



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

To: Assembly of the Administrative Conference of the United States

From: Mark Thomson
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Date: August 17, 2021

Subject: *Clarifying Statutory Access to Judicial Review of Agency Action*: Committee on Judicial Review's Response to Assembly Remand

At the 74th Plenary Session, the Assembly considered a proposed recommendation, *Clarifying Statutory Access to Judicial Review of Agency Action*. Parts of the proposed recommendation—most notably Paragraphs 2 and 4(b)—urged Congress to adopt statutory language providing that the limitations period for seeking judicial review of the promulgation, amendment, or repeal of a rule commences the day the final rule is published in the *Federal Register*.

Just before the Plenary Session, several members filed comments noting that Paragraphs 2 and 4(b) could cause problems in cases involving rulemakings with post-promulgation comment periods (*i.e.*, rulemakings in which an agency promulgates a rule before receiving and considering public comment). In such cases, the members explained, the recommendations in Paragraphs 2 and 4(b) could result in the limitations period expiring before (or shortly after) the agency responds to public comments, which might lead to wasted resources or traps for unwary would-be litigants.

Following debate at the Plenary Session, the Assembly remanded the proposed recommendation to the Committee on Judicial Review primarily to consider whether and how the recommendation should address rulemakings with post-promulgation comment periods. Assembly members also suggested a few small, technical edits for possible consideration on remand.

The Committee met on July 22 to address the remand. In the end, its members unanimously agreed that the best approach to the problems posed by rulemakings with post-promulgation comment periods is to exempt such rulemakings from the recommendation's scope. The members decided as much because the *Sourcebook of Federal Judicial Review Statutes*, which served as the report underlying the draft recommendation, does not address rulemakings with post-promulgation comment periods, and because there remains considerable uncertainty about the consequences of adopting new language specifically addressing such rulemakings. Thus, the Committee changed Paragraphs 2 and 4(b) of the draft recommendation to clarify that they apply only in cases where a final rule is published in the *Federal Register* after the public has been given a chance to comment on the rule. The Committee made corresponding edits to the parts of the preamble describing

Paragraphs 2 and 4(b), including adding a footnote to make explicit the draft recommendation's scope.

In addition to those changes, the revised draft recommendation includes a clarifying edit to Paragraph 4(g), replacing the phrase "issued the order" with the phrase "took the action." That modification was made because the draft recommendation covers agency actions beyond adjudicatory orders. The Committee debated but ultimately opted against making other proposed edits.