

# ARTICLES

## INTERIM-FINAL RULES: MAKING HASTE SLOWLY

MICHAEL ASIMOW\*

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\* Professor of Law, UCLA Law School. The author appreciates the guidance provided by Tim Bober, Arthur Bonfield, Daniel Cohen, Curtis Copeland, Edwin Dutra, Neil Eisner, John Golden, Eleanor D. Kinney, Ronald Levin, Jeffrey Lubbers, Tim Malloy, Lars Noah, and Thomas Sargentich, and the research assistance of Marc Koonin, Diana Ponce-Gomez, and Ethan Walsh. Numerous agency staff members talked to the author about the subjects discussed in this Article but asked not to be named. I deeply appreciate their contributions.

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## INTRODUCTION

Interim-final rules<sup>1</sup> are rules adopted by federal agencies *that become effective without prior notice and public comment and that invite post-effective public comment*. The adopting agency dispenses with pre-effective notice and comment in reliance on an exception to the Administrative Procedure Act's (APA's) normal rulemaking requirements.<sup>2</sup> Often, but not always, the agency relies on the APA provision excusing prior notice and comment on the basis that there is good cause to believe that such procedures would be impracticable or contrary to the public's interest.<sup>3</sup> The adopting agency declares that it will consider post-effective public comments, will modify the rule in light of those comments, and will then adopt a final rule.<sup>4</sup> Thus an interim-final rule is an example of making haste slowly; the rule is effective immediately but it also serves as a notice of proposed rulemaking for the final rule that will supplant it. Interim-final rules have the same legal effect and are judicially reviewed in the same manner as any other final rules.<sup>5</sup>

1. The words "rule" and "regulation" are synonymous. The words are used interchangeably in common parlance and in this Article.

2. Administrative Procedure Act, 5 U.S.C. § 553 (1994) [hereinafter APA]. The APA will be referred to herein without the prefatory 5 U.S.C.

3. APA § 553(b)(B). The APA contains a second good cause exception. Under section 553(d)(3), the agency can shorten the normal 30-day pre-effectiveness period for good cause. Interim-final rules are normally effective immediately (that is, the agency relies on both of the good cause exceptions). Some interim-final rules dispense with prior notice and comment but are not immediately effective (that is, the agency relies on section 553(b)(3)(B) but not section 553(d)(3)). *See infra* note 55.

4. The final rule that supplants an interim-final rule is referred to herein as a final-final rule. *See infra* text accompanying note 7.

5. *See, e.g.,* Career College Ass'n v. Riley, 74 F.3d 1265, 1268 (D.C. Cir. 1996) (stating that interim-final rule is final for purposes of statute requiring adoption of final rule by statutory date). The D.C. Circuit has remarked that the agency cannot resist review of an interim rule on the theory that it is considering comments that could lead to a modification of the rule. *See* Competitive Telecomms. Ass'n v. FCC, 87 F.3d 522 (D.C. Cir. 1996).

The Commission can not expect to avoid judicial scrutiny so easily -- especially when the "interim" is measured in years and follows almost a decade of 'transition.' Indeed, even an interim rule expected to be in place for only a brief time is subject to review, or agencies would be free to act unreasonably for that time. . . . The proper judicial response to an interim rule is not to abdicate responsibility but rather to review it with the understanding that the agency may reasonably limit its commitment of resources to refining a rule with a short life expectancy.

This article uses the catchy but rather peculiar term “interim-final rules”<sup>6</sup> to refer to rules adopted without prior public participation that invite post-effective public participation. However, numerous other labels for such rules are in common use. Sometimes such rules are called “interim” or “temporary” rules or “final rules; comments requested.” Interim-final rules have become a generally-accepted and frequently-employed rulemaking technique in the federal administrative establishment.<sup>7</sup> This article also uses the inelegant term “final-final rule” to refer to the rule that supplants an interim-final rule. So far as is known, nobody else has ever used the term final-final (and probably no one ever will).

At the last plenary session before its tragic and untimely demise, the Administrative Conference of the United States (ACUS) adopted Recommendation 95-4 (ACUS Recommendation 95-4), Part II of which strongly endorsed interim-final rulemaking.<sup>8</sup> I prepared the consultant’s report that

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*Id.*, at 531 (citation omitted). *But see* Competitive Telecomms. Ass’n v. FCC, 117 F.3d 1068, 1073 (8th Cir. 1997) (suggesting interim rules are entitled to more than the usual degree of deference because they are a form of interim relief).

6. One district court referred to the phrase “interim-final” as an oxymoron. The court was uncertain whether the phrase meant that the rule was the final version of a rule that applied only for an interim period, or whether it was an interim version of a rule intended to apply indefinitely. *See* *Analysas Corp. v. Bowles*, 827 F. Supp. 20, 21 n.3 (D.D.C. 1993). This Article focuses on the latter type of rule. An interim-final rule is intended to apply indefinitely but has been adopted in an interim form that will be reconsidered and modified in light of public input. Another court referred to the designation as “maladroit” but held that those subject to it would understand that the rule was in fact binding although it would be modified in light of comments received. *See* *Career College Ass’n*, 74 F.3d at 1268.

7. The term “interim-final” has achieved general currency. The searches described in this note occurred on Westlaw on September 3, 1998 and covered the term “interim-final” with and without the hyphen. Courts have used the term in 283 opinions. Law journals and CLE materials have used the term in 613 articles. In the Federal Register, the term combined with various years appeared as follows:

- 1993 times when combined with “1991,”
- 2080 times when combined with “1992,”
- 2066 times when combined with “1993,”
- 2004 times when combined with “1994,”
- 1853 times when combined with “1995,”
- 1619 times when combined with “1996,”
- 1138 times when combined with “1997,”
- 642 times when combined with “1998” (up to Sept. 3).

The label “interim-final” seems to be giving way to “final rule; comments requested.” This change in taste probably explains the decline in use of the term “interim-final” from 1996 to 1998. The actual usage of the device is holding steady, not decreasing. *See infra* text accompanying notes 43-50.

8. ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110 (1995) [hereinafter ACUS Recommendation 95-4]. The full text of ACUS Recommendation 95-4 is attached as Appendix A. An earlier ACUS recommendation covered some of the same ground. ACUS Recommendation 83-2, The “Good

paved the way for the portion of ACUS Recommendation 95-4 relating to interim-final rules.<sup>9</sup> This Article reconsiders and updates that report.

This study does not consider (except incidentally) several other types of rules that are related to interim-final rules. For example, it does not consider “temporary” rules,<sup>10</sup> meaning ones that will be in effect only for a limited period, usually quite brief, before lapsing at a date set forth in the rule. It does not consider rules (even though they are also called interim-final), which are adopted after normal pre-adoption APA notice and comment procedure.<sup>11</sup> Nor does it consider direct final rules, which are adopted pursuant to the “unnecessary” prong of the APA’s good cause exception.<sup>12</sup>

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Cause” Exemption from APA Rulemaking Requirements, 48 Fed. Reg. 31,180 (1983) [hereinafter ACUS Recommendation 83-2], focuses on the good cause exception and calls for a post-promulgation comment opportunity when the impracticability or public interest prongs of the good cause exception are employed. The text of ACUS Recommendation 83-2 is attached as Appendix B.

9. The consultant’s report appears at 1994-95 ACUS Recommendations and Reports 477 (Asimow, ACUS Study). This Article does not necessarily reflect the views of either the staff or the members of ACUS. ACUS Recommendation 95-4 also dealt with the distinct subject of direct final rules, discussed *infra* note 12. Professor Ronald Levin prepared the consultant’s report relating to direct final rules. See Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995) (introducing “direct final rulemaking” variation on section 553 notice and comment rulemaking under the APA).

10. Some agencies, such as the Internal Revenue Service, use the term “temporary” to refer to rules that this Article describes as “interim-final.” See E. Norman Peterson Marital Trust v. Commissioner, 78 F.3d 795, 798 (2d Cir. 1996) (deciding that temporary tax regulations are entitled to same weight as final regulations); Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343 (1991) [hereinafter Asimow, *Temporary Tax Regulations*] (legal problems in Treasury’s use of temporary regulations)

11. See, e.g., Civil Penalties for Fair Housing Act Violations, 64 Fed. Reg. 6,744 (to be codified at 24 C.F.R. pt. 180) (discussing interim regulations governing hearing procedures for civil rights matters). This type of rule is employed when a final rule diverges significantly from the proposed version. Rather than return to square one with a re-proposed rule, the agency adopts an interim-final rule, requesting comment on the portion of the final rule that varies from the proposed rule.

The agency may genuinely want public input on the new approach taken in the final rule. It may also fear that the public did not receive adequate notice with respect to the change; it hopes that the opportunity for post-adoption comment might cure the procedural defect. See, e.g., Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994) (holding that when interim rule contains important change not mentioned in proposed rule, the interim rule is invalid). Part III, *infra*, discusses whether post-adoption comment on a rule adopted without any prior notice and comment might validate the rule despite failure to meet the standards of the good cause exception.

12. An agency publishes a direct final rule in the Federal Register with a notice that explains that the rule will become effective at a future date (often in 60 days), unless, by a deadline date (often 30 days), any person has filed adverse or negative comments (or in some versions has signified an intention to do so). If such notice is received, the agency withdraws the direct final rule, republishes it as a proposed rule, and goes through the usual notice and comment pro-

Part I of this Article discusses the reasons why agencies use interim-final rules and documents their increasing usage. Part II discusses a number of legal issues arising out of the use of interim-final rules. It considers both problems arising under the APA and under other statutes that impose procedural constraints on the rulemaking process. Part III discusses ACUS Recommendation 95-4 and makes some additional policy recommendations.

## I. INTERIM-FINAL RULES IN FEDERAL ADMINISTRATIVE PRACTICE

### A. *Why Agencies Use Interim-Final Rules*

Interim-final rules can, where legally authorized, strike a pragmatic compromise between the costs and delays inherent in complying with the various statutory constraints on the rulemaking process and the public benefits that accrue from complying with those provisions. The familiar APA rulemaking provisions call for agencies that contemplate the adoption of a rule to give notice of the proposed rule, invite public comments, consider the comments, and only then adopt a final rule that includes a statement of basis and purpose.<sup>13</sup> The rule becomes effective no earlier than thirty days after it is adopted.<sup>14</sup>

The public benefits of pre-adoption public participation are well recognized.<sup>15</sup> Public input provides valuable information to rulemaking agencies at low cost to the agencies. Rules adopted with public participation are

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cedure. In many cases, the agency publishes the direct final rule and a proposed rule at the same time so that if anyone objects to the direct final rule, the agency is prepared immediately to switch to the proposed rule track.

Direct final rules are a useful and efficient innovation. They allow an agency to dispense with public comment and the attendant expense and delay when nobody is interested in commenting. The direct final approach provides assurance that it really was "unnecessary" to invite public comments. Such rules are now quite heavily used. *See* Levin, *supra* note 9; GENERAL ACCOUNTING OFFICE, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES, 14-16 (1998) [hereinafter GAO Study] (concluding that agencies have good cause for not obtaining unnecessary comments); OFFICE OF THE VICE PRESIDENT, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: IMPROVING REGULATORY SYSTEMS 42-44 (1993) (recommending greater use of direct final rulemaking). *But see* Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401 (1999) (questioning both the legality and utility of direct final rules). Professor Levin has responded to Noah's critique. Ronald Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999).

13. APA § 553(b), (c).

14. APA § 553(d).

15. *See, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 260-66 (3d ed. 1994) (analyzing the many advantages of rulemaking procedures that produce higher quality rules).

likely to be more effective and less costly to administer than rules written without such participation. They contain fewer mistakes. They are more likely to deal with unexpected and unique applications or exceptional situations, and are more politically acceptable to the persons who must live with them.

Beyond these utilitarian calculations, notice and comment procedures serve fundamental democratic purposes. An agency that adopts rules makes new law without direct accountability to the voters. Notice and comment procedure is a surrogate political process. It helps to alleviate the undemocratic character of agency rulemaking and enhances the legitimacy of the process. It provides a channel that allows interested persons to exercise political power by indicating mass opposition to a proposed rule. Notice and comment also enhances the ability of Congress and the President to provide oversight of the rulemaking process.<sup>16</sup>

However, APA rulemaking procedure is commonly perceived as becoming ever more cumbersome and costly.<sup>17</sup> Consequently, agencies typically take advantage of the APA rulemaking exceptions when they are available.<sup>18</sup> The exception most pertinent to this Article is the "good cause" exception. Under the good cause exception, no pre-adoption procedures are required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>19</sup> This study focuses on interim-final rules

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16. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (arguing that administrative procedures facilitate legislative oversight of rulemaking).

17. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (analyzing rulemaking process 20 years after dawning of era); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 73-75 (1995) (evaluating series of changes in legal doctrines having the potential to deossify agency rulemaking).

18. The APA rulemaking provisions are inapplicable to military and foreign affairs functions, to matters relating to agency management or personnel, and to public property, loans, grants, benefits, or contracts. APA § 553(a). They are also inapplicable to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. APA § 553(b)(A).

19. *Id.* § 553(b)(B). See generally Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113 (1984) (analyzing good cause exception); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317 (1989) (same); Layne M. Campbell, Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act*, 1980 BYU L. REV. 93 (1980) (same); Catherine J. Lanctot, Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 GEO. L.J. 765 (1980)

adopted without prior public participation under the impracticable or public interest prongs of the good cause exemption.<sup>20</sup>

Here are some examples of interim-final rules adopted in December 1997, under authority of the APA's good cause exemption:

- The Animal and Plant Inspection Service of the Department of Agriculture added seventy-eight quarantined counties to the pine shoot beetle regulations.<sup>21</sup>
- The Environmental Protection Agency (EPA) suspended the imminent effective date of its ethylene oxide regulations because it had learned of explosions of equipment at EO facilities.<sup>22</sup>
- A Federal Aviation Administration (FAA) Airworthiness Directive required more frequent inspections of fuel pumps on the Boeing 747.<sup>23</sup>
- The Internal Revenue Service (IRS) and Department of Labor adopted regulations bringing mental health plans into parity with other group health plans because sponsors needed timely guidance to comply with recently adopted statutes.<sup>24</sup>

An agency's decision to rely on the APA's good cause exemption has consequences that extend well beyond dispensing with notice and comment. As discussed below,<sup>25</sup> at the interim-final rule stage an agency relying on the good cause exception is also excused from complying with the Regulatory Flexibility Act,<sup>26</sup> which requires preparation of statements detailing the impact of the rule on small business. The agency is also excused from the provisions of the Unfunded Mandates Reform Act that require it

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(same).

20. Thus this article does not discuss, except incidentally, interim-final rules adopted under APA exceptions other than the impracticability or public interest prongs of the good cause exemption. See, e.g., *Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995) (noting that interim rule was a general statement of policy and therefore could be revoked without notice and comment). Similarly, it does not cover, except incidentally, interim-final rules adopted after a pre-adoption notice and comment procedure, or rules adopted under the unnecessary prong of the good cause exemption, whether or not in the form of direct final rules. See *supra* notes 9 and 12. Nor does it discuss the APA's 30-day pre-effectiveness requirement which can also be dispensed with for good cause. See *supra* note 3.

21. See 7 C.F.R. § 301.51-1 (1999).

22. See 40 C.F.R. § 63.60 (1998).

23. See 14 C.F.R. pt. 39 (1999). Airworthiness Directives are discussed *infra* notes 45 and 136.

24. See 29 C.F.R. pt. 2590 (1998). The interim-final rule explained that insurers needed immediate guidance since they had to amend plans for plan years beginning only a week after adoption of the regulations. Normally, the good cause standard is not satisfied by the agency's need to supply guidance to regulated persons. See *infra* note 66.

25. See *infra* text accompanying notes 97-106.

26. 5 U.S.C. §§ 601-612 (1994 & Supp. III 1997).

to prepare cost-benefit analyses for certain significant regulatory actions.<sup>27</sup> Whether these statutes apply at the final-final rule stage is another matter to be discussed below.

Interim-final rules adopted under the good cause exemption strike a compromise between a perceived need for immediate adoption of a rule and the values of public participation and regulatory analysis. When it adopts an interim-final rule, an agency captures some, but not all, of the benefits of pre-adoption public comment.<sup>28</sup> It also captures some, but not all, of the cost and time savings of adopting a rule without any public participation or regulatory analysis at all.

An agency that chooses to rely on interim-final rules does so as the result of a two-step analytical process. First, the agency decides that it is legally entitled to adopt a rule without engaging in the normal process of pre-adoption public participation. Although several APA exceptions might apply, the occasion for adopting an interim-final rule is often the presence of some exigency that provides good cause for dispensing with public participation. In this situation, the agency staff and agency heads believe that a rule which they believe promotes their regulatory objectives should go into effect immediately (or at least much sooner than it could go into effect if notice and comment procedures were observed). This decision may arise from a genuine emergency or from a sincere and understandable desire to achieve regulatory objectives as quickly as possible. It may also arise from a desire to avoid or defer the various bureaucratic costs of engaging in the rulemaking process (particularly those incurred by reason of the solicitation and evaluation of public comments) and by compliance with the regulatory flexibility requirements.<sup>29</sup>

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27. 2 U.S.C. §§ 1501-1571, 658(a)-(g) (Supp. III 1997)

28. It seems likely that the quality of interim-final rules often suffers from the failure to utilize pre-adoption public input. Public comment typically improves a rule by pointing out overlooked problems or needed fine-tuning. In the ACUS study, I presented some anecdotal accounts of flawed interim-final rules. See Asimow, ACUS Study, *supra* note 9, at 494-96; see also Jordan, *supra* note 19, at 160-62 (describing cases in which interim rules would have benefited from prior comment).

29. Obviously a reader of the Federal Register finds it difficult to assess whether a particular interim-final rule arose out of a genuine emergency or from one of the other motivations mentioned in the text. This Article does not attempt to evaluate whether agency claims of good cause are sustainable. However, a recent GAO study cast considerable doubt on some of the good cause claims in the sample of rules adopted in 1997 without prior notice and comment. GAO study, *supra* note 12, at 21-23. For example, one rule claimed that good cause existed "because this rule will facilitate tourist and business travel to and from Slovenia." *Id.* at 22. Another stated that rules involving disaster assistance could be immediately adopted because "major disasters continue to occur." *Id.* at 23. Others claimed that rules had to be adopted immediately because of deadline pressure — but the deadlines had long since passed. See *id.* at 22.

Second, the agency decides that it should solicit post-effective comments and make a commitment to consider those comments at the time it makes the interim-final rule final. Note that this part of the agency's decision is not legally obligatory. Except where statutes require utilization of interim-final methodology,<sup>30</sup> an agency is never required to engage in further process after adopting a rule under the good cause exemption (or any other APA exemption). Solicitation of post-effective comments, consideration of such comments, preparation of a basis and purpose statement, and adoption of a final-final rule modifying the interim-final rule are all time consuming chores that an agency assumes voluntarily.

Given the realities that all agencies confront — busy staff, tight budgets, and a variety of competing priorities<sup>31</sup> — why would an agency make and follow through on a commitment to perform tasks that it is not legally required to perform?<sup>32</sup> Agencies may perceive that there is an important tactical reason for inviting post-effective comments, considering them, and moving to the final-final stage. The fact that the agency solicited and considered the post-effective comments in good faith might persuade a court that the agency's initial good cause claim was justified.<sup>33</sup>

In addition to this tactical consideration, agencies genuinely wish to adopt rules that are as effective, efficient, and widely accepted as possible. They are well aware that public commentary helps achieve these objectives by pointing out overlooked alternative approaches or other flaws in the rule and by increasing the extent to which commentators buy into the rule. Therefore, they are willing to shoulder the costs of soliciting and considering comments and revising the rule in light of the comments.

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30. See discussion *infra* notes 40 and 103.

31. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 404-09 (contending that requiring agencies to employ notice and comment procedures before adopting non-legislative rules would discourage adoption of such rules).

32. Of course, in some cases there is no follow-through; notwithstanding the promise to consider public comments, the interim-final rule lingers in limbo indefinitely. See *infra* text accompanying notes 43-50 and 124-37. However, in most cases of interim-final rules adopted under the good cause exception that produce a significant impact on non-governmental entities, the agency does follow through and moves to the final-final stage. Indeed, it could be argued that submission of comments on an interim-final rule is equivalent to a petition for amendment of a rule that would require at least a response by the agency. See *infra* text accompanying notes 34-38. As yet, there is no authority on this question.

33. See *infra* text accompanying notes 75-81. The fact that the agency followed through on its promise to consider comments and make the rule final may also be explained by the presence of strong staff work. At some agencies, all interim-final rules are tracked by computer and the general counsel's office periodically reminds the responsible staff members to finalize the process.

It could be argued that an invitation to the public to provide post-effective comment is superfluous because anyone has the right to petition for the issuance, amendment, or repeal of a rule.<sup>34</sup> Therefore, in a sense, no rule is ever really final; someone can always petition to change or repeal it and the agency has to consider and decide what to do with the petition.

However, in my view, interim-final methodology is much better than relying on the petition process as a way of dealing with problems that crop up in rules that were adopted without public participation. When an agency adopts an interim-final rule, it warrants that the process of public participation is continuing and that the rule is not yet set in concrete. All interested persons are invited to comment by a fixed date, and the agency explicitly agrees to consider those comments as part of the process of finalizing the rule. This invitation is likely to provoke significant public participation. In contrast, the opportunity to petition the agency lacks structure and is unlikely to provoke nearly as much public participation.<sup>35</sup> While the APA requires that agencies furnish prompt notice of the denial of a petition, together with a brief statement of the grounds for denial,<sup>36</sup> agency staff may regard petitioners as pests<sup>37</sup> and the responses to petitions for rulemaking are often long delayed and perfunctory.<sup>38</sup>

### B. Increasing Use of Interim-Final Rules

Interim-final rules have become part of the rulemaking routine.<sup>39</sup> Quite frequently, specific statutes authorize or even require an agency to adopt interim-final rules in order to set a new regulatory scheme in motion quickly.<sup>40</sup> Some agencies have routinized interim-final rules in their pro-

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34. See APA § 553(e); *Auer v. Robbins*, 519 U.S. 452, 458-59 (1997) (stating proper remedy for allegedly obsolete regulations is petition for rulemaking). See generally William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1 (1988) (examining existing petition procedures).

35. See Luneburg, *supra* note 34, at 58 (stating that there are few rulemaking petitions).

36. See APA § 555(e).

37. See Luneburg, *supra* note 34, at 26.

38. See *id.* at 15, 33-35 (concluding that delays may be caused by hope that problem will disappear or petitioner will lose interest); *id.* at 62-63 (discussing that petitions can be perceived as undesirable disruption of agency regulatory priorities).

39. See *supra* note 7; see also *infra* text accompanying notes 43-50; Timothy Stoltzfus Jost, *Governing Medicare*, 51 ADMIN. L. REV. 39, 92 (1999) (stating that most Medicare rules are now adopted in interim-final form).

40. Among the statutory provisions authorizing adoption of interim-final rules:

(a) The Secretary of the Treasury is authorized to promulgate interim-final rules concerning portability of group health plans. I.R.C. § 9833 (1999).

(b) The Federal Aviation Reauthorization Act, section 273, 49 U.S.C. § 45,301 (1994)

cedural regulations.<sup>41</sup> Some courts have mandated the use of interim-final methodology in order to prevent the collapse of a regulatory scheme.<sup>42</sup>

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& Supp. III 1997), authorized the FAA to adopt interim-final rules imposing fees on airlines that over fly the United States. *See Asiana Airlines v. FAA*, 134 F.3d 393, 396-99 (D.C. Cir. 1998) (discussing provision intended to override normal APA rulemaking requirements).

(c) The Emergency Planning and Community Right to Know Act authorized the adoption of interim-final rules concerning the threshold planning amounts of extremely hazardous substances. *See* 42 U.S.C. § 11,002(a)(3)(A)(i) (1994).

(d) The Residential Lead-Based Paint Hazard Reduction Act of 1992 provided for adoption of interim-final rules concerning occupational exposure to lead in the construction industry. *See* 42 U.S.C. § 4853 (1994).

(e) The Social Security Amendments of 1983, 97 Stat. 65, 168, authorized interim-final rules to implement the new Medicare prospective payment system. The statute prescribed time limits and effective dates for the rules. *See Methodist Hosp. v. Shalala*, 38 F.3d 1225, 1235-38 (D.C. Cir. 1994) (consequences of statutory adoption of interim-final procedure).

(f) A statute authorized interim rules to implement Medicaid expenditure reductions in 1981. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, *applied in* *Coalition of Mich. Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 457-59 (E.D. Mich. 1982).

(g) Under the Department of Energy Organization Act, the Department can adopt emergency rules but must provide notice, comment, and oral argument within a reasonable period after adopting the rules. *See* 42 U.S.C. § 7191(e) (1994 & Supp. III 1997).

(h) Emergency mine safety rules must be accompanied by a notice of proposed rulemaking. The agency has nine months to enact final rules. *See Federal Mine Safety and Health Act of 1977*, 30 U.S.C. § 811(b)(3) (1994).

(i) An appropriation provision legitimated existing EPA interim-final rules, thus mooted judicial review of their validity. *See Mobil Oil Corp. v. EPA*, 35 F.3d 579 (D.C. Cir. 1994) (holding that subsequent congressional action mooted judicial review).

(j) An exception to the anti-kickback Medicare rules calls for negotiated rulemaking followed by adoption of an interim-final rule to implement the negotiated rule. Act of Aug. 21, 1996, Pub. L. No. 104-191, § 216, 110 Stat. 1936, 2007 (codified at 42 U.S.C. § 1320a-7 (Supp. III. 1997)).

(k) EPA can grant a time-limited emergency exemption or tolerance from a pesticide regulation without prior notice and comment. Within 60 days after issuance, a person may file an objection to the exemption rule. As soon as practicable, EPA shall issue an order which can include revision to the regulation or order. This frequently used procedure appears to be a form of interim-final rule; I counted these provisions in my Federal Register survey of interim-final rules in the fourth quarter of 1997. *See Federal Food, Drug, and Cosmetic Act*, 21 U.S.C. § 346(l)(6), (g)(2) (1994 & Supp. III 1997).

In addition, President Clinton's proposed Health Security Act provided authority for several agencies to issue interim-final regulations, subject to change based on subsequent public comment. H.R. 4, 103d Cong. § 1911 (1993). *See Eleanor D. Kinney, Protecting Consumers and Providers Under Health Reform: An Overview of the Major Administrative Law Issues*, 5 HEALTH MATRIX 83, 118 (1995).

41. *See, e.g.*, 21 C.F.R. § 10.40(e)(1) (1998) (FDA).

42. *See Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (invalidating important regulatory scheme relating to hazardous wastes because final rule was not "logical out-

To document the prevalence of interim-final rules, I searched the Federal Register for four quarters: the first quarter of 1989, the third quarter of 1991, the second quarter of 1994, and the fourth quarter of 1997. I counted all interim-final rules I found. I excluded mere corrections, rules that expired by their own terms within a relatively short period of time, such as closure of a river for boating because of a fireworks show,<sup>43</sup> and rules which had previously been the subject of pre-effective notice and comment.<sup>44</sup> Then I tracked each of the interim-final rules adopted in those quarters of 1989, 1991, and 1994 to see whether that rule had been made final within three years after it was adopted.

In the first quarter of 1989, ninety-two interim-final rules were adopted. As of February 1992, forty-nine of these had been made final (with or without modifications), one had been dropped, and forty-two (or forty-six percent) remained outstanding as interim-final rules.<sup>45</sup>

In the third quarter of 1991, agencies adopted ninety interim-final rules, fifty had been made final as of November 1994, two were dropped, and

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growth" of proposed rule). The court in *Shell Oil* suggested the agency adopt an interim rule under the good cause exception, soliciting post-adoption public participation, to prevent a discontinuity in regulation. See *Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419, 427 (3d Cir. 1982) (declaring interim rule invalid; court delays its mandate six months to allow agency to adopt new rule); see also *United States Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981) (same); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 812-13 (9th Cir. 1980) (allowing invalidly adopted final-final rule to remain in effect pending comments to avoid regulatory disruption); *Federal Land Bank of Springfield v. Farm Credit Admin.*, 676 F. Supp. 1239, 1249-50 (D. Mass. 1987) (dictum) (stating that court might allow rule invalidly adopted under good cause exception to remain in effect as interim rule if effect of vacating it would be disruptive to regulatory scheme); David B. Chaffin, Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of United States Steel and Western Oil & Gas*, 1982 DUKE L.J. 461 (discussing some possible remedies for APA noncompliance).

43. Admittedly, this methodology is quite rough. Different quarters from different years may not be comparable to each other. For example, an end-of-the-year rush might lead agencies to use interim-final rules more extensively in the final calendar quarter of the year. Similarly, I did not count the number of rules issued with normal notice and comment; if the latter were rising rapidly, the percentage of rules adopted as interim-final rules might be declining rather than increasing as my methodology would suggest. Nevertheless, I believe my effort to count interim-final rules adopted in four different quarters of four different years at least reveals the prevalence of the device, the declining number of rules adopted under the good cause exception without inviting post-adoption comment, and the substantial number of interim-final rules that were not made final within a three year period.

44. See *supra* note 11.

45. A substantial number of the rules counted during each of these quarters were airworthiness directives of the FAA mandating particular safety checks on aircraft or air space directives reallocating specific locations between air space control regions. As pointed out, *infra* note 136, these interim-final rules never draw any comments and FAA does not bother to make them final. Arguably, these should be dropped from consideration.

thirty-eight (or forty-two percent) remained outstanding as interim-final rules. During that same quarter, forty-six final rules were adopted under the good cause exemption which did not seek post-promulgation comments.<sup>46</sup> Thus interim-final rules outnumbered final rules adopted under the good cause exemption by about two to one.<sup>47</sup>

In the second quarter of 1994, approximately 139 interim-final rules were adopted by about thirty agencies. Three years later, seventy-three remained as interim-final rules.<sup>48</sup> Only twelve rules were adopted under the impracticability or public interest prongs of the good cause exception without seeking post-effective comment.

In the fourth quarter of 1997, approximately 150 interim-final rules were adopted by more than thirty agencies. I found only five rules adopted as final rules under the impracticability or public interest prongs of the good cause exception without an invitation to submit post-promulgation comments.

Thus the utilization of interim-final rules seems to be holding steady or even increasing while the number of final rules adopted without an opportunity to comment has decreased sharply.<sup>49</sup> These conclusions were confirmed by a GAO study which estimated that between 350 and 400 interim-final rules were adopted in each of the years 1992 to 1997.<sup>50</sup>

### C. *Quality of Public Comments and Agency Receptivity to Making Changes*

In evaluating the arguments about the utility of interim-final methodology, a critical question is whether interim-final regulations attract as much public comment, and as thoughtful public comment, as a proposed regulation. When a rule has already gone into effect, some potential commentators may not bother to submit comments on it. They may assume that the rule is set in concrete, so it is not worth taking a lot of time or paying a pro-

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46. Eighteen of these were FAA airworthiness or air space directives. I did not count rules adopted under the "unnecessary" prong of good cause, only those under the "impracticable" or "contrary to the public interest" prongs.

47. Or better than three to one if airworthiness and air space directives are excluded.

48. However, of these 73, 50 were FAA airworthiness directives or air space regulations. See *supra* note 45. Of the rest, only eight were adopted under the impracticability or public interest prongs of the good cause exception. The other 15 were adopted under other exemptions.

49. The Federal Register study indicates that the use of the term "interim-final" is declining in favor of other labels such as "final rule; comments requested."

50. GAO study, *supra* note 12, at 15. The GAO study used somewhat different definitions than I did and thus may have counted fewer interim-final rules. In particular, it appears GAO did not count EPA pesticide tolerance rules as interim-final rules. *Id.* at 18; see *supra* note 40, at para. (k).

fessional to prepare comments on it. It may make more sense to just accept the rule as a *fait accompli* and accommodate to the rule. On the other hand, interim-final rules may elicit *more and better comments* than proposed rules since a rule that has already gone into effect may be taken more seriously by the persons affected by it than one that may never go into effect or will not go into effect for a long time.

Of course, it is difficult to offer any empirically-based answer to the question of whether interim-final rules attract greater or fewer comments than do proposed rules. There is no typical rule with respect to which one can compare the response rates based on whether the rule was interim-final or proposed. Indeed, proposed rules and interim-final rules may not be entirely comparable, because interim-final rules may be more tightly drafted with fewer alternative approaches or open-ended provisions than proposed rules.

I have asked a good many federal officials engaged in the rulemaking process for their opinion on this issue and the results are inconclusive. Some say there is no perceptible difference; others think that proposed rules draw more and better comments than interim-final rules. Still others say that it is difficult to make comparisons because proposed rules are more loosely drafted than interim-final rules and thus more likely to provoke comments and suggestions.

A related issue is whether an agency is more or less receptive to comments on interim-final than on proposed rules. Once an agency has decided on the definitive form of a new rule and the rule has actually gone into effect on an interim-final basis, agency personnel may be reluctant to make substantial alterations to the rule in response to comments. The staff may respond defensively, dismissing all but the most compelling (or the most trivial) comments as not worth the price of trying to fix the rule. They may be concerned that any changes could disappoint reliance interests or cause confusion among regulated parties or the enforcement staff.

Again, there is no way to know whether agency staff really treat post-effective comments more dismissively than pre-effective comments. The majority of the agency staff members I interviewed on this point believe that agencies are less responsive to comments on interim-final rules than on proposed rules. But the point should not be overstated. An agency tends to be reluctant to make changes in both proposed and interim-final rules. In either situation, the agency staff have made a substantial intellectual commitment to the rule and are naturally reluctant to tinker with it in response to comments from people that they tend to believe are much less informed (or much more biased) than they are.

## II. LEGAL ISSUES RELATING TO INTERIM-FINAL RULES

A. *The APA and Interim-Final Rules*1. *The Good Cause Exception*

In order to dispense with pre-adoption public participation, an agency must qualify under an APA rulemaking exception. Absent such an exception, a rule adopted with post- rather than pre-adoption notice and comment is procedurally invalid. There is, in other words, no APA exception for interim-final rules.<sup>51</sup> Prevailing judicial doctrine holds that post-adoption procedure is inferior to pre-adoption procedure and the defect is not harmless error.<sup>52</sup>

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51. I have been told that interim-final rules are used so frequently that some government employees think there is a special APA exception for them.

52. As the Fifth Circuit said in support of the general rule:

EPA argues that even if it was obliged to afford opportunity for § 553 notice and comment before making the designations, its failure to do so was cured by its acceptance of comments after the effective date. The argument mixes notions of mootness, harmless error, and minimal injury to petitioners. While the substantial public health interests involved give these arguments some surface appeal, accepting them would lead in the long run to depriving parties affected by agency action of any way to enforce their § 553 rights to pre-promulgation notice and comment.

Essentially the argument is that despite its lack of literal compliance with § 553 the EPA satisfied the intent of § 553 by accepting post-promulgation comments and keeping an open mind about revisions. The EPA overlooks, however, the crucial difference between comments before and after rule promulgation. Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas . . . . Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.

United States Steel Corp. v. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979) (concluding invitation for post-promulgation comment does not comply with APA requirements); National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978) (emphasizing correct procedure order dictates notice should be given first, followed by comments, and final rule promulgation); Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1020 (3d Cir. 1972) (concluding opportunity to petition for reconsideration of rule adopted without public participation does not satisfy APA); Hedge v. Lyng, 689 F. Supp. 884, 889 (D. Minn. 1987) (stating plaintiffs need opportunity to comment on proposed regulations). *But see* Cal-Almond, Inc. v. USDA, 14 F.3d 429, 441-42 (9th Cir. 1993) (holding agency's failure to meet good cause standard harmless error because industry had participated in open meetings before rule adopted); Crowley's Yacht

Most interim-final rules are adopted under authority of the impracticability<sup>53</sup> or public interest prongs<sup>54</sup> of the APA's "good cause" exception.<sup>55</sup> Courts have decided numerous cases involving interim-final rules adopted under the good cause provision; some cases uphold the agency claims,<sup>56</sup>

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*Yard, Inc. v. Peña*, 886 F. Supp. 98, 100 (D.D.C. 1995) (noting APA satisfied by opportunity for post-adoption comment on temporary rule relating to drawbridge hours).

53. According to the legislative history, "[i]mpracticable' means a situation in which the due and required [the House Report adds the word 'timely'] execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings." APA LEGISLATIVE HISTORY, S. DOC. NO. 79-404, at 200, 258 (1946). The Attorney General's Manual on the APA gives as an example of impracticability a determination by the Civil Aeronautics Board (now the FAA) after an accident investigation that certain air safety rules must be issued or amended without delay in the interest of safety. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30-31 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

54. According to the legislative history, "'public interest' supplements the terms 'impracticable' or 'unnecessary;,' it requires that public rule-making procedures shall not unreasonably prevent an agency from fulfilling its duty . . . ." S. DOC. NO. 79-404, at 258. According to the Attorney General's Manual, "'public interest' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice." The Memorandum gives as an example the issuance of financial controls under such circumstances that advance notice would defeat their purpose. ATTORNEY GENERAL'S MANUAL, *supra* note 53, at 31.

55. APA § 553(b)(B), *quoted in supra* text accompanying note 19. The APA contains a second good cause exception. The agency can dispense with the normal 30-day pre-effective period "for good cause found and published with the rule." APA § 553(d)(3). Interim-final rules are frequently effective immediately on their publication, meaning that the agency has relied on the second good cause exception as well as the first. This Article does not focus on the section 553(d)(3) good cause exception. *See generally* Jordan, *supra* note 19, at 141-52. The section 553(d)(3) good cause standard is easier to satisfy than the section 553(b)(B) good cause standard. *See, e.g.,* *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485-87 (9th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992).

56. *See* *Service Employees Int'l Union Local 102 v. County of San Diego*, 60 F.3d 1346, 1352 n.3 (9th Cir. 1995) (noting exposure of governmental employers to enormous liability under Fair Labor Standards Act); *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987) (holding that combination of factors including interim nature of rule met public interest standard for adopting utility rate base rule); *Sepulveda v. Block*, 782 F.2d 363, 366 (2d Cir. 1986) (concluding Congress intended that agency adopt rules quickly for statute with immediate effective date); *Petry v. Block*, 737 F.2d 1193, 1200-05 (D.C. Cir. 1984) (predicting rule would probably have been upheld even if no comments had been requested); *National Fed'n of Fed. Employees v. Devine*, 671 F.2d 607, 610-12 (D.C. Cir. 1982) (holding interim regulation valid because necessary to prevent mass confusion; comment process must be completed expeditiously); *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885-86 (3d Cir. 1982) (recognizing deadline pressure for implementing new law); *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1158-59 (D.C. Cir. 1981) (requiring agency to institute new notice and comment procedure rather than rely on 90-day post-effective comment period); *Republic Steel Corp. v. Costle*, 621 F.2d 797, 803-04 (6th Cir. 1980) (ruling public health imperative and Congressional deadlines warrant immediate action); *Universal Health Serv. of McAllen, Inc. v.*

others reject them.<sup>57</sup>

Numerous judicial decisions, well supported by the legislative history,<sup>58</sup> establish that the APA's good cause provision is narrowly construed. Courts make an independent judgment about whether it applies, and do so on a contextual, case-by-case basis. Thus precedents are of little value in predicting a court's response to a good cause claim. In general, only in compelling situations will a court subordinate the values embodied in public participation<sup>59</sup> to claims of administrative necessity.<sup>60</sup> To establish that notice and comment procedure would be "impracticable" or "contrary to

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Sullivan, 770 F. Supp. 704, 720-21 (D.D.C. 1991) (upholding interim-final rule in part because of opportunity for post-promulgation comment); *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 331-34 (1990) (citing administrative difficulties and confusion over benefits permit rule to qualify as good cause), *aff'd*, 925 F.2d 1454 (Fed. Cir. 1991).

57. See *Cal-Almond, Inc.*, 14 F.3d at 441-42 (holding agency failed to meet good cause standard but rule valid because error harmless); *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144-46 (D.C. Cir. 1992) (determining argument that regulated parties would rush to beat proposed rule was unsubstantiated); *Riverbend Farms, Inc.*, 958 F.2d at 1486 (holding error harmless); *Air Transport Ass'n of Am. v. DOT*, 900 F.2d 369, 379-81 (D.C. Cir. 1990) (finding both temporary and final rule invalid), *vacated*, 498 U.S. 1077 (1991), *dismissed on remand*, 933 F.2d 1043 (D.C. Cir. 1991); *Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983) (concluding need for budgetary savings insufficient); *Buschmann v. Schweiker*, 676 F.2d 352, 357-58 (9th Cir. 1982) (finding inadequate showing of emergency); *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980) (stating agency had enough time to meet deadline); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380-81 (3d Cir. 1979) (showing EPA could have met schedule for proposed rule); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977) (same); *Thrift Depositors of Am., Inc. v. OTS*, 862 F. Supp. 586 (D.D.C. 1994) (deciding all factors considered, agency still failed to meet good cause standard); *Texas Food Indus. Ass'n v. USDA*, 842 F. Supp. 254, 261 (W.D. Tex. 1993) (concluding USDA did not show immediate harm to justify emergency rule); *Analysas Corp. v. Bowles*, 827 F. Supp. 20, 23-25 (D.D.C. 1993) (finding claim of clearing up public confusion is inadequate); *United States v. Rainbow Family*, 695 F. Supp. 294, 304-06 (E.D. Tex. 1988) (citing agency dilatory in adopting rule requiring permits for gatherings in National Forest); *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395, 399 (D.D.C. 1983) (invalidating Baby Doe rule as arbitrary and capricious).

58. The exemption is not to be an "escape clause" from required procedures. "A true and supported or supportable finding of necessity or emergency must be made and published." S. DOC. NO. 79-404, at 200, 258 (1946). See, e.g., *New Jersey Dep't of Env'tl. Protection v. EPA*, 626 F.2d 1038, 1045-47 (D.C. Cir. 1980) (citing cases and legislative history calling for narrow reading of exceptions).

59. See *supra* text accompanying notes 15-16.

60. See generally Lavilla, *supra* note 19, at 333-50; Jordan, *supra* note 19, at 120-29; Campbell, *supra* note 19. A minority of judicial decisions are more deferential and seem to take the agency at its word when it claims good cause for dispensing with public participation. See, e.g., *National Customs Brokers & Forwarders Ass'n v. United States*, 59 F.3d 1219, 1223-24 (Fed. Cir. 1995) (holding good cause findings not arbitrary). Also the good cause requirements may be applied more leniently in the case of agencies that are exempt from the APA rulemaking requirements, but which voluntarily assumed those burdens by a procedural regulation. See *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (dictum).

the public interest,”<sup>61</sup> the agency must demonstrate the presence of exigent circumstances. For example, an imminent implementation deadline imposed by a statute<sup>62</sup> or judicial decision<sup>63</sup> may qualify under the “impracticability” prong as good cause for dispensing with pre-adoption public participation. A public health or safety emergency or an environmental crisis also potentially qualifies.<sup>64</sup> Similarly, notice and comment can be dispensed with as “contrary to the public interest” when those procedures would thwart the statutory purpose.<sup>65</sup>

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61. *Supra* notes 53-54.

62. *See* *Methodist Hosp. v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (upholding interim-final rule because of urgent deadline and very complex statute); *Sepulveda v. Block*, 782 F.2d 363, 366 (2d Cir. 1986) (affirming good cause finding since statute effective immediately, legislative history indicates dissatisfaction with slow pace of implementation of prior statute); *Petry v. Block*, 737 F.2d 1193, 1200-02 (D.C. Cir. 1984) (holding interim rule valid due to very short deadline for implementation of statute and diligent effort by understaffed agency to meet it); *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885 (3d Cir. 1982) (noting intense statutory deadline pressure); *Universal Health Serv. of McAllen, Inc. v. Sullivan*, 770 F. Supp. 704, 720-21 (D.D.C. 1991) (finding implementation problems combined with very heavy agency work-load warrants use of interim-final rules even though agency missed rulemaking deadline). *See generally* Eleanor Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855, 875-99 (1990) (stating Congress passed immediately effective statutes which required implementing regulations); *Lavilla, supra* note 19, at 352-63 (discussing public procedures that justify dispensing with requirements in certain cases).

Yet even in cases involving intense time pressures, courts have rejected good cause claims lest agencies be encouraged to procrastinate until just before the deadline. As one court noted:

This rationale [the good cause exception] is one that permits avoidance of APA procedures only in exceptional circumstances. Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the “good cause” banner and promulgate rules without following APA procedures. Because of this possibility for abuse, “the mere existence of deadlines for agency action . . . [can] not in itself constitute good cause for a § 553(b)(B) exception.”

*Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (citation omitted); *see also* *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (holding post-promulgation comment period insufficient as substitute for APA procedures).

63. *See* *American Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (upholding rule only if it applied temporarily rather than permanently).

64. *See, e.g.,* *Hawaii Helicopter Operators Ass’n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (confirming emergency created by large number of helicopter accidents indicated good cause); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750-52 (10th Cir. 1987) (upholding good cause due to urgent need for hunting regulations where season had begun and herds could dwindle to extinction); *Northwest Airlines v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (finding urgent need to allocate landing slots at National Airport); *Lavilla, supra* note 19, at 363-72 (discussing the existence of “factual emergencies”).

65. *See, e.g.,* *Service Employees Int’l Union Local 102 v. County of San Diego*, 60 F.3d 1346, 1352 n.3 (9th Cir. 1995) (finding exposure of governmental employers to enormous li-

However, according to numerous decisions, good cause is not established simply because an agency wishes to adopt immediately effective rules to provide guidance or simplify enforcement.<sup>66</sup> Nor is a court likely to accept a claim of emergency in cases where an agency appears to have been dilatory in adopting the rule.<sup>67</sup> And, every provision in the rule (including the one challenged by the plaintiff) must be justified by exigent circumstances.<sup>68</sup>

Generally, the agency must articulate the factual basis for its claim of

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ability under Fair Labor Standards Act as good cause). Several cases applied the exemption to the imposition of wage and price controls, or to permission to increase prices, since advance warning of the rules would have triggered price increases or withholding of supplies. Yet courts did not accept such claims with respect to later phases of the control programs. *See Jordan, supra* note 19, at 120-22.

The generic argument that an interim-final rule is needed to forestall a regulatory rush to beat the deadline is not persuasive absent a detailed factual showing that such a rush would undermine the purposes of the applicable legislation. *See Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145-46 (D.C. Cir. 1992) (concluding agency failed to prove that pipelines would rush new construction to avoid future rule); *Thrift Depositors of Am., Inc. v. Office of Thrift Supervision*, 862 F. Supp. 586, 592 (D.D.C. 1994) (finding evidence insufficient to prove savings associations would seek conversion prior to implementation of new rule).

66. *See, e.g., Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995) (“Notice and comment requirement would be a dead letter if compliance could be excused whenever the beneficial effect would thereby be accelerated.”); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801-02 (D.C. Cir. 1983) (fact that existing rule is confusing and difficult for agency to enforce does not provide good cause to adopt new one without prior notice); *United States Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (providing guidance for states in drafting air pollution implementation plans is not good cause); *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (same); *Analysas Corp. v. Bowles*, 827 F. Supp. 20, 22-25 (D.D.C. 1993) (same). However, a sufficient showing that the absence of rules was creating mass confusion harmful to government or to the beneficiaries of the program might support a good cause exemption. *See Service Employees Int’l Union*, 60 F.3d at 1352 n.3 (citing enormous liability as justification for good cause); *Woods Psychiatric Inst. v. United States*, 20 Ct. Cl. 324, 331-34 (1990) (deciding good cause applies when lack of guidance would create confusion), *aff’d*, 925 F.2d 1454 (Fed. Cir. 1991).

67. *See, e.g., Air Transport Ass’n of Am. v. DOT*, 900 F.2d 369, 379 (D.C. Cir. 1990) (stating delays caused by attention to other priorities undercuts good cause claim), *vacated*, 498 U.S. 1077 (1991), *dismissed on remand*, 933 F.2d 1043 (D.C. Cir. 1991); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291-92 (3d Cir. 1977) (concluding agency had several years to meet judicial deadline and even issued advance notice of proposed rulemaking but could not complete rulemaking cycle in time — good cause claim rejected); *United States v. Rainbow Family*, 695 F. Supp. 294, 304-06 (E.D. Tex. 1988) (finding lack of good cause because of two year delay). *But see Universal Health Serv. of McAllen, Inc.*, 770 F. Supp. at 720-21 (upholding good cause claim even though agency missed deadline for promulgating rules in light of agency’s overwhelming work load and compelling case for immediate effectiveness).

68. *See United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985) (holding provision at issue not justified by good cause even if other portions were justified); *Thrift Depositors of Am., Inc.*, 862 F. Supp. at 591.

exigent circumstances when it adopts a rule under the good cause exception, even though the statute calls only for a good cause finding and “a brief statement of reasons therefor in the rules issued.” Post hoc explanations are not acceptable.<sup>69</sup>

## 2. *Adopting a Final-Final Rule*

The act of modifying and finalizing an interim-final rule is itself a rule-making that must comply with the APA.<sup>70</sup> Normally, at the final-final rule stage, no exigent circumstances are present that require the second rule-making. Granted, there was a prior emergency, but the interim-final rule remains in effect to address it. Therefore, a final-final rule must be preceded by public participation unless it independently qualifies for an APA exemption.<sup>71</sup> The invitation for comments that accompanied the interim-final rule generally satisfies the APA’s public participation requirements applicable to the final-final rule, whether or not the invitation was contained in the proposed rules section of the Federal Register.<sup>72</sup>

However, if a final-final rule diverged substantially from the interim-final, it could be found that commentators had insufficient notice.<sup>73</sup> A

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69. See, e.g., *Tennessee Gas Pipeline Co.*, 969 F.2d at 1145 (concluding agency failed to set forth basis for its conclusion that rule had to be effective immediately to avoid environmental damage); *Garner*, 767 F.2d at 120-21 (deciding refinancing assistance insufficient to justify regulation). But see *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App.) (finding omission is mere technical violation where reasons were obvious and compelling), *cert. denied*, 419 U.S. 896 (1974). See generally *Lavilla*, *supra* note 19, at 399-403 (arguing that the requirement for a statement of reasons not be strictly enforced).

70. See APA § 551(5) (“[r]ulemaking means agency process for formulating, amending, or repealing a rule.”). Consequently, any changes made in a final-final rule should be prospective only unless the applicable statute permits retroactive rulemaking. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213-15 (1988) (retroactive rulemaking invalid under APA absent statutory authorization).

71. See *American Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) (public participation not impracticable at the final-final rulemaking stage). Public participation in the adoption of the final rule might be “unnecessary” if there were no significant comments on the interim-final rule and the rule is being made final without significant modification. Of course, any of the numerous other APA rulemaking exceptions might also be applicable to the final-final rulemaking.

72. See, e.g., *Petry v. Block*, 737 F.2d 1193, 1197-98 (D.C. Cir. 1984) (stating that information supplied by agency to public at time interim rule adopted was sufficient disclosure to allow informed public comment).

73. See *Kooritzky v. Reich*, 17 F.3d 1509, 1513-14 (D.C. Cir. 1994) (deciding interim rule contains important change not mentioned in proposed rule — rule invalid); *Methodist Hosp. v. Shalala*, 38 F.3d 1225, 1237-38 (D.C. Cir. 1994) (determining provision in final-final rule was logical outgrowth of provision in interim-final rule so commentators had adequate notice); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979) (holding final-final rule invalid because interim-final rule failed to give adequate notice to commenters), *cert. denied*,

court might also find that the public had insufficient time to comment<sup>74</sup> or that the agency had failed to disclose material information needed by public commentators.<sup>75</sup> Similarly, the agency must meet the normal standards for responding to serious and material public comments. If the agency failed to do so, the final-final rule might be invalidated either because it lacked the appropriate statement of basis and purpose or on the ground that the final rule was arbitrary and capricious.<sup>76</sup>

### 3. *Whether the Use of Interim-Final Methodology Strengthens the Agency's Good Cause Claim*

Suppose that an agency's good cause claim for dispensing with public participation at the interim-final stage presents a close call.<sup>77</sup> Does the fact that the agency requested and considered post-adoption comments place extra weight on the agency's side of the scales? A number of decisions have explicitly recognized that a process of inviting and considering post-adoption comment strengthens an agency's good cause claim for adoption of an interim-final rule.<sup>78</sup> Thus there is a significant tactical reason for

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444 U.S. 1096 (1980); DAVIS & PIERCE, *supra* note 15, at § 7.3 (discussing cases that held notice invalid). In *BASF*, Justice Rehnquist would have granted certiorari to give the Court an opportunity to consider the problem of divergence between final-final and interim-final rules. 444 U.S. at 1097.

74. *Cf. American Fed'n of Gov't Employees*, 655 F.2d at 1157 (ruling that interim-final rule was valid because of exigent circumstances). The court found that a 90 day comment period on the interim-final rule was insufficient. It is unclear whether the court would have been satisfied by a longer comment period on the interim-final rule or whether it was insisting on an independent notice and comment process for the promulgation of the final-final rule.

75. *See Petry*, 737 F.2d at 1198 (discussing appellants argument that agency's actions were insufficient to ensure informed responses).

76. *See DAVIS & PIERCE, supra* note 15, at 312 (analyzing the consideration of comments). *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983) (holding that normal arbitrary-capricious standard applies to revocation or modification of prior rule).

77. *See sources cited supra* notes 56-57.

78. *See Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144-46 (D.C. Cir. 1992) (holding rule invalid despite being interim); *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987) (inviting post-adoption comments treated as factor in agency's favor); *Petry*, 737 F.2d at 1203 (concluding post-promulgation comments prove open-mindedness of agency); *National Fed'n of Fed. Gov't Employees v. Devine*, 671 F.2d 607, 610-13 (D.C. Cir. 1982) (determining OPM satisfied good faith effort for public comment); *Republic Steel Corp. v. Costle*, 621 F.2d 797, 804 (6th Cir. 1980) (finding EPA seriously considered industry comments); *Coalition of Mich. Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 457-59 (E.D. Mich. 1982) (upholding regulation since post hoc comment period was given).

In *Mid-Tex Electric*, the fact that a rule was interim was one of several factors that, taken together, justified a good cause exemption. However, the other factors were fairly compelling: i) an earlier rulemaking proceeding had produced a substantial record; ii) the

agencies to use interim-final methodology when adopting a rule under the good cause exemption.<sup>79</sup>

Certainly, for this tactic to work, the agency must give careful consideration to the post-effective comments that it received.<sup>80</sup> An interim-final rule will also stand a better chance of being judicially upheld if it is temporary — that is, effective only for a precisely limited and relatively brief duration.<sup>81</sup> Some cases upholding interim-final rules under the good cause exception additionally suggest that the rules are more likely to be upheld if they have a limited reach — in other words, they really are not too important.<sup>82</sup> But courts caution that the limited reach of the rule is only one fac-

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interim rule was adopted in response to a Court of Appeals decision invalidating a prior rule — but approving most of its substance; iii) the interim rule provided adequate protection for the interests of those who might be harmed by it; iv) the earlier rule and the interim rule together had generated heavy reliance interests; and v) there was a need for continuity of rules for public utility pricing. *Mid-Tex Electric*, 822 F.2d at 1131-1134. The court expressed concern lest its tolerance of temporary regulations give the agency an incentive to engage in dilatory tactics during the post-effective comment period. See *Pierce*, *supra* note 17, at 73-75 (discussing *Mid-Tex Electric* with approval).

79. To be sure, some cases considering whether interim-final rules were properly adopted under the good cause exemption seem to ignore the fact that an agency solicited post-adoption comment or give little weight to that factor. See, e.g., *Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419, 425-26 (3d Cir. 1982) (deciding advance notice of interim-final and proposed rulemaking not enough for good cause); *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885 n.9 (3d Cir. 1982) (concluding good cause present but if it were not present interim nature of rule would not have saved it); *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980) (disregarding opportunity for post-promulgation comment period); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 n.4 (3d Cir. 1977) (noting immediately effective regulations may deter reconsideration).

80. See, e.g., *National Fed'n of Fed. Gov't Employees*, 671 F.2d at 610-12 (observing notice and comment procedures in place for final rulemaking); *Republic Steel Corp.*, 621 F.2d at 804 (noting agency made 36 changes in interim rule); *Universal Health Serv. of McAllen, Inc. v. Sullivan*, 770 F. Supp. 704, 719-21 (D.D.C. 1991) (observing agency incorporating suggestions as amendments to final rules).

81. See *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750-52 (10th Cir. 1987) (upholding rule which would be in effect for single game season); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580-82 (D.C. Cir. 1981) (upholding temporary rule which deferred effective date of prior regulation for seven-month period).

This argument is far less compelling in the case of an interim-final rule that could remain in effect indefinitely. See *Thrift Depositors of Am., Inc. v. Office of Thrift Supervision*, 862 F. Supp. 586, 593 (D.D.C. 1994) (concluding that since agency could not say when rule would become final because of need for review by the Office of Management and Budget (OMB) and other agencies, this factor was not helpful); *Analysas Corp. v. Bowles*, 827 F. Supp. 20, 25 (D.D.C. 1993) (noting that agency gave no indication it is moving quickly to finalize rule).

82. See *Tennessee Gas Pipeline Co.*, 969 F.2d at 1145 (stating limited nature of rule alone could not justify good cause); *Thrift Depositors of Am., Inc.*, 862 F. Supp. at 593 (finding that because rule has broad scope there is greater need for prior input); *Analysas Corp.*, 827 F. Supp.

tor — it is not true that any minor regulation can be adopted on an interim basis. That would let the exception swallow the rule.<sup>83</sup>

#### 4. *Final-Final Rules that Supplant Invalidly-Adopted Interim-Final Rules*

A related issue arises upon a challenge to a final-final rule. Suppose a court finds that the interim-final version of the rule (which is no longer in effect) failed to qualify under whatever exemption from notice and comment that the agency claimed. Does that mean that the final-final rule is also invalid because the comment period occurred pursuant to an invitation in an invalidly adopted interim-final rule? A number of decisions have said exactly that.<sup>84</sup> The theory of these cases is that the illegally adopted interim rule discouraged the public from commenting on the proposed final rule.

In my view, these cases are illogical and incorrect.<sup>85</sup> At the time a final-final rule is challenged, it should not matter at all whether the interim-final rule it supplanted was or was not validly supported by the good cause exemption. Whether or not the interim-final was valid, some members of the public might have been deterred from commenting on it.<sup>86</sup> It would make no difference to the marginal public commentator whether a court might later find that there was no good cause to adopt the interim-final rule without prior notice and comment — and there is obviously no good way for the commentator to even predict that this might occur.

Courts routinely uphold final-final rules that supplant validly-adopted interim-final rules because the comment opportunity on the interim-final

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at 25.

83. See *Tennessee Gas Pipeline Co.*, 969 F.2d at 1145 (predicting abuse of limited interim rules).

84. See *Air Transport Ass'n of Am. v. DOT*, 900 F.2d 369, 379-80 (D.C. Cir. 1990) (both interim and final-final rules invalid) *vacated*, 498 U.S. 1077 (1991), *dismissed on remand*, 933 F.2d 1043 (D.C. Cir. 1991); *New Jersey Dep't of Env'tl. Protection v. EPA*, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980) (holding post hoc comment period does not cure failure to follow APA procedures); *United States Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979); *Lavilla*, *supra* note 19, at 408-10, 412-13. *Cf. Reeder v. FCC*, 865 F.2d 1298, 1304 (D.C. Cir. 1989) (invalidating rule adopted after improper notice despite the receipt of curative comments where inadequate showing that agency's mind remained open); *United States v. Garner*, 767 F.2d 104, 120-21 (5th Cir. 1985) (concluding Rule B lacks proper statement of basis and purpose; it cannot be saved by relying on prior Rule A that was invalidly adopted under good cause exception); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901-03 (D.C. Cir. 1978) (deciding that ability to request reconsideration of invalidly adopted rule cannot be treated as opportunity to comment).

85. Automatic invalidation of a final-final rule is likely to be highly disruptive of a regulatory program. As a result, courts that have invalidated final-final rules because of defects at the interim-final stage often have exercised their remedial discretion to leave the final-final rule in effect. See *supra* note 42.

86. See *supra* text accompanying note 50.

rule satisfies APA requirements.<sup>87</sup> In my view, the same should be true of comments invited by an invalidly-adopted interim-final rule; that rule should be viewed as a notice of proposed rulemaking that validates the final-final rule. So long as the agency meets normal APA standards by giving consideration to material public comments, it should not matter that the request for comments accompanied an invalidly-adopted interim rule.

Agencies could also argue that the decisions invalidating final-final rules because they replace invalid interim-final rules are incorrect because the defect seems to be harmless error by the time the final-final rule has been adopted. The public's opportunity to comment on the interim-final rule was sufficient to meet the APA's standards; the error relating to adoption of the interim-final rule makes little difference to anyone once the final-final rule has supplanted the interim-final rule.<sup>88</sup> Or, the issue could be viewed as moot in light of the fact that the invalidly-adopted interim-final rule is no longer in effect.

Some decisions have upheld final-final rules that supplant invalidly-adopted interim-final rules where the agency met the burden of showing that it had an "open mind" and seriously took account of the comments on the interim-final rule.<sup>89</sup> These cases reach a correct result, but I suggest

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87. See *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984) (concluding that information supplied by agency to public at time interim rule adopted was sufficient disclosure to allow informed public comment on final-final rule); *Universal Health Serv. of McAllen, Inc. v. Sullivan*, 770 F. Supp. 704, 719-21 (D.D.C. 1991) (allowing final-final rule to supplant valid interim-final rule).

88. See *Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 442 (9th Cir. 1993) (noting failure to meet good cause standard is harmless error because entire industry participated in open meetings before rule was adopted); *Riverbend Farms v. Madigan*, 958 F.2d 1479 (9th Cir. 1992) (failing to meet good cause standard created harmless error due to industry knowledge and participation before adopted), *cert. denied*, 506 U.S. 999 (1992). Note that the APA requires courts to take "due account . . . of the rule of prejudicial error." APA § 706. This provision "means that a procedural omission which has been cured by affording the party the procedure to which he was originally entitled is not a reversible error." APA LEGISLATIVE HISTORY, S. DOC. NO. 79-404, at 200, 214 (1946). This comment in the legislative history precisely describes the situation in which an invalidly adopted interim-final rule invites comments prior to adoption of a final-final rule.

89. See *Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288, 1291-93 (D.C. Cir. 1994) (requiring agency to make "compelling showing" that it maintained an open mind); *Petry*, 737 F.2d at 1203 (upholding final rule — alternative ground); *Levesque v. Block*, 723 F.2d 175, 187-89 (1st Cir. 1983) (holding interim rule invalid but final rule valid because agency demonstrated that real public reconsideration had occurred); *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982) (final rule stipulated to be valid even though interim-final rule invalid); *Kollett v. Harris*, 619 F.2d 134, 145-46 (1st Cir. 1980) (assuming final-final rule valid because parties did not question it); *Jordan*, *supra* note 19, at 166-68; *Lavilla*, *supra* note 19, at 412-13 (discussing effects of lack of good cause for promulgation of first rule on second rule issued after public procedures).

that courts dispense with the rather subjective "open-mind" test.<sup>90</sup> The only standard should be whether the agency complied with normal APA requirements by considering and responding to material public comments invited by the interim rule.

### B. Other Statutes Constraining the Rulemaking Process

Aside from the APA, a hodgepodge of statutes and executive orders impose procedural constraints on the rulemaking process. These provisions require rulemaking agencies to engage in various forms of analysis or to submit rules to Congress or the Office of Management and Budget (OMB) before adopting them. Some of these provisions apply to rules adopted on an emergency basis. Others are tied to the APA's proposed rule process and thus do not apply to rules properly adopted under the good cause exemption. Still others contain emergency provisions not tied to the APA. These various procedural constraints were often enacted with little consideration of their relationship to other constraining provisions or to the aggregate burden they impose on rulemaking agencies. As a result, there are several unresolved problems arising out of the relationship between these various provisions.

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See also the cases cited in note 40, *supra*, in which courts allow a final-final rule that supplanted an invalidly adopted interim-final rule to remain in effect pending receipt of additional comments. For example, *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 812-13 (9th Cir. 1980), involved an invalidly adopted interim-final rule followed by adoption of a final-final rule. The Court declared that it normally would invalidate both rules. However, the court exercised its remedial discretion to leave the final-final rule in effect pending receipt of additional comments by the petitioners. The court did not want to frustrate the operation of the Clean Air Act in California during the deliberative process and was reluctant to intrude excessively into the complex process of environmental regulation. See also *United States Steel Corp.*, 649 F.2d at 576-77 (leaving challenged designations in effect until future administrative proceedings had been completed). I disagree with these cases. The notice and comment procedure triggered by the interim-final rule should be sufficient to validate the final rule without a further opportunity to comment. And the comment process on the final-final rule seems likely to reprise uselessly the comment process that has already occurred.

90. Thus, *Air Transport Ass'n of America v. DOT*, 900 F.2d 369, 378-81 (D.C. Cir. 1990), vacated, 498 U.S. 1077 (1991), dismissed on remand, 933 F.2d 1043 (D.C. Cir. 1991), seems wrongly decided. This case held that the Department of Transportation failed to overcome the "presumption against closed-mindedness." The agency responded to comments on the invalidly adopted interim-final rule but made no changes in response to the comments, nor did its replies "suggest that the agency had afforded the comments particularly searching consideration." This test is much more stringent than the normal inquiry as to whether an agency has taken account of public comments; it seems wholly inappropriate in the present context.

### 1. Constraints Applicable to Interim-Final Rules

Some procedural constraints apply to all rules, including those adopted without prior notice and comment. Thus all rules, including those adopted as interim-final rules, must be submitted to Congress under the Congressional review provisions enacted as part of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>91</sup> In most cases, SBREFA permits a rule submitted to Congress to go into effect on the date provided in the rule.<sup>92</sup> “Major” rules cannot become effective before sixty days after the later of the date on which Congress receives the report or the rule is published in the Federal Register.<sup>93</sup> However, the SBREFA provides that emergency rules can go into effect at such time as the agency determines.<sup>94</sup>

Similarly, Executive Order 12,866<sup>95</sup> applies in cases of emergency rule-making. The Executive Order requires submission of all “regulatory actions” to the Office of Information and Regulatory Affairs (OIRA), in the OMB. It further requires preparation of a cost benefit assessment for “significant” regulatory actions. In cases of emergency (or when an agency is obligated by law to act more quickly than normal review procedures allow), the agency shall notify OIRA as soon as possible and comply with the normal analytical requirements “to the extent practicable.” In cases of statutory or court-imposed deadlines, the agency shall “to the extent practicable” schedule rulemaking proceedings to allow OIRA sufficient time to conduct its review.<sup>96</sup>

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91. 5 U.S.C. § 801 (Supp. III 1997); see Daniel Cohen, *S. 981, the Regulatory Improvement Act of 1998: The Most Recent Attempt to Develop a Solution in Search of a Problem*, 50 ADMIN. L. REV. 699, 705-06 (1998) [hereinafter Cohen, *Solution in Search of a Problem*]; see also Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997). Similarly, NEPA’s requirement that an environmental impact statement be prepared before an agency takes a major action significantly affecting the quality of the human environment applies independently of whether the APA rulemaking provisions are applicable.

92. See 5 U.S.C. § 801(a)(4) (Supp. III 1997).

93. See *id.* § 801(a)(3). Later dates apply if Congress enacts a joint resolution disapproving the rule.

94. See *id.* § 808(2). The standard is the same as that in the APA — impracticable, unnecessary, or contrary to the public interest. I have been informed that OMB interprets the emergency provision of SBREFA so that it applies to a rule that went through the notice and comment process (because the agency could have but did not choose to claim that the APA good cause provision applied). I have also been informed that GAO disagrees with OMB’s interpretation. See Cohen, *Solution in Search of a Problem*, *supra* note 91, at 706 n.38 (discussing agency discretion with regard to effective date).

95. 58 Fed. Reg. 51,735 (1993).

96. 5 U.S.C. § 6(a)(3)(D). It is my understanding that OIRA does not require an agency to comply with the Executive Order at the final-final rule stage if the emergency provision applied at the interim-final stage.

## 2. Constraints Not Applicable to Interim-Final Rules

The Regulatory Flexibility Act (Reg-Flex)<sup>97</sup> requires an agency to prepare an initial and a final Reg-Flex analysis, unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. A Reg-Flex analysis describes the impact of the rule on small entities and enumerates alternative approaches that might impose a lesser impact on small entities. The agency must publish an initial Reg-Flex analysis together with the notice of proposed rulemaking and publish a revised final Reg-Flex analysis with the final rule. In the case of EPA and OSHA, the agency must convene a review panel of agency employees that collects advice and recommendations from small entity representatives, and files a report that becomes part of the rulemaking record. Compliance with certain provisions of Reg-Flex is subject to judicial review.<sup>98</sup>

The Reg-Flex requirements are inapplicable to rules adopted under the APA's good cause exception. The reason is that the statute defines a "rule" as a rule for which the agency is required by the APA or any other law to publish a notice of proposed rulemaking — and no such notice is required to be published prior to adoption of a rule that is exempt from notice and comment because of the good cause exception.<sup>99</sup> Because compliance with

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97. 5 U.S.C. §§ 601 *et. seq.* (Supp. III 1997). See Cohen, *supra* note 91, at 707-12 (recounting history of Reg-Flex and its amendment by SBREFA); Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L. REV. 123 (1997) (defining the SBREFA). The predecessor statute is described in Paul Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213. See Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998) (criticizing the underlying concept of Reg-Flex and concluding that small business should not receive special regulatory treatment).

98. See 5 U.S.C. § 611 (Supp. III 1997). This is a major change from prior law under which compliance with Reg-Flex was not judicially reviewable.

99. See *id.* § 601(2) (defining 'rule' and notice requirements); GAO Study, *supra* note 12, at 25-26 (discussing connection between APA and Reg-Flex). Note that the Reg-Flex Act applies *whenever* an agency publishes notice of proposed rulemaking "pursuant to section 553(b) [of the APA] or any other law." Thus, it could be argued that the Reg-Flex requirements apply to a notice of proposed rulemaking required only by agency regulations since agency regulations enacted pursuant to delegated legislative power "have the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979). The issue remains unresolved.

Reg-Flex contains an emergency exception. In an emergency, the agency head can waive or delay the preparation of the initial Reg-Flex analysis and delay preparation of the final Reg-Flex analysis for 180 days. 5 U.S.C. § 608 (Supp. III 1997). However, these provisions apply only if Reg-Flex is triggered by a notice of proposed rulemaking required by law. The emergency exception would be irrelevant when an agency adopts an interim-final rule since such a rule, by definition, is not preceded by a notice of proposed rulemaking.

Reg-Flex may be costly and inconvenient, agencies have an additional and substantial incentive to utilize interim-final methodology under authority of the APA's good cause exception, assuming they can advance a plausible exigent circumstances claim.<sup>100</sup>

There is, however, a serious issue of whether Reg-Flex applies when an interim-final rule is supplanted by a final-final rule. Adopting a final-final rule is itself a separate rulemaking action under the APA.<sup>101</sup> The impracticability or public interest prongs of the good cause exception are unlikely to apply to the adoption of the final-final rule since there is generally no emergency situation requiring immediate action when the final-final rule is adopted.<sup>102</sup> In some cases, the unnecessary prong of the good cause exception might apply at the final-final stage if the rule has a trivial impact or in cases where the public submitted no material comments on the interim-final rule and the final-final version is substantially unchanged from the interim-final version. Thus the normal APA rulemaking provisions are likely to apply to the process of adopting a final-final rule.

Unless some other APA rulemaking exception (such as the unnecessary exception) applies, a final-final rule can be validly adopted only if the invitation to comment in the interim-final rule is viewed as a notice of proposed rulemaking with respect to the final-final rule. This legally required notice of proposed rulemaking could well serve as the trigger that makes the Reg-Flex requirements applicable *to the adoption of the final-final rule*.<sup>103</sup> In other words, it might be held that the invitation to comment contained in an interim-final rule must include an initial Reg-Flex analysis (or a no-impact certification). In addition, the final-final rule would have to be accompanied by a final Reg-Flex analysis. OSHA and EPA would have to satisfy the requirement that they convene employee panels between the time of adoption of the interim-final and the time of adoption of the fi-

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100. The GAO study indicates that the Reg-Flex requirements would have applied to a large number of interim-final rules. See GAO Study, *supra* note 12, at 27-30.

101. The APA defines rulemaking as the agency process for "formulating, amending, or repealing a rule." APA § 551(5). Thus even if a final-final rule is seen as amending or just tidying up the interim-final version, it is nevertheless a separate rulemaking action.

102. See *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1980) (notice and comment procedure not impracticable at the final-final stage).

103. This is particularly a problem for tax rules because the statute explicitly requires publication of a proposed regulation simultaneously with publication of a temporary regulation. I.R.C. § 7805(e)(1) (1998). Thus, Reg-Flex compliance may well be required when a validly adopted temporary tax regulation is superseded by a permanent regulation. However, Reg-Flex does not apply to IRS interpretive rules except to the extent they impose data collection obligations and many IRS regulations are interpretive rather than legislative. See 5 U.S.C. § 603(a) (special rule for tax interpretive rules); Asimow, *Temporary Tax Regulations*, *supra* note 10, at 350-61 (analyzing difference between legislative and interpretative tax regulations)

nal-final rule. In short, a final-final rule is at risk of judicial invalidation if it lacks the required analyses (or lacks a no-impact certification).

It could be argued that this result serves the purposes of Reg-Flex. The modifications made to an interim-final rule in light of public comment might make the final-final rule less onerous to small business. Nevertheless, applying the Reg-Flex requirements to the process of final-final rule-making would be a bad idea. If the process of finalizing an interim-final rule triggered Reg-Flex, agencies would be strongly discouraged from making their interim-final rules final.<sup>104</sup> Instead, they would be encouraged to leave those rules forever in interim-final limbo. As discussed below, an agency is not ordinarily required to finalize an interim-final rule (although doing so is good insurance against a challenge that the good cause exception was inapplicable to adoption of the interim-final rule). In my view, agencies should be encouraged not to consign their interim-final rules to file and forget status. Instead, agencies should take account of the comments received on their interim-final rules and adopt final-final rules as soon as possible. If Reg-Flex applies to the process of final-final rulemaking, agencies are much less likely to make their interim-final rules final. That would be an unfortunate result.

Therefore, I believe that the courts that are called on to construe Reg-Flex should decide the Reg-Flex is inapplicable to the adoption of a final-final rule that supplants a validly adopted interim-final rule. In other words, I believe that for Reg-Flex purposes the good cause exception that sheltered the interim-final rule should extend to the final-final rule as well. The entire rulemaking process (interim-final and final-final) should be considered one that never included a proposed rule and thus never triggered Reg-Flex. Concededly, this argument is inconsistent with the approach to interim-final rulemaking under the APA that I have championed in this article: that the interim-final and final-final rules are separate acts of rulemaking. The inconsistency in approach arises from the need to make the APA and Reg-Flex work together harmoniously. I add that most agency counsel with whom I discussed this issue do not believe that Reg-Flex should or does apply to final-final rules, although they differ on the rationale. Indeed, some of them were aghast at the very idea.<sup>105</sup>

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104. The perverse result described in the text does not apply if the interim-final rule is sunsetted — that is, it lapses automatically if not finalized by a certain date. Automatic sunset setting applies to interim-final tax rules and some others specifically authorized by statute. See I.R.C. § 7805(e)(2) (1998) (“Any temporary regulation shall expire within 3 years after the date of issuance of such regulation”). Several of the statutory provisions discussed in note 40, *supra*, have a similar sunset provision.

105. One agency commentator believes that the “unnecessary” exception should always apply to the process of adopting a final-final rule since a comment procedure has already

Nevertheless, courts may determine that Reg-Flex applies to the adoption of final-final rules. Agencies should consider how they might lessen the risk of judicial invalidation of rules on this basis. They should find ways to conform their interim-final rulemaking process to the Reg-Flex requirements. Perhaps an agency should routinely treat the adoption of an interim-final rule, adopted under the impracticability or public interest prongs of the good cause exception, as the publication of a notice of proposed rulemaking for Reg-Flex purposes. Agencies could routinely publish an initial Reg-Flex analysis (or a no-impact certification) with the interim-final rule. If there were a true emergency that precluded the agency from completing the initial Reg-Flex analysis at the time the interim-final rule was adopted, the agency could utilize Reg-Flex's emergency provision to waive or delay the preparation of the initial Reg-Flex analysis. Then a final Reg-Flex analysis could be prepared to accompany the final-final rule. If there were a time problem at the final-final adoption stage, the final Reg-Flex analysis could be delayed for a period not exceeding 180 days after adoption of the final-final rule.<sup>106</sup>

The Unfunded Mandates Act is another statute that constrains the rule-making process and is tied to the APA's good cause provision.<sup>107</sup> The Unfunded Mandates Act requires agencies to prepare a cost-benefit analysis

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occurred with respect to the interim-final rule and it would be unnecessary to have an additional comment period with respect to the final-final rule. That approach would eliminate any necessity for Reg-Flex compliance at the final-final rule stage. *See Duquesne Light Co. v. EPA*, 481 F.2d 1, 8 (3d Cir. 1973) (holding that federal notice and comment would be unnecessary because rule had already been subjected to such procedure at state level — alternative holding); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 502-03 (4th Cir. 1973) (same).

Another approach is suggested by several cases that allow agencies to alter final rules without a new round of notice and comment on a no-harm, no-foul theory. *See Texas v. Lyng*, 868 F.2d 795, 797-800 (5th Cir. 1989) (allowing agency to withdraw proposed rule, then adopt it as final rule); *Trans-Pacific Freight Conference v. Federal Maritime Comm'n*, 650 F.2d 1235, 1257-59 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 984 (1981) (altering final rule without additional comment period by restoring provision contained in proposed rules — all parties had adequate notice and opportunity to furnish input); *see also Spartan Broadcasting Co. v. FCC*, 619 F.2d 314, 322 (4th Cir. 1979) (adopting final rule and altering it in response to petitions for reconsideration — rule upheld because petitioners had adequate opportunity to comment on the issue). I regard these cases as dubious authority since they seem contrary to the APA's requirement that amendment of a rule is itself an act of rule-making. *See APA* § 551(5); *see Consumer Energy Council v. FERC*, 673 F.2d 425, 445-48 (D.C. Cir. 1982) (revoking rule that had been invalidated by legislative veto is ineffective without notice and comment), *cert. denied*, 463 U.S. 1216 (1983). Once a rule is adopted or a proposed rule is withdrawn, the public should be entitled to treat these actions as definitive acts of law making.

106. 5 U.S.C. § 608(a), (b). *See supra* note 99.

107. Unfunded Mandates Reform Act of 1995, 5 U.S.C. § 1532 (Supp. III 1997).

for certain rules containing a federal mandate that would require expenditures by state, local, or tribal governments, or the private sector, of \$100,000,000 per year.<sup>108</sup> The Unfunded Mandates Act's trigger is the same as Reg-Flex — the adoption of a proposed rule required by the APA or other law.<sup>109</sup> Consequently, a rule adopted as an interim-final rule appears to be exempt from the Unfunded Mandates Act. As in the case of Reg-Flex, however, it could be argued that the Unfunded Mandates Act applies to a final-final rule since the interim-final rule functions as a legally required proposed rule. However, this outcome may have little practical significance since Executive Order 12,866 also requires cost benefit analysis for an even more inclusively defined set of such rules<sup>110</sup> — and the Executive Order applies to any final action whether or not it went through the proposed rule stage.

### III. POLICY RECOMMENDATIONS

This section discusses the policy proposals in Part II of ACUS Recommendation 95-4<sup>111</sup> and makes some additional proposals that were not covered in the ACUS recommendation.

#### A. Making Post-Adoption Comment Mandatory

ACUS recommended that agencies use post-effective comment procedures for *all* legislative rules adopted without pre-effective notice and comment under the impracticable or contrary to the public interest prongs of the good cause exception.<sup>112</sup> It added that, if necessary, the President

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108. *Id.* § 1532 (Supp. III 1997). The Act contains numerous exceptions and is inapplicable to independent regulatory agencies. *See* 2 U.S.C. § 658(1) (Supp. III 1997).

109. *See* 2 U.S.C. § 658(10) (incorporating the Reg-Flex definition of “rule”); GAO Study, *supra* note 12, at 26-27 (same). The GAO Report also observes that proposals for regulatory reform legislation presently under Congressional consideration could, if adopted, impose additional analytical requirements on agencies that would be triggered by adoption of proposed rules. *Id.* at 27-28. Thus, these new requirements for cost-benefit and risk analysis for major rules might be inapplicable to interim-final rules, but possibly applicable to final-final rules. If these proposals are adopted, the legislation should make clear how the new analytic requirements would apply to interim-final rulemaking.

110. Under Exec. Order 12,866, 58 Fed. Reg. 51,735 (1993), a significant regulatory action is one having an annual effect on the economy of at least \$100 million or a material adverse affect on the economy (or any sector thereof). The set of regulatory actions described in the Executive Order (i.e., having an annual \$100 million “effect on the economy”) is much broader than the set of regulatory actions described in Unfunded Mandates (i.e., requiring annual expenditures of \$100 million).

111. ACUS Recommendation 95-4, *supra* note 8.

112. ACUS also recommended that agencies “consider using post-promulgation procedures for *all* rules issued without pre-promulgation notice and comment under any of the

should issue an appropriate executive order or Congress should amend the APA to include such a requirement.<sup>113</sup>

This recommendation is appropriate. Agencies should not dispense completely with public comment just because exigent circumstances permitted the agency to adopt a rule without prior public participation. The logic of notice and comment<sup>114</sup> — that it produces better rules and it legitimizes the process — applies just as strongly to emergency rules as it does to rules where a more leisurely process is possible.<sup>115</sup>

Many of the rules adopted under the impracticable and public interest prongs of APA section 553(b)(B) are quite important, both to the agency and to regulated parties.<sup>116</sup> Some sort of emergency situation required that they be put in place without customary public participation. The presence of an emergency suggests that the agency identified an important problem that called for immediate rectification. As a result, it is likely that some members of the public will be seriously impacted by the rule. Such persons should have an opportunity to furnish input on the rule and many of them are likely to take advantage of that opportunity.<sup>117</sup>

ACUS Recommendation 95-4 suggested that “if necessary” the President should issue an executive order or Congress should amend the APA to require post-promulgation comment. Neither an executive order nor an APA amendment<sup>118</sup> has been forthcoming.

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APA’s exemptions.” This part of the recommendation is beyond the scope of this Article. See ACUS Recommendation 76-5, 41 Fed. Reg. 56,769 (1976) (urging agencies to invite post-promulgation comment after issuing interpretive rules or general policy statements); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977) (discussing Recommendation 76-5).

113. ACUS Recommendation 95-4, *supra* note 8, at 43,112, ¶ II.A. A footnote to this Recommendation made clear that it does not apply to temporary rules, meaning those that expire by their own terms within a relatively brief period. A second footnote observed that ACUS did not recommend a change in the coverage of the “good cause” exemption but did not oppose such a change if understood simply as a codification of existing practice. See *supra* notes 13-14.

114. See *supra* text accompanying notes 13-16.

115. See *ICC v. Oregon Pac. Indus., Inc.*, 420 U.S. 184, 193 (1975) (Powell, J., concurring) (concurring that public comment should be invited on emergency rule once emergency abates).

116. See GAO Study, *supra* note 12, at 13 (pointing out that 11 of the 61 “major rules” adopted in 1997 were adopted without public participation).

117. To prevent interested persons from overlooking an interim-final rule, the adopting agency should publish it in the final rule section of the Federal Register and should also cross-reference it in the proposed rule section of the Register.

118. A provision in an unenacted regulatory reform bill in the 104th Congress contained a provision that went beyond this recommendation. See Comprehensive Regulatory Reform Act of 1995, H.R. 2586, 104th Cong. § 2. That provision would have required an agency that employed the good cause exception to provide pre-adoption procedure “to the maximum extent feasible prior to the promulgation of the final rule.” Moreover, the agency would have to “fully

I believe that agencies adopting rules in emergency situations should be required to utilize interim-final methodology. When it updates the APA, Congress should require agencies that adopt interim-final rules to invite post-adoption comments. Such a provision would be consistent with the large number of statutes already adopted which require various versions of this methodology in specifically defined situations.<sup>119</sup> Obviously, it is better to have a single procedural statute requiring interim-final methodology than an assortment of inconsistent hybrid rulemaking provisions spread throughout the statute books.

Nevertheless, it would appear that neither an executive order nor an APA amendment is "necessary" (as ACUS used this term) to make interim-final rulemaking obligatory. Agency practice already conforms to ACUS Recommendation 95-4. Almost all of the current crop of rules adopted under the impracticable or public interest prongs of the good cause exception include an invitation for post-effective public comment.<sup>120</sup> Perhaps influenced by ACUS Recommendation 95-4, agencies across the board appear to have perceived that the tactical<sup>121</sup> and practical<sup>122</sup> advantages to their programs of using the interim-final approach outweigh the costs of doing so.

I normally favor lightening, not increasing, the burdens of regulatory

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comply with such provisions as soon as reasonably practicable after the promulgation of the rule." The same requirement was contained in S. 1080, 97th Cong. § 553(b)(2)(C) (1982); the Senate adopted this bill unanimously in 1982, but it failed in the House. For discussion of this and other provisions in failed regulatory reform measures see Jordan, *supra* note 19, at 168-76.

I oppose this provision because it relies on several highly indeterminate tests. It will always be arguable whether an agency provided pre-adoption procedure "to the maximum extent feasible" and whether it completed post-adoption procedure "as soon as reasonably practicable." The last thing we need is more opportunities for regulated parties to raise doubts about the procedural validity of rules or to compel courts to apply vague, contextual, standardless provisions to complex agency rulemaking chronologies. Because the standards are so lacking in content, such cases are particularly likely to be decided in accordance with a judge's political philosophy.

A Florida provision requiring an agency to adopt rules whenever it is "feasible and practicable" to do so inspired a rulemaking counter-revolution. See FLA. STAT. ANN. § 120.54(l) (West Supp. 1998); Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?*, 49 ADMIN. L. REV. 345 (1997) (discussing the backlash that occurred as a result of the required rulemaking provisions).

119. See *supra* note 40.

120. See *supra* text accompanying notes 43-50. This finding is in sharp contrast to previous practice. Lavilla found that only about 25% of the rules adopted under the good cause exemption in 1987 called for post-adoption comment. See Lavilla, *supra* note 19, at 412. However, Lavilla's sample includes rules adopted under the unnecessary prong of the good cause exemption so his results are not strictly comparable to mine.

121. See *supra* text accompanying notes 77-83.

122. See *supra* text accompanying notes 13-16.

procedure on agencies.<sup>123</sup> I believe that an accumulation of procedural constraints on rulemaking tends to ossify the rulemaking process, thwarts rather than promotes regulatory objectives, and drives agencies to pursue sub-optimal policymaking strategies. However, I favor requiring agencies to utilize interim-final methodology, because the requirement is not onerous. Indeed, it is already being complied with in a very high percentage of rules adopted under the impracticability and public interest prongs of the good cause exception. Moreover, the basic logic of notice and comment rulemaking requires it.<sup>124</sup> Public participation in agency lawmaking is now an administrative law norm; if exigent circumstances preclude pre-adoption participation, the public should always be invited to participate on a post-adoption basis.

### B. Shelf-Life of Interim-Final Rules

One problem with interim-final rules is that it is easy to put them aside once they are adopted. Inertia is at work; the rule is already in effect and nothing really needs to be done about it. Members of the public subject to the rule are complying with it. Busy members of the agency staff feel no pressure to deal with the comments received (if any) or to figure out how to modify the rule in light of the comments or administrative experience.

My Federal Register study of interim-final rules<sup>125</sup> indicated that many of the rules remained unfinalized three years after they were adopted. In the case of the 1989 rules, forty-six percent remained unfinalized by 1992. In the case of the 1991 rules, forty-two percent remained unfinalized by

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123. See, e.g., Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS., Winter & Spring 1994, at 127 (economic analysis of effect of increasing regulatory costs); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992) (empirical treatment of effect of requiring public participation in making non-legislative rules).

124. The APA rulemaking provisions in numerous states permit emergency rulemaking but allow such rules to be in effect for not longer than 120 days. In effect, therefore, they require the emergency rule to be accompanied by a request for comments if the agency wishes the rule to remain in effect after 120 days. See MODEL STATE APA OF 1961, § 3(b), 15 U.L.A. 168 (1990); 1 GREGORY OGDEN, CALIFORNIA PUBLIC AGENCY PRACTICE § 21.05, 21.06[4] (7th ed. 1995); Robert M. Larsen, Comment, *The Wisconsin Emergency Rule Provision: Increased Use in Response to a Slow Rulemaking Process*, 1978 WIS. L. REV. 485 (1978).

The 1981 Model State APA, § 3-108(c), 15 U.L.A. 43 (1990), does not require post-adoption comment for rules adopted under its emergency exception. However, the governor or the legislative rules committee can trigger post-adoption notice and comment procedure. If the trigger occurs, the rule lapses unless the agency completes notice and comment procedure and re-adopts it within 180 days. The drafter of this provision defends it, but he also concedes that there are good arguments for making post-adoption comment mandatory. ARTHUR M. BONFIELD, STATE ADMINISTRATIVE RULEMAKING § 6.8.9 (1986).

125. See *supra* text accompanying notes 43-50.

1994. In the case of the 1994 rules, fifty-two percent remained unfinalized by 1997. However, many of the unfinalized regulations were FAA Airworthiness Directives or Airspace Directives, rules which never attract any comment and which FAA justifiably does not bother to make final.<sup>126</sup> If Airworthiness and Airspace Directives are removed, the percentage of unfinalized interim-final rules is much lower.

At least with respect to interim-final rules which attracted some public comment, agencies should make strong efforts to finalize the rule as soon as possible.<sup>127</sup> If rules dangle indefinitely in interim limbo, the post-adoption comment period was a waste of everyone's time. Desirable modifications in the rule will not occur. Moreover, members of the public will be less likely to submit comments on future interim-final rules, since they would understandably assume that their contributions will vanish into a black hole. Strong management is necessary to induce staff members to complete the work on interim-final rules.

An important policy issue concerning interim-final rules is whether agencies should be compelled to convert their interim-final rules into final-final rules. ACUS Recommendation 95-4 advises agencies to "consider whether to include in the Federal Register notice a commitment to act on any significant adverse comments within a fixed period of time or to provide for a sunset date for the rule."<sup>128</sup> However, I found no interim-final rules published in the fourth quarter of 1997 that contained such a commitment.

At first glance, this portion of ACUS Recommendation 95-4 seems quite weak. ACUS might have recommended a variety of stronger provisions to remedy the problem of interim-final rules that remain unfinalized. Nevertheless I believe ACUS was correct in not doing so.

For example, ACUS might have recommended enactment of a sunset provision like that contained in Internal Revenue Code section 7805(e)(2).<sup>129</sup> That provision, adopted in 1988 without any meaningful legislative history,<sup>130</sup> requires the Treasury Department to finalize its tem-

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126. See *supra* notes 45-46; *infra* note 135.

127. See *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 531 (D.C. Cir. 1996) (criticizing FCC for keeping rule in interim form for period of years); Kinney, *supra* note 60, at 884, 992 (demonstrating how agencies administering Medicaid program invite comments on interim final rules but fail to make them final).

128. ACUS Recommendation 95-4, *supra* note 8, at 43, 113, ¶ 11.B.3.

129. I.R.C. § 7805(e)(1) (1998).

130. See Asimow, *Temporary Tax Regulations*, *supra* note 10, at 361-64 (discussing history of code sections 7805(e) and 7805(f)). Section 7805(e) was a compromise provision; it grew out of unsuccessful efforts to narrow or repeal the interpretive rule exception as applied to tax regulations and also to improve the Treasury's compliance with the Reg-Flex Act.

Temporary tax regulations adopted before the enactment of section 7805(e)(2) have

porary tax regulations within three years after they are issued; otherwise the rules expire.<sup>131</sup> This provision appears to have worked well and to have caused no serious problems for Treasury.<sup>132</sup>

Nevertheless, I would not support enactment of an across-the-board sunset provision because it would be likely to cause serious practical problems.<sup>133</sup> Consider the various scenarios that are likely to occur, none of

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languished many years in the interim limbo. Management does not want to allocate precious staff time to making them final. One important example is a set of temporary regulations relating to the tax incidents of divorce which were adopted in 1985 and have never been finalized, despite numerous criticisms and suggestions. Treas. Reg. §§ 1.71-1T, 1.1041-1T; see Michael Asimow, *The Assault on Tax-Free Divorce: Carryover Basis and Assignment of Income*, 44 TAX L. REV. 65, 84-112 (1988).

131. Temporary tax regulations are identical to standard interim-final rules; they are not "temporary" as the term is used in this Article because they apply indefinitely rather than for a brief defined period. See *supra* note 10. Section 7805(e)(1) requires the agency to issue all temporary regulations simultaneously as proposed regulations. This did not change prior practice. Treasury had always invited post-adoption comments on temporary regulations.

A similar provision under the Endangered Species Act provides that in an emergency a species can be placed on the endangered list without prior notice and comment. However, post-adoption rulemaking procedure must be completed within 240 days or the regulation is deemed repealed. See Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(7) (1994). I have been informed that an unpublished policy of HUD requires that interim-final rules be made final or republished as a new interim-final rule within 12 months.

132. Treasury and IRS officials who spoke off the record stated that they were not aware of any serious problems caused by section 7805(e)(2). In their view, the section provides a desirable incentive to pay attention to temporary regulations to prevent them from lapsing. In a couple of instances, the agency experienced some time pressures in completing action within the three-year period. Recently, one minor regulation lapsed because the agency did not think it was worth the trouble of making it final. As a general practice, IRS and Treasury try to make both proposed and temporary regulations final within one to two years.

However, it is important to note that Treasury makes much less use of temporary regulations than it did in the 1980s when it was deluged with rulemaking projects. If Treasury were required to adopt a large number of regulations on an emergency basis, section 7805(e)(2) would create serious difficulties because a large number of regulations would be sunsetted at the same time. See Asimow, *Temporary Tax Regulations*, *supra* note 10, at 347 n.23 (Treasury relied heavily on temporary regulations after enactment of Tax Reform Act of 1986).

133. See Jordan, *supra* note 19, at 168-74 (discussing legislation proposed in 1982 and 1983 that would have imposed 120-day time limit on "emergency" regulations adopted without prior notice and comment proceedings under good cause exception). I believe that 120 days is far too short a period. Such a provision would be similar to the APAs in many states that utilize the 1961 Model State APA. See *supra* note 123.

In California, the 120-day shelf life provision does not work well. CAL. GOV'T CODE §11346.1(b) (West, 1992 & Supp 1999). My interviews indicate that, in cases of complex regulations, 120 days is insufficient time to obtain comments and to modify the rule in light of the comments. As a result, the Office of Administrative Law is frequently compelled to authorize re-adoption of regulations for numerous additional 120-day periods. See *id.* §11346.1(h); OGDEN, *supra* note 124, at §§ 21.05, 21.06[4].

them optimal:

- A sunset provision may compel an agency to allocate scarce resources to rule revision as the three-year date nears, thus interfering with other uses of those resources that the agency regards as having higher priority.
- If staff cannot be spared to finalize the rule, the rule may lapse with disruptive effect on the agency's regulatory program.
- The agency may decide to just let a useful but not critically important rule lapse on the theory that the burdens of finalizing it exceed the benefits of doing so.
- The agency might decide to re-promulgate the rule as a new interim-final rule, thus starting the sunset clock running anew; however, this action would be legally problematic because there might be no applicable APA exemption.<sup>134</sup>
- The sunset provision may force the agency into a hasty decision to make a rule final without any changes, even though modifications would be appropriate in light of public comments or actual administrative experience.<sup>135</sup>
- The sunset provision might require an agency to finalize a rule after three years even though it still has not figured out what to do with the problem.

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Similarly, I oppose the provision contained in several unenacted bills that would require completion of post-adoption procedure "as soon as reasonably practicable." See *supra* note 117. This vague phrase is an invitation to litigation; moreover, it is not clear that an agency should be required to prioritize the task of finalizing interim-final rules regardless of other demands on staff time.

For the same reason, I disagree with Lavilla's suggestion that a court invalidate an interim-final rule that remains in effect after the emergency that justified its adoption has passed. See Lavilla, *supra* note 19, at 413-16. This proposal is supported only by *Valiant Steel & Equipment Inc. v. Goldschmidt*, 499 F. Supp. 410, 412-13 (D.D.C. 1980), which maintains that an interim-final rule is valid when issued but becomes invalid after 22 months. I believe this standard is impossibly vague in addition to suffering the same practical problems as a sunset provision.

134. It might be difficult to show the same emergency that justified adoption of the interim-final rule still exists at the time the rule is repromulgated.

135. A failure to consider public comments, or to explain why the comments were disregarded, could render the rule vulnerable to attack on judicial review. See *supra* text accompanying notes 73-76. Cf. Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467, 475-76 (1987) (remarking that statutory deadline caused hasty and poorly crafted rules); M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149 (1995) (stating that "hammer" statute which made proposed regulations automatically final by deadline date caused adoption of final rules before agency was ready to issue them, required dubious act of replacing one set of final rules with another set, and resulted in neglect of other agency functions).

- The agency staff might overlook a sunset date, in which case the rule would inadvertently lapse. Such things should not happen, but with constant staff turnover and a very busy agency, sooner or later they will.

A sunset statute would require unnecessary busywork in some cases. Suppose an agency adopts a large number of emergency rules with respect to which it expects no comments and typically never receives any.<sup>136</sup> In such circumstances, the publication of a notice in the Federal Register that the unchanged rule has become final costs money and serves no useful purpose except to satisfy a desire for tidiness.

Another approach that ACUS might have pursued is to require an agency to insert a finality date in an interim-final rule. That date could not be later than the expiration of some fixed period — say, three years after the effective date of the rule. The rule would be deemed to be adopted as a final-final rule on that date if the agency has taken no further action in the meantime. This solves the problem of unnecessary busywork or inadvertent lapse discussed in the preceding paragraphs. However, the built-in finality date approach has the same problems of disruptive effect on agency operations inherent in the sunset approach.<sup>137</sup>

In short, ACUS was right to eschew a legally obligatory sunset provision that would apply across the board. There is already a sufficient incentive for agencies to make their interim-final rules final; doing so lessens the risk that the rule will be set aside because its adoption violated the APA's rulemaking provisions.<sup>138</sup> Sunset provisions appear to cause more problems than they solve. As a matter of good administrative practice, however, agencies should track all interim-final rules by computer. The rules should not vanish into interim limbo forever. General counsel should urge the staff to finalize their interim-final rules as soon as possible and continue reminding them to do so until the status of the rule is finally resolved.

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136. Airworthiness Directives published by the FAA are an example. These mandate emergency safety procedures such as inspections for corrosion on particular aircraft. FAA publishes a large number of these and virtually never receives any comments, since the directives are informally cleared with users and manufacturers before being published. The Directives are sometimes superseded by new ones that mandate different procedures and are also adopted under the good cause exemption. Similarly, FAA adopts Airspace Directives that relocate cities within air traffic control regions. These are also adopted under the good cause exception. According to an interview with an FAA staff attorney, no comments are ever received.

137. For example, if a rule became final without any changes because of a built-in finality date, but the agency had received comments on the rule, a court might well set the final rule aside because the agency had failed to respond to comments after inviting them. *See supra* text accompanying notes 73-76.

138. *See supra* text accompanying notes 77-83.

C. *Permanent Rules that Supplant Interim-Final Rules*

According to several decisions, a final-final rule is vulnerable to challenge on the grounds that the interim-final rule that it supplanted was invalid because the interim-final rule was not supported by sufficiently compelling exigent circumstances.<sup>139</sup> Numerous rules are potentially vulnerable to this type of attack. In an earlier section of this Article, I criticized those cases as illogical and potentially disruptive both to an agency's regulatory program and to reliance interests based on the rule.<sup>140</sup>

ACUS Recommendation 95-4 provides: "Where an agency has used post-promulgation procedures . . . courts are encouraged not to set aside such ratified or modified rule solely on the basis that inadequate good cause existed originally to dispense with pre-promulgation notice and comment procedures."<sup>141</sup>

I would favor accomplishing this result by a statute providing that a final rule supplanting an interim-final rule may not be invalidated simply because the agency lacked good cause to adopt the interim-final rule.<sup>142</sup> The Conference's recommendation is a second-best solution: it counsels federal courts not to set aside a final rule that supplants an interim-final rule under these circumstances.<sup>143</sup>

This recommendation would not apply if an interim-final rule is challenged *before* it is converted into a final-final rule. An interim-final rule could be judicially invalidated on the basis that it was adopted without qualifying for an APA exemption such as good cause. Thus, for example, sanctions arising under the interim-final version of the regulation could be set aside, but sanctions under the final-final rule would be upheld. An advantage of this approach is that it would give agencies that had some doubts about the strength of the emergency exemption claimed for an interim-final rule a powerful incentive to get their interim-final rules into final-final form as soon as possible.

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139. See *supra* text accompanying note 84.

140. See *supra* text accompanying notes 85-90.

141. ACUS Recommendation 95-4, *supra* note 8, at 43, 113.

142. See Asimow, *Temporary Tax Regulations*, *supra* note 10, at 372-73 (discussing proposal for an amnesty provision protecting permanent tax regulations that supplant temporary tax regulations).

143. Under either approach, a court might invalidate a final-final rule for the same reasons that a court might invalidate any final rule. For example, a court could invalidate a final-final rule because it was so different from the interim-final rule that the public was not properly notified or because an agency failed adequately to consider the comments it received in response to an interim-final rule. See *supra* text accompanying notes 73-76.

D. *Authorizing Interim-Final Rules by Statute*<sup>144</sup>

Interim-final rules are often employed where Congress has adopted a new statute that requires an agency to adopt implementing rules under time constraints. Often, agencies simply cannot complete work on the rules within the deadline date. This situation often calls for the use of interim-final rules adopted under the APA's good cause exception. As we have seen, the courts apply the good cause exemption on a contextual, case-specific basis. Some cases have allowed the agencies to dispense with notice and comment where rules are adopted under pressure of statutory deadlines.<sup>145</sup> Other decisions have invalidated such rules, deciding that the agency could have complied with the APA if it had engaged in a full-court press.<sup>146</sup> In short, an agency is taking a considerable risk if it relies on the good cause exception to adopt interim-final rules under a statute that imposes tight implementation deadlines.

In these situations, Congress has repeatedly and sensibly authorized the use of interim-final rules.<sup>147</sup> They recognize the reality that a series of tight deadlines for adopting regulations can create terrible problems for agencies that lack the staff to do everything at once. These statutes allow an agency to put a regulatory scheme in place quickly without concern that a court will later second guess the agency's good cause finding. Such judicial decisions can be devastating to a regulatory program.

With the security provided by an explicit authorization to use the interim-final approach, an agency will not be put to the choice of making a risky good cause claim or rushing its way through a proposed rule process that will satisfy no one. Instead, the interim-final approach assures that statutory deadlines can be met without risking disaster down the line. The public will be invited to furnish input on the new rule in a structured post-adoption notice and comment process. The agency will be required to take account of those comments, as well as its actual experience under the rule, when it adopts a final-final rule. This is a good compromise between the practical need to get a regulatory scheme running quickly and the practical and political imperatives that members of the public participate in making the rules that affect their lives.

In this situation, Congress should consider imposing a sunset requirement. The sunset provision would cause an interim-final rule to lapse un-

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144. The issue discussed here was not part of ACUS Recommendation 95-4.

145. See *supra* note 62.

146. See *id.*

147. See *supra* note 40. The downside of these provisions is that they encourage Congress to create more and more unrealistic deadlines for adopting regulations. Such deadlines interfere with agency priority-setting and often create havoc.

less converted to a final-final rule by a designated date.<sup>148</sup> When Congress specifically authorizes interim-final rulemaking because of an urgent need to get a new regulatory scheme in place quickly, it seems likely that the rules will be so important and controversial that the agency should not be permitted to allow them to dangle in interim limbo indefinitely.<sup>149</sup> Here it may be justifiable for Congress to require commitment of agency resources to the finalization of the rules.

Where Congress authorizes interim-final rules to speed implementation of a new statute, it should also provide that the rules will not be effective until thirty days after they are adopted. In this situation, the normal thirty day pre-effectiveness period of section 553(d) seems especially important, since the rules may come as a surprise to regulated parties.<sup>150</sup> However, the generic good-cause exemption of section 553(d) will remain in effect, so that an agency might shorten or eliminate the thirty day period if it can make a sufficiently persuasive case for doing so.

#### CONCLUSION

Interim-final rules have come of age. They embody the useful technique of making haste slowly. Interim-final methodology allows regulators to adopt rules quickly when quick action is required by exigent circumstances, yet also obtain many of the benefits of public participation in rulemaking. Indeed, it is now rare that an agency adopts an emergency rule without soliciting post-adoption comments. Congress should continue to specifically authorize the use of interim-final methodology when it adopts statutes that impose tight regulatory deadlines.

In line with the suggestions in ACUS Recommendation 95-4, the interim-final approach should be mandatory. Agencies adopting rules under the impracticability or public interest prongs of the good cause exception should be required to solicit post-adoption public comment on the rules. As a matter of good practice, but not under authority of an across-the-board

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148. Several of the statutes authorizing interim-final rules to implement new rules have contained sunset provisions. For example, Congress provided a four-month shelf life provision with respect to the interim-final rule provision of the Social Security Amendments of 1983. See Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 168 (authorizing interim-final rules to implement new Medicare prospective payment system, and prescribing time limits and effective dates for rules). Congress allows 240 days in the case of emergency rules under the Endangered Species Act. See *supra* note 130.

149. I previously indicated opposition to an across-the-board sunset provision for all interim-final rules. The situation discussed in text of specially mandated interim-final rule-making is distinguishable because of the likely importance of the rules. It is justifiable to make the finalizing of such rules a matter of high priority.

150. The interim-final rules provided for by the 1983 Social Security Amendments embodied a 30-day pre-effectiveness period. See 97 Stat. 65, at 168; *supra* note 40.

statute or executive order, agencies should finalize their interim-final rules as rapidly as possible. Both courts and Congress should recognize that there is neither logic nor utility in setting aside final-final rules that supplant invalid interim-final rules, provided that the interim-final version triggers an acceptable public comment process.

Along with numerous other devices developed by agencies and by Congress, interim-final rules should take their place as a well-accepted antidote to rulemaking ossification.

**APPENDIX A**  
**ADMINISTRATIVE CONFERENCE OF THE**  
**UNITED STATES**  
**RECOMMENDATION 95-4**

60 Fed. Reg. 43,110 (Aug. 18, 1995)

PROCEDURES FOR NONCONTROVERSIAL AND EXPEDITED RULEMAKING

Rulemaking has been the subject of considerable debate and review in recent times. Concern has been expressed that rulemaking processes provide adequate opportunity for meaningful public input while allowing agencies, in appropriate circumstances, to expedite the implementation of rules when they either are needed immediately or are routine or noncontroversial. Agencies have experimented with procedures to achieve these objectives. Two of these procedures, "direct final rulemaking," and "post-promulgation comment" rules (also called "interim final rulemaking") are discussed here.

DIRECT FINAL RULEMAKING

Direct final rulemaking is a technique for expediting the issuance of noncontroversial rules. It involves agency publication of a rule in the Federal Register with a statement that, unless an adverse comment is received on the rule within a specified time period, the rule will become effective as a final rule on a particular date (at least 30 days after the end of the comment period). However, if an adverse comment is filed, the rule is withdrawn, and the agency may publish the rule as a proposed rule under normal notice-and-comment procedures.<sup>1</sup>

The process generally has been used where an agency believes that the rule is noncontroversial and adverse comments will not be received. It allows the agency to issue the rule without having to go through the review process twice (i.e., at the proposed and final rule stages),<sup>2</sup> while at the same

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1. When an agency believes that it can incorporate the adverse comment in a subsequent direct final rulemaking, it may use the direct final rulemaking process again.

2. Rules are generally reviewed both by the agency and by the Office of Information and Regulatory Affairs. Internal agency review is often time-consuming. Under current

time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial.

Under current law, direct final rulemaking is supported by two rationales. First, it is justified by the Administrative Procedure Act's "good cause" exemption from notice-and-comment procedures where they are found to be "unnecessary." The agency's solicitation of public comment does not undercut this argument, but rather is used to validate the agency's initial determination. Alternatively, direct final rulemaking also complies with the basic notice-and-comment requirements in section 553 of the APA. The agency provides notice and opportunity to comment on the rule through its Federal Register notice; the publication requirements are met, although the information has been published earlier in the process than normal; and the requisite advance notice of the effective date required by the APA is provided.<sup>3</sup>

Because the process protects public comment and expedites routine rulemaking, the Administrative Conference recommends 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. The Conference further recommends that agencies explain when and how they will employ direct final rulemaking. Such a policy should be issued as a procedural rule or a policy statement.<sup>4</sup>

The Conference recommends that agencies publish in the notice of the direct final rulemaking the full text of the rule and the statement of basis and purpose, including all the material that would be required in the preamble to a final rule. The Conference also recommends that the public be afforded adequate time for comment.<sup>5</sup>

The direct final rulemaking process is based upon the notion that receipt of "significant adverse" comment will prevent the rule from automatically becoming final. Agencies have taken different approaches in defining "ad-

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practice, review of direct final rules by OIRA would be uncommon, since, under E.O. 12,866, only rules deemed to be "significant" are subject to review. Should this policy be changed, the Conference urges that agency rules issued through the direct final rulemaking process be subject to no more than one OIRA review.

3. A separate Federal Register notice stating that no adverse comment has been received and that the rule will be effective on a date at least 30 days in the future can also be used to further alleviate any concern regarding proper advance notice to the public.

4. The Conference has previously suggested that notice-and-comment procedures be used for procedural rules where feasible. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From APA Notice-and Comment Rulemaking Requirements."

5. The Conference has previously recommended that the APA be amended to ensure that at least 30 days be allowed for public comment, while encouraging longer comment periods. Recommendation 93-4, "Improving the Environment for Agency Rulemaking," para. IV and Preamble at p. 5.

verse” comments for this purpose. Some have said that a mere notice of intent to file an adverse comment is sufficient. Others have required that the comment either state that the rule should not be adopted or suggest a change to the rule; proposals simply to expand the scope of the rule would not be considered adverse. Some have said that a recommended change in the rule would not in and of itself be treated as adverse unless the comment states that the rule would be inappropriate as published. The Conference recommends that a significant adverse comment be defined as one where the commenter explains why the rule would be inappropriate, including challenges to the rule’s underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether a significant adverse comment is sufficient to terminate a direct final rulemaking, agencies should consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process.

To assure public notice of whether and when a direct final rule becomes effective, agencies should include in their initial Federal Register notices a statement that, unless the agency publishes a Federal Register notice withdrawing the rule by a specified date, it will become effective no less than 30 days after such specified date. Alternatively, an agency should publish a separate “confirmation notice” after the close of the comment period stating that no adverse comments were received and setting forth an effective date at least 30 days in the future. The effective date of the rule should be at least 30 days after the public has been given notice that the agency does not intend to withdraw the rule, unless the rule “grants or recognizes an exemption or relieves a restriction,” 5 U.S.C. § 553(d)(1), or is otherwise exempted from the delayed effective date of section 553(d) of the APA. The fact that a rule has proved noncontroversial is not itself an appropriate basis for dispensing with the delay in the effective date.

Agencies may also wish to consider using direct final rulemaking procedures in some cases where the text of the rule has been developed through the use of negotiated rulemaking. Where the course of the negotiations suggests that the result will be noncontroversial, the direct final rulemaking process offers the opportunity for expedited rulemaking while at the same time ensuring that the opportunity for comment is not foreclosed.

Although direct final rulemaking is viewed by the Conference as permissible under the APA as currently written, Congress may wish to expressly authorize the process. Authorization would alleviate any uncertainty and reduce the potential for litigation.

## POST-PROMULGATION COMMENT PROCEDURES (“INTERIM FINAL RULEMAKING”)

Agencies have increasingly used a post-promulgation comment process commonly referred to as “interim final rulemaking” to describe the issuance of a final rule without prior notice and comment, but with a post-promulgation opportunity for comment. By inviting comment, the agency is indicating that it may revise the rule in the future based on the comments it receives--thus leading to the label of an “interim-final” rule.

Although the process has been used in a variety of contexts, it is used most frequently where an agency finds that the “good cause” exemption of the APA justifies dispensing with prepromulgation notice and comment. Recognizing the value of public comment, however, the agency offers an opportunity for comment after the final rule has been published.<sup>6</sup> This allows the agency both to issue the rule quickly where necessary and provide opportunity for some public comment. On the other hand, prepromulgation comment is generally considered preferable because agencies are perceived by commenters as more likely to accept changes in a rule that has not been promulgated as a final rule--and potential commenters are more likely to file comments in advance of the agency’s “final” determination.

Under current law, agencies must be able to justify use of the good cause or other exemptions from notice-and-comment procedures under the APA if they are providing only post promulgation comment opportunity. Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified. Where a rule is exempt from notice-and comment requirements, however, it is still advantageous to provide such procedures, even if offered after the rule has been promulgated. Public comment can provide both useful information to the agency and enhanced public acceptance of the rule.<sup>7</sup>

The Conference therefore recommends that, where an agency invokes the good cause exemption because notice and comment are “impracticable” or “contrary to the public interest,” it should provide an opportunity for post-promulgation comment.<sup>8</sup> This recommendation does not apply to tem-

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6. The Administrative Conference has recommended such post-promulgation comment opportunity. See Recommendation 83-2, “The ‘Good Cause’ Exemption from APA Rulemaking Requirements.”

7. See also Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-2 (to be codified at 2 U.S.C. § 1532) (requirement for preparing analysis in connection with “general notice of proposed rulemaking” for rules resulting in non-federal expenditures of \$100,000,000 or more).

8. This is consistent with the Conference’s long-standing position that such opportunity for comment should be offered. See n.6, *supra*; see also Recommendation 90-8,

porary rules, i.e., those that address a temporary emergency or expire by their own terms within a relatively brief period, such as rules that close waterways for boat races or airspace for air shows.

When using post-promulgation comment procedures in this context, agencies should implement the following processes. The agency should include in the notice of the rule a request for public comment as well as a statement that it will publish in the Federal Register a response to significant adverse comments received along with modifications to the interim rule, if any. The Conference also suggests that an agency generally put a cross-reference notice in the "Proposed Rules" section of the Federal Register to ensure that the public is notified of the request for comment. The agency should then, and as expeditiously as possible, respond to any significant adverse comments and make any changes that it determines are appropriate. Agencies should consider including in the initial notice either a deadline by which they will respond to comments and make any appropriate changes or a "sunset" or termination date for the rule's effectiveness.

The Conference addresses these recommendations in the first instance to the agencies. If they do not implement these proposals, the Conference recommends that the President issue an appropriate executive order mandating use of post-promulgation comment procedures for rules issued under the good cause exemption (except those invoking the "unnecessary" clause). If necessary, or when the APA is otherwise reviewed, Congress should amend the APA to include such a requirement.

The Conference also suggests that agencies consider using similar procedures for other rules issued initially without notice and comment, such as interpretive rules, procedural rules, or rules relating to grants, benefits, contracts, public property, or military or foreign affairs functions.<sup>9</sup> Only for those rules where notice and comment are considered unnecessary should such processes not be used; in such cases, agencies should consider direct final rulemaking.

Where an agency has used post-promulgation comment procedures, responded to significant adverse comments and ratified or modified the rule as appropriate, the Conference suggests that a reviewing court generally should not set aside that ratified or modified rule solely on the basis that adequate good cause did not exist to support invoking the exemption initially. At this stage, the agency's initial flawed finding of good cause should normally be treated as harmless error with respect to the validity of the ratified or modified rule.

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"Rulemaking and Policymaking in the Medicaid Program," para.A(2).

9. Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy." Cf. Recommendation 92-1, "The Procedural and Practice Rule Exemption From APA Notice-and-Comment Rulemaking Requirements."

## RECOMMENDATION

## I. Direct Final Rulemaking

A. In order to expedite the promulgation of noncontroversial rules, agencies should develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comment. Agencies should define "significant adverse comment" as a comment which explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. Procedures governing the direct final rulemaking process should be established and published by each agency.

B. Direct final rulemaking should provide for the following minimum procedures:

1. The text of the rule and a notice of opportunity for public comment should be published in the final rule section of the Federal Register,<sup>10</sup> with a cross-reference in the proposed rule section that advises the public of the comment opportunity.

2. The notice should contain a statement of basis and purpose for the rule which discusses the issues the agency has considered and states that the agency believes that the rule is noncontroversial and will elicit no significant adverse comment.

3. The public should be afforded adequate time (at least 30 days) to comment on the rule.

4. The agency's initial Federal Register notice should state which of the following procedures will be used if no significant adverse comments are received: (a) the agency will issue a notice confirming that the rule will go into effect no less than 30 days after such notice; or (b) that unless the agency publishes a notice withdrawing the rule by a specified date, the rule will become effective no less than 30 days after the specified date.<sup>11</sup>

5. Where significant adverse comments are received or the rule is otherwise withdrawn, the agency should publish a notice in the Federal Register stating that the direct final rulemaking proceeding has been terminated.<sup>12</sup>

C. Agencies should also consider whether to use direct final rulemaking following development of a proposed rule through negotiated rulemaking.

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10. Agencies should also consider other mechanisms for providing public notice.

11. 5 U.S.C. § 553(d) provides for exemption from the 30-day advance notice where, for example, the rule "grants or recognizes an exemption or relieves a restriction."

12. At that point, of course, the agency may proceed with usual notice-and comment rulemaking, or if the agency believes it can easily address the comment(s), it may proceed with another direct final rulemaking.

D. If legislation proves necessary to remove any uncertainty that direct final rulemaking is permissible under the APA, Congress should amend the APA to confirm that direct final rulemaking is authorized.

## II. Post-Promulgation Comment Procedures (Interim-Final Rulemaking)

A. Agencies should use post-promulgation comment procedures (so-called "interim final rulemaking") for all legislative rules that are issued without pre-promulgation notice and comment because such procedures are either "impracticable" or "contrary to the public interest."<sup>13</sup> 5 U.S.C. Sec. 553(b)(3)(B) ("good cause exemption")<sup>14</sup> If necessary, the President should issue an appropriate executive order or Congress should amend the APA to include such a requirement.

B. When using post-promulgation comment procedures, agencies should:

1. Publish the rule and a request for public comment in the final rules section of the Federal Register, and in general, provide a cross-reference in the proposed rules section that advises the public that comments are being sought.

2. Include a statement in the Federal Register notice that, although the rule is final, the agency will, if it receives significant adverse comments, consider those comments and publish a response along with necessary modifications to the rule, if any.

3. Consider whether to include in the Federal Register notice a commitment to act on any significant adverse comments within a fixed period of time, or to provide for a sunset date for the rule.

C. Where an agency has used post-promulgation comment procedures (i.e., appropriate agency ratification or modification of the rule following review of and response to post-promulgation comments), courts are encouraged not to set aside such ratified or modified rule solely on the basis that inadequate good cause existed originally to dispense with prepromulgation notice and comment procedures.

D. Agencies should consider using post-promulgation comment procedures for all rules that are issued without prepromulgation notice and comment, including interpretive rules, procedural rules, rules relating to contracts, grants etc., or military or foreign affairs functions.<sup>15</sup>

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13. This recommendation does not apply to temporary rules, meaning those that expire by their own terms within a relatively brief period.

14. The Conference does not recommend a change in the coverage of the "good cause" exemption, but does not oppose a change if such a change is understood simply as a codification of existing practice.

15. However, this recommendation does not apply to rules issued under the "unnecessary" clause of the good cause exemption; in such cases, agencies should consider using direct final rulemaking. See Part I, above.

**APPENDIX B**  
**ADMINISTRATIVE CONFERENCE OF THE**  
**UNITED STATES**  
**RECOMMENDATION 83-2**

48 Fed. Reg. 31,180 (July 7, 1983)

THE "GOOD CAUSE" EXEMPTION FROM APA RULEMAKING  
REQUIREMENTS

The Administrative Procedure Act (APA) provides for public participation in agency rulemaking. The Act's minimum requirements for informal rulemaking are notice and an opportunity to comment on proposed rules. The advantages of public participation in agency rulemaking are widely recognized: the agency benefits because interested persons are encouraged to submit information the agency needs to make its decision; the public benefits for an opportunity to participate in shaping the final agency action. Congress recognized, however, that in some situations the normal public participation procedures should not be required. Consequently, the APA contains a number of exemptions, including a "good cause" exemption which allows agencies to dispense with notice and comment if those procedures are "impracticable, unnecessary, or contrary to the public interest."<sup>1</sup>

Experience has confirmed the need for a "good cause" exemption from the APA's notice and comment requirements. The situations in which the exemption is invoked are diverse, and it is not feasible to identify them all in advance. Some recurring examples of the types of situations requiring use of the exemption are those in which (1) advance notice of rulemaking will defeat the regulatory objective, (2) immediate action is necessary to reduce or avoid health hazards or imminent harm to persons or property, (3) immediate action is required to prevent serious dislocation in the marketplace, and (4) delay in promulgation will cause an injurious inconsistency between an agency rule and a newly enacted statute or judicial deci-

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1. 5 U.S.C. § 553(b)(3)(B). The Administrative Conference has already addressed other exemptions from notice-and-comment rulemaking procedure: Recommendation 69-8 (proprietary matters); Recommendation 73-5 (military and foreign affairs functions), and Recommendation 76-5 (interpretive rules and statements of general policy).

sion. A survey of court opinions in cases involving challenges to agency invocation of the good cause exemption shows that agencies generally have used the exemption with due regard to Congress' admonition that exemptions from section 553 requirements be construed narrowly.

However, experience with good cause exemption also underscores the value of public participation in rulemaking. The risk of error is heightened when an agency acts summarily, and some rules promulgated under the good cause exemption have been based on faulty or inadequate information and have produced unanticipated and undesirable effects. Public participation probably would have led to better decisions in these cases, and it might also have increased interested persons' perceptions of the fairness of the rulemaking process as well as their acceptance of the rule.

The Administrative Conference's study of the good cause exemption coincides with a reexamination of the exemption by the Congress. In the 97th Congress, the Senate passed a regulatory reform bill (S. 1080) that, among other things, would have amended the good cause exemption as follows: except for rules having an insignificant impact, an agency invoking the good cause exemption would be required to comply with public participation requirements to the maximum extent feasible prior to promulgation and to fully comply after promulgation. A bill introduced in the House of Representatives in the 98th Congress (H.R. 1776) would make rules adopted under the good cause exemption interim rules that cease to be effective unless replaced by permanent rules within a prescribed period of time.

The Administrative Conference recommends that agencies provide a post-promulgation comment opportunity for rules they adopt under the good cause exemption. This opportunity should be provided whether the agency invokes the exemption on its own initiative or in response to a statutory or judicial requirement. The post-promulgation comment opportunity will give interested persons a chance to expose any errors or oversights that occurred in the formulation of the rule and to present policy arguments for changing the rule. The agency should publish a response to any relevant and significant comments, as well as its reasons for changing or not changing the rule in light of the comments. The responsive statement should be published within a reasonable time after receipt of public comments, taking into account the nature and number of comments and the agency's other responsibilities. Of course, the agency's decision to amend or repeal the rule, or its decision to deny commenters' requests for changes, will be judicially reviewable under the APA.

The Conference recommends, however, that the post-promulgation comment opportunity not extend to rules for which the agency determines public procedure to be "unnecessary," as that term has been interpreted by

courts. Generally, courts have applied the “unnecessary” ground to rules that are minor or merely technical amendments in which the public has little interest; they generally have not upheld its application to rulemaking involving agency discretion on matters having a substantial impact on the public. Finally, in Paragraph 3, the Conference advises agencies to consider other measures that might appropriately be employed in particular rulemakings under the good cause exemption.

In making this recommendation, the Conference cautions agencies against more readily invoking the good cause exemption on the belief that the post-promulgation comment opportunity will be an adequate substitute for the opportunity to comment prior to adoption of a rule. Comment after promulgation is less likely to cause an agency to reconsider the basic policy choices it made in formulating the rule. And even if the agency does reconsider the basis of the rule, it may be impossible to reverse the effects of a rule that is already in place.

#### RECOMMENDATION

1. Agencies adopting rules under the good cause exemption in the Administrative Procedure Act should provide interested persons an opportunity for post-promulgation comment when the agencies determine notice and comment prior to adoption is “impracticable” or “contrary to the public interest.” However, a post-promulgation comment opportunity should not be required when the agency determines public procedures are “unnecessary” as that term has been interpreted by courts reviewing agency use of the good cause exemption.

2. To implement paragraph 1, agencies should:

a. Publish a notice of the post-promulgation comment opportunity in the Federal Register along with the rule and the agency’s statement of reasons for its finding of good cause;

b. Give interested persons an appropriate period of time to submit comments on the rule; and

c. Within a reasonable time after close of the comment period, publish a statement in the Federal Register indicating the agency’s adherence to, or plans to change, the rule and include in the statement a response to significant and relevant issues raised by the public comments.

3. In addition to the post-promulgation comment procedures specified in paragraph 2, agencies adopting rules under the good cause exemption should consider:

a. Framing the rule as narrowly as possible while still accomplishing the regulatory objective;

b. Using notice and comment procedure to develop general criteria to be applied by the agency in foreseeable, recurring situations that require

emergency action;

c. Promulgating the rule as an interim rule, to be followed by an amended rule promulgated after complying with notice and comment requirements; and

d. Taking appropriate alternative steps to obtain the views of interested persons before adopting the rule.

4. If Congress amends the good cause exemption in 5 U.S.C. § 553(b), it should impose requirements no more stringent than are here recommended.

