



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

### Committee on Rulemaking

#### Draft Recommendation for Committee | October 22, 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]y  
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

<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.

**Commented [RC1]:** Comment from Senior Fellow Michael E. Herz:

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.



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

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

<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).

**Commented [RC2]:** Comment from Special Counsel Jeffrey S. Lubbers:

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.

**Commented [RC3]:** Comment from Special Counsel Jeffrey S. Lubbers:

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”

**Commented [RC4]:** Comment from Special Counsel Jeffrey S. Lubbers:

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.



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

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

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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 the request for comments in the interim final rules satisfied the APA’s notice-and-comment  
64 requirements, and the Court declined to evaluate the validity of the subsequent final rules based  
65 on whether the agencies failed to maintain an “open mind” when evaluating comments received  
66 in response to the interim final rules.<sup>12</sup>

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

### RECOMMENDATION

#### Public Engagement in Good Cause Rulemaking Generally

74 1. Agencies should voluntarily engage with the public when issuing rules that fall within the  
75 terms of the “good cause” exemption in 5 U.S.C. 553(b)(B) if such engagement will help  
76 the agency determine whether the exemption applies to the rule or will help inform the  
77 development or modification of the rule. ~~When agencies find for good cause that~~  
78 ~~notice and comment procedures would be impracticable, unnecessary, or contrary to the~~  
79 ~~public interest, they~~ should engage with the public in rulemakings under the good cause  
80 exemption as follows:

**Commented [RC5]:** At meeting #1, the committee asked ACUS staff to revise paragraph 1 to clarify the voluntary nature of public engagement practices when the good cause exemption applies. ACUS staff have added new language to paragraph 1 and 1.a consistent with this direction.

Relatedly, at meeting #1, Government Member Alex Goodenough stated that the recommendation should make clear that it pertains to agency best practices and not to agency legal obligations. To the extent the revised language does not address this point, ACUS staff can prepare additional draft language based on committee discussion at meeting #2.

**Commented [RC6]:** Alex: make clear about best practices, not legal obligation

<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, ¶ I.I.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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- 81 a. Consider voluntarily using notice-and-comment rulemaking, as appropriate (see
- 82 Paragraph 4) Using notice-and-comment procedures before adopting final rules
- 83 when agencies determine it is appropriate and feasible (see Paragraph 5);
- 84 b. Consider using alternative rulemaking procedures to adopt final rules, including
- 85 direct final rulemaking (see Paragraph 56) and interim final rulemaking (see
- 86 Paragraph 98), as appropriate; and
- 87 c. In the case of rules in which the agency finds that notice-and-comment would be
- 88 impracticable or contrary to the public interest, consider using other forms of
- 89 public engagement to supplement the rulemaking process, including seeking
- 90 input from the public through requests or notices published in the Federal
- 91 Register, conducting targeted outreach to individuals who should participate in
- 92 the process, and holding different types of meetings with affected interests and
- 93 other interested persons (see Paragraph 7).

94 2. When agencies engage with the public in rulemaking under the good cause exemption  
 95 (that is, in good cause rulemaking), they should engage proactively with a wide range of  
 96 persons interested in or affected by the rulemakings, including regulated entities,  
 97 regulatory beneficiaries, experts with knowledge germane to the rulemaking, and  
 98 individuals who have historically been underrepresented in agency rulemakings.

99 3.2. Agencies should develop and make publicly available policies regarding how they will  
 100 engage with the public in rulemakings in which they forgo pre-adoption notice-and-  
 101 comment procedures. Such policies should explain what types of pre- and post-adoption  
 102 public engagement opportunities the agency provides, including any opportunities  
 103 required by agency-specific statutes, and whether there are any rules for which the  
 104 agency does not provide opportunities for such engagement.

**Pre-Adoption Public Engagement**

105 4.3. Agencies should determine whether and how to engage with the public before adopting  
 106 good cause rules. In doing so, agencies should consider such factors as:

Commented [RC7]: Delete 1.a. and develop alternative language consistent with previous ACUs recs.

Commented [RC8]: Comment from Senior Fellow Michael E. Herz:

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).

Commented [BB9]: 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?

Commented [RC10]: Comment from Senior Fellow Michael E. Herz:

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.

Commented [RC11]: Comment from Government Member Miriam E. Vincent:

There is a difference between a "notice of something" that notifies the public and a Notice-category document. If ... [1]

Commented [RC12]: Comment from Special Counsel Jeffrey S. Lubbers: ... [2]

Commented [RC13]: Consider referencing prior public engagement rec.

Commented [RC14]: Comment from Special Counsel Jeffrey S. Lubbers:

Same point: add "might be" before "interested."

Commented [RC15]: Comment from Senior Fellow Michael E. Herz: ... [3]

Commented [RC16]: Comment from Special Counsel Jeffrey S. Lubbers: ... [4]

Commented [RC17]: Comment from Special Counsel Jeffrey S. Lubbers: ... [5]



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- 107 a. Whether public engagement is necessary to elicit information the agency needs to  
108 develop the rule;
- 109 b. Whether public engagement is important in light of the subject matter of the rule  
110 (such as when the rule has substantial effects on the public or is likely to be  
111 complex or controversial); and
- 112 c. Whether the agency has the discretion or time to engage with the public about the  
113 rule on a pre-adoption basis (such as when adoption of the rule is not necessary to  
114 address an emergency or is not required by a legal deadline).
- 115 5.4. Notice-and-Comment Rulemaking. Even when an agency concludes that notice-and-  
116 comment procedures would be impracticable or contrary to the public interest, the agency  
117 should consider using notice-and-comment rulemaking after considering the factors set  
118 out/outlined in Paragraph 4.
- 119 6.5. Direct Final Rulemaking. When agencies conclude that notice-and-comment rulemaking  
120 procedures are unnecessary and that the rule is unlikely to result in significant adverse  
121 comment, agencies should use direct final rulemaking, which is a type of rulemaking  
122 where the agency publishes a final rule that becomes effective after the agency provides  
123 the public with an opportunity to comment on it. A “significant adverse comment” is one  
124 that explains why the rule would be inappropriate, including a comment challenging the  
125 rule’s underlying premise or approach, or explaining why the rule would be ineffective or  
126 unacceptable without a change. Agencies should use the following procedures when  
127 conducting direct final rulemaking:
- 128 a. The agency should publish the direct final rule in the “Rules and Regulations”  
129 section of the Federal Register.
- 130 b. The direct final rule should contain a statement of basis and purpose for the rule  
131 that discusses the issues the agency has considered and explains why the agency  
132 believes that the rule is noncontroversial and will elicit no significant adverse  
133 comment.
- 134 c. The agency should solicit comment from the public on the rule for a period of at  
135 least 30 days, either by requesting comments in the direct final rule or by

**Commented [RC18]:** Comment from Senior Fellow Michael E. Herz:

The factors are not really “outlined.” Maybe “set out”?

**Commented [RC19]:** Comment from Senior Fellow Michael E. Herz:

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.”

**Commented [RC20]:** Comments from Senior Fellows Ronald M. Levin and Nina A. Mendelson:

Discuss finality and statutes of limitations issues.

**Commented [RC21]:** Comment from Senior Fellow Michael E. Herz:

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.

**Commented [RC22]:** Comment from Senior Fellow Michael E. Herz:

I would stop after “rulemaking” in line 112 and delete everything through line 117 except the last word. If thi... [6]

**Commented [RC23]:** Comment from Government Member Miriam E. Vincent:

[Multiple comments on parallel structure for this paragraph and corresponding subparagraphs.]

**Commented [RC24]:** Comment from Senior Fellow Michael E. Herz:

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

**Commented [RC25]:** Comment from Government Member Miriam E. Vincent:

This language implies that an agency has the option of publishing a direct final rule somewhere other than the “Rule” category - which it does not have. I recommen... [7]



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136 publishing a companion proposed rule in ~~the “Proposed Rules” section of the~~  
137 same issue of *Federal Register* that requests such comments;

138 d. ~~If the agency receives no significant adverse comments, the rule should become~~  
139 effective not less than 30 days after the close of the comment period. ~~If the agency~~  
140 elects to issue a subsequent notice in the *Federal Register* confirming that it  
141 received no significant adverse comments, the rule should become effective not  
142 less than 30 days after such notice.

143 e. ~~If the agency receives significant adverse comments or otherwise decides to~~  
144 withdraw the direct final rule before it becomes effective, the agency should  
145 publish a notice in the *Federal Register* stating that it is terminating the direct  
146 final rulemaking and explaining whether it will ~~pursue further~~  
147 rulemaking on the matter. ~~If the agency previously requested comments in a~~  
148 companion proposed rule as described in Paragraph 6.c., the agency may proceed  
149 with notice-and-comment rulemaking consistent with the proposed rule.

150 7.6. ~~Supplemental Methods of Pre-Adoption Public Engagement.~~ Before adopting good cause  
151 rules, agencies should consider using other methods of public engagement ~~to gather~~  
152 ~~information that may assist agencies in developing or refining good cause rules before~~  
153 ~~publication to supplement the rulemaking process.~~ Such methods may include:

154 a. Publishing requests for information or advance notices of proposed rulemaking in  
155 the *Federal Register* ~~to gather information that may assist agencies in developing~~  
156 ~~or refining good cause rules before publication;~~

157 b. ~~Conducting targeted outreach to inform interested persons and obtain feedback~~  
158 about good cause rules under development and to encourage their participation in  
159 related rulemakings the agency may conduct in the future; and

160 c. Holding meetings (which may include listening sessions, town halls, and one-on-  
161 one discussions with affected persons) to obtain feedback on topics related to the  
162 rulemaking, particularly when members of the public are less likely to participate  
163 in the rulemaking via written responses.

**Commented [RC26]:** Comment from Government Member Miriam E. Vincent:  
see my comment on "Rules and Regulations" in 6.a.

**Commented [RC27]:** Comment from Special Counsel Jeffrey S. Lubbers:  
This paragraph would seem to incentivize an agency not to confirm it received no significant adverse comments.

**Commented [RC28]:** Comment from Government Member Miriam E. Vincent:  
I recommend changing this to 45 or 60 days after. Agencies frequently have trouble getting the required documents drafted and through agency clearance in time to publish 30 days after the comment period closes. If the agency fails to publish a withdrawal in time, the OFR will codify the direct final rule.

**Commented [RC29]:** Comment from Special Counsel Jeffrey S. Lubbers:  
Why wouldn't the agency normally announce immediately that it is proceeding with a proposed rule, without announcing that it will consider future rulemaking?

**Commented [RC30]:** Comment from Special Counsel Jeffrey S. Lubbers:  
Why wouldn't the agency normally announce immediately that it is proceeding with a proposed rule, without announcing that it will consider future rulemaking?

**Commented [RC31]:** Comment from Special Counsel Jeffrey S. Lubbers:  
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 "unnece... [8]

**Commented [RC32]:** Comment from Senior Fellow Michael E. Herz:  
See comment to line 80. Maybe delete "to gather information that may assist agencies in developing or refining good... [9]

**Commented [RC33]:** Comment from Senior Fellow Michael E. Herz:  
See comment to line 80. Maybe delete "to gather information that may assist agencies in developing or refining good... [10]

**Commented [RC34]:** Comment from Senior Fellow Michael E. Herz:  
See comments to line 87. The two references should be consistent.

**Commented [RC35]:** Comment from Senior Fellow Michael E. Herz:  
... [11]



164 8.7. When agencies conduct rulemaking after engaging with the public on a pre-adoption  
165 basis, they should summarize the results of those efforts in subsequent rulemaking  
166 documents published in the *Federal Register* and in the appropriate public docket for the  
167 rulemaking.

**Post-Adoption Public Engagement**

168 9.8. *Interim Final Rulemaking.* When agencies find for good cause that notice-and-comment  
169 procedures are impracticable or contrary to the public interest, they should use interim  
170 final rulemaking, which is a type of rulemaking in which the agency provides the public  
171 with an opportunity to comment on the rule after the agency adopts it. Agencies should  
172 use the following procedures when conducting interim final rulemaking:

- 173 a. The agency should publish the interim final rule document in the “Rules and  
174 Regulations” section of the *Federal Register*.
- 175 b. The agency should solicit comment from the public on the interim final rule for a  
176 period of at least 30 days (or at least 60 days in the case of major rules under the  
177 Congressional Review Act and in the case of significant rules under Executive  
178 Order 14,094), either by requesting comments in the interim final rule document  
179 or by publishing a companion proposed rule document in the “Proposed Rules”  
180 section of the same issue of *Federal Register* that requests such comments.
- 181 c. In its request for comments on the interim final rule, the agency should state that,  
182 although the rule is final, the agency will consider any significant adverse  
183 comments received, publish a response to them, and modify the rule if necessary.
- 184 d. The agency should include in the interim final rule published in the *Federal*  
185 *Register* a commitment to act on any significant adverse comments within a fixed  
186 period of time or to provide for a sunset date for the rule.

187 10.9. *Issuing Final Rules After Adopting Major or Significant Rules Under the Good*  
188 *Cause Exemption.* Consistent with agency resources and priorities, agencies should issue  
189 final rules that adopt the interim rule (with or without changes) that address comments  
190 and other input received in response to prior public engagement on good cause rules that

**Commented [RC36]:** Comment from Special Counsel Jeffrey S. Lubbers:

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.

**Commented [RC37]:** Comment from Senior Fellow Michael E. Herz:

Delete “appropriate”

**Commented [RC38]:** Comment from Special Counsel Jeffrey S. Lubbers:

... [12]

**Commented [RC39]:** Comment from Senior Fellow Michael E. Herz:

... [13]

**Commented [RC40]:** Comment from Government Member Miriam E. Vincent:

... [14]

**Commented [RC41]:** Comment from Government Member Miriam E. Vincent:

... [15]

**Commented [RC42]:** Comment from Government Member Miriam E. Vincent:

... [16]

**Commented [RC43]:** Comment from Special Counsel Jeffrey S. Lubbers:

... [17]

**Commented [RC44]:** Comment from Government Member Miriam E. Vincent:

... [18]

**Commented [RC45]:** Comment from Special Counsel Jeffrey S. Lubbers:

... [19]

**Commented [RC46]:** Comment from Government Member Miriam E. Vincent:

... [20]

**Commented [RC47]:** Comment from Senior Fellow Michael E. Herz:

... [21]

**Commented [RC48]:** Comment from Government Member Miriam E. Vincent:

... [22]

**Commented [RC49]:** Comment from Government Member Miriam E. Vincent:

... [23]

**Commented [RC50]:** Comment from Special Counsel Jeffrey S. Lubbers:

... [24]





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are considered “major rules” under the Congressional Review Act or “significant regulatory actions” under Executive Order 14,094. Agencies should issue such final rules in the following circumstances:

- a. Members of the public have submitted significant adverse comments indicating that the good cause rule should be modified or rescinded;
- b. Changes in circumstances since the issuance of the good cause rule indicate that the agency should modify or rescind the rule (because, for example, the rule addressed an emergency that has ended); and
- c. The good cause rule represents an exercise of the agency’s policymaking discretion.

**Explaining the Agency’s Assertion of the Good Cause Exemption**

11.10. Agencies should explain in their good cause rules why notice-and-comment procedures are unnecessary, impracticable, or contrary to the public interest. The explanation should:

- a. Appear in a dedicated section of the rule’s preamble;
- b. Describe the specific good cause basis for the agency’s invocation of the exemption (whether the rule is unnecessary, impracticable, or contrary to the public interest), including whether the agency is relying on more than one good cause basis for the rule (for example, whether the agency believes notice-and-comment procedures are both unnecessary and impracticable for the rule).
- c. Include a brief statement of reasons supporting the assertion of the exemption.

12.11. When engaging with the public about a current or contemplated good cause rule, agencies should seek comment or other input on whether dispensing with notice-and-comment procedures would be consistent with the good cause exemption.

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

13.12. The President should issue an executive order directing agencies (not including independent regulatory agencies listed in 44 U.S.C. 3502(5)) as follows:

**Commented [RC51]:** Comment from Senior Fellow Michael E. Herz:

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.”

**Commented [RC52]:** Comment from Senior Fellow Michael E. Herz:

Same confusion . . . .

**Commented [BB53]:** Question for committee: Should this section appear earlier in the recommendation? If so, where?

**Commented [RC54]:** Comment from Senior Fellow Michael E. Herz:

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?

**Commented [RC55]:** Comment from Senior Fellow Michael E. Herz:

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 2 and 3. The idea should also be included in the preamble (see above comment on the preamble) and

**Commented [RC56]:** Alex comments:

- 1. Rec should be directed to agencies
- 2. No deadline is preferred but if deadline IFRs should last for 3 years
- 3. Delete b; current GC criteria is adequate

**Commented [RC57]:** Comment from Special Counsel Jeffrey S. Lubbers:

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)



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 216 a. An agency shall not issue an interim final rule that remains in effect for a  
217 period of greater than one year, except that an agency may extend such period  
218 for no longer than six months subject to review by the Office of Management  
219 and Budget (OMB).  
220 b. An agency shall not issue a rule as an interim final rule if the rule is a major  
221 rule under the Congressional Review Act unless a statute precludes the use of  
222 pre-adoption notice-and-comment rulemaking procedures for such a rule; the  
223 rule responds to an emergency that threatens the public health, safety, or  
224 welfare; or pre-adoption notice-and-comment procedures are unnecessary  
225 because the rule does not affect the rights of or benefits to affected parties.  
226 14.13. OMB should issue guidance that encourages agencies to engage with the public in  
227 good cause rulemakings, consistent with this Recommendation.

**Commented [RC58]:** Comment from Senior Fellow Michael E. Herz:

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.