



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Public Engagement in Agency Rulemaking Under the Good Cause Exemption

### Committee on Rulemaking

#### Draft Recommendation for Committee | October 8, 2024

1 Public participation plays an essential role in agency rulemaking. Agencies facilitate such  
2 participation through public engagement activities designed to elicit input from the public,  
3 including efforts to enhance public understanding of the rulemaking process and foster  
4 meaningful public participation in it. As the Administrative Conference has recognized, “[b]  
5 providing opportunities for public input and dialogue, agencies can obtain more comprehensive  
6 information, enhance the legitimacy and accountability of their decisions, and increase public  
7 support for their rules.”<sup>1</sup> The Administrative Procedure Act (APA) recognizes the value of public  
8 participation in rulemaking by requiring agencies to publish a notice of proposed rulemaking in  
9 the *Federal Register* and providing interested persons an opportunity to comment on rulemaking  
10 proposals.<sup>2</sup>

11 At the same time, notice-and-comment procedures can be time-consuming and resource-  
12 intensive, and there are circumstances in which the costs of those procedures may outweigh their  
13 benefits in terms of public participation. For this reason, the APA permits agencies to forgo  
14 notice-and-comment procedures when they find for “good cause” that such procedures would be  
15 “impracticable, unnecessary, or contrary to the public interest” and they incorporate this finding  
16 and “a brief statement of reasons” for it in their rules.<sup>3</sup> Notice and comment may be  
17 “impracticable” when an agency “finds that due and timely execution of its functions would be

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<sup>1</sup> See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

<sup>2</sup> 5 U.S.C. § 553(b)–(c).

<sup>3</sup> *Id.* § 553(b)(B). In this Recommendation, the terms “good cause rulemaking” and “good cause rules” are used to refer to, respectively, rulemakings conducted under the good cause exemption and rules issued under the exemption.



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18 impeded by the notice otherwise required [by the APA].”<sup>4</sup> Notice and comment may be  
19 “unnecessary” when a rule is a “minor rule or amendment” or “a routine determination,  
20 insignificant in nature and impact, and inconsequential to the industry and to the public.”<sup>5</sup> And  
21 notice and comment may be “contrary to the public interest” in “the rare circumstance when  
22 ordinary procedures—generally presumed to serve the public interest—would in fact harm that  
23 interest.”<sup>6</sup>

24 Even when agencies find good cause to forgo notice-and-comment procedures, it is often  
25 valuable for agencies to engage with the public through other means. Indeed, agencies often use  
26 direct final rulemaking or interim final rulemaking when they invoke the good cause exemption.  
27 Agencies use direct final rulemaking for noncontroversial or routine rules for which they  
28 conclude that notice-and-comment procedures are unnecessary. In this type of rulemaking, the  
29 agency publishes a final rule that goes into effect only after the agency provides the public with  
30 an opportunity to comment on the rule and receives no significant adverse comment on it.  
31 Agencies use interim final rulemaking when they find for good cause that notice-and-comment  
32 procedures are impracticable or contrary to the public interest, such as when the rule is necessary  
33 to respond to an emergency situation or to relieve an unnecessary restriction on the public. In  
34 interim final rulemaking, the rule becomes effective without prior notice and public comment but  
35 does invite post-adoption public comment even though such public comment is not required.

36 The Conference has encouraged robust public participation in agency rulemaking and has  
37 identified many effective methods for engaging with the public outside the notice-and-comment  
38 process,<sup>7</sup> including in circumstances in which agencies invoke the good cause exemption. In  
39 Recommendation 83-2, *The “Good Cause” Exemption from APA Rulemaking Requirements*, the  
40 Conference encouraged agencies to “provide a post-promulgation comment opportunity for rules

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<sup>4</sup> *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *see also* ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947).

<sup>5</sup> *Util. Solid Waste Activities Grp.*, 236 F.3d at 754–55.

<sup>6</sup> *Id.* at 755.

<sup>7</sup> *See* Recommendation 2018-7, *supra* note 1; *see also* Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023).



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41 they adopt under the good cause exemption.”<sup>8</sup> In Recommendation 95-4, *Procedures for*  
42 *Noncontroversial and Expedited Rulemaking*, the Conference recommended that agencies “use  
43 direct final rulemaking in all cases where the ‘unnecessary’ prong of the good cause exemption  
44 is available, unless the agency determines that the process would not expedite issuance of such  
45 rules.” There the Conference recommended procedures for (1) publishing direct final rules, (2)  
46 requesting comments on such rules, and (3) finalizing or withdrawing the rules depending on  
47 whether the agency received significant adverse comments. In Recommendation 95-4, the  
48 Conference also recommended that agencies use interim final rulemaking when they conclude  
49 that using notice-and-comment procedures would be “impracticable” or “contrary to the public  
50 interest.” It recommended that agencies (1) request public comment in the *Federal Register* at  
51 the time the interim final rule is published, (2) explain that they will consider significant adverse  
52 comments received and publish a response with necessary modifications to the rule if necessary,  
53 and (3) consider whether to include in the *Federal Register* notice a commitment to act on any  
54 significant adverse comments within a fixed period of time or to provide a sunset date for the  
55 rule.<sup>9</sup>

56 The Conference is revisiting the topic of public engagement in rulemaking under the  
57 good cause exemption for two reasons. First, best practices for public engagement have become  
58 increasingly important as agencies rely more frequently on the good cause exemption.<sup>10</sup> Second,  
59 there have been legal developments since 1995, particularly a 2020 decision by the Supreme  
60 Court addressing certain final rules that were issued after the relevant agencies first requested  
61 comments on the rules via previous interim final rules.<sup>11</sup> In that case, the Court concluded that  
62 the request for comments in the interim final rules satisfied the APA’s notice-and-comment

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<sup>8</sup> Admin. Conf. of the U.S., Recommendation 83-2, *The “Good Cause” Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31,180 (July 7, 1983).

<sup>9</sup> Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Aug. 18, 1995).

<sup>10</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-21, *AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS* (2012); see also CONG. RES. SERV., R44356, *THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION* (2016).

<sup>11</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020).



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63 requirements, and the Court declined to evaluate the validity of the subsequent final rules based  
64 on whether the agencies failed to maintain an “open mind” when evaluating comments received  
65 in response to the interim final rules.<sup>12</sup>

66 Based on a reexamination of agency rulemaking practices under the good cause  
67 exemption,<sup>13</sup> this Recommendation identifies best practices for enhancing public engagement in  
68 good cause rulemaking, particularly when agencies use direct and interim final rulemaking. It  
69 also encourages agencies to use alternative methods—such as publishing requests for  
70 information, engaging in targeted outreach, convening listening sessions with interested persons,  
71 and soliciting post-adoption comments—to reap the benefits of robust public participation even  
72 when they rely properly on the good cause exemption.

### RECOMMENDATION

#### Public Engagement in Good Cause Rulemaking Generally

- 73 1. When agencies find for good cause that notice-and-comment procedures would be  
74 impracticable, unnecessary, or contrary to the public interest, they should engage with the  
75 public as follows:
- 76 a. Using notice-and-comment procedures before adopting final rules when agencies  
77 determine it is appropriate and feasible (see Paragraph 5);
  - 78 b. Using alternative rulemaking procedures to adopt final rules, including direct final  
79 rulemaking (see Paragraph 6) and interim final rulemaking (see Paragraph 8); and

**Commented [BB1]:** Question for committee: To what extent, if at all, should agencies be encouraged to use notice-and-comment rulemaking (or be discouraged from asserting the good cause exemption) when the good cause exemption is legally available to them?

<sup>12</sup> *Id.* at 683–85. The Court also explained that, even assuming the APA required the agencies to solicit comments via notices of proposed rulemaking rather than interim final rules, there was no prejudicial error given that the challengers had notice of the regulations and an opportunity to comment on them. *Id.* at 684. In addition, given the Court’s conclusion that the interim final rules satisfied notice-and-comment requirements, the Court declined to address the argument that the agencies lacked good cause to promulgate the interim final rules under the good cause exemption. *Id.* at 686 n.14. *Cf.* Recommendation 95-4, *supra* note 9, ¶ II.C. (“[C]ourts are encouraged not to set aside [rules] solely on the basis that inadequate good cause existed originally to dispense with pre-promulgation notice and comment procedures.”)

<sup>13</sup> See Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rulemaking, (Oct. 4, 2024) (draft report to the Admin. Conf. of the U.S.).



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- 80           c. Using other forms of public engagement to supplement the rulemaking process,  
81           including seeking input from the public through requests or notices published in  
82           the *Federal Register*, conducting targeted outreach to individuals who should  
83           participate in the process, and holding different types of meetings with affected  
84           interests and other interested persons (see Paragraph 7).
- 85       2. When agencies engage with the public in rulemaking under the good cause exemption  
86       (that is, in good cause rulemaking), they should engage proactively with a wide range of  
87       persons interested in or affected by the rulemakings, including regulated entities,  
88       regulatory beneficiaries, experts with knowledge germane to the rulemaking, and  
89       individuals who have historically been underrepresented in agency rulemakings.
- 90       3. Agencies should develop and make publicly available policies regarding how they will  
91       engage with the public in rulemakings in which they forgo pre-adoption notice-and-  
92       comment procedures. Such policies should explain what types of pre- and post-adoption  
93       public engagement opportunities the agency provides, including any opportunities  
94       required by agency-specific statutes, and whether there are any rules for which the  
95       agency does not provide opportunities for such engagement.

### **Pre-Adoption Public Engagement**

- 96       4. Agencies should determine whether and how to engage with the public before adopting  
97       good cause rules. In doing so, agencies should consider such factors as:
- 98           a. Whether public engagement is necessary to elicit information the agency needs to  
99           develop the rule;
- 100           b. Whether public engagement is important in light of the subject matter of the rule  
101           (such as when the rule has substantial effects on the public or is likely to be  
102           complex or controversial); and
- 103           c. Whether the agency has the discretion or time to engage with the public about the  
104           rule on a pre-adoption basis (such as when adoption of the rule is not necessary to  
105           address an emergency or is not required by a legal deadline).



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- 106 5. *Notice-and-Comment Rulemaking*. Even when an agency concludes that notice-and-  
107 comment procedures would be impracticable or contrary to the public interest, the agency  
108 should consider using notice-and-comment rulemaking after considering the factors  
109 outlined in Paragraph 4.
- 110 6. *Direct Final Rulemaking*. When agencies conclude that notice-and-comment rulemaking  
111 procedures are unnecessary and that the rule is unlikely to result in significant adverse  
112 comment, agencies should use direct final rulemaking, which is a type of rulemaking  
113 where the agency publishes a final rule that becomes effective after the agency provides  
114 the public with an opportunity to comment on it. A “significant adverse comment” is one  
115 that explains why the rule would be inappropriate, including a comment challenging the  
116 rule’s underlying premise or approach, or explaining why the rule would be ineffective or  
117 unacceptable without a change. Agencies should use the following procedures when  
118 conducting direct final rulemaking:
- 119 a. The agency should publish the direct final rule in the “Rules and Regulations”  
120 section of the *Federal Register*.
  - 121 b. The direct final rule should contain a statement of basis and purpose for the rule  
122 that discusses the issues the agency has considered and explains why the agency  
123 believes that the rule is noncontroversial and will elicit no significant adverse  
124 comment.
  - 125 c. The agency should solicit comment from the public on the rule for a period of at  
126 least 30 days, either by requesting comments in the direct final rule or by  
127 publishing a companion proposed rule in the “Proposed Rules” section of the  
128 same issue of *Federal Register* that requests such comments;
  - 129 d. If the agency receives no significant adverse comments, the rule should become  
130 effective not less than 30 days after the close of the comment period. If the agency  
131 elects to issue a subsequent notice in the *Federal Register* confirming that it  
132 received no significant adverse comments, the rule should become effective not  
133 less than 30 days after such notice.



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- 134 e. If the agency receives significant adverse comments or otherwise decides to  
135 withdraw the direct final rule before it becomes effective, the agency should  
136 publish a notice in the *Federal Register* stating that it is terminating the direct  
137 final rulemaking and explaining whether it will consider future rulemaking on the  
138 matter. If the agency previously requested comments in a companion proposed  
139 rule as described in Paragraph 6.c., the agency may proceed with notice-and-  
140 comment rulemaking consistent with the proposed rule.
- 141 7. *Supplemental Methods of Pre-Adoption Public Engagement.* Before adopting good cause  
142 rules, agencies should consider using other methods of public engagement to supplement  
143 the rulemaking process. Such methods may include:
- 144 a. Publishing requests for information or advance notices of proposed rulemaking in  
145 the *Federal Register* to gather information that may assist agencies in developing  
146 or refining good cause rules before publication;
- 147 b. Conducting targeted outreach to inform interested persons and obtain feedback  
148 about good cause rules under development and to encourage their participation in  
149 related rulemakings the agency may conduct in the future; and
- 150 c. Holding meetings (which may include listening sessions, town halls, and one-on-  
151 one discussions with affected persons) to obtain feedback on topics related to the  
152 rulemaking, particularly when members of the public are less likely to participate  
153 in the rulemaking via written responses.
- 154 8. When agencies conduct rulemaking after engaging with the public on a pre-adoption  
155 basis, they should summarize the results of those efforts in subsequent rulemaking  
156 documents published in the *Federal Register* and in the appropriate public docket for the  
157 rulemaking.

### **Post-Adoption Public Engagement**

- 158 9. *Interim Final Rulemaking.* When agencies find for good cause that notice-and-comment  
159 procedures are impracticable or contrary to the public interest, they should use interim  
160 final rulemaking, which is a type of rulemaking in which the agency provides the public



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- 161 with an opportunity to comment on the rule after the agency adopts it. Agencies should  
162 use the following procedures when conducting interim final rulemaking:
- 163 a. The agency should publish the interim final rule document in the “Rules and  
164 Regulations” section of the *Federal Register*.
  - 165 b. The agency should solicit comment from the public on the interim final rule for a  
166 period of at least 30 days (or at least 60 days in the case of major rules under the  
167 Congressional Review Act and in the case of significant rules under Executive  
168 Order 14,094), either by requesting comments in the interim final rule document  
169 or by publishing a companion proposed rule document in the “Proposed Rules”  
170 section of the same issue of *Federal Register* that requests such comments.
  - 171 c. In its request for comments on the interim final rule, the agency should state that,  
172 although the rule is final, the agency will consider any significant adverse  
173 comments received, publish a response to them, and modify the rule if necessary.
  - 174 d. The agency should include in the *Federal Register* a commitment to act on any  
175 significant adverse comments within a fixed period of time or to provide for a  
176 sunset date for the rule.
- 177 10. *Issuing Final Rules After Adopting Major or Significant Rules Under the Good Cause*  
178 *Exemption*. Consistent with agency resources and priorities, agencies should issue final  
179 rules that address comments and other input received in response to prior public  
180 engagement on good cause rules that are considered “major rules” under the  
181 Congressional Review Act or “significant regulatory actions” under Executive Order  
182 14,094. Agencies should issue such final rules in the following circumstances:
- 183 a. Members of the public have submitted significant adverse comments indicating  
184 that the good cause rule should be modified or rescinded;
  - 185 b. Changes in circumstances since the issuance of the good cause rule indicate that  
186 the agency should modify or rescind the rule (because, for example, the rule  
187 addressed an emergency that has ended); and
  - 188 c. The good cause rule represents an exercise of the agency’s policymaking  
189 discretion.





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### Explaining the Agency's Assertion of the Good Cause Exemption

Commented [BB2]: Question for committee: Should this section appear earlier in the recommendation? If so, where?

- 190 11. Agencies should explain in their good cause rules why notice-and-comment procedures  
191 are unnecessary, impracticable, or contrary to the public interest. The explanation should:  
192 a. Appear in a dedicated section of the rule's preamble;  
193 b. Describe the specific good cause basis for the agency's invocation of the  
194 exemption (whether the rule is unnecessary, impracticable, or contrary to the  
195 public interest), including whether the agency is relying on more than one good  
196 cause basis for the rule (for example, whether the agency believes notice-and-  
197 comment procedures are both unnecessary and impracticable for the rule).  
198 c. Include a brief statement of reasons supporting the assertion of the exemption.  
199 12. When engaging with the public about a current or contemplated good cause rule, agencies  
200 should seek comment or other input on whether dispensing with notice-and-comment  
201 procedures would be consistent with the good cause exemption.

### Ensuring Agencies Engage with the Public in Good Cause Rulemaking

- 202 13. The President should issue an executive order directing agencies (not including  
203 independent regulatory agencies listed in 44 U.S.C. 3502(5)) as follows:  
204 a. An agency shall not issue an interim final rule that remains in effect for a  
205 period of greater than one year, except that an agency may extend such period  
206 for no longer than six months subject to review by the Office of Management  
207 and Budget (OMB).  
208 b. An agency shall not issue a rule as an interim final rule if the rule is a major  
209 rule under the Congressional Review Act unless a statute precludes the use of  
210 pre-adoption notice-and-comment rulemaking procedures for such a rule; the  
211 rule responds to an emergency that threatens the public health, safety, or  
212 welfare; or pre-adoption notice-and-comment procedures are unnecessary  
213 because the rule does not affect the rights of or benefits to affected parties.  
214 14. OMB should issue guidance that encourages agencies to engage with the public in good  
215 cause rulemakings, consistent with this Recommendation.