



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

To: Members of the Committee on Judicial Review, Project Advisors,
and Other ACUS Members

From: Bobby Ochoa
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Date: July 16, 2021

Subject: *Clarifying Statutory Access to Judicial Review of Agency Action: Assembly's
Remand of Recommendation to Resolve Certain Issues*

At the 74th Plenary Session, the Assembly remanded *Clarifying Statutory Access to Judicial Review of Agency Action* to the Judicial Review Committee to address several issues, most prominent among them a problem identified with Paragraphs 2 and 4(b) (and related preambular language) that arises when a rule's publication and effective date precede notice and opportunity to comment. To aid the Committee's deliberations at its July 22 meeting, this memorandum briefly describes each issue on remand, identifies the proposed edits members have offered to resolve the issues, and lists (and provides links to) several member comments and other helpful information.

1. Issue with Paragraphs 2 & 4(b) when Rule's Publication and Effective Date Precede Notice and Comment

The main issue discussed during the Plenary Session is that the Committee-proposed Recommendation, specifically Paragraphs 2, 4(b), and related preambular language, does not adequately account for scenarios in which the traditional notice-and-comment sequence is inverted (i.e., the rule takes effect prior to the conclusion of any comment period). After extensive debate over possible edits to Paragraph 2, the Assembly remanded the Recommendation to the Judicial Review Committee.

When a rule's publication and effective date precede notice and opportunity to comment (whenever and however that occurs), these paragraphs (as originally drafted) could leave open the possibility for the statute of limitations period to run simultaneously with the comment period (or at least leave the question open to argument because the language is ambiguous). This can become a problem because litigants may confront confusing questions about when to file a petition for review, whether to submit a protective petition for review simply to preserve a claim, and whether they have exhausted their opportunities before the agency. Rather than risk limitations issues by waiting for the comment period to run its course, litigants confronting such questions may opt to bring suit before the comment period is complete or before an agency has had time to review and respond to the comments it receives. That could have the effect of costing agencies a chance to correct their own oversights or improve their own rules outside the judicial process.

Senior Fellow Nina A. Mendelson submitted a [comment](#) (dated June 15, 2021) raising this issue and cited both direct rulemaking and interim-final rulemaking as processes in which the issue is likely to arise, as well as recent case law and reports suggesting this is likely to become more common in the future. She also submitted a [comment](#) (dated June 22, 2021) elaborating on this issue after the Plenary Session.

For reference, in direct rulemaking the agency states that the rule will go into effect on a certain date, unless it gets substantive adverse comments during the comment period. In interim-final rulemaking, the rule becomes effective immediately upon publication, and the agency typically stipulates that it will alter the interim rule if warranted by public comments. Inversion of the typical notice-and-comment process might also occur in other types of rulemakings in which the process is expedited, including what some people call temporary rulemakings, which result in rules that automatically expire pursuant to a sunset provision. With temporary rulemaking, an inverted process could occur if the proposed rule becomes immediately effective upon publication in the *Federal Register*. The potential for future agency action in response to public comments creates similar issues to those identified above in direct and interim-final rulemaking.

After the issue of inverted rulemaking processes surfaced, Judicial Review Committee Chair and Public Member Kristin E. Hickman drafted the below revisions (with input from staff and other members) and submitted this language in a formal [comment](#) (dated June 16, 2021). These revisions also appear in the accompanying redline for the Judicial Review Committee meeting on July 22, 2021. These revisions address the issue by recommending that Congress extend the time

for seeking review up to (and including) the rule’s effective date in the context of direct, interim-final, or temporary rules. Kristin’s proposed revisions would do the following:

Add the following language at lines 49–52 (preamble):

Direct, interim-final, and temporary rulemaking, in which an agency seeks and addresses comments after publishing rules in the *Federal Register*, may raise unique issues with respect to the timing of judicial review. Recommendations 2 and 4(b) provide that Congress should extend the time for seeking judicial review in these contexts.

Add the following language at lines 132–136 (Paragraph 2):

Where an agency issues a direct, interim-final, or temporary rule with an opportunity to comment after the rule has been published in the *Federal Register*, Congress should extend the time for seeking review by the length of the period up to and including the effective date of the rule.

Add the following language at lines 153–156 (Paragraph 4(b)):

To address situations in which an agency issues a direct, interim-final, or temporary rule with an opportunity to comment after the rule has been published in the *Federal Register*, the time for seeking review should be extended by the length of the period up to and including the effective date of the rule.

2. Rules not Published in the *Federal Register* (Paragraph 2)

During the Assembly’s discussion at the Plenary Session, members pointed out that not every rule needs to be published in the *Federal Register*, which created some potential issues in Paragraph 2. To address those issues, consultant Jonathan R. Siegel has proposed changing the second sentence of Paragraph 2 of the Recommendation to add the highlighted language below.

Lines 130–132 (Paragraph 2):

Where the event is the promulgation, amendment, or repeal of a rule, **and notice of the event must be published in the *Federal Register*,** Congress should provide that the event date is the date of the publication of the rule in the *Federal Register*; **where the rule is so published.**

3. Definition of “Order” in the APA (Paragraph 4(g))

During the Assembly’s general discussion at the Plenary Session, several members described how the APA defines “order” in a way that only applies to adjudicatory orders. Because the Recommendation is meant to cover agency action beyond adjudicatory orders, the use of “order” in the Recommendation thus could unintentionally diminish the Recommendation’s intended scope. To address that problem, Professor Siegel suggests changing “issued the order” to “took the action” in Paragraph 4(g), which is the only use of the term “order” in the proposed Recommendation. This change is shown in the accompanying redline and below.

Lines 176–177 (Paragraph 4(g)):

g. Whenever a specific judicial review statute requires that a party seeking review serve the document initiating review on the agency that ~~issued the order~~ **took the action** of which review is sought “simultaneously” with filing the document, this requirement is satisfied if the document is served on the agency within a reasonable but specific number of days, such as seven or fourteen days either before or after filing.

4. “General” Judicial Review Statute

Senior Fellow Sally Katzen raised a point about use of the word “general” when referring to the judicial review statute referenced throughout the Recommendation. During the Plenary Session, Sally suggested striking the word “general” from Paragraph 5 at line 185, as shown below:

5. The Conference’s Office of the Chairman should prepare and submit to Congress a proposed ~~general~~ judicial review statute for consideration that would provide for the statutory changes in Paragraph 4.

“General” also appears in several other places in the Recommendation. The phrase “general judicial review statute” appears in four other places in the Recommendation. The phrase “general statute” (when referring to the proposed statute) also appears in five places in the Recommendation. Staff identified the locations (by line number) and reproduced each instance below (quoting the Recommendation text and highlighting each phrase). The Committee will need to consider whether to strike some or all of these additional instances of “general” in conformity with the previous suggested edit. Alternatively, the Committee might choose to substitute a different word that captures the Committee’s intent without implicating the problem Sally identified.

- Preamble at line 22 (quoted below):

The second section (Paragraphs 4 and 5) recommends the preparation and passage of a **general judicial review statute** (referred to below as “the **general statute**”) that would cure problems in existing judicial review statutes.

- Preamble at line 35 (quoted below):

Paragraph 4(a) provides that Congress should include in the recommended **general judicial review statute** a provision that would add one day to the review period whenever a specific judicial review statute uses one of the unusual forms, thus saving certain cases from dismissal.

- Heading for Paragraph 4 between lines 142 and 143 (quoted below):

General Judicial Review Statute

- Paragraph 4 at line 143 (quoted below):

4. Congress should enact a new **general judicial review statute** that includes these provisions:

- Preamble at line 22 (quoted below):

The second section (Paragraphs 4 and 5) recommends the preparation and passage of a general judicial review statute (referred to below as “the **general statute**”) that would cure problems in existing judicial review statutes.

- Preamble at line 46 (quoted below):

Paragraph 4(b) provides that Congress should include in the **general statute** a provision that whenever a time period for seeking judicial review begins upon the issuance of a rule, the time starts when the rule is published in the *Federal Register*.

- Preamble at lines 79–80 (quoted below):

Paragraph 4(e) provides that Congress should include in the **general statute** a provision generally allowing documents initiating judicial review to comply either with an applicable specific judicial review statute or an applicable rule of court.

- Preamble at lines 86–87 (quoted below):

Accordingly, Paragraph 4(f) provides that Congress should include in the **general statute** a provision that whenever a specific judicial review statute authorizes a party to seek judicial review of agency action in a specified court, the court will have jurisdiction to consider the resulting case.

- Preamble at line 101 (quoted below):

Paragraph 4(g) therefore provides that whenever a specific judicial review statute requires a party seeking judicial review to serve a copy of the document initiating review on the agency involved “simultaneously” with filing it, the service requirement is satisfied if the document is served on the agency within the number of days specified in the recommended **general statute**.

5. List of Other Relevant Materials

- [Proposed Recommendation](#) for Committee’s Consideration on July 22, 2021 (redline, July 16, 2021).
- [Comment](#) by Consultant Jonathan R. Siegel (June 29, 2021).
- [Comment](#) by Senior Fellow Nina A. Mendelson (June 22, 2021).
- [Comment](#) by Public Member Kristin E. Hickman (June 16, 2021).
- [Comment](#) by Senior Fellow Nina A. Mendelson (June 15, 2021).
- [Proposed Recommendation](#) for Plenary (redline, June 11, 2021).
- [Proposed Recommendation](#) for Plenary (clean, June 2, 2021).
- *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ____, 140 S. Ct. 2367, 207 L. Ed. 2d 819 (2020). Slip opinion available [here](#).
- *Milice v. Consumer Prod. Safety Comm’n*, 2021 U.S. App. LEXIS 19764, No. 21-1071 (D.C. Cir. July 2, 2021). Opinion available [here](#).