Comment from Senior Fellow Michael E. Herz on *Public Engagement in Agency Rulemaking Under the Good Cause Exemption*

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One general question. The recommendation seems to say that any time n&c is unnecessary, the agency should engage in DFRM, and any time n&c is impracticable or contrary to the public interest it should engage in IFRM. So in *no circumstances* should it just invoke good cause and issue a final rule. I'm not sure that makes sense. For lots of trivial rules, technical amendments, or time-limited rules (this season's catch limits for a particular fishery), the extra burden and/or expense, limited though it may be, of a DFRM or IFRM is just not worth it. If the recommendation really would require one or the other in all good cause rulemakings, (a) it should say so explicitly and (b) there should be something in the preamble to justify it. If not, then the wording of paragraphs 6 and 9 needs to be less absolute.

Preamble – Is it possible to beef this up? That is, just from reading the preamble, it is not clear to me why, if the good cause exception applies, pre-publication engagement is so important. It may be that for all the same reasons n&c is not called for, pre-publication engagement is likewise not called for. Or, it might be that they serve different functions, or have different costs and benefits, so one has nothing to do with the other. I am not saying that the recommendation is misplaced; my instinct is that it is correct. I am just saying that the case is not made by the preamble.

One point in particular that really should be made appears in paragraph 12 of the recommendation: public engagement is especially important for good cause rulemaking because it will help the agency understand whether or not there is good cause.

If an agency engages in extensive engagement before anything is published, and as a result learns no one cares or has any objection, then invoking the unnecessary prong would seem in order and the system has worked well. If, on the other hand, the agency gathers a lot of great info, on the strength of which it concludes it has all it needs and so n&c is unnecessary, then the system has worked poorly and n&c has been circumvented. I don't think agencies do the latter, but it might be worth making clear that that is not what ACUS thinks "unnecessary" means.

Line 16 – I would put the definition of "good cause rulemaking," which is an essential term, into the text.

Lines 76-77 (and elsewhere as relevant). It does not make sense to me to tell an agency it should consider going through notice and comment in circumstances where doing so is impracticable or contrary to the public interest. If I were an agency, I would never do so. And as a citizen, I don't want agencies to do so. By definition, that would be either impossible or harmful. The only question is when and whether the agency should go through n&c when it is unnecessary. Even there, there is a harm in wasted resources. So that makes no sense unless one adopts a particular definition of "unnecessary," namely, that the agency has all the information it needs, but n&c would still produce some ancillary benefits (public confidence, legitimacy, transparency, greater compliance).

Line 80 – I tripped over "supplement the rulemaking process." This is a supplement to the *n&c process*, but it is *part of* the *rulemaking* process. Could just delete "to supplement the rulemaking process," and the sentence would be fine.

Line 87 – not sure about "interested in or affected by." The APA's references to "interested persons" are a little confusing. In section 557(d) it clearly means someone with a stake, i.e. someone who is not disinterested (neutral). But in 553, no one has ever read it that way, though it seems likely the drafters meant it to have the same meaning. Or at least no one has ever tried to enforce such a restricted reading. Anyone who is "interested" in the sense of not *un*interested can comment. That's the meaning here; interested as opposed to affected by. I absolutely think anyone who wants to--who finds the matter interesting, who cares—should be allowed to comment. And *maybe* agencies should do affirmative outreach to such persons. But I'm not sure, and the committee should at least make a conscious decision to say so. Perhaps: "a wide range of persons affected by the rulemakings or with relevant expertise, including . . . ." That would be more consistent with the specific examples.

Lines 105-109 – This is problematic. First, it is limited to impracticable and contrary to the public interest, omitting unnecessary. But if n&c really would be either of those things, then the agency should not engage in it. Period. If anything, this paragraph should apply to the unnecessary prong only. Perhaps the best way round this problem, and it would make sense in its own right, is to rephrase this along the following lines: "In determining whether notice-and-comment procedures would be impracticable or contrary to the public interest, agencies should consider the factors outlined in paragraph 4."

Line 109 – The factors are not really "outlined." Maybe "set out"?

Lines 112-117 – I would stop after "rulemaking" in line 112 and delete everything through line 117 except the last word. If this needs saying (not sure it does) it should be in the preamble. Then: "When conducting direct final rulemaking –"

Paragraph 6.a to 6.e – Not sure this is necessary

Line 142 – See comment to line 80. Maybe delete "to gather information that may assist agencies in developing or refining good cause rules before publication" from 7.a, where it is not necessary, and insert it here (i.e.: ". . . agencies should consider using other methods of public engagement to gather information that may assist agencies in developing or refining good cause rules before publication."

Line 147 – See comments to line 87. The two references should be consistent.

Line 151 – Here it's "affected persons." Different from "interested persons"? I wouldn't think so, but the use of the different terms implies as much. See comments to lines 87 and 147.

Line 156 – delete "appropriate"

Line 160 – end sentence after "final rulemaking"

Lines 174-76 – Not sure what it means to "act on" adverse comments. I also found the reference to a sunset provision is confusing. Do you mean that the agency should commit to *either* responding to adverse comments *or* adopting a sunset provision? Is the sunset provision only triggered by adverse comments? I realize this comes from 95-4, but the fact that ACUS used these phrases before doesn't mean that we are stuck with them. But most important, paragraph 13.a says that all interim final rules should include a sunset provision. So it makes no sense to say that the agency should commit to adopting an after-the-fact sunset provision if it receives adverse comments.

Lines 183-84 – This is a little confusing because it refers to *prior* public engagement (i.e. pre-publication where there's no n&c), but subparagraph refers to adverse comments on a rule that *has been issued*. Paragraph a does not work. If you are talking about issuance of a final final rule after comments on an interim final rule, there is not a problem – general principles require this. Ditto for issuance of a final rule after the withdrawal of a direct final rule in light of substantial comments. So this recommendation would only apply to the issuance of the DFR or the IFR. If that's right, maybe rewrite that subparagraph to refer to "submissions that were inconsistent with the Direct or Interim Final Rule adopted by the agency."

Lines 185-87 – Same confusion . . . .

Paragraph 11 – I guess it does no harm, but does this do anything more than restate existing legal obligations under 553(b)(B) and cases thereunder? If not, perhaps move to the preamble?

Paragraph 12 –If you delete par. 11, this doesn't work as a stand-alone section. But even if you retain par. 11, I'd move this. It would work as a stand-alone paragraph between current paragraphs 23 and 3. The idea should also be included in the preamble (see above comment on the preamble) and

Paragraph 13.a – If this is such a good idea that it should be included in an EO, why is it not part of the recommendation itself. That is, shouldn't we recommend that agencies do this even without an EO? Alternatively, if everything else is such a good idea, why shouldn't it go into the EO? There may be excellent reasons that I am overlooking, but they should be set out in the preamble.