Comment from Senior Fellow Ronald M. Levin on *Clarifying Statutory Access to Judicial Review of Agency Action*
July 20, 2021

These are my comments on some of the issues that the Judicial Review Committee will consider at its July 22 meeting. The goal is to respond to the charge by the 74th Plenary Session to rework a few passages in the pending recommendation, particularly as they pertain to direct final rules and interim final rules. (I won't discuss temporary rules, because I know too little about them.) I'll be responding in part to previous comments submitted by Nina Mendelson, Alan Morrison, and Allison Zieve, all of which I found extremely helpful.

A central difficulty is that these two forms of rulemaking have no statutory framework. They presuppose the APA's "good cause" exemption, 5 U.S.C. § 553(b)(B), but the manner in which they actually work is based on custom and practice, although ACUS Recommendation 95-4 provides helpful guidance when it is followed.

I doubt that it makes sense for ACUS to recommend the manner in which Congress should define the filing deadlines in statutes that will govern judicial review of a mode of rulemaking that is itself undefined by statute. This is particularly true in the case of direct final rulemaking, because I am not aware of any situations in which Congress has overtly authorized direct final rulemaking in an organic statute. Thus, I doubt that the recommendation should address direct final rulemaking at all in paragraph 2. On the other hand, paragraph 4 would be a very apt locale in which we could take up these issues. A court could look to the "general judicial review statute," or whatever we ultimately call it, for supplementary direction with regard to a situation—namely direct final rulemaking—that the enabling statute does not address.

The interim final rulemaking situation is a little more complicated, because Congress does sometimes direct or authorize an agency to issue interim rules to address particular situations that it expects will require immediate action. So we might want to include language in paragraph 2 that is limited to those specific rulemakings. Usually, however, agencies issue interim final rules on the basis of § 553(b)(B) alone. With regard to those situations, I would say the same as with direct final rulemaking: any provisions we propose should probably appear in paragraph 4 but not paragraph 2.

All of that said, I think that direct final rulemaking and interim final rulemaking present us with very different issues, so we should think about them separately, and probably handle them separately as well.

Direct Final Rulemaking

I was the ACUS consultant for the direct final rulemaking sections of Recommendation 95-4. I wrote the report underlying the recommendation, and I also wrote a followup article, *More on Direct Final Rulemaking*, 51 Admin. L. Rev. 757 (1999). So I have quite a few thoughts on this topic.

When we wrote the recommendation, we weren't thinking about judicial review, because, by definition, direct final rules are supposed to be noncontroversial matters that few people would

want to litigate about. Nevertheless, direct final rules are sometimes appealed, so we should think about how to handle those situations.

If Recommendation 95-4 were codified into law, the problem of what event triggers the limitations period would be fairly easy for us to handle. It provides in relevant part:

> 4. The agency's initial Federal Register notice should state which of the following procedures will be used if no significant adverse comments are received: (a) the agency will issue a notice confirming that the rule will go into effect no less than 30 days after such notice; or (b) that unless the agency publishes a notice withdrawing the rule by a specified date, the rule will become effective no less than 30 days after the specified date.
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> 5. Where significant adverse comments are received or the rule is otherwise withdrawn, the agency should publish a notice in the Federal Register stating that the direct final rulemaking proceeding has been terminated.

Thus, we could have provided that when an agency uses a system of "confirmation notices" to confirm that it means to stand by its rule (¶ 4(a)), putatively adverse comments notwithstanding, that notice could provide the appropriate starting point for the judicial review period. If the agency does not issue confirmation notices (¶ 4(b)), a commenter could infer from the absence of a ¶ 5 notice by the "specified date" that the agency means to stick with the rule, and that date could be regarded as the date on which the rule has become final and ready for judicial review.

However, the reality is that agencies don't always follow this protocol. The very recent case of Milice v. CPSC (D.C. Cir. July 2, 2021), which Allison cited for us, shows how badly things can go awry. In that case the CPSC issued a direct final rule on September 20, 2019, inviting "significant adverse comments" within thirty days and stating that the rule would take effect on December 22 if no such comments were received. Plaintiff New Civil Liberties Alliance submitted what it thought was an adverse comment on October 21. However, it heard nothing until the CPSC notified it on February 6 that it did not consider the comment significantly adverse. NCLA promptly appealed, but the court held that the appeal was untimely, because the September 20 announcement had been a final agency action, and NCLA had not petitioned for review within 60 days of that date.

The CPSC showed poor practice by not following a procedure that would give commenters clear and timely notice of its intention to let the rule stand. Even worse, the D.C. Circuit blundered badly in its finality analysis, showing obliviousness to the way direct final rulemaking is supposed to work. The court said that, under its case law, the possibility that an agency would change its mind later does not detract from the finality of a rule upon its publication. In an ordinary case, this would be right, because an agency always could have second thoughts after a rule, and you cannot let that bare possibility prevent the rule from becoming appealable (and thus from letting the statute of limitations begin as of that time). But direct final rulemaking is entirely different. The whole point of this technique is that the agency uses the opportunity for post hoc objection as a reality check to confirm its initial impression that the rule would be uncontroversial, making public comment "unnecessary" under § 553(b)(B). Thus, the agency's invocation of the exemption at the time of promulgation is inherently provisional and not

"definitive" for finality purposes. The court's reasoning would have been fine if the agency had simply invoked the good cause exemption outright at the outset. But, by treating this case as though that outright invocation had occurred, it made the direct final rulemaking procedure meaningless.

In my second article, I suggested that a post-promulgation "significant adverse comment" should be considered tantamount to a petition for reconsideration, because it brings new information to the agency's attention, namely that its initial expectation that public comment was "unnecessary" was incorrect or at least debatable. 51 Admin. L. Rev. at 765-66. A reconsideration petition, of course, tolls the statute of limitation. In *Milice*, the court refused to consider a reconsideration theory, noting that plaintiffs had never characterized their submissions in those terms. One could potentially criticize counsel here, but I don't think much if anything should turn on the individual litigant's choices. The court should have held that, in a direct final rulemaking context, the adverse comments that NCLA had submitted amounted to a reconsideration petition as a matter of law.

Now, given that this sort of misfire can occur, what can we do about it? Alan suggested that "[t]he agency should be required to announce its decision before the statute starts to run." I could agree in the abstract, but I don't see how the Conference, in the context of this project, could recommend such a change in agency procedure. We're dealing only with judicial review legislation. Thus, I tend to think that Kristin Hickman's solution (perhaps with minor editing, as discussed below) is the optimal answer. The rule's effective date is a readily ascertainable datum from the agency's initial notice; and the thrust of Kristin's proposal is that the limitations statute is *extended* beyond that date for, say, thirty days. In *Milice* that date would have been December 22. If a commenter interested in judicial review had heard nothing by that date, it could inquire about the rule's status; but even if the agency were stonewalling, the commenter would have a clear path to file suit.

I recognize Allison's concern that our recommendation should not encourage a court to hold that the initial promulgation date was "final agency action," but I tend to think that the statutory extension that Kristin's language contemplates would send a strong signal that such a holding would be erroneous.

Actually, the effective-date benchmark would probably extend the statutory period a little beyond the periods that my "ideal" system would contemplate, as described above. A notice-based limitations period would presumably begin running before the rule takes effect. However, the effective-date benchmark has the administrability advantage just mentioned for exceptional cases; and for all cases in which the direct final rulemaking process is working as intended, the extension would make no difference, because judicial review would be unlikely anyway.

Interim Final Rulemaking

I am not sure that we need to make any special provisions for interim final rules, other than what paragraphs 2 and 4 already say. This is a very tentative judgment, and I am open to revising it. This is a pretty complex area, and it may have dimensions that I haven't considered. At the

moment, however, it seems to me that current doctrine should take care of the various issues that people have raised, and the suggested statutory fixes don't necessarily improve things.

More specifically, I suspect that courts can get to the right results if they simply recognize that "final agency action" may exist at two stages in the process. One is when the agency adopts the interim final rule initially, and the other is when it adopts a revised rule or reaffirms the original rule—if it ever does either.

First, consider the initial promulgation of the rule. I fail to see how it could possibly not be final agency action, because it imposes actual obligations or prescribes actual benefits in the real world, and the agency considered these moves so significant that it believed it had good cause to adopt them immediately. So an affected person could file a petition for review, and the limitations period can begin to run.

Alan raised the possibility of appealing from some aspects of the rule and not others, but I am not sure what that means in practical terms. Of course, some of the consequences of the rule, and some of the potential grounds for challenge, would not have ripened yet. But my sense is that the litigant is often expected to file within the deadline anyway, and then the parties and the court can sort out how to deal with these issues through ripeness dismissals without prejudice, holding-in-abeyance stays, etc.

In the context of regular (not interim) regulations, courts have read various exceptions into the limitations statutes themselves, and those exceptions enable some petitions for review to be entertained after the time period specified in the statute runs out. I wrote about this case law in my article *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 Cardozo L. Rev. 2203 (2011). One safety valve is that if a claim ripens after the rule has gone into effect (e.g, you say that a purported policy statement will be applied in a binding manner, but it's too early to know how the agency will in fact apply it), you can raise that claim later—but only if you raised it at the outset and were dismissed out on ripeness grounds. Id. at 2215 & nn. 60-61, 2218 n.80. I did not look specifically at whether the same principles apply to interim final rules; maybe they don't. But my real point is that the judicial machinery for entertaining such out-of-time claims is available if the court wants to use it, and that possibility raises some doubt about whether we want to try to improve on this nuanced area through legislation.

If all of the above seems to put too much burden on challengers to file before they are ready, I should add that I agree with Alan that they should get another shot when (actually, *if*) the agency files a final-final rule to replace the interim rule. As he said, this is a whole new rule, and so it is a final agency action that should start the limitations clock all over again. I further assume that they would get this shot even if they did not file suit at the outset to challenge the interim rule, and that they can sue over any part of the rule, not just the new aspects of it.

Moreover—going a little further out on a limb than Alan did—I think the same opportunity to sue should exist if the agency announces that, after reviewing the comments, it will make no changes at all in the original rule. Even in this situation, I would think the announcement is final agency action, because it determines "definitively" that the commenters won't get anything from the post-promulgation proceedings the agency conducted. This is in line with recent cases that

have treated denial of relief as final agency action. Cf. Salinas v. R.R. Retirement Bd., 141 S. Ct. 691 (2121) (refusal to reopen was final agency action); U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016) (jurisdictional determination that *denied* a safe harbor to landowners was final agency action).

The most difficult aspect of the problem is the situation in which the agency invites post-promulgation comments but never gets around to doing anything with them. The interim final rule stays on the books indefinitely. Over the years I have often heard practitioners complain about this phenomenon, and I have heard proposals to rectify the situation, such as imposing a deadline on the length of time an interim rule can remain in effect, or allowing a cause of action to challengers to force the agency to complete the proceedings. Those ideas haven't borne fruit. But I tend to doubt that ACUS can do anything to address these objections through a rule on the wording of limitations periods.

That doubt isn't self-evident. Nina suggested that the legislation we will propose could simply say that an interim rule can be challenged any time until the agency completes the post-promulgation proceedings; maybe, she says, this would put pressure on the agency to finish those proceedings expeditiously. I won't dismiss the idea out of hand, but to me the idea feels rather heavyhanded, bearing in mind that ACUS Recommendation 82-7 did affirm the basic legitimacy of short limitations periods for specified types of rules. Having, in effect, no limitations statute in place at all during the post-promulgation period, which might last years, seems at odds with that view.

More generally, however, we have the question of whether our proposed legislation could do anything to codify some or all of the above principles, replacing doctrinal uncertainty with statutory predictability. Maybe it could. We could perhaps adapt the Hickman language to be explicit that a new limitations period commences from the "effective dates" ensuing from both the initial promulgation of the interim rule and the final-final rule that succeeds it. But that would require more revision of her proposed language than I can fashion at the moment, so I will simply pose that question without trying to answer it.

Some Editorial Polishing

Suppose we decide in principle to use Kristin's formulation for paragraph 4(b). For reasons discussed above, I tend to think we should apply the language to direct final rulemaking, but not necessarily other rulemaking, but I will ignore that premise for the moment.

As submitted, her amendment to paragraph 4(b) reads: "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." When I first read the passage, I was confused, because it specifies the end date of the limitations period, but not the starting date. So I asked myself, "extended from *when*?"

To clarify what I think she means, and also to fix a dangling modifier at the beginning of the sentence, I suggest the following tweak: "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*, **Congress should provide that** the time for seeking review **will** ~~should~~ be extended by the length of the period **running from its publication date** up to and including the effective date of the rule."

The "General Review Statute"

I don't recall Sally Katzen's exact concern, but I can see the argument that *generality* is not exactly the attribute that one would most naturally use to describe the statute we have in mind. "Default statute" or "fallback statute" seem worthy of consideration. But I tend to see more merit in Alan's proposal to refer to a "supplementary judicial review statute." Looking ahead to the ultimate addition to the U.S. Code, we would probably caption the provision "Supplemental provisions regarding judicial review of agency action," or something like that.

For purposes of the recommendation, though, how about referring to the "general supplementary statute"? This change in usage would maintain continuity with the label we have been using up to now, but it might contain enough precision of focus to answer Sally's concerns.