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

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Lines 24-28: It might be worth grappling with the basic issue a little more here. Something like the following:

> The Conference has long encouraged robust public participation in agency rulemaking and has identified effective methods for engaging with the public outside of, and to supplement, the notice-and comment process.[old FN 7] The fact that *notice and comment* is unnecessary, impracticable, or contrary to the public interest does not mean that *no* public engagement is appropriate. Indeed, such engagement may be especially important precisely because standard notice and comment is not occurring. And such engagement can also help agencies determine whether the good cause exemption is applicable.
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> Of course, the same factors that make a comment period inappropriate may equally argue against other sorts of public engagement as well. Neither the agency nor the public is well served by utterly pointless, or counterproductive, efforts to engage the public. Such circumstances are rare, however. The goal of this recommendation is to identify ways in which agencies can meaningfully and usefully engage the public even when forgoing notice and comment under the good cause exception.

[If we do this, then also delete the sentence that is at lines 41-44 to this paragraph.]

Lines 30-31: replace "rulemaking procedures agencies employ when they invoke the good cause exemption but still seek public comment" with "mechanisms"

Line 33: rewrite to say: ". . . in which the agency simultaneously publishes a final rule and solicits comments on it; the rule goes into effect only if no significant adverse comments are received."

Lines 37-38: replace "and may consider such comments after the rule goes into effect." With "; the agency may later replace the published rule with a "final final rule" in light of those comments."

Line 59: I'd say "a subsequent final rule"—singular rather than plural—since the preceding clause is singular. Also I'd say "final final rule". Cf. Jeff Lubbers comment on line 136.

Lines 81-83: The wording here and the wording at lines 132-36 should track one another, mutatis mutandis, no?

Line 76: replace "that the rule is" with "the rule as"

Line 97: "if needed for fair consideration of the comments" seems wrong. Consideration of the comments is something the agency does; lengthening the comment period is for the benefit of

commenters, not the agency. Maybe "if needed to provide a fair opportunity to prepare comments"? (I'm not completely sure what this is driving at)

Line 99, paragraph 4: The 3 listed types of comments make sense, but they are not exhaustive. For example, they don't include the objection that the rule violates a statute or the Constitution. (Maybe that's implicit in "challenges the rule's underlying premise or approach"? Not really.) I'd suggest (a) adding a 4th example (though current "c." should still come last" along the lines of "violates a relevant statute or the Constitution" and/or (b) rewrite the opening clause to indicate that the list is not exhaustive.

In addition, shouldn't there be some requirement of plausibility? As written, I can force n&c by, to use Bill Funk's example, saying that the agency's approach is completely wrong because this is an area that should be left unregulated when Congress has imposed a nondiscretionary duty on the agency to write a regulation. Maybe add "plausibly" before the colon (and make an equivalent change if the intro is rewritten)?

Line 115: replace "explains" with "describes"

Line 119: We changed this formulation with regard to DFR. Similar change here? It's a slightly different setting. I would think that agencies really should always use IFR when invoking these prongs, UNLESS (and it's a big unless) the same reasons for skipping n&c also apply to ex post comment. The short-term, emergency rule is the most obvious example. Maybe add at the end, after (a) and (b) something like: "unless doing so would itself be impracticable or contrary to the public interest."

Line 126: replace "that the rule is" with "the rule as"

Line 143, Paragraph 9: If the agency receives and considers comments and concludes that the IFR is just fine, there is a value in it announcing to the world that it has done so. It eliminates the suspense; it demonstrates that the agency is doing its job; it may be relevant to judicial review. If there were sunset provisions, it would be a necessity. As written, the recommendation implies that the agency need say nothing at all in these circumstances. I'd suggest adding a sentence or brief stand-alone paragraph saying that if, after reviewing all comments, the agency concludes that no changes to the IFR are warranted it should . . . what? Reissue the IFR as an FFR? Publish a statement in the Federal Register that it has concluded no changes to the IFR are warranted?

Line 153, Paragraph 10: This paragraph is limited to situations where an agency issues a DFR or IFR. But an agency might rely on the good cause exception and not issue a DFR or IFR. In those circumstances, might supplemental public engagement still be appropriate? As written, it's double or nothing; agencies should either (a) ignore the public altogether or (b) go the supplemental engagement route *and* the DFR/IFR route. Perhaps situation (a) is a highly rare, special subset where public input just doesn't matter. But the basic point that supplemental engagement might be helpful, including in determining whether there is good cause, would seem to apply even if the agency is going to skip n&c and not issue a DFR or IFR.

If that's right, the easiest fix would be to replace "issuing a direct or final rule" with "invoking the good cause exception" in lines 154-55. Then in line 161 replace "direct or interim final rule" with "final rule" or "direct, interim, or other final rule"

Paragraphs 12 and 13: I am agnostic on the question whether it is appropriate to direct a recommendation to the president or OMB.

But as to Paragraph 12, I was unsure why these two items in particular are singled out for an EO. In what way are they different from other pieces of the recommendation, any of which could also be put into an EO? It's always implicit in any ACUS recommendation that the President, if so moved, might incorporate it into an EO.

Obviously, if the committee decides to be silent re an EO, the particulars of paragraph 12 should go into the recommendation itself.

As to paragraph 13, in the real world, does an OMB guidance that "encourages" certain practices matter more than an ACUS recommendations? If so, paragraph 13 is a way of leveraging up. But if not, then the game may not be worth the candle.