



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

### Committee on Rulemaking

#### Draft Recommendation for Committee | November 4, 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 provide interested persons an opportunity to comment on rulemaking  
10 proposals.<sup>2</sup>

11 However, 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. 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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

18 impeded by the notice otherwise required [by the APA].”<sup>3</sup> Notice and comment may be  
19 “unnecessary” when a rule is “a routine determination, insignificant in nature and impact, and  
20 inconsequential to the industry and to the public” or when the agency lacks discretion regarding  
21 the substance of the rule.<sup>4</sup> And notice and comment may be “contrary to the public interest” in  
22 “the rare circumstance when ordinary procedures—generally presumed to serve the public  
23 interest—would in fact harm that interest.”<sup>5</sup>

24 Even when agencies choose to invoke the good cause exemption to notice-and-comment  
25 rulemaking (or are considering whether to invoke it), it is often valuable for agencies to engage  
26 with the public through other means. Public input obtained through means other than notice-and-  
27 comment rulemaking can help agencies determine whether to invoke the good cause exemption  
28 as well as evaluate the substance of the proposed rule.

29 Agencies engage with the public in a variety of ways when invoking the good cause  
30 exemption. The two primary rulemaking procedures agencies employ when they invoke the good  
31 cause exemption but still seek public comment are usually referred to as direct final rulemaking  
32 and interim final rulemaking.<sup>6</sup> When notice and comment is unnecessary, agencies sometimes  
33 use direct final rulemaking, in which they publish a final rule that goes into effect only after the  
34 agency provides an opportunity for public comment and receives no significant adverse  
35 comment. When notice and comment is impracticable or contrary to the public interest, agencies  
36 sometimes use interim final rulemaking, in which they request public comment on a final rule at  
37 the same time the rule is published and may consider such comments after the rule goes into  
38 effect. Agencies sometimes also use other, more informal procedures—including publishing

---

<sup>3</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>4</sup> *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d at 754); *Metzenbaum v. Fed. Energy Regulatory Comm’n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982).

<sup>5</sup> *Mack Trucks, Inc.*, 682 F.3d at 95.

<sup>6</sup> The APA does not define direct final rulemaking or interim final rulemaking. Agencies developed these terms to describe commonly used processes for engaging with the public when they invoke the good cause exemption.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

39 requests for information, engaging in targeted outreach, and convening listening sessions with  
40 interested persons—when they invoke the good cause exemption.

41 The Conference has long encouraged robust public participation in agency rulemaking  
42 and has identified many effective methods for engaging with the public outside the notice-and-  
43 comment process,<sup>7</sup> including in circumstances in which agencies invoke the good cause  
44 exemption. In Recommendation 83-2, *The “Good Cause” Exemption from APA Rulemaking*  
45 *Requirements*, the Conference encouraged agencies to “provide a post-promulgation comment  
46 opportunity for rules they adopt under the good cause exemption.”<sup>8</sup> In Recommendation 95-4,  
47 *Procedures for Noncontroversial and Expedited Rulemaking*, the Conference recommended that  
48 agencies “use direct final rulemaking in all cases where the ‘unnecessary’ prong of the good  
49 cause exemption is available, unless the agency determines that the process would not expedite  
50 issuance of such rules,” and provided best practices for doing so. In Recommendation 95-4, the  
51 Conference recommended that agencies use interim final rulemaking when they conclude that  
52 using notice-and-comment procedures would be “impracticable” or “contrary to the public  
53 interest,” and provided best practices for doing so.

54 The Conference is revisiting the topic of public engagement in rulemaking under the  
55 good cause exemption for two reasons. First, best practices for public engagement have become  
56 increasingly important as agencies rely more frequently on the good cause exemption.<sup>9</sup> Second,  
57 there have been legal developments since 1995, particularly a 2020 decision by the Supreme  
58 Court holding that a request for comments in an interim final rule satisfied the APA’s notice-  
59 and-comment requirements for subsequent final rules.<sup>10</sup>

---

<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).

<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> 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>10</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

60 Based on a reexamination of agency rulemaking practices under the good cause  
61 exemption,<sup>11</sup> this Recommendation identifies best practices for enhancing public engagement in  
62 rulemaking under the good cause exemption, particularly when agencies use direct and interim  
63 final rulemaking. It also encourages agencies to use alternative methods—such as publishing  
64 requests for information, engaging in targeted outreach, convening listening sessions with  
65 interested persons, and soliciting post-adoption comments—to reap the benefits of robust public  
66 participation even when they rely properly on the good cause exemption. Recommendations 83-2  
67 and 95-4 are superseded to the extent that they recommend public engagement practices that are  
68 inconsistent with this recommendation.

### RECOMMENDATION

#### Direct Final Rulemaking

- 69 1. An agency should use direct final rulemaking when it:
- 70 a. For good cause finds that it is “unnecessary” to undertake notice-and-comment  
71 rulemaking; and
- 72 b. Concludes that the rule is unlikely to elicit any significant adverse comments.
- 73 2. When an agency uses direct final rulemaking, it should publish in the *Federal Register* a  
74 rule that:
- 75 a. Identifies that the rule is a “direct final rule”;
- 76 b. Provides a brief statement explaining the basis for the agency’s finding that it is  
77 unnecessary to undertake notice-and-comment rulemaking;
- 78 c. Provides a statement of the rule’s basis and purpose and explains the issues the  
79 agency considered in developing the rule;
- 80 d. Provides a period of at least 30 days during which interested persons may submit  
81 comments regarding the substance of the rule or the agency’s finding that notice-  
82 and-comment rulemaking is unnecessary;

---

<sup>11</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.).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 83 e. Explains that the agency will withdraw the direct final rule if it receives any  
84 significant adverse comments and specifies any additional actions that the agency  
85 will take if it withdraws the direct final rule;
- 86 f. Specifies when the rule will take effect if the agency receives no significant  
87 adverse comments or, alternatively, specifies that the agency will issue a  
88 subsequent notice in the *Federal Register* confirming that the agency received no  
89 significant adverse comments; and
- 90 g. Identifies any companion proposed rule, as described in Paragraph 3.
- 91 3. When an agency issues a direct final rule, it should consider publishing in the same issue  
92 of the *Federal Register* a companion proposed rule that will serve as a notice of proposed  
93 rulemaking if the agency later withdraws the direct final rule upon receiving any  
94 significant adverse comments.
- 95 4. An agency should consider any comment received during direct final rulemaking to be a  
96 significant adverse comment if it:
- 97 a. Challenges the rule's underlying premise or approach;
- 98 b. Explains why the rule would be ineffective or unacceptable without a change;
- 99 c. Explains why notice-and-comment rulemaking is necessary; or
- 100 d. Raises an issue serious enough to warrant substantive response in a notice-and-  
101 comment process, even if the agency disagrees with the comment.
- 102 5. The agency should provide that a direct final rule will take effect at least 30 days after the  
103 close of the comment period if the agency receives no significant adverse comments or at  
104 least 30 days after publication of a subsequent notice in the *Federal Register* confirming  
105 that the agency received no significant adverse comments.
- 106 6. If the agency receives any significant adverse comments or otherwise decides to  
107 withdraw the direct final rule before it takes effect, the agency should publish a notice in  
108 the *Federal Register* that states that the agency is withdrawing the direct final rule and  
109 explains any further rulemaking the agency will conduct on the matter. If the agency  
110 previously requested comments in a companion proposed rule as described in Paragraph

**Commented [BB1]:** Question for committee:

Should agencies provide for an effective date of more than 30 days after the close of the comment period when they don't publish a confirmation notice?

Government Member Miriam E. Vincent recommended a period of 45 or 60 days, noting that agencies frequently have trouble getting the required documents drafted and cleared in time to publish within 30 days. If the agency fails to publish a withdrawal in time, OFR will codify the direct final rule.

Potential language: Add a second sentence to Paragraph 5 to read as follows: "An agency that does not publish a confirmation notice should consider providing an effective date greater than 30 days after the close of the comment period if the agency believes it is necessary to ensure that it has adequate time to withdraw the rule in the event it receives significant adverse comment."



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

111 3, the agency may proceed with notice-and-comment rulemaking consistent with the  
112 proposed rule.

### **Interim Final Rulemaking**

- 113 7. An agency should use interim final rulemaking when it:
- 114 a. For good cause finds that it is “impracticable” to undertake notice-and-comment  
115 rulemaking; or
- 116 b. For good cause finds that it is “contrary to the public interest” to undertake notice-  
117 and-comment rulemaking.
- 118 8. When an agency uses interim final rulemaking, it should publish in the *Federal Register*  
119 a rule that:
- 120 a. Identifies that the rule is an “interim final rule”;
- 121 b. Provides a brief statement explaining the basis for the agency’s finding that is  
122 “impracticable” or “contrary to the public interest” to undertake notice-and-  
123 comment rulemaking;
- 124 c. Provides a statement of the rule’s basis and purpose and explains the issues the  
125 agency considered in developing the rule;
- 126 d. Provides a period of at least 30 days (or 60 days for a “[s]ignificant regulatory  
127 action” under Executive Order 14,094) during which interested persons may  
128 submit comments regarding the substance of the rule or the agency’s finding that  
129 notice-and-comment rulemaking is impracticable or contrary to the public  
130 interest;
- 131 e. Explains that the agency will consider any comments that it receives in response  
132 to the interim final rule;
- 133 f. Explains that the rule is a final rule and specifies the date upon which the rule will  
134 take effect; and
- 135 g. Specifies when and under what circumstances the agency will publish a  
136 subsequent rule (see Paragraph 9).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 137 9. Consistent with agency resources and priorities, an agency should issue a subsequent rule  
138 within a reasonable time responding to all significant comments and modifying or  
139 rescinding the rule as appropriate if:
- 140 a. The rule is a “[s]ignificant regulatory action” under Executive Order 14,094;
  - 141 b. The agency received significant comments indicating that the rule should be  
142 modified or rescinded; or
  - 143 c. Changes in circumstances since the issuance of the rule indicate that the agency  
144 should modify or rescind the rule (because, for example, the rule addressed an  
145 emergency that has ended).

Commented [BB2]: Question for committee:  
Should the recommendation encourage agencies to take action on comments received on an interim final rule?

**Supplemental Public Engagement**

- 146 10. An agency should use supplemental forms of public engagement, including those  
147 identified in Recommendation 2018-7, *Public Engagement in Rulemaking*, before issuing  
148 a direct or interim final rule when such engagement would help the agency (a) determine  
149 if notice-and-comment rulemaking is unnecessary, impracticable, or contrary to the  
150 public interest or (b) develop the rule. Supplemental forms of public engagement include  
151 requests for information and advance notices of proposed rulemaking; targeted outreach  
152 to interested persons, including members of communities that historically have been  
153 underrepresented in agency rulemaking; and listening sessions, town halls, and other  
154 meetings. The agency should explain in the direct or interim final rule what supplemental  
155 public engagement the agency undertook and how input received through such  
156 engagement informed or influenced development of the rule.
- 157 11. An agency should use supplemental forms of public engagement after issuing a direct or  
158 interim final rule when such engagement would help the agency (a) determine whether it  
159 properly invoked the good cause exemption to notice-and-comment rulemaking or (b)  
160 obtain input on the substance of the rule. If the agency publishes a subsequent rule, it  
161 should explain in the rule what supplemental public engagement the agency undertook  
162 and how the input received through such engagement informed or influenced



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

163 development of the rule. The agency should disclose the following to the public, as  
164 applicable:

- 165 a. The occurrence of all oral ex parte communications, including the identity of  
166 those involved in the discussion and the date and location of the meeting;
- 167 b. The content of all oral ex parte communications through a written summary filed  
168 in the appropriate rulemaking docket;
- 169 c. Transcripts or recordings, if any, of oral presentations made in the course of the  
170 rulemaking; and
- 171 d. All written submissions, in the appropriate rulemaking docket.

### **Ensuring Agencies Engage with the Public in Rulemaking Under the Good Cause Exemption**

- 172 12. The President should issue an executive order directing agencies (not including  
173 independent regulatory agencies listed in 44 U.S.C. 3502(5)) as follows:
- 174 a. An agency shall not issue an interim final rule that remains in effect for a period  
175 of greater than one year, except that an agency may extend such period for no  
176 longer than six months subject to review by the Office of Management and  
177 Budget (OMB).
  - 178 b. An agency shall not issue a rule as an interim final rule if the rule is a major rule  
179 under the Congressional Review Act unless a statute precludes the use of pre-  
180 adoption notice-and-comment rulemaking procedures for such a rule; the rule  
181 responds to an emergency that threatens the public health, safety, or welfare; or  
182 pre-adoption notice-and-comment procedures are unnecessary because the rule  
183 does not affect the rights of or benefits to affected parties.
- 184 13. OMB should issue guidance that encourages agencies to engage with the public in  
185 rulemakings under the good cause exemption, consistent with this Recommendation.

#### **Commented [BB3]: Question for committee:**

Should the draft recommendation retain Paragraphs 12 and 13?

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).