



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Engagement in Agency Rulemaking Under the Good Cause Exemption

Committee on Rulemaking

Draft Recommendation for Committee | November 12, 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 mechanisms procedures agencies employ when they
31 invoke the good cause exemption but still seek public comment are usually referred to as direct
32 final rulemaking and interim final rulemaking.⁶ When notice and comment is unnecessary,
33 agencies sometimes use direct final rulemaking, in which the agency simultaneously publishes a
34 final rule and solicits comments on it; the rule goes into effect only if no significant adverse
35 comments are received they publish a final rule that goes into effect only after the agency
36 provides an opportunity for public comment and receives no significant adverse comment. When
37 notice and comment is impracticable or contrary to the public interest, agencies sometimes use
38 interim final rulemaking, in which they request public comment on a final rule at the same time
39 the rule is published; the agency may later replace the published rule with a “final final rule” in

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.

Commented [BB1]: Comment from Senior Fellow Michael E. Herz:

Lines 24-28: It might be worth grappling with the basic issue a little more here. Something like the following:

The Conference has long encouraged robust public participation in agency rulemaking and has identified effective methods for engaging with the public outside of, and to supplement, the notice-and comment process.[old FN 7] The fact that *notice and comment* is unnecessary, impracticable, or contrary to the public interest does not mean that *no* public engagement is appropriate. Indeed, such engagement may be especially important precisely because standard notice and comment is not occurring. And such engagement can also help agencies determine whether the good cause exemption is applicable. Of course, the same factors that make a comment period inappropriate may equally argue against other sorts of public engagement as well. Neither the agency nor the public is well served by utterly pointless, or counterproductive, efforts to engage the public. Such circumstances are rare, however. The goal of this recommendation is to identify ways in which agencies can meaningfully and usefully engage the public even when forgoing notice and comment under the good cause exception.

[If we do this, then also delete the sentence that is at lines 41-44 to this paragraph.]



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40 [light of those comments and may consider such comments after the rule goes into effect.](#)

41 Agencies sometimes also use other, more informal procedures—including publishing requests
42 for information, engaging in targeted outreach, and convening listening sessions with interested
43 persons—when they invoke the good cause exemption.

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

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.⁹ Second,
60 there have been legal developments since 1995, particularly a 2020 decision by the Supreme

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).



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61 Court holding that a request for comments on an interim final rules satisfied the APA’s notice-
62 and-comment requirements for subsequent final rules.¹⁰

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

RECOMMENDATION

Direct Final Rulemaking

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

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

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

Commented [BB2]: Comment from Senior Fellow Michael E. Herz:

The wording here and the wording at [Paragraph 8.d] should track one another, mutatis mutandis, no?

Commented [BB3]: Comment from Senior Fellow Michael E. Herz:

“if needed for fair consideration of the comments” seems wrong. Consideration of the comments is something the agency does; lengthening the comment period is for the benefit of commenters, not the agency. Maybe “if needed to provide a fair opportunity to prepare comments”? (I’m not completely sure what this is driving at)

Commented [BB4]: Comment from Senior Fellow Michael E. Herz:

The 3 listed types of comments make sense, but they are not exhaustive. For example, they don’t include the objection that the rule violates a statute or the Constitution. (Maybe that’s implicit in “challenges the rule’s underlying premise or approach”? Not really.) I’d suggest (a) adding a 4th example (though current “c.” should still come last” along the lines of “violates a relevant statute or the Constitution” and/or (b) rewrite the opening clause to indicate that the list is not exhaustive.

In addition, shouldn’t there be some requirement of plausibility? As written, I can force n&c by, to use Bill Funk’s example, saying that the agency’s approach is completely wrong because this is an area that should be left unregulated when Congress has imposed a nondiscretionary duty on the agency to write a regulation. Maybe add “plausibly” before the colon (and make an equivalent change if the intro is rewritten)?



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- 111 publish a confirmation notice should consider providing an effective date greater than 30
112 days after the close of the comment period if the agency believes it is necessary to ensure
113 that it has adequate time to withdraw the rule in the event it receives significant adverse
114 comment.
- 115 6. If the agency receives any significant adverse comments or otherwise decides to
116 withdraw the direct final rule before it takes effect, the agency should publish a notice in
117 the *Federal Register* that states that the agency is withdrawing the direct final rule and
118 describes any further rulemaking the agency will conduct on the matter. If the agency
119 previously requested comments in a companion proposed rule as described in Paragraph
120 3, the agency may proceed with notice-and-comment rulemaking consistent with the
121 proposed rule.

Interim Final Rulemaking

- 122 7. An agency is encouraged to use interim final rulemaking when it:
- 123 a. For good cause finds that it is “impracticable” to undertake notice-and-comment
124 rulemaking; or
- 125 b. For good cause finds that it is “contrary to the public interest” to undertake notice-
126 and-comment rulemaking.
- 127 8. When an agency uses interim final rulemaking, it should publish in the *Federal Register*
128 a rule that:
- 129 a. Identifies the rule as an “interim final rule”;
- 130 b. Provides a brief statement explaining the basis for the agency’s finding that is
131 “impracticable” or “contrary to the public interest” to undertake notice-and-
132 comment rulemaking;
- 133 c. Provides a statement of the rule’s basis and purpose and explains the issues the
134 agency considered in developing the rule;
- 135 d. Provides a period of at least 30 days (or in most cases 60 days for a “[s]ignificant
136 regulatory action” under Executive Order 12,866 as amended by Executive Order
137 14,094) during which interested persons may submit comments regarding the

Commented [BB5]: [Comment from Senior Fellow Michael E. Herz:](#)

We changed this formulation with regard to DFR. Similar change here? It's a slightly different setting. I would think that agencies really should always use IFR when invoking these prongs, UNLESS (and it's a big unless) the same reasons for skipping n&c also apply to ex post comment. The short-term, emergency rule is the most obvious example. Maybe add at the end, after (a) and (b) something like: "unless doing so would itself be impracticable or contrary to the public interest."



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- 138 substance of the rule or the agency’s finding that notice-and-comment rulemaking
139 is impracticable or contrary to the public interest;
- 140 e. Explains that the agency will consider any comments that it receives in response
141 to the interim final rule;
- 142 f. As applicable, sets forth the agency’s plans for supplemental public engagement
143 (see Paragraph 11) and solicits public input on those public engagement plans;
- 144 g. Explains that the rule is being adopted without prior notice and comment,
145 specifies the date upon which the rule will take effect, and identifies the rule’s
146 expiration date if applicable; and
- 147 h. Specifies that the agency will consider the comments and issue a new final rule
148 that reaffirms, modifies, or withdraws the interim final rule (see Paragraph 9).
- 149 9. An agency should reaffirm, modify, or withdraw an interim final rule by publishing a
150 new final rule in the *Federal Register* that responds to all significant comments.
151 Consistent with agency resources and priorities, an agency should publish the new final
152 rule as expeditiously as possible and should prioritize rules that are considered
153 “[s]ignificant regulatory actions” under Executive Order 12,866 as amended by
154 Executive Order 14,094.

Supplemental Public Engagement

- 155 10. When appropriate, an agency should use supplemental forms of public engagement,
156 including those identified in Recommendation 2018-7, *Public Engagement in*
157 *Rulemaking*, before invoking the good cause exemption when such engagement would
158 help the agency (a) determine if notice-and-comment rulemaking is unnecessary,
159 impracticable, or contrary to the public interest or (b) develop the rule. The agency
160 should explain in the direct or interim final rule what supplemental public engagement
161 the agency undertook.
- 162 11. An agency should consider using supplemental forms of public engagement after issuing
163 an interim final rule. Consistent with Executive Order 13,563 and Recommendation
164 2021-2, *Periodic Retrospective Review*, an agency should prioritize for retrospective

Commented [BB6]: Added sunset date language to this subparagraph. (The committee previously included this as a separate subparagraph.)

Commented [BB7]: Clarify 8.h. re: Andrew’s and others’ comments

Commented [BB8]: Revised consistent with the committee’s direction.

Commented [BB9]: Revised consistent with the committee’s direction.

Also, at committee meeting #5, the committee debated whether to provide a specific period of time by which agencies must issue a new rule. Suggested time periods included 18 months and 3 years.

Commented [BB10]: Jeff/Ron: consider preamble addition re: agencies should only do good cause rules where actual good cause; conference is concerned about lack of follow up on IFRs

Commented [BB11]: Comment from Government Member Alex Goodenough:

This recommendation seems impracticable in most cases when the agency has determined that the IFR addresses an “emergency situation[.]” or “where delay could result in serious harm.” *Am. Pub. Gas Ass’n v. United States Dep’t of Energy*, 72 F.4th 1324, 1340 (D.C. Cir. 2023) (quotation marks omitted). Likewise, the issuance of an RFI or an ANPRM before promulgating an IFR seems counterintuitive where the agency has determined that the notice and comment “would defeat the purpose of the proposal,” such as when “announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.” *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012) (quotation marks omitted).

Commented [BB12]: Comment from Senior Fellow Michael E. Herz:

This paragraph is limited to situations where an agency issues a DFR or IFR. But an agency might rely on the good cause exception and not issue a DFR or IFR. In those circumstances, might supplemental public engagement still be appropriate? As written, it’s double or nothing: agencies should either (a) ignore the public altogether or (b) go the supplemental engagement route *and* the DFR/IFR route. Perhaps situation (a) is a highly rare, special subset where public input just doesn’t matter. But the basic point that supplemental engagement might be helpful, including ... [1]

Commented [BB13]: Revised consistent with committee’s direction.



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165 review interim final rules that are significant regulatory actions under Executive Order
166 12,866 as amended by Executive Order 14,094. An agency should explain in any
167 subsequent final rule what supplemental public engagement the agency undertook.
168 11.12. Consistent with Recommendation 2014-4, “*Ex Parte*” Communications in
169 *Informal Rulemaking*, an agency should disclose ex parte communications that occur
170 during supplemental public engagement. For purposes of applying Recommendation
171 2014-4, an interim final rule should be considered the equivalent of a notice of proposed
172 rulemaking.

Commented [BB14]: Revised consistent with committee’s direction to refer solely to ex parte recommendation.

Comment from Senior Fellow Michael E. Herz:

This paragraph is limited to situations where an agency issues a DFR or IFR. But an agency might rely on the good cause exception and not issue a DFR or IFR. In those circumstances, might supplemental public engagement still be appropriate? As written, it's double or nothing; agencies should either (a) ignore the public altogether or (b) go the supplemental engagement route *and* the DFR/IFR route. Perhaps situation (a) is a highly rare, special subset where public input just doesn't matter. But the basic point that supplemental engagement might be helpful, including in determining whether there is good cause, would seem to apply even if the agency is going to skip n&c and not issue a DFR or IFR.

If that's right, the easiest fix would be to replace "issuing a direct or final rule" with "invoking the good cause exception" in lines 154-55. Then in line 161 replace "direct or interim final rule" with "final rule" or "direct, interim, or other final rule"