

# The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action

Jared P. Cole  
Legislative Attorney

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## Summary

While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute's "good cause" exception permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and bypass its 30-day publication requirement if good cause exists. Federal courts reviewing this agency practice have varied in their analysis, resulting in confusion as to precisely what constitutes "good cause." In addition, some courts have indicated that these are two distinct standards; others do not always distinguish between the two.

What precisely constitutes good cause is not explicit from the APA's text. In order to understand the operation of the good cause exception, it may be helpful to divide good cause cases into several categories: (1) emergencies; (2) contexts where prior notice would subvert the underlying statutory scheme; and (3) situations where Congress intends to waive Section 553's requirements.

Courts differ as to the proper standard of review when agencies invoke the good cause exception. One pitfall is the proper characterization of the agency's action—is an agency determination that good cause exists to bypass Section 553 a discretionary decision or a legal conclusion? Challenges to agency discretionary decisions are governed by Section 706(2)(A)'s arbitrary and capricious standard, while procedural challenges pursuant to Section 706(2)(D) that an agency failed to comply with the provisions of the APA are often reviewed *de novo*. Some courts have applied the former standard when reviewing good cause determinations, others the latter. Still other courts appear to not clearly adopt either standard, but focus instead on simply "narrowly construing" the provision. Recent judicial analysis of the Attorney General's actions pursuant to the Sex Offender Registration and Notification Act (SORNA) illustrates this divergence. The Attorney General issued an interim rule applying SORNA retroactively and relied on the good cause exception to bypass Section 553's requirements. Federal courts split as to the legality of the Attorney General's actions as well as to the appropriate standard of review when examining good cause invocations.

Agency use of the good cause exception can also be important in the context of presidential transitions. Recent outgoing presidential administrations have engaged in "midnight rulemaking," whereby federal agencies increase the number of regulations issued during the final months of a presidential administration. A subsequent presidential administration of a different party, however, may have different policy priorities. Nonetheless, once a rule is finalized by an agency, repeal of a rule requires compliance with Section 553's notice and comment procedures. In order to gain control of the rulemaking process, some Presidents have sought to impose a moratorium on new regulations at the beginning of their administration. Agencies implementing such moratorium directives have often relied on use of the good cause exception to justify their actions.

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## Introduction

Federal agencies issue numerous rules pursuant to congressionally delegated authority. These rules have the force and effect of law. The Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules. The statute's "good cause" exception, however, permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and to bypass its requirement that rules be published 30 days before implementation if good cause exists.<sup>1</sup> In 2012, the Government Accountability Office (GAO) found that between 2003 and 2010 federal agencies issued about 35% of major rules and about 44% of nonmajor rules without a notice of proposed rulemaking (NPRM).<sup>2</sup> Of those rules issued without an NPRM, agencies justified their action most often by invoking the good cause exception.<sup>3</sup> However, federal courts reviewing this agency practice have varied in their analysis—as to the proper standard of review, whether there are actually two good cause provisions, and what factors justify the exception—resulting in confusion as to precisely what constitutes "good cause."<sup>4</sup> This report will examine judicial analysis of the good cause standard and map several factors that lead courts to uphold or reject agencies' invocation of the exception.

## Notice and Comment Rulemaking

The APA imposes procedural requirements on the actions of executive branch agencies.<sup>5</sup> Agencies engaged in "formulating, amending, or repealing" a rule are subject to either the APA's formal or informal rulemaking provisions.<sup>6</sup> A rule is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."<sup>7</sup> If an agency's organic statute requires rulemaking to be "on the record," then the APA's formal rulemaking procedures are required.<sup>8</sup> Otherwise, the informal notice and comment rulemaking provisions of

<sup>1</sup> 5 U.S.C. § 553(b)(3)(B); (d).

<sup>2</sup> The GAO report adopted the definition of major rules in the Congressional Review Act, which distinguishes between major rules and nonmajor rules. Major rules are those determined by the office of Information and Regulatory Affairs (OIRA) to, among other things, have or be likely to have an annual effect on the economy of \$100 million or more. 5 U.S.C. § 804(2).

<sup>3</sup> See Government Accountability Office, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments* (Dec. 2012). Of the agency rules examined in the GAO's sample, agencies invoked the good cause exception in 77% of major rules and 61% of nonmajor rules promulgated without an NPRM. *Id.* at 15.

<sup>4</sup> Some commentators have opined that the apparent circuit split on the proper standard of review will be addressed by the Supreme Court. See Leland E. Beck, *APA Circuit Split – Notice and Comment Good Cause Bypass In SORNA Retroactivity Regulations*, *Federal Regulations Advisor*, <http://www.fedregsadvisor.com/2013/03/16/apa-circuit-split-notice-and-comment-good-cause-bypass-in-sorna-retroactivity-regulations/> (Mar. 16, 2013). However, the Solicitor General has so far successfully argued against review of the question in Supreme Court certiorari stage briefs. See Brief for the Federal Respondents in Opposition to Certiorari, *Oregon Trollers Association, et al. v. Carlos Gutierrez, et al.*, No. 06-662, 452 F.3d 1104 (9<sup>th</sup> Cir. 2006), *certiorari denied*, *Oregon Trollers Ass'n v. Gutierrez*, 549 U.S. 1338, 1338 (2007). See also *United States Steel Corp. v. EPA*, 444 U.S. 1035, (denying certiorari in *United States Steel Corp. v. EPA*, 605 F.2d 283 (7<sup>th</sup> Cir. 1979)), *reh'g denied*, 445 U.S. 939 (1980).

<sup>5</sup> 5 U.S.C. § 551 *et seq.*

<sup>6</sup> 5 U.S.C. § 551(5).

<sup>7</sup> 5 U.S.C. § 551(4).

<sup>8</sup> *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973); 5 U.S.C. §§ 556, 557.

Section 553 of the APA apply.<sup>9</sup> The most common process for issuing rules is under the latter category.<sup>10</sup>

Section 553 requires agencies to provide the public with notice of a proposed rulemaking.<sup>11</sup> The notice must include “(1) the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>12</sup> The public then has an opportunity to submit written comments on the rule.<sup>13</sup> Following consideration of these comments, the agency publishes a final rule with a “concise general statement of [its] basis and purpose.”<sup>14</sup> Such rules must be published in the Federal Register not less than 30 days before the effective date.<sup>15</sup>

However, the APA contains several exceptions to Section 553’s procedural requirements. First, certain subject areas are wholly exempt from the requirements of Section 553.<sup>16</sup> Second, certain “rules” issued by agencies that do not regulate public conduct with the “force and effect of law” are exempt from Section 553’s notice and comment requirements. These include rules concerning “agency organization, procedure, or practice,” or procedural rules,<sup>17</sup> as well as interpretive rules and general statements of policy, or nonlegislative rules.<sup>18</sup> Such “rules” differ from the substantive, or legislative, rules subject to Section 553 that do bind the public’s behavior. Third, certain legislative rules are exempt from Section 553’s notice and comment requirement when an “agency for good cause finds” that issuing a proposed rule and holding a comment period would be “impracticable, unnecessary, or contrary to the public interest.”<sup>19</sup> Finally, the 30-day publication requirement does not apply when an agency finds good cause.<sup>20</sup>

The APA’s “good cause” exception(s) thus permits agencies to issue substantive rules that bind the public without following Section 553’s notice and comment requirement and to waive the 30-day publication requirement.<sup>21</sup> However, the proper standard for invoking the exemption is unclear; commentators have noted the vagueness of the applicable terms.<sup>22</sup> Federal courts are

<sup>9</sup> Other types include formal, hybrid, direct final, and negotiated rulemaking. See CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd.

<sup>10</sup> CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

<sup>11</sup> 5 U.S.C. § 553(b).

<sup>12</sup> 5 U.S.C. § 553(b)(1)-(3). This is done via publication in the *Federal Register*.

<sup>13</sup> 5 U.S.C. § 553(c).

<sup>14</sup> 5 U.S.C. § 553(c).

<sup>15</sup> 5 U.S.C. § 553(d).

<sup>16</sup> Rules pertaining to (1) “a military or foreign affairs function of the United States,” (2) “a matter relating to agency management or personnel,” or (3) a matter relating to “public property, loans, grants, benefits, or contracts” are exempt. 5 U.S.C. § 553(c).

<sup>17</sup> 5 U.S.C. § 553(b)(3)(A).

<sup>18</sup> 5 U.S.C. § 553(b)(3)(A).

<sup>19</sup> 5 U.S.C. § 553(b)(3)(B). Agencies must provide “a brief statement of reasons” supporting the good cause invocation. 5 U.S.C. § 553(b)(3)(B). See *S. California Aerial Advertisers’ Ass’n v. F.A.A.*, 881 F.2d 672, 677 (9<sup>th</sup> Cir. 1989).

<sup>20</sup> 5 U.S.C. § 553(d)(2), (3). The publication requirement also does not apply to interpretive rules or statements of policy and substantive rules which relieve a restriction. 5 U.S.C. § 553(d)(2), (3).

<sup>21</sup> Courts sometimes require good cause to be established separately in order to waive the notice-and-comment procedures as well as the 30-day publication requirement. See *U.S. v. Brewer*, 766 F.3d 884, 888 (8<sup>th</sup> Cir. 2014) (“[C]ourts should not conflate the pre-adoption notice-and-comment requirements, listed in § 553(b) and (c), with the post-adoption publication requirements, listed in § 553(d). Because these are separate requirements, the agency must have good cause to waive each.”).

<sup>22</sup> See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1123 (2009); Connor Raso, (continued...)

divided on the proper standard of review when faced with challenges to agencies' use of the exemption to forgo notice and comment procedures. And judicial analysis of agencies' use of the exception appears to consider a wide range of factors without a clear limiting principle.<sup>23</sup> Further, courts divide as to whether a failure to include a formal statement of reasons in the rule when bypassing Section 553's requirements is fatal to the rule's validity.<sup>24</sup>

## Are There Actually Two Good Cause Standards?

Section 553(b)(B) of the APA provides that compliance with notice and comment rulemaking may be bypassed when an "agency for good cause finds" that doing so would be "impracticable, unnecessary, or contrary to the public interest";<sup>25</sup> Section 553(d) provides that the 30-day publication rule may be waived for good cause.<sup>26</sup> Some courts have indicated that these are two distinct standards; others do not always distinguish between the two.<sup>27</sup> Courts that do conceptualize them differently note that notice and comment rulemaking allows public participation, while "the purpose of the thirty-day waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect."<sup>28</sup> In making the latter determination, the D.C. Circuit has noted that agencies "should 'balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.'"<sup>29</sup> In addition, some courts have indicated that the test for good cause to waive notice and comment is more stringent than to waive the 30-day rule.<sup>30</sup>

However, courts sometimes decline to decide whether the two standards are different, ruling that the circumstances do or do not support good cause under both exceptions,<sup>31</sup> or do not

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*Agency Avoidance of Rulemaking Procedures*, 67 ADMIN L. REV. 65, 87-90 (2015).

<sup>23</sup> See *Raso*, *supra* note 22, at 87-90 (asserting that judicial analysis of the good cause exception is "inconsistent.").

<sup>24</sup> Compare *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App. 1974) ("A failure to incorporate in rules a statement of basis and purpose, in technical violation of § 553(c), has been held not to void the rules where 'both the basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed.'") (quoting *Hoving Corp. v. Federal Trade Commission*, 290 F.2d 803, 807 (2d Cir. 1961) with *Kelly v. U.S. Dep't of Interior*, 339 F. Supp. 1095, 1102 (E.D. Cal. 1972) ("We think the omission is fatal not only because it violates § 553(b) (B), but also because it leaves us with nothing to measure the propriety of ignoring the 30-day rule.").

<sup>25</sup> 5 U.S.C. 553(b)(B).

<sup>26</sup> 5 U.S.C. 553(d).

<sup>27</sup> Compare *Buschmann v. Schweiker*, 676 F.2d 352, 356 (9th Cir. 1982); *U.S. v. Johnson*, 632 F.3d 912, 927-30 (5th Cir. 2011) with *United States v. Gould*, 568 F.3d 459, 481 (4th Cir. 2009) (Michael, J., dissenting) (asserting that "courts have regarded § 553(d)(3)'s good cause standard as distinct from and somewhat more flexible than § 553(b)(B)'s good cause standard") (citing *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981)); *Rowell v. Andrus*, 631 F.2d 699, 703 (10th Cir. 1980) (noting that the two provisions have different purposes).

<sup>28</sup> *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996).

<sup>29</sup> *Id.* (quoting *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977)). See *Black v. Pritzker*, No. CV 14-782 (CKK), 2015 WL 4747409, at \*12 (D.D.C. Aug. 10, 2015).

<sup>30</sup> *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. E.P.A.*, 605 F.2d 283, 289-90 (7th Cir. 1979).

<sup>31</sup> *NW Airlines v. Goldsmith* (8th Cir. 1981) (upholding good cause for both based on similar reasoning); *U.S. v. Cain*, 583 F.3d 408, 423-24 (6th Cir. 2009) (acknowledging that the two standards are different but rejecting both claims of good cause on similar grounds).

acknowledge that the two might differ in substance.<sup>32</sup> In fact, some courts distinguished between the two in some cases, but not in others.<sup>33</sup>

Whether courts distinguish conceptually between the two standards or not, at a functional level, the two can sometimes operate independently. Courts will sometimes find that good cause exists to issue immediately applicable emergency regulations, but conclude that there is no reason the agency cannot make them temporary, subject to notice and comment procedures.<sup>34</sup> In addition, courts have sometimes found good cause for an agency to issue an immediately applicable interim rule when the agency permits comment on the final rule.<sup>35</sup>

## What Constitutes Good Cause?

Leaving aside disagreements over the proper standard of review, under what circumstances have courts upheld agency invocations of good cause to bypass notice and comment rulemaking? The APA's text limits good cause to an agency finding that compliance with notice and comment rulemaking is "impracticable, unnecessary, or contrary to the public interest."<sup>36</sup> However, judicial application of these factors tends to converge.<sup>37</sup> Consequently, leaving aside minor or technical rules where compliance with Section 553 is unnecessary,<sup>38</sup> it may be helpful to divide good cause

<sup>32</sup> U.S. v. Johnson, 632 F.3d 912, 927-30 (5<sup>th</sup> Cir. 2011); U.S. v. Valverde, 628 F.3d 1159 (9<sup>th</sup> Cir. 2010); United States v. Reynolds, 710 F.3d 498, 509-14 (3d Cir. 2013).

<sup>33</sup> Compare Tennessee Gas Pipeline Co. v. F.E.R.C., 969 F.2d 1141, 1144 (D.C. Cir. 1992) with Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

<sup>34</sup> See e.g., Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981); Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (9<sup>th</sup> Cir. 1992); Kollett v. Harris, 619 F.2d 134, 145 & n.15 (1<sup>st</sup> Cir. 1980) ("The case upon which the Secretary relies, dealt not with good cause for eliminating prior notice and comment under section 553(b)(B) but with good cause under section 553(d) to forego the 30-day waiting period before an adopted rule becomes effective. The section 553(d) deferral period is for the purpose of affording affected persons time to adjust to the rule. As plaintiffs have suggested no reason why such an adjustment interval was needed here or demonstrated any prejudice from the interim rule's being given immediate effect, and as the Secretary had an obvious need to administer the program, we conclude, under the circumstances, that the Secretary had good cause to make the interim deeming regulations immediately effective but not to bypass prior notice and comment procedures.") (citations omitted); Ishtyaq v. Nelson, 627 F. Supp. 13, 23 (E.D.N.Y. 1983) ("By proceeding as it did here, promulgating an immediately effective interim rule and following it with a 30 day notice and comment period and the adoption of a final rule, amended in light of the public comments received, the INS fully discharged its obligations under § 553 of the Act"); Black v. Pritzker, No. CV 14-782 (CKK), 2015 WL 4747409, at \*9 (D.D.C. Aug. 10, 2015) ("Instead, the D.C. Circuit has made clear that the requirements for showing good cause under § 553(b), not at issue in this case, and under § 553(d), which is at issue in this case, are different.").

<sup>35</sup> Am. Transfer & Storage Co. v. I.C.C., 719 F.2d 1283, 1294 (5<sup>th</sup> Cir. 1983).

<sup>36</sup> 5 U.S.C. § 553(b)(B).

<sup>37</sup> See Util. Solid Waste Activities Grp. v. E.P.A., 236 F.3d 749, 755 (D.C. Cir. 2001).

<sup>38</sup> Rulemaking is unnecessary when agencies make minor or technical determinations involving little to no agency discretion. See Mack Trucks, Inc. v. E.P.A., 682 F.3d 87, 94 (D.C. Cir. 2012) ("This prong of the good cause inquiry 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.'") (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001)); N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 767 (4<sup>th</sup> Cir. 2012); Nat'l Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978); United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30-31 (1947) ("'Unnecessary' refers to the issuance of a minor rule in which the public is not particularly interested."); Senate Report, No. 752, 79<sup>th</sup> Cong. 1<sup>st</sup> Sess. at 14(1945) ("'Unnecessary' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved.").

Agencies also sometimes utilize "direct-final rulemaking," whereby the agency publishes a proposed rule, and the notice includes language providing that the rule will become effective as a final rule on a specific date unless an adverse comment is received by the agency. If even a single adverse comment is received, the direct final rule is (continued...)



cases into several categories: (1) emergencies; (2) contexts where prior notice would subvert the underlying statutory scheme; and (3) situations where Congress intends to waive Section 553's requirements.

## Emergencies

Concern for public safety can constitute good cause to bypass notice and comment procedures. For example, in 2004, the D.C. Circuit upheld the Federal Aviation Administration's (FAA) rule, promulgated without notice and comment, covering the suspension and revocation of pilot certificates on security grounds.<sup>39</sup> The agency argued that the regulation was necessary to protect the public against security threats. The court accepted this contention, ruling that the "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001" supported the good cause finding.<sup>40</sup> Likewise, the Ninth Circuit upheld an FAA rule that established special operating procedures for air tour operators.<sup>41</sup> The agency argued that current regulations were insufficient to protect public safety, as the regulation was promulgated after seven helicopter accidents in the preceding year. The court accepted the agency's position and upheld the good cause finding.<sup>42</sup>

However, the "mere existence" of a deadline is usually insufficient to establish good cause.<sup>43</sup> Courts have generally rejected good cause exemptions when agencies argue that statutory deadlines alone justify bypassing notice and comment procedures or the 30-day publication requirement.<sup>44</sup> Instead, some "exigency" is required, independent of the deadline itself, which merits dispensing with Section 553's requirements.<sup>45</sup> Importantly, courts have precluded efficiency goals and concern for agency convenience from qualifying as exigencies.<sup>46</sup>

For example, courts may find good cause when circumstances outside an agency's control make compliance with notice and comment rulemaking or the 30-day publication requirement impracticable.<sup>47</sup> This can include situations where an agency, faced with a statutory or regulatory deadline to promulgate regulations, invokes good cause to support an order deferring a rule's

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withdrawn, and the agency must issue a proposed rule under the APA's informal notice and comment requirements. One might justify such action as bypassing Section 553's requirements because the proposed rule is unnecessary. However, some have argued that such procedures comply with Section 553 as they issue notice and delay finality of the rule for 30 days. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 4-6 (1995).

<sup>39</sup> *Jifry v. F.A.A.*, 370 F.3d 1174, 1179-80 (D.C. Cir. 2004).

<sup>40</sup> *Id.* at 1180.

<sup>41</sup> *Hawaii Helicopters Operators Ass'n v. F.A.A.*, 51 F.3d 212, 214 (9<sup>th</sup> Cir. 1995).

<sup>42</sup> *Id.*

<sup>43</sup> *United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207, 213 (5<sup>th</sup> Cir. 1979).

<sup>44</sup> *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981); *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981); *United States Steel Corp. v. United States Environmental Protection Agency*, 595 F.2d 207, 213 (5<sup>th</sup> Cir. 1979).

<sup>45</sup> *Natural Resources Defense Council, Inc., v. Evans*, 316 F.3d 904, 912 (9<sup>th</sup> Cir. 2003); *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006).

<sup>46</sup> *See, e.g., Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006).

<sup>47</sup> *Northwest Airlines v. GoldSchmit*, 645 F.2d 1309, 1320-21 (8<sup>th</sup> Cir. 1981); *American Federation of Government Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (upholding good cause exception to issue interim rule when agency, in response to judicial order, promulgated immediately effective regulations that aimed to prevent economic harm to poultry producers and consumers).



implementation.<sup>48</sup> This exception is only appropriate 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.”<sup>49</sup> For example, the D.C. Circuit ruled that the Office of Personnel Management’s deferment of a health plan enrollment period because of recent litigation uncertainty and threats to the financial stability of the program did not violate the APA.<sup>50</sup> In that case, litigation in other courts, combined with losses associated with a major health benefit provider, created an emergency situation wherein commencement of the enrollment period without deferment would have “posed a serious threat to the financial stability of the benefit program.”<sup>51</sup> These circumstances were outside of the agency’s control, not leaving enough time to comply with notice and comment procedures.<sup>52</sup> Consequently, the court found that good cause existed to waive Section 553’s requirements.

Similarly, swift action may be permitted when, due to circumstances outside of an agency’s control, a regulation is needed in the public interest.<sup>53</sup> For example, in 1981 the Eighth Circuit upheld a temporary FAA rule allocating air carrier slots at National Airport in Washington, D.C.<sup>54</sup> Previously, air carriers had traditionally agreed on the appropriate slots through air scheduling committees, which reported their agreement to the FAA. In 1980, for the first time in the scheduling committees’ history, the air carriers could not come to an agreement. The court noted the need for notice to the airlines and the public for scheduling purposes, and concluded that “the rapid resolution of the slot allocation problem at National was not only in the interest of the traveling public, particularly on the eve of the winter holiday season, but also consistent with the national interest in the efficient utilization of the navigable airspace.”<sup>55</sup> The court thus upheld the agency’s good cause finding to shorten the comment period and make the rule effective immediately.<sup>56</sup> In contrast, concerns about the fiscal health of one regulated entity might not rise to this level.<sup>57</sup> For instance, in 2012, the EPA promulgated an interim final rule (IFR) without notice and comment that permitted heavy-duty diesel engine manufacturers to sell noncompliant engines if they paid certain penalties.<sup>58</sup> The D.C. Circuit found that the purpose of the IFR was not to prevent any threat to the public, but instead “to rescue a lone manufacturer from the folly of its own choices.”<sup>59</sup> Absent some important public interest, or even a systemic threat to an entire

<sup>48</sup> *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).

<sup>49</sup> *Id.*

<sup>50</sup> *Nat’l Fed. of Federal Emp. v. Devine*, 671 F.2d 607 (D.C. Cir. 1982).

<sup>51</sup> *Id.* at 611.

<sup>52</sup> *Id.*

<sup>53</sup> *Reeves v. Simon*, 507 F.2d 455, 457 (Temp. Emer. Ct. App. 1974) (finding that good cause was established to dispense with 30-day publication requirement because of a national gasoline shortage emergency).

<sup>54</sup> *Northwest Airlines v. GoldSchmit*, 645 F.2d 1309, 1320 (8<sup>th</sup> Cir. 1981) (“Although some dispute exists over whether the ‘good cause’ exception of § 553(d)(3) encompasses more situations than the ‘good cause’ exception of § 553(b)(B), we need not determine in the present case whether the two ‘good cause’ exceptions carry the same meaning. In our view the urgent necessity for rapid administrative action under the circumstances of the present case would justify the Secretary’s finding of ‘good cause’ under either exception.”).

<sup>55</sup> *Id.* at 1321.

<sup>56</sup> *Id.* The court acknowledged that “some dispute exists over whether the ‘good cause’ exception of § 553(d)(3) encompasses more situations than the ‘good cause’ exception of § 553(b)(B)” but concluded that good cause was established here in either case.

<sup>57</sup> *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012).

<sup>58</sup> *Id.* at 89.

<sup>59</sup> *Id.* at 93 (quoting Petitioner’s Brief at 29).

industry and its customers, saving one regulated entity—which could have avoided the problem if it made better business decisions—did not constitute good cause.<sup>60</sup>

Importantly, conclusory claims by an agency of an emergency situation, unaccompanied by independent facts, are insufficient to constitute good cause.<sup>61</sup> In a leading case for this proposition, the D.C. Circuit invalidated the Federal Energy Regulatory Commission's (FERC's) issuance of an interim rule that required pipeline companies to make disclosures and give advance notice prior to constructing new facilities or replacing existing ones.<sup>62</sup> Previously, the agency automatically approved the construction of new facilities. In a shift of policy, the agency simultaneously published a Notice of Proposed Rulemaking to solicit comments on a forthcoming final rule as well as a binding interim rule. The agency defended the interim rule as, among other things, necessary to prevent environmental damage from companies accelerating the construction of new facilities before the final rule came into force.<sup>63</sup> However, the court found that good cause to do so had not been established. It ruled that the agency had not provided a sufficient factual basis to accept this reasoning.<sup>64</sup> At bottom, the agency relied upon its own expertise in predicting that, without the interim rule, firms would rush to begin new projects that would harm the environment. Because the agency failed to provide evidence beyond its own expertise on the matter, the D.C. Circuit refused to uphold a finding of good cause.<sup>65</sup>

## Congressional Intent

As discussed above, the mere existence of a statutory deadline, in and of itself, is usually insufficient to constitute good cause. However, Congress can implicitly waive the APA's requirements. For instance, when Congress imposes certain procedures, which, taken together with a deadline, are irreconcilable with Section 553's requirements, then courts may read congressional intent to waive the APA's requirements.<sup>66</sup>

Similarly, some courts have found that the imposition of a congressional deadline can support a good cause finding. For example, the congressional imposition of a stringent deadline which makes agency compliance with Section 553 impracticable can constitute good cause.<sup>67</sup> Similarly,

<sup>60</sup> *Id.* at 94.

<sup>61</sup> *See, e.g.,* Sorenson Commc'ns Inc. v. F.C.C., 755 F.3d 702, 707 (D.C. Cir. 2014) (finding that no good cause existed when the agency failed to establish facts supporting a "threat of impending fiscal peril"). As mentioned previously, *supra* notes 73-93, a number of courts recently rejected the Attorney General's invocation of good cause in the SORNA cases as merely restating the purpose of the statute, rather than proffering independent evidence. *See* United States v. Valverde, 628 F.3d 1159, 1167 (9<sup>th</sup> Cir. 2010) ("[T]he Attorney General did little more than restate the general dangers of child sexual assault, abuse, and exploitation that Congress had sought to prevent when it enacted SORNA."); United States v. Brewer, 766 F.3d 884, 890 (8<sup>th</sup> Cir. 2014) ("[T]he Attorney General's 'public safety rationale cannot constitute a reasoned basis for good cause because it is nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA.'") (quoting Reynolds, 710 F.3d at 512); *see also* United States v. Johnson, 632 F.3d 912, 928 (5<sup>th</sup> Cir. 2011); United States v. Cain, 583 F.3d 408, 421 (6<sup>th</sup> Cir. 2009).

<sup>62</sup> *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1146 (D.C. Cir. 1992). The court found that there was not good cause to waive the notice and comment requirements or the 30-day publication rule, but did not distinguish between the two as separate standards.

<sup>63</sup> *Id.* at 1143.

<sup>64</sup> *Id.* at 1145-46.

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.,* Asiana Airlines v. F.A.A., 134 F.3d 393, 398 (D.C. Cir. 1998); *Methodist Hospital of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1998). Here, courts are finding that the APA is inapplicable, rather than that good cause is established.

<sup>67</sup> *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885-86 (3<sup>rd</sup> Cir. 1982).

when the issuance of interim rules is necessary in order to comply with a new law, good cause to waive Section 553's requirements can be established.<sup>68</sup> That said, whether Congress intended to waive these procedures in a particular situation is largely a fact-specific inquiry. In the past, courts have divided as to whether Congress so intended in the same statutory scheme.<sup>69</sup>

## Harm Caused by Prior Notice

Courts have sometimes found good cause when advance notice of a rule would cause harm to the public. For example, the Ninth Circuit upheld the Secretary of Agriculture's invocation of good cause to bypass the APA's 30-day publication requirement when issuing rules governing the orange market.<sup>70</sup> Pursuant to the Agricultural Marketing Agreement Act, the Secretary is authorized to regulate the market in certain commodities and issue rules regarding volume restrictions every week. With regard to navel oranges, a committee holds a regular meeting, open to the public, to decide on the appropriate volume restrictions for the next week. The decision is then recommended to the Secretary, who actually issues the binding rule. The court reasoned that requiring the Secretary to give 30-day advance notice of each rule would cause harm by forcing the agency to predict the proper restrictions in advance of when a reasonable determination could actually be made.<sup>71</sup> The committee in charge of formulating recommendations revises its projections "right up until, and occasionally even during, the week in question."<sup>72</sup> The court concluded that it could not require compliance with this requirement "without throwing the entire regulatory program out of kilter."<sup>73</sup> However, the court ruled that good cause had not been established to bypass the notice and comment requirements.<sup>74</sup> While it was impracticable to predict the final rule a month in advance, nothing precluded the Secretary from notifying the public of the meeting and permitting comments every week.

Similarly, courts have found good cause when compliance with Section 553 would subvert the rule or underlying statute's purpose.<sup>75</sup> This has occurred several times in the context of government price controls. For example, in response to the 1970's oil crisis, the Federal Energy Administration (FEA)<sup>76</sup> issued regulations to equalize prices without notice and an opportunity to comment.<sup>77</sup> The Temporary Emergency Court of Appeals upheld the good cause invocation, finding that given the emergency conditions behind the oil price legislation and the potential "price discrimination and other market dislocations" that could be caused by advance notice of the rule, the agency had good cause to bypass notice and comment rulemaking.<sup>78</sup> Likewise, courts have upheld good cause invocations when notice of a price increase would worsen oil supply

<sup>68</sup> *American Transfer & Storage Co. v. I.C.C.*, 719 F.2d 1283, 1292-93 (5<sup>th</sup> Cir. 1983).

<sup>69</sup> Compare *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 210 (5<sup>th</sup> Cir. 1979); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *W. Oil & Gas Ass'n v. U.S. E.P.A.*, 633 F.2d 803, 811 (9<sup>th</sup> Cir. 1980); *State of N. J., Dep't of Env'tl. Prot. v. U.S. Env'tl. Prot. Agency*, 626 F.2d 1038, 1040 (D.C. Cir. 1980) with *U.S. Steel Corp. v. U.S. E.P.A.*, 605 F.2d 283, 289 (7<sup>th</sup> Cir. 1979); *Republic Steel Corp. v. Costle*, 621 F.2d 797 (6<sup>th</sup> Cir. 1980).

<sup>70</sup> *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9<sup>th</sup> Cir. 1992).

<sup>71</sup> *Id.* at 1485-86.

<sup>72</sup> *Id.* at 1486.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1487.

<sup>75</sup> See, e.g., *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emerg. Ct. App. 1975).

<sup>76</sup> Now known as the Department of Energy.

<sup>77</sup> *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1490 (Temp. Emerg. Ct. App. 1975).

<sup>78</sup> *Id.* at 1492. The court also reviewed the factual question of whether the agency's good cause finding was shown in the record and concluded that it was. *Id.* at 1492-94.

shortages,<sup>79</sup> as well as in circumstances where “announcement of a future price freeze would generate a ‘massive rush to raise prices.’”<sup>80</sup>

## Standards of Review

One potential reason for confusion regarding the issue is disagreement regarding the appropriate standard of review when agencies invoke the good cause exception. As an initial matter, federal courts appear to agree that the good cause exception is to be “narrowly construed.”<sup>81</sup> Executive agencies bear the burden of persuasion in convincing a court that good cause exists,<sup>82</sup> and the exception is not to be used as an “escape clause” to avoid rulemaking procedures when convenient for the agency.<sup>83</sup> “Bald assertions” by an agency that comments are unnecessary in a particular situation do not create good cause.<sup>84</sup> Otherwise, the exception would swallow the rule.<sup>85</sup> In other words, agencies must provide courts with a sufficient reason showing why good cause exists in order to justify bypassing Section 553’s procedural requirements.<sup>86</sup> Courts are divided, however, as to the proper standard of review when an agency does so.

As relevant to agency rulemaking, the APA, in Section 706, direct courts to

hold unlawful and set aside agency action, findings, and conclusions found to be—  
arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]  
without observance of procedure required by law.<sup>87</sup>

## Judicial Review of Agency Action

Courts employ a variety of legal doctrines when reviewing agency action. These standards are conceptually distinct, however, from judicial review of trial court proceedings.<sup>88</sup> Broadly, courts review agency factual findings, discretionary decisions, and legal conclusions, although

<sup>79</sup> *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emerg. Ct. App. 1975).

<sup>80</sup> *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emerg. Ct. App. 1975).

<sup>81</sup> *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (“We have repeatedly made clear that the good cause exception ‘is to be narrowly construed and only reluctantly countenanced.’”) (citing *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001)); *Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419, 426 (3d Cir. 1982) (“In considering whether there was good cause for the agency to adopt the data compensation regulations without prior notice-and-comment, we are guided by the principle that the exception is to be narrowly construed.”); *San Diego Air Sports Ctr., Inc. v. F.A.A.*, 887 F.2d 966, 969 (9<sup>th</sup> Cir. 1989) (“We have stated that ‘[t]he exceptions to section 553 will be narrowly construed and only reluctantly countenanced.’”) (quotations omitted) (citing *Alcaraz v. Block*, 746 F.2d 593, 612 (9<sup>th</sup> Cir.1984)).

<sup>82</sup> *Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10<sup>th</sup> Cir. 1987); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983).

<sup>83</sup> *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (citing *American Fed’n of Govt. Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981)).

<sup>84</sup> *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 800-01 (D.C. Cir. 1983); *Mobil Oil Corp. v. Department of Energy*, 610 F.2d 796, 803 (Temp.Em.Ct.App.1979).

<sup>85</sup> *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 800-01 (D.C. Cir. 1983); *Housing Authority of City of Omaha v. United States Housing Authority*, 468 F.2d 1, 8 (8<sup>th</sup> Cir.1972).

<sup>86</sup> *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 447 (D.C. Cir. 1982) *aff’d sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

<sup>87</sup> 5 U.S.C. § 706(2)(A), (D).

<sup>88</sup> See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 197 n.23 (2010) (noting that the judicial review standards of the APA are not “duplicated by the standards of review used by appellate courts to review trial courts.”).

distinguishing between these situations can be difficult.<sup>89</sup> The amount of deference given by a court to the agency's decision varies depending on which agency action is under review.<sup>90</sup>

However, courts do not always explicitly adopt standards of review, sometimes concluding that an agency's construction of a statute stands or fails under multiple standards.<sup>91</sup> In addition, judicial review of agency's fact-findings can simultaneously include consideration of substantial discretionary decisions, complicating the precise scope of review.<sup>92</sup> Further, distinguishing differences between the potential outcomes under each standard can sometimes be a difficult analytical exercise.<sup>93</sup> Nevertheless, an explanation of the various standards can be helpful in understanding the nature of federal court review.

## Review of Legal Conclusions

Courts review agencies' *legal* conclusions according to several standards. When a plaintiff challenges an agency action as inconsistent with statute, courts must interpret the meaning of the legislative provision. In the case of ambiguity, courts grant *Chevron* deference to agencies' interpretations of their own statutory authority if Congress intended to permit the agency to "speak with the force of law."<sup>94</sup> In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court ruled that when courts review an agency's "construction of [a] statute which it administers,"<sup>95</sup> "[s]tatutory ambiguities" are resolved, "within the bounds of reasonable

<sup>89</sup> In fact, some scholars have claimed that the differences in outcomes when courts apply the various doctrines are negligible. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–1120 (2008); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682 (2002).

<sup>90</sup> Scholars have also criticized judicial application of these categories for lacking doctrinal consistency. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1120–35 (2008).

<sup>91</sup> See, e.g., *NRDC v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 878–89 (9<sup>th</sup> Cir. 2005) ("We need not resolve this question here, because even under the *Chevron* standard of review, the 2002 quota was based on an impermissible construction of the Act. We therefore will assume that *Chevron* review is appropriate."); *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l. Hosp.*, 374 F.3d 362, 369 (5<sup>th</sup> Cir. 2004) ("We do not need to decide whether the [Pension Benefit Guaranty Corp.'s ("PBGC's")] interpretation of annuity starting date warrants *Chevron* deference because it is clear that the PBGC's order may be upheld as a matter of law under the less deferential standard set forth in [*Mead*]."); *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) ("We therefore accord [the Centers for Medicare and Medicaid Services'] interpretation considerable deference, whether under *Chevron* or otherwise."); cf. *United States v. Atandi*, 376 F.3d 1186, 1189 (10<sup>th</sup> Cir. 2004) ("Without determining whether full *Chevron* deference is owed to this ATF interpretation of § 922(g)(5)(A) in light of the criminal nature of that statute, we unquestionably owe 'some deference' to the ATF's regulation." (citation omitted)); Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1912 (2006).

<sup>92</sup> *Iowa League of Cities v. EPA*, 711 F.3d 844, 872–73 (8<sup>th</sup> Cir. 2013); *U.S. v. Reynolds*, 710 F.3d 498, 507–09 (3d Cir. 2013); *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1486 (Temp. Emer. Ct. App. 1983) ("Nevertheless, although a court may exercise greater independent judgment when reviewing agency action on procedural, rather than substantive grounds, to the extent that the requisite procedures involve factual determinations, deference is still afforded to agency judgments.").

<sup>93</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) ("[T]otality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation."); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 138 (2010) ("[C]ourts do not, in the end, discern the differences among these various doctrines, frequently do not distinguish among the doctrines in application, and probably do not really care which standard of review they apply most of the time.").

<sup>94</sup> *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

<sup>95</sup> 467 U.S. 837, 843 (1984).



interpretation, not by the courts but by the administering agency.”<sup>96</sup> *Chevron* deference in such cases requires courts to defer to an agency’s construction of an ambiguous statute if the agency’s interpretation is reasonable.<sup>97</sup> In *United States v. Mead*, the Supreme Court clarified that *Chevron* deference applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>98</sup> Congressional intent to do so with regard to a specific statute can be shown by, for example, a specific grant of power to conduct rulemaking or adjudications.<sup>99</sup>

Otherwise, agencies’ legal interpretations are given less deference by courts.<sup>100</sup> This is not to say however, that agency interpretations necessarily receive no weight at all. The Court indicated in *Skidmore v. Swift and Co.* that when an agency interprets a “highly detailed” “regulatory scheme” and the agency has “the benefit of specialized experience”<sup>101</sup> then the agency’s view is accorded “a respect proportional to its ‘power to persuade.’”<sup>102</sup> The agency is not exercising delegated authority to interpret its statutory provision, so resolution of the question is for the judiciary. Nonetheless, courts will give consideration to the agency’s interpretation, the “weight” of which “will depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”<sup>103</sup>

<sup>96</sup> *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013).

<sup>97</sup> *Id.* *Chevron* analysis is often described as containing two steps. At the first step, courts examine whether Congress has clearly spoken to the issue. If not, then at step two, the agency gets deference in its interpretation of statutory ambiguities. The Court has indicated that the analysis at *Chevron* step two, examining whether the agency’s construction is reasonable, largely overlaps with arbitrary and capricious review. *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011); see *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) (“The *Chevron* analysis and the ‘arbitrary, capricious’ inquiry set forth in *State Farm* overlap in some circumstances, because whether an agency action is ‘manifestly contrary to the statute’ is important both under *Chevron* and under *State Farm*.”); *id.* at 620 (Wald, J., concurring) (“I agree with the panel that despite these distinctions, the *Chevron* and *State Farm* frameworks often do overlap.”); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1271 (1997). See *infra* note 112. For more on the *Chevron* doctrine, see CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey.

<sup>98</sup> *Mead*, 533 U.S. at 226-27. The question whether Congress gave the agency the power to interpret a statute with the force of law is sometime called *Chevron* step zero. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

<sup>99</sup> *Mead*, 533 U.S. at 226-27. These procedural options are not the exclusive indicia of congressional intent to delegate interpretative authority. See *Mead*, 533 U.S. at 230-31; *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002). For more on the application of *Mead* in the federal appellate courts, see Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003).

<sup>100</sup> *Mead*, 533 U.S. at 234-35. The Court has declined to adopt *Chevron* deference for a variety of agency actions that do not carry the force of law. See, e.g., *Wos v. E.M.A. ex rel Johnson*, 133 S. Ct. 1391, 1402 (2013); *Alaska Dep’t of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 487-88 (2004); *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473 (2002).

<sup>101</sup> *Mead*, 533 U.S. at 235

<sup>102</sup> *Id.* at 235 (quoting *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944)).

<sup>103</sup> *Skidmore*, 323 U.S. at 140. As mentioned above, *supra* notes 89-93, predicting differences in outcomes based on these types of review can be difficult. For example, while *de novo* review does not require a court to give any deference to an agency interpretation, it nonetheless seems unlikely that, even absent *Skidmore* deference, a reviewing court would refuse to even consider an agency’s view on a matter challenged by a plaintiff. See Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 9 TEX. L. REV. 625, 638-39 (2015); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 161 (2010) (“So while in theory, *de novo* review is a very different standard from that of reasonableness, in practice it is difficult to see how courts would be able to ignore reasonable agency interpretations in reaching their conclusions.”).

Finally, when courts review agency legal interpretations regarding compliance with statutes it does not administer or the Constitution, such review can be still stricter—courts sometimes review agency compliance with the APA’s procedural requirements *de novo*,<sup>104</sup> or without any deference at all to the agency’s decision.<sup>105</sup> Under the APA, agency actions can be challenged for failing to comply with “procedure required by law.”<sup>106</sup> For example, if an agency categorizes an action as an interpretive rather than legislative rule, it may bypass Section 553’s notice and comment rulemaking procedures. Courts reviewing whether the rule in question is actually legislative or interpretive will sometimes review the issue *de novo*, refusing to grant any deference to the agency because the agency has not been granted authority by Congress to administer the APA.<sup>107</sup>

## Review of Factual Determinations and Discretionary Decisions

In contrast, courts review agency *factual* findings in *formal* proceedings under the “substantial evidence” test.<sup>108</sup> The APA distinguishes between formal proceedings, which must include trial-type procedures, and informal proceedings, which are not subject to the same strictures, at least by the APA. In formal proceedings, the agency’s factual findings are “made on the record.”<sup>109</sup> The Supreme Court has explained that under this review, courts examine whether the facts are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>110</sup> However, the APA does not specify a particular type of review for agency factual determinations in *informal* proceedings.<sup>111</sup> Instead, the APA’s “catch-all” provision for judicial review of agency action, the “arbitrary and capricious” standard, includes review of agency factual determinations in this context.<sup>112</sup> Lower courts appear to agree that the difference in the amount of evidence required between the two standards is nominal,<sup>113</sup> although formal proceedings must be supported with evidence found within the record, while informal

<sup>104</sup> *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) (“[A]n agency has no interpretive authority over the APA.”); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that “when it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency’s particular interpretation”); *Reno-Sparks Indian Colony v. U.S. E.P.A.*, 336 F.3d 899, 910 n.11 (9<sup>th</sup> Cir. 2003) (“This Court reviews *de novo* the agency’s decision not to follow the APA’s notice and comment procedures.”); *Campanale & Sons v. Evans*, 311 F.3d 109, 120 n.14 (1<sup>st</sup> Cir. 2002); *Warden v. Shalala*, 149 F.3d 73, 79 (1<sup>st</sup> Cir. 1998); *Meister v. Dept. of Agric.*, 623 F.3d 363, 370 (6<sup>th</sup> Cir. 2010) (*de novo* review but acknowledging that part of the question is discretionary which is deferential); *Iowa League of Cities v. EPA*, 711 F.3d 844, 872-73 (8<sup>th</sup> Cir. 2013); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 146 (2010) (“*De novo* review is appropriate when agencies are interpreting laws that they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.”).

<sup>105</sup> *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9<sup>th</sup> Cir. 2006) (explaining that *de novo* requires the court to “review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered”).

<sup>106</sup> 5 U.S.C. § 706(2)(D).

<sup>107</sup> *See, e.g., Meister v. Dep't of Agric.*, 623 F.3d 363, 370 (6<sup>th</sup> Cir. 2010); *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n. 11 (9<sup>th</sup> Cir. 2003); *Ward v. Shalala*, 149 F.3d 73, 79 (1<sup>st</sup> Cir. 1998).

<sup>108</sup> 5 U.S.C. § 706(2)(E).

<sup>109</sup> 5 U.S.C. § 556(c), 557(b)(2).

<sup>110</sup> *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938)).

<sup>111</sup> *See* 5 U.S.C. § 553.

<sup>112</sup> *See Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 684 (D.C. Cir. 1984).

<sup>113</sup> *Id.* at 684.



proceedings can be supported with any evidence an agency had before it when it made a decision.<sup>114</sup>

Courts also review agency *discretionary* decisions and will invalidate actions found to be “arbitrary, capricious, [or] an abuse of discretion.”<sup>115</sup> While courts applying this standard of review “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,”<sup>116</sup> the “scope of review ... is narrow and a court is not to substitute its judgment for that of the agency.”<sup>117</sup> This means “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>118</sup> A court might consider whether the agency

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>119</sup>

For example, when the Federal Food and Drug Administration approves a drug for the market,<sup>120</sup> or the Environmental Protection Agency issues a permit that controls the amount of pollutants discharged in a geographic area,<sup>121</sup> federal courts review these decisions under the arbitrary and capricious standard.<sup>122</sup>

## Standard of Review When Agencies Invoke the Good Cause Exception

As mentioned above, courts differ as to the proper standard of review when agencies invoke the good cause exception. One pitfall is the proper characterization of the agency’s action—is an agency determination that good cause exists to bypass Section 553 a discretionary decision or a legal conclusion? Challenges to agency discretionary decisions are governed by Section 706(2)(A)’s arbitrary and capricious standard, while procedural challenges pursuant to Section 706(2)(D) that an agency failed to comply with the provisions of the APA are often reviewed *de novo*. Some courts have applied the former standard when reviewing good cause determinations,<sup>123</sup> others the latter.<sup>124</sup> Because judicial review *de novo* is a much more “exacting

<sup>114</sup> *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 604 (D.C. Cir. 2007).

<sup>115</sup> 5 U.S.C. § 706(2)(A).

<sup>116</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>117</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>118</sup> *Id.* at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

<sup>119</sup> *Id.*

<sup>120</sup> *See, e.g., Scott v. Food and Drug.*, 728 F.2d 322, 324 (6<sup>th</sup> Cir. 1984); *Hill Dermaceuticals, Inc. v. U.S. Food and Drug Admin.*, 2012 WL 5914516 (D.D.C. 2012).

<sup>121</sup> *Natural Resources Defense Council, et. al, v. Environmental Protection Agency*, 808 F.3d 556 (2d Cir. 2015).

<sup>122</sup> *State Farm*, 463 U.S. at 43.

<sup>123</sup> *See, e.g., Sorenson Commc’ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014); *Util. Solid Waste Activities Grp., v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 306 (9<sup>th</sup> Cir. 1980).

<sup>124</sup> *United States v. Dean*, 604 F.3d 1275, 1278 (11<sup>th</sup> Cir. 2010); *United States v. Garner*, 767 F.2d 104, 116 (5<sup>th</sup> Cir. 1985); *Ohio State Consumer Educ. Ass’n v. Schweiker*, 541 F. Supp. 915, 919 (S.D. Ohio 1982); *Coal. of Mich. Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 459 (E.D. Mich. 1982).

standard” than the “deferential” posture of arbitrary and capricious review,<sup>125</sup> the selection of a standard can be important. Complicating matters, however, is the practice of some courts to not clearly adopt either standard, but focus instead on simply “narrowly constru[ing]” the provision.<sup>126</sup> This “interpretive framework has been developed separate and apart from [the APA’s text], derived from the legislative history of the good cause exception.”<sup>127</sup> Finally, still another standard of review has been highlighted by at least one circuit as distinct: a mixed standard that incorporates *both* arbitrary and capricious and *de novo* review.<sup>128</sup> Here, the court reviews *de novo* “whether the agency’s asserted reason for waiver of notice and comment constitutes good cause, as well as whether the established facts reveal justifiable reliance on the reason,” while “any factual determinations made by the agency to support its proffered reason are subject to arbitrary and capricious review.”<sup>129</sup>

Recent judicial analysis of the Attorney General’s actions pursuant to the Sex Offender Registration and Notification Act (SORNA)<sup>130</sup> illustrates the divergence respecting interpretations of the good cause exception. SORNA requires states to establish sex offender registries and mandates that convicted sex offenders register their place of residence and employment with the state registry.<sup>131</sup> However, SORNA authorized the Attorney General to “specify the applicability” of those requirements to sex offenders convicted before the law’s enactment or its “implementation in a particular jurisdiction.”<sup>132</sup> The Attorney General issued an interim rule applying SORNA’s requirements retroactively and relied on the good cause exception to bypass the notice and comment rulemaking requirements as well as the 30-day publication rule.<sup>133</sup> Various individuals convicted of failing to register under the statute pursuant to the interim rule’s authority brought challenges to the Attorney General’s invocation of the good cause exception.<sup>134</sup>

The interim rule specified two reasons supporting a finding of good cause to bypass Section 553’s requirements. First, “to eliminate any possible uncertainty about the applicability of the Act’s

<sup>125</sup> See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376-77 (1989); *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 760 (3d Cir. 1982); *NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

<sup>126</sup> *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982); *Mid-Tex Elec. Coop. v. Fed. Energy Regulatory Comm’n*, 822 F.2d 1123, 1132 (D.C. Cir. 1987).

<sup>127</sup> *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013).

<sup>128</sup> *Id.* at 508-09.

<sup>129</sup> *Id.* at 508. It is unclear whether other courts that apply *de novo* review to agency good cause determinations would recognize this standard as distinct. See *Sorenson Commc’ns Inc. v. F.C.C.*, 755 F.3d 702, 706 n.3 (D.C. Cir. 2014) (applying *de novo* review to an agency’s good cause determination but “defer[ing] to an agency’s factual findings and expert judgments therefrom, unless such findings and judgments are arbitrary and capricious”); *National Federation of Federal Emp. v. Devine*, 671 F.2d 607, 610-12 (D.C. Cir. 1982) (reviewing *de novo* whether good cause existed to bypass notice and comment rulemaking, but reviewing a challenge to the substantive validity of the underlying action itself—postponement of a health benefit enrollment period—under the arbitrary and capricious standard).

<sup>130</sup> 42 U.S.C. § 16901, *et seq.*

<sup>131</sup> 42 U.S.C. § 16913.

<sup>132</sup> 42 U.S.C. § 16913(b), (d). The Supreme Court held that SORNA’s registration provision did not automatically apply retroactively. *U.S. v. Reynolds*, 132 S.Ct. 975, 978 (2012).

<sup>133</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed.Reg. 8894, 8897 (Feb. 28, 2007) [hereinafter AG Interim Rule]; see 28 C.F.R. pt. 72 (2008). Subsequently, the Attorney General issued proposed guidelines for implementation of the act and solicited comments. The Attorney General issued the final regulation on July 2, 2008. National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38030–01, 38030, 38046–47 (July 2, 2008).

<sup>134</sup> For an individual arrested for behavior occurring before the promulgation of the final rule, the government’s authority to arrest the individual rested on the interim rule issued without notice and comment. If the interim rule was issued in violation of the APA, then it is invalid and cannot sustain an individual’s conviction.

requirements,” and second, “to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions.”<sup>135</sup>

The Fourth and Sixth Circuits appear to have reviewed the determination *de novo*,<sup>136</sup> the Fifth and Eleventh Circuits applied the arbitrary and capricious standard,<sup>137</sup> and the Ninth, Third, and Eighth Circuits expressly declined to decide the appropriate standard of review, ruling that the Attorney General’s invocation of good cause would fail even under the deferential arbitrary and capricious standard.<sup>138</sup> Interestingly, the standard of review does not precisely mirror the outcomes in the cases. The Fourth Circuit, apparently applying *de novo* review, and the Eleventh Circuit, applying the arbitrary and capricious standard, both upheld the Attorney General’s good cause finding.<sup>139</sup> In contrast, the Sixth Circuit used *de novo* review to invalidate the good cause invocation, while the Fifth, Ninth, Third, and Eighth Circuits found the Attorney General’s action to fail even under the more deferential arbitrary and capricious standard.<sup>140</sup> These courts appear to fundamentally disagree as to what factors agencies may invoke when supporting a good cause finding.

Seemingly applying *de novo* review, although in an abbreviated fashion, the Fourth Circuit upheld the Attorney General’s action for three reasons. First, “the need for legal certainty” as to whether SORNA applied retroactively; second, “[d]elaying implementation” of the rule posed a danger to public safety; and third, the Attorney General did permit public comments after the interim rule was promulgated.<sup>141</sup> Although conducting a substantially lengthier analysis, the Eleventh Circuit also upheld the Attorney General’s good cause finding under arbitrary and capricious review, focusing primarily on the threat to public safety.<sup>142</sup> The court ruled that the

<sup>135</sup> AG Interim Rule, *supra* note 135, at 8896-97.

<sup>136</sup> See *United States v. Cain*, 583 F.3d 408, 434 n.4 (6<sup>th</sup> Cir. 2009) (Griffin, J., dissenting) (“It appears that the majority has reviewed *de novo* the Attorney General’s finding of good cause.”); *United States v. Gould*, 568 F.3d 459, 470 (4<sup>th</sup> Cir. 2009); *United States v. Brewer*, 766 F.3d 884, 888 (8<sup>th</sup> Cir. 2014) (“The Fourth and Sixth Circuits, however, applied *de novo* review.”); *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013) (noting the “the Fourth and Sixth Circuits’ application of *de novo* review, although these courts do not specifically state the standard they applied”).

<sup>137</sup> *United States v. Johnson*, 632 F.3d 912, 928 (5<sup>th</sup> Cir. 2011); *United States v. Dean*, 604 F.3d 1275, 1278 (11<sup>th</sup> Cir. 2010); *United States v. Brewer*, 766 F.3d 884, 888 (8<sup>th</sup> Cir. 2014) (“This deferential standard appears similar to the approach taken by the Fifth and Eleventh Circuits, which each used an arbitrary-and-capricious standard.”); *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013) (noting “the Fifth and Eleventh Circuits’ use of the arbitrary and capricious standard in their SORNA decisions.”).

<sup>138</sup> *United States v. Reynolds*, 710 F.3d 498, 500 (3d Cir. 2013) (“We conclude that the Attorney General’s assertion of good cause fails even the most deferential standard of arbitrary and capricious. Just what is the applicable standard of review for agency determinations that good cause justifies waiver of notice and comment is a question for another day.”) (citations omitted); *United States v. Brewer*, 766 F.3d 884, 888 (8<sup>th</sup> Cir. 2014) (“[W]e agree with the Third Circuit that the Attorney General’s assertion of good cause fails under any of the above standards.”); *United States v. Valverde*, 628 F.3d 1159, 1162 (9<sup>th</sup> Cir. 2010) (“Because we would, under either standard, affirm the dismissal of the indictment on the ground that no validly promulgated regulation had applied SORNA retroactively to Valverde at the time of his failure to register, we need not determine whether a *de novo* or an abuse of discretion standard of review applies here.”).

<sup>139</sup> *United States v. Gould*, 568 F.3d 459, 470 (4<sup>th</sup> Cir. 2009); *United States v. Dean*, 604 F.3d 1275, 1278 (11<sup>th</sup> Cir. 2010).

<sup>140</sup> *United States v. Brewer*, 766 F.3d 884, 888 (8<sup>th</sup> Cir. 2014); *United States v. Reynolds*, 710 F.3d 498, 500 (3d Cir. 2013); *United States v. Johnson*, 632 F.3d 912, 928 (5<sup>th</sup> Cir. 2011); *United States v. Valverde*, 628 F.3d 1159, 1162 (9<sup>th</sup> Cir. 2010).

<sup>141</sup> *United States v. Gould*, 568 F.3d 459, 470 (4<sup>th</sup> Cir. 2009).

<sup>142</sup> *United States v. Dean*, 604 F.3d 1275, 1278 (11<sup>th</sup> Cir. 2010). Addressing the Attorney General’s guidance argument, the court also noted that the agency “was granted sole discretion to determine whether SORNA applies retroactively, and there was no guidance at all in place in that matter.” That is “particularly important here as the persons who were (continued...) ”

Attorney General only had to show that there was “good cause to believe that delay would do real harm.”<sup>143</sup> It found that “the retroactive rule reduced the risk of additional sexual assaults and sexual abuse by sex offenders by allowing federal authorities to apprehend and prosecute them,” and “removes a barrier to timely apprehension of sex offenders.”<sup>144</sup> In addition, the court noted that the agency was given discretion to determine whether SORNA applied retroactively, and given the importance for convicted sex offenders who “need[ed] to know whether to register,” there was a need for legal certainty in the matter.<sup>145</sup>

In contrast, the circuits that rejected the Attorney General’s good cause determination did not find the professed need to eliminate uncertainty or protect public safety sufficient. These courts found the Attorney General’s arguments to be largely conclusory, failing to establish independent facts that compelled a good cause finding. First, these courts reasoned, a bare desire to offer guidance to parties affected by a rule, standing alone, is not sufficient reason to find good cause. Otherwise, the exception “would swallow the rule.”<sup>146</sup> In passing SORNA and leaving to the Attorney General whether to retroactively apply its terms to sex offenders, Congress itself had necessarily created some delay in SORNA’s applicability.<sup>147</sup> The Attorney General’s “conclusory” arguments of harm were “not sufficient to upset this balance.”<sup>148</sup> Second, the Attorney General’s public safety argument was “nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA.”<sup>149</sup> Many laws presumably protect the public, so “[i]f the mere assertion that such harm will continue while an agency gives notice and receives comments were enough to establish good cause, then notice and comment would always have to give way.”<sup>150</sup>

## What Happens When a Court Rejects an Agency’s Good Cause Finding?

The appropriate remedy when a court rejects an agency’s good cause finding can also vary. The APA provides that courts “shall ... hold unlawful and set aside agency action” that violates “procedure required by law.”<sup>151</sup> However, it also instructs courts to take “due account” of the

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(...continued)

affected by the rule were already convicted of their prior crimes and need to know whether to register.” Nonetheless, the court noted “this reason alone may not have established the good cause exception,” although “it does count to some extent.”

<sup>143</sup> *Id.* at 1281.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1280.

<sup>146</sup> *United States v. Cain*, 583 F.3d 408, 421 (6<sup>th</sup> Cir. 2009); *United States v. Johnson*, 632 F.3d 912, 929 (5<sup>th</sup> Cir. 2011); *United States v. Reynolds*, 710 F.3d 498, 513 (3d Cir. 2013); *United States v. Valverde*, 628 F.3d 1159, 1166 (9<sup>th</sup> Cir. 2010); *United States v. Brewer*, 766 F.3d 884, 889-90 (8<sup>th</sup> Cir. 2014).

<sup>147</sup> *United States v. Cain*, 583 F.3d 408, 421 (6<sup>th</sup> Cir. 2009).

<sup>148</sup> *Id.*

<sup>149</sup> *United States v. Reynolds*, 710 F.3d 498, 513 (3d Cir. 2013).

<sup>150</sup> *Id.* at 512; *United States v. Valverde*, 628 F.3d 1159, 1167 (9<sup>th</sup> Cir. 2010) (“[T]he Attorney General did little more than restate the general dangers of child sexual assault, abuse, and exploitation that Congress had sought to prevent when it enacted SORNA.”); *United States v. Brewer*, 766 F.3d 884, 890 (8<sup>th</sup> Cir. 2014) (“[T]he Attorney General’s ‘public safety rationale cannot constitute a reasoned basis for good cause because it is nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA.’”) (quoting *Reynolds*, 710 F.3d at 512); *see also* *United States v. Johnson*, 632 F.3d 912, 928 (5<sup>th</sup> Cir. 2011); *United States v. Cain*, 583 F.3d 408, 421 (6<sup>th</sup> Cir. 2009).

<sup>151</sup> 5 U.S.C. § 706(2)(D).

“rule of prejudicial error.”<sup>152</sup> Consequently, when courts find that agencies failed to comply with the APA’s rulemaking requirements, they will sometimes vacate the rule,<sup>153</sup> but may not do so if the failure to comply with those procedures was harmless.<sup>154</sup> Likewise, when courts reject an agency’s good cause finding, the agency’s rule may be vacated and remanded to the agency to comply with the APA.<sup>155</sup> However, in certain circumstances, the court may find that the lack of good cause was harmless, such as when the larger purposes of Section 553 of the APA are met despite certain technical compliance errors.<sup>156</sup> In addition, some courts have found that an agency lacked good cause and remanded to the agency to follow Section 553, but nonetheless left the challenged rules in place pending the completion of new proceedings that comply with the APA.<sup>157</sup>

## Presidential Transitions

Agency use of the good cause exception can also be important in the context of presidential transitions. Recent outgoing presidential administrations have engaged in “midnight rulemaking,” whereby federal agencies increase the number of regulations issued during the final months of a presidential administration.<sup>158</sup> A subsequent presidential administration of a different party, however, may have different policy priorities. Nonetheless, once a rule is finalized by an agency, repeal of a rule requires compliance with Section 553’s notice and comment procedures.<sup>159</sup> Further, while courts might uphold a change from one administration to the next in an agency’s legal interpretation contained in a rule if the agency receives deference on the matter,<sup>160</sup> if no deference is given to an agency’s construction of a statute, then the agency will not be able to adopt a contrary construction in the future.<sup>161</sup>

Consequently, in order to gain control of the rulemaking process, some Presidents have sought to impose a moratorium on new regulations at the beginning of their administration. For example, at the beginning of the George W. Bush Administration, White House Chief of Staff Andrew Card issued a memorandum to federal agencies on January 20, 2001, instructing them to (1) “send no

<sup>152</sup> 5 U.S.C. § 706.

<sup>153</sup> *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

<sup>154</sup> *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007); *Jackson Cty., N. Carolina v. F.E.R.C.*, 589 F.3d 1284, 1290 (D.C. Cir. 2009).

<sup>155</sup> *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95-96 (D.C. Cir. 2012).

<sup>156</sup> *See U.S. v. Reynolds*, 710 F.3d 498, 517-18 (discussing *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9<sup>th</sup> Cir. 1992)).

<sup>157</sup> *See, e.g., U.S. Steel Corp. v. E.P.A.*, 649 F.2d 572, 577 (8<sup>th</sup> Cir. 1981); *Western Oil and Gas Association v. United States Environmental Protection Agency*, 633 F.2d 803, 812-13 (9<sup>th</sup> Cir. 1980).

<sup>158</sup> *See* CRS Report R42612, *Midnight Rulemaking*, by Maeve P. Carey.

<sup>159</sup> 5 U.S.C. § 551(5).

<sup>160</sup> *See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (noting that *Chevron* deference may apply to changed agency interpretations, and that agencies often reconsider interpretations and policies on the basis of changed factual circumstances or changes in presidential administrations); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (ruling that an agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates”); *Chevron*, 467 U.S. at 866 (granting deference to the EPA when the agency changed its position as to what a “stationary source” meant in the Clean Air Act).

<sup>161</sup> *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).



proposed or final regulation to the Office of the Federal Register,” (2) withdraw rules that had been sent to the Office but not yet published, and (3) postpone the effective date of regulations that had been published but not yet gone into effect for 60 days.<sup>162</sup> Likewise, early in the Obama Administration, on January 20, 2009, White House Chief of Staff Rahm Emanuel issued a similar memorandum to federal agency heads.<sup>163</sup>

In response to both memorandums, agencies that delayed the effective date of rules sometimes justified their actions by arguing that the delay was supported by good cause.<sup>164</sup> The majority of these invocations were not reviewed by courts; however, in 2004, the Second Circuit Court of Appeals invalidated a Department of Energy (DOE) rule delaying the effective date of certain efficiency standards.<sup>165</sup> On February 2, 2001, DOE issued a “final rule,” without notice and comment, delaying the effective date of certain efficiency standards.<sup>166</sup> The agency’s final rule cited to the January 20, 2001, Card Memorandum and was effective immediately. The delay rule also noted that good cause existed to bypass Section 553 because the agency wanted more time to consider the standards and because of the imminence of the date the standards would be effective.<sup>167</sup> Various parties challenged, among other things, DOE’s issuance of this final rule delaying the effective date of the efficiency standards.<sup>168</sup> In finding that there was no good cause to support bypassing notice and comment procedures in this situation, the court’s analysis did not examine the significance (if any) of the Card memorandum. Instead, the court ruled that “an emergency of DOE’s own making” cannot constitute good cause.<sup>169</sup> Further, the court noted that no emergency existed, the only thing “that was imminent was the impending operation of a statute intended to limit the agency’s discretion (under DOE’s interpretation), which cannot constitute a threat to the *public* interest.”<sup>170</sup> Consequently, the court invalidated the rule.<sup>171</sup>

## Congressional Proposals to Alter the Standard

Various changes to the APA’s good cause exception have been proposed by Members of Congress and commentators.<sup>172</sup> During the 114<sup>th</sup> Congress, a bill was introduced that aims to restructure

<sup>162</sup> U.S. White House Office, “Regulatory Review Plan,” 66 Fed. Reg. 7702 (Jan. 24, 2001). The memorandum excluded rules promulgated pursuant to judicial or statutory deadlines and notify OMB of rules that should be excluded because of public health and safety.

<sup>163</sup> Executive Office of the President, “Memorandum for the Heads of Executive Departments and Agencies,” 74 Fed. Reg., 4435, Jan. 26, 2009. The memorandum explained that the OMB Director could exempt rules in “emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters, or otherwise.” *Id.* In addition, when agencies made extensions of the effective date of regulations, agencies should “immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules.” *Id.*

<sup>164</sup> GAO-02-370R, Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s January 20, 2001, Memorandum (2002); Center for Medicare and Medicaid Services, Medicaid Program; State Flexibility for Medicaid Benefit Packages: Delay of Effective Date, 74 FR 5808 (Feb. 2, 2009). Agencies also justified the delay by claiming that such delays were procedural rules exempt from notice and comment rulemaking requirements.

<sup>165</sup> *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004).

<sup>166</sup> *Id.* at 204.

<sup>167</sup> *Id.* at 205.

<sup>168</sup> *Id.* at 184-191.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 205.

<sup>171</sup> *Id.* at 206.

<sup>172</sup> See James Kim, Note, *For A Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1051 (2011); Juan J. Lavilla, *The* (continued...)

Section 553's requirements.<sup>173</sup> Among other things, the bill would require agencies to provide notice of proposed rulemakings to the public and the Office of Information and Regulatory Affairs,<sup>174</sup> to provide 60 or 90 days, depending on the rule, for comments; and in certain circumstances, to provide a public hearing for the consideration of certain factual issues.<sup>175</sup>

Under this bill, if an agency for good cause finds that compliance with Section 553 is unnecessary, then it may issue a final rule. However, if the agency for good cause finds that compliance is impracticable or contrary to the public interest, the agency may issue an interim rule, but must subsequently engage in notice and comment proceedings before the rule is finalized.<sup>176</sup> In addition, during the 60 days after a presidential inauguration, agencies may delay implementation of rules that have not been finalized for 90 days for reconsideration.<sup>177</sup> The bill does not, however, appear to alter the applicable standard of review for good cause, or specify what factors a reviewing court should consider.

## Author Contact Information

Jared P. Cole  
Legislative Attorney  
jpcole@crs.loc.gov, 7-6350

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*Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 324 (1989).

<sup>173</sup> Regulatory Accountability Act of 2015, S. 2006 (Introduced Aug. 6, 2015).

<sup>174</sup> The Office of Information and Regulatory Affairs (OIRA) is one of several offices within the Office of Management and Budget (OMB).

<sup>175</sup> Regulatory Accountability Act of 2015, S. 2006 § 3(2).

<sup>176</sup> Regulatory Accountability Act of 2015, S. 2006 § 3(2).

<sup>177</sup> Regulatory Accountability Act of 2015, S. 2006 § 3(2).