



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Engagement in Agency Rulemaking Under the Good Cause Exemption

Committee on Rulemaking

Draft Recommendation for Committee | November 6, 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.”¹ 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.²

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

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

² 5 U.S.C. § 553(b)–(c).



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18 impeded by the notice otherwise required [by the APA].”³ 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.⁴ 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.”⁵

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 rule the agency is considering.

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.⁶ 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

³ *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).

⁴ *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).

⁵ *Mack Trucks, Inc.*, 682 F.3d at 95.

⁶ 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.



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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,⁷ 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.”⁸ 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.⁹ Second,
57 there have been legal developments since 1995, particularly a 2020 decision by the Supreme
58 Court holding that a request for comments on an interim final rule satisfied the APA’s notice-
59 and-comment requirements for subsequent final rules.¹⁰

⁷ 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).

⁸ 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).

⁹ 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).

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



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

RECOMMENDATION

Direct Final Rulemaking

- 69 1. Except in the rare instance that an agency determines that direct final rulemaking would
70 not expedite issuance of a rule, an agency should use direct final rulemaking when it:
- 71 a. For good cause finds that it is “unnecessary” to undertake notice-and-comment
72 rulemaking; and
 - 73 b. Concludes that the rule is unlikely to elicit any significant adverse comments.
- 74 2. When an agency uses direct final rulemaking, it should publish in the *Federal Register* a
75 rule that:
- 76 a. Identifies that the rule is a “direct final rule”;
 - 77 b. Provides a brief statement explaining the basis for the agency’s finding that it is
78 unnecessary to undertake notice-and-comment rulemaking;
 - 79 c. Provides a statement of the rule’s basis and purpose and explains the issues the
80 agency considered in developing the rule;

¹¹ 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 d. Provides a period of at least 30 days during which interested persons may submit
82 comments objecting to the agency's finding that notice-and-comment rulemaking
83 is unnecessary, including comments regarding the substance of the rule;
- 84 e. Explains that the agency will withdraw the direct final rule if it receives any
85 significant adverse comments and specifies any additional actions that the agency
86 may take if it withdraws the direct final rule;
- 87 f. Specifies when the rule will take effect if the agency receives no significant
88 adverse comments;
- 89 g. If applicable, specifies whether the agency will issue a subsequent notice in the
90 *Federal Register* confirming that the agency received no significant adverse
91 comments (see Paragraph 5); and
- 92 h. Identifies any companion proposed rule, as described in Paragraph 3.
- 93 3. When an agency issues a direct final rule, it may consider publishing in the same issue of
94 the *Federal Register* a companion proposed rule that will serve as a notice of proposed
95 rulemaking if the agency later withdraws the direct final rule upon receiving any
96 significant adverse comments. In such companion proceedings, the agency should
97 consider providing an additional period for comment if needed for fair consideration of
98 the comments.
- 99 4. An agency should consider any comment received during direct final rulemaking to be a
100 significant adverse comment if it:
- 101 a. Challenges the rule's underlying premise or approach;
- 102 b. Explains why the rule would be ineffective or unacceptable without a change; or
- 103 c. Explains why notice-and-comment rulemaking is necessary.
- 104 5. The agency should provide that a direct final rule will take effect at least 30 days after the
105 close of the comment period if the agency receives no significant adverse comments or at
106 least 30 days after publication of a subsequent notice in the *Federal Register* confirming
107 that the agency received no significant adverse comments. An agency that does not
108 publish a confirmation notice should consider providing an effective date greater than 30
109 days after the close of the comment period if the agency believes it is necessary to ensure



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110 that it has adequate time to withdraw the rule in the event it receives significant adverse
111 comment.

112 6. If the agency receives any significant adverse comments or otherwise decides to
113 withdraw the direct final rule before it takes effect, the agency should publish a notice in
114 the *Federal Register* that states that the agency is withdrawing the direct final rule and
115 explains any further rulemaking the agency will conduct on the matter. If the agency
116 previously requested comments in a companion proposed rule as described in Paragraph
117 3, the agency may proceed with notice-and-comment rulemaking consistent with the
118 proposed rule.

Interim Final Rulemaking

- 119 7. An agency should use interim final rulemaking when it:
- 120 a. For good cause finds that it is “impracticable” to undertake notice-and-comment
121 rulemaking; or
 - 122 b. For good cause finds that it is “contrary to the public interest” to undertake notice-
123 and-comment rulemaking.
- 124 8. When an agency uses interim final rulemaking, it should publish in the *Federal Register*
125 a rule that:
- 126 a. Identifies that the rule is an “interim final rule”;
 - 127 b. Provides a brief statement explaining the basis for the agency’s finding that is
128 “impracticable” or “contrary to the public interest” to undertake notice-and-
129 comment rulemaking;
 - 130 c. Provides a statement of the rule’s basis and purpose and explains the issues the
131 agency considered in developing the rule;
 - 132 d. Provides a period of at least 30 days (or 60 days for a “[s]ignificant regulatory
133 action” under Executive Order 12,866 as amended by Executive Order 14,094)
134 during which interested persons may submit comments regarding the substance of
135 the rule or the agency’s finding that notice-and-comment rulemaking is
136 impracticable or contrary to the public interest;



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- 137 e. Explains that the agency will consider any comments that it receives in response
138 to the interim final rule;
- 139 f. Explains that the rule is a final rule and specifies the date upon which the rule will
140 take effect; and
- 141 g. Specifies when and under what circumstances the agency will publish a
142 subsequent final rule that supersedes the interim final rule (see Paragraph 9).
- 143 9. Consistent with agency resources and priorities, an agency should issue a subsequent
144 final rule within a reasonable time responding to all significant comments and modifying
145 or rescinding the rule as appropriate if:
- 146 a. The rule is a “[s]ignificant regulatory action” under Executive Order 12,866 as
147 amended by Executive Order 14,094;
- 148 b. The agency received significant comments indicating that the rule should be
149 modified or rescinded; or
- 150 c. Changes in circumstances since the issuance of the rule indicate that the agency
151 should modify or rescind the rule (because, for example, the rule addressed an
152 emergency that has ended).

Commented [BB1]: Question for committee:

Should the recommendation encourage agencies to take action on comments received on an interim final rule?

Supplemental Public Engagement

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



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- 164 11. An agency should use supplemental forms of public engagement after issuing a direct
165 final rule or interim final rule when such engagement would help the agency (a)
166 determine whether it properly invoked the good cause exemption to notice-and-comment
167 rulemaking or (b) obtain input on the substance of the rule. If the agency publishes a
168 subsequent final rule that supersedes a previous final rule issued under the good cause
169 exemption, it should explain in the subsequent final rule what supplemental public
170 engagement the agency undertook and how the input received through such engagement
171 informed or influenced development of that rule. The agency should disclose the
172 following to the public, as applicable:
- 173 a. The occurrence of all oral ex parte communications, including the identity of
174 those involved in the discussion and the date and location of the meeting;
 - 175 b. The content of all oral ex parte communications through a written summary filed
176 in the appropriate rulemaking docket;
 - 177 c. Transcripts or recordings, if any, of oral presentations made in the course of the
178 rulemaking; and
 - 179 d. All written submissions, in the appropriate rulemaking docket.

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

- 180 12. The President should issue an executive order directing agencies (not including
181 independent regulatory agencies listed in 44 U.S.C. 3502(5)) as follows:
- 182 a. An agency shall not issue an interim final rule that remains in effect for a period
183 of greater than one year, except that an agency may extend such period for no
184 longer than six months subject to review by the Office of Management and
185 Budget (OMB).
 - 186 b. An agency shall not issue a rule as an interim final rule if the rule is a major rule
187 under the Congressional Review Act unless a statute precludes the use of pre-
188 adoption notice-and-comment rulemaking procedures for such a rule; the rule
189 responds to an emergency that threatens the public health, safety, or welfare; or

Commented [BB2]: Comment from Special Counsel Jeffrey S. Lubbers:

The term “subsequent rule” is also used here. I again would use “final final rule” for IFR’s. But I don’t think either term is apt in referring to DFRs because any “subsequent” rule would be a regular N & C rule that is separate from the original DFR. Moreover I don’t think an agency would ever do any public engagement during the comment period of the DFR—maybe they would do some beforehand, but once they issued it as a DFR, they would simply wait to see if anyone objected.

As for paragraph 11(a)-(e), why don’t we just say that our Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking, should apply to both IFRulemaking and DFRulemaking?? I do note that 2014-4 does say that “Agencies should not impose restrictions on ex parte communications before an NPRM is issued” although they “may” disclose them if they want to. This recommendation as written would apply to pre-NPRM communications, but it doesn’t differentiate between them and others.

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).

Commented [BB4]: 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.



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190 pre-adoption notice-and-comment procedures are unnecessary because the rule
191 does not affect the rights of or benefits to affected parties.
192 13. OMB should issue guidance that encourages agencies to engage with the public in
193 rulemakings under the good cause exemption, consistent with this Recommendation.