



**Insight**

# Interim Final Rules: A Primer

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## EXECUTIVE SUMMARY

- Interim final rules (IFRs) are rules issued by federal agencies that become effective upon publication without first seeking public comment on the rule's substance.
- Used during emergencies and other times of need, IFRs can help expedite the regulatory process to quickly put in place binding regulatory requirements.
- Because IFRs offer agencies advantages over the typical regulatory process, the privilege of issuing them can lead to abuse.
- Ultimately, courts determine if IFRs are justified, and adverse rulings can force agencies to restart the regulatory process.

## INTRODUCTION

Interim final rules (IFRs) are rules issued by federal agencies that become effective upon publication without first seeking public comment on the rules' substance. Instead, federal agencies solicit public comment at the time of publication and may make changes to the rules depending upon that feedback. Often used during emergencies and other times of need, IFRs can help expedite the regulatory process to put in place binding regulatory requirements in short order.

This primer aims to explain the legal basis for IFRs, how they are supposed to work, why agencies may prefer IFRs to typical rulemaking, and possibilities for abuse.

## THE LEGAL BASIS FOR IFRs

The term "interim final rule" has become so commonplace that a typical assumption is that there is specific language in the U.S. Code defining the term and setting clear circumstances for, and limitations on, the use of such rules. In fact, there is no such language. IFRs have become a widely used agency term for rules that meet certain exemption criteria from typical notice-and-comment procedures spelled out in the Administrative Procedure Act (APA), the nearly 75-year-old law underpinning how federal rules are made.

The APA exempts notice of proposed rulemaking requirements in limited circumstances, including "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>[1]</sup> This "good cause" exception is cited to justify the use of IFRs and must be accompanied by an explanation in a rule's preamble citing the circumstances for foregoing public comment, which can include emergencies, judicial deadlines, and statutory requirements.

## HOW IFRs WORK

IFRs are different from other forms of rules that also bypass notice-and-comment procedures, such as temporary final rules (TFRs) and direct final rules (DFRs). TFRs typically are of short duration and have a specified termination date. DFRs are used when an agency believes there is no foreseeable opposition to a rule. DFRs rules are often published with a notice that the agency will rescind the rule and issue a notice of proposed rulemaking if it receives a substantive comment opposing it within a limited comment window. IFRs, rather, are essentially proposed rules that have immediate effect while public comment is obtained and considered. The catch, however, is that historically relatively few IFRs are ever modified because of feedback (or even finalized permanently, for that matter).[2]

A good example of an IFR is the first [rule](#) jointly issued by the Department of the Treasury and the Small Business Administration (SBA) earlier this year to implement the Paycheck Protection Program. In this instance, Treasury and SBA put in place the parameters by which small businesses would be eligible for the program, including requirements on lenders and borrowers. Because of language included in the Coronavirus Aid, Relief, and Economic Security Act requiring the agencies to have the program operational within 30 days of its passage, there was no time to propose language, accept public comment, and make changes. Instead, the agencies have continued to roll out additional IFRs reforming certain elements of the program on an ongoing basis. While this approach is not ideal for regulatory certainty, the dire need to provide financial assistance to small businesses during the early stages of the COVID-19 emergency justifiably overrode the need to have the program's details etched in stone.

IFRs offer agencies other advantages beyond expediency on urgent matters and skipping the time-consuming notice-and-comment process on the front end of a rulemaking. The good cause exception of the APA also allows agencies to avoid regulatory impact assessments typically required under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.[3] Agencies can therefore favor IFRs because they speed up the process and reduce the amount of staff resources devoted to pre-rule analysis. These advantages create the possibility for agencies to abuse IFRs by inflating claims of urgency to avoid certain procedural steps.

Abusing IFRs can ultimately set agencies back months or years. IFRs can be challenged in federal court like any other rule, and an adverse ruling can force the agency back to the beginning of the process. Ultimately, the use of IFRs is a risk/reward proposition that must be weighed by an agency. There is no judicial precedent that governs how courts will decide on IFR cases. Each rule is measured on a case-by-case basis depending on the strength of the agency's justification for using the APA's good-cause exception.[4]

## CONCLUSION

IFRs are essentially proposed rules that have immediate effect. These rules can be a useful tool for agencies to expedite the regulatory process in times of urgent need, but agencies must explain why they have good cause for issuing IFRs.

Because IFRs allow agencies to skip some time-consuming steps in the regulatory process, they can be favored by agencies. This preference can lead to abuse of the APA's good-cause exception. The main check preventing agencies from abusing IFRs is the judicial system, as courts ultimately decide if an agency was justified in issuing an IFR, and adverse rulings can restart the regulatory process.

[1] 5 USC § 553(b)(B)

[2] Asimow, Michael. *Interim-Final Rules: Making Haste Slowly*. 51 Admin. L. Rev. 703 (1999). 737-741.

[3] *Ibid.* 709.

[4] *Ibid.* 716-723.