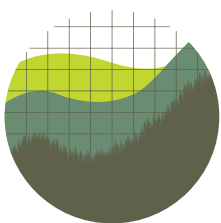




# Administrative Severability

A Tool Federal Agencies Can Use  
to Address Legal Uncertainty



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## Introduction

Several recent developments in administrative law—namely the Supreme Court’s embrace of the major questions doctrine and decision to hear a case asking it to overrule or clarify *Chevron* deference—have left federal agencies uncertain about how regulations will fare in litigation. Agencies adapting to this uncertainty may want to pay closer attention to recent case law on administrative severability, which allows a court to sever the invalid portion of a rule while leaving the rest intact.<sup>1</sup>

This recent case law indicates that boilerplate severability clauses<sup>2</sup> may not convince a court to find a rule severable. Instead, to improve the chances that a court will find a rule severable, agencies should consider including more specific discussions of severability in the rule’s supporting analyses. They should also consider addressing severability at all stages of the rulemaking process—from the initial proposal to the final rule.

## Administrative Severability Is Closely Related to Statutory Severability

Statutory severability has been around for some time, but administrative severability, which draws heavily from the statutory context, is a more recent development. In the statutory context, lawmakers often use severability clauses as a security measure to preserve as much of their law as possible in the event of an adverse decision on the statute’s constitutionality. A severability clause declares that, if a court finds one part of the statute invalid, it should sever that portion of the law while leaving the remainder of the law intact.

In 2015, Charles Tyler and E. Donald Elliott published the seminal academic article on administrative severability, which explored the then-recent trend of agencies including severability clauses in their rules and orders.<sup>3</sup> Examining case law on both statutory and administrative severability, Tyler and Elliott discerned two prongs of the severability analysis: intent and workability. For a court to sever an invalid portion of a rule, it must find both (1) that the agency would have intended to promulgate the remaining portion and (2) that the remainder can function independently. The Supreme Court articulated these factors in the statutory context in *Alaska Airlines, Inc. v. Brock*,<sup>4</sup> and it applied them in the administrative context just one year later in *K Mart Corp. v. Cartier, Inc.*<sup>5</sup>

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<sup>1</sup> Courts have interpreted the Administrative Procedure Act to allow them the option of severing agency rules and orders. *See, e.g.,* *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1144 (D.C. Cir. 2022).

<sup>2</sup> Although some courts use the term severability “clause” when describing express discussions of severability in a statute or rule, others refer to these discussions as severability “provisions.” Compare *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (“The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute.”), with *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68, 98 (D.D.C. 2020) (Jackson, J.) (“[T]he 2019 Election Rule contains an express severability provision[.]”). This report uses the terms interchangeably.

<sup>3</sup> Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 *Yale L.J.* 2286, 2294–96 (2015).

<sup>4</sup> 480 U.S. 678, 684 (1987).

<sup>5</sup> 486 U.S. 281, 294 (1988).

While severability clauses can be relevant to a court’s analysis, the Supreme Court clarified in *Whole Woman’s Health v. Hellerstedt* that such clauses, at least in the statutory context, are “an aid merely; not an inexorable command.”<sup>6</sup> The Court has yet to opine on administrative severability clauses, but lower courts have treated them similarly to statutory clauses—as merely an interpretive aid. In other words, rather than defer to severability clauses in agency rules, lower courts analyze both the quality of the severability clause at hand and the surrounding context. Ultimately, courts evaluate any persuasive evidence of agency intent and workability. And if courts have reason to substantially doubt that the agency would have issued the rule absent the invalid portion or that the remainder can function independently, they generally decline to find the rule severable, notwithstanding the agency’s inclusion of a severability clause.

## Recent Case Law and a Path Toward Better Severability Clauses

In the eight years since Tyler and Elliott’s article, courts have had many more opportunities to evaluate administrative severability clauses. One notable trend emerging from these opinions is that courts appear more likely to respect a severability clause if it directly addresses intent and workability. Effective clauses convincingly demonstrate the agency’s position on both prongs.

For example, in *American Fuel & Petrochemical Manufacturers v. EPA*, the D.C. Circuit found that the agency’s 2019 rule for gasoline blended with up to 15 percent ethanol was severable based in large part on its more thorough severability discussion in the rule’s preamble, which addressed both prongs of the analysis.<sup>7</sup> The provision stated that section II of the rule “establish[ed] a single, unified program” that operated independently of the rule’s section III program.<sup>8</sup> In other words, section III would still be “workable” without section II. In writing this specific language, the agency also engaged with the consequences of severability, persuasively demonstrating its intent that the regulation be severed in this way. The provision therefore instructed the court to sever section II from section III if need be, which is exactly what the court did.<sup>9</sup>

Similarly, the court in *AFL-CIO v. NLRB* found a detailed severability provision persuasive.<sup>10</sup> The agency’s severability provision stated that most, but not all, combinations of the rule’s provisions could function independently, pointing out the provisions that could not be severed.<sup>11</sup> The court concluded that “the Board made an *intentional determination* that nearly all of the rule’s provisions” were severable.<sup>12</sup> The court therefore considered the severability clause persuasive evidence of agency intent and severed the rule accordingly.<sup>13</sup>

Not all severability clauses persuasively demonstrate agency intent and workability of the remainder. Most notably, when an agency uses a boilerplate severability clause it does not provide any particularly persuasive evidence that it seriously considered its severability position. For example, in *Nasdaq Stock Market LLC v. SEC*, the D.C. Circuit acknowledged that the agency included a severability provision in its 2021 orders governing the dissemination of equity market data, but the provision was boilerplate and the court gave it little weight as evidence of intent and workability.<sup>14</sup> The court instead

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<sup>6</sup> 136 S. Ct. 2292, 2319 (2016) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884–885 n.49 (1997)).

<sup>7</sup> 3 F.4th 373, 384 (D.C. Cir. 2021).

<sup>8</sup> *Id.* at 384 (quoting *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26,980, 26,983 (June 10, 2019))

<sup>9</sup> *Id.*

<sup>10</sup> 466 F. Supp. 3d 68, 98 (D.D.C. 2020), *aff’d in part, rev’d in part on other grounds*, 57 F.4th 1023 (D.C. Cir. 2023).

<sup>11</sup> *Id.* at 99.

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> 38 F.4th 1126, 1144 (D.C. Cir. 2022).

looked to the rest of the rule and concluded that it would not be workable without the stricken provision.<sup>15</sup> Similarly, the court in *Flores v. Barr* declined to sever the rule in question, calling the government’s reliance on a “pro forma” severability clause “unavailing.”<sup>16</sup> On review, the Ninth Circuit disagreed, citing the same boilerplate severability clause favorably.<sup>17</sup> This disagreement indicates that even boilerplate clauses have some value. But agencies hoping to craft the most effective severability clauses should learn from trends in the case law and draft detailed and specific severability clauses.

## Case Law Underscores the Importance of Consistent Severability Discussions in a Rule’s Supporting Analyses

In recent years, courts have also looked to various other sources of evidence to answer the two prongs of the severability analysis, including the administrative record and the rule’s structure and stated purpose. In *High Country Conservation Advocates v. U.S. Forest Service*, the Tenth Circuit looked to the structure of the agency’s environmental impact statement (EIS) as confirming its severability conclusion.<sup>18</sup> Determining that the agency had treated the rule as a whole in its EIS, rather than contemplating individual sections, the court found that severance was not appropriate (despite the presence of a severability clause).<sup>19</sup> Similarly, the D.C. Circuit in *Sierra Club v. FERC* found that the agency’s order was not severable because its EIS had “treated the project as a single, integrated proposal.”<sup>20</sup> Also looking to the rulemaking record, the D.C. Circuit in *American Petroleum Institute v. EPA* examined the agency’s response to public comments in its severability analysis.<sup>21</sup> The court found that the agency’s responses indicated that the rule’s provisions were too intertwined to function independently if severed.<sup>22</sup>

Courts have also looked to the structure and purpose of the rule to inform severability analysis. In *Wilmina Shipping AS v. U.S. Department of Homeland Security*, the court determined that it could sever the agency’s order because the remainder would still meet the purpose of the order.<sup>23</sup> The order had included two mechanisms to ensure compliance, so even with one mechanism struck down, the remainder would “function sensibly” alone and accomplish the order’s purpose.<sup>24</sup> In *Mayor of Baltimore v. Azar*, the Fourth Circuit declined to sever a rule because of its structure.<sup>25</sup> Because the agency labeled the invalid portions of a rule “major provisions,” the court substantially doubted that the remaining portions of the rule could function sensibly on their own.<sup>26</sup>

These recent cases underscore the fact that severability clauses do not guarantee courts will find a rule severable, just as their absence does not preclude severability. Rather, courts will also scrutinize other evidence, including the history, text, and purpose of a rule when deciding severability questions.

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<sup>15</sup> *Id.*

<sup>16</sup> 407 F. Supp. 3d 909, 930 (C.D. Cal. 2019), *aff’d in part, rev’d in part sub nom.* *Flores v. Rosen*, 984 F.3d 720, 736 (9th Cir. 2020).

<sup>17</sup> *Flores*, 984 F.3d at 736.

<sup>18</sup> 951 F.3d 1217, 1229 (10th Cir. 2020).

<sup>19</sup> *Id.*

<sup>20</sup> 867 F.3d 1357, 1366 (D.C. Cir. 2017).

<sup>21</sup> 862 F.3d 50, 71 (D.C. Cir. 2017).

<sup>22</sup> *Id.* at 72.

<sup>23</sup> 75 F. Supp. 3d 163, 173 (D.D.C. 2014).

<sup>24</sup> *Id.* at 172 (quoting *MD/DC/DE Broadcasters Ass’n v. FCC*, 253 F.3d 732, 735 (D.C. Cir. 2001)).

<sup>25</sup> 973 F.3d 258, 293 (4th Cir. 2020).

<sup>26</sup> *Id.* (cleaned up).



# Clarifying Best Practices for Administrative Severability

Agencies considering administrative severability clauses in their rules should take note of this recent case law and consider a comprehensive severability analysis at all stages of rulemaking in order to improve the chances that a court will find their rules severable. This more recent case law also aligns with a 2018 memo from the Administrative Conference of the United States, which recommended best practices for administrative severability.<sup>27</sup> In light of these recommendations and the most recent case law on administrative severability, agencies should keep the following suggestions in mind when developing their severability analysis.

1. **Make case-by-case determinations on severability.** In their article, Tyler and Elliott suggest that agencies may sometimes opt against including a severability clause because they fear drawing attention to legally contentious provisions.<sup>28</sup> But this may not be a relevant concern for rules that are likely to be challenged regardless.<sup>29</sup>
2. **Begin discussing severability early.** Severability arguments are stronger when backed up by evidence of severability analysis at all stages of agency rulemaking. Agencies should thus begin thinking about severability at the earliest possible stage, including when drafting the notice of proposed rulemaking, to maximize opportunities to develop a sophisticated severability framework.
3. **Consider severability implications in all aspects of a rulemaking.** Agencies should conduct a comprehensive severability analysis and reflect their conclusions throughout the rulemaking process. In conducting its severability analysis, an agency should consider:
  - Crafting the rule’s structure so that discrete sections that may be subject to legal challenge do not appear “intertwined” with the remainder of the rule.<sup>30</sup>
  - Choosing language carefully when describing each provision. For example, avoid labelling a provision “major” if not necessary.<sup>31</sup>
  - Conducting segmented National Environmental Policy Act reviews or regulatory impact analyses (RIAs) that align with how the agency believes a rule can be severed (if necessary).<sup>32</sup> If feasible, the agency should analyze different portions of the rule separately when drafting the EIS or RIA. For instance, as part of an RIA, an agency could consider making clear that individual portions of the rule are independently cost-benefit justified, rather than simply concluding that the rulemaking package as a whole is cost-benefit justified.

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<sup>27</sup> Administrative Conference of the U.S, Recommendation 2018-2, Severability in Agency Rulemaking (2018).

<sup>28</sup> Tyler & Elliott, *supra* n. 3, at 2311.

<sup>29</sup> Additional scholarship may be useful to determine whether advocates have used severability provisions to guide legal challenges to administrative regulations.

<sup>30</sup> *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (quoting *Tel. & Data Sys. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994)).

<sup>31</sup> *Mayor of Baltimore*, 973 F.3d at 293.

<sup>32</sup> See *High Cty. Conservation Advocates*, 951 F.3d at 1229, and *Sierra Club*, 867 F.3d at 1366.

- Soliciting public comments on severability. The agency’s responses can later provide additional evidence that the agency thoroughly addressed severability.<sup>33</sup>
  - Restating its severability analysis in the rule’s statement of basis and purpose.<sup>34</sup>
4. **Write detailed severability clauses.** Effective clauses will describe the agency’s reasoned severability conclusions and explain why the rule will “function sensibly” without certain provisions.<sup>35</sup> Specific severability clauses will more convincingly establish agency intent and give the court a basis for concluding that the remainder will function sensibly on its own.<sup>36</sup>

Ultimately, agencies should be aware that they may need to do more than copy and paste a severability clause into the final text of a rule to convince a court that the rule is severable. Thoroughly addressing severability may be at least one way agencies can more proactively respond to increased litigation and uncertainty in administrative law.

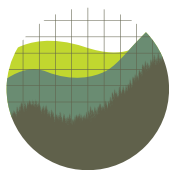
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<sup>33</sup> See *Am. Petroleum Inst.*, 862 F.3d at 71.

<sup>34</sup> See *Administrative Conference of the U.S.*, *supra* n. 27, at 1(c).

<sup>35</sup> *MD/DC/DE Broadcasters Ass’n*, 253 F.3d at 735.

<sup>36</sup> See *Am. Fuel & Petrochemical Mfrs.*, 3 F.4th at 37, and *AFL-CIO*, 466 F. Supp. 3d at 98.



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