



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

### Committee on Rulemaking

#### Draft Recommendation for Committee | October 29, 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

**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.

<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 in 553bb 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>

**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.

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.

**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”

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.

**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.

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).



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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 determine whether to engage with the public on a voluntary basis when  
75 they conduct rulemakings that are subject to the good cause exemption in  
76 5 U.S.C. § 553(b)(B). When deciding whether to engage with the public in good cause  
77 rulemaking, agencies should consider factors such as whether:
- 78 a. Public engagement would help the agency determine if the good cause exemption  
79 applies to the rule;

Commented [RC5]: Comment from Special Counsel Jeffrey S. Lubbers:

I realize paragraph 4 is limited to “good cause rules” but I think most of this would apply to rules within other exemptions. Also, is that shorthand term one we should be encouraging?

<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 a-b. Public engagement would be useful to elicit information the agency needs to  
81 develop the rule;
- 82 b-c. The agency has adequate time or resources to engage with the public about the  
83 rule (such as when adoption of the rule is not necessary to address an emergency  
84 or is not required by a legal deadline); and
- 85 e-d. ~~The time or resources required to engage with the public are justified. Whether~~  
86 ~~public engagement is important~~ in light of the subject matter of the rule (such as  
87 when the rule ~~has~~ substantially ~~ly~~ affects ~~on~~ the public ~~or is or is likely to be~~  
88 complex or controversial).
- 89 2. ~~If agencies decide to engage with the public in good cause rulemaking in light of the~~  
90 ~~factors in Paragraph 1, agencies should consider using the following types of public~~  
91 ~~engagement: When agencies find for good cause that notice-and-comment procedures~~  
92 ~~would be impracticable, unnecessary, or contrary to the public interest, they should~~  
93 ~~engage with the public as follows:~~
- 94 a. Direct final rulemaking (see Paragraphs 57 and 68);
  - 95 b. Interim final rulemaking (see Paragraphs 89 through 104);
  - 96 c. Voluntary notice-and-comment rulemaking (see Paragraphs 11 and 12h-14); and
  - 97 d. Supplemental forms of public engagement (see Paragraphs 132 and 143).
- 98 3. ~~Agencies should issue good cause rules as no-comment final rules—that is, rules for~~  
99 ~~which agencies provide no opportunity for the public to comment on the rule—when~~  
100 ~~agencies determine that public engagement is not supported by the factors in Paragraph 1.~~
- 101 4. ~~Agencies should issue good cause rules as temporary rules—that is, rules that are~~  
102 ~~effective for specific and limited periods of time—when the agency:~~
- 103 a. ~~Knows in advance that the need or good cause basis for the rule will be limited in~~  
104 ~~duration; or~~
  - 105 b. ~~Decides in advance that it will reconsider the need or good cause basis for the rule~~  
106 ~~at a definite date in the future.~~
- 107 ~~2. When agencies engage with the public in rulemaking under the good cause exemption~~  
108 ~~(that is, in good cause rulemaking), they should engage proactively with a wide range of~~

Commented [RC6]: Make clear relates to costs/benefits

Commented [RC7]: Alex: make clear about best practices, not legal obligation

Commented [RC8]: Consider referencing prior public engagement rec.

Commented [RC9]: Delete 1.a. and develop alternative language consistent with previous ACUs recs.



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109 persons interested in or affected by the rulemakings, including regulated entities,  
110 regulatory beneficiaries, experts with knowledge germane to the rulemaking, and  
111 individuals who have historically been underrepresented in agency rulemakings.

112 3. — Agencies should develop and make publicly available policies regarding how they will  
113 engage with the public in rulemakings in which they forgo pre-adoption notice-and-comment  
114 procedures. Such policies should explain what types of pre- and post-adoption public  
115 engagement opportunities the agency provides, including any opportunities required by agency  
116 specific statutes, and whether there are any rules for which the agency does not provide  
117 opportunities for such engagement.

**Direct Final Rulemaking**

118 5. When agencies conclude that notice-and-comment rulemaking procedures are  
119 unnecessary and that the rule is unlikely to result in significant adverse comment,  
120 agencies should use direct final rulemaking, which is a type of rulemaking where the  
121 agency publishes a final rule that becomes effective after the agency provides the public  
122 with an opportunity to comment on it.

123 4.6. Agencies should use the following procedures when conducting direct final rulemaking:

- 124 a. The agency should publish in the *Federal Register* a direct final rule that  
125 discusses the issues the agency has considered and explains why the agency  
126 believes that the rule is noncontroversial and will elicit no significant adverse  
127 comment.
- 128 b. The agency should solicit comment from the public on the rule for a period of at  
129 least 30 days, either by requesting comments in the direct final rule or by  
130 publishing a companion proposed rule in the same issue of *Federal Register* that  
131 requests such comments.
- 132 c. Agencies should treat a comment as a “significant adverse comment” when the  
133 comment explains why the rule would be inappropriate, including a comment that  
134 challenges the rule’s underlying premise or approach, or that explains why the  
135 rule would be ineffective or unacceptable without a change. In determining

Commented [RC10]: Comment from Special Counsel Jeffrey S. Lubbers:

Same point: add “might be” before “interested.”

Commented [RC11]: Comment from Senior Fellow Michael E. Herz:

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 uninterested 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... [1]

Commented [RC12]: ACUS staff suggests deleting in light of committee’s deletion of other paragraph

Commented [RC13]: Comment from Special Counsel Jeffrey S. Lubbers:

It’s unclear to me what an agency should do here. “any rules for which the agency does not provide opportunities”... [2]

Commented [RC14]: The committee deleted the first of the two highlighted recommendations at meeting #1. Given the deletion of the first highlighted recommendation, it would be appropriate to delete the second highlighted recommendation as well. Both highlighted recommendations are largely... [3]

Commented [RC15]: Comments from Senior Fellows Ronald M. Levin and Nina A. Mendelson:

Discuss finality and statutes of limitations issues.

Commented [RC16]: 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... [4]

Commented [RC17]: 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... [5]

Commented [RC18]: Comment from Government Member Miriam E. Vincent:

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

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

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



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136 whether a comment is significantly adverse, agencies should consider whether the  
 137 comment raises an issue serious enough to warrant substantive response in a  
 138 notice-and-comment process, even if the agency disagrees with the comment.  
 139 d. If the agency receives no significant adverse comments, the rule should become  
 140 effective not less than 30 days after the close of the comment period. If the agency  
 141 elects to issue a subsequent notice in the *Federal Register* confirming that it  
 142 received no significant adverse comments, the rule should become effective not  
 143 less than 30 days after such notice. The agency should explain in the original  
 144 direct final rule whether it will issue such confirmation notice and that, if it does  
 145 not issue such notice, when the direct final rule will become effective.  
 146 e. If the agency receives significant adverse comments or otherwise decides to  
 147 withdraw the direct final rule before it becomes effective, the agency should  
 148 publish a notice in the *Federal Register* stating that it is terminating the direct  
 149 final rulemaking and explaining whether it will pursue further rulemaking on the  
 150 matter. If the agency previously requested comments in a companion proposed  
 151 rule as described in Paragraph 6.c., the agency may proceed with notice-and-  
 152 comment rulemaking consistent with the proposed rule.  
 153 7. Agencies that use direct final rulemaking should adopt a regulation stating that a direct  
 154 final rule becomes final, for purposes of appeal, on the date the rule becomes effective as  
 155 described in Paragraph 6.d.

**Interim Final Rulemaking**

156 5.8. When agencies find for good cause that notice-and-comment procedures are  
 157 impracticable or contrary to the public interest, they should use interim final rulemaking,  
 158 which is a type of rulemaking in which the agency provides the public with an  
 159 opportunity to comment on the rule after the agency adopts it.  
 160 6.9. Agencies should use the following procedures when conducting interim final  
 161 rulemaking:

**Commented [RC20]:** ACUS staff have added this language for committee consideration based on previous comments of (and subsequent consultation with) Senior Fellow Ron Levin.

**Commented [RC21]:** 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 [RC22]:** 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 [RC23]:** ACUS staff have added this language for committee consideration based on previous comments of (and subsequent consultation with) Senior Fellow Ron Levin.

**Commented [RC24]:** 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 [RC25]:** 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 [RC26]:** Comment from Government Member Miriam E. Vincent:

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

**Commented [RC27]:** ACUS staff have added this language for committee consideration based on previous comments of (and subsequent consultation with) Senior Fellow Ron Levin.

**Commented [RC28]:** Comment from Special Counsel Jeffrey S. Lubbers:

... [6]

**Commented [RC29]:** Comment from Senior Fellow Michael E. Herz:

end sentence after "final rulemaking"

**Commented [RC30]:** Comment from Government Member Miriam E. Vincent:

... [7]



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- 162 a. The agency should solicit comment from the public on the interim final rule for a  
 163 period of at least 30 days (or at least 60 days in the case of major rules under the  
 164 Congressional Review Act and in the case of “[s]ignificant regulatory action[s]”  
 165 under Executive Order 14,094), either by requesting comments in the interim final  
 166 rule document or by publishing a companion proposed rule document in the same  
 167 issue of *Federal Register* that requests such comments.
- 168 b. In its request for comments on the interim final rule, the agency should state that,  
 169 although the rule is final, the agency will consider any significant-adverse  
 170 comments received, publish a response to them, and modify the rule if necessary.
- 171 c. The agency should include in the interim final rule published in the *Federal*  
 172 *Register* a commitment to act on any significant adverse comments within a fixed  
 173 period of time or to provide for a sunset date for the rule.
- 174 7.10. Consistent with agency resources and priorities, agencies should issue final rules  
 175 that address comments and other input received in response to prior public engagement  
 176 on good cause rules that are considered “major rules” under the Congressional Review  
 177 Act or “significant regulatory actions” under Executive Order 14,094. Agencies should  
 178 issue such final rules in the following circumstances:
- 179 a. Members of the public have submitted significant-adverse comments indicating  
 180 that the good cause rule should be modified or rescinded;
- 181 b. Changes in circumstances since the issuance of the good cause rule indicate that  
 182 the agency should modify or rescind the rule (because, for example, the rule  
 183 addressed an emergency that has ended); and
- 184 c. The good cause rule represents an exercise of the agency’s policymaking  
 185 discretion.

**Voluntary Notice-and-Comment Rulemaking**

- 186 8.11. When agencies determine that a rulemaking is subject to the good cause  
 187 exemption, they should consider voluntarily using notice-and-comment rulemaking after

**Commented [RC31]:** Comment from Special Counsel Jeffrey S. Lubbers:  
 Why would a major rule under the CRA, at least one that qualifies for IFR require a 60-day comment period, since it would still be voluntary for the agency to seek comment in the first place?

**Commented [JG32]:** Super minor. Just for consistency with the EO and Rec. 2011-2.

**Commented [RC33]:** Comment from Government Member Miriam E. Vincent:  
 see my comment for 6.a.

**Commented [RC34]:** Comment from Special Counsel Jeffrey S. Lubbers:  
 Lines, 172, 175, & 183: I’m not sure “adverse” is the right word to use here. Even if the comment is not adverse (as defined in this recommendation), it may suggest an alternative worth considering or make some other constructive comment that the agency should respond to.

**Commented [RC35]:** Comment from Government Member Miriam E. Vincent:  
 add a best practice that agencies publish final rules that adopt the interim rule (with or with changes).  
 without this addition, the recommendation implies that agencies should issue a final rule only for major or significant rules; however, unless an agency adopts the interim final rule, the regulations will remain classified as interim.

**Commented [RC36]:** Comment from Senior Fellow Michael E. Herz: ... [8]

**Commented [RC37]:** Comment from Government Member Miriam E. Vincent:  
 Remove this paragraph (see comment to 9.a.) ... [9]

**Commented [RC38]:** Comment from Government Member Miriam E. Vincent: ... [10]

**Commented [RC39]:** Comment from Special Counsel Jeffrey S. Lubbers: ... [11]

**Commented [RC40]:** Comment from Senior Fellow Michael E. Herz: ... [12]

**Commented [RC41]:** Comment from Senior Fellow Michael E. Herz:  
 Same confusion . . . .





188 considering the factors in Paragraph 1 and the other forms of public engagement in  
189 Paragraphs 7 through 13.

190 a.12. Agencies should consider voluntarily using notice-and-comment rulemaking  
191 when there is legal uncertainty whether the exemption would apply to the rule.

**Supplemental Public Engagement**

192 9.13. Agencies should consider using other methods of public engagement to  
193 supplement the good cause rulemaking process, including those identified in  
194 Recommendation 2018-7, *Public Engagement in Rulemaking*. Such methods may  
195 include:

- 196 a. Publishing requests for information or advance notices of proposed rulemaking in  
197 the *Federal Register* to gather information that may assist agencies in developing  
198 or modifying good cause rules;
- 199 b. Conducting targeted outreach to inform interested persons and obtain feedback  
200 about good cause rules and to encourage their participation in related rulemakings  
201 the agency may conduct in the future; and
- 202 c. Holding meetings (which may include listening sessions, town halls, and one-on-  
203 one discussions with affected persons) to obtain feedback on topics related to the  
204 rulemaking, particularly when members of the public are less likely to participate  
205 in the rulemaking via written responses.

206 10.14. When agencies conduct rulemaking after engaging with the public using the  
207 methods in Paragraph 13, they should summarize the results of those efforts in  
208 subsequent rulemaking documents published in the *Federal Register* and in the public  
209 docket for the rulemaking.

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

210 11.15. Agencies should explain in their good cause rules why notice-and-comment  
211 procedures are unnecessary, impracticable, or contrary to the public interest under the  
212 good cause exemption. The explanation should:

Commented [RC42]: Comment from Senior Fellow Michael E. Herz:

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

Commented [RC43]: 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 [RC44]: 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 “unnecessary” prong. Even for some rules under the other two prongs, the agency would not want to tip off people that they are considering a rule.

Commented [RC45]: Comment from Senior Fellow Michael E. Herz:

... [13]

Commented [RC46]: Comment from Senior Fellow Michael E. Herz:

... [14]

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

... [15]

Commented [RC48]: Comment from Senior Fellow Michael E. Herz:

... [16]

Commented [RC49]: Comment from Special Counsel Jeffrey S. Lubbers:

... [17]

Commented [RC50]: Comment from Senior Fellow Michael E. Herz:

Delete “appropriate”

Commented [BB51]: Question for committee: Should this section appear earlier in the recommendation? If so, where?

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

I guess it does no harm, but does this do anything mo... [18]



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- 213 a. Appear in a dedicated section of the rule’s preamble;
- 214 b. Describe the specific good cause basis for the agency’s invocation of the
- 215 exemption (whether the rule is unnecessary, impracticable, or contrary to the
- 216 public interest), including whether the agency is relying on more than one good
- 217 cause basis for the rule (for example, whether the agency believes notice-and-
- 218 comment procedures are both unnecessary and impracticable for the rule).
- 219 c. Include a brief statement of reasons supporting the assertion of the exemption.
- 220 ~~12.~~ When engaging with the public about a current or contemplated good cause rule, agencies
- 221 should seek comment or other input on whether dispensing with notice-and-comment
- 222 procedures is or would be consistent with the good cause exemption.

223 16.

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

- 224 ~~13.~~ 17. The President should issue an executive order directing agencies (not including
- 225 independent regulatory agencies listed in 44 U.S.C. 3502(5)) as follows:
- 226 a. An agency shall not issue an interim final rule that remains in effect for a
- 227 period of greater than one year, except that an agency may extend such period
- 228 for no longer than six months subject to review by the Office of Management
- 229 and Budget (OMB).
- 230 b. An agency shall not issue a rule as an interim final rule if the rule is a major
- 231 rule under the Congressional Review Act unless a statute precludes the use of
- 232 pre-adoption notice-and-comment rulemaking procedures for such a rule; the
- 233 rule responds to an emergency that threatens the public health, safety, or
- 234 welfare; or pre-adoption notice-and-comment procedures are unnecessary
- 235 because the rule does not affect the rights of or benefits to affected parties.
- 236 ~~14.~~ 18. OMB should issue guidance that encourages agencies to engage with the public in
- 237 good cause rulemakings, consistent with this Recommendation.

**Commented [RC53]:** 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 [RC54]:** Government Member Alex Goodenough raised questions at meeting #1 about whether to retain the two paragraphs in this section. His points included that any recommendations should be directed to agencies (not the President or OMB), the recommendations should not impose timelines for agencies to follow up on IFRs, and the recommendations should not impose heightened standards for invoking the good cause exemption in the case of major or significant rules (current statutory good cause criteria are adequate).

**Commented [RC55]:** 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)

**Commented [RC56]:** 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.

**Page 6: [1] Commented [RC11]                      Rulemaking Committee                      10/8/24 12:08:00 AM**

Comment from Senior Fellow Michael E. Herz:

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 *uninterested* 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.

**Page 6: [2] Commented [RC13]                      Rulemaking Committee                      10/8/24 9:46:00 AM**

Comment from Special Counsel Jeffrey S. Lubbers:

It’s unclear to me what an agency should do here. “any rules for which the agency does not provide opportunities”—does this mean categories of rules, specific rules? I’m not sure it’s worth trying to list these.

**Page 6: [3] Commented [RC14]                      Rulemaking Committee                      10/28/24 10:55:00 PM**

The committee deleted the first of the two highlighted recommendations at meeting #1. Given the deletion of the first highlighted recommendation, it would be appropriate to delete the second highlighted recommendation as well. Both highlighted recommendations are largely drawn from prior ACUS recommendations, and the second highlighted recommendation appears out of place in absence of the first.

**Page 6: [4] Commented [RC16]                      Rulemaking Committee                      10/7/24 11:58:00 PM**

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.

**Page 6: [5] Commented [RC17]                      Rulemaking Committee                      10/8/24 12:14:00 AM**

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 this needs saying (not sure it does) it should be in the preamble. Then: “When conducting direct final rulemaking –”

**Page 7: [6] Commented [RC28]                      Rulemaking Committee                      10/8/24 10:11:00 AM**

Comment from Special Counsel Jeffrey S. Lubbers:

Paragraph 9 seems both over-inclusive in that it suggests that all rules within these two prongs should use IFR, it is also under-inclusive in that some rules covered by other exemptions should be candidates for IFR.

**Page 7: [7] Commented [RC30]                      Rulemaking Committee                      10/8/24 8:51:00 AM**

Comment from Government Member Miriam E. Vincent:

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

**Page 8: [8] Commented [RC36]                      Rulemaking Committee                      10/8/24 12:23:00 AM**

Comment from Senior Fellow Michael E. Herz:

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.

**Page 8: [9] Commented [RC37] Rulemaking Committee 10/8/24 8:56:00 AM**

Comment from Government Member Miriam E. Vincent:

Remove this paragraph (see comment to 9.a.)

If suggested edits to 9.a. are rejected, then change "Federal Register" to

"published interim final rule" or "interim final rule published in the Federal Register".

**Page 8: [10] Commented [RC38] Rulemaking Committee 10/8/24 8:57:00 AM**

Comment from Government Member Miriam E. Vincent:

immediately after "final rules" add "that adopt the interim rule (with or without changes)"

**Page 8: [11] Commented [RC39] Rulemaking Committee 10/8/24 10:14:00 AM**

Comment from Special Counsel Jeffrey S. Lubbers:

Wouldn't it help to introduce the term "final final rules" here?

**Page 8: [12] Commented [RC40] Rulemaking Committee 10/8/24 12:24:00 AM**

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."

**Page 9: [13] Commented [RC45] Rulemaking Committee 10/8/24 12:18:00 AM**

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 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."

**Page 9: [14] Commented [RC46] Rulemaking Committee 10/15/24 12:34:00 PM**

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 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."

**Page 9: [15] Commented [RC47] Rulemaking Committee 10/8/24 12:20:00 AM**

Comment from Senior Fellow Michael E. Herz:

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

**Page 9: [16] Commented [RC48]**

**Rulemaking Committee**

**10/8/24 12:21:00 AM**

Comment from Senior Fellow Michael E. Herz:

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.

**Page 9: [17] Commented [RC49]**

**Rulemaking Committee**

**10/8/24 10:10:00 AM**

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.

**Page 9: [18] Commented [RC52]**

**Rulemaking Committee**

**10/8/24 12:26:00 AM**

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?