Comment from Senior Fellow Nina A. Mendelson on *Clarifying Statutory Access to Judicial Review of Agency Action*
June 15, 2021

This recommendation contributes very usefully to greater clarity around access to judicial review.

I write to raise one issue with the draft recommendation for statutorily provided time periods for review, however. The preamble, at Lines 39-43, and Recommendation 2, at Lines 122-124, both state that such periods should run from a rule's publication in the Federal Register. This generally is helpful because it would remove ambiguity around the meaning of the term "promulgate" often used in such statutory provisions. For rules that follow the traditional pattern, such an approach is also logical and easy to administer: notice of proposed rule followed by comment period, in turn followed by final rule publication, at which point the time period begins to run.

However, additional language is needed to address the triggering of the statute of limitations when an agency uses "expedited rulemaking." This includes direct final rulemaking, in which the agency states that unless an adverse comment is received within a specified time period after the Federal Register publication date, the rule will become effective as a final rule on a particular date, and interim final rulemaking, in which the agency affords a post-publication opportunity for comment (frequently, though not always, publishing another notice confirming that the interim final rule will remain final). E.g., ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* (June 15, 1995). In *Little Sisters of the Poor,* when the rulemaking agencies used interim final rules, the Supreme Court approved "post-promulgation" notice and comment as consistent with the requirements of Administrative Procedure Act section 553 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). We accordingly should expect agency use of these rulemaking approaches to increase.

But the draft recommendation's approach is likely to be problematic when statutes of limitations are brief and when the agency is using expedited rulemaking. If the time period for review begins to run as of the date of Federal Register publication, it will run simultaneously with the comment period. Many statutes of limitation listed on the Excel spreadsheet are under six months in length; comment periods can also be on the order of months A commenter and potential challenger might not know if the agency will ultimately reject a comment and might have to file a petition for review simply to preserve the claim from a statute of limitations challenge. A commenter filing such a protective claim could then face challenges on the ground that the commenter had not exhausted opportunities before the rulemaking agency. Such a Catch-22 is of course contrary to the general sense of the recommendation that judicial review should be reasonably available and not denied on nitpicky grounds.

This issue is pending before the D.C. Circuit in *Milice vs. CPSC,* in which 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.* The CPSC has taken no further action, though it did receive a comment raising the issue (incorporation by reference of a privately drafted standard) that is the basis for the challenge in *Milice*. If the court interprets "promulgation" to mean Federal Register publication, it will mean that the time limit to challenge the rule would be deemed to have run while the agency still reserved its right to withdraw the rule.

In my view, ACUS should speak to this issue in the recommendation. While I think the drafting of particular language should await agreement on the appropriate solution, a possible solution would be to recommend that time periods for direct final rules not begin to run until the announced effective date, and that time periods for interim final rules not begin to run until the agency has published a second notice confirming that the interim final rule will be treated as final for all purposes. In both cases, the agency would either have addressed comments or clearly signalled that it will do nothing further with comments it has received. 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. The solution would introduce complexity into the otherwise straightforward recommendation to have time limits begin to run as of the date of publication, but unfortunately it seems something is needed here. Another possibility would be to refer this particular issue back to committee for further assessment.

Nina A. Mendelson