

Comment from Liaison Representative William Funk on *Clarifying Statutory Access to Judicial Review of Agency Action*
July 22, 2021

In anticipation of the meeting on Thursday, I wanted to raise the following:

First: In recommendation #2, if a rule is not required to be published in the Federal Register, what starts the time for seeking review. I don't see that addressed. Also, I think the preamble at least should address this issue and describe when rules are not required to be published in the Federal Register.

Second, direct final rules usually provide for a delayed effective date, as was the case in the *Milice* case, so that the fix provided would work. However, interim final rules and temporary rules invariably are effective immediately, as was the case in *Little Sisters*. Thus, there would be no additional time added to the date of publication in the Federal Register. Thus, there would be no "fix" with respect to such rules. I see two options. First, in recommendation #2, change the fix so as to add additional time even when the effective date is the same as the publication date if comments are requested. Second, to limit the fix to situations in which there is a delayed effective date to consider comments.

The problem with the first solution is that there is really no definite end point from which to start the statute of limitations. While comments may result in a change to the rule, that will result in a new rule which will trigger a new statute of limitations. Otherwise, if the comments do not occasion a change to the rule, it is not clear when the statute would start to run.

The second solution would "fix" the problem by extending the time from which the statute runs until the date certain when the rule goes into effect, when there is a delayed effective date. It simply would not address situations in which there is no delayed effective date. Thus, the statute for normal interim final rules and temporary rules would still run from the date of Federal Register publication.

I certainly prefer the second solution and would suggest the following language: "When an agency issues a rule with a delayed effective date without having provided prior notice and an opportunity to comment on the rule, Congress should extend the time for seeking review by the length of the period up to and including the time between the publication of the rule in the Federal Register and the effective date of the rule." This language would avoid the particular denomination of the rule and tie the "fix" to the particular problem.

With respect to recommendation 4.b., I would propose the following solution: "To address the situations in which an agency issues a rule with a delayed effective date without having provided prior notice and an opportunity to comment on the rule, the time for seeking review should be extended by the length of the period up to and including the time between the publication of the rule in the Federal Register and the effective date of the rule."

Finally, I would suggest substitution of the word "technical" for the word "general" to describe the nature of the proposed statute.