Public Comment

on

Amending the Administrative Procedures With Respect to the Import and Export of Natural Gas
Docket ID No. DOE-HQ-2025-0010
RIN: 1901-AB67

from

Bridget C.E. Dooling

June 16, 2025

Introduction

On May 16, 2025, the U.S. Department of Energy (DOE or the Department) published 13 direct final rules (DFRs) in the *Federal Register*. This comment is a **significant adverse comment** on the DFR entitled *Amending the Administrative Procedures With Respect to the Import and Export of Natural Gas*, as captioned above.

My comment draws upon comments filed by a group of law professors in response to four of the Department's May 16, 2025 DFRs, referred to herein as the "Murthy & Squillace Comment."[1] I file this specific comment to ensure that the Department is prompted to correct its error in the above-captioned DFR.

As the Murthy & Squillace Comment explains, DOE's use of DFRs "contravenes the clear language of the Administrative Procedure Act (APA), ignores long-established procedures on notice and comment rulemaking, and undermines the role of public participation in government rulemaking." That conclusion applies to the above-captioned DFR as well. To make the regulatory changes described in the above-captioned DFR, the Department must proceed, if at all, through a proposed rule.

I am a law professor who researches and teaches administrative law. I also have extensive experience in the federal government, having served as a career analyst at the Office of Information and Regulatory Affairs (OIRA) for over 10 years. A longtime member of the administrative law community, I have held several different roles at the Administrative Conference of the United States (ACUS), including as the member representing the Office of Management & Budget and 3-time consultant, and I continue to serve as senior fellow. I also recently served a 3-year term on the Council of the American Bar Association's Section of

[1] The Murthy & Squillace Comment is included below as an appendix.

Administrative Law and Regulatory Practice, and I continue to be a co-chair for the annual ABA Administrative Law Conference. I also serve on the executive council of the administrative law section of the Association of American Law Schools. As such, I'm well acquainted with both the relevant legal rules and the practical realities of federal rulemaking, and I hold in high regard the civil servants working every day to ensure that agencies lawfully fulfill their missions for the American people.

Background: DFRs in Federal Rulemaking

The Administrative Procedure Act (APA) governs federal agency rulemaking. The ordinary process involves an agency publishing a proposed rule, followed by a comment period and the agency's consideration of received comments, and then final rule publication. This process follows through on the APA's promise of a regulatory system that is open to public input and a government that is humble enough to receive and consider it. Sometimes, of course, the ordinary process will not work for various reasons. Congress anticipated this possibility in the APA, building in an agency's ability to claim "good cause" and take some procedural shortcuts when the situation calls for it.[2] Courts have repeatedly held when interpreting the APA that these shortcuts should be "narrowly construed and only reluctantly countenanced" so that they do not swallow ordinary notice and comment rulemaking.[3] One of those shortcuts, which has evolved through administrative practice, is the direct final rule (DFR).

The Murthy & Squillace Comment summarizes the wide-spread agreement inside and outside government that DFRs are to be used only for non-controversial regulatory changes.[4] In those instances, the agency may claim that ordinary rulemaking would be "impracticable, unnecessary, or contrary to the public interest;" the APA "good cause" standard.[5] DFRs make a kind of bargain with the public: the agency makes a claim that the content of its rule is so non-controversial that it expects nobody will object. But if someone does object—in a significant adverse comment—the agency commits that the DFR will be nullified, and if the agency wishes

[2] 5 U.S.C. § 553(b)(B).
[3] Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992).
[4] Murthy & Squillace Comment p.4-5. Scholars have written extensively about the DFR and its function in administrative law and practice. *See, e.g.,* Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995); Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 Admin. L. Rev. 757 (1999); Ronald M. Levin, *The Duty to Respond to Rulemaking Comments*, 134 Yale L.J. F. 821 (2024); Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rulemaking (Report to the Admin. Conf. of the U.S.) 2 (2024); Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Mark Seidenfeld, *Rethinking the Good Cause Exception to Notice-and-Comment Rulemaking in Light of Interim Final Rules*, 75 Admin. L. Rev. 787 (2023). The Administrative Conference of the United States, a government agency that convenes administrative law experts, has also issued relevant recommendations. *See, e.g.*, Admin. Conf. of the U.S., *Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking*.
[5] 5 U.S.C. § 553(b)(B).

to proceed it will do so through a proposed rule.[6] The DFR is therefore a rather unusual rulemaking vehicle that suits only very unique circumstances.

DOE's Justification

DOE's justification for its use of a DFR provokes the core issue of this comment. For ease of reference, here is the justification offered by the Department in its DFR:

> DOE is amending Part 590 of Title 10, Code of Federal Regulations by this direct final rule. Part 590 contains rules that govern the administrative procedures with respect to the import and export of natural gas. On July 25, 2018, DOE amended the Part 590 regulations for the first time since being promulgated by DOE in 1989. See 83 FR 35106. DOE now amends the Part 590 regulations again to remove antiquated references and update submission processes to reduce the burden on the public. Notably, DOE is moving the general requirements for filing documents with FE to FE's website (https://www.energy.gov/fe/regulation). Doing so allows FE to update filing instructions to increase accuracy and decrease unnecessary burdens on the public. For example, the regulations as currently written require parties to submit "an original and fifteen (15) copies of all applications, filings and submittals" to FE. See § 590.103(a). This may have been an appropriate and reasonable requirement when the regulations were first promulgated in 1989, but this requirement does not serve any legitimate purpose today and only serves to create an unnecessary burden on the public. The regulations also currently require parties to physically file documents to the "Office of Fuels Program" (see § 590.104), an office that no longer exists. Additionally, the regulations as currently written do not contemplate submission, inspection, or service of documents through electronic means. See, e.g., §§ 590.103(a), 590.104, 590.106, 590.107(c), 590.107(e). Finally, the regulations as currently written are inaccurate with respect to the payment of filing fees (see § 590.207) since checks are no longer accepted and filing fees must be submitted electronically. DOE is updating these antiquated aspects of the regulation to bring the process into the 21st century.

[6] *See, e.g.*, Office of the Federal Register, *A Guide to the Rulemaking Process*, 9 ("If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely.").

I. The Department's DFR does not satisfy the "good cause" exemption under the APA.

If an agency claims an APA "good cause" exemption from notice and comment rulemaking, it must provide a "finding and a brief statement of reasons therefor in the rules issued."[7] In this DFR, the Department does not claim a "good cause" exemption, nor does it offer its reasons for such a claim. Therefore, this DFR is invalid.

Instead, the Department only offers its justifications for why it wants to rescind the contents of the DFR. By doing so, the Department demonstrates that it misunderstands the APA's "good cause" standard, which is not about whether the rescinded rule is "impracticable, unnecessary, or contrary to the public interest." Rather, the "good cause" standard is about whether notice and comment rulemaking is "impracticable, unnecessary, or contrary to the public interest." DOE's justification for why, in its view, the rule is ripe for repeal is nonresponsive to the APA's "good cause" requirements.

At no point in its DFR does the Department explain why ordinary notice and comment rulemaking would be "impracticable, unnecessary, or contrary to the public interest." Instead, the Department offers policy arguments, which, ironically, are precisely the kind of justifications about which the APA guarantees the public an opportunity to comment.

Because it commits error in applying the "good cause" standard, the Department fails to meet its burden to make these regulatory changes using a DFR. The Department must withdraw this DFR.

II. If a significant adverse comment is received, the Department may only proceed with a proposed rule.

The Department's direct final rule states: "If significant adverse comments are received, notice will be published in the Federal Register before the effective date either withdrawing the rule or issuing a new final rule which responds to significant adverse comments."

As explained in the Murthy & Squillace Comment, when an agency receives a significant adverse comment on a DFR, the Department's next step—absent good cause—is to issue a notice of proposed rulemaking.[8] Therefore, the Department erred in its statement about the consequence of a significant adverse comment. Instead, upon receiving a significant adverse comment, the DFR is nullified. At that point, and because the Department misjudged the public's interest in the DFR, the Department must start over. If it chooses to proceed with its efforts to rescind this DFR's regulatory provisions it can do so by issuing a proposed rule.

[7] 5 U.S.C. § 553(b)(B).
[8] Murthy & Squillace Comment p.5-6.

It is possible that the Department could try to claim that its misuse of DFRs is "harmless error," but it is not, for at least three reasons.

First, the doctrine of harmless error in administrative law cases is unsettled, evolving, and subject to a circuit split.[9] Even when harmless error has been applied to instances in which agencies failed to provide appropriate notice and comment, the agency must make a "compelling showing" that it had an "open mind" to any comments received.[10] By asserting that it plans to proceed to a final rule even if it receives a significant adverse comment, the Department failed to demonstrate an open mind in this DFR. In addition, the conclusory nature of the Department's justification does not compellingly show an open mind.

Second, by choosing an incorrect vehicle—the DFR—for its rulemaking, the Department misled the public about the nature of the regulatory changes it was initiating. As noted above, a DFR is for non-controversial changes. This fundamental legal error, and by a sophisticated party that is well-positioned to understand the APA, cannot be cured by responding to received comments and finalizing the rule.

Third, DFRs rest on an agreement that if a substantial adverse comment is received, the agency will rescind the DFR and proceed via proposed rule instead. If the Department reneges on that long-running and universally accepted approach, the Department undermines trust in our government and the rulemaking process. The Department should not be party to a game of "catch me if you can" rather than following Congress's command in the APA to use a predictable, reliable process. Procedural gamesmanship degrades the Department's reputation at a time when public confidence is already disturbingly low. Given the stakes, the Department should think very carefully about claiming that its errors here are harmless, because in the plain meaning of that term, they are not.

The Department's justification suggests that the provisions discussed in this DFR are out-dated. This could be a sound justification for a DFR, but under the APA the Department must actually make and explain its claim to "good cause." If it does so, the Department could likely re-issue a DFR for these provisions.

Conclusion

The above-captioned DFR does not meet the "good cause" exemption under the APA. As such, the Department must withdraw its *Amending the Administrative Procedures With Respect to the Import and Export of Natural Gas* DFR and, if it chooses to proceed with these policy changes,

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[9] *Compare* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253 (2017), *with* Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 106 (2017). Two recent Supreme Court cases demonstrate the difficulty that courts have in applying this doctrine. *Compare Calcutt v. FDIC*, 598 U.S. 623 (2023), *with FDA v. Wages & White Lion Investments, L.L.C.*, 604 U.S. __ (2025).

[10] Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261, 294-97 (2016) (describing the "open mind" standard).

issue a proposed rule instead. The Department could also opt to re-issue a DFR but with the appropriate “good cause” justification based on the provisions being out-dated. If I may be of any assistance, please let me know.

Sincerely,

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APPENDIX: Murthy-Squillace Comment

To: The U.S. Department of Energy

From: Undersigned Professors of Law

Date: June 16, 2025

Re: Law Professor Comments Objecting to the Use of Direct Final Rules to Rescind or Amend Nondiscrimination Regulations in Programs or Activities Receiving Federal Financial Assistance at these Four Dockets:

Docket DOE-HQ-2025-0024 (General Provisions)

Docket DOE-HQ-2025-0015 (New Construction Requirements)

Docket DOE-HQ-2025-0025 (Basis of Sex in Education Programs or Activities)

Docket DOE-HQ-2025-0016 (Basis of Sex in Sports Programs)

Contents

I. Introduction and Summary

On May 16, 2025, the U.S. Department of Energy's (DOE) issued four direct final rules purporting to rescind or amend key elements of its existing regulations related to nondiscrimination:

1. Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions);[1]
2. Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities;[2]

[1] 90 Fed. Reg. 20777. This direct final rule followed Executive Order 14281 of April 23, 2025 on "Restoring Equality of Opportunity and Meritocracy," which directed the Attorney General, in coordination with other agencies, to "initiate appropriate action to repeal or amend the implementing regulations for Title VI of the Civil Rights Act of 1964 for all agencies to the extent they contemplate disparate-impact liability."

[2] 90 Fed. Reg. 20783.

3. Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance;[3] and
4. Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance.[4]

The inappropriate use of direct final rules in these contexts appears to follow a Presidential Memorandum issued by President Donald Trump on April 9, 2025, entitled "Directing the Repeal of Unlawful Regulations."

We are law professors with expertise in administrative law, and our significant adverse comment explains why we believe the DOE must withdraw all four of these direct final rules. The use of direct final rules in these contexts contravenes the clear language of the Administrative Procedure Act (APA), ignores long-established procedures on notice and comment rulemaking, and undermines the role of public participation in government rulemaking. If the DOE wants to amend its regulations on nondiscrimination, it must follow the regular notice and comment procedures outlined in the APA.[5]

We understand that direct final rules and other expedited procedures for rulemaking are sometimes appropriate to reduce the time and cost of rulemaking.[6] However, an agency cannot simply avoid the APA standard without justifying its decision. Rather, an agency seeking to avoid notice and comment must satisfy one of the specific exemptions outlined in the APA. In particular, the "good cause" exemption, which the DOE apparently intends to invoke for at least three of the four direct final rules,[7] only applies when the agency determines that the traditional

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[3] 90 Fed. Reg. 20788.
[4] 90 Fed. Reg. 20786.
[5] In contrast, the DOE has issued a proposed rule with a 60 day comment period to rescind certain regulatory provisions related to nondiscrimination based on age in federally assisted programs or activities. *See* Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (Nondiscrimination on the Basis of Age), 90 Fed. Reg. 20949 (May 16, 2025).
[6] *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995); Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999); Ronald M. Levin, *The Duty to Respond to Rulemaking Comments*, 134 YALE L.J. F. 821 (2024); MARK SQUILLACE, BEST PRACTICES FOR AGENCY USE OF THE GOOD CAUSE EXEMPTION FOR RULEMAKING (REPORT TO THE ADMIN. CONF. OF THE U.S.) (2024), https://www.acus.gov/sites/default/files/documents/Best%20Practices%20for%20Agency%20Use%20of%20the%20Good%20Cause%20Exemption%20for%20Rulemaking%20%28Final%20Report%29.pdf; Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE LAW JOURNAL 1385 (1992); Mark Seidenfeld, *Rethinking the Good Cause Exception to Notice-and-Comment Rulemaking in Light of Interim Final Rules*, 75 ADMIN. L. REV. 787 (2023); Cong. Rsch. Serv., Cole, Jared, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action. R44356.*, https://www.congress.gov/crs-product/R44356.
[7] The DOE's summary for the rules related to the nondiscrimination general provisions, new construction requirements, and on the basis of sex in education all describe the existing regulations as "unnecessary." *See* 90 Fed. Reg. 20777; 90 Fed. Reg. 20783; 90 Fed. Reg. 20788. The DOE rule relating to nondiscrimination on the basis of sex in sports programs does not use the term "unnecessary," but instead, seeks comment on a wide range of topics. *See* 90 Fed. Reg. 20786. The APA also sets forth two general exemptions to notice and comment rulemaking, i.e., if involves "a military or foreign affairs function of the United States; or (2)a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. §553(a). Neither is relevant to the DOE direct final rules on nondiscrimination.

process is "impracticable, unnecessary, or contrary to public interest."[8] Although experts, including signatories to this comment, have recognized that "drawing a clear line between those rules that warrant a public comment process and those that are properly exempted from that process has proved challenging,"[9] it is quite easy to show that the DOE's efforts to repeal these nondiscrimination rules fail to meet the good cause test. For that reason and the reasons explained below, the DOE must follow a full notice and comment process.

None of the four DOE's direct final rules even mention "good cause," and they do not discuss why it would be "impracticable, unnecessary, or contrary to public interest" to undertake a normal rulemaking.[10] Rather, in an apparent nod to the APA's good cause provision, the DOE merely states in three of the direct final rules that it seeks to eliminate or rescind "unnecessary" regulations.[11] By doing so, the DOE demonstrates that it misunderstands the APA's "good cause" standard, which is not about whether the rescinded rule is unnecessary; rather, the standard focuses on whether notice and comment rulemaking is unnecessary. The DOE seems to be asserting that if the rule is unnecessary, notice and comment rulemaking is also unnecessary—but this simply does not meet the APA's "good cause" standard.[12]

In the direct final rule on "Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities," for example, DOE offers policy justifications for rescinding the rule—that in DOE's view, the rule is unnecessary because a more general standard exists and that the rule is unduly burdensome because it lacks flexibility.[13] In fact, these are exactly the kinds of justifications about which the APA guarantees the public an opportunity to comment.[14]

Oddly, the direct final rule on "Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance" does not even mention any of the terms used in the good cause exemption under the APA.[15] In that rulemaking, the "DOE seeks comment on all aspects of the rule, including but not limited to the prior rule's consistency with statutory authority and the Constitution, the prior rule's costs and benefits, and the prior rule's effect on

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[8] 5 U.S.C. §553(b)(B).
[9] SQUILLACE, *supra* note 6 at 2. *See also* Levin [*Direct Final Rulemaking*], *supra* note 6; Levin [*More on Direct Final Rulemaking*], *supra* note 6; Levin [*The Duty to Respond to Rulemaking Comments*], *supra* note 6.
[10] 5 U.S.C. §553(b)(B).
[11] 90 Fed. Reg. 20777 ("SUMMARY: This direct final rule rescinds certain unnecessary regulatory provisions related to nondiscrimination in federally assisted programs or activities."); 90 Fed. Reg. 20781 ("DOE reviewed this rescission under the provisions of the Regulatory Flexibility Act . . . . This final rule eliminates unnecessary regulations."); 90 Fed. Reg. at 20789 ("SUMMARY: This final rule rescinds certain unnecessary regulatory provisions related to nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance."); 90 Fed. Reg. 20783 (noting that "DOE has determined this provision to be unnecessary and unduly burdensome").
[12] *See* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93-95 (D.C. Cir. 2012).
[13] 90 Fed. Reg. 20783.
[14] *See generally* Levin [*The Duty to Respond to Rulemaking Comments*], *supra* note 6.
[15] 90 Fed. Reg. 20786.

small business, entrepreneurship and private enterprise."[16] This request for substantive comments is, in and of itself, a clear example as to why a direct final rule is inappropriate.

The DOE's direct final rules on nondiscrimination also contravene the longstanding and well-established practice for such rules. In all four of the direct final rules, the DOE states that if it receives significant adverse comments, it will withdraw the rule and issue either a "new direct final rule" or a "final rule" that "responds to significant adverse comments."[17] But if significant adverse comments are received, the DOE cannot simply publish a new direct final rule or a new final rule, but must instead issue a notice of proposed rulemaking. To expedite the timeline, DOE could have published notices of proposed rulemaking simultaneously with the direct final rules, as recommended by the Administrative Conference of the United States.[18] But the DOE cannot lawfully avoid the democratic public participation principles for federal rulemaking that are inherent in the APA's informal notice and comment process. That is why the APA's exemptions from that notice and comment process are narrowly tailored.

II. The DOE's Direct Final Rules Do Not Qualify for the Good Cause Exemption under the Administrative Procedure Act

Unless otherwise required by statute, an agency need not follow the usual notice and comment rulemaking provisions if—

> 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.[19]

If an agency is claiming this exemption, then it must incorporate a good cause "finding and a brief statement of reasons therefore in the rules issued."[20] By claiming that notice and comment is "unnecessary" to rescind this rule in three of the direct final rules, the DOE plainly seems to be invoking this prong of the exemption.[21]

When the good cause exemption applies because notice and comment are "unnecessary," federal agencies may use a direct final rule. The Administrative Conference of the United States

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[16] *Id.*
[17] *Compare* 90 Fed. Reg. 20777 (stating that it will issue another "direct final rule") *with* 90 Fed. Reg. 20783, 90 Fed. Reg. 20788, and 90 Fed. Reg. 20786 (all stating that DOE will issue another "final rule").
[18] Admin. Conf. of the U.S., *Recommendation 2024-6, Public Engagement in Agency Rulemaking Under the Good Cause Exemption*, (Dec. 17, 2024), https://www.acus.gov/document/public-engagement-agency-rulemaking-under-good-cause-exemption ("When an agency issues a direct final rule, it may consider publishing in the same issue of the *Federal Register* a companion proposed rule that will serve as a notice of proposed rulemaking if the agency later withdraws the direct final rule upon receiving any significant adverse comments. In the event the agency receives significant adverse comments, the agency should consider providing an additional period for public comment on the companion proposed rule"). *See also* SQUILLACE, *supra* note 6 at 29.
[19] 5 U.S.C. § 553(b)(B).
[20] *Id.*
[21] 90 Fed. Reg. at 20777; 90 Fed. Reg. at 20781; and 90 Fed. Reg. at 20789.

has clarified that "direct final rulemaking is a technique for expediting the issuance of noncontroversial rules."[22] But it further makes clear that an agency should only use this process when it believes that "the rule is noncontroversial and adverse comments will not be received."[23] Put another way, a direct final rule is only appropriate when it involves "a minor rule in which the public is not particularly interested."[24] As courts have explained, the unnecessary prong is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[25]

The DOE's direct final rules in all four of these cases utterly fail to meet these standards because they involve major changes in agency policy in which the public has a substantial interest.[26] Moreover, because the DOE must provide an adequate response to public comment before the rule takes effect, the DOE's failure to follow the regular notice and comment process here risks a judicial finding that the agency "entirely failed to consider an important aspect of the problem," and was thus arbitrary and capricious.[27]

The steps that the DOE contemplates it may take in the future would compound the errors of its current approach. The DOE suggests in its direct final rule on "Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions)" that if significant adverse comments are received, it will "withdraw[] the rule *or issu[e]a new direct final rule which responds to significant adverse comments*."[28] (Emphasis added.) In the other three direct final rules, the DOE states that if it receives significant adverse comments, it will proceed by "either withdrawing the rule *or issuing a new final rule which responds to significant adverse comments*."[29] (Emphasis added.) If significant adverse comments are received and DOE elects to continue with the rulemaking, then DOE must issue a notice of proposed rulemaking. A second direct final rule or a new final rule would be entirely

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[22] Admin. Conf. of the U.S., *Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking*, https://www.acus.gov/document/procedures-noncontroversial-and-expedited-rulemaking.
[23] *Id.*
[24] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT (1947).
[25] Mack Trucks, 682 F. 3d at 94. *See also* Util. Solid Waste Activities Grp. v. EPA., 236 F.3d 749, 755 (D.C. Cir. 2001); South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983); Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969). Another court, speaking more generally about the good cause exemption, has noted that this exemption should be "narrowly construed and only reluctantly countenanced." Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting State of New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C.Cir.1980)).
[26] "A simple example where notice-and-comment procedures were properly deemed unnecessary involved the 'Social Security Number Fraud Prevention Act Requirements.' In April 2024, the Office of Personnel Management (OPM) promulgated a DFR to implement requirements mandated by the Social Security Number Fraud Prevention Act of 2017. The rule prohibits the inclusion of Social Security numbers on any document sent by an agency through the mail unless the OPM Director considers it necessary. OPM deemed notice-and-comment unnecessary for this rule because it was purely procedural and reflected a statute that was already in effect that the agency had no discretion to change." SQUILLACE, *supra* note 6 at 15 (discussing 89 Fed. Reg. 25749 (Apr. 12, 2024)).
[27] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[28] 90 Fed. Reg. 20777.
[29] 90 Fed. Reg. 20783; 90 Fed. Reg. 20788; and 90 Fed. Reg. 20786.

inappropriate. As the Office of the Federal Register has explained in *A Guide to the Rulemaking Process:*

> If adverse comments are submitted, the agency is required to withdraw the direct final rule before the effective date. The agency may re-start the process by publishing a conventional proposed rule or decide to end the rulemaking process entirely.[30]

This makes good sense because the basis for a direct final rule is that it involves minor, noncontroversial issues. Receipt of significant adverse comments makes clear that the issues are neither minor nor noncontroversial. Even if the DOE is confident about its own views that it regards public comment as "unnecessary," that is not the legal standard under 5 U.S.C. § 553(b)(B). When an exemption to the APA standards does apply, the agency cannot simply sidestep the affirmative burden that the APA places on it. It must issue a notice of proposed rulemaking, solicit public comment, and then respond to significant comments.[31] To expedite the timeline, the DOE could have published such a notice simultaneously with the direct final rule, as recommended by the Administrative Conference of the United States.[32] But the DOE should not undercut the democratic principle of public participation in government rulemaking that is inherent in the informal notice and comment process under the APA.

Indeed, ACUS' Recommendation 2024-6 encourages agencies to "use additional forms of public engagement. . . before considering whether to invoke the good cause exemption," and not to make it easier to avoid notice and comment on proposed rules, as the DOE has tried to do in this case.[33] Given the serious legal questions about the DOE's invocation of the good cause exemption in these cases, the only prudent and lawful course for the DOE is to withdraw the direct final rules and, if it chooses to proceed with these actions, use the regular notice and comment process.

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[30] Office of the Federal Register, *A Guide to the Rulemaking Process*, 9, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf. *See also* SQUILLACE, *supra* note 6 at 29 ("If the agency receives significant adverse comments, it has two options. It can either withdraw the rule or publish a regular proposed rule that is open for public comment. In either case, the agency should promptly publish notice of its decision in the Federal Register so that the public knows whether the rule has gone into effect.").

[31] Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). *See* Levin [*The Duty to Respond to Rulemaking Comments*], *supra* note 6 at 823 (explaining that an administrative agency's duty to respond to comments "serves to make agency decision-making better informed and more careful than it would otherwise be, and it also promotes public trust in the outcomes of the administrative process"); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012), https://www.gao.gov/products/gao-13-21 (noting that an agency that solicits public comment outside of a notice of proposed rulemaking is not "obligated to respond to comments it has received").

[32] Admin. Conf. of the U.S., *supra* note 18 ("When an agency issues a direct final rule, it may consider publishing in the same issue of the *Federal Register* a companion proposed rule that will serve as a notice of proposed rulemaking if the agency later withdraws the direct final rule upon receiving any significant adverse comments. In the event the agency receives significant adverse comments, the agency should consider providing an additional period for public comment on the companion proposed rule"). *See also* SQUILLACE, *supra* note 6 at 29.

[33] Admin. Conf. of the U.S., *supra* note 18.

III. The DOE's Failure to Afford a Regular Notice and Comment Process is Not Harmless Error

Courts are understandably skeptical of agencies using good cause to fast-track controversial or significant policy reversals, and that is the nature of the DOE's direct final rules in these cases. Moreover, the agency's failure to engage in the kind of notice and comment rulemaking required by the APA is not harmless error.[34] Many members of the public share an interest in promoting nondiscrimination practices in government agency programs. Given the public's reliance interest on the longstanding regulations that are being purportedly being rescinded,[35] the DOE should have expected that the public would want to comment on substantive changes to the rules. The DOE's actions are contrary to the APA and bypass legal processes that value public engagement and help ensure that an agency considers all perspectives.[36]

Evidence of the public's significant interest in this rule is easily demonstrated by the large number of public comments that the DOE received when it first proposed to issue a rule on "Nondiscrimination in Federally Assistance Programs; General Provisions":

> On November 16, 1978, the Department of Energy issued a proposed rule to carry out its responsibilities under the various laws governing nondiscrimination in Federally assisted programs. Five hundred and eleven (511) responses were received during the thirty-one day comment period. Of that total, 431 respondents concurred with the proposed rule as published. The remaining 80 comments recommended various changes. The Department's response to these comments and the explanation for changes in the proposed rule are set forth below in the summary of the final regulation.[37]

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[34] *Cf.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 684 (2020).

[35] *See* Dep't of Homeland Sec. v. Regents of the Univ. of California, 591 U.S. 1 (2020) ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.") (internal citations and quotes omitted)

[36] *See* Admin. Conf. of the U.S., *supra* note 18 (noting that "[t]he 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.").

[37] 45 Fed. Reg. 40514, 40514 (1980). *See also* Nondiscrimination on the Basis of Race, Color, National Origin, Handicap, or Age in Programs or Activities Receiving Federal Financial Assistance; Final Rule, 68 Fed. Reg. 51334, 51338 (Aug. 26, 2003) ("In the NPRM, we invited comments on the proposed regulations. We received two comments."); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 4627, 4629 (2001) ("Furthermore, the provisions of this final rule were proposed by the Department of Justice and public comment invited for a period of 60 days. See 64 FR 58567 (Oct. 29, 1999). DOJ received a total of 22 comments, five of which were submitted by other Federal agencies."); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 8747 (2001) (explaining why temporarily delaying effective date of rule for 60 days was exempt from notice and comment under 5 U.S.C. §553(b)(A) and §553(d)(3)); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 Fed. Reg. 18721 (2001) (stating that the final rule published on January 18, 2001 became effective for DOE on April 23, 2001); Enforcement of Nondiscrimination on the Basis of Handicap in Federally Assisted Programs; Final Rule, 55 Fed.

Furthermore, there continues to be significant public interest in these regulatory changes, which underscores the need for the usual notice and comment rulemaking process. Regulations.gov shows that voluminous comments have already been submitted to the DOE as of the filing of this comment.

- 6,860 comments have been submitted to the DOE direct final rule on "Rescinding Regulations Related to Nondiscrimination in Federally Assisted Programs or Activities (General Provisions);"[38]
- 7,254 comments to the DOE direct final rule on "Rescinding New Construction Requirements Related to Nondiscrimination in Federally Assisted Programs or Activities;"[39]
- 8,281 comments have been submitted to the DOE direct final rule on "Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance;"[40] and
- 2,105 comments have been submitted to the DOE direct final rule on "Nondiscrimination on the Basis of Sex in Sports Programs Arising Out of Federal Financial Assistance."[41]

IV. Conclusion

The DOE's use of direct final rules to rescind aspects of longstanding regulations on nondiscrimination is woefully inappropriate. The direct final rules clearly do not meet the "good cause" exemption under the APA.[42] DOE must withdraw these direct final rules and, if it chooses to proceed with these policy changes, issue notices of proposed rulemaking instead.

Respectfully submitted,

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Reg. 52136, 52136 (1990) (noting that fifteen agencies "received several comments from States, architects, interest groups, and individuals").

[38] https://www.regulations.gov/document/DOE-HQ-2025-0024-0001.

[39] https://www.regulations.gov/document/DOE-HQ-2025-0015-0001.

[40] https://www.regulations.gov/document/DOE-HQ-2025-0025-0001.

[41] https://www.regulations.gov/document/DOE-HQ-2025-0016-0001.

[42] 5 U.S.C. §553(b)(B).

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