

Comment from Special Counsel Jeffrey S. Lubbers on *Public Engagement in Agency Rulemaking Under the Good Cause Exemption*

October 7, 2024

I agree with many of the comments made by the previous three commenters, but here are a few more:

Line 19: The “unnecessary prong” can also be validly invoked if the agency has no discretion under the statute as to what the final rule should be.

Line 27: This makes it look like agencies routinely use DFR for rules under the unnecessary prong, which isn’t true, nor do we want them to do so every time. Maybe add “sometimes”

Line 31: Same comment, but here (and in paragraph 9) I would add the notion that agencies sometimes do (and sometimes should) use IFR when other exemptions are invoked.

Line 82: “should” seems to be the wrong word here—“individuals who might be interested in participating”

Line 87: Same point: add “might be” before “interested.”

Lines 94-95: It’s unclear to me what an agency should do here. “any rules for which the agency does not provide opportunities”—does this mean categories of rules, specific rules? I’m not sure it’s worth trying to list these.

Line 97: I realize paragraph 4 is limited to “good cause rules” but I think most of this would apply to rules within other exemptions. Also, is that shorthand term one we should be encouraging?

Lines 129-133: This paragraph would seem to incentivize an agency not to confirm it received no significant adverse comments.

Lines 134-139: Why wouldn’t the agency normally announce immediately that it is proceeding with a proposed rule, without announcing that it will consider future rulemaking?

Line 141—I don’t think that these outreach methods would make sense (or would even be worth considering) for some “good cause rules,” such as most rules encompassed by the “unnecessary” prong. Even for some rules under the other two prongs, the agency would not want to tip off people that they are considering a rule.

Lines 154-157: While this might be a good thing to do in some circumstances I am dubious about requiring this as an across-the-board requirement—especially one that might become judicially reviewable.

Line 158: Paragraph 9 seems both over-inclusive in that it suggests that all rules within these two prongs should use IFR, it is also under-inclusive in that some rules covered by other exemptions should be candidates for IFR.

Line 166: Why would a major rule under the CRA, at least one that qualifies for IFR require a 60-day comment period, since it would still be voluntary for the agency to seek comment in the first place?

Lines, 172, 175, & 183: I'm not sure "adverse" is the right word to use here. Even if the comment is not adverse (as defined in this recommendation), it may suggest an alternative worth considering or make some other constructive comment that the agency should respond to.

Lines 178-179: Wouldn't it help to introduce the term "final final rules" here?

Line 202: I doubt that ACUS would want to go on record suggesting that such an Executive Order should not apply to independent agencies, since it already opined in Recommendation 88-9 that, "As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies." (Para. 2)