

Direct Final Rulemaking

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This Article introduces "direct final rulemaking," a variation on section 553 notice-and-comment rulemaking under the Administrative Procedure Act. To use this highly efficient procedure, an agency publishes a rule and declares that the rule will become effective unless the agency receives an objection within a short stated interval, such as thirty days. If no one objects, the rule can become law without further effort on the agency's part. This Article recommends that agencies make broad use of the device in situations in which a rule is expected to be entirely noncontroversial. The Article first describes early experience with the direct final rulemaking technique at the Environmental Protection Agency, the Department of Agriculture, and the Department of Transportation. Next, the Article addresses the strength of the legal arguments supporting direct final rulemaking. Agencies could argue that the technique satisfies the good cause exemption to section 553; alternatively, they could claim that direct final rulemaking constitutes substantial compliance with the notice-and-comment requirements of section 553. Finally, the Article discusses the various policy choices that agencies face in deciding whether and how to use direct final rulemaking.

Introduction

"Direct final rulemaking" is a variation on the normal notice-and-comment model of informal rulemaking prescribed by section 553 of the Administrative Procedure Act¹ ("APA"). To use this procedure, an agency publishes a rule in the Federal Register with a statement that the rule will become effective unless the agency receives an adverse comment or a written notice that someone intends to submit an adverse comment. In most cases the agency asks to receive objections within thirty days and makes the rule effective after sixty days if no one objects. If even one person files an adverse comment or notice, the agency must withdraw the rule. Typically it will then immediately republish the substance of the direct final rule as a proposed rule, thus initiating the ordinary notice-and-comment process.

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¹ 5 U.S.C. § 553 (1994).

The purpose of the direct final rulemaking technique is to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be adequate. It is intended to enable the agency to avoid two rounds of deliberation on the rule—once at the proposal stage and once at the final promulgation stage. To date, direct final rulemaking has been little publicized and therefore little used, but the climate is right for a considerable expansion in its use. In an era in which the rulemaking process has been criticized as too cumbersome,² and in which most agencies face the prospect of living under more severe resource constraints than they have experienced in the past, administrators have strong reasons to take note of the efficiencies that direct final rulemaking offers.

In fact, this technique has already received favorable attention from influential voices in the executive branch. It was highlighted in *Improving Regulatory Systems*, one of the reports accompanying the National Performance Review or “reinventing government” effort led by Vice President Al Gore.³ The authors of that report urged each regulatory agency to consider making use of direct final rulemaking during the coming year.⁴ The Administrative Conference of the United States (“ACUS”), in its 1993 recommendation on “Improving the Environment for Agency Rulemaking,”⁵ also urged agencies to consider the possible advantages of direct final rulemaking.⁶ The present study builds on those pronouncements and other words of praise,⁷ by outlining a legal and practical framework within which direct final rulemaking can flourish.

Direct final rulemaking should be distinguished from “interim final rulemaking,” another policymaking technique that is less elaborate than the usual notice-and-comment process for developing regulations. When an agency uses interim final rulemaking, it adopts a rule without prior public input, makes it immediately effective, and then invites post-promulgation comments directed towards the issue of whether the rule should be changed sometime in the future.⁸ Both techniques generally presuppose that the

2 See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). Even the Supreme Court, referring to what has traditionally been called *informal* rulemaking, now speaks of “the time-consuming rulemaking process.” *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232, 1239 (1995).

3 See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 42-44 (1993) [hereinafter *IMPROVING REGULATORY SYSTEMS*]. The team leader for this report was Jeffrey Lubbers, who is also Research Director of ACUS. See Jeffrey S. Lubbers, *Better Regulations: The National Performance Review’s Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1165-70, 1173 (1994) (elaborating on and giving background of recommendation).

4 See *IMPROVING REGULATORY SYSTEMS*, *supra* note 3, at 44.

5 ACUS Recommendation 93-4, 59 Fed. Reg. 4670 (1994).

6 See *id.* at 4673 (“Agencies should . . . consider the use of ‘direct final’ rulemaking where appropriate to eliminate double review of noncontroversial rules.”).

7 See, e.g., John Donnelly, *FSIS Streamlines Routine Rule-Making*, FOOD & DRINK DAILY, July 7, 1994 (quoting food industry lawyers who hailed the advent of direct final rulemaking at the Food Safety and Inspection Service as a needed corrective to torpid decisional processes and a spur to innovation in their industry). The same article quotes an FSIS official as saying the approach “is in everybody’s interest. It just saves time.” *Id.*

8 See Michael R. Asimov, *Interim-Final Rules, 1994-95 RECOMMENDATIONS & REPS. OF*

agency can rely on an APA exemption, such as the “good cause” exemption,⁹ as a basis for not engaging in prior notice-and-comment proceedings.¹⁰

Although the resemblance between direct final rulemaking and interim final rulemaking may sometimes have led to confusion,¹¹ they differ in that the latter is generally used because of some felt urgency in instituting a regulation immediately.¹² It frequently involves regulations that are deeply controversial; the agency solicits comment for its own edification or to identify possible bases of legal challenge, but will not alter the rule unless the comment *persuades* it to do so. The situation is thus quite distinct from that of direct final rulemaking, in which the agency undertakes to withdraw its rule if *anyone* objects. By using direct final rulemaking, the agency is gambling that no one will object. Such universal acquiescence is unlikely in the case of a regulation that is considered urgent enough to warrant interim final rulemaking.

Part I of this Article reports on the agencies’ initial experience with direct final rulemaking. Part II explores the strength of the legal arguments supporting an agency’s authority to use this approach to rulemaking. Part III then discusses policy choices that agencies must make regarding the circumstances in which they will use direct final rulemaking and the manner in which they will do so.¹³

I. Initial Experience with Direct Final Rulemaking

To provide a factual context for analysis, we shall first review the manner in which direct final rulemaking has been implemented by the federal agencies that have already made use of it.

ACUS 477 (1995). A recommendation adopted by ACUS in June 1995 endorsed the term “post-promulgation comment rules” as a more straightforward name for such rules. See Appendix *infra* pp. 30-34.

⁹ See 5 U.S.C. § 553(b)(B) (1994).

¹⁰ Direct final rulemaking, however, may sometimes be defensible as constituting substantial compliance with the APA notice-and-comment procedures. See *infra* part II.B. This would seldom if ever be true of interim final rulemaking.

¹¹ For example, the Environmental Protection Agency (“EPA”) published a regulation requiring that off-highway diesel fuel be dyed red, so that it would not be confused with aviation fuel, which is blue. See 59 Fed. Reg. 35,854 (1994) (codified at 40 C.F.R. § 80). The published statement accompanying the regulation described it (accurately) as an interim final rule. See *id.* Later, however, in its semiannual regulatory agenda, EPA called the regulation a direct final rule. See 59 Fed. Reg. 58,200, 58,301 (1994).

¹² See, e.g., *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (interim final rule used to comply with tight statutory deadline); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750-52 (10th Cir. 1987) (interim final rule used because of imminent danger of irreversible damage to environment).

¹³ The National Performance Review report appeared to assume that the process of direct final rulemaking does not entail publication of a “confirmation notice,” in which an agency announces that a direct final rule has gone into effect because no adverse reactions were received. See IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 46 n.16. Because agency practice varies in this regard, the present study assumes that the term “direct final rulemaking” can apply regardless of whether the agency issues a confirmation notice. It treats the desirability of that step as a question for analysis. See *infra* part III.E.

A. *Environmental Protection Agency*

The Environmental Protection Agency ("EPA") invented direct final rulemaking in the early 1980s. The agency had encountered numerous complaints about the slow pace of its process for approving revisions to "state implementation plans" ("SIPs") under the Clean Air Act.¹⁴ As part of a package of measures designed to speed up the process, EPA began using direct final rulemaking in 1981.¹⁵ The agency explained why the SIP revision process seemed to lend itself well to this device: "Because of the straightforward nature of some actions or the narrowness of their scope, many SIP revisions get few, if any, comments from the public during the comment period."¹⁶

After six months of experience, EPA reported that it had needed to withdraw fewer than five percent of the ninety SIP revisions it had processed during this period using the direct final rulemaking approach.¹⁷ Moreover, the new system had enabled the agency to process SIP revisions in considerably less than half the time that had been required for processing a similar group of noncontroversial SIP revisions prior to the experiment.¹⁸ Accordingly, EPA decided to use direct final rulemaking whenever possible¹⁹ and has done so nationwide for over a decade.²⁰

In 1989, EPA announced that it would begin regular use of direct final rulemaking in a second context: promulgation of "significant new use rules" ("SNURs") issued under the Toxic Substances Control Act.²¹ SNURs are utilized to impose controls on new uses for chemical substances that may pose hazards to health or the environment. The agency predicted that it would usually employ direct final rulemaking in promulgating these rules because "EPA does not generally anticipate public comment on these SNURs."²² Experience with the process has also been successful: "SNURs for at least a hundred chemicals have been issued as direct final rules."²³

The procedures EPA uses for direct final rulemaking in these two contexts are almost identical.²⁴ The agency allows thirty days for comments after publication of a direct final rule; the rule goes into effect sixty days after

¹⁴ 47 Fed. Reg. 27,073, 27,073 (1982).

¹⁵ See 46 Fed. Reg. 44,476 (1981). At that time, EPA called the device "immediate final rulemaking." *Id.* at 44,477.

¹⁶ *Id.*

¹⁷ See 47 Fed. Reg. 27,073, 27,074 (1982).

¹⁸ See *id.* (stating that SIP revisions handled through direct final rulemaking had required an average of 161 days for processing; the comparison group had required an average of 419 days).

¹⁹ See *id.*

²⁰ See IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43.

²¹ See 54 Fed. Reg. 31,298, 31,298 (1989). The rules are codified at 40 C.F.R. §§ 721.160(c)(3), 721.170(d)(4)(i) (1994). See also EPA Issues "Generic" Rule; May Issue Many Use Rules in Next Year, *Official Says*, Daily Rep. for Execs. (BNA), July 31, 1989 (background to rules).

²² 54 Fed. Reg. 31,298, 31,299 (1989).

²³ IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43.

²⁴ See 40 C.F.R. § 721.170(d)(4)(i)(B) (1994) (SNUR procedure); 47 Fed. Reg. 27,073, 27,074 (1982) (SIP Procedure).

publication of the notice if no one gives written notice within the comment period of an intention to submit adverse or critical comments. EPA will issue a second notice if it *withdraws* a direct final rule after receipt of an objection, but it does not publish anything to announce that a direct final rule *will* go into effect.²⁵

Since May 1994, however, EPA's direct final rulemaking procedure for issuing SIPs has differed slightly from its past approach.²⁶ Now, when EPA publishes a direct final rule to establish a SIP, it simultaneously launches a conventional rulemaking proceeding regarding the same rule by publishing a "companion" notice of proposed rulemaking.²⁷ If no one objects to the rule, the latter notice is simply forgotten; if the agency receives one or more adverse comments, it withdraws the direct final rule and continues with the rulemaking process on the basis of the comment(s) it has already received.²⁸ When using this model, EPA informs members of the public that if they wish to comment on the rule, they should do so forthwith (during the thirty-day period after the direct final rule is announced), because the agency does not intend to provide an additional comment period later.²⁹ EPA has not extended this variation on the direct final rulemaking model to SNURs.³⁰ Thus, if the agency withdraws a SNUR direct final rule due to opposition from a member of the public, it will ordinarily issue a notice of proposed rulemaking at *that* time, thus providing the public with a second comment period.

EPA has also used direct final rulemaking to issue individual regulations in other areas. In these areas, EPA has not relied on any prior policy statement providing for the use of this technique under specified circumstances; it has simply announced in the statement accompanying the rule that the agency would use direct final rulemaking because it expected that the rule would be noncontroversial and that no one would submit adverse or critical comments. In fact, the concept of direct final rulemaking seems to have permeated the EPA's institutional culture, with agency lawyers regularly considering use of the technique in any context in which it might prove feasible.³¹

One such instance involved amendments to EPA's recent regulation on reformulated gasoline. Direct final rulemaking would not have worked for

²⁵ See, e.g., 54 Fed. Reg. 31,298, 31,299 (1989) ("routinely only one *Federal Register* document is required to establish a SNUR").

²⁶ See 59 Fed. Reg. 24,054 (1994) (explaining new direct final rulemaking procedure for SIPs).

²⁷ See *id.*

²⁸ See *id.*

²⁹ See, e.g., 60 Fed. Reg. 10,533 (1995) (to be codified at 40 C.F.R. § 52).

³⁰ See 60 Fed. Reg. 11,033 (1995) (announcing SNUR direct final rule without a companion notice of proposed rulemaking).

³¹ See, e.g., 60 Fed. Reg. 35,703 (1995) (to be codified at 40 C.F.R. §§ 264-265, 271) (approving a new method of establishing whether absorbent materials are biodegradable and thus eligible for disposal in hazardous waste landfills); 60 Fed. Reg. 21,682 (1995) (to be codified at 40 C.F.R. § 82) (using direct final rulemaking process for portion of regulations on recycling of refrigerants from automobile air conditioners); 60 Fed. Reg. 17,950 (1995) (establishing permit application process for storm water dischargers under Clean Water Act, with rule to be final in 120 days if EPA did not receive adverse comments within 60 days), *withdrawn*, 60 Fed. Reg. 40,230 (1995).

the reformulated fuels program as a whole, which involved a complex regulatory negotiation, followed by a public uproar over EPA's adoption of a rule that differed from the negotiated agreement, and ultimately a successful appeal in court.³² Five months after issuing the initial regulation, however, EPA used direct final rulemaking to make minor corrections to it.³³ Interestingly, when the agency received adverse comments, it did not withdraw the entire direct final rule. Treating the items in the rule as severable, EPA withdrew only those specific items that had triggered dissent, letting the others stand.³⁴

Another recent exercise in direct final rulemaking involved notices of written exemptions from the acid rain program permitting and monitoring requirements for sixty-five industrial facilities in ten states.³⁵ Again, the agency contemplated severability: EPA stated that if it were to receive adverse comments on any exemption, it would withdraw only that exemption, not the entire rule.³⁶

In sum, EPA has had a lengthy and for the most part successful experience with its use of direct final rulemaking. The agency is overwhelmingly the principal user of the technique in the federal government.³⁷ Moreover, the agency apparently plans to make wider use of this approach in fresh contexts in the near future.³⁸

B. Department of Agriculture

Five agencies within the Department of Agriculture have announced within the past two years that they intend to make use of the direct final rulemaking technique.³⁹ Instead of incorporating the technique into their processes for handling specific programmatic challenges, as EPA did with its SIPs and SNURs, the Agriculture agencies have taken a more generic approach. They have simply released policy statements declaring that they will make use of direct final rulemaking in appropriate circumstances. All the notices state that the issuing agency will use direct final rulemaking only for rules that are considered to be noncontroversial and unlikely to generate ad-

³² See *American Petroleum Inst. v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995).

³³ See 59 Fed. Reg. 36,944 (1994) (codified at 40 C.F.R. § 80) (announcing direct final rule).

³⁴ See 60 Fed. Reg. 6030 (1995) (partial withdrawal of final rule).

³⁵ See 60 Fed. Reg. 4413 (1995) (to be codified at 40 C.F.R. § 72).

³⁶ See also 60 Fed. Reg. 26,510 (1995) (to be codified at 40 C.F.R. §§ 9, 72, 75) (employing partial withdrawal procedure for other components of acid rain program).

³⁷ A search of the entire LEXIS Federal Register file in early March 1995, using the search terms "direct final rule or direct final rulemaking," turned up 449 documents. Adding the modifier "and not (EPA or USEPA)" reduced the list to 26 documents.

³⁸ See *Potential-to-Emit Policy Provided to States Under New EPA Policy*, Daily Env't Rep. (BNA) No. 19, at A4-A5 (Jan. 30, 1995) (plan to use direct final rule to approve states' potential-to-emit limitations for facilities that seek to avoid "major source" designation under Clean Air Act); *Enforcement: EPA to Craft New Policy on Corporate Audits*, Daily Env't Rep. (BNA) No. 5, at S22-23 (Jan. 9, 1995) (plan to use direct final rule to establish policy for giving "traffic tickets" to minor offenders).

³⁹ See Grain Inspection, Packers and Stockyards Administration, 60 Fed. Reg. 10,303 (1995); Agricultural Marketing Service, 59 Fed. Reg. 51,083 (1994); Federal Crop Insurance Corporation, 59 Fed. Reg. 42,487 (1994); Food Safety and Inspection Service, 59 Fed. Reg. 34,375 (1994); Animal and Plant Health Inspection Service, 58 Fed. Reg. 47,206 (1993).

verse comments, and that the agency will look to past experience with similar rules in making these predictions. Despite minor differences in the wording of the notices, all of the Agriculture agencies intend to use the same procedures for direct final rulemaking. All use a sixty-day period before an unopposed rule becomes effective and a thirty-day period during which the public may submit an adverse comment or a notice of intent to submit one. Unlike EPA's statements, the Agriculture statements also contain a definition of "adverse" (all substantially the same as each other). A typical passage, that of the Animal and Plant Health Inspection Service ("APHIS"), reads:

By "adverse comments" we mean comments that suggest that the rule should not be adopted, or that suggest that a change should be made to the rule. A comment expressing support for the rule as published would obviously not be considered adverse. Neither would a comment suggesting that requirements in the rule should, or should not, be employed by APHIS in other programs or situations outside the scope of the direct final rule.⁴⁰

In addition, the Agriculture agencies' procedures differ from EPA's in that they contemplate a "confirmation notice" in the *Federal Register* advising the public after the thirty-day comment period that no adverse comments were received and the rule has gone into effect.⁴¹ When EPA engages in direct final rulemaking, it publishes a second notice only if it decides *not* to let a rule go into effect.⁴²

Some of the Agriculture agencies have already resorted to direct final rulemaking, producing an interesting harvest of regulations. For example, APHIS was the first of the Agriculture agencies to develop a policy for this technique. It has successfully used direct final rules to exclude six varieties of rust-resistant barberry plants from its black stem rust quarantine;⁴³ to designate the Cincinnati airport a limited port of entry for importation of pet birds;⁴⁴ to add various breeds of horses and cattle to its list of purebred animals;⁴⁵ and to add New Hampshire to the list of states authorized to receive mares and stallions imported from certain countries.⁴⁶ A direct final rule promulgated by the Food Safety and Inspection Service ("FSIS") permits importation of meat products from the Czech Republic (rather than from "Czechoslovakia," as under the prior rule).⁴⁷ When the National Institute of Standards and Technology amended its handbook of standards for scales used to weigh agricultural products, two agencies used direct final rules to update their regulations by incorporating the new standards.⁴⁸ One is not

40 58 Fed. Reg. 47,206, 47,206 (1993).

41 See, e.g., *id.*

42 See *supra* note 25 and accompanying text.

43 See 59 Fed. Reg. 17,917 (1994) (codified at 7 C.F.R. § 301).

44 See 59 Fed. Reg. 44,893 (1994) (codified at 9 C.F.R. § 92).

45 See 59 Fed. Reg. 49,785 (1994) (codified at 9 C.F.R. § 151).

46 See 59 Fed. Reg. 63,698 (1994) (codified at 40 C.F.R. § 92).

47 See 60 Fed. Reg. 18,540 (1995) (to be codified at 9 C.F.R. § 327).

48 See 60 Fed. Reg. 31,907 (1995) (to be codified at 7 C.F.R. § 802) (scales for weighing grain); 60 Fed. Reg. 12,883 (1995) (to be codified at 9 C.F.R. §§ 317, 318) (scales for inspecting meat and poultry products).

surprised that the agencies expected to receive no comments on technical regulations such as these.

In one instructive episode involving direct final rulemaking, APHIS announced on March 1, 1994, that it would permit importers of mangoes and grapefruits from Mexico to use hot forced air in treating their wares for fruit flies.⁴⁹ The agency received *exactly one* adverse comment—from a citrus industry representative, who noted that the specifications in the rule would exclude several larger sizes of grapefruit from the rule's scope.⁵⁰ True to the paradigm of direct final rulemaking, APHIS withdrew the rule on April 21.⁵¹ On November 14, the agency republished a proposed rule extending the plan to the larger grapefruits, and, upon receiving only favorable responses, finalized the rule on February 6, 1995.⁵² Thus, a single negative comment caused the rulemaking to extend over eleven months rather than sixty days.⁵³

C. Department of Transportation

Finally, direct final rulemaking has made an appearance in two, or perhaps three, agencies within the Department of Transportation. The Federal Aviation Administration ("FAA") was the first to issue a proposed regulation adopting procedures for direct final rulemaking.⁵⁴ Like the Agriculture agencies' policy statements, the regulation is intended as a generic model, usable in diverse contexts. The proposed procedure is basically the same as the Agriculture model, including a confirmation notice if no adverse comment is received. The FAA's definition of "adverse comment" is slightly different:

Comments that are outside the scope of the rule will not be considered adverse under this procedure. A comment recommending a rule change in addition to the direct final rule would not be considered an adverse comment, unless the commenter states that the rule would be inappropriate as proposed or would be ineffective without the additional change.⁵⁵

The FAA notice discusses some of the contexts in which the agency anticipates relying on direct final rulemaking. The agency expressly contemplates using the process in conjunction with regulatory negotiation: direct final rulemaking may be invoked for "noncontroversial rules *and consensual rules*, where [FAA] believes there will be no adverse public comment."⁵⁶ Specifically, the agency would consider issuing a direct final rule where a broad-based advisory group such as its Aviation Rulemaking Advisory Com-

⁴⁹ See 59 Fed. Reg. 9613 (1994).

⁵⁰ See 60 Fed. Reg. 6957 (1995) (to be codified at 7 C.F.R. §§ 300, 319).

⁵¹ See *id.*

⁵² See *id.*

⁵³ For a similar incident in which a SIP revision took a year to promulgate because EPA's receipt of a single adverse comment prevented the completion of direct final rulemaking, see 59 Fed. Reg. 5724 (1994) (codified at 40 C.F.R. § 52) (volatile organic compound emission regulation intercepted by adverse comment from Flexible Packaging Association).

⁵⁴ See 59 Fed. Reg. 50,676 (1994) (to be codified at 14 C.F.R. § 11).

⁵⁵ *Id.* at 50,677.

⁵⁶ *Id.* at 50,676 (emphasis added).

mittee has negotiated a unanimous recommendation regarding which the agency expects no adverse comments,⁵⁷ such as a recommendation “to harmonize FAA and European technical standards for the manufacture of aircraft.”⁵⁸ Airworthiness directives, amendments to airspace designations, and extensions of compliance dates are other types of rules that the agency foresees developing through direct final rulemaking, if it expects a particular rule to be noncontroversial.⁵⁹

More recently, the Coast Guard also published a proposed set of standard procedures for direct final rulemaking.⁶⁰ These procedures are similar to those of the FAA, although the policy’s definition of “adverse comment” resembles that of the Agriculture agencies more than it resembles that of the FAA.⁶¹ The Coast Guard listed twenty contexts in which it would consider using direct final rulemaking, including noncontroversial rules to govern individual regattas and marine parades, describe anchorage areas, or prescribe shipping safety fairways.⁶² The policy expressly stated that if adverse comments applied only to a severable part of a rule, the Coast Guard might treat the rest of the rule as final.⁶³

Another agency within the Department of Transportation, the Research and Special Programs Administration (“RSPA”), has issued rules that bear at least a resemblance to direct final rules, although the agency did not use that term to describe them. RSPA issued a pair of rules extending the dates for compliance with pre-existing regulations—one dealing with construction of cargo tanks,⁶⁴ the other with transportation of infectious substances.⁶⁵ Viewing each time extension as “noncontroversial,” and “not anticipat[ing] any adverse comments,”⁶⁶ RSPA invoked the procedures associated with direct final rulemaking: If no adverse comments were received, the extension would stand (as did occur with the cargo tanks rule⁶⁷); but if RSPA were to receive comments demonstrating that an extension was unjustified, the agency would withdraw it and republish it as the basis of an ordinary notice-and-comment proceeding.⁶⁸

These two extension rules did not exactly fit the direct final rulemaking paradigm, because in each proceeding the agency made clear that only *persuasive* comments would deflect it from its intended course of action; the mere receipt of an adverse comment would not necessarily have induced the

57 See *id.* at 50,677.

58 *Id.*

59 See *id.*

60 See Coast Guard Rulemaking Procedures, 60 Fed. Reg. 31,267 (1995) (to be codified at 33 C.F.R. § 1).

61 See *id.* at 31,268.

62 See *id.*

63 See *id.*

64 See 59 Fed. Reg. 1784 (1994) (announcing cargo tanks regulation).

65 See 59 Fed. Reg. 48,762 (1994) (announcing infectious substances regulation).

66 59 Fed. Reg. 48,762, 48,763 (1994); 59 Fed. Reg. 1784, 1784 (1994).

67 See Construction of Cargo Tank Motor Vehicles; Confirmation of Effective Date, 59 Fed. Reg. 12,861 (1994) (to be codified at 49 C.F.R. § 171) (confirmation notice for cargo tanks rule).

68 59 Fed. Reg. 48,762, 48,763 (1994); 59 Fed. Reg. 1784, 1784 (1994).

agency to withdraw the rule (nor, presumably, would a mere declaration of intent to submit comments). Indeed, RSPA did receive a comment attacking the extension of the infectious substances rule, but went ahead with its original plan, concluding that the commenter's arguments were outweighed by other considerations.⁶⁹ The proceedings might be better understood as examples of interim final rulemaking, supported by (implicit) findings of "good cause" and accompanied by the assurance of a round of notice-and-comment if a proposal were to make a case for one.⁷⁰ Even granting that these proceedings were not true examples of direct final rulemaking, however, they at least demonstrate that awareness of direct final rulemaking is percolating through the executive branch and that there is a need to clarify the appropriate occasions for its use. That is the task to which this Article is devoted.

II. *The Legality of Direct Final Rulemaking*

There has never been a legal challenge to a direct final rule, according to officials at EPA (the only agency that has been issuing such rules long enough to have provoked such a challenge).⁷¹ This should not be surprising, because rules that survive the objection period provided in direct final rulemaking tend, by definition, to be so noncontroversial that nobody desires to challenge them, in court or even before the agency.

Nevertheless, the lack of challenges to the legitimacy of direct final rulemaking may not last for long.⁷² For example, even if no one cares to object to the abbreviated procedure at the promulgation stage, a regulated person who is faced with an enforcement or penalty action for violating a direct final rule would have a strong incentive to challenge the rule if possible.⁷³ This scenario might be especially likely if agencies follow the lead of the FAA and use direct final rulemaking to adopt negotiated rules⁷⁴—which

⁶⁹ See 59 Fed. Reg. 53,116 (1994) (to be codified at 49 C.F.R. § 171).

⁷⁰ In a third proceeding, RSPA used similar procedures as a vehicle for inviting requests for reconsideration on one issue involved in a regulation governing pressure testing of pipelines. See 59 Fed. Reg. 29,379 (1994). The underlying regulation had been developed through traditional notice-and-comment, but the specific issue of whether petroleum could be used for this purpose had not been explicitly raised before. Thus, the invitation to submit comments may have served to head off any controversy over whether the petroleum issue was a "logical outgrowth" of the original notice.

⁷¹ See *IMPROVING REGULATORY SYSTEMS*, *supra* note 3, at 43. Like any other rule, of course, a direct final rule could be challenged for exceeding the agency's authority, constituting an abuse of discretion, etc. The present discussion deals only with whether the use of direct final rulemaking could itself be a basis for challenge.

⁷² See, e.g., *AOPA Says Direct Rulemaking May Contain Flaw*, *AVIATION DAILY*, Jan. 13, 1995, at 70 [hereinafter *AOPA Objection*] (reporting assertion by general counsel of Aircraft Owners and Pilots Association that FAA's proposed direct final rulemaking procedures "may well contravene the intent, if not the letter, of the Administrative Procedures [sic] Act").

⁷³ In some contexts, however, statutory or other restrictions on judicial review may foreclose challenges to a direct final rule in an enforcement proceeding. Under the Clean Air Act, for example, certain rules may be reviewed only within 60 days of their promulgation, and procedural objections that were not raised during the comment period may generally not be raised during judicial review. See 42 U.S.C. § 7607(b)(1) (Supp. V 1993) (limitations period); 42 U.S.C. § 7607(d)(7)(B) (1988) (exhaustion requirement).

⁷⁴ See *supra* note 56 and accompanying text (noting FAA's interest in such use).

rest upon consensus of the immediate participants but are not necessarily inconsequential in their impact.

In any event, if one is interested in encouraging use of direct final rulemaking by agencies that have not already made a commitment to the practice, one must address an issue that would naturally occur to those agencies: the magnitude of the litigation risks they might run by engaging in it. It seems appropriate, therefore, to examine the grounds on which direct final rulemaking might be challenged and the arguments that can be raised in its defense.

Broadly speaking, a legal defense of direct final rulemaking is likely to take one of two different paths. One approach, considered in Section A of this Part, would see direct final rulemaking as a systematic device for implementing the “good cause” exemption⁷⁵ to the APA notice-and-comment requirements.⁷⁶ The prospects for agencies’ making effective use of this theory depend on whether the government can successfully navigate some relatively uncharted legal waters, but if it should prove viable the theory would offer the government the maximum in practical latitude. The second approach, considered in Section B, would argue that the direct final rulemaking process, or something very much like it, may substantially comply with the informal rulemaking procedures of the APA.⁷⁷ There is a strong argument that the APA model permits at least some forms of direct final rulemaking, but this line of analysis may not permit quite as much streamlining as agencies would like. Finally, Section C of this Part examines an additional factor that is common to the two approaches: the agency’s obligation to give adequate preparation time to the public before a direct final rule becomes effective.⁷⁸

A. Direct Final Rulemaking and the Good Cause Exemption

The first line of reasoning to be examined rests on the premise that the circumstances in which an agency pursues direct final rulemaking are, virtually by definition, exempted from the usual public participation requirements of the APA, because such participation would be “unnecessary” within the meaning of the good cause exemption of section 553(b)(B).⁷⁹ That provision states that the usual notice-and-comment obligations of sections 553(b) and (c) do not apply “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, *unnecessary*, or contrary to the public interest.”⁸⁰ Although the tradition has been to construe

⁷⁵ See 5 U.S.C. § 553(b)(B) (1994).

⁷⁶ See *infra* notes 79-96 and accompanying text.

⁷⁷ See *infra* notes 97-109 and accompanying text.

⁷⁸ See *infra* notes 110-125 and accompanying text.

⁷⁹ 5 U.S.C. § 553(b)(B) (1994). There is also a “good cause” exemption permitting an agency to make a rule effective less than 30 days after publication. See 5 U.S.C. § 553(d)(3) (1994). That exemption falls outside the present discussion but will be considered below. See *infra* part II.C.

⁸⁰ 5 U.S.C. § 553(b)(B) (1994) (emphasis added).

the good cause exemption narrowly,⁸¹ the arguments for invoking the exemption in the present context turn out to be surprisingly strong.

Although the agencies that engage in direct final rulemaking have never expressly invoked the good cause exemption in this connection, they may well have proceeded on the assumption that it applies. Agencies never refer to a direct final rule as a “proposed” rule. As its name implies, the rule is regarded as *final* from the moment of its first publication.⁸² Direct final rules are always published in the final rules section of the *Federal Register*, not the proposed rules section.⁸³ Regardless of the agencies’ intentions, however, the good cause theory appears to be the most credible way to fit actual practice into the structure of the APA.

The standard explanation of the meaning of the “unnecessary” component of the good cause exemption stems from the legislative history of the APA. According to the House and Senate reports accompanying the enactment of the APA, the term means “unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved.”⁸⁴ This exegesis directly parallels the explanation that agencies routinely give when they invoke the direct final rulemaking process: that they have done so because they believe the rule in question to be noncontroversial and unlikely to attract public comment.

One can, accordingly, think of the direct final rulemaking process as an imaginative mechanism for implementing the “unnecessary” component of the good cause exemption in a responsible fashion. The process is analogous to the procedure that the Administrative Conference has recommended that agencies follow when they invoke the *other* components of the good cause exemption (those in which the agency finds prior public comment to be “impracticable” or “contrary to the public interest”). In those situations, ACUS has said, the agency should solicit post-promulgation comment instead.⁸⁵ Direct final rulemaking is at least as protective of the public as that procedure. It embodies a built-in safeguard against the possibility that the agency may have erred in believing that the public would not wish to comment: if even one person submits an adverse comment, or demonstrates an intent to do so, the rule is withdrawn.

⁸¹ See, e.g., Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 120-41 (1984); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 333-38 (1989).

⁸² EPA's original name for the technique, “immediate final rulemaking” is even more revealing in this regard. See *supra* note 15.

⁸³ See, e.g., 40 C.F.R. § 721.170(d)(4)(i)(A) (1994) (providing for issuance of direct final rules for SNURs in the final rules section of the *Federal Register*).

⁸⁴ SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 200 (1946) [hereinafter APA LEGISLATIVE HISTORY] (Senate); *id.* at 258 (House).

⁸⁵ See ACUS Recommendation 83-2, The “Good Cause” Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.83-2 (1994). This advice was expressly made inapplicable to rules in which the agency determines public comment to be “unnecessary.” *Id.* ¶ 1.

Although the matter is not free from doubt, the case law construing the “unnecessary” exemption supports the validity of direct final rulemaking. Judicial decisions construing the exemption appear to accept the committee reports’ explanation of the term “unnecessary;”⁸⁶ thus, when presented with the kind of cases that are characteristic of direct final rulemaking—cases that do tend to involve “minor and technical” matters in which the public “is not particularly interested”—one may assume that they would be receptive to a claim of exemption. A fortiori, they should be receptive to direct final rulemaking, in which the agency, which could have provided no public procedure at all, instead allows any member of the public to trigger notice-and-comment proceedings by filing an adverse comment.

It is true that government efforts to invoke the exemption seem to lose more often than they win, but part of the reason is that, in several of the relatively few cases involving the exemption that have actually been litigated, agencies have sometimes resorted to strained arguments that have very little to do with the actual rationale of the exemption, as stated in the legislative history. For example, the case law tends to repudiate the ideas that prior public participation in a rulemaking is “unnecessary” if the agency could have developed its policy through adjudication instead, or if the agency invited post-promulgation comment instead, or if the rescission of a rule restores a status quo ante about which the public had a chance to comment when the rule was first promulgated.⁸⁷ The courts’ rejection of these shaky propositions was perfectly understandable.

Perhaps the larger difficulty emerging from the case law is the tradition that exceptions from notice-and-comment procedure should be “narrowly construed and reluctantly countenanced.”⁸⁸ This restrictive attitude towards the good cause exception reflects a judicial belief in the inherent advantages of public proceedings; it may also stem from a fear that agencies will apply the exemption with a systemic bias towards their desire to fulfill their own statutory mission, with too little heed for the perspectives of members of the public who might not share the agency’s belief in the rightness of its cause.

Whatever force these rationales may possess in other contexts, they seem out of place in the present context. As just noted, the critical feature of direct final rulemaking is that even one objector can “blackball” the rule—as the episode involving the APHIS rule on mangos and grapefruits aptly illustrates.⁸⁹ The agency’s commitment to withdraw the rule if it receives an adverse comment (or even a notice of intent to submit an adverse comment) is

⁸⁶ See, e.g., *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 n.2 (9th Cir.), cert. denied, 113 S. Ct. 598 (1992); *National Nutritional Foods Ass’n v. Kennedy*, 572 F.2d 377, 385 (2d Cir. 1978); *National Helium Corp. v. Federal Energy Admin.*, 569 F.2d 1137, 1146 & n.20 (Temp. Emer. Ct. App. 1977); *Texaco, Inc. v. Federal Power Comm’n*, 412 F.2d 740, 743 (3d Cir. 1969).

⁸⁷ Cases rejecting these arguments are recounted, and discussed with approval, in Jordan, *supra* note 81, at 130-35. Professor Jordan also cogently criticizes decisions *upholding* the argument that public comment may be “unnecessary” if the matters addressed in the rule were previously ventilated in proceedings before state agencies. *Id.* at 132-33.

⁸⁸ *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983); see, e.g., *National Nutritional Foods Ass’n v. Kennedy*, 572 F.2d 377, 384-85 (2d Cir. 1978); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977).

⁸⁹ See *supra* notes 49-53 and accompanying text.

a safety valve protecting the interest of members of the public to present their views to the agency if they so desire. More than that, it gives the agency an incentive to use direct final rulemaking only for matters that it genuinely expects to be noncontroversial. If the “blackball” forces a withdrawal of the direct final rule, the agency must begin all over again with notice-and-comment, and will probably complete the proceeding later than if it had not resorted to direct final rulemaking in the first place. Thus, as other observers have noted, the dynamics of the direct final rulemaking system exert a self-policing influence on the agency.⁹⁰

Accordingly, although in the abstract one might be disinclined to trust an agency’s potentially self-serving declaration that it does not believe the public would disagree with its position, the combination of that perception *and* the subsequent failure of the public to register an objection, after an opportunity to offer one, creates a highly credible case for the applicability of the “unnecessary” criterion.

To be sure, some cases have held that an invocation of the good cause exemption cannot succeed unless the agency *expressly* invokes the exemption and presents reasons to bolster its position.⁹¹ Indeed, the statutory language supports this line of reasoning as a general proposition. Nevertheless, these cases (none of which has involved the “unnecessary” branch of good cause) seem basically concerned with preventing agencies from devising post hoc rationalizations to justify their failure to observe their statutory obligations.⁹² Agencies which engage in direct final rulemaking do regularly articulate an express conclusion that they believe the rule to be noncontroversial and unlikely to attract comment. This is exactly the sort of inquiry contemplated by the exemption; no purpose would be served, no extra thought stimulated, by a judicial insistence that the agency recite the magic words “good cause.”

In any event, although the judicial literature, read in isolation, might convey the impression that the “unnecessary” exemption can come into play only in rare and exceptional circumstances, agencies make use of the exemption in numerous cases that do not show up in court. Professor Lavilla, after examining every issue of the *Federal Register* during a six-month period, found that agencies had expressly invoked the good cause exemption in

⁹⁰ See IMPROVING REGULATORY SYSTEMS, *supra* note 3, at 43; Donnelly, *supra* note 7 (quoting an FSIS official: “It would not be in the interest of the agency to issue a direct final rule and then receive adverse comments and have to start the whole process anew . . .”). EPA’s recent policy of issuing certain direct final rules at the same time as a parallel notice of proposed rulemaking reduces this self-policing influence. See *supra* notes 26-29 and accompanying text. Even when an agency follows this approach, however, its commitment to withdraw the rule if anyone expresses opposition helps to protect the public from overly aggressive reliance on direct final rulemaking.

⁹¹ See, e.g., *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145-46 (D.C. Cir. 1992); *Kelly v. Department of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972). *But see* *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App.) (excusing omission of reasons where they are obvious and the entire trade was fairly appraised by procedures followed), *cert. denied*, 419 U.S. 896 (1974); *Wells v. Schweiker*, 536 F. Supp. 1314, 1323 (E.D. La. 1982).

⁹² See *Nutritional Foods*, 572 F.2d at 384 & n.13.

twenty-five percent of the rules they published.⁹³ Of the rules accompanied by findings of good cause, twenty percent relied on the “unnecessary” criterion alone.⁹⁴ Thus, agencies deemed public comment “unnecessary” in roughly five percent of all the rules they announced during this period. Lavilla identified a number of rules that had involved such minimal changes in the legal order that the agencies seemed correct in finding public comment superfluous.⁹⁵ Such rules constitute a wide body of agency actions that would appear to lend themselves, at least potentially, to the use of direct final rulemaking.

One might ask, however, why an agency should use direct final rulemaking in a case in which it could use the good cause exemption to avoid any public procedures at all. One answer is that a process that smokes out unanticipated adverse reactions gives the agency precisely the benefits that notice-and-comment procedure is supposed to provide: the opportunity to avoid mistakes, to learn from others’ perspectives, and to enhance the public acceptability of the ultimate product. A more hard-headed answer is that rules issued under the good cause exemption are always vulnerable to a risk that a court may subsequently find that the agency invoked the exemption erroneously. Direct final rulemaking is a means by which the agency can, at low cost, reduce that risk.⁹⁶

B. Direct Final Rulemaking as Notice-and-Comment Rulemaking

Although the argument for sustaining direct final rulemaking under the good cause exemption seems cogent, its ultimate prospects are uncertain, because of the caution that courts have traditionally displayed in overseeing the agencies’ administration of the exemption. Moreover, even if courts ultimately find that *most* direct final rulemaking fits within the exemption, they might decide that some particular rules do not. Accordingly, the following discussion explores an alternative theory: that direct final rulemaking is consistent with the informal rulemaking procedures of the APA.⁹⁷ Of course, as we have seen, the agencies do not purport to follow section 553 procedure; they do not, for example, “propose” a rule for comment when they issue a direct *final* rule.⁹⁸ Nevertheless, there is room to contend that what agencies

⁹³ See Lavilla, *supra* note 81, at 338-39 & n.86. Including rules in which agencies appeared to have *tacitly* invoked the exemption would have raised this figure to 33 percent. See *id.* at 339.

⁹⁴ See *id.* at 351 n.124. This figure would more than double if one were to include those instances in which the agency invoked the “unnecessary” test in conjunction with one or both of the other tests in the good cause exemption. See *id.*

⁹⁵ See *id.* at 389-90 (citing, e.g., rules rescinding provisions that were obsolete or that the agency no longer had authority to enforce).

⁹⁶ To be sure, there are cases in which an agency *should* use the good cause exemption to forgo all public procedures, including direct final rulemaking. See *id.* at 386-88 (citing situations in which an agency had absolutely no discretion about the contents of its rule, such as where its task was merely to make a mathematical calculation, to ascertain an objective fact, etc.).

⁹⁷ Some organic statutes require agencies to follow procedures that differ from the § 553 model. See, e.g., Clean Air Act § 307(d)(1), 42 U.S.C. § 7607(d)(1) (1988). In that situation, the relevant question would be whether direct final rulemaking substantially complies with those procedures.

⁹⁸ See *supra* notes 82-83 and accompanying text.

actually do in direct final rulemaking constitutes substantial compliance with the APA, at least if they handle the process carefully.

1. Notice and Opportunity for Comment

It seems fairly clear that direct final rulemaking substantially complies with an agency's obligation to provide notice of the proposed rule (subsection (b)) and an opportunity to comment on it (subsection (c)). The agency can easily include in its *Federal Register* notice all the information that subsection (b) requires. Similarly, all direct final rulemaking schemes entail an invitation to members of the public to submit comments. The time period typically allowed for those comments, thirty days, is not lengthy, but it appears to fall within the normal range for relatively simple rulemaking proceedings.⁹⁹ Of course, any agency could institute a longer comment period without frustrating the essential nature of the direct final rulemaking approach.

One might question whether the fact that the issuing agency characterizes the rule as "final" could reasonably be understood as implying that agency staff are already wedded to their position.¹⁰⁰ Such an implication would be problematic under section 553(b), because the public might then be less willing to comment (believing it to be futile) and the staff might not give full consideration to any comments that did arrive. Concerns of this kind underlie the usual reluctance of courts to permit post-promulgation comment to substitute for pre-promulgation comment, for example in cases involving interim final rules.¹⁰¹

However, any such argument appears to be misdirected. As we have seen, the realities of direct final rulemaking militate sharply against an agency's developing a mindset that would lead it to assume that the rule is a *fait accompli*, because even one objector can "blackball" the rule.¹⁰² Know-

⁹⁹ ACUS has recommended that Congress amend § 553(b) to specify a comment period of "no fewer than 30 days." ACUS Recommendation 93-4, 59 Fed. Reg. 4670, 4674 (1994). Although the Conference regarded this 30 day period as a minimum (subject to the agency's ability to provide a shorter period, or none, by showing "good cause"), it would be hard to fault an agency for allowing only the accepted minimum period in a rulemaking proceeding that is expected to be noncontroversial.

Case law discussing how much time must be allowed in a comment period is almost nonexistent. In one case, the court criticized (in dictum) a 10 day period but provided no general guidance except for one platitude: § 553(b) "means that a reasonable notice shall be given, though of necessity the period must be subject to some flexibility." *Fund for Animals v. Frizzell*, 530 F.2d 982, 988, 990 (D.C. Cir. 1975). A dictum in another case relied on the ACUS guideline to suggest that 30 days would have been a "barebones" comment period. *See Petry v. Block*, 737 F.2d 1193, 1201-02 (D.C. Cir. 1984).

¹⁰⁰ One industry spokesman has asserted: "There are frequent circumstances where our members have felt they did not have adequate opportunity for input to the FAA early enough before views and positions started to harden . . . and direct final rulemaking raises concerns about an even more abbreviated procedure." *AOPA Objection*, *supra* note 72, at 70.

¹⁰¹ *See, e.g., United States Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979) (expressing doubt as to whether an agency considers seriously public comment when the regulations are a "fait accompli"); *cf. Asimow*, *supra* note 8, at 486-87 (reporting practitioners' belief that agencies are relatively unresponsive to post promulgation comments on interim final rules).

¹⁰² *See supra* notes 49-53, 89 and accompanying text.

ing this, agency personnel have a strong incentive not to think of the publication of a direct final rule as settled policy. Of course, there is ultimately no way to prevent administrators from harboring a degree of psychological commitment to the positions they espouse in proposed rules; indeed, a degree of policy orientation is inevitable and necessary.¹⁰³ But the controlling point is that the dynamics of the direct final rulemaking approach seem unlikely to aggravate whatever tendencies toward psychological commitment inhere in the ordinary rulemaking process. The word “final” that is used in the published notice is in the end only a word; any connotation of irrevocability is belied by the underlying dynamics of the context in which it appears.

2. *Publication of Rule and Statement of Basis and Purpose*

To prevail under the “substantial compliance” theory, an agency defending a direct final rule would also need to demonstrate that it has complied in substance with two publication requirements. Section 552(a)(1) of the APA requires each agency to “separately state and currently publish in the Federal Register . . . substantive rules of general applicability”¹⁰⁴ Also, section 553(c) requires an agency to “incorporate in the rules adopted a concise general statement of their basis and purpose.”¹⁰⁵ Normally, these obligations are met at the end of the rulemaking process, by the publication of a final rule in the *Federal Register*, together with an explanatory statement. In direct final rulemaking, however, the EPA publishes nothing at all at the end of the process (i.e., when it determines that no one has submitted or intends to submit an adverse comment). The Agriculture agencies do publish a confirmation notice to announce that the rule will stand, but such notices are only a few inches long.¹⁰⁶ These agencies do not republish the text of the direct final rule, nor do they state the “basis and purpose” of the rule at that time. On the surface, at least, both omissions seem to violate the APA.

This potential objection seems unduly formalistic, however. The text of the rule itself will generally be unchanged since its publication in the original announcement. Thus, that publication would seem adequate to satisfy the agency’s obligation under section 552(a)(1). If the agency does decide to make changes in the rule, those changes undoubtedly would be stated in a *Federal Register* notice when the rule is finalized.¹⁰⁷

As for the statement of basis and purpose, the same sentence of the APA that imposes this obligation indicates that the statement should be published “[a]fter consideration of the relevant matter presented.”¹⁰⁸ If the

¹⁰³ See *Association of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (holding that policymakers may be disqualified for prejudgment in rulemaking proceedings only under extremely limited circumstances), *cert. denied*, 447 U.S. 921 (1980); *id.* at 1176 (Leventhal, J., concurring) (“It would be the height of absurdity, even a kind of abuse of administrative process, for an agency to embroil interested parties in a rulemaking proceeding, without some initial concern that there was an abuse that needed remedying . . .”).

¹⁰⁴ 5 U.S.C. § 552(a)(1)(D) (1994).

¹⁰⁵ 5 U.S.C. § 553(c) (1994).

¹⁰⁶ For examples of representative notices, see *supra* notes 43-46.

¹⁰⁷ See, e.g., 59 Fed. Reg. 17,917, 17,917 (1994) (confirming adoption by APHIS of black stem rust quarantine rule and correcting the name of one species affected).

¹⁰⁸ 5 U.S.C. § 553(c) (1994).

agency has received *no* “relevant matter,” or at least none arguing against adoption of the rule, it seems logical to presume that the agency’s reasons for adopting the rule are the same as they were when it proposed the measure some thirty days earlier. Notices initiating a direct final rulemaking proceeding always contain a statement of reasons, which in every substantial sense can serve the same functions as a traditional statement of basis and purpose. This conclusion is supported by cases holding that, for purposes of a court’s exercise of its substantive review functions, an agency’s failure to publish an explanatory statement is not fatal if the action is self-explanatory.¹⁰⁹ In short, direct final rulemaking appears to be in substantial compliance with the publication requirements of the APA, because members of the public receive the same information about the contents and rationale of the rule that they would receive in a typical rulemaking proceeding—only sooner.

C. The Issue of Preparation Time

Regardless of whether agencies rely on a “good cause” theory or a “substantial compliance” theory to validate direct final rulemaking, they must confront the implications of the section 553(d) requirement that, in general, “[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date.”¹¹⁰ Indeed, there are grounds for concern that *none* of the agencies that now utilize direct final rulemaking is in complete compliance with this APA provision. Once they face the issue, however, agencies should have little difficulty adapting to meet the provision’s requirements.

The purpose of section 553(d) is stated in the House and Senate committee reports accompanying the APA: to “afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt.”¹¹¹ On a general level, the interest of regulated persons in receiving adequate advance notice of a change in the law before it becomes enforceable seems evident; it even has an arguable constitutional dimension.¹¹² A small business, for example, might not be able to comply with a new regulation until it has revised its printed forms to reflect new regulatory requirements, or has held a training

¹⁰⁹ See, e.g., *American Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct. Cl. 1979); *Alabama Ass’n of Ins. Agents v. Board of Govs.*, 533 F.2d 224, 236-37 (5th Cir. 1976), *cert. denied*, 435 U.S. 904 (1978).

¹¹⁰ 5 U.S.C. § 553(d) (1994).

¹¹¹ APA LEGISLATIVE HISTORY, *supra* note 84, at 201 (Senate); *id.* at 259 (House).

¹¹² See *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) (to comply with due process in publicizing a statute, “[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply”). This fleeting reference to a “reasonable opportunity” has never been developed, and, in the absence of visible constitutional restraint, courts have sometimes stretched the presumption that everyone knows the law to remarkable lengths. See *United States v. Casson*, 434 F.2d 415, 422 (D.C. Cir. 1970) (concluding that a burglar in the District of Columbia was on constructive notice by 10:00 p.m. that a bill increasing the District’s penalties for burglary had been signed in Texas at 3:05 p.m.). The due process issue will not be pursued here, because the APA-conferred right to notice of the adoption of new regulations is surely as strong, and probably stronger, than any comparable constitutional right.

session to acquaint employees with those requirements. Congress seems to have concluded that, with certain exceptions to be discussed presently, regulated persons are entitled to at least a month's lead time in order to make such preparations for compliance.

The specific problem that section 553(d) poses in the context of direct final rules is that, although interested persons know from the outset of the rulemaking proceeding what the text of the rule is expected to be, they cannot know until after the comment period whether the agency will let the rule become *effective*. It can be strongly argued that regulated persons, such as the hypothetical small business just mentioned, cannot fairly be expected to begin gearing up for compliance until they know whether the agency means to stand by the direct final rule. (Note, in this connection, that the absence of controversy over whether the rule should be adopted would by no means negate the possibility that the steps required to come into compliance would be burdensome.) Under the normal APA rulemaking scheme, the thirty-day period prescribed in section 553(d) does not begin to run from the publication of a *proposed* rule; the clock begins running only after the agency publishes the *final* rule, even if the agency does not change the text of the rule.¹¹³ One need make only a small extension of this principle in order to draw the conclusion that a direct final rule should not go into effect until at least thirty days after the public has notice that the agency has decided not to withdraw the rule.

If the conclusion just stated is correct, the agencies that now use direct final rulemaking will surely need to modify their practices. This is most obviously true of EPA, which makes its direct final rules effective sixty days after issuance but does not make a formal announcement when a direct final rule survives the comment period.¹¹⁴ The world is left to speculate about whether the rule has gone into effect, at least until such time as it can reasonably assume the agency would have made an announcement if it were going to withdraw the rule.

The Agriculture agencies would also need to alter their practices. In their system, a direct final rule becomes effective on Day 60 after initial publication if no one files an adverse comment by Day 30, and the agencies' policy is to publish a "confirmation notice" after the comment period to inform the public that the rule will indeed go into effect.¹¹⁵ Superficially, this system conforms to section 553(d), because the period from Day 31 to Day 60 meets the statutory standard. Yet that reasoning holds water only if, within twenty-four hours of the expiration of the comment period, three events occur: (a) the agency determines that it received no comments, or that any comments it may have received were not "adverse;" (b) the agency prepares the confirmation notice and forwards it to the *Federal Register*; and (c) the *Federal Register* publishes the notice. Common sense tells us, however, that things do not happen quite that rapidly in the federal government.

113 See *Rowell v. Andrus*, 631 F.2d 699, 704 (10th Cir. 1980).

114 See *supra* note 25 and accompanying text.

115 See *supra* note 41 and accompanying text.

Indeed, the first few confirmation notices from APHIS have been published an average of twelve days before their stated effective dates.¹¹⁶

The analysis to this point has assumed that the APA rulemaking process is fully applicable to direct final rulemaking—a proposition most closely associated with what the preceding section called the “substantial compliance” theory. If, however, an agency can rely on the “good cause” exception of section 553(b)(B) as a justification for direct final rulemaking, the legal issue posed by section 553(d) is at least closer. The agency could take the position that its direct final rules are “final” immediately upon publication; on this premise, the sixty-day period customarily allowed between publication of the rule and its effective date more than meets the requirement of section 553(d).

Yet one may wonder whether this argument would necessarily stand up in the event of judicial review. A court might well decide that, whatever label the agency chooses to affix, a direct final rule is actually somewhat tentative—in substance a *proposal*—until the comment period ends and the agency concludes that it has received no adverse comments (or written statements of intent to submit one). Requiring regulated parties to shoulder the burden of uncertainty as to whether the “final” rule will survive the comment period might seem incompatible with the underlying purpose of section 553(d).¹¹⁷ In any event, the agency’s defense assumes that the “good cause” exemption of section 553(b)(B) applies to direct final rulemaking, and that assumption, although strongly defensible, is not an entirely safe one.

Incidentally, section 553(d) does contain a “good cause” exemption of its own,¹¹⁸ but any supposition that it can obviate all difficulties relating to the consistency of direct final rulemaking with section 553(d) would be ill-founded. It is fairly clear that an agency does not have good cause to make a

¹¹⁶ See 59 Fed. Reg. 63,698 (1994) (codified at 9 C.F.R. § 92) (publishing APHIS confirmation notice seven days before effective date of rule); 59 Fed. Reg. 49,785 (1994) (codified at 9 C.F.R. § 151) (publishing purebred horses confirmation notice 17 days before effective date of rule); 59 Fed. Reg. 44,893 (1994) (codified at 9 C.F.R. § 92) (publishing pet bird importation confirmation notice 13 days before effective date of rule); 59 Fed. Reg. 17,917 (1994) (codified at 7 C.F.R. § 301) (publishing black stem rust confirmation notice 11 days before effective date of rule).

¹¹⁷ The government’s best argument here might be that § 553(d) does *not* guarantee a 30 day period in which regulated parties are *certain* that a rule will go into effect. Even after issuing a “final” rule, an agency might later receive and act favorably on a petition for reconsideration; or the filing of a petition for judicial review might lead the agency or a court to stay the rule’s effective date pending appeal. See 5 U.S.C. § 705 (1994) (authorizing stays). Similarly, the argument would continue, the possibility that the agency might withdraw a direct final rule because it has received unexpected adverse comments is simply another “condition subsequent” that does not negate the immediate finality of the rule for purposes of § 553(d). This argument may not carry the day, however. It is one thing to say that the preparation time afforded by § 553(d) is subject to contingencies such as reconsideration and judicial review, of which Congress must have been aware when it enacted the APA, and another to say that the time period must remain subject to the uncertainties stemming from an administrative agency’s unilateral prediction that no one will oppose the rule.

¹¹⁸ See 5 U.S.C. § 553(d)(3) (1994). For surveys of the extensive and heavily fact-dependent case law, see Jordan, *supra* note 81, at 141-52, and Kevin D. Hart, Annotation, *What Constitutes “Good Cause” Under Provision of Administrative Procedure Act (5 USCS § 553(d)(3)) Allowing Agency Rule to Become Effective Less than 30 Days After Publication*, 55 A.L.R. FED. 880 (1981).

rule immediately effective merely because it has good cause to dispense with notice-and-comment.¹¹⁹ More specifically, a lack of controversy over the merits of a rule does not logically imply that persons governed by it should not be entitled to the thirty days of preparation time that section 553(d) sets as a presumptive norm. Of course, the good cause exemption is and should be available where there is some public urgency impelling the agency to make a given rule effective without delay; but where a rule is mundane enough to be a good candidate for direct final rulemaking, one would expect that the government will usually *not* be able to cite any strong need to expedite its proceedings. In fact, it appears that the government seldom if ever argues that there is “good cause” to make a regulation effective in less than thirty days because a month’s wait is “unnecessary.”

Section 553(d) does, however, contain at least one exemption that should prove useful to agencies in some direct final rulemaking contexts: a rule may be issued without the thirty-day delay in effective date if it “grants or recognizes an exemption or relieves a restriction.”¹²⁰ Many direct final rules fit within this category and thus can be put into effect as soon as the agency decides not to withdraw the rule.¹²¹

Given the concerns stated above, how could an agency shape its direct final rulemaking policies to avoid the risk of infringing section 553(d)? For an agency that issues confirmation notices, the answer seems clear. It could draft those notices to specify that a direct final rule will become effective no fewer than thirty days after the notice is published. Thus, if the confirmation notice happened to be published on Day 45, it could state that the rule will be effective on Day 75. If an agency has decided for some reason that it prefers not to issue confirmation notices,¹²² it might experiment with declaring that a certain period of agency silence should be interpreted as meaning that the agency intends for the rule to become effective. The preamble to a direct final rule might say, for example, that if the agency does not publish a notice withdrawing the rule by Day 50 after its initial release, the public should assume that the rule will stand, with an effective date no earlier than Day 80.

Adoption of one of these approaches would seem sufficient to shield agencies from claims that direct final rulemaking violates section 553(d). Any of the approaches would of course make the process less speedy—but only by two or three weeks, which is not much compared with other common delays in the regulatory process.¹²³ At the same time, it would not detract from the capacity of direct final rulemaking to minimize unnecessary reviews

¹¹⁹ See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 37-38 (1947); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir.), cert. denied, 113 S. Ct. 598 (1992); *Wells v. Schweiker*, 536 F. Supp. 1314, 1327-28 (E.D. La. 1982).

¹²⁰ 5 U.S.C. § 553(d)(1) (1994).

¹²¹ A third exemption, for interpretative rules and statements of policy, is probably irrelevant here. See 5 U.S.C. § 553(d)(2) (1994). An agency is unlikely to use direct final rulemaking to promulgate such rules, because the APA allows them to be issued without notice-and-comment anyway. See 5 U.S.C. § 553(b)(A) (1994).

¹²² Policy considerations that might lead an agency to wish to avoid confirmation notices are explored below. See *infra* part III.E.

¹²³ Such a brief delay would, for example, appear to preserve most of the time savings that

and conserve agency staff time, which is probably the main attraction of the technique. An agency that is averse to legal risks may well find this tradeoff appealing.

To be sure, the magnitude of the legal risks involved here should not be overstated. The weight of judicial authority indicates that a violation of section 553(d) should not serve to impair the validity of a regulation, but should only serve to extend the time period before it becomes effective.¹²⁴ That position seems sound as a general matter, because such a violation casts no doubt on the intrinsic soundness of the rule, and the extension accords the individual precisely the protection that section 553(d) contemplates. Thus, even if it were held that agencies have been infringing section 553(d) in all of their direct final rulemaking activities, that conclusion should not cast doubt on the enforceability of existing direct final rules, nor would it even subject the agency to much legal jeopardy in an individual case. Nevertheless, an agency policy that entails continuing violations of the APA should surely be changed.¹²⁵ The above discussion provides at least a context for reflection as to whether current modes of direct final rulemaking do entail such continuing violations.

III. Using Direct Final Rulemaking

Assume now that the legality of direct final rulemaking can be sustained on one or more of the theories reviewed in the preceding Part. Agencies that decide to make use of the device will have to examine a variety of issues regarding the proper occasions for and conditions of its use. This Part offers a checklist of several such issues.

A. The Decision to Use Direct Final Rulemaking

The reasons why agencies should give serious consideration to using direct final rulemaking when possible are straightforward and have been men-

EPA has realized by resorting to direct final rulemaking for revisions of SIPs. See *supra* note 18 and accompanying text.

¹²⁴ See, e.g., *Prows v. Department of Justice*, 938 F.2d 274, 276 (D.C. Cir. 1991) (holding that a regulation issued in violation of § 553(d) becomes valid after expiration of the 30 day notice period); *Rowell v. Andrus*, 631 F.2d 699, 704 (10th Cir. 1980) (same); *United States v. Gavrilovic*, 551 F.2d 1099, 1106 (8th Cir. 1977) (holding same by implication); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (holding same by implication). Cases that appear to hold otherwise can be explained on the ground that they also involved an agency's failure to invite prior comment. See, e.g., *Sannon v. United States*, 460 F. Supp. 458, 468 (S.D. Fla. 1978); *Kelly v. Department of Interior*, 339 F. Supp. 1095, 1101-02 (E.D. Cal. 1972). Understandably, courts are often reluctant to hold the latter type of error harmless, because of the difficulty of knowing what the comments would have said or how the agency would have reacted. But see, e.g., *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429, 442 (9th Cir. 1993) (condoning a failure to solicit prior comment); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487-88 (9th Cir.) (same), *cert. denied*, 113 S. Ct. 598 (1992).

¹²⁵ A rule with a faulty effective date can create a trap for an unwary government litigant. If the pleadings in an enforcement action merely allege that the respondent violated the rule after the effective date stated in the rule, the litigation may be delayed by the respondent's contention that the pleadings fail to specify whether the offense occurred during a time period with respect to which the rule is enforceable. See *Rowell*, 631 F.2d at 704.

tioned already. The approach permits the agency to streamline its regulatory process by eliminating a second round of reviews for regulations that are noncontroversial enough to require only one round, and thereby expediting the issuance of rules. As an efficiency measure, the technique generally meets with praise.¹²⁶ Looking for ways to shorten and simplify the rulemaking process seems especially important at a time when resource constraints are likely to become more stringent for a number of agencies. Not only are budgets likely to face downward pressure, but Congress now seems poised to enact comprehensive legislation that would *augment* the procedures agencies must follow when they promulgate so-called “major” rules.¹²⁷ Both of these developments will presumably drain resources away from agencies’ efforts to generate rules that are not “major.”

On the other hand, when a rule appears to be noncontroversial, direct final rulemaking can be a superior alternative to simply invoking the good cause exception and doing without any public proceedings at all. As has already been pointed out,¹²⁸ this technique not only gives the agency the benefit of any public input that may unexpectedly surface, but also may help shield the agency against a claim that the good cause exemption was improperly invoked (especially if the agency conducts the direct final rulemaking proceeding in a manner that can be credibly defended as substantial compliance with section 553 procedure).

Of course, an agency has to proceed carefully in selecting rules as candidates for direct final rulemaking. The most basic guideline is straightforward: an agency should resort to this device only in developing rules that are truly likely to be noncontroversial. This guideline follows directly from the self-policing feature of the process that has been mentioned earlier:¹²⁹ If the agency proves mistaken in its prediction that no one will seek to comment adversely, and the rule has to be withdrawn and resubmitted for notice-and-comment, the ultimate issuance of the rule will take longer than if the agency had never tried to use direct final rulemaking.¹³⁰

Aside from the built-in incentive to exercise self-restraint in the use of direct final rulemaking, agencies might at least consider the risk that the use

¹²⁶ See *supra* notes 3-7 and accompanying text.

¹²⁷ See, e.g., S. 343, 104th Cong., 1st Sess. §§ 621-622 (1995) (as reported in S. REP. NO. 90, 104th Cong., 1st Sess. 5-8 (1995)). The oversight program administered by the Office of Information and Regulatory Affairs already requires executive agencies to follow special procedures when they develop major rules. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (1994). However, the pending legislation would extend this obligation to independent agencies, broaden the definition of “major rule,” and specify new areas of inquiry. See S. 343 §§ 621-622, 632-633.

¹²⁸ See *supra* note 96 and accompanying text.

¹²⁹ See *supra* notes 89-90 and accompanying text.

¹³⁰ No such delay will occur if the agency follows EPA’s recent practice of issuing “companion” notices of proposed rulemaking to accompany certain direct final rules. See *supra* notes 26-27 and accompanying text. Such a policy does not, however, change the reality that the agency will have to withdraw the direct final rule if it receives an adverse comment. Thus, the agency still has good reasons not to resort to direct final rulemaking indiscriminately, because if a member of the public objects to the rule, the agency will have wasted time and resources publishing two *Federal Register* notices (one announcing the direct final rule and one withdrawing it) to no avail.

of this technique could foster misunderstanding in some contexts. The announcement of a so-called “final” rule might inadvertently convey the impression that the agency would be reluctant to consider adverse public comments about its intended course of action.¹³¹ Of course, the fact that anyone could “blackball” the rule ought to negate any such impression, but a risk of confusion may exist nevertheless.¹³² Probably, however, the main conclusion to be drawn from the existence of this risk is that the agency must take pains to explain what it is doing, not that the agency should forgo direct final rulemaking entirely.

B. Regularization of Direct Final Rulemaking Procedures

Much can be said for the decisions of the Agriculture and Transportation Department agencies to promulgate a general policy statement defining the procedures they will use in direct final rulemaking proceedings. Although the essential features of the device are simple enough that they can be (indeed, should be) explained each time the agency uses it, a generic framework should promote consistency in the agency’s processes and should spare it the necessity to reinvent the wheel each time it wishes to invoke the device in a new setting. As the use of direct final rulemaking spreads, agencies new to the practice would benefit from being able to borrow from standardized models (which may not all be identical, of course) developed by agencies that have longer experience with it.

C. The Length and Purpose of the Comment Period

In most direct final rulemaking proceedings, agencies have allowed thirty days for members of the public to submit adverse comments or written notice of an intent to submit adverse comments.¹³³ This figure falls within the normal range for rulemaking proceedings.¹³⁴ The Administrative Conference has, however, encouraged agencies to allow longer comment periods in notice-and-comment rulemaking,¹³⁵ and agencies issuing direct final rules have a similar choice to make.

¹³¹ See *supra* note 100 and accompanying text.

¹³² A misunderstanding of this kind is probably least likely to occur in regulatory settings in which the agency uses direct final rules routinely. By now, for example, environmental lawyers have had ample opportunity to become accustomed to the procedures that EPA uses when it institutes new SIPs and SNURs. See *supra* notes 12-30 and accompanying text.

¹³³ Thirty days is the comment period usually allowed by EPA, the Coast Guard, and the Agriculture agencies. *But see* 60 Fed. Reg. 17,950, 17,950 (1995) (allowing 60 days for objections to storm water discharge rule). The FAA procedural regulation does not specify a length for the comment period, apparently leaving this decision for case-by-case determination. See *supra* note 54 and accompanying text.

¹³⁴ See ACUS Recommendation 93-4, 59 Fed. Reg. 4670, 4674 (1994) (recommending that APA be amended to allow comment periods of “no fewer than 30 days”). The proposed amendment would not directly apply to direct final rulemaking proceedings, of course, if those proceedings are seen as falling within the good cause exemption of § 553(b)(B). See, e.g., 59 Fed. Reg. 48,762 (1994) (allowing *eight days* for public comment on RSPA’s extension of compliance date for infectious substances regulation).

¹³⁵ See ACUS Recommendation 93-4, 59 Fed. Reg. 4670, 4674 n.46 (1994).

The issue here is largely the same as would arise in ordinary notice-and-comment proceedings: the agency must balance the desire for streamlining with the need to make sure that interested persons are able to learn about the rulemaking, consult internally, and register a response. A few differences between the two types of proceedings may be noted. On the one hand, members of the public arguably need less time to respond to a direct final rule than to a typical proposed rule, because they only need to notify the agency of an *intention* to submit adverse comments; they do not actually need to write them. On the other hand, if resort to the direct final rulemaking process does trigger concerns about the rule being “railroaded,” the agency might decide to extend its comment period in order to assuage concerns in the regulated or beneficiary community about its own openmindedness.¹³⁶

A different sort of question about the comment period concerns its underlying purpose: should it serve merely as a mechanism for determining whether or not the rule is controversial, or should it also serve as the primary (or even exclusive) opportunity for interested persons to express their views on the merits? In essence, this question requires an appraisal of EPA’s recent practice of sometimes issuing a direct final rule together with a “companion” notice of proposed rulemaking.¹³⁷ Under this practice—originally devised as a policy for processing SIP revisions, but later used in some other contexts as well—the public’s only opportunity to comment occurs at a time when no one is sure whether the agency’s effort to proceed by direct final rule will be successful. In initiating this procedure, EPA explained that it “eliminates the need for a new proposed rule and an additional comment period, and assists in getting these SIP actions published in a more expedient manner.”¹³⁸

Although streamlining is the fundamental idea behind direct final rulemaking, there are grounds for concern that EPA’s new twist on the technique may carry this goal too far. Arguably, the approach makes the public’s opportunity to comment less meaningful than it should be. When an agency publishes a notice of proposed rulemaking as a companion document to a direct final rule, making an express finding that it expects the rule to be non-controversial, it may instill a false sense of security in interested persons whose views ought to be heard in the event that the direct final rule is withdrawn. For example, an environmental organization might refrain from commenting on a direct final rule because it expects EPA’s position to stand and considers the rule livable; but if the agency discovers that it must proceed with a full-fledged rulemaking proceeding because of an adverse comment from industry, the environmentalists perhaps deserve to be given a fresh op-

¹³⁶ See Donnelly, *supra* note 7 (quoting a public interest lawyer suggesting a 90 day time frame).

¹³⁷ See *supra* notes 26-30 and accompanying text.

¹³⁸ 59 Fed. Reg. 24,054 (1994). EPA also hoped that the procedure would protect direct final rulemaking proceedings from being derailed by casual or insubstantial objections. As explained below, a suitable definition of “adverse comment” can address apprehensions of this kind. See *infra* part III.D.

portunity to challenge industry's claims or to argue for changes in the opposite direction.¹³⁹

The potential detriment to public participation must, of course, be weighed against the agency's interest in further expediting the direct final rulemaking process. Yet the incremental savings to the agency from the new EPA approach seem fairly limited. After all, that approach is no more efficient than the standard direct final rulemaking process in cases in which the rule proves to be noncontroversial. In fact, the agency winds up worse off in such cases, because hindsight reveals that the "companion" notice was published needlessly. The savings of time and resources accrue only in the situation in which the agency's prediction proves erroneous and the rule must be withdrawn—and if direct final rulemaking is being used properly, that situation ought to be relatively rare.¹⁴⁰

D. The Definition of "Adverse Comment"

The Agriculture, FAA, and Coast Guard procedures for direct final rulemaking contain helpful definitions of the kind of "adverse comment" that should induce an agency to withdraw a direct final rule.¹⁴¹ Each makes the straightforward points that a comment that proposes a change in the rule would meet this standard, while a comment approving of the rule as published would not. One might, however, raise a question about the FAA's statement that a "comment recommending a rule change in addition to the direct final rule would not be considered an adverse comment, unless the commenter states that the rule would be inappropriate as proposed or would be ineffective without the additional change."¹⁴² This phrasing is slightly ambiguous. It should be interpreted to mean (or reworded to say) that a comment could be considered adverse not only if it states that the rule would be *intrinsically* inappropriate without a change, but also if it states that the agency would be *acting* inappropriately if it were to adopt the rule without change.

The distinction is subtle, but the underlying concern is to take account of a commenter who says, in effect, "this is fine as far as it goes, but it would be

¹³⁹ In ordinary APA rulemaking, when an agency receives comments and decides to modify a proposed rule, interested persons who were satisfied with the original proposal, and therefore refrained from commenting on it, are not normally entitled to a second chance to participate. See *American Medical Ass'n v. United States*, 887 F.2d 760, 769 (7th Cir. 1989). In direct final rulemaking, however, in which the *agency itself* predicts that the rule will be noncontroversial, an interested person who relies on the prediction can make a somewhat stronger equitable argument that the agency should provide a renewed opportunity for comment if the prediction proves mistaken.

¹⁴⁰ The new EPA approach may actually elicit objections that would not otherwise have been lodged, through the influence of what game theorists call a "prisoner's dilemma." To use the previous hypothetical, the approach gives the environmental organization an incentive to submit comments because of the risk that the industry group *might* do so—and vice versa. The same incentive does not exist in conventional direct final rulemaking: each side can afford to wait and see if the other will object during the initial comment period, and the result may be that neither will object.

¹⁴¹ See *supra* notes 40, 55 and accompanying text.

¹⁴² 59 Fed. Reg. 50,677 (1994) (to be codified at 14 C.F.R. § 11).

a bad idea for you to do this and no more.” Private parties understand that when an agency has adopted one rule on a subject, inertia often takes hold, causing the agency to leave the subject alone for an indefinite period of time. Consequently, commenters who wish to see an agency take large steps have a strong interest in pressing that point at the very time when the agency intends to take small ones. Receipt of such a comment should trigger a rulemaking proceeding in which the commenter’s position can be examined carefully (and in which others can make a case *against* the agency’s going beyond its original rule).

Indeed, courts expect an agency to respond persuasively to comments urging it to take more dramatic action than the action it did take; the lack of such a response may be an abuse of discretion.¹⁴³ To be sure, an agency has broad discretion to set its agenda and to deal with problems one step at a time.¹⁴⁴ Nevertheless, the agency’s self-interest lies in making a strong record to respond to pleas to go further than it would prefer; brushing such comments aside can be counterproductive. Administrative policies setting a framework for direct final rulemaking should leave room for such records to be built.

Admittedly, however, these fine distinctions about the phrasing of a general policy may seem overly subtle. In the end, agencies will inevitably have to make periodic judgment calls in individual cases in order to decide whether a given comment is “adverse.” Probably, the agency should expect the commenter to display some minimum level of seriousness of purpose. One can easily imagine, in this age of widespread anti-government feeling, an individual who might decide to file routine, indiscriminate objections to direct final rules, without providing a substantive basis for the objections. An agency could hardly be asked to allow the direct final rulemaking process to be held hostage to such obstructionism. One benchmark the agency might use, in deciding whether a comment rises to the level of “adverseness,” would be whether the agency would have paid any serious attention to the comment, and responded to it, if it had received the comment in an ordinary rulemaking proceeding.¹⁴⁵ Again, however, case-by-case judgment seems unavoidable in this situation.

E. Confirmation Notices

The most conspicuous difference in agencies’ approaches to direct final rulemaking is that the Agriculture and Transportation agencies, if they re-

¹⁴³ See *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 486-89 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984); *ILGWU v. Donovan*, 722 F.2d 795, 815-18 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

¹⁴⁴ See *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 224-25 (1991); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *Federal Power Comm’n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

¹⁴⁵ See, e.g., *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1355 n.15 (D.C. Cir. 1985) (explaining that an agency need not respond to remote or insignificant comments); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (noting that “lack of agency response or consideration becomes of concern” when comment is “significant enough to step over a threshold requirement of materiality”), *cert. denied*, 417 U.S. 921 (1974).

ceive no adverse comment or notice of intent to file one, will publish a notice informing the public that they intend to let a direct final rule stand, while EPA's uniform practice is to publish no confirmation notice. Agencies that adopt direct final rulemaking in the future will have to choose between these two models. The legal considerations that might bear on this choice have already been discussed.¹⁴⁶ The following discussion puts the legal points aside and examines confirmation notices from a more practical standpoint.

The practice of publishing a confirmation notice has obvious appeal in terms of minimizing uncertainty and confusion among members of the public, who are spared the need to watch the *Federal Register* for an indefinite period.¹⁴⁷ Agencies must consider the strength of this argument in particular contexts. Relevant to the inquiry would be questions such as: Absent a confirmation notice, how easily could an interested person find out the status of the rule (e.g., through an industry newsletter, telephone contact with the agency, etc.)? To what extent would anyone's primary conduct or decisions be affected by timely knowledge as to the rule's status?¹⁴⁸

The costs to the agency of a confirmation notice are, in the first instance, economic, because *Federal Register* filings are charged against the issuing agency's budget. The price is low, because a confirmation notice is usually only a few inches in length;¹⁴⁹ but if the agency were to issue numerous direct final rules, as EPA does, the combined expense could at some point add up to "real money."¹⁵⁰ More important, perhaps, is the effort and delay that may result from the inclusion of an extra step in the direct final rulemaking process. Certainly, the desire to avoid the need for a second series of reviews by responsible agency personnel is one of the principal reasons to use the process. An agency should, however, be able to minimize this cost by structuring its internal processes so that the issuance of a confirmation notice is a ministerial task that an employee without policymaking responsibility can perform.

¹⁴⁶ In brief recapitulation, if the agency treats direct final rulemaking as substantial compliance with the APA, reviewing courts might deem the use of a confirmation notice necessary to satisfy the requirement of a statement of basis and purpose (although this argument seems unsound) and also to provide a benchmark by which to measure the required 30-day period preceding the rule's effective date. See *supra* notes 97-109 and accompanying text. If the agency can succeed in invoking the good cause exception of § 553(b), the former argument would certainly not apply, and the latter might not, although that is less clear. See *supra* notes 79-96 and accompanying text.

¹⁴⁷ It can also provide an occasion to make clarifications or technical corrections in the rule. See *supra* note 107 and accompanying text.

¹⁴⁸ According to the Acting Director (now Director) of the *Federal Register*, members of the public do call his office with some frequency to ask whether a direct final rule has been allowed to stand. Interview with Richard L. Claypoole, Acting Director of the *Federal Register* (May 2, 1995).

¹⁴⁹ For example, see the APHIS confirmation notices cited *supra* notes 43-46. The Government Printing Office charges agencies \$125 per column of the *Federal Register*, although some agencies can obtain a lower price by submitting copy in electronic form. Thus, a confirmation notice will probably cost \$125 or (since charges cannot be prorated among columns) \$250 in most cases. Interview with Richard L. Claypoole, *supra* note 148.

¹⁵⁰ A more intangible cautionary factor may be that growth in the number of notices (or pages) in the *Federal Register* is often cited as a crude measure of burgeoning "overregulation." See, e.g., S. REP. NO. 90, 104th Cong., 1st Sess. 37, 39 (1995). Agencies sensitive to such perceptions have an incentive to shun inessential notices.

The ability to streamline the confirmation notice function may not rest entirely with the agency, however. It is unclear whether an agency's decision to publish a confirmation notice could in some instances trigger a new review by the Office of Information and Regulatory Affairs ("OIRA").¹⁵¹ Avoidance of such a review seems essential if direct final rulemaking is to achieve the streamlining that it is supposed to bring about. One would hope, therefore, that OIRA would be willing to forgo review at the confirmation notice stage in any rulemaking proceeding in which the agency has elected to proceed by direct final rule. This would not detract from the substantive authority of the oversight office; it would merely mean that the office would need to do its review up front, with the understanding that a second review would not occur if no member of the public wishes to submit an adverse comment. Of course, OIRA generally has an interest in conserving its resources by not reviewing rules in an early stage of their development; but, given the agencies' incentive not to resort to direct final rulemaking at all unless adverse comments from the public are unlikely, it would seem logical for OIRA to treat direct final rules as "ripe" for a one-time-only review when they are first promulgated.¹⁵²

F. Length of Time Allowed Before Rule Becomes Effective

As explained earlier, agencies may be required to delay the effective dates of their direct final rules to a later time than they have generally assumed, in order to comply with the thirty-day period of section 553(d).¹⁵³ Whether or not that is so, the thirty-day requirement is merely a legal minimum.¹⁵⁴ Agencies using direct final rulemaking must make a situation-specific judgment about the length of time that regulated persons realistically need to adapt to a newly announced rule. To date there appears to be no direct evidence that the customary sixty days has proved inadequate in any context, but in some situations a longer period might be desirable. Agencies have broad, but not completely unfettered, discretion to choose a time period that accommodates the need for expedition with the need for fairness to those who must conform to the new regime.¹⁵⁵

¹⁵¹ In general, OIRA reviews only rules it considers "significant." See Exec. Order No. 12,866, § 6(b)(1), 29 WKLY. COMP. PRES. DOC. 1925 (1993). This criterion would seem to exclude most direct final rules, but OIRA has no firm policy exempting direct final rules from review.

¹⁵² A similar analysis would apply to any other reviewers of the rulemaking process outside the agency itself. For example, a bill passed by the House of Representatives would entrust a broad reviewing role to the Chief Counsel for Advocacy of the Small Business Administration. See H.R. 9 (as amended by insertion of text of H.R. 926), 104th Cong., 1st Sess. § 102, 141 CONG. REC. H2630 (1995).

¹⁵³ See *supra* part II.C.

¹⁵⁴ See National Ass'n of Indep. T.V. Producers & Distribs. v. FCC, 502 F.2d 249, 254 (2d Cir. 1974); APA LEGISLATIVE HISTORY, *supra* note 84, at 201 (Senate); *id.* at 259-60 (House).

¹⁵⁵ See *Indep. T.V. Producers*, 502 F.2d at 253-55 (holding that FCC abused its discretion by allowing industry insufficient time to adapt to new regulation before its effective date).

Conclusion

Direct final rulemaking is still in its early stages. Agencies have not used it for enough time and in enough different contexts to allow anyone to be confident that all the potential problems have already come to light. Nevertheless, the foregoing study seems adequate to permit several generalizations about the practice. First, the direct final rulemaking technique seems to be serving valuable functions. Second, current practice rests on a defensible legal foundation, and acceptance of even the most pessimistic assessment of the legal constraints on direct final rulemaking would require only small adjustments in current practice. Third, the models for the use of direct final rulemaking developed by the three agencies that have already made a commitment to the technique seem broadly appropriate, although many of the specific details can only be resolved on a case-by-case basis.

By their nature, the issues surrounding direct final rulemaking do not seem cosmic, even when measured against what Judge (now Justice) Scalia once flippantly called “the regrettably limited cosmos of administrative procedure.”¹⁵⁶ The device cannot be used at all except for rules that are unlikely to be controversial. Still, it deserves much broader use in the federal government than has yet occurred,¹⁵⁷ and one can expect that over time its value will become recognized. It is, indeed, rulemaking made simple.

Appendix

Procedures for Noncontroversial and Expedited Rulemaking†

Administrative Conference of the United States

Recommendation 95-4

Rulemaking has been the subject of considerable debate and review in recent times. Concern has been expressed that rulemaking processes provide adequate opportunity for meaningful public input while allowing agencies, in appropriate circumstances, to expedite the implementation of rules when they either are needed immediately or are routine or noncontroversial. Agencies have experimented with procedures to achieve these objectives. Two of these procedures, “direct final rulemaking,” and “post-promulgation comment” rules (also called “interim final rulemaking”) are discussed here.

¹⁵⁶ Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, v (Summer 1982).

¹⁵⁷ As this Article went to press, a few additional agencies had just begun to join the direct final rulemaking bandwagon. See 60 Fed. Reg. 62,316 (1995) (repeal of obsolete rules by the Department of Energy); 60 Fed. Reg. 56,506 (1995) (repeal of obsolete rules by the Federal Election Commission).

† The Administrative Conference adopted Recommendation 95-4 on June 15, 1995. The recommendation dealt with both direct final rulemaking and post-promulgation comment rulemaking (also called interim final rulemaking). Only the portions relating to direct final rulemaking are reprinted here. The full text of the recommendation is published at 60 Fed. Reg. 43,110 (1995).

Direct Final Rulemaking

Direct final rulemaking is a technique for expediting the issuance of non-controversial rules. It involves agency publication of a rule in the Federal Register with a statement that, unless an adverse comment is received on the rule within a specified time period, the rule will become effective as a final rule on a particular date (at least 30 days after the end of the comment period). However, if an adverse comment is filed, the rule is withdrawn, and the agency may publish the rule as a proposed rule under normal notice-and-comment procedures.¹

The process generally has been used where an agency believes that the rule is noncontroversial and adverse comments will not be received. It allows the agency to issue the rule without having to go through the review process twice (i.e., at the proposed and final rule stages),² while at the same time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial.

Under current law, direct final rulemaking is supported by two rationales. First, it is justified by the Administrative Procedure Act's "good cause" exemption from notice-and-comment procedures where they are found to be "unnecessary." The agency's solicitation of public comment does not undercut this argument, but rather is used to validate the agency's initial determination. Alternatively, direct final rulemaking also complies with the basic notice-and-comment requirements in section 553 of the APA. The agency provides notice and opportunity to comment on the rule through its Federal Register notice; the publication requirements are met, although the information has been published earlier in the process than normal; and the requisite advance notice of the effective date required by the APA is provided.³

Because the process protects public comment and expedites routine rulemaking, the Administrative Conference recommends that agencies use direct final rulemaking in all cases where the "unnecessary" prong of the good cause exemption is available, unless the agency determines that the process would not expedite issuance of such rules. The Conference further recommends that agencies explain when and how they will employ direct final rulemaking. Such a policy should be issued as a procedural rule or a policy statement.⁴

1 When an agency believes that it can incorporate the adverse comment in a subsequent direct final rulemaking, it may use the direct final rulemaking process again.

2 Rules are generally reviewed both by the agency and by the Office of Information and Regulatory Affairs. Internal agency review is often time-consuming. Under current practice, review of direct final rules by OIRA would be uncommon, since, under E.O. 12,866, only rules deemed to be "significant" are subject to review. Should this policy be changed, the Conference urges that agency rules issued through the direct final rulemaking process be subject to no more than one OIRA review.

3 A separate Federal Register notice stating that no adverse comment has been received and that the rule will be effective on a date at least 30 days in the future can also be used to further alleviate any concern regarding proper advance notice to the public.

4 The Conference has previously suggested that notice-and-comment procedures be used for procedural rules where feasible. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From APA Notice-and-Comment Rulemaking Requirements."

The Conference recommends that agencies publish in the notice of the direct final rulemaking the full text of the rule and the statement of basis and purpose, including all the material that would be required in the preamble to a final rule. The Conference also recommends that the public be afforded adequate time for comment.⁵

The direct final rulemaking process is based upon the notion that receipt of "significant adverse" comment will prevent the rule from automatically becoming final. Agencies have taken different approaches in defining "adverse" comments for this purpose. Some have said that a mere notice of intent to file an adverse comment is sufficient. Others have required that the comment either state that the rule should not be adopted or suggest a change to the rule; proposals simply to expand the scope of the rule would not be considered adverse. Some have said that a recommended change in the rule would not in and of itself be treated as adverse unless the comment states that the rule would be inappropriate as published. The Conference recommends that a significant adverse comment be defined as one where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether a significant adverse comment is sufficient to terminate a direct final rulemaking, agencies should consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process.

To assure public notice of whether and when a direct final rule becomes effective, agencies should include in their initial Federal Register notices a statement that, unless the agency publishes a Federal Register notice withdrawing the rule by a specified date, it will become effective no less than thirty days after such specified date. Alternatively, an agency should publish a separate "confirmation notice" after the close of the comment period stating that no adverse comments were received and setting forth an effective date at least thirty days in the future. The effective date of the rule should be at least thirty days after the public has been given notice that the agency does not intend to withdraw the rule, unless the rule "grants or recognizes an exemption or relieves a restriction," 5 U.S.C. § 553(d)(1), or is otherwise exempted from the delayed effective date of section 553(d) of the APA. The fact that a rule has proved noncontroversial is not itself an appropriate basis for dispensing with the delay in the effective date.

Agencies may also wish to consider using direct final rulemaking procedures in some cases where the text of the rule has been developed through the use of negotiated rulemaking. Where the course of the negotiations suggests that the result will be noncontroversial, the direct final rulemaking process offers the opportunity for expedited rulemaking while at the same time ensuring that the opportunity for comment is not foreclosed.

⁵ The Conference has previously recommended that the APA be amended to ensure that at least 30 days be allowed for public comment, while encouraging longer comment periods. Recommendation 93-4, "Improving the Environment for Agency Rulemaking," ¶IV and Preamble at p. 5.

Although direct final rulemaking is viewed by the Conference as permissible under the APA as currently written, Congress may wish to expressly authorize the process. Authorization would alleviate any uncertainty and reduce the potential for litigation.

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Recommendation

I. Direct Final Rulemaking

A. In order to expedite the promulgation of noncontroversial rules, agencies should develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comment. Agencies should define "significant adverse comment" as a comment which explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. Procedures governing the direct final rulemaking process should be established and published by each agency.

B. Direct final rulemaking should provide for the following minimum procedures:

1. The text of the rule and a notice of opportunity for public comment should be published in the final rule section of the Federal Register,¹⁰ with a cross-reference in the proposed rule section that advises the public of the comment opportunity.

2. The notice should contain a statement of basis and purpose for the rule which discusses the issues the agency has considered and states that the agency believes that the rule is noncontroversial and will elicit no significant adverse comment.

3. The public should be afforded adequate time (at least 30 days) to comment on the rule.

4. The agency's initial Federal Register notice should state which of the following procedures will be used if no significant adverse comments are received: (a) the agency will issue a notice confirming that the rule will go into effect no less than 30 days after such notice; or (b) that unless the agency publishes a notice withdrawing the rule by a specified date, the rule will become effective no less than 30 days after the specified date.¹¹

5. Where significant adverse comments are received or the rule is otherwise withdrawn, the agency should publish a notice in the Federal Register stating that the direct final rulemaking proceeding has been terminated.¹²

C. Agencies should also consider whether to use direct final rulemaking following development of a proposed rule through negotiated rulemaking.

¹⁰ Agencies should also consider other mechanisms for providing public notice.

¹¹ 5 U.S.C. 553(d) provides for exemption from the 30-day advance notice where, for example, the rule "grants or recognizes an exemption or relieves a restriction."

¹² At that point, of course, the agency may proceed with usual notice-and-comment rulemaking, or if the agency believes that it can easily address the comment(s), it may proceed with another direct final rulemaking.

D. If legislation proves necessary to remove any uncertainty that direct final rulemaking is permissible under the APA, Congress should amend the APA to confirm that direct final rulemaking is authorized.

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