

Comment from Senior Fellow Nina A. Mendelson on *Clarifying Statutory Access to Judicial Review of Agency Action*
June 22, 2021

I am submitting these comments in anticipation of the to-be-scheduled summer 2021 committee meeting on revising Recommendations 2 and 4(a) in the context of expedited rulemaking.

Again, for rules that follow the traditional pattern (NOPR, comment period, FR), Recommendations 2 and 4(a)'s suggestion to Congress that statutory time periods for review run from the date of publication makes good sense.

For both direct final rules (DFR) and interim final rules (IFR), the comment period does not begin until after publication, however, creating potential difficulties. Agency use of these devices is significant. In GAO's 2012 analysis of agency use of public comment based on a sampling of rules over a 7 year period, GAO reported. GAO did an analysis of agency reliance on public comment back in 2012 based on a sampling of rules issued from 2003-2010. GAO reported, "Agencies did not publish a notice of proposed rulemaking (NPRM) . . . for about 35 percent of major rules and about 44 percent of nonmajor rules published during 2003 through 2010," and "agencies requested comments on 77 of the 123 major rules issued without an NPRM in GAO's sample. The agencies did not issue a follow-up rule or respond to comments on 26 of these 77 rules." *Agencies Could Take Additional Steps to Respond to Public Comments* (Dec. 2012), <https://www.gao.gov/assets/gao-13-21.pdf>. With respect to IFRs, GAO found agencies "made changes to the text of 15 of the 29 major interim rules when they were finalized, most often in response to public comments." See also Philip Wallach and Nicholas Zeppos, *Contestation of Direct Final Rules in the Trump Administration* (2018), <https://www.brookings.edu/research/contestation-of-direct-final-rules-during-the-trump-administration/>. (agencies have used DFRs 100-300 times per year since 1995). Finally, in 2020, in *Little Sisters of the Poor*, the Supreme Court approved "post-promulgation" notice and comment in IFRs as consistent with 5 U.S.C. 553's requirements even without a finding of good cause. See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, __ U.S. __, 140 S. Ct. 2367, 2384-2386, 2386 n. 14 (2020). Depending on how *Little Sisters of the Poor* is read in future, we might expect agency use of both IFRs and DFRs to increase.

If the time period for review begins to run as of the date of Federal Register publication, as Recommendations 2 and 4(b) suggest, the time period will run simultaneously with the post-publication comment period. Many statutes of limitation listed on the Excel spreadsheet appendix to the report – over 30 of them, including statutes governing challenges to consumer safety rules, air quality rules, and fuel economy rules -- are under six months in length. Comment periods can also be on the order of months. If the SOL runs from publication, a commenter and potential challenger might not know by its end if the agency might change its rule in response to a comment. The commenter might have to file a petition for review simply to preserve the claim. This would waste resources (if the agency ends up agreeing with the comment); it might also confuse or trap unsophisticated parties, who might not anticipate the need to file such a protective claim if the agency ends up disagreeing. In other words, a late-filed claim might face a statute of limitations claim; one that is filed too early might be unnecessary. It also might face a challenge on the ground that the commenter had not exhausted opportunities before the rulemaking agency, a doctrine that

has become more developed in recent years with respect to rulemaking. *E.g.: NTCH, Inc. v. FCC*, 950 F.3d 871, 882 (D.C. Cir. 2020) (Generally, a challenger “forfeit[s] an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration.”) (internal cites omitted); *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001 (“It is black-letter administrative law that ‘[a]bsent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.’ ”) (internal cites omitted). Such a Catch-22 is of course contrary to the general sense of the recommendation that judicial review should be reasonably available and judicial review rules should not trap the unwary.

The proper response might be different however, for direct final rulemaking and interim final rulemaking because of varying commitments by agencies to consider comments and varying approaches to setting effective dates. Neither procedure is statutorily described; both are a matter of custom, supported by a 1995 ACUS Recommendation. *See* ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* (June 15, 1995).

Direct Final Rulemaking. In direct final rulemaking, the agency generally states in its Federal Register notice that unless an adverse comment is received within a specified time period, the DFR will become effective as a final rule on a particular date following that period. The agency typically also expressly reserves its right to publish a further notice withdrawing the DFR prior to the specified effective date. The DFR notice thus represents a sort of conditional issuance of final rule. The time period issue in DFRs is pending before the D.C. Circuit in a challenge to a consumer safety rule in *Milice vs. CPSC*, No. 21-1071 (D.C. Cir., argued 5/2021). In *Milice*, the statutory time limit to seek review of a CPSC rule is sixty days “after promulgation.” 15 U.S.C. 2060. The direct final rule in the case, on infant bath safety seats, was published in the Federal Register on September 20, 2019. *See* 84 Fed. Reg. 49,435. The Federal Register notice stated that the rule would be “effective on December 22, 2019, [three months after publication] unless we receive significant adverse comment by October 21, 2019 [and] publish notification . . . withdrawing this direct final rule before its effective date.” *Id.* Based on a casual review of recently published DFRs, this type of statement appears to be typical of DFRs. The CPSC has taken no further action, though it did receive a comment raising the issue (failure to publish a privately drafted IBR standard) that is the basis for the challenge in *Milice*. If the court interprets “promulgation” to mean Federal Register publication, the time limit to challenge the rule would be deemed to have run while the agency still reserved its right to withdraw the rule.

The strong agency statement in a DFR would reasonably prompt a commenter to wait for the agency to respond to comments, presenting a trap for the unwary. Allison Zieve and Kristin Hickman have suggested extending the time period for judicial review (starting from publication) by the period from publication through the effective date. Thus, a suit prior to the effective date would not face dismissal. Instead, a 60 day time period, say, might be extended longer--up to and including the 60th day after the effective date.

This works well for DFRs because the agency will have clearly signalled that, as of the specified date, not only is the rule effective, but the agency will take no further action in response to comments.

Interim final rulemaking.

Devising an appropriate start for an SOL in the context of interim final rulemaking is trickier. The usual practice here is for an agency to make an IFR immediately (or nearly immediately) effective with publication and then to open a comment period. Similar to the DFR setting, a commenter might be faced with having to file a petition seeking review of an IFR while simultaneously filing comment.

But unlike the DFR, an IFR is typically already in effect, and the agency generally does not specify in advance a clear end point at which point it will be deemed to have considered comments. Instead, the agency may choose to publish a second notice either modifying the IFR in response to comments or declaring it final final. But as commentators have observed, there's no regular practice here; IFRs often stay in place for years with no second notice ever published. Perhaps the comment opportunity that is associated with an IFRs thus might be understood to incorporate less of an agency commitment to respond compared with a DFR. If so, a court might more often find IFRs ripe for review notwithstanding an open comment period and/or forbear applying an exhaustion rule to a petitioner's challenge to the IFR. I have not found challenges to IFR review petitions on exhaustion grounds. However, there is still some element of a trap around the IFR's post-publication comment period. Courts have regularly considered ripeness challenges to such petitions, for example, and based on facts around the agency's conduct, have sometimes found IFR petitions unripe based on the factual likelihood of further agency action.

For example, courts have dismissed petitions for review on ripeness grounds based on assertions that agencies are considering changes to interim final rules. E.g. *Colorado Christian University v. Sebelius*, 2013 WL 93188 (D. Co. 2013) (finding challenge unripe because agency was actively considering changes to interim final rule); *Conlon v. Sebelius*, 923 F.Supp.2d 1126 (N.D. Ill. 2013) (finding challenge to final rule unripe in light of government's ANPRM, stated intent to modify final rule, and representations not to enforce final rule in the meantime) (finding challenge unripe based on government's representations regarding amendment and enforcement).

In that regard, consider a few fairly confusing statements made by agencies in issuing IFRs in the last year. The CFPB published an IFR in connection with debt collector conduct, see 86 Fed. Reg. 21163 (Apr. 22, 2021), effective May 3, 2021, inviting comments by May 7, 2021, and stating: "The Bureau will evaluate comments received on the interim final rule to determine whether it is appropriate to revise the [IFR]."

NOAA/NMFS published an IFR on fisheries regulation on June 11, 2021, effective June 11, 2021, and seeking comments by July 12, 2021. 86 Fed. Reg. 31178 (June 11, 2021). The agency stated: "NMFS seeks comments on this interim final rule and will respond to those comments in a subsequent final rule."

The CFTC published an IFR on January 5, 2021, effective that same day, and requested comments by March 8, 2021. The agency stated, "[T]he Commission welcomes public comments from interested persons regarding any aspect of its consideration of, and the changes made by, this Interim Final Rule, as well as the following pertaining to potential additional amendments in the future." The agency asked commenters to answer numerous specific questions.

Statements like these could be interpreted by commenters as serious agency commitments to engage with comments, creating an SOL trap if commenters were to wait to challenge an IFR, undermining the ripeness of the IFR, and giving rise to exhaustion arguments. Of course, these also could be interpreted as meaningless boilerplate. If both commenters and judges interpret them that way, there would be less of a trap as long as commenters understand the SOL for an IFR runs from the date of publication no matter what the agency says and even if the commenter has filed a comment.

But assuming there is a trap that the committee wishes to address, the solution proposed for DFRs may not help much with IFRs because the effective date of an IFR is typically right around the same time as publication. I had earlier proposed that an SOL not begin to run until an agency issues a “final final” rule. With respect to interim final rules, this solution also could have the salutary effect of encouraging agencies to clearly state that interim final rules are indeed final. On the other hand, it might create greater problems if an SOL never begins to run at all. Instead, we could combine such an approach with a Zieve/Hickman-type approach that would lengthen the SOL by the period between the IFR and any final final rule. Other solutions might also be possible, including specifying a longer SOL when the agency uses an IFR. Unfortunately, choosing varying solutions introduces complexity into the otherwise straightforward recommendation to have time limits begin to run as of the date of publication, but it seems something is needed in the expedited rulemaking setting.

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