



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2024-6

Public Engagement in Agency Rulemaking Under the Good Cause Exemption

Adopted December 12, 2024

Public participation plays an essential role in agency rulemaking. Agencies facilitate such participation through public engagement activities designed to elicit input from the public, including efforts to enhance public understanding of the rulemaking process and foster meaningful public participation in it. As the Administrative Conference has recognized, “[b]y providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.”¹ The Administrative Procedure Act (APA) recognizes the value of public participation in rulemaking by generally requiring agencies to publish a notice of proposed rulemaking in the *Federal Register* and provide interested persons an opportunity to submit written comments on rulemaking proposals.²

However, notice-and-comment procedures can be time-consuming and resource-intensive, and there are circumstances in which the costs of those procedures may outweigh their benefits in terms of public participation. For this reason, the APA permits agencies to forgo notice-and-comment procedures when, among other reasons, they find for “good cause” that such procedures would be “impracticable, unnecessary, or contrary to the public interest” and they incorporate this finding and “a brief statement of reasons” for it in their rules.³ Notice and comment may be “impracticable” when an agency “finds that due and timely execution of its

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).



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functions would be impeded by the notice otherwise required [by the APA].”⁴ Notice and comment may be “unnecessary” when a rule is “a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public”⁵ or when the agency lacks discretion regarding the substance of the rule.⁶ And notice and comment may be “contrary to the public interest” in “the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest.”⁷

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.⁸ 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 weigh equally against other types of public engagement as well. Neither the agency nor the public is well served by needless 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 relying on the good cause exemption.

Agencies engage with the public in a variety of ways when invoking the good cause 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 755).

⁶ *Metzenbaum v. Fed. Energy Regul. Comm’n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982).

⁷ *Mack Trucks, Inc.*, 682 F.3d at 95.

⁸ *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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rulemaking and interim final rulemaking.⁹ When notice and comment is unnecessary, agencies sometimes use direct final rulemaking, in which the agency simultaneously publishes a final rule and solicits comments on it, with the rule going into effect only if no significant adverse comments are received. When notice and comment is impracticable or contrary to the public interest, agencies sometimes use interim final rulemaking, in which, at the same time the rule is published, they request public comment on a final rule for the purpose of deciding whether to reaffirm, modify, or replace the published rule in light of those comments. Agencies sometimes also use other, more informal procedures—including publishing requests for information, engaging in targeted outreach, and convening listening sessions with interested persons—when they invoke the good cause exemption.

The Conference has addressed direct final rulemaking and interim final rulemaking in prior recommendations. In Recommendation 83-2, *The “Good Cause” Exemption from APA Rulemaking Requirements*, the Conference encouraged agencies to “provide a post-promulgation comment opportunity for rules they adopt under the good cause exemption.”¹⁰ In Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, the Conference recommended that agencies “use direct final rulemaking in all cases where the ‘unnecessary’ prong of the good cause exemption is available, unless the agency determines that the process would not expedite issuance of such rules,” and provided best practices for doing so.¹¹ In Recommendation 95-4, the Conference recommended that agencies use interim final rulemaking when they conclude that using notice-and-comment procedures would be “impracticable” or “contrary to the public interest,” and provided best practices for doing so.¹²

⁹ 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.

¹⁰ 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).

¹¹ Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Aug. 18, 1995).

¹² *Id.*



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The Conference is revisiting the topic of public engagement in rulemaking under the good cause exemption for two reasons. First, best practices for public engagement have become increasingly important as agencies rely more frequently on the good cause exemption.¹³ Second, there have been legal developments since 1995, particularly a 2020 decision by the Supreme Court on interim final rulemaking.¹⁴

Based on a reexamination of agency rulemaking practices under the good cause exemption,¹⁵ this Recommendation identifies best practices for enhancing public engagement in rulemaking under the good cause exemption, particularly when agencies use direct final rulemaking and interim final rulemaking. It also encourages agencies to use alternative methods—such as publishing requests for information, engaging in targeted outreach, convening listening sessions with interested persons, and soliciting post-adoption comments—to reap the benefits of robust public participation even when they rely properly on the good cause exemption. Recommendations 83-2 and 95-4 are superseded to the extent that they recommend public engagement practices that are inconsistent with this Recommendation.

RECOMMENDATION

Direct Final Rulemaking

1. Except in the rare instance that an agency determines that direct final rulemaking would not expedite issuance of a rule, an agency should use direct final rulemaking when it:
 - a. For good cause finds that it is “unnecessary” to undertake notice-and-comment rulemaking; and
 - b. Concludes that the rule is unlikely to elicit any significant adverse comments.

¹³ 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. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016).

¹⁴ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 683 (2020).

¹⁵ See Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rulemaking (Dec. 4, 2024) (report to the Admin. Conf. of the U.S.).



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2. When an agency uses direct final rulemaking, it should publish in the *Federal Register* a rule that:
 - a. Identifies the rule as a “direct final rule”;
 - b. Provides a brief statement explaining the basis for the agency’s finding that it is unnecessary to undertake notice-and-comment rulemaking;
 - c. Provides a statement of the rule’s basis and purpose and explains the issues the agency considered in developing the rule;
 - d. Provides a period of at least 30 days during which interested persons may submit comments regarding the substance of the rule;
 - e. Explains that the agency will withdraw the direct final rule if it receives any significant adverse comments and specifies any additional actions that the agency may take if it withdraws the direct final rule;
 - f. Specifies when the rule will take effect if the agency receives no significant adverse comments (see Paragraph 5);
 - g. If applicable, specifies whether the agency will issue a subsequent notice in the *Federal Register* confirming that the agency received no significant adverse comments (see Paragraph 5); and
 - h. Identifies any companion proposed rule, as described in Paragraph 3.
3. When an agency issues a direct final rule, it may consider publishing in the same issue of the *Federal Register* a companion proposed rule that will serve as a notice of proposed rulemaking if the agency later withdraws the direct final rule upon receiving any significant adverse comments. In the event the agency receives significant adverse comments, the agency should consider providing an additional period for public comment on the companion proposed rule.
4. An agency should consider any comment received during direct final rulemaking to be a significant adverse comment if the comment explains why:
 - a. The rule would be inappropriate, including challenges to the rule’s underlying premise or approach; or
 - b. The rule would be ineffective or unacceptable without a change.



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5. Absent exceptional circumstances for providing a different effective date, the agency should provide that a direct final rule will take effect at least 30 days after the close of the comment period if the agency receives no significant adverse comments or at least 30 days after publication of a subsequent notice in the *Federal Register* confirming that the agency received no significant adverse comments. 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 comments.
6. If the agency receives any significant adverse comments or otherwise decides to withdraw the direct final rule before it takes effect, the agency should publish a notice in the *Federal Register* that states that the agency is withdrawing the direct final rule and describes any further rulemaking the agency will conduct on the matter. If the agency previously requested comments in a companion proposed rule as described in Paragraph 3, the agency may proceed with notice-and-comment rulemaking consistent with the proposed rule.

Interim Final Rulemaking

7. An agency is encouraged to use interim final rulemaking when it for good cause finds that it is “impracticable” or “contrary to the public interest” to undertake notice-and-comment rulemaking.
8. When an agency uses interim final rulemaking, it should publish in the *Federal Register* a rule that:
 - a. Identifies the rule as an “interim final rule”;
 - b. Provides a brief statement explaining the basis for the agency’s finding that is “impracticable” or “contrary to the public interest” to undertake notice-and-comment rulemaking;
 - c. Provides a statement of the rule’s basis and purpose and explains the issues the agency considered in developing the rule;



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- d. Provides a period of at least 30 days (or in most cases at least 60 days, in particular for “major rules” as defined in the Congressional Review Act) during which interested persons may submit comments regarding the substance of the rule or the agency’s finding that notice-and-comment rulemaking is impracticable or contrary to the public interest;
 - e. Explains that the agency will consider any comments that it receives in response to the interim final rule;
 - f. As applicable, sets forth the agency’s plans for supplemental public engagement (see Paragraph 11) and solicits public input on those public engagement plans;
 - g. Explains that the rule is being adopted without prior notice and comment, specifies the date upon which the rule will take effect, and identifies the rule’s expiration date if applicable; and
 - h. Specifies that the agency will consider the comments and complete the rulemaking by reaffirming, modifying, or withdrawing the interim final rule (see Paragraph 9).
9. An agency should conclude the interim final rulemaking by publishing a new final rule in the *Federal Register* that responds to all significant comments and reaffirms, modifies, or withdraws the interim final rule as appropriate. Consistent with agency resources and priorities, an agency should publish the new final rule as expeditiously as possible and should prioritize “major rules” as defined in the Congressional Review Act.

Additional Public Engagement

10. When appropriate, an agency should use additional forms of public engagement, including those identified in Recommendation 2018-7, *Public Engagement in Rulemaking*, before considering whether to invoke the good cause exemption when such engagement would help the agency (a) determine if notice-and-comment rulemaking is unnecessary, impracticable, or contrary to the public interest or (b) develop the rule. The agency should explain in the direct or interim final rule what additional public engagement the agency undertook.



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11. An agency should consider using supplemental forms of public engagement after issuing an interim final rule. Consistent with Executive Order 13,563 and Recommendation 2021-2, *Periodic Retrospective Review*, an agency should prioritize for retrospective review interim final rules that are “major rules” as defined in the Congressional Review Act. An agency should explain in any subsequent final rule what supplemental public engagement the agency undertook.
12. Consistent with Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*, an agency should disclose ex parte communications that occur during supplemental public engagement. For purposes of applying Recommendation 2014-4, an interim final rule should be considered the equivalent of a notice of proposed rulemaking.