

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

December 6, 2024

Lines 87-88:

I propose an amendment deleting the words after "or" in 2(d). Would a comment simply saying "I think you were wrong to not go through notice-and-comment rulemaking" really be enough to derail a direct-final rule? Unless that comment was accompanied by a substantive argument against the rule, I wouldn't think so. I think this is an addition that will make it harder to use DFR and easier for people to disrupt it.

I also believe the language after "or" in 2(d) is inconsistent with Paragraph 4. Paragraph 4 only seems to refer to substantive comments. As the preamble to 95-4 says: "The Conference recommends defining a significant adverse comment as one where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether a significant adverse comment is sufficient to terminate a direct final rulemaking, agencies should consider whether the comment raises an issue serious enough to warrant a **substantive** response in a notice-and-comment process."

Paragraph 5:

The rationale for the second sentence is unclear. Why would there be a problem with withdrawing the rule in time in this situation? From the meetings I gather it is because the Office of the Federal Register will automatically publish it in the CFR at the end of the 30 days if they are not told to withdraw it.

Personally I would feel more comfortable recommending that any time an agency uses DFR and doesn't receive any significant adverse comments they should publish a notice to that effect in the *Federal Register*.

I would propose two separate amendments on this paragraph: (1) on line 115 after the word "rule" add "(in time to meet the needs of the Office of the Federal Register)" and (2) an independent amendment that would substitute new language at the beginning of the second sentence: "Agencies should normally publish such a confirmation notice, but if they do not, they should consider..."