

Comment from Senior Fellow Allison M. Zieve on *Clarifying Statutory Access to Judicial Review of Agency Action*
July 18, 2021

I wanted to add a few thoughts in response to the ACUS proposed language and Alan Morrison's comment.

I am concerned that both ACUS's proposed language, and even more so Alan's suggestion, could (if adopted by Congress) be read to prevent people from suing as soon as a direct/interim rule is published. The concern is whether the recommendation could be read to mean that a direct or interim final rule do not constitute "final agency action," which is a prerequisite to suit under the APA. The ability to sue promptly after issuance is important, though, particularly where someone wants to seek a preliminary injunction or prompt dec relief before a rule goes into effect.

Alan's #3 suggests postponing the start of the statute of limitations. If Congress specifies that the limitations period has not started to run until after an agency takes a second action after issuing the direct/interim rule, however, that cause of action has not yet accrued. As a result, people would not be able to challenge the direct final until after it is in effect and may not be able to challenge the interim rule until it is replaced with a final after notice and comment. Both seem problematic, especially because interim final rules can remain in effect for months (or longer) and people should be able to sue to challenge them before they are replaced with final rules.

The analogy to FRAP in Alan's comment highlights the problem: Under FRAP, a premature appeal ripens after posttrial motions are disposed of, but until then it is premature and the court of appeals can't take action on it. Again, that would pose a problem for cases where the litigant need to seek a stay or preliminary injunction (which requires that the court have jurisdiction over the petition for review) or where the interim final rule is in force for a lengthy period.

So between the two suggestions, my preference would be to adopt the ACUS proposed language but to add a sentence to make clear that the extending the limitations period is not meant to suggest that a direct/interim rule is not "final agency action."

That said, I think that we should also consider whether we address the issue at all. In the situation where an agency issues "an interim final rule" with opportunity for comment to be followed by a "final rule," the current recommendation seems fine as is. The only time the concern noted at the plenary arises is in the situation where an agency issues a direct final but says that it may alter the rule based on comment received before the effective date, and the effective date is co-extensive with the limitations period. I am only aware of a single case in which that situation occurred, the plaintiff did not sue until after the effective date, and therefore the case was dismissed. For the reasons stated above, I have some concern that we are trying to revise the recommendation to address a situation that is very unusual and that the recommendation could have unintended consequences for a far broader range of cases than those we are trying to address.

If we do address this situation, perhaps the better approach would be to recommend that Congress provide that, where the effective date of a final rule is the same as the last date of the limitations period, the limitations period shall be extended by 30 days.

Finally, as to a different point, the ACUS (redlined) proposal says “direct, interim, or temporary rule.” I thought that “temporary rules” are those that specifically provide that they are in effect for only a specific period of time. Although temporary rules have sometimes been issued without prior notice and an opportunity for comment, I think that in that situation that they are in fact both temporary and direct final (regardless of the title stated in the Federal Register notice). But I don’t think that the fact that a rule is temporary necessarily means that it has been issued without notice and comment. If my understanding is correct, then “temporary” rules would not be among those we are addressing.

Thanks,

Allison