



Administrative Conference Recommendation 2024-1

Choice of Forum for Judicial Review of Agency Rules

Adopted June 13, 2024

Final rules adopted by federal agencies are generally subject to review in the federal courts.¹ In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the Administrative Conference sought to identify principles to guide Congress in choosing the appropriate forum for judicial review of agency rules. The most significant was Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, which recommended that, in the case of rules adopted after notice and comment, Congress generally should provide for direct review in the courts of appeals whenever “an initial district court decision respecting the validity of the rule will ordinarily be appealed” or “the public interest requires prompt, authoritative determination of the validity of the rule.”² Subsequent recommendations opposed altering the ordinary rules governing venue in district court actions against the United States,³ set forth a principle for determining when it is appropriate to give the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review agency rules,⁴ and offered guidance to Congress on the factors it should consider in determining whether

¹ See 5 U.S.C. § 702. This Recommendation does not address judicial review of adjudicative orders, including those that announce principles with rule-like effect or agency actions regarding petitions for rulemaking. Additionally, the Recommendation does not address suits challenging agency delay or inaction in promulgating rules. See *Telecomms. Rsch. & Action Ctr. v. Fed. Commc’ns Comm’n*, 750 F.2d 70, 72 (D.C. Cir. 1984); see generally Joseph W. Mead, *Choice of Forum for Judicial Review of Agency Rules* (May 9, 2024) (report to the Admin. Conf. of the U.S.).

² 40 Fed. Reg. 27,926 (July 2, 1975).

³ Admin. Conf. of the U.S., Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the Government*, 47 Fed. Reg. 30,706 (July 15, 1982).

⁴ *Id.*



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to assign responsibility for review to a specialized court.⁵ The Conference also addressed the choice of forum for judicial review of rules adopted under specific statutes.⁶

Several years ago, the Conference undertook a study to identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.⁷ Based on that initiative, ACUS adopted Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*,⁸ which recommended that Congress address statutory provisions that create unnecessary obstacles to judicial review or overly complicate the process of judicial review. That Recommendation also prompted questions regarding “whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute.”⁹

In this Recommendation, the Conference revisits the principles that should guide Congress in choosing the appropriate forum for judicial review of agency rules and in drafting clear provisions that govern the choice of forum. While this Recommendation offers drafting advice to Congress, agencies may also find it useful in responding to congressional requests for technical assistance.¹⁰

Determining the Court in Which to Seek Review

Absent a statute providing otherwise, parties may seek judicial review of agency rules in a district court. Although this approach may be appropriate in some contexts, direct review by a court of appeals is often more appropriate. For one, district court proceedings are less necessary when an agency has already compiled an administrative record that is adequate for judicial

⁵ Admin. Conf. of the U.S., Recommendation 91-9, *Specialized Review of Administrative Action*, 56 Fed. Reg. 67,143 (Dec. 30, 1991).

⁶ Admin. Conf. of the U.S., Recommendation 76-4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act*, 41 Fed. Reg. 56,767 (Dec. 30, 1976); Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991).

⁷ See Jonathan R. Siegel, Admin. Conf. of the U.S., *Sourcebook of Federal Judicial Review Statutes* 33 (2021).

⁸ 86 Fed. Reg. 53,262 (Sept. 27, 2021).

⁹ *Id.* at 53,262 n.7.

¹⁰ See Admin. Conf. of the U.S., Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).



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review and further appeal of a district-court decision is likely. Allowing parties to choose the district court in which to seek review also creates opportunities for forum shopping to a greater extent than when review is sought in a court of appeals.¹¹ For these and other reasons, Congress has in many contexts provided for direct review of agency rules in the courts of appeals. And in a minority of statutes, Congress has required parties to seek review in a single, specified tribunal.

In this Recommendation, the Conference generally reaffirms its earlier recommendations that Congress ordinarily should provide for direct review of agency rules by a court of appeals. The Conference believes that this principle is particularly important for rules promulgated through public notice and opportunity for comment. Such procedures produce a record that is conducive to review by an appeals court without need for additional development or factfinding, and drawing the line at rules promulgated after public notice and opportunity for comment provides a relatively clear jurisdictional rule.

Avoiding Drafting Ambiguities

Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions which this Recommendation addresses.¹² First, some statutes specify the forum for review of “orders” without specifying the forum for review of “rules” or “regulations.” This can lead to uncertainty regarding whether “orders” includes rules, particularly because the Administrative Procedure Act defines an “order” as any agency action other than a rule.¹³ Second, some statutes are unclear as to the forum in which a party may file an action challenging the validity of a rule. A lack of clarity may result from statutory silence or a choice-of-forum provision of uncertain scope.

¹¹ See Mead, *supra* note 1; Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the “Race to the Courthouse” in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).

¹² The Committee on Judicial Review, from which this Recommendation arose, identified a third source of ambiguity: Many statutes are unclear as to whether choice-of-forum provisions regarding rules apply only to rules promulgated by an agency or whether they apply also to other rule-related actions such as delay or inaction in promulgating a rule or the grant or denial of a petition for rulemaking. This Recommendation does not address this ambiguity. The Committee on Judicial Review has suggested it for future study by the Conference.

¹³ 5 U.S.C. § 551(6).



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This Recommendation urges Congress, in drafting new or amending existing provisions governing the choice of forum for the review of rules,¹⁴ to avoid using the term “orders” to encompass rules; to state clearly the forum in which judicial review of rules is available; and to state clearly whether such provisions apply to rule-related actions other than the promulgation of a rule.

RECOMMENDATION

1. When drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court of appeals.
2. When drafting a statute that provides for judicial review of agency actions, Congress should state explicitly whether actions taken under the statute are subject to review by a district court or, instead, subject to direct review by a court of appeals. If Congress intends to establish separate requirements for review of rules, as distinguished from other agency actions, it should refer explicitly to “rules” and not use the term “orders” to include rules.

¹⁴ This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address existing statutes.