

Comment from Government Member Alex Goodenough on *Public Engagement in Agency Rulemaking Under the Good Cause Exemption*

November 5, 2024

OMB has the following comments on draft Recommendations 7-13 for the ACUS Committee on Rulemaking dated November 6, 2024 on the project “Public Engagement in Agency Rulemaking Under the Good Cause Exemption”:

Recommendations 7-9 “Interim Final Rulemaking”

- Recommendation 8
 - Recommendation 8d, Line 132: for consistency with EO 12866 language add “in most cases” after the “or”
 - Recommendation 8f, Line 139: To avoid confusion, instead of “is a final rule” consider “is being adopted without prior notice and comment”.
 - Recommendation 8g, Line 141: replace “will” with “plans to”. OMB believes that a sunset date is unnecessary and that the recommendation would better focus on agencies planning to address significant adverse comments within a reasonable period of time.
 - Addition to Recommendation 8g or new recommendation: It is reasonable and desirable for agencies communicate to the public a planned target date by which the agency expects to finalize the IFR after consideration of comments received. This communication could also be made by inclusion of a proposed finalization action along with an estimated timeline for promulgation of a final rule in the agency’s biannual Unified Agenda of Federal Regulatory Actions. Suggested language for addition to recommendation: “The agency should include an entry in the next update of the Unified Agenda of Regulatory and Deregulatory Actions for issuance of a final rule.”
 - Suggested additions to Recommendation 8 or 9: We suggest that ACUS provide additional recommendations providing guidance on how agencies should engage with interested persons following issuance of an IFR. This could include an addition to Recommendation 8 that an agency “set forth its plans for post-promulgation public engagement in the IFR or a companion proposed rule document, and solicit public input on those public engagement plans.” Alternatively, this could take the form of an addition to recommendation 9, a cross reference to recommendation 10 below, and provide addition detail in recommendation 10. We note OMB has promulgated guidance to agencies

regarding best practices for public engage on regulatory actions: [“Broadening Public Participation and Community Engagement in the Regulatory Process.”](#)

- Recommendation 9: The rationale for limiting to significant rules should be explained. Consider instead changing the recommendation to tell agencies to prioritize significant rules.

Recommendations 10-11 “Supplemental Public Engagement”

- Recommendation 10
 - This recommendation seems impracticable in most cases when the agency has determined that the IFR addresses an “emergency situation[]” or “where delay could result in serious harm.” *Am. Pub. Gas Ass’n v. United States Dep’t of Energy*, 72 F.4th 1324, 1340 (D.C. Cir. 2023) (quotation marks omitted). Likewise, the issuance of an RFI or an ANPRM before promulgating an IFR seems counterintuitive where the agency has determined that the notice and comment “would defeat the purpose of the proposal,” such as when “announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.” *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012) (quotation marks omitted).
- Recommendation 11 addition or new separate recommendation: We believe that Recommendation 11 could be expanded and strengthened by encouraging agencies to prioritize IFRs (and perhaps Direct Final rules) for retrospective review (consistent with ACUS Recommendation 2021-2 and EO 13563), particularly those IFRs that are significant rules under EO 12866. Possible language for such a recommendation could be: “Agencies should prioritize interim final rules that are significant rules under EO 12866 for retrospective review consistent with ACUS Recommendation 2021-2 and EO 13563.”

Recommendations 12-13 “Ensuring Agencies Engage with the Public in Rulemaking Under the Good Cause Exemption”

- Recommendation 12a:
 - Recommendation 12a is repetitive of the goals of recommendations 8-11 above and those recommendations can be expanded adequately to address the issues of agency consideration of comments and appropriate finalization of interim final rules. See comments above.
 - A fixed deadline is not desirable given the variety of circumstances that can arise and scarce agency resources. We generally agree with the reasoning underlying the ABA’s reluctance in [Resolution 106B](#) “to establish a single legally enforceable deadline by which such a response must occur [to public comments] – the diversity of rules and the potential scope of competing obligations on an agency both counsel allowing agencies to set a deadline.” Agencies are best positioned to make prioritization decisions in relation to the use of their limited rulemaking resources following the issuance of an interim final rule.

- We also note that good cause rulemakings may be issued a “lumpy” manner in response to emergency circumstances driven by external events. Examples of such events include the 9/11 terrorist attacks, the great financial crisis, and the COVID-19 pandemic. Fixed expiration dates for IFRs would further complicate and potentially disrupt agencies’ ability to respond effectively and efficiently to these emergency situations. This is particularly the case since agencies’ response to these emergency events may continue over a period of months or years.
- If a fixed timeline for finalization is retained, given time required for rulemaking, a one year period is far too short. Suggest at least 3 year period as a non-binding best practice. A 3 year period would align with the period that Congress enacted elsewhere, for example for IRS temp regs at 26 USC 7805(e)(2): “Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.”
- Once again, the concerns underlying Recommendation 12 can be addressed by expanding recommendations 8-11 to provide recommended methods by which agencies can most productively engage with the public post-promulgation of a good cause rulemaking.
- Recommendation 12b
 - Existing good cause criteria are adequate. Unclear why fact of rule being a major rule under the CRA should overrule the usual good cause criteria of notice and comment being impracticable, unnecessary, or contrary to the public interest. This recommendation would unnecessarily complicate good cause statements for no clear benefit.
 - The upshot of this would be that, as a matter of policy, agencies could not rely on the “contrary to the public interest” prong of good cause for major rules. Policymakers should explain why when, “for example, announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent,” *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012) (quotation marks omitted)—a seemingly acute circumstance—notice and comment should be required if the rule is major.
- Recommendation 13: We note OMB provided general guidance to agencies on public participation that was published last year titled “Broadening Public Participation and Community Engagement in the Regulatory Process”:
<https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf>.