REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

BEST PRACTICES FOR AGENCY USE OF THE GOOD CAUSE EXEMPTION FOR RULEMAKING

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Final Report on Best Practices for Agency Use of the Good Cause Exemption for Rulemaking

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Executive Summary

Academic and political commentators have long focused on the good cause exemption from notice-and-comment rulemaking in the Administrative Procedure Act (APA) because it places two important principles of administrative law in tension with one another. On the one hand, the APA guarantees the public the right to engage agency officials

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in the rulemaking process by providing them with an opportunity to offer comments, and by requiring agencies to respond to significant comments that they receive. On the other hand, the APA recognizes that the opportunity to comment can be time-consuming and expensive, and so, notice and comment may not be appropriate, necessary, or even in the public interest for certain rules. This concern over the time and cost of rulemaking has become more prominent as the notice-and-comment process has become more cumbersome and litigation over rules more frequent.

The APA's "good cause" exemption is the statutory vehicle that authorizes agencies to avoid the notice-and-comment process where that process is "impracticable, unnecessary, or contrary to the public interest." Yet drawing a clear line between those rules that warrant a public comment process and those that are properly exempted from that process has proved challenging. Courts have sometimes drawn lines for agencies in particular factual settings, and commentators, good government organizations, and the Administrative Conference of the United States (ACUS) have made recommendations for improving the approach taken by agencies when invoking good cause. Some of these recommendations include the use of tools like "interim final rules" (IFR) and "direct final rules" (DFR), which are nowhere mentioned in the APA, but are often used by agencies today.

The IFR, for example, takes effect immediately upon publication but is subject to public comment and an obligation on the part of the agency to consider those comments and to issue final rules that amend the IFR as may be warranted based upon the comments received. Even if no changes are deemed necessary, the agency must still publish the rule in final form.[1]

Although the use of IFRs has become somewhat standardized among

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[1] If an agency properly invokes the good cause exemption, it is not required to offer any opportunity for comment. Moreover, the APA makes no provision for an IFR. Nonetheless, because an IFR is styled as an "interim" rule, that characterization plainly contemplates a final rule. In theory, the Office of Information and Regulatory Affairs (OIRA) monitors IFRs to ensure that agencies publish the final rule in a timely fashion. In practice, however, it seems that agencies often fail to publish their final rules. *See* Dan Bosch, *Interim Final Rules: Not So Interim*, AMERICAN ACTION FORUM (Dec. 8, 2020), https://www.americanactionforum.org/research/interim-final-rules-not-so-interim (describing the frequent failure of agencies to publish in a timely manner a final rule following an IFR).

federal agencies, a 2020 decision of the Supreme Court has the potential to upend the longstanding limitations on the use of this tool. *Little Sisters of the Poor v. Pennsylvania*,[2] involved two IFRs issued by the Department of Health and Human Services and other agencies that allowed exemptions on religious and moral grounds from the requirement in the Affordable Care Act that health care plans cover contraceptives.[3] Rather than focusing on the agencies' demonstration of good cause, the Supreme Court suggested that IFRs satisfy all of the requirements of notice-and-comment rulemaking, and that, accordingly, an agency need not even show good cause.[4] If this were true, however, then agencies could issue IFRs for every rulemaking, and thereby avoid their obligation to give prior notice and an opportunity to comment on a proposed rule before it takes effect, as the APA has always required for most rules.[5] Instead, agencies could allow all rules to take effect immediately, before any comments are received, and dispense with the need to demonstrate good cause.[6]

One of the more surprising aspects of the *Little Sisters* decision is the lack of attention to what appears to be a mistake by Justice Thomas. Thomas wrote the majority opinion, but Justices Alito and Kagan penned separate concurring opinions, and Justice Ginsburg wrote a dissent. Yet none of them so much as mentioned Thomas's apparent misinterpretation of the notice-and-comment requirements of the APA. One would expect some discussion of that issue in the other opinions, especially by Justice Kagan, who is generally hailed as an administrative law expert.

Unlike the IFR, the DFR does not take effect until the agency provides a brief, usually 30-day comment period. But the DFR becomes final automatically if no adverse comments are received. If adverse comments are received, however, the DFR must generally be withdrawn, and further

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[2] 591 U.S. 657 (2020).

[3] Section 2713 of the Public Health Service Act; 42 U.S.C. § 300gg-13.

[4] "Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs." *Little Sisters of the Poor*, 591 U.S. at 686 n.14.

[5] 5 U.S.C. §§ 553(b) & (c).

[6] *See* Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2094–2102 (2023), where the authors offer a full-throated critique of the *Little Sisters* decision and why it seems so clearly at odds with the APA.

rulemaking proceedings on that subject are generally subject to the full notice-and-comment process.[7]

In addition to these two categories of rules that agencies consider exempt from the usual notice-and-comment process, some agencies issue rules for which no opportunity to comment is offered. These are sometimes called "direct to final" rules, although because that term is easily confused with "direct final rules," this Report recommends a new term, "no comment final rules" (NCFR) to describe this category.

To be clear, agencies are not required to offer an opportunity to comment in any of these situations if they properly invoke the good cause exemption. The policy of affording comment opportunities on IFRs and DFRs thus reflects both a sensitivity to honoring public preferences that favor an opportunity to comment, and the desire to minimize the risk of litigation when the good cause exemption is invoked. But since the use of IFRs and DFRs, and the invocation of good cause more generally has become commonplace, agencies should adhere to a set of best practices when invoking the good cause exemption. Ideally, such practices should be set out by a government authority with a role in overseeing all agency rulemaking.

This Report offers recommendations for employing best practices when invoking the good cause exemption from notice-and-comment rulemaking. It proposes definitions for the key terms – IFRs, DFRs, and NCFRs – and for how and when these categories should be used. It also describes appropriate tools and policies that agencies might employ when invoking good cause.

The Report recognizes that amending the APA to reflect best practices when agencies use the good cause exemption is unlikely, and poses unnecessary risks, and so it considers other possibilities for establishing national standards. These possibilities include, for example, a Presidential Executive Order, or official guidance from either the Department of Justice or the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). Recommendations from

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[7] Sometimes, however, agencies will publish a DFR alongside a proposed rule. This allows them to proceed to a final rule without starting the process over when they receive significant adverse comments. *See, e.g., Rules of Practice and Procedure Before the Benefits Review Board.* 89 Fed. Reg. 8533 (Feb. 8, 2024). *See also, Procedures for Transportation Workplace Drug and Alcohol Testing Programs,* 89 Fed. Reg. 51984 (June 21, 2024); 89 Fed. Reg. 52002 (June 21, 2024).

ACUS could also spur improved agency rulemaking processes when using the good cause exemption, even if such recommendations are not binding on agencies.

Introduction

This Report was commissioned by ACUS for the purpose of examining the "good cause" exemption from notice-and-comment rulemaking. After reviewing the history and use of the exemption, the Report makes recommendations on how the current law related to the good cause exemption might be improved. These recommendations focus, in particular, on the appropriate level of public engagement when the good cause exemption is invoked.

The project commenced with a review of the current law as it relates to the good cause exemption. This review benefited greatly from the earlier work of legal academics and government agencies,[8] and that work features prominently in this Report. The project then proceeded by conducting interviews with a wide range of federal agencies that have used the good cause exemption.[9] These interviews were led by the author with the able assistance of Ben Birkhill, Attorney Advisor for ACUS, and Telly Scott, Research Assistant to the author. The author identified a list of nine questions that largely revolved around the circumstances that led to the decision to use the exemption, the frequency with which agencies invoked the exemption, and the post-promulgation processes that were typically offered by the agency when the exemption was invoked.

As the interviews proceeded, it became increasingly clear that most

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[8] *See e.g.*, Mark Seidenfeld, *Rethinking the Good Cause Exemption to Notice and Comment Rulemaking in Light of Interim Final Rules*, 75 ADMIN L. REV. 787 (2023); Kyle Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237 (2021); JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXEMPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012); Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999).

[9] Interviews were conducted with the following agencies: the Environmental Protection Agency, the Department of Energy, the Coast Guard, the Department of Transportation, the Federal Reserve, the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, the United States Department of Agriculture, the Bureau of Industry and Security at the Department of Commerce, the United States Patent and Trademark Office, the Department of Education, and the Office of Personnel Management.

agencies face unique circumstances that lead them to employ the good cause exemption. While some common themes emerged, the interviews often diverged from the questions originally identified and evolved to a more focused look at the unique circumstances facing each agency. For example, in our interview with the Department of Energy, we discussed waiving notice-and-comment for rules related to the Civil Nuclear Credit Program. The Coast Guard discussed their specific use of the good cause exemption in the context of creating safety or security zones. Similarly, the Department of Transportation discussed their specific use of the good cause exemption in the context of Airworthiness Directives or Airspace Designations.

These interviews and the related research reveal opportunities to improve the use of the good cause exemption in ways that might engage the public in more meaningful ways, and these ideas will be explored in detail in a series of recommendations at the end of this Report. These recommendations will also include specific language that might ideally be offered as possible amendments to the APA but that could alternatively be set forth in a Presidential Executive Order, or a Department of Justice Guidance Document. The likelihood that these recommendations will be adopted might also be enhanced if they receive the support of ACUS, the American Bar Association, or other professional organizations interested in improving the notice-and-comment rulemaking process.

Background

The Administrative Procedure Act (APA) defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...."[10] Rulemaking typically occurs through an "informal" notice-and-comment process established by the APA.[11] That section requires publication in the Federal Register of a "general notice of proposed [rulemaking][,]" which must include the nature of the rulemaking proceedings, the legal authority for the rule, and the terms or substance of the proposed rule.[12] It further requires the agency to "give interested persons an opportunity to participate in the rule making

[10] 5 U.S.C. § 551(4).

[11] 5 U.S.C. § 553. The APA provides for formal rules, with a formal adjudicatory hearing, only where the statute requires that rules be adopted "on the record after an opportunity for an agency hearing." 5 U.S.C. § 553(c); *see also,* United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973).

[12] *Id.* § 553(b).

through submission of written data, views, or arguments with or without opportunity for oral presentation."[13] After taking public comments into account, the agency must publish the text of a final rule and include "a concise general statement of [its] basis and purpose."[14] Subject to the exemptions described below, the final rules may not take effect for at least 30 days after publication.[15]

Although not required by the APA, most agencies that engage in notice-and-comment rulemaking typically provide the text of the proposed rule along with an explanation that sets out the reasons for the proposal. This discussion, called the preamble, precedes the text of the proposed rule itself, and is usually quite detailed, typically exceeding in length the text of the rule itself. Likewise, the "basis and purpose" statement required for final rules appears as a preamble to the text of the final rule. In addition to explaining in detail how the agency arrived at the text of the final rule, the preamble to the final rule must "respond[] to significant points raised by the public."[16]

Importantly, however, the requirement that agencies afford an opportunity to comment does not apply to every agency rulemaking proceeding. First, it does not apply—

> to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.[17]

The exemptions for "military or foreign affairs function[s]" and "matter[s] relating to agency management or personnel matters," may be appropriate in light of national security and privacy concerns. But the exemptions for "public property, loans, grants, benefits, or contracts" seem like an anachronism and should probably be revisited since they

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[13] *Id.* § 553(c).

[14] *Id.*

[15] *Id.* § 553(d). The APA sets both the floor and the ceiling for the procedures agencies must provide in the context of informal rulemaking. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). Formal rulemaking is rare but requires compliance with the formal hearing requirements of 5 U.S.C. §§ 556 & 557.

[16] Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[A] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.")

[17] 5 U.S.C. § 553(a).

often involve important issues with significant impacts on private parties and the public interest.[18] Indeed, agencies that administer programs in these areas often do provide opportunities for notice-and-comment, even if the APA does not require that they do so, probably because they recognize the significant public interest in these issues. A good example comes from the Department of Energy's (DOE) Civil Nuclear Credit Program. That Program, which was mandated by the Bipartisan Infrastructure Law,[19] allows the DOE to provide financial support to prevent the premature closure of nuclear power plants that were otherwise projected to cease operations due to economic factors. The law directs the DOE to promulgate regulations to provide for the recapture of those credits that were awarded to a nuclear reactor if either (a) the nuclear reactor terminates operations during the 4-year award period or (b) the nuclear reactor does not operate at an annual loss in the absence of an allocation of credits.

In accordance with this law, the DOE issued an interim final rule (IFR) that established the procedure for the recapture of credits that were awarded during the initial award period.[20] In defending its decision to issue an IFR, the DOE noted that the rules "involved . . . a matter related to agency . . . grants, benefits, or contracts," and was thus entirely exempt from the APA's notice-and-comment requirements.[21] So, the DOE's decision to take post-promulgation comments through an IFR actually went beyond what the APA required.

In addition to the 5 U.S.C. § 553(a) exemptions, the APA provides that notice-and-comment requirements do not apply—

> to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or *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*

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[18] *See* Admin. Conf. of the U.S., Recommendation 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 38 Fed. Reg. 19784 (July 23, 1973); *see also*, Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property Loans, Grants, Benefits or Contracts*, 118 U. PA. L. REV. 540 (1970).

[19] Public Law 117–58, 117th Congress, 1st Sess. (2021).

[20] *See* Civil Nuclear Credit Program and Recapture of Credits, 89 Fed. Reg. 864 (Jan. 8, 2024).

[21] 5 U.S.C. § 553(a)(2).

the public interest.[22]

Likewise, the restriction on the 30-day waiting period for final rules to take effect does not apply to this same category of rules.[23]

As authorized by 5 U.S.C. § 553(b)(A), agencies can avoid notice-and-comment rulemaking by issuing interpretive rules or by issuing general statements of policy (GSOPs). Courts generally accept an agency's decision to forego notice-and-comment for these types of rules,[24] so long as they do not have the "force of law" or establish a "binding norm."[25] Agencies can generally satisfy this test by building sufficient flexibility into any standard that they might adopt such that it allows the agency to deviate from the standard in an appropriate case. So, for example, in *Pacific Gas & Electric v. Federal Power Commission,* the court considered a policy designed to address natural gas shortages. The Federal Power Commission Order suggested that plans for curtailing natural gas deliveries during a shortage should follow certain priorities, but also provided that the agency would uphold any plan that was "just and reasonable" and did not grant any "undue preference or advantage." This flexibility was enough for the court to find that the Order did not have the force of law and was thus fairly characterized as a GSOP.[26]

The issues surrounding both the "public property, loans, grants, benefits, or contracts" exemptions, and the exemptions for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are beyond the scope of this study.

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[22] *Id.* § 553(b) (emphasis added).

[23] *Id.* § 553(d). An example using 5 U.S.C. § 553(d) comes from the Subsistence Management Regulations for Public Lands in Alaska promulgated by the U.S. Forest Service and U.S. Fish and Wildlife Service. 89 Fed. Reg. 22949 (Apr. 3, 2024). The agencies published proposed rules following notice-and-comment procedures but made the final rule effective immediately under 5 U.S.C. § 553(d). They justified this decision because "[i]n the more than 30 years that the Program has been operating, there has never been a benefit to the public by delaying the effective date of the subsistence regulations. A lapse in regulatory control can affect the continued viability of fish or wildlife populations and future subsistence opportunities for rural Alaskans and would generally fail to serve the overall public interest." *Id*. at 22951.

[24] To be clear, these are "rules" as defined by the APA. They simply are not rules that require a notice-and-comment process. *See* 5 U.S.C. § 551(4).

[25] *See* American Mining Congress v. Mine Safety & Health Admin., 995 F.2d. 1106 (D.C. Cir. 1993); Pacific Gas & Electric v. Federal Power Commission, 506 F.2d 33 (D.C. Cir 1974); *see also,* Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987).

[26] 506 F.2d at 39–41.

Nonetheless, they relate directly to the broader question that underlies this study, which is, when should the law excuse agencies from the APA's public comment and public participation rulemaking processes. To answer this question, agencies must take account of two competing considerations. First is the important democratic principle of allowing and encouraging the public to engage government decision-makers on law and policy questions that are relevant to their interests. In this way, both the agency and the commenter can gain a richer understanding of the basis for the proposed action, and its potential consequences. On the other hand, government decisionmakers should not lose sight of the fact that process is not free.[27] The "informal" notice-and-comment rulemaking process has become increasingly complex in ways that often prevent agencies from making timely decisions.[28] Moreover, notice-and comment rulemaking can take years to complete, and if the rules are the least bit controversial, they often lead to litigation that can cause significant delays in implementing rules that agencies deem important to protect public health and safety, and even negate the implementation of such rules altogether.[29]

For these reasons, agencies have strong incentives to avoid notice-and-comment processes, and they often find creative ways to do so.[30] In a report issued in 2012, the Government Accountability Office

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[27] *See* Mark Squillace, *Meaningful Engagement in Public Lands Decisionmaking*, 59 ROCKY MTN. MIN. L. FND. 21-1 (2013).

[28] Informal rulemaking often requires agencies to comply with the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., and Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993), among many other things. *See e.g.,* Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L. J. 1385 (1992).

[29] The quintessential example might be the so-called "WOTUS" rule, which sought to define the term "waters of the United States" for purposes of federal jurisdiction under the Clean Water Act. The Environmental Protection Agency and U.S. Army Corps of Engineers have issued rules seeking to define the term multiple times, and those rules have faced challenges leading to U.S. Supreme Court review on four occasions. *See* Michael Smith, *et al., Here we WOTUS Again*, BROWNSTEIN CLIENT ALERT (Aug. 31, 2023), https://www.bhfs.com/insights/alerts-articles/2023/here-we-wotus-again. Despite all of this activity, the meaning of the term, and the scope of the Clean Water Act, remain unresolved to this day.

[30] ACUS issued recommendations in 1983 and 1995 that recommend reforms to address concerns about inadequate public engagement, and these recommendations are addressed later in this report. *See* Admin. Conf. of the U.S., Recommendation 83-

(GAO) found that between 2003 and 2010, federal agencies published 568 major rules and about 30,000 nonmajor rules.[31] Of these, the agencies did not provide a notice of proposed rulemaking and allow public comment prior to final promulgation for about 35% major rules,[32] and for about 44% of all nonmajor rules.[33] According to the GAO, 47% of the major rules and 8% of the nonmajor rules that claimed an exemption were issued as IFRs whereby an opportunity to comment was afforded after the rule went into effect. In these cases, agencies must eventually issue a final rule that ideally responds to comments that were received. However, if the rule qualifies under one of the exemptions from notice and comment, the APA does not require the agency to offer any such response.[34]

IFRs should be contrasted with DFRs, which are typically reserved for rules that involve routine or noncontroversial matters, and for which notice and comment are thus deemed unnecessary. Here, agencies provide for a rule to take effect on a certain date in the future unless the agency receives a substantive adverse comment. If that occurs, the agency withdraws the rule before it takes effect, after which it can choose to proceed with a notice-and-comment process.[35]

Some agencies also employ a separate category of what is sometimes described as a "direct to final" rule. This category involves rules for which notice-and-comment is deemed entirely unnecessary, usually because they merely correct clerical errors or make technical, non-substantive changes. Nonetheless, because this category could easily be confused with "direct final rules" the recommendations propose a

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2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31180 (July 7, 1983); Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43110 (Aug. 18. 1995).

[31] Defined under the Congressional Review Act "as one that, among other things has resulted in or is likely to result in an annual effect on the economy of $100 million or more." U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8, at 7; 5 U.S.C. § 804(2).

[32] Under the Congressional Review Act, "major rules" are essentially defined as those that have an annual impact on the economy of $100 million or more. 5 U.S.C. § 804(2).

[33] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8, at 17.

[34] It seems possible, nonetheless, that a court could find that the failure to respond to a significant comment rendered the decision "arbitrary and capricious" and thus enjoin the rule on that basis. See 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983).

[35] *See* OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011).

new term – "no comment final rules" (NCFR). This avoids the confusion that the term "direct to final" creates.

ACUS previously considered many of the issues raised in this Report. In 1969, ACUS issued a brief recommendation on eliminating the exemptions for "public property, loans, grants, benefits, or contracts."[36] Although that recommendation would require an amendment to the APA, the policy could also be implemented through one of various executive actions, such as are described in the recommendations section of this Report.

In 1983, ACUS recommended that agencies provide interested persons an opportunity for post-promulgation comment when they invoke the APA's good cause exemption.[37] ACUS made a similar recommendation in 1995, along withs several other modest suggestions for improving the IFR and DFR processes.[38] Each of these recommendations is discussed in greater detail in various sections of this Report.

The Good Cause Categories

As previously explained, this Report focuses on the "good cause" exemptions to notice-and-comment rulemaking found at 5 U.S.C. 553(b)(B). As that provision states, "good cause" may be found when notice and comment would be "*impracticable, unnecessary, or contrary to the public interest*." Many courts have held that this exemption should be "narrowly construed and only reluctantly countenanced."[39] A narrow construction of the good cause exemption makes sense if the agency fails to offer any public process. But as will be explained in more detail below, at least one commentator has persuasively argued that the standard should be loosened for interim final rules, where a public comment process occurs after the rule takes effect.[40] Each of these "good cause" categories raise slightly different issues and for that reason, each is addressed separately below.

A. When is notice and comment "impracticable?

The Attorney General's Manual explains "that a situation is

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[36] Recommendation 69-8, *supra* note 18.

[37] Recommendation 83-2, *supra* note 30.

[38] Recommendation 95-4, *supra* note 30.

[39] *See, e.g.*, Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

[40] Seidenfeld, *supra* note 8.

'impracticable' when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553]," as when a safety investigation shows that a new safety rule must be put in place immediately.[41] In *Utility Solid Waste Activities Group v. E.P.A.*[42] the Court of Appeals for the District of Columbia Circuit rejected an EPA claim that notice and comment were impracticable for what it described as a "technical" amendment to a rule. That rule concerned the use of porous materials contaminated by spills of liquid PCBs, but the court found that the EPA failed to show "any threat to the environment or human health or that some sort of emergency had arisen" sufficient to justify issuance of the amendment without notice and comment.[43]

The Coast Guard offers a good example of the appropriate use of the impracticability exemption. The Coast Guard is frequently called upon to establish Security Zones and Safety Zones for short term activities that take place on navigable waters. For example, on June 4, 2024, the Heritage Flight Foundation notified the Coast Guard that they would be conducting an air show from 6 p.m. through 7:30 p.m. on September 4, 2024, near Narragansett Bay in Rhode Island.[44] These Security Zone and Safety Zone rules tend to involve short term activities for which the Coast Guard often receives limited advance notice. So, as in this case, the Coast Guard cannot, as a practical matter, make a timely decision while also affording the public an opportunity to comment on such requests. In this case, for example, the Coast Guard issued a "temporary final rule" on August 12, 2024, establishing a safety zone for navigable waters within the West Passage of Narragansett Bay, which was effective only from 6 p.m. on September 4, 2024, until 7:30 p.m. on September 5, 2024.[45]

Another example comes from the Community Reinvestment Act, Supplemental Rule published jointly by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC)

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[41] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947) (hereafter, Attorney General's Manual).

[42] 236 F.3d 749 (D.C. Cir. 2001).

[43] *See also* Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236–37 (D.C. Cir.1994); Petry v. Block, 737 F.2d 1193, 1201 (D.C. Cir.1984).

[44] 89 Fed. Reg. 65540 (Aug. 12, 2024).

[45] *Id.*

as an IFR in March of 2024.[46] The Community Reinvestment Act (CRA) encourages financial institutions to help meet the credit needs of their communities. The agencies had promulgated rules to implement the law in 2023. Certain provisions of that rule were scheduled to take effect on April 1, 2024. On March 29, 2024, however, just 3 days before the rule was set to take effect, the agencies promulgated an IFR extending the compliance date for certain aspects of the rule to January 1, 2026. The agencies thought the extension was necessary because of the confusion surrounding certain public filing requirements and geographic area requirements. The confusion resulted from the fact these requirements differed depending on whether the bank was deemed intermediate or large, and the criteria for determining whether banks were intermediate or large were going to change on January 1, 2026. The agencies thus thought that extending the deadline to correspond with the change in the criteria for determining bank size would promote greater stability and certainty for banks and other stakeholders, and eliminate confusion, during the transition to the 2023 CRA Final Rule. And because the rule was set to take effect just three days before the IFR was issued, notice and comment was impractical. Of course, the IFR will also cause a delay of nearly two years in meeting the public filing requirements, and this could adversely impact the credit needs of the communities that the CRA was designed to protect.

The agency received only five comments on the IFR. Two banks welcomed the rule, but two community groups did not. For example, the National Community Reinvestment Coalition (NCRC) complained that delaying "the requirement that banks post their CRA public file on their websites is a blunt, drastic solution to a minor problem for which a more tailored approach is simple and straightforward."[47]

Given the nature of this rule, and the fact that it was issued just three days before the underlying rule was set to take effect, it seems unlikely that the rule that ultimately finalizes the IFR will differ

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[46] 89 Fed. Reg. 22060 (Mar. 29, 2024). This rule also adopted as final, without an opportunity for notice and comment, includes certain technical amendments to the 2023 Community Reinvestment Final Rule. Because these technical amendments "do not change the substance or meaning of" that final rule, the agency deemed a comment opportunity unnecessary. Thus, the use of the good cause exemptions seems entirely appropriate in this case.

[47] See *Comment of the National Community Reinvestment Coalition (NCRC), available at* https://www.regulations.gov/document/OCC-2022-0002-0693/comment.

substantively from the IFR. Nonetheless, this example does suggest that the agencies should have afforded better advance consultation with affected stakeholders even if pre-promulgation notice and comment was deemed impractical.

B. When is notice and comment "unnecessary"?

According to the Attorney General's Manual, the APA's reference to "'[u]nnecessary' refers to the issuance of a minor rule in which the public is not particularly interested."[48] As one court explained, the unnecessary prong is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[49] When notice and comment seems unnecessary, agencies are likely to either issue a NCFR, or a DFR.

Utility Solid Waste Activities Group v. E.P.A. is once again instructive here. The amended rule promulgated by the EPA was neither insignificant nor inconsequential. In fact, it "greatly expanded the regulated community and increased the regulatory burden."[50] Accordingly, the court found that advance notice-and-comment was necessary before promulgating this rule.

A simple example where notice-and-comment procedures were properly deemed unnecessary involved the "Social Security Number Fraud Prevention Act Requirements." In April 2024, the Office of Personnel Management (OPM) promulgated a DFR to implement requirements mandated by the Social Security Number Fraud Prevention Act of 2017. The rule prohibits the inclusion of Social Security numbers on any document sent by an agency through the mail unless the OPM Director considers it necessary. OPM deemed notice-and-comment unnecessary for this rule because it was purely procedural and reflected a statute that was already in effect that the agency had no discretion to change.[51]

A more complex example comes from rules implementing the Northeast Multispecies Fishery Management Plan (FMP). Under that Plan, the National Marine Fisheries Service (NMFS) sets an annual

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[48] ATTORNEY GENERAL'S MANUAL, supra note 41, at 31.

[49] South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983); *see also* Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969).

[50] 236 F.3d at 755.

[51] 89 Fed. Reg. 25749 (Apr. 12, 2024).

allocation of available catch for a portion of the Northeast multispecies fish stocks for each approved sector.[52] Annual sector allocations set annual catch entitlements (ACE) based on the sector's members fishing history. NMFS found that an opportunity for public comment was unnecessary because prior rules prescribed how the allocations should be determined, and the public had an opportunity to comment on the formula used to set the allocation. Specifically, NMFS found that because "the ACE allocations are based on long-established fishing histories and are formulaic, administrative, and involve no exercise of discretion, notice and comment was not necessary.[53]

When an agency claims good cause on the grounds that notice and comment are unnecessary it often uses a DFR process as a sort of check on that decision. The decision of the Court of Appeals for the District of Columbia Circuit in *Milice v. Consumer Product Safety Commission (CPSC)*,[54] illustrates one of the problems that can arise in using a DFR in this situation. The case involved a provision in the relevant law that required the CPSC decision to incorporate by reference into its regulations a privately drafted safety standard.[55] When such standards were revised, the revised standard became the federal standard in 180 days unless the CPSC determined within 90 days that the revised standard did not improve the safety of the consumer product.

The *Milice* case involved an ASTM[56] standard for infant bath seats. The existing CPSC rule had referenced the old ASTM standard but in June 2019, the ASTM revised its infant bath seat standard. So, the CPSC issued a DFR on September 20, 2019, announcing that the new standard would take effect on December 22, 2019, unless it received significant adverse comments. On October 21, 2019, the New Civil Liberties Alliance (NCLA) objected to the revised rule on the grounds that incorporation of ASTM's standards by reference was unconstitutional because the binding ASTM standard was hidden behind a paywall. The NCLA objection noted that the CPSC could avoid this problem by

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[52] A sector is defined as "a group of persons holding limited access Northeast multispecies permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time...."

[53] 89 Fed. Reg. 23941 (2024).

[54] 2 F.4th 994 (D.C. Cir. 2021).

[55] 15 U.S.C. 2056a(b)(4)(B).

[56] Now known as ASTM International, the acronym stands for the American Society for Testing and Materials.

simply reproducing the standards in full in the final rule. The CPSC responded on February 6, 2020, that the NCLA comment was not significantly adverse because it did not implicate product safety.

Subsequently, on February 20, 2020, Milice, an expectant mother, filed a petition for review of the 2019 CPSC rule. The relevant statute required such challenges to be filed within 60 days from the promulgation of the rule,[57] and the court held that promulgation occurred on the date of the original DFR – September 20, 2019. As a result, the court found the petition untimely and the case was dismissed.

Professor Ronald Levin has pointed out a fundamental problem with the *Milice* decision.[58] While the DFR was originally promulgated on September 20, 2019, it was not scheduled to take effect until December 22, 2019. Had the Court used that as the promulgation date, the petition would have been timely. Moreover, by its terms, a DFR does not become final unless and until a 60-day comment period expires without significant adverse comments. Thus, the public may not know whether the rule will become final until after the period for challenging the rule has expired. It seems inherently unfair to require a party to file a lawsuit before that party even knows whether one is needed. Indeed, in the *Milice* case, the agency did not actually decide that the NCLA comment was not adverse until February 6, 2020.[59] One might reasonably argue that only then was the rule ripe for challenge.

C. When is notice and comment "contrary to the public interest"?

Regarding the "public interest" ground for finding good cause, the Attorney General's Manual states that this "connotes a situation in which the interest of the public would be defeated by any requirement of advance notice," as when announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent. Still, claiming that the public interest requires an exemption from notice-and-comment may seem too vague to be meaningful. For example, one federal official with whom we spoke commented that

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[57] 15 U.S.C. § 2060(g)(1)(c).

[58] Ronald Levin, *The D.C. Circuit Undermines Direct Final Rulemaking*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (Aug. 2, 2021), https://www.yalejreg.com/nc/the-d-c-circuit-undermines-direct-final-rulemaking-by-ronald-m-levin.

[59] ATTORNEY GENERAL'S MANUAL, supra note 41, at 31; *see also* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992); Levesque v. Block, 723 F.2d 175, 184–85 (1st Cir. 1983).

"everything we do is in the public interest, why else would we do it?"[60] The *Utility Solid Waste Activities Group v. E.P.A.* decision also helps to illustrate the limits of this exemption. In that case, the court found that nothing like the standard set forth in the Attorney General's Manual for invoking the public interest could be found in this case and so a notice-and-comment process was required.[61]

Emergency situations are often used to justify the invocation of the public interest. A recent example of such an emergency involved an IFR issued in 2021 by the Department of Health and Human Services. The rule required facilities participating in Medicare and Medicaid to ensure that their covered staff were vaccinated against COVID. To support the claim of good cause for the IFR, the Secretary found that vaccination of healthcare workers against COVID–19 was "necessary for the health and safety of individuals to whom care and services are furnished." More specifically, the Secretary found that any delay in issuing the rule "would endanger patient health and safety given the spread of the Delta variant." In *Biden v. Missouri*,[62] the Supreme Court upheld the use of an IFR in this case. Likewise, in *Jifry v. FAA*,[63] the court upheld FAA rules issued without notice-and-comment that authorized the FAA to automatically suspend airman certificates upon written notification from the TSA that the pilot posed a security threat. According to the court, the threat to national security provided good cause for not offering advance public participation.[64]

Perhaps because of the ambiguity surrounding the public interest concept, several agencies, including the EPA, the DOE, the FAA, and the Federal Reserve indicated that they tend to use the public interest as the basis for forgoing notice and comment in combination with a claim that it is also impractical and/or unnecessary. An example from the Office of the Comptroller of the Currency, the Federal Reserve, and the Federal Deposit Insurance Corporation occurred during the pandemic.

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[60] *Comment by official in the Office of Chief Counsel for Industry and Security, Bureau of Industry and Security*, U.S. Department of Commerce, May 8, 2024.

[61] *See also,* Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012).

[62] 595 U.S. 87 (2022).

[63] 370 F.3d 1174 (D.C. Cir. 2004).

[64] *See also*, Hawaii Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 214 (9th Cir. 1995); American Federation of Government Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

In March 2020, these agencies issued the "Regulatory Capital Rule" as an IFR.[65] The IFR gave banking organizations the option to delay for two years the requirement to provide an estimate of the effect of the current expected credit loss (CECL) on regulatory capital. This two-year delay was to be followed by a three-year transition period. The rule was designed to allow banking organizations to focus on lending to creditworthy households and businesses as they navigate the economic strains posed by the COVID-19 pandemic, while at the same time maintaining the quality of regulatory capital. The IFR received six comments that were largely supportive of the rule. The final rule was issued on September 30, 2020, with only minor clarifications and adjustments.[66]

While the public interest often justifies the issuance of an IFR, agencies are sometimes delinquent in promulgating a final rule, which can seriously undermine meaningful public engagement. That is because it effectively denies commenters a timely response to their concerns. One way to address this problem is to allow the IFR to expire if the agency fails to finalize the rule by a date certain. Understandably, agencies are reluctant to self-impose such a deadline, and so only a higher authority would be in a position to mandate such a policy, but it seems worth considering, especially if the policy could allow for some flexibility.

Courts have occasionally impressed upon agencies the importance of completing IFR rulemakings expeditiously. For example, in *Mid-Tex Electric Cooperative v. Federal Energy Regulatory Commission*,[67] then-Judge Ruth Bader Ginsburg upheld an IFR issued by FERC that allowed utilities to include in their rate base the cost of certain infrastructure that was still under construction. While acknowledging certain risks associated with anti-competitive behavior, the court was satisfied that FERC had not ignored those concerns in its interim rule. Nonetheless, it made clear that the good cause exemption should be "narrowly construed and reluctantly countenanced."[68] In that light it warned that a court's "tolerance of 'temporary' measures installed without a public airing may give the agency an apparent incentive to proceed with its

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[65] 85 Fed. Reg. 17723 (Mar. 31, 2020).

[66] 85 Fed. Reg. 61577 (Sept. 30, 2020).

[67] 822 F.2d 1123 (D.C. Cir. 1987)

[68] *Id.* at 1132, *citing* American Federation of Government Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)

permanent rulemaking at a leisurely pace," and that accordingly, "the agency must convince us, as FERC has done here, that it is not engaging in dilatory tactics during the interim period.[69]

OIRA's Role in Monitoring Use of the Good Cause Exemption

Since the Reagan Administration, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) has been charged with the task of reviewing proposed regulations before they become final.[70] Agencies submit DFRs to OIRA but because they tend to be fairly minor and noncontroversial, OIRA tends to approve them rather quickly. Moreover, since a DFR that receives no adverse comments becomes final automatically on the date specified in the original Federal Register notice, no further review is necessary. Ideally, the agency should issue a second Federal Register notice indicating that the DFR has taken effect, although that is not required. This is especially important in cases like *Milice*, where a party claims that their comments are significant and require withdrawal of the rule. If significant adverse comments are received, of course, the agency should quickly withdraw the rule. The agency can immediately reissue it as a proposed rule with an opportunity for comment or proceed with a companion proposed rule that was issued at the same time as the DFR, but that proposed rule will be subject to the full OIRA review process.[71]

For IFRs, the rule takes effect immediately on publication, but by their terms the agency must still promulgate them as final rules after taking into account the public comments received. The problem here is that agencies have little incentive to issue final rules so long as they can use the interim rules. As a result, IFRs tend to languish. One federal agency official acknowledged that when the agency issues IFRs they often fail to issue final rules for a long time. He noted, however, that OIRA keeps IFR files open and presses the agency to finalize the rules. That said, it might be desirable to limit the length of time that an IFR can remain in effect before it is finalized. Among other things, that will help ensure that the agency responds in a timely manner to any comments

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[69] 822 F.2d at 1132, *citing* Council for Southern Mountains v. Donovan, 653 F.2d 573, 582 (D.C. Cir. 1981).

[70] *See* MAEVE P. CAREY, CONG. RSCH. SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2011).

[71] *See* OFF. OF THE FED. REG., *supra* note 35.

received in response to the IFR.

Recommendations

Agency lawyers are mindful of their responsibility to afford the public notice and an opportunity to comment whenever possible. On the other hand, agencies also understand that process is not free, and notice-and-comment processes take considerable agency time and resources. For this reason, agencies are right to invoke good cause once they have fairly determined, and adequately explained in a Federal Register notice, that the notice-and-comment process, otherwise required by the APA, is impracticable, unnecessary, and/or contrary to the public interest. Having made this determination, however, agencies must still decide whether to issue a rule as a NCFR, a DFR, or an IFR. Unfortunately, the APA offers little guidance on whether and when to invoke any of these instruments to implement an agency policy.

ACUS previously addressed the good cause exemption itself in a brief recommendation issued in 1983. In that recommendation, ACUS recommended that:

> Agencies adopting rules under the good cause exemption in the Administrative Procedure Act should provide interested persons an opportunity for post-promulgation comment when the agencies determine notice and comment prior to adoption is "impracticable" or "contrary to the public interest."[72]

This recommendation included various implementation strategies. Similar recommendations were made in a subsequent ACUS recommendation issued in 1995.[73] That recommendation focused specifically on the procedures that agencies should follow when using direct final rulemaking and interim final rulemaking. Similarly, the GAO in its 2012 Report recommended that "the Director of OMB, in consultation with the Chairman of the ACUS, issue guidance to encourage agencies to respond to comments on final major rules … that are issued without prior notice of proposed rulemaking."[74] Finally, the American Bar Association (ABA) House of Delegates adopted a Resolution in 2016 that tracks the ACUS recommendation but offers significantly more detail as follows: It would also specifically require

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[72] Recommendation 83-2, *supra* note 30.

[73] Recommendation 95-4, *supra* note 30.

[74] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8, at 28.

certain amendments to the APA as follows:[75]

> Require that when an agency promulgates a final rule without a notice and comment process because such procedure is impracticable, unnecessary, or contrary to the public interest, it must:
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> (i) invite the public to submit post-promulgation comments and
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> (ii) set a target date by which it expects to adopt a successor rule after consideration of the comments received; provided that:
>
> a. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date;
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> b. The adequacy of the agency's compliance with the foregoing obligation would not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking would be unaffected; and
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> c. The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule.[76]

Notably, these recommendations do not propose to eliminate the good cause exemption. But they are consistent in advocating for greater public comment opportunities after the fact when an agency is justified in using the exemption for a particular rule. The ABA recommendations also set standards designed to encourage timely finalization of rules, and a full explanation of the basis for the final rule once it is promulgated.

One commentator has suggested that courts should be wary when the good cause exemption is invoked to deny pre-promulgation

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[75] *See* ABA Resolution 106B, Adopted February 8, 2016, at 2. The ABA Resolution also recommended "repeal[ing] the exemptions from the notice-and-comment process for "public . . . loans, grants [and] benefits" and narrow the exemptions for "public property [and] contracts" and for "military or foreign affairs functions." *Id.* at 8-9. *See also Statement on ABA Proposals to Amend APA*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/projects/statement-aba-proposals-amend-apa.

[76] ABA Resolution 106B, *supra* note 75, at 2, 9–10.

comment opportunities for a major rule, but he concedes that denying pre-promulgation notice and comment opportunities may be justified even for some major rules.[77] Another commentator has detailed the inherent problems associated with limiting comments to the post-promulgation period, even as he supports the use of the good cause exemption in appropriate cases.[78]

Still, much better guidance could be provided to agencies that are facing a decision as to whether to invoke the good cause exemption. A recommendation to offer better guidance raises an initial question as to the form that such guidance should take. Relatedly, there are questions about whether the guidance should impose mandatory obligations on agencies, or whether agencies should have the discretion to ignore that guidance. Answers to these questions might depend on the form of the guidance. Four paths for providing such guidance stand out as most likely:

(1) an amendment to the APA;

(2) a Presidential Executive Order;

(3) guidance from the Department of Justice; or

(4) guidance from the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).

The material below explores each of these paths in greater detail.

Options for Providing Guidance

A. Amending the APA

Amending the APA would offer the greatest certainty over the long term and should prove relatively easy to enforce if an agency ran afoul of its terms. On the other hand, opening the APA to address the "good cause" exemption would provide an opportunity to create mischief with other parts of the APA, such as its judicial review provisions. Depending

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[77] James Yates, Essay, *"Good Cause" Is Cause for Concern*, 86 GEO. WASH. L. REV. 1438, 1449–50 (2018). Yates argues that "major rules" should always undergo pre-promulgation notice and comment unless— "(A) the rule addresses an immediate emergency or risk of emergency to public health, safety, or welfare; or (B) where notice and comment would be unnecessary and does not substantially affect the rights of regulated parties."

[78] Seidenfeld, *supra* note 8.

on how it is written, a legislative solution might also prove less flexible and adaptable in responding to the myriad situations that the many diverse government agencies encounter. Drafters might try to build flexibility into the language, but such flexibility could very well provide agencies with the opportunity to circumvent the new standards that would otherwise apply. Finally, it will be difficult and perhaps impossible to persuade the Congress to adopt legislation on what might seem to some like a minor procedural issue. For that reason, the focus of this Report is on the other options that can be implemented within the executive branch.

B. A Presidential Executive Order

If legislation is not an option, then the President could sign an Executive Order that sets out requirements for agencies to follow when invoking the good cause exemption.[79] Executive Orders could prove quite durable as, for example, with Executive Order 12866,[80] which sets out requirements for agency rulemaking. On the other hand, if the policy laid out in the Order proves controversial (if, for example, the Order is viewed as limiting the use of the good cause exemption), a subsequent Administration could simply repeal the Order or issue its own. Moreover, the President's ability to enforce an executive order largely depends on the ability to remove executive branch officers. But since the President cannot remove the heads of independent regulatory agencies, agencies like the Federal Communications Commission and the Federal Energy Regulatory Commission, might simply choose to ignore the Order.[81] That said, all government agencies, whether executive or independent, might welcome guidance offered through an Executive Order on the use of the good cause exemption. In interviews with agency officials and their lawyers, it became clear that they largely support public participation opportunities, whether before or after a rule takes effect, and they would welcome guidance that would help them to decide when and how to invoke good cause for waiving advance notice and comment.

A final issue with an executive order concerns the fact that they are typically not subject to judicial review, and thus cannot be enforced by third parties. They are enforced, if at all, by the President through his

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[79] This could be styled as an amendment to Executive Order 14094 on *Modernizing Regulatory Review*, 88 Fed. Reg. 21879 (Apr. 11, 2023).

[80] Executive Order 12866, *supra* note 28.

[81] *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

power to remove executive officers.

C. Department of Justice Guidance

A third option might be for the Department of Justice to issue guidance on the use of the good cause exemption. In 2021, Attorney General Merrick Garland issued a Memorandum (Garland Memorandum) on the Department's internal use of guidance documents.[82] According to that Memorandum—

> … [T]he following principles should govern the Department's issuance of guidance documents and, as appropriate, the Department's use of guidance documents issued by both the Department and other agencies:
>
> The Department's guidance documents should be drafted with the recognition that they do not bind the public … or have the force and effect of law. Guidance documents may, however, set forth the Department's interpretation of binding regulations, statutes, and constitutional provisions. To reflect this distinction, Department components shall, to the greatest extent practicable: (i) label a document as guidance when it is intended as such; and (ii) cite the source of any binding legal requirements the guidance is describing.

The Department of Justice also famously issued guidance on the meaning and scope of the APA shortly after its enactment.[83] The Department's position on the interpretation of the APA, and the use of the good cause exemption, is set out in the Attorney General's Manual. The Department has also issued guidance on several other legal issues. For example, the Office of Information Policy at Justice issues government-wide guidance on the Freedom of Information Act.[84] Likewise, Justice issues guidance on issues that arise under the Americans with Disabilities Act.[85] Finally, Aram Gavoor and Steven Platt

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[82] U.S. DEP'T OF JUST., ISSUANCE AND USE OF GUIDANCE DOCUMENTS BY THE DEPARTMENT OF JUSTICE (2021).

[83] ATTORNEY GENERAL'S MANUAL, supra note 41.

[84] *See FOIA.gov - Freedom of Information Act: Frequently Asked Questions (FAQ),* U.S. DEP'T OF JUST., https://www.foia.gov/faq.html.

[85] *See, e.g., Justice Department Issues Guidance on Protections for People with Opioid Use Disorder under the Americans with Disabilities Act,* U.S. DEP'T OF JUST. (Apr. 5, 2022), https://www.justice.gov/opa/pr/justice-department-issues-guidance-protections-

offer a compelling case for the constructive role that Department of Justice guidance could play on the interpretation and implementation of the APA.[86]

The Garland Memorandum makes clear that guidance documents "do not have the force and effect of law," and they tend to be less formal than either legislation or executive orders. Nonetheless, when issued by the Department of Justice they come from the agency that is responsible for defending most agencies in court when they are sued. So, the Department could announce that it will not commit to defending those agencies in court if they follow practices inconsistent with its guidance. As with Executive Orders, such guidance could be rather easily overturned following a change of Administrations. But if the guidance simply offers common sense approaches to using the good cause exemption it might very well be welcomed by agencies and thus stand the test of time.

To give such guidance more heft, the Department of Justice could treat it like a notice-and-comment rule. Using this approach, it would first publish draft guidance in the Federal Register with an opportunity for public comment. The Department would then publish its final guidance with a response to all significant comments. While such guidance would have all the trappings of a rule, the Department of Justice should be clear to label this as guidance and should build into the guidance sufficient flexibility such that the Department could choose to defend an agency that did not follow all aspects of the guidance on the grounds that it does not have the force of law. This would avoid any issue that the Department is claiming the authority to issue binding APA rules. Still, as previously suggested, the Department does have the power to decide whether it will defend particular agency practices, and thus the authority to reject a case where its guidance policies were not followed.

D. Office of Information and Regulatory Affairs (OIRA) Guidance

As previously described, the 2012 GAO Report recommended that "the Director of OMB … issue guidance to encourage agencies to

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people-opioid-use-disorder-under-americans; *Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act*, U.S. DEP'T OF JUST. (Mar. 18, 2022), https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act.

[86] *See* Aram Gavoor & Steven Platt, *U.S. Department of Justice Executive Branch Engagement on Litigating the Administrative Procedure Act*, 75 ADMIN. L. REV. 429 (2023).

respond to comments on final major rules ... that are issued without prior notice of proposed rulemaking."[87] Since the OMB through OIRA carries out an important review function for all significant agency rules, it has substantial experience dealing with rules for which agencies invoke the good cause exemption.[88] Moreover, because the OIRA serves an important gatekeeper function, it can help to ensure that final rules meet all relevant legal and policy requirements. Where rules fail to meet these requirements, it can simply refuse to approve them until they do so.[89]

As a related matter, OIRA could also issue its own guidance to agencies, like the approach suggested for the Department of Justice. In some ways, OIRA is in an even stronger position than Justice because of its ability to withhold approval of rules that fail to meet its guidance standards.

While OIRA performs an important gatekeeper function for the government, its role in reviewing regulations is not without controversy.[90] Most importantly, the regulatory review process can cause – and sometimes has caused – significant delays in approving rules that are necessary to protect public health, the environment, public benefits, and other important government functions, and critics charge that these delays are unrelated to the review process but are rather designed to minimize costs to regulated parties.[91] The concern that OIRA might use guidance to delay the issuance of important rules, even if unfounded, suggests that it might be preferable for the Department of Justice to issue guidance rather than having it come from OIRA.

Proposals for Reforming Agency Use of the Good Cause Exemption

A. Define the Key Terms

Assuming that the federal government settles on an appropriate path to reform its policies under the good cause exemption, what reforms should be adopted? They should start with definitions. The terms "direct final rule" and interim final rule" have generally

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[87] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8, at 28.

[88] *See* CONG. RSCH. SERV., *supra* note 70.

[89] *Id.*

[90] *See, e.g.,* PUBLIC CITIZEN, THE PERILS OF OIRA REGULATORY REVIEW (2013).

[91] The pros and cons of the OIRA review process are fleshed out in companion articles published in the Harvard Law Review in 1986. *Compare* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 10875 (1986) *with* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write Regulations*, 99 HARV. L. REV. 1058 (1986).

understood meanings but they would benefit from further clarification. The Federal Register has published guidance that includes definitions of these terms.[92] The definitions proposed here, however, provide greater specificity regarding the nature and use of these terms. In addition, they add a definition of a new term – a "final no comment rule" to reflect the situation where public comment opportunities are deemed entirely unnecessary. Some agencies have labeled these as "direct to final" rules but that arguably breeds confusion with the term, "direct final rules."

Interim Final Rule: An "interim final rule" (IFR) is a rule for which an agency claims a good cause exemption from the APA's pre-promulgation notice and comment process. IFRs take effect immediately upon publication in the Federal Register but should include a statement justifying the invocation of the good cause exemption and explaining the basis and purpose for the rule. An IFR should be available for public comment for not less than 30 days after publication and should set a reasonable target date when the rule will expire unless the agency publishes a final rule that responds to any significant comments that it receives. Except in exceptional circumstances that are described in the Federal Register notice, the target date for expiration of IFRs should not extend beyond one year from the close of the public comment period. In all cases, agencies should strive to finalize IFRs expeditiously.

Rationale: The proposed definition follows the conventional

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[92] *See* OFF. OF THE FED. REG., *supra* note 35. That publication defines these terms as follows:

> ***Interim Final Rule:*** When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an "interim final rule," or "interim rule." This type of rule becomes effective immediately upon publication. In most cases, the agency stipulates that it will alter the interim rule if warranted by public comments. If the agency decides not to make changes to the interim rule, it generally will publish a brief final rule in the *Federal Register* confirming that decision.
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> ***Direct Final Rule***: When an agency decides that a proposed rule is unnecessary because it would only relate to routine or uncontroversial matters, it may publish a direct final rule in the *Federal Register*. In a direct final rule, the agency states that the rule will go into effect on a certain date, unless it gets substantive adverse comments during the comment period. An agency may finalize this process by publishing in the *Federal Register* a confirmation that it received no adverse comments. If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely.

understanding of an IFR with one important difference. Consistent with the 2016 ABA Resolution,[93] it requires a target date for finalizing the rule, although it adds the additional requirement that target dates should normally not exceed one year from the close of the public comment period. This is intended to avoid the situation where agencies allow IFRs to languish. The failure to finalize an IFR in a timely fashion allows the agency to avoid offering a timely response to comments that are received. Commenters might fairly object to a system that allows an interim rule to remain in effect for several years before they receive a response from the agency. On the other hand, agencies might argue that one year affords them insufficient time to publish a final rule, especially in cases where the rule addresses complex issues. In such cases, the agency might reasonably set a target date that extends beyond one year, with the expectation that it will issue a final rule expeditiously.

Direct Final Rule: A "direct final rule" (DFR) is a rule for which notice and comment is deemed unnecessary because it relates to routine or noncontroversial matters. An agency issuing a DFR must publish it in the Federal Register and make it available for public comment for not less than 30 days before the rule takes effect. If the agency receives no significant adverse comments, it should publish a notice in the Federal Register confirming that fact and indicating that the rule is final for purposes of judicial review. If the agency receives significant adverse comments, it has two options. It can either withdraw the rule or publish a regular proposed rule that is open for public comment. In either case, the agency should promptly publish notice of its decision in the Federal Register so that the public knows whether the rule has gone into effect.

When promulgating a DFR, agencies also have the option of publishing a proposed rule alongside the DFR. In this way, the DFR can go into effect if no significant adverse comments are received. But if adverse comments are received, the agency can begin work on the final rule without having to republish the DFR as a proposed rule.[94]

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[93] *See* ABA Resolution 106B, *supra* note 75.

[94] This is exactly what the Department of Labor did with its proposed rules of practice and procedure for its Benefits Review Board. In fact, the agency did receive significant adverse comments and so it reverted to the proposed rule and published a final rule on March 11, 2024. 89 Fed. Reg. 8533 (Feb. 8, 2024). A similar approach was used by the Department of Transportation and is described at footnote 62. *See*

Rationale: This largely tracks the traditional meaning of a DFR with a few important differences. Traditionally, an adverse comment on a DFR would force either withdrawal of the rule, or an entirely new notice and comment rulemaking proceeding. But given the nature of the DFR, the agency should have the discretion to publish a proposed rule alongside the DFR. The proposed definition also makes clear that adverse comments must be significant to trigger rejection of the DFR. This recommendation tracks a prior 1995 recommendation from ACUS.[95] This 1995 ACUS recommendation defines a 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 inappropriate without a change.

The recommendation goes on to state that—

> In applying this definition, the agency should also consider "whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process."

As described in the 1995 ACUS recommendation, the "significant adverse comment" test does not seem especially rigorous and, given that the rule is supposed to be routine or noncontroversial, a minor adverse comment should not be allowed to block the DFR from taking effect.[96] Moreover, empirical data collected on the use of DFRs suggests that agencies have been largely successful in avoiding notice and comment

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Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 89 Fed. Reg. 51984 (June 21, 2024); 89 Fed. Reg. 52002 (June 21, 2024).

[95] Recommendation 95-4, *supra* note 30, at ¶ 1A. The recommendation resulted from a report prepared by Professor Ronald Levin. He expanded on this recommendation in a subsequent law review article. Ronald Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

[96] At least one agency, the Food and Drug Administration, has adopted rules that follow the ACUS recommendation. *Direct Final Rule Procedures: Guidance for FDA and Industry*, 62 Fed. Reg. 62,466 (1997). But Lars Noah has argued that the DFR process does not offer any meaningful advantage over notice-and-comment rulemaking and may be more vulnerable to judicial challenge. *See* Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN L. REV. 401, 428 (1999).

because they did not receive adverse comments.[97]

No Comment Final Rule: If an agency determines that public participation is unnecessary because a rule merely corrects clerical errors, involves technical amendments that do not impact regulated parties or other third parties, or implements a mandatory statutory requirement, it may publish a "final no comment rule" (NCFR) in the Federal Register with a clear explanation of why public comment is deemed unnecessary.[98] A NCFR can take effect immediately upon publication and shall be deemed final agency action for purposes of judicial review.

Rationale: In some cases, such as where an agency is correcting a clerical error, making a technical correction to an existing rule, or implementing a mandatory statutory requirement, public participation should be wholly unnecessary. In these cases, it is unnecessarily burdensome to ask that the agency follow the IFR or DFR procedures. Nonetheless, if an agency were to abuse the use of the NCFR category, OIRA should take responsibility for curbing such abuse. Moreover, judicial review of any such decision always remains available.

B. Afford Comment Opportunities When Invoking the Good Cause Exemption

Consistent with the previous 1983 ACUS Recommendation 83-2, the 1995 ACUS Recommendation 95-4, and the 2016 ABA Resolution, agencies that invoke the good cause exemption should generally afford the public some opportunity to comment. In the case of an IFR that

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[97] In the three years following the release of the ACUS recommendation, Lars Noah identified 915 DFRs. Of these, 59, or about 6.4%, were withdrawn, presumably due to significant adverse comments. These statistics, which were generated by Professor Noah himself, would seem to belie his conclusion that the DFR process offers no meaningful advantage.

[98] Some agencies refer to these as a "direct ***to*** final rule." This term, however, seems easily confused with the term "direct final rule," which is the reason for the proposed more descriptive term – "final no comment rule." The U.S. Department of Transportation described this distinction between "direct final rules" and "direct to final rules," during our interview with them. They also offered an interesting example of a DFR that was issued simultaneously with a proposed rule. *Procedures for Transportation Workplace Drug and Alcohol Testing Programs,* 89 Fed. Reg. 51984 (2024); 89 Fed. Reg. 52002 (2024). The agency invited a single set of comments on both rules and made clear that if they received adverse comments that prevented the DFR from taking effect they would not offer a second comment period on the proposed rule but would go straight to a final rule.

opportunity may occur after the IFR takes effect. In the case of a DFR, the opportunity to comment occurs before the rule takes effect but it may go into effect automatically if the agency determines that no significant adverse comments were received.

When an agency receives significant comments it should provide a meaningful response and conclude the rulemaking process in a timely fashion. In any case, the agency should promptly publish notice of its decision in the Federal Register.

Agencies should use an NCFR only in those cases where public interest in the rule is highly unlikely because the NCFR merely involves the correction of a clerical error, a minor technical change that does not affect third parties, or where it implements a mandatory statutory requirement. If, however, public interest in the NCFR surfaces, the agency may wish to open the rule for public comment.

Rationale: Most observers who have studied the issue agree that an opportunity for public notice and comment should be the default position for all government regulatory actions. But in some cases, that opportunity can be offered after the rule takes effect as with an IFR. In the case of a DFR, where public comment is deemed unnecessary, public comments are accepted before the rule takes effect, but the agency does not expect significant adverse comments, and so the rule may take effect automatically after the comment period closes. In some other cases, agencies might issue a NCFR because they have determined that providing an opportunity for notice and comment is entirely unnecessary.

In any case where an agency provides an opportunity for public comment, however, the agency should respond to all significant comments and promptly conclude the rulemaking process by publishing its final decision in the Federal Register. Moreover, if the public comment process raises issues that the agency had not considered or were not fully addressed in the original Federal Register notice, the agency should consider using supplemental public engagement procedures. These might include an additional public comment period, or public or private meetings with relevant stakeholders. When offering supplemental public engagement procedures, agencies should comply with best practices for handling *ex parte* communications as set forth in

ACUS Recommendation 2014-4.[99] In addition, agencies should be mindful of the risk of "rent seeking" behavior by parties with financial interests in the outcome of the rule by affirmatively seeking out alternative points of view.[100]

C. Avoid Claiming Good Cause for Major Rules

All major rules, as defined by the Congressional Review Act, shall follow the notice and comments process as set forth in section 553 unless—

1. the statute precludes the use of the 5 U.S.C. § 553 process; or
2. the rule responds to an emergency that threatens the public health, safety, or welfare; or
3. notice and comment are unnecessary because the rules do not affect the rights of or benefits to affected third parties.

Where an agency invokes the good cause exemption for a major rule it should publish in the Federal Register a detailed explanation of the grounds for claiming the exemption, including an explanation as to how a pre-promulgation notice and comment process is unnecessary or could cause substantial harm to the public health, safety, or welfare.

Rationale: As previously described, a 2012 GAO report found that 35% of all major rules are carried out under an IFR.[101] That seems extremely high given the significant impact that these rules have on the economy, our society, and thus on affected third parties. It further suggests that some agencies could be abusing the good cause exemption when it comes to major rules. One commentator has outlined a sensible proposal for addressing the use of the good cause exemption for major rules.[102] This Report accepts the underlying idea contained in that proposal with some modifications that might lead to easier adoption.

On the other hand, Mark Seidenfeld has argued persuasively for expanded use of the good cause exemption, although not specifically in the context of major rules. He argues that "[a]s long as the rule is better

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[99] Admin. Conf. of the U.S., Recommendation 2014-4, "*Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35993 (June 25, 2014).

[100] Regarding "rent seeking" behavior and the underlying principles of public choice theory, *see* Eamonn Butler, *Public Choice – A Primer*, Institute of Economic Affairs (2012).

[101] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8.

[102] Yates, *supra* note 48.

than the regulatory status quo, it is better for it to become effective sooner rather than later." He also acknowledges, however, potential problems with IFRs.

Seidenfeld notes, for example, the "conundrum" created by the good cause exemption. On the one hand, it has the benefit of allowing important agency rules to take effect quickly. On the other hand, a quick process may result in an inferior rule because it was denied the possibility of improvement through the notice and comment process.

Despite his support for greater use of IFRs, Seidenfeld describes several reasons for caution. First, he admits that public comments "increase[e] the breadth of sources of information available to agencies, both about the technical aspects of the rule and the various stakeholders' preferences regarding it…," and this might lead to rules that better serve the public interest.[103] He is unconvinced, however, about the value of public comments, suggesting that most comments are ineffective in moving an agency's position, and that agencies generally know most of what is relevant to a proposed rule, before it is even published.[104] While this observation is undoubtedly true in some cases, it is surely not true in all cases. Moreover, and as Seidenfeld admits, the prospect of judicial review incentivizes agencies to pay close attention to the comments they receive. It also incentivizes the public to draft substantial comments that demand an agency response.

Seidenfeld is also dismissive of the idea that the notice-and-comment process makes agency action "meaningfully democratic." According to Seidenfeld, this is because the process is biased in favor of those with focused interests, and that individual commenters generally do not understand the issues, and their comments may not even reflect their values.[105] While public choice theory[106] arguably supports Seidenfeld's first point, and while many commenters may lack a sophisticated understanding of the issues, an agency's commitment to good public process can minimize the influence of powerful interest groups, and can elevate public engagement and make it meaningful.[107] Indeed, notice-and-comment procedures sometimes do lead to

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[103] Seidenfeld, *supra* note 8, at 797.
[104] *Id.* at 798–99.
[105] *Id.* at 803–04.
[106] *See* Butler, *supra* note 100.
[107] *See* Squillace, *supra* note 27.

significant changes to a proposed rule, and perhaps more importantly, they promote buy-in by the affected public, and help to create a better record in the event of judicial review.

D. Repeal or modify the exemptions from the notice-and-comment process for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

This recommendation is similarly supported, with slight differences, by the 2016 ABA Resolution.[108] While it is technically beyond the scope of this Report, which is focused solely on the good cause exemption, it is sufficiently related to the public participation values addressed in this Report to warrant a brief discussion here.

To fully implement this recommendation the APA would need to be amended, and for the reasons previously stated, that seems unlikely. But the President could effectively accomplish this change by issuing an Executive Order that required compliance with the notice and comment requirements of the APA in most cases that are now exempt under 5 U.S.C. § 553(a). This would be an important change because of the exemption's potentially wide scope. The reference to public property, for example, would likely include public lands, and would encompass rules related to such iconic places as national parks, national forests, and wilderness areas. It could mean that rules that involve activities that occur on these lands, which are matters of great public interest, including such things as permits for grazing, oil and gas development, renewable energy siting, and logging might be exempt from notice and comment procedures. The agencies that manage these lands have generally accepted their responsibility to follow notice-and-comment procedures, but that could change rather quickly, as suggested by a 2013 rule promulgated by the U.S. Department of Agriculture.[109]

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[108] ABA Resolution 106B, *supra* note 75, at 2, 8–9. *See also* Recommendation 69-8, *supra* note 18; Bonfield, *supra* note 18.

[109] In 1971, Secretary of Agriculture Clifford Hardin announced that the USDA would follow a policy whereby the agency would only forgo notice and comment rulemaking procedures under the good cause exemption at 5 U.S.C. § 553(b)(3)(B), and not under 5 U.S.C. § 553(a)(2). 36 Fed. Reg. 13804 (July 24, 1971). Somewhat surprisingly, Secretary of Agriculture Tom Vilsack revoked this policy in 2013, thereby restoring the agency's discretion to waive notice and comment under 5 U.S.C. § 553(a)(2). 78 Fed. Reg. 64194 (Oct. 28, 2013). While the USDA continues to offer

Similar arguments could be made with other exemptions established under the section. The reference to "loans" would seem to encompass student loans, an issue of great interest to millions of students who rely on these loans. Likewise, the reference to "benefits" could include Medicare, Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and a wide range of other benefit programs. Rules impacting loan and benefit programs have historically been subject to notice and comment procedures, but as with public property, the agencies that administer these programs could plainly invoke these exemptions.

One can make more nuanced arguments regarding some other categories, especially, rules involving "military or foreign affairs functions," which are exempt under 5 U.S.C. § 551(a)(1). But plainly, a comprehensive review of these exempted categories is long overdue, and the repeal or narrowing of these exemptions warrants a careful and comprehensive investigation. Perhaps ACUS should undertake a separate investigation into the use of these exemptions.

Conclusion

Over the years, many organizations and commentators, including ACUS, have made recommendations designed to improve the use of the good cause exemption from notice-and-comment rulemaking. Most agencies seem sensitive to their obligation to provide opportunities for comment in appropriate cases, even as they continue to invoke the exemption when they believe that public participation is "impracticable, unnecessary, or contrary to the public interest." This is as it should be. Public participation processes are not free, and agencies properly avoid them when an exemption can be fairly justified, and when such processes are not likely to yield any significant benefit. Still, agencies are rightly sensitive to public demands that agencies should afford the public the right to meaningfully engage the agency on important decisions, especially where their rights or interests might be affected. So, it makes sense that an open public process should be the default position with respect to agency rulemaking proceedings.

The IFR, DFR, and NCFR processes offer an important option that allow agencies to streamline the rulemaking process for rules that

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notice and comment opportunities for most rules that might fit the 5 U.S.C. § 553(a)(2) categories, this decision raises a red flag that should spur an effort to repeal or modify the law.

warrant different treatment. The IFR process allows comments only after the rule takes effect, which can, of course, impact the final rule. The DFR process, when properly invoked, allows a rule to take effect quickly, after a brief comment period, although nuisance comments could unreasonably force a withdrawal of the rule. This is why DFRs should be allowed to go forward unless significant adverse comments are received. Finally, a properly invoked NCFR should not raise any objections. If it does, it should perhaps have been issued as a DFR or IFR, or perhaps even gone through a regular notice and comment process.

While agencies must enjoy flexibility when using these different tools, they would benefit from better guidance on best practices for their use. That guidance could be formal and binding, as with amendments to the APA, but a more practical and less formal solution might be found through the use of an executive order from the President, or guidance from the Department of Justice or the Office of Information and Regulatory Affairs in the OMB. Whatever approach is taken, however, something more should be done. The time for providing agencies with better guidance on the use of the good cause exemption is long overdue.