic, we interviewed officials in various agencies' offices of general counsel with responsibility either for providing advice on the form and content of proposed rules or for overseeing the defense of agency rules in litigation.[3] Our goal was to identify techniques that agencies have used or have considered using to mitigate the costs associated with remedying legal defects in agency rules. In producing this report, we hope that agencies will be able to learn from their peers.

The remainder of this report is divided into four Parts. Part I provides background on the potential costs associated with remedying legal infirmities in administrative rules and summarizes related research. Part II explains the study's methodology and describes the respondents interviewed. Part III, which forms the heart of the study, reports the results of the interviews. Finally, Part IV recommends best practices for agencies to consider when promulgating and defending their rules.

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[2] For representative examples, see Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511; Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001); Cass Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071 (1990); and Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 Mich. L. Rev. 1355 (2016).

[3] For purposes of this report, the term "general counsel's office" includes agency departments that actually go by that name and their alternatively-named functional equivalents in other agencies—e.g., the Office of the Solicitor at the Department of Labor. We also include under this label officials at the Department of Justice with responsibility for defending agency rules in court.

I. Background And Summary Of Previous Research

A. Background

There are a series of challenges at the heart of judicial review of agency rules.

1. Legal Uncertainty

Agencies often face substantial and unavoidable legal uncertainty when promulgating new substantive rules. By statutory design, rulemaking is procedurally cumbersome. To promulgate a rule, an agency typically must comply with a host of procedural and substantive requirements found in the text of the Administrative Procedure Act (APA) and the judicial glosses that have been given to it.

Before issuing a final rule, an agency must first provide a "[g]eneral notice of proposed rule making," typically by publishing the proposed rule in the Federal Register.[4] Further, to give the aforementioned notice requirement teeth, judicial doctrine requires the agency's final rule to be a "logical outgrowth" of the proposed rule.[5]

After publishing the notice of proposed rulemaking, the agency must then "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[6] Then, in promulgating the final rule, the agency must provide sufficient justification for the rule to assure a reviewing court that the rule is not "arbitrary and capricious."[7] Under the moniker of "hard look review," the federal courts have construed this requirement to impose a substantial burden of explanation on the agency. As the Supreme Court explained in its watershed *State Farm* decision: "[A]n agency rule would be

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[4] 5 U.S.C. § 553(b).

[5] Int'l Union, United Mine Workers v. Mine Safety & Health Admin., 626 F.3d 84, 94-95 (D.C. Cir. 2010); Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 174 (2007).

[6] 5 U.S.C. § 553(c).

[7] 5 U.S.C. § 706(2)(A).

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[8] One way that an agency can fall short of this mandate is by failing to provide a sufficient explanation of the rule's basis and purpose, including a response to all relevant and significant comments received during the notice-and-comment period.[9]

As this brief summary of the requirements of hard look review suggests, the APA's complex set of notice-and-comment requirements can create substantial legal uncertainty for an agency attempting to regulate in good faith. More specifically, it is often difficult for an agency to predict whether a reviewing court will conclude, *inter alia*, that it has relied on impermissible factors;[10] failed to consider an important aspect of the problem it seeks to address;[11] adequately responded to all "significant"

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[8] Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1962). Although distinguished scholars have recently questioned whether, on the whole, contemporary courts generally apply a searching version of "hard look" review, see Gersen & Vermeule, *supra* note 2, at 1361-70, no one seriously doubts that "hard look" review continues to be a substantial source of uncertainty for an agency contemplating the promulgation of a final rule.

[9] See Reyblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997) ("An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems."); PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

[10] See Jerry L. Mashaw, Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability, 57 Law & Contemp. Probs. 185, 203 (1994) (noting the uncertainty that results because judges are relatively uninformed about which of the issues raised in a challenge to a rule are important).

[11] See Breyer, *supra* note 2, at 388 (noting uncertainty in whether a court will appreciate the "problems the agency faces in setting technical standards in complex areas").

comments;[12] failed to provide notice of a rule from which the final rule "logically" grew; etc.

In addition to the indeterminacy surrounding how to comply with the APA's notice-and-comment requirements, the APA also has numerous exceptions, the applications of which are also often difficult to predict. One such exception is that the agencies need not comply with the APA's notice-and-comment requirements when promulgating rules regulating certain subject matters, such as foreign affairs, national security, and internal personnel matters.[13] A second is that the APA's notice-and-comment requirements do not apply to "non-legislative rules"—that is, rules that do not have the "force and effect of law"[14]—such as policy statements and interpretive rules.[15] Still a third is that agencies need not comply with the APA's notice-and-comment requirements where they have "good cause" to believe that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[16]

The application of these exceptions is often far from clear. When is a rule sufficiently connected to "foreign affairs" to qualify for § 553(a)(1) exemption?; when does a rule have the "force and effect of law," such that it must be promulgated through notice and comment?; what qualifies as "good cause" to eschew notice and comment? Case law, to be sure, provides structure for answering these questions and thereby reduces some of the uncertainty that they engender. In many circumstances,

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[12] See Richard J. Pierce, Jr., Seven Ways To Deossify Agency Rulemaking, 47 Admin. L. Rev. 59, 69 (1995) ("Agencies can predict neither the scope nor the intensity of the duty [to explain rulemaking decisions] as it is ultimately applied by a reviewing court.").

[13] See 5 U.S.C. §§ 552-556.

[14] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979)).

[15] 5 U.S.C. § 553(b)(3)(A) (exempting "general statements of policy" and "interpretative rules" from notice and comment).

[16] 5 U.S.C. § 553(b)(3)(B).

however, an agency will not necessarily know whether or not a contemplated rule qualifies under one of the exceptions.[17]

Nor does the legal quagmire end with the APA's requirements and exceptions. An agency seeking to promulgate a new rule may also face substantial uncertainty about its statutory authority to take a particular action, which must be authorized by congressional statute.[18] Under *Chevron*, a reviewing court must defer to a reasonable interpretation of an ambiguous statute offered by an agency to whom Congress has given interpretive authority. *Chevron*'s deference regime, however, does not totally eliminate the legal uncertainty that an agency may face in interpreting a statute. For one thing, it may be unclear whether Congress has given the agency interpretive authority over the particular issue involved in the case.[19] For another, it will not always be clear to the agency before promulgating a final rule that a reviewing court will later determine that the statute *is* ambiguous. As a consequence, it will not always be clear to the agency whether it is required, under the *Prill* doctrine, to explain its resolution of the statutory ambiguity,[20] or whether it will receive deference on its interpretation of the statute at all.

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[17] See Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108 (D.C. Cir. 1993) ("The distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt has been aptly described as 'enshrouded in considerable smog.'" (quoting Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984))).

[18] 5 U.S.C. § 706(2)(C) (providing that a reviewing court shall hold unlawful and set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations").

[19] See, e.g., Gonzales v. Oregon, 546 U.S. 243 (2006). Although a reviewing court must defer to an agency's interpretation of a statutory ambiguity that concerns scope of its own statutory authority, it will not always be clear to the agency when the court will determine that the statute is ambiguous on that matter in the first place. See City of Arlington. v. FCC, 569 U.S. 290, 299-08 (2013) (requiring deference to agencies' interpretations regarding the scope of their own authority under *Chevron* step two). In other words, it may be hard to predict when a court will find that the issue of the scope of an agency's authority should be resolved under *Chevron* step one or step two. This contributes to agencies' uncertainty in rulemaking.

[20] Prill v. NLRB, 755 F.2d 941, 942 (D.C. Cir. 1985) (requiring an agency to identify a statutory ambiguity before benefiting from *Chevron* deference); see generally

From this review of the legal hurdles that an agency faces when promulgating a new rule, it is easy to see why judicial review is sometimes said to be the last step in the rulemaking process.[21]

2. Harsh and Inflexible Remedies

The default judicial remedy for legal infirmity in an administrative rule is vacatur of the entire rule.[22] It is not entirely clear why this is so. Section 706 of the APA provides that a reviewing court "shall … hold unlawful and *set aside*" agency actions that violate one of the APA's requirements.[23] But nothing in the APA or the case law expressly says that § 706 must be interpreted to mean that courts must invalidate an entire administrative rule that contains a legal defect. And indeed, as explained more fully below, this is not the only remedial course that courts take.

Instead, the default remedy in administrative law appears to be an inchoate effect of the *Chenery* doctrine. *Chenery* stands for the proposition that a reviewing court may not affirm an agency decision on a ground different from that adopted by the agency to justify its action.[24] This principle is commonly thought to respect Congress' delegation of authority to make rules to an expert agency, rather than to the court because, when a court affirms on a ground not adopted by the agency, it substitutes its judgment for the agency's. Similarly, the practice of

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Daniel J. Hemel & Aaron Nielson, Chevron Step One-and-a-Half, 84 U. Chi. L. Rev. 757 (2017).

[21] Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253, 261 (2017).

[22] Stephanie J. Tatham, Executive Summary, Admin. Conference of the U.S., The Unusual Remedy of Remand Without Vacatur (2014), http://perma.cc/2WVD-ZDH2; Bagley, *supra* note 21, at 257-58.

[23] 5 U.S.C. § 706(2) (emphasis added).

[24] SEC v. Chenery Corp., 332 U.S. 194, 204 (1947); SEC v. Chenery Corp., 318 U.S. 80, 92-94 (1943).

vacating a defective rule to allow an agency to correct the defect appears to stem from the belief that it is the agency's primary responsibility to determine how to remedy its defects and to decide whether provisions that were not implicated in the defect should remain in effect in the absence of the invalid provision. It is in this sense, as Judge Henry Friendly colorfully put it, that administrative law adheres to remedial "purism"—the view that "guessing by a court about what the agency might do when apprised of … an error is an unlawful intrusion into the sanctity of administrative process, and once such an error is detected, the case must go back so that the agency, as the sole repository of authority, can decide it right."[25]

3. High Costs of Rulemaking

The costs of total vacatur of an administrative rule are often gargantuan. These costs come in at least three varieties.

First, total vacatur results in administrative waste, as much of the time and energy invested in promulgating the final rule will have been for naught. And if the agency wants to re-initiate the rulemaking, it will have to incur much of that same expense anew.[26]

Second, where the net impact of a rulemaking was positive, total vacatur eliminates the benefits that the final rule was meant to achieve, at least for the time that it takes the agency to repromulgate a similar rule. And the regulatory delay can be substantial.[27] Moreover, the agency may ultimately decide to abandon the rule altogether because its

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[25] Henry J. Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199, 223; see Bagley, *supra* note 21, at 257-58.

[26] Bagley, *supra* note 21, at 263 ("[r]ectifying … mistake[s] may be no mean feat, especially if doing so requires the agency to trudge through the procedural thicket surrounding notice and comment.").

[27] Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 Admin. L. Rev. 101, 117 (2015); Robert J. Hume, How Courts Impact Federal Administrative Agency Behavior 70-91 (2009); Emily Hammond Meazell, Deference and Dialogue in Administrative Law, 111 Colum. L. Rev. 1722, 1781 (2011).

"priorities may have changed, its staff may have been reassigned, or the external groups supporting action may have dispersed."[28] Finally, one study in the late 1980s found that around 40% of the time agencies made little, if any, substantive changes on remand but merely provided additional evidence or explanation.[29]

Third, the strong medicine of total vacatur may exacerbate the "ossification" of the rulemaking process, making the process slower and more rigid.[30] Consider, for example, the position of an agency that has received trenchant comments during the comment period and is considering how to proceed. Should the agency incorporate the comments into the final rule and risk the possibility that a reviewing court will find the final rule is not a "logical outgrowth" of the proposed rule?[31] Should the agency reject the comments and risk the possibility that the court will find its rejection of evidence to be a failure to consider all relevant factors in promulgating the regulation? These questions are often difficult and deserve careful consideration. But the longer that an agency takes to

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[28] Bagley, *supra* note 21, at 263; see Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 295 (1987); Richard J. Pierce, Jr., The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s, 43 Admin. L. Rev. 7 (1991).

[29] Peter H. Schuck & E. Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1050.

[30] See, e.g., Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Dule L.J. 1385, 1385 (1997); Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483, 486 (1997) ("First, agencies' belief that they must devote an inordinate amount of their resources to each rulemaking proceeding hampers their willingness and ability to issue regulations to the extent warranted by the problems within their jurisdictions."); Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 294 (1987); Pierce, *supra* note 28, at 67-68.

[31] Cf. United Steelworkers v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980) ("A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." (internal quotation omitted)).

answer these questions, the longer it will take the agency to promulgate the final rule. The default, total-vacatur remedy often gives agencies an incentive to agonize over these details well past the point where additional effort would benefit the public or regulated industries. It thus contributes to the ossification of the rulemaking process.[32]

B. Previous Research

One may seek to redress these challenges from several angles. One could, for example, tweak administrative law doctrines in ways that would allow agencies more easily to determine whether their draft rules are likely to survive a judicial challenge.[33] Or one could attempt to reduce the cost and increase the speed of agency rulemaking by attempting to streamline agencies' internal rulemaking procedures.[34]

These inquiries are important and worthwhile, but this report addresses a third possibility, asking what an agency can do to encourage courts to order more limited judicial remedies, thereby reducing the costs of fixing legal infirmities in the agency's rules. The balance of this section summarizes some of the existing literature on this topic.

1. Severability

One strategy that an agency can take to convince a reviewing court to order a remedy that is less onerous than total vacatur of a rule is to include a severability clause in the text of the rule (or the rule's statement of basis and purpose). In 2015, the authors published an article in the

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[32] A court may determine that a final rule is not a "logical outgrowth" of the proposed rule, and thus unlawful, when the final rule is "surprisingly distant" from the proposed rule. Arizona Public Service Co. v. E.P.A., 211 F.3d 1280, 1299 (D.C. Cir. 2000). Determining when a rule is "surprisingly distant," however, is inherently indeterminate.

[33] See, e.g., Gersen & Vermeule, *supra* note 2, at 1370-1405; Adrian Vermeule, Deference and Due Process, 129 Harv. L. Rev. 1890 (2016).

[34] See, e.g., Jeffrey S. Lubbers, Better Regulations: The National Performance Review's Regulatory Reform Recommendations, 43 Duke L.J. 1165, 1173 (1994).

Yale Law Journal on this topic.[35] That article explained that, as a general matter, agencies rarely include severability clauses in their rules.[36] At the time of that article's publication, most agencies had never included a severability clause in one of their rules.[37] And of the agencies that had, only a handful had included a severability clause in more than 2% of their rules promulgated between 2000 and 2014.[38]

The article concluded that agencies' infrequent use of severability clauses is due to a vicious cycle between the courts and the agencies. On one hand, judicial doctrine on severability, especially on severability clauses in administrative rules, is thin and therefore provides little guidance on the likely legal effect of a severability clause in an administrative rule.[39] As a consequence, an agency could reasonably conclude that it has little reason to include a severability clause in a new, final rule. Why commit to a position on severability in the final rule, when there is no reason to think that a court is more likely to defer to that clause than it is to defer to the agency's position on severability articulated in its briefs? On the other hand, because agencies rarely include severability clauses in their rules (in part because of the reasons just mentioned and in part because of the perception of some agency officials that a severability clause will make a rule more vulnerable to challenge), courts review very few administrative rules containing severability clauses and therefore have few opportunities to develop clearer and more robust judicial doctrine on the subject.

The article proposed two solutions to what the authors believed was an under-use of severability clauses in administrative rules. First, the article urged administrative agencies to consider including severability

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[35] See generally Charles W. Tyler & E. Donald Elliott, Administrative Severability Clauses, 124 Yale L.J. 2286 (2015).

[36] Id. at 2319.

[37] Id.

[38] Id. at 2349-52; see id. at 2319 (explaining methodology).

[39] Id. at 2312-18.

clauses in rules that they have determined are severable. Doing so is often fairly inexpensive for the agency, it would notify the public of the agency's position on the issue, and it would often bolster the agency's position on remedies in litigation.[40] Second, the article urged courts to adopt a deferential framework for reviewing administrative severability clauses—i.e., a framework that typically would leave the lawful aspects of administrative rules in place when the regulatory text or the rule's statement of basis and purpose includes a severability clause.[41]

2. Prejudicial Error

Another strategy for convincing a reviewing court to order less onerous remedies is to attempt to persuade the court that a legal infirmity in an administrative rule is harmless. A recent article by Professor Nicholas Bagley in the *Columbia Law Review* contends that the APA's "prejudicial error" provision[42]—located in the same provision that specifies the grounds for judicial review of agency actions—has fallen into virtual desuetude.[43] He criticizes this development, arguing that courts should more frequently find that errors in administrative rules are harmless.[44]

It is often clearly the case, Bagley observes, that the legal infirmities in agency rules have had no detrimental effect on the party

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[40] Id. at 2318-23, 2344-48.

[41] Id. at 2331-47.

[42] 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error.")

[43] Bagley, supra note 21, at 262, 265; see United States v. Johnson, 632 F.3d 912, 931 (5th Cir. 2011) (concerns that an agency may flout procedural requirements "support the limited role of the harmless error doctrine in administrative law"); Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (D.C. Cir. 2014) ("We have not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice.").

[44] Bagley finds case law support—albeit admittedly thin—in the Supreme Court's recent decisions in National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659 (2007), Shinseki v. Sanders, 556 U.S. 396, 406-11 (2009), and Federal Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004).

challenging the rule. Suppose, for example, that the agency extensively consulted a party before the promulgating a final rule but that the party later challenges the rule in court on the ground that the agency did not comply with the APA's notice requirement. Even if the challenger is right on the merits that the agency failed to comply with the APA, the error was arguably harmless, at least with respect to the challenger.[45] After all, the agency consulted with the party on the substance of the rule before the rule was promulgated. In these circumstances, invalidating an otherwise-valid rule on the ground that this particular challenger was not given "notice" would be a disproportionate remedy for the violation.[46]

3. Remand Without Vacatur

Remand without vacatur—that is, judicial remand of an agency action that permits the action to remain in place while the agency reviews its defects—is another, fairly modest remedial option available to a court reviewing an administrative rule. Under D.C. Circuit law, a court may order the remedy (a) where a rule's defect is that it was inadequately explained and where further explanation could potentially cure that defect; or (b) where immediate vacatur would cause great disruption to a legitimate regulatory program.[47]

The legality of this remedy has been the subject of some controversy in the D.C. Circuit. As mentioned above, the APA provides that reviewing courts "shall … hold unlawful and *set aside*" agency actions that violate

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[45] Bagley, *supra* note 21, at 266.

[46] Ronald M. Levin, Scope-of-Review Doctrine Restated: An Administrative Law Section Report, 38 Admin. L. Rev. 239, 284 (1986); Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 312 (2003) ("This clause, a harmless error principle, necessarily implies that the 'shall … set aside' language found earlier in the provision must mean 'shall generally,' not 'shall always.'" (quoting Administrative Procedure Act, 5 U.S.C. § 706 (2000)).

[47] Tatham, *supra* note 22, at 1; Remand Without Vacatur, ACUS Recommendation 2013-6 (Adopted December 5, 2013).

one of the APA's requirements.[48] Does the APA's imperative that courts shall "set aside" agency action mean that a reviewing court must *vacate* defective rules? Some members of the D.C. Circuit have thought so.[49] But that position has always been a minority view. Though most judges on the D.C. Circuit have concluded that the remedy is consistent with the APA, the Supreme Court has repeatedly declined to address the issue, despite numerous opportunities to do so.[50]

Several scholars have offered commentary on remand without vacatur—some of it positive and some of it negative.[51] And ACUS has sponsored a study on the remedy and issued a recommendation offering various suggestions to the courts and agencies.[52]

II. Methodology and Participants

In September 2015, in response to our article on severability clauses, ACUS first organized a roundtable discussion on the topic of severability clauses in administrative rules. That discussion made apparent the value in further study of administrative techniques for reducing the costs of remedying legal infirmities in rules. ACUS then commissioned this study and report in July 2017.

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[48] 5 U.S.C. § 706(2) (emphasis added).

[49] See, e.g., Milk Train, Inc. v. Veneman, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("Although I greatly respect the majority's attempt to save a well-intended relief program from possibly inefficient further proceedings, I do not think we can lawfully do so."); Checkosky v. SEC, 23 F.3d 452, 490-91 (D.C. Cir. 2004) (Randolph, J., dissenting).

[50] Tatham, *supra* note 22, at 8-9 (identifying missed opportunities).

[51] Compare Levin, Vacation, *supra* note 46; Kristina Daugirdas, Note, Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings, 80 N.Y.U. L. Rev. 278 (2005) with Daniel B. Rodriguez, Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law, 36 Ariz. St. L.J. 599 (2004).

[52] Tatham, *supra* note 22.

The authors asked ACUS members and affiliates at the following agencies to put the authors in touch with officials with knowledge and expertise about the subject of the study: the Environmental Protection Agency, the Department of Energy, the Department of Labor, the Federal Trade Commission, the Department of Education, the Federal Drug Administration, the Securities Exchange Commission, the Federal Energy Regulatory Commission, the Department of Justice, the National Highway Transportation Safety Administration, the Department of Homeland Security, and the Consumer Financial Protection Bureau.[53] With the exception of the officials from the Justice Department, each respondent was either a current or former official in the functional equivalent of the agency's general counsel's office.

Over a series of several months, the authors conducted phone interviews of agency staff on the topics identified during the meeting of the Committee on Judicial Review. Before conducting some of the interviews, the authors distributed to the respondents a list of potential subtopics that would potentially be explored.

All respondents preferred to share their views anonymously and without attribution to their particular agency. The views expressed during the interviews thus reflect a mix of personal and institutional opinions. In some cases, a single agency official was interviewed; in others, multiple officials participated in the study.

III. Interview Responses

During the interviews, agency officials were asked about the techniques they use or have considered using for attempting to minimize the costs of remedying actual or potential legal defects in agency rules. This Part explains the responses given during interviews. It is organized into two thematic sections. Section A addresses techniques that agencies have employed or have considered employing *before* promulgating a new, final rule. Section B addresses techniques agencies can employ *after* promulgating a new, final rule.

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[53] The Department of Homeland Security and the Consumer Financial Protection Bureau respectfully declined to participate in the study.

A. Before Promulgation

Respondents were asked what steps they have taken or have considered taking to limit the extent to which legal defects in rules will disrupt otherwise valid regulations. In other words, what steps can agencies take to avoid legal defects in parts of a regulatory program from tainting other aspects of the program?

1. Severability clauses

Respondents from four agencies indicated that their agencies had recently included a severability clause in at least one of their rules.[54] One official reported that his or her agency's general practice is to consider including a "blanket" severability clause in each rule that the agency promulgates—i.e., a clause providing that all provisions of a rule are intended to be severable.

The respondents who indicated that their agencies had used a severability clause in at least one of their recent rules were asked for their assessment of the additional costs associated with including a severability clause in a rule. Each official opined that the marginal drafting costs of including a severability clause in a rule were not appreciably high.

The respondents disagreed, however, about whether including a severability clause in a rule appreciably increased an agency's total regulation costs because they disagreed about whether including such a claim increased the chance that a rule would receive substantial scrutiny in court. On one hand, one official observed that his or her agency had

[54] These reports were consistent with the authors' 2015 study on severability clauses, see Tyler & Elliott, *supra* note 35, at 2349-52, and with the authors' review of the Federal Register in preparing this report. Officials from several other agencies reported that they could not recall an instance in which the agency had included a severability clause in one of its rules. Although these reports were also consistent with the authors' 2015 study, the authors' recent review of the Federal Register identified at least one severability clause that had not been identified by the respondents.

regularly included severability clauses in some of its rules since the 1980s and had not found that it weakened the agency's position on the merits in litigation. On the other hand, two officials—one from an agency that has included a severability clause in a recent rule and another from an agency that has not—opined that a severability clause could signal weakness to a reviewing court. One of these officials also worried that a severability clause would lock the agency in to a position on severability that it may later realize, upon further reflection, it should not have adopted.

Officials at two agencies also cautioned that an agency's propensity for including severability clauses in its rules should depend on its subject matter and rulemaking processes. One official noted that the rules promulgated by the official's agency tend to be relatively atomistic, and therefore more easily divided into severable parts, as compared to the rules of some other agencies. Those comments were echoed by other officials, who warned that the practice of including blanket severability clauses for each rule that the agency promulgates would likely not be appropriate for an agency attempting to promulgate a rule for which the individual parts are highly interdependent and contingent on other parts.

2. Alternatives to Severability Clauses

Respondents were also asked about several potential alternative modifications to the regulatory text that would attempt to achieve the same benefits as a severability clause without expressly including such a clause.

a. Respondents were asked whether their agencies had considered promulgating aspects of an otherwise unified regulatory program through multiple, discrete rules, rather than a single rule, in order to avoid the risk of an unlawful aspect of the program tainting the otherwise lawful aspects of the program. Officials from two agencies each reported that their agencies had done this, at least on one occasion, to mitigate the risk of legal taint. These officials cautioned, however, that dividing a rule into multiple segments can create legal risks for the agency's rule that would not otherwise exist. For example, two officials suggested that

simultaneously promulgating multiple rules that cross-reference one another may increase the probability that either rule will be challenged and that a reviewing court will be skeptical of the segmented-rulemaking process. Deviations from the ordinary course, one might think, are circumstantial evidence of legal uncertainty somewhere in the rulemaking.

Along related lines, two officials warned that, in some circumstances, segmenting rules may have the effect of weakening the agency's overall case for the regulatory program. If, for example, the agency has compiled a complex economic analysis to support the program as a whole, that analysis may not support any of the segmented aspects of the program as well as it would support a single rule implementing the entire program.

Relatedly, an official from another agency suggested that, if the agency's authority to take a particular action is uncertain, agency officials may consider testing the legality of the action by promulgating a narrower, less costly rule that will tee up the legal question that the agency needs resolved, thereby avoiding the cost of a more costly regulatory program in the event that the courts disagree with the agency's legal theory.[55] Officials from that agency, however, hastened to add that it was rare—though not unprecedented—for the agency to issue rules where its authority to regulate was not well established.

By contrast, officials from two agencies reported that staff at their agencies would be reluctant to consider the possibility of segmenting a unified regulatory program into multiple rules due to competing

[55] The authors note that, in appropriate settings, an agency can assert in the preamble of the rule that it has promulgated a discrete portion of a larger regulatory program as part of a larger plan to take "one step at a time." See Ctr. for Biological Diversity v. Envtl. Prot. Agency, 722 F.3d 401, 405-10 (D.C. Cir. 2013) (permitting agencies to take discrete steps toward a larger congressionally-mandated goal as long as the agency demonstrates that it is cognizant of Congress' desired outcome and is taking steps to fulfill it).

demands for the agency heads' time and attention.[56] Similarly, officials from two agencies remarked that dividing a rule into discrete parts would require additional agency resources and that their agencies' regulatory timelines are often too short to consider this technique as a viable alternative to a severability clause.

b. Respondents were also asked whether their agencies had ever promulgated rules with fallback provisions—i.e., provisions that would take effect only in the event that a court were to vacate other provisions of the rule. No respondent could recall or was willing to discuss a time that the agency had used fallback provision. A few respondents, however, found the suggestion intriguing. One official offered an example (which the authors have modified to preserve the official's anonymity) with a structure similar to the following:

> Suppose an agency is charged with setting a standard for the size of fish that amateur fishermen may keep. Suppose further that the agency is contemplating two different standards—one that is based entirely on data about the expected fish population at various rates with which fishermen are allowed to keep fish, and another that is based on that data as well as data about the *cost of implementing* amateur fishing hauls at various rates with which fishermen are allowed to keep fish. Finally, suppose that the agency prefers the second standard, but that it is uncertain whether the statute charging it with responsibility for setting the standard permits it to take the cost of implementation into account. During notice and comment on both potential standards, commenters have questioned the agency's legal authority to adopt the second standard. While the agency believes it has that authority, it also recognizes that a remand would cause unnecessary delay in the implementation of *some* standard. The agency could promulgate the second standard with a *fallback provision* stating that the former standard shall

[56] For the purposes of this report, the term "agency head" includes an agency's most senior official(s) whether a single agency head, such as the EPA Administrator, or a multi-member commission or board, such as the FCC Commissioners.

take effect if a court determines that the latter standard is unlawful.[57]

c. Respondents were also asked whether their agencies have attempted to structure their rules to reflect their views about the severability of various provisions (even if not by including an express severability clause). Officials from three agencies reported that their agencies, when appropriate, will structure the regulatory text of rules so that each provision is independent of others, bolstering the agency's intended position in litigation that if one provision is held unlawful, the others should remain in effect. Attorneys from these agencies routinely search for places to clarify which aspects of the regulatory text are interdependent and which aspects of the text are independent. They also search places to clarify where aspects of the regulatory text are supported by multiple, independently sufficient grounds. These officials also indicated that attorneys in charge of reviewing draft regulatory text will sometimes advise officials in charge of drafting the text to subdivide provisions into more discrete chapters, sections, and parts, in order to bolster the agency's position to a reviewing court that certain provisions were intended to work independently, or conversely, to lump provisions together to bolster the agency's case that the provisions were intended to work together.

3. Stakeholder input

Respondents were also asked whether their agencies seek input from stakeholders concerning any of the issues discussed above. All agencies reported that they generally seek input from stakeholders regarding the expected impact of proposed rules but that they do not specifically seek input on procedural matters, such as severability clauses. One official, however, opined that stakeholder input may be

[57] Although this issue was not discussed with EPA officials, it occurred to the authors of this report that this is arguably the structure of the Clean Power Plan. That rule requires states to meet emissions targets based on three "building blocks," but also provides that if a court determines that the agency was not permitted to base standards on one of the buildings blocks, that the standard shall be based on the other two. See 40 C.F.R. Part 60.

particularly valuable on procedural issues. Some stakeholders will have a strong interest in a proposed regulation and will be willing to invest heavily into researching the interaction of various provisions, thus allowing those stakeholders to provide the agency with useful information that the agency might not otherwise have.

4. Litigation Risk Assessments

Respondents were asked about the content of litigation risk assessments prepared by their agencies' general counsel's offices. Officials from five agencies opined that litigation risk assessments were most useful when incorporated into an iterative drafting process between policy experts, legal compliance experts, and those responsible for drafting regulatory text. According to these officials, the development of regulatory text at their agencies is a collaborative process in which policy experts and compliance attorneys work together to balance the perceived costs and benefits of various regulatory options, *including* the potential risk of a judicial ruling invalidating aspects of the regulatory program. Officials from three agencies emphasized that the collaborative nature of the rule drafting process is aided by the fact that lawyers are brought in during the earliest stages of rule development. These officials also emphasized that, during the drafting process, officials have robust discussions about the risks of an adverse judicial ruling to a particular program, as well as risks to *other* programs that may be vulnerable to same sort of legal challenge, but which have thus far not been challenged.

Several agencies' officials also mentioned that, on occasion, their agencies had robust communication with attorneys at the Department of Justice with responsibility for ultimately defending a proposed rule in litigation. However, the extent to which the Department of Justice was involved in the development of agency rules depended heavily on the nature of the rulemaking and the relationship between agency staff and the DOJ attorneys responsible for defending the agency's rules.

B. After Promulgation

Respondents were also asked to comment on techniques that their agencies have used or have considered using after promulgating a new final rule to mitigate the costs of remedying potentially infirm rules.

1. Compromise

Officials from several agencies emphasized the importance of proactively engaging with regulated entities to reach compromises, where possible. In this regard, one agency strategy is to seek a settlement in litigation that is amenable to the agency's regulatory goals.[58] Two officials noted that their agencies face litigation over compliance with statutory deadlines. Proactive settlement negotiations can be therefore be very useful in allowing agencies in that situation to promote their regulatory objectives without substantial interference from the judicial branch. Another strategy mentioned was to seek to understand the compliance difficulties that individual regulated entities face and to offer delayed implementation of new rules as to those entities for a reasonable amount of time.

2. Briefing Remedies

Respondents were also asked whether the government had requested specific remedies in briefs defending their rules as a means of limiting the costs flowing from an adverse judicial ruling.[59] In particular,

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[58] Cf. Wendy Wagner, Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation, 53 Wm. & Mary L. Rev. 1717, 1770 (2012) (noting, in the context of drafting rules, that "[m]ollifying litigious groups during rule development or during the comment process could go a long way to lower the agency's litigation risk.").

[59] Several scholars have noted that the issue of remedies "receive[s] little attention in briefing." Bagley, *supra* note 21, at 262; Daugirdas, *supra* note 51, at 310. In one sense, this is strange. If a more limited remedy would benefit the agency—and in many cases, it clearly would—then why don't agencies nearly always ask for it? One reason may be that agencies believe that arguments about remedy will fall on unreceptive ears. But, as explained in the main text, a more important reason may

respondents were asked whether the government had (a) argued that an invalid provision of a rule was severable; (b) argued that the appropriate remedy for an invalid rule is remand without vacatur; (c) argued that a rule's legal infirmity was harmless error; or (d) sought a voluntary remand of a rule to avoid a damaging precedential ruling.[60]

a. Officials from two agencies reported that their agencies had at least on one occasion argued in a brief that an agency rule was severable. One of those officials said that the issue of severability commonly arises in moot courts in preparation for oral argument, but that it is much less likely to appear as an argument in the agency's briefs.[61] That official, as well as officials from another agency, opined that their agencies rarely affirmatively argue remedies in their briefs because the agencies' primary position is typically that their actions were lawful—i.e., that the agencies are right on the merits—and that an argument about remedies would weaken and distract from that position.

b. Officials from two agencies reported that the government had sought remand without vacatur in some cases challenging the agency's rules, while officials from another agency reported that they were unaware of an instance in which the government had made that argument in one of their cases. An official from a fourth agency remarked that he or she thought that the government should seek remand without vacatur more often than it does. The official speculated that litigators are hesitant to ask for remand without vacatur because they worry that doing so weakens the government's position on the merits. In other words, litigators may worry that asking for remand without vacatur

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to do with litigation strategy—namely, an agency might believe that briefing remedies would weaken its position on the merits.

[60] We use the locution "the government" rather than "the agency" because some agencies studied here have independent authority to defend their rules in litigation, while other agencies are usually (if not always) represented by the Department of Justice.

[61] That lawyers who defend agency rules in court commonly prepare answers to remedy-related questions suggests that the issue arises with some frequency at oral argument.

signals to the court that the agency lacks confidence in its position on the merits. Officials from two agencies opined that the litigation-strategy concern was easily overstated. Any marginal risk associated with requesting a more limited remedy, these officials said, could likely be mitigated by making clear that the agency's primary position was that the rule is lawful and that the agency was only briefing the issue of remedy *in the alternative*.

c. Respondents were asked whether they were aware of an instance in which the government had argued that a flaw in an administrative rule was harmless error. Several officials said yes; most said no. One official recalled an instance in which agency had argued that failure to conduct notice and comment was harmless error because the parties subject to the rule were made sufficiently aware of the rule's content before the rule was promulgated.

d. Respondents were asked whether their agency had ever sought a voluntary remand of a rule to avoid an adverse judicial ruling. Officials from one agency indicated that the agency has on occasion requested a voluntary remand of a rule in order to avoid the possibility of an adverse circuit court holding that the agency *generally* had no authority to take the kind of action in question.

Finally, on the issue of briefing remedies, a former official from one agency indicated that, in his or her view, asking for particular remedies when a rule has never been enforced would often be a tall order because it would be more difficult to show a reviewing court that the agency that large-scale reliance interests had been built up around the rule. Along similar lines, the same official opined that a court is much less likely to grant a more limited remedy sought by the agency if there is potentially a substantive problem with a rule—e.g., that the rule is ultra vires—than if the defects in the rule are entirely procedural—e.g., failure to provide adequate notice.

IV. Recommendations

This Part suggests practices that agencies should consider when preparing to promulgate new, final rules and when defending those rules

in litigation. One theme that emerged from our interviews with agency officials is that the techniques described in Part III are highly context-dependent. Each agency has its own unique mission, its own internal processes and structures, its own staff (with their various competencies and areas of expertise), its own relationship to other agencies and to the President and Congress, and its own budget. Each of those characteristics can affect whether the techniques discussed above are advisable in any particular situation. Accordingly, it would be unwise to recommend that all agencies should adopt a particular practice in all circumstances. Instead, this Part proposes a list of practices that agency staff should consider when promulgating new, final rules that involve an appreciable degree of legal uncertainty.

A. Before Promulgation

Recommendation #1: *Consider including a severability clause in a new rule, where the agency has determined that the rule's provisions would function independently.*

Severing the invalid provisions of a rule from the valid provisions (and leaving the valid ones in effect) has the potential to avoid many of the costs of total vacatur. While the public may lose the benefits, such as they are, of legally infirm provisions, and while the agency may incur the expense of re-promulgating those provisions, the unchallenged provisions may remain good law and continue to benefit the public and the agency.

Including a severability clause in a final rule (that an agency would prefer to be severable) may increase the chance that a reviewing court will determine that the infirm portions of a rule actually are severable. In the absence of a severability clause, a reviewing court may be concerned that severing the remaining aspects of a rule would put the court a position of effectively endorsing a rule that the agency had not promulgated.[62] Severability clauses can help alleviate this problem, by assuring the reviewing court that the agency intended the remainder of

[62] In a sense, this is similar to the *Chenery* rule against affirming agency's rule on a ground that it did not offer during the initial rulemaking.

the rule to stay in effect, even in the absence of the invalid provision.[63] Moreover, a severability clause can promote predictability in the law by notifying the industry and the public more generally of the agency's position on the issue.

As explained above, some agency officials have the sense that including a severability clause in a final rule makes the rule more likely to be challenged. That may be true in some cases, though we are skeptical that it is true as a general matter. Some areas of regulation are sufficiently controversial that any rule in that area is destined to reach the courts, whether or not it contains a severability clause. And it is in *these* rules—those that are most likely to be challenged—where the benefits of severability clauses are at their apex.

To be clear, as the phrasing of this recommendation suggests, the authors do not recommend that agencies include severability clauses in every rule. Severability clauses are not advisable in all circumstances. One example where a severability clause would be inappropriate is where the rule's efficacy depends on the interconnectedness of its provisions. Another is where the agency simply does not know what its position on severability is at the time it promulgates the final rule.[64] In this circumstance, asking for severance during litigation is certainly one option available to an agency. But where an agency has determined its position on severability during the rule drafting process, severability clauses can promote important benefits that are worth taking seriously.

Recommendation #2: *When contemplating a new regulatory program, whose legality is not well established, consider rolling the program out through multiple rules, rather than a single rule.*

Another technique for preventing potential legal defects in one aspect of a regulation from remedially tainting the other aspects of the

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[63] See Tyler & Elliott, *supra* note 35, at 2298-99.

[64] As explained above, some agencies indicated that they preferred to express their opinions on severability after litigation had been initiated, rather than during the process of promulgating a final rule.

regulation is simply promulgating the regulation through multiple, discrete rules, rather than a single rule. While the case law on severability clauses is somewhat thin—and therefore not totally well established—an agency can guarantee that the various aspects of a regulation will be independent by simply passing numerous rules.

Promulgating multiple rules, however, can have drawbacks. Several respondents indicated that, in some instances, the administrative record may provide stronger support for a single rule than it does for either of two separately promulgated rules. Other officials opined that dividing regulations into separate rules would be too costly, time consuming, and taxing of the agency heads' time to be seriously considered by their agencies. In addition, dividing regulations into multiple rules is a fairly heavy handed technique that can achieve only some of the benefits of a severability clause. A severability clause can specify any number of relationships between regulatory provisions—e.g., that all of a rule's sections are severable; that a *particular* provision is severable; that particular provisions are severable from some provisions, but not from others; etc. By contrast, dividing a regulation into multiple rules really only specifies one type of relationship—namely, that the regulations promulgated in one rule are independent from the regulations promulgated in the other rule.

Still, some agencies, at least some of the time, have found separating regulations on subject matters into multiple rules to be a useful way of expressing to a reviewing court that the agency regards the regulations as independent. Agencies should therefore at least consider this as one of the options, on a menu of available options, for attempting to minimize the costs of remedying potential legal defects in its rules.

Recommendation #3: *Organize rules in ways that clearly reflect the independence of or inter-dependence between their provisions.*

Several respondents emphasized that their offices of general counsel work hard to ensure that a rule's text and structure reflect the logical and practical relationships between a rule's provisions. For example, it is a best practice for an agency to make clear when it intends for features of a rule to function independently by dividing those features

into separate parts and sections and indicating in the rule's text that those features are supported by independent justifications and evidence. Doing so can strengthen the agency's argument to a reviewing court that it intended the rule to be severable, even in the absence of a severability clause.

Recommendation #4: *Consider including "fallback" provisions in a new rule, where the agency's preferred course is legally uncertain and where there is a clear second-best alternative.*

When the legality of an agency's preferred regulatory course is not well established, the agency may know what its preferred second-best alternative would be, in the event that a reviewing court determines that its preferred course is unlawful. The agency, for example, may prefer to impose a standard—call it Standard X—that is based on extant scientific data and the agency's own costs of implementation. And the agency may also know that, if the agency is not permitted to take its own costs of implementation into account, that it would prefer a slightly more stringent standard—call it Standard Y—that is based only on the scientific data and not on the costs of implementation. In such circumstances, the agency should consider taking both Standard X and Standard Y through the notice-and-comment process and promulgating a rule that imposes Standard X and that specifies that Standard Y will take effect in the event that a reviewing court holds Standard X to be unlawful.[65]

Recommendation #5: *When contemplating the promulgation of a new regulatory program, the legality of which is uncertain, consider promulgating a smaller, less costly rule as a test case.*

As discussed above, agencies sometimes wish to regulate in areas where their authority to do so is not well established. Unfortunately, these types of rulemakings can be associated with high administrative costs, as an agency may have to invest heavily in new research and a new enforcement apparatus. The risk that a reviewing court will not adopt

[65] As noted above (note 57), this is arguably the structure of the EPA's Clean Power Plan.

the agency's position on its regulatory authority can therefore be very costly. Officials at one agency mentioned that one way to mitigate this risk is to promulgate a narrower, less costly rule as a form of "test case"—i.e., a rule that will allow the agency to test its legal theory in court without incurring the large costs of a new regulatory program.

To be sure, in many circumstances, this technique will not be advisable. The time it takes for a "test case" to be promulgated and to reach final judgment in court may be too long for an agency to wait before rolling out its intended program. Still, this strikes us as another option that agencies should consider when determining how best to minimize the costs of remedying potentially defective rules.

Recommendation #6: *Consider integrating litigation risk assessments early in the process of drafting regulatory text and include litigation risk as part of the cost-benefit analysis when choosing between various regulatory options.*

Most respondents indicated that the formulation of new regulatory policy worked best when the process of drafting a rule's regulatory text was viewed as a close collaboration between policy experts, compliance experts, litigators, and rule drafters. They reported that rule drafting processes that are iterative, rather than linear, permit the agency to more finely balance the benefits of marginal increases in regulatory impact against the marginal costs of additional litigation risk. One reason why that arrangement works well is that it allows an agency with that internal review structure to include the risk of litigation in its cost-benefit analysis when determining the best regulatory course.

Some officials reported that the lawyers responsible for defending a rule in court were sometimes consulted only at the late stages of the rule drafting process and even, on occasion, only after a final rule had been promulgated and litigation had begun. In our view, these agencies should collaborate with experienced litigators early in the rule drafting process, at least when promulgating high-impact rules that are likely to be challenged in litigation.

B. After Promulgation

Recommendation #7: *The Judicial Conference should develop for the federal courts' consideration a briefing policy that would encourage agencies to submit briefing on remedies.*

Government lawyers defending agency rules in court are often faced with a strategic dilemma. On one hand, briefing remedies can be seen as a sign of weakness in the agency's position on the merits, both in court and in the media. On the other hand, an agency will often have a preference for a more limited remedy that it would prefer to explain to a reviewing court, if it knew that the court was going to find its rule unlawful. Due to streamlined briefing schedules, however, an agency that chooses not to brief remedies in its brief on the merits will often never be given a second opportunity to explain to the court why it should not vacate a rule in its entirety.

Courts should recognize this dilemma and consider taking steps to ameliorate the distortions it causes in the briefs that the courts receive. One way to do this would be to adopt a default policy (from which any particular district judge or panel of appellate judges could opt-out) of allowing agencies to submit supplemental briefing in cases where the court believes it will likely hold a rule unlawful or to consider remedial issues as sufficient grounds of reconsideration. While this proposal would likely improve the quality of briefs submitted by the government on remedies, it has the drawback of making the briefing schedule less streamlined.

Another, perhaps better, way of ameliorating the dilemma is to provide in the court's briefing order that agencies are to submit any plausible arguments on remedies in their principal briefs on the merits. The D.C. Circuit's Rules already address a similar dilemma facing rule challengers. Parties challenging administrative rules often face plausible arguments that they lack standing. In the absence of any rule to the contrary, they may prefer for strategic reasons not to address standing in their opening briefs, even when they know that standing will feature prominently in the parties' arguments to the D.C. Circuit. The Circuit Rules ameliorate this issue by directing appellants or petitioners in cases

involving direct review of administrative actions to include in their opening briefs "arguments and evidence establishing the claim of standing."[66] Because the Circuit Rules require petitioners to address standing in their opening briefs, no one infers from that fact that they have made standing arguments that they are uncertain about their position on standing. Similarly, courts could ameliorate the strategic dilemma that agencies face by requiring the parties to brief remedies whenever there are plausible arguments that total vacatur would be inappropriate in the event that the reviewing court holds the agency's rule unlawful.

Recommendation #8: *Where the agency has a firm view about the appropriate remedy for a defective rule, consider proactively seeking that remedy in litigation briefs.*

With regard to remedies, one lesson is that agencies might not receive what they don't request. The authors believe that one contributing cause of total vacatur's status as a default remedy in administrative law is that agencies request more limited remedies less than they should. We therefore recommend that, where appropriate, agencies affirmatively argue to courts their positions on the appropriate remedy for a defect in an administrative rule—e.g., that the provisions of a rule should be severed; that an infirmity was harmless error; or that the court should remand the rule without vacating it.

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[66] D.C. Cir. Rule 28(7) ("Standing. In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. This section, entitled 'Standing,' must follow the summary of argument and immediately precede the argument. When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing. See Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002).").

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