



## Recommendation 95-4

### **Procedures for Noncontroversial and Expedited Rulemaking**

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(Adopted June 15, 1995)

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 However, if an adverse comment is filed, the rule is withdrawn, and the agency may publish the rule as a proposed rule under normal notice-and-comment procedures.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 time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial.

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

<sup>2</sup> 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 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.



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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 "adverse" 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;

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<sup>3</sup> 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.

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

<sup>5</sup> 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," ¶IV and Preamble at p. 5.



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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 the rule would be inappropriate as published. The Conference recommends defining a significant adverse comment 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



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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 pre-promulgation 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 pre-promulgation 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 temporary rules, i.e., those that address a temporary

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

<sup>7</sup> 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).

<sup>8</sup> 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, “Rulemaking and Policymaking in the Medicaid Program,” ¶A(2).



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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

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<sup>9</sup> 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.”



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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.

### **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

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<sup>10</sup> Agencies should also consider other mechanisms for providing public notice.



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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.

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. § 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.

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<sup>11</sup> 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.”

<sup>12</sup> 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.

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

<sup>14</sup> 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.



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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 pre-promulgation notice and comment procedures.

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

### Citations:

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<sup>15</sup> 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.