



Public Engagement in Agency Rulemaking Under the Good Cause Exemption

Committee on Rulemaking

Proposed Recommendation from 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]y
5 providing opportunities for public input and dialogue, agencies can obtain more comprehensive
6 information, enhance the legitimacy and accountability of their decisions, and increase public
7 support for their rules.”¹ The Administrative Procedure Act (APA) recognizes the value of public
8 participation in rulemaking by generally requiring agencies to publish a notice of proposed
9 rulemaking in the *Federal Register* and provide interested persons an opportunity to provide
10 written comments on rulemaking 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.³ 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).

³ *Id.* § 553(b)(B).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

18 impeded by the notice otherwise required [by the APA].”⁴ 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.⁵ 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.”⁶

24 The Conference has long encouraged robust public participation in agency rulemaking
25 and has identified effective methods for engaging with the public outside of, and to supplement,
26 the notice-and-comment process.⁷ The fact that *notice and comment* is unnecessary,
27 impracticable, or contrary to the public interest does not mean that *no* public engagement is
28 appropriate. Indeed, such engagement may be especially important precisely because standard
29 notice and comment is not occurring. And such engagement can also help agencies determine
30 whether the good cause exemption is applicable.

31 Of course, the same factors that make a comment period inappropriate may weigh equally
32 against other types of public engagement as well. Neither the agency nor the public is well
33 served by needless or counterproductive efforts to engage the public. Such circumstances are
34 rare, however. The goal of this recommendation is to identify ways in which agencies can
35 meaningfully and usefully engage the public even when relying on the good cause exception.

36 Agencies engage with the public in a variety of ways when invoking the good cause
37 exemption. The two primary rulemaking mechanisms are usually referred to as direct final

⁴ *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).

⁵ *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).

⁶ *Mack Trucks, Inc.*, 682 F.3d at 95.

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

38 rulemaking and interim final rulemaking.⁸ When notice and comment is unnecessary, agencies
39 sometimes use direct final rulemaking, in which the agency simultaneously publishes a final rule
40 and solicits comments on it, with the rule going into effect only if no significant adverse
41 comments are received. When notice and comment is impracticable or contrary to the public
42 interest, agencies sometimes use interim final rulemaking, in which they request public comment
43 on a final rule at the same time the rule is published for the purpose of deciding whether to
44 reaffirm, modify, or replace the published rule in light of those comments. Agencies sometimes
45 also use other, more informal procedures—including publishing requests for information,
46 engaging in targeted outreach, and convening listening sessions with interested persons—when
47 they invoke the good cause exemption.

48 The Conference has addressed direct final rulemaking and interim final rulemaking in
49 prior recommendations. In Recommendation 83-2, *The “Good Cause” Exemption from APA*
50 *Rulemaking Requirements*, the Conference encouraged agencies to “provide a post-promulgation
51 comment opportunity for rules they adopt under the good cause exemption.”⁹ In
52 Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, the
53 Conference recommended that agencies “use direct final rulemaking in all cases where the
54 ‘unnecessary’ prong of the good cause exemption is available, unless the agency determines that
55 the process would not expedite issuance of such rules,” and provided best practices for doing so.
56 In Recommendation 95-4, the Conference recommended that agencies use interim final
57 rulemaking when they conclude that using notice-and-comment procedures would be
58 “impracticable” or “contrary to the public interest,” and provided best practices for doing so.

59 The Conference is revisiting the topic of public engagement in rulemaking under the
60 good cause exemption for two reasons. First, best practices for public engagement have become

⁸ 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.

⁹ 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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

61 increasingly important as agencies rely more frequently on the good cause exemption.¹⁰ Second,
62 there have been legal developments since 1995, particularly a 2020 decision by the Supreme
63 Court on interim final rulemaking.¹¹

64 Based on a reexamination of agency rulemaking practices under the good cause
65 exemption,¹² this Recommendation identifies best practices for enhancing public engagement in
66 rulemaking under the good cause exemption, particularly when agencies use direct final
67 rulemaking and interim final rulemaking. It also encourages agencies to use alternative
68 methods—such as publishing requests for information, engaging in targeted outreach, convening
69 listening sessions with interested persons, and soliciting post-adoption comments—to reap the
70 benefits of robust public participation even when they rely properly on the good cause
71 exemption. These recommendations constitute policy recommendations to agencies and are not
72 intended to reduce legal risk. Recommendations 83-2 and 95-4 are superseded to the extent that
73 they recommend public engagement practices that are inconsistent with this recommendation.

RECOMMENDATION

Direct Final Rulemaking

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

¹⁰ 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).

¹¹ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020).

¹² 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

- 81 a. Identifies the rule as a “direct final rule”;
- 82 b. Provides a brief statement explaining the basis for the agency’s finding that it is
- 83 unnecessary to undertake notice-and-comment rulemaking;
- 84 c. Provides a statement of the rule’s basis and purpose and explains the issues the
- 85 agency considered in developing the rule;
- 86 d. Provides a period of at least 30 days during which interested persons may submit
- 87 comments regarding the substance of the rule or the agency’s finding that notice-
- 88 and-comment rulemaking is unnecessary;
- 89 e. Explains that the agency will withdraw the direct final rule if it receives any
- 90 significant adverse comments and specifies any additional actions that the agency
- 91 may take if it withdraws the direct final rule;
- 92 f. Specifies when the rule will take effect if the agency receives no significant
- 93 adverse comments;
- 94 g. If applicable, specifies whether the agency will issue a subsequent notice in the
- 95 *Federal Register* confirming that the agency received no significant adverse
- 96 comments (see Paragraph 5); and
- 97 h. Identifies any companion proposed rule, as described in Paragraph 3.
- 98 3. When an agency issues a direct final rule, it may consider publishing in the same issue of
- 99 the *Federal Register* a companion proposed rule that will serve as a notice of proposed
- 100 rulemaking if the agency later withdraws the direct final rule upon receiving any
- 101 significant adverse comments. In the event the agency receives significant adverse
- 102 comments, the agency should consider providing an additional period for public
- 103 comment.
- 104 4. An agency should consider any comment received during direct final rulemaking to be a
- 105 significant adverse comment if the comment explains why:
- 106 a. The rule would be inappropriate, including challenges to the rule's underlying
- 107 premise or approach; or
- 108 b. The rule would be ineffective or unacceptable without a change.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 109 5. The agency should provide that a direct final rule will take effect at least 30 days after the
110 close of the comment period if the agency receives no significant adverse comments or at
111 least 30 days after publication of a subsequent notice in the *Federal Register* confirming
112 that the agency received no significant adverse comments. An agency that does not
113 publish a confirmation notice should consider providing an effective date greater than 30
114 days after the close of the comment period if the agency believes it is necessary to ensure
115 that it has adequate time to withdraw the rule in the event it receives significant adverse
116 comment.
- 117 6. If the agency receives any significant adverse comments or otherwise decides to
118 withdraw the direct final rule before it takes effect, the agency should publish a notice in
119 the *Federal Register* that states that the agency is withdrawing the direct final rule and
120 describes any further rulemaking the agency will conduct on the matter. If the agency
121 previously requested comments in a companion proposed rule as described in Paragraph
122 3, the agency may proceed with notice-and-comment rulemaking consistent with the
123 proposed rule.

Interim Final Rulemaking

- 124 7. An agency is encouraged to use interim final rulemaking when it:
- 125 a. For good cause finds that it is “impracticable” to undertake notice-and-comment
126 rulemaking; or
 - 127 b. For good cause finds that it is “contrary to the public interest” to undertake notice-
128 and-comment rulemaking.
- 129 8. When an agency uses interim final rulemaking, it should publish in the *Federal Register*
130 a rule that:
- 131 a. Identifies the rule as an “interim final rule”;
 - 132 b. Provides a brief statement explaining the basis for the agency’s finding that is
133 “impracticable” or “contrary to the public interest” to undertake notice-and-
134 comment rulemaking;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 135 c. Provides a statement of the rule’s basis and purpose and explains the issues the
136 agency considered in developing the rule;
- 137 d. Provides a period of at least 30 days (or in most cases 60 days for a “[s]ignificant
138 regulatory action” under Executive Order 12,866 as amended by Executive Order
139 14,094) during which interested persons may submit comments regarding the
140 substance of the rule or the agency’s finding that notice-and-comment rulemaking
141 is impracticable or contrary to the public interest;
- 142 e. Explains that the agency will consider any comments that it receives in response
143 to the interim final rule;
- 144 f. As applicable, sets forth the agency’s plans for supplemental public engagement
145 (see Paragraph 11) and solicits public input on those public engagement plans;
- 146 g. Explains that the rule is being adopted without prior notice and comment,
147 specifies the date upon which the rule will take effect, and identifies the rule’s
148 expiration date if applicable; and
- 149 h. Specifies that the agency will consider the comments and complete the
150 rulemaking by reaffirming, modifying, or withdrawing the interim final rule (see
151 Paragraph 9).
- 152 9. An agency should complete the interim final rulemaking by publishing a new final rule in
153 the *Federal Register* that responds to all significant comments and reaffirms, modifies, or
154 withdraws the interim final rule as appropriate. Consistent with agency resources and
155 priorities, an agency should publish the new final rule as expeditiously as possible and
156 should prioritize rules that are considered “[s]ignificant regulatory actions” under
157 Executive Order 12,866 as amended by Executive Order 14,094.

Supplemental Public Engagement

- 158 10. When appropriate, an agency should use supplemental forms of public engagement,
159 including those identified in Recommendation 2018-7, *Public Engagement in*
160 *Rulemaking*, before invoking the good cause exemption when such engagement would
161 help the agency (a) determine if notice-and-comment rulemaking is unnecessary,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 162 impracticable, or contrary to the public interest or (b) develop the rule. The agency
163 should explain in the direct or interim final rule what supplemental public engagement
164 the agency undertook.
- 165 11. An agency should consider using supplemental forms of public engagement after issuing
166 an interim final rule. Consistent with Executive Order 13,563 and Recommendation
167 2021-2, *Periodic Retrospective Review*, an agency should prioritize for retrospective
168 review interim final rules that are significant regulatory actions under Executive Order
169 12,866 as amended by Executive Order 14,094. An agency should explain in any
170 subsequent final rule what supplemental public engagement the agency undertook.
- 171 12. Consistent with Recommendation 2014-4, *“Ex Parte” Communications in Informal*
172 *Rulemaking*, an agency should disclose ex parte communications that occur during
173 supplemental public engagement. For purposes of applying Recommendation 2014-4, an
174 interim final rule should be considered the equivalent of a notice of proposed rulemaking.