



## **Recommendation 83-2**

### **The "Good Cause" Exemption from APA Rulemaking Requirements**

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(Adopted June 10, 1983)

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 decision. 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

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<sup>1</sup> 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).



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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.



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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



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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.

### Citations:

48 FR 31180 (July 7, 1983)

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