Comment from Senior Fellow Alan B. Morrison on *Clarifying Statutory Access to Judicial Review of Agency Action*
July 16, 2021

I am putting these comments in writing because I can stay no later than 2:30 [on Thursday] because of a prior appointment.

On the direct/interim/temporary rule situation, there are two potential problems: the first is that a party may be too late (the main problem discussed) and the second is that, if the rule is not yet "final," the agency may claim that a petition for review is premature, even though the rule is currently effective. I have treated all three types of rules the same, although Nina's memo suggests some differences. I assume that there are some differences, but I think they can be made irrelevant by my proposals.

On the too late problem, the agency might eventually have done one of (at least) three things: (1) make some changes and issue a new final rule; (2) make some changes, but issue a notice only for those changes.; and (3) make no changes.

Providing for a timely appeal presents no problem in situation (1) because the whole rule has been newly issued and the objecting party can object to any portion of that new rule. But in situation (2), if a person objected to the part that was unchanged, the agency might argue that it was too late. And in (3) there is the same problem as (2), but in addition what happens if the agency does not issue a notice when it "decides" to do nothing more, or actually never decides?

The current draft says that Congress should extend the time to seek review, but it seems to me that "extension" is not the right way to look at it because it requires calculations etc. Rather, the time to seek review should not commence until the happening of one of the three events noted above. That works for (1) with nothing more. But for (2) the statute should be clear that the issuance of a new rule after a direct/interim/temporary rule revives the right to object to the entire rule, including parts that have not been changed. For (3), the time should not start to run until a notice of no change is published in the Federal Register. A statement issued with the initial rule, that the agency will not make changes unless it receives significant adverse comments (or anything else) by a date certain, should not have that proposed date serve as a trigger for the start of the running of a statute. The agency should be required to announce its decision before the statute starts to run.

Many of these problems will vanish if my second recommendation is adopted: authorize, but not require, the filing of a petition for review (complaint) after the issuance (no need for Federal Register) of any direct/interim/temporary rule and include a direction that the petition shall not be dismissed as premature/unripe, or on the ground that the litigant has failed to present the claim to the agency [that is fair because the agency chose not to accept comments before issuing a rule with an immediate effective date], based on the agency's statement that it is accepting further comments and may revise the rule based on them. FRAP 4(a)(2) has a similar provision for too-early filings: "(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

Many litigants will want to sue immediately because the rule is adversely affecting them, but they will not have to seek review immediately. In addition, the court may choose to wait to pass on the merits to see whether the objection is eliminated, especially if the harm to the objector is not serious. And once the agency issues a final rule, the complaint can be amended under FRCP 15, or the petition for review can be updated to reflect the date of the new rule under FRAP 15(a)(2)(C). To the extent that litigants file "early" and then amend/update, the problems described above for late filings will be reduced in frequency, if not complexity. As for the concern that the early filing may be unnecessary (and cost a few hundred dollars), the litigant can choose not to file early, but if litigation seems inevitable or even likely, the early filing will end up being desirable if not absolutely necessary. And it is much better than filing too late.

On Sally Katzen's concern, I confess that I do not recall the reason for her concern, but regardless, I am fine with changing the title: I suggest "Supplementary Judicial Review Statute" because it does supplement all other judicial review statutes. But I could also live with other titles, including general if that is still open. I am agnostic on whether to keep "general" as a descriptive term assuming it is not in the title.

On item 2, for rules that are not required to be (must be in the proposed amendment) published in the Federal Register, I have a question: is there no time limit (beyond the basic 5 year rule) for suing over those rules or does the time start to run on the date that the rule is approved by the agency official? I think we should answer the question and if necessary provide a rule for seeking review in those cases.

Alan