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Skipping Notice and Comment Over Time: Interim-Final Rules

By: Laura Stanley | October 6, 2021

In brief…

The Office of Information and Regulatory Affairs makes regulatory review data on interim-final rules easily accessible. Analyzing interim-final rules that have gone through regulatory review over time can shed light on the success of agency efforts to bypass the notice-and-comment process.

The Trump administration issued several controversial regulations using interim-final rulemaking. For example, three departments issued a set of interim-final rules that provided relief for religious institutions that objected to the Affordable Care Act contraception mandate. The controversy brought renewed public scrutiny to this rulemaking method where final rules are promulgated prior to notice and comment.

These interim-final rules survived a procedural legal challenge that was appealed all the way to the Supreme Court. Professor Kristin Hickman described the associated opinion as an "endorsement of interim-final rulemaking…as procedurally equivalent to the more standard notice-and-comment rulemaking process."

Interim-final rulemaking may have received validation in court, but have agencies started using interim-final rulemaking more in recent administrations? This commentary relies on review data from the Office of Information and Regulatory Affairs (OIRA) to evaluate if interim-final rules have become more common recently. While there is no clear directional trend over time or across presidential administration, recent administrations have issued fewer interim-final rules in the "sunrise" and "midnight" periods. This is notable because these periods are sometimes characterized by a relatively high volume of actions that skip notice-and-comment procedures.

Good Cause Exceptions to Notice and Comment

The Administrative Procedure Act (APA) at § 553 generally requires agencies to publish a notice of proposed rulemaking and provide the public with the opportunity to comment before issuing a legally binding rule. However, the APA allows for "good cause" exceptions to the notice-and-comment

requirements, which exist when notice and comment would be "impracticable, unnecessary, or contrary to the public interest."

Interim-final rules are legally binding rules that allow for public comment at the time the rule is promulgated. Interim-final rules are one type of rulemaking that can evade pre-promulgation notice and comment, but only if agencies meet one of the "good cause" exceptions, or if Congress has expressly authorized the interim-final rules by statute. Although agencies can later make changes to the rules based on input in public comments, scholars have argued that once an agency is implementing a rule, its "interests in stability and continuity will make the agency reluctant to change the rule."

Agencies also use other vehicles to issue rules and other actions without pre-promulgation notice and comment that rely on the "good cause" exceptions in the APA. For example, agencies sometimes use direct final rulemaking.

New presidential administrations also regularly order agencies to delay the effective dates of rules that are not yet in effect, bypassing notice and comment. Many issue 60-day delays, and although agencies might not be able to successfully show "good cause" for bypassing notice and comment, the time period is generally too short to prompt legal challenges. The Trump administration issued several longer effective date delays, prompting legal challenges. Courts rejected the argument that a new administration's plan to reconsider the rule is a "good cause" exception to the notice-and-comment requirements, meaning these delays cannot continue indefinitely unless the agency can come up with another "good cause" for delay.

Tracking Interim-Final Rules That Went Through Interagency Review

To evaluate trends in interim-final rulemaking, this commentary evaluates regulatory review data from OIRA between January 1, 1994 and August 31, 2021. The analysis includes interim-final rules OIRA reviewed and excludes any interim-final rule that was identified as later "withdrawn by the agency before OIRA completed review." Although interim-final rules are just one vehicle that agencies use to bypass pre-promulgation notice and comment, OIRA's data make it feasible to evaluate interim-final rules that went through OIRA review. OIRA classifies rules that went through its interagency review process into the following mutually exclusive categories: "interim final," "final," or "final no material change." This analysis cannot capture all the actions that skipped pre-promulgation notice and comment. For example, it likely does not capture most effective date delays that skipped notice and comment since many effective date delays do not go through OIRA review. It also excludes interim-final rules that did not go through OIRA review because they are not economically or otherwise significant.

Over the period in question, interim-final rules represented 19.4% of all final rules that went through OIRA review. Economically significant interim-final rules represented 17.1% of all final economically significant rules.

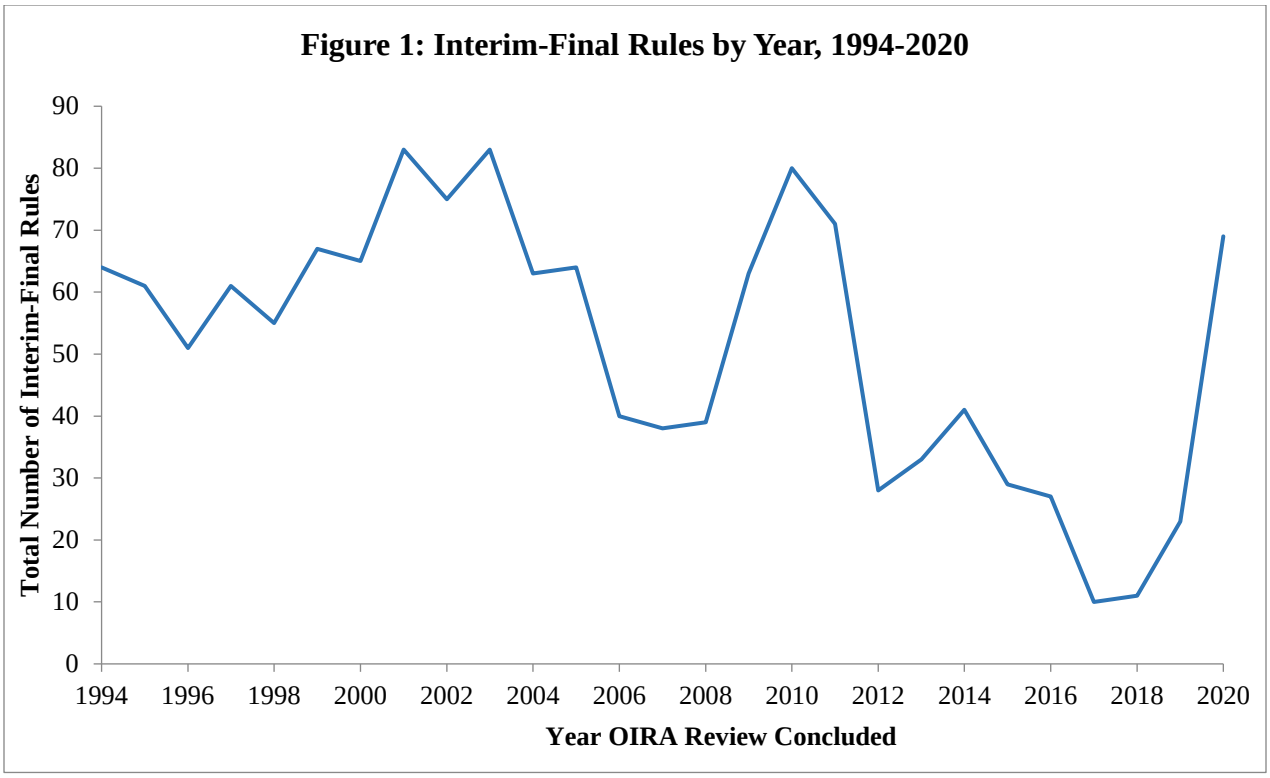


Figure 1 illustrates the variation in the total number of interim-final rules issued between 1994 and 2021 that went through OIRA review. There is no clear directional trend over time or across presidential administrations.

Unsurprisingly, there are upticks in the absolute number interim-final rules published following national crises. For example, there was an increase in interim-final rules following the September 11 attacks. Between 1998-2000, agencies published on average 62 interim-final rules per year. Between 2001-2003, agencies published on average 80 interim-final rules per year, which represents a 29% increase over the prior three-year period. There was also an increase in the number of interim-final rules in 2009 following the Great Recession as agencies implemented the American Recovery and Reinvestment Act of 2009. Between 2006-2008, agencies published on average 39 interim final rules. Between 2009-2011, agencies published on average 71 interim-final rules, which is close to double the amount released in the prior three-year period. Agencies also published more interim-final rules in 2020 than in any other year during the Trump administration. Prior to the COVID-19 pandemic, the Trump administration was on track to issue fewer interim-final rules than any other administration in the period evaluated, both in absolute numbers and as a proportion of the total final rules published.

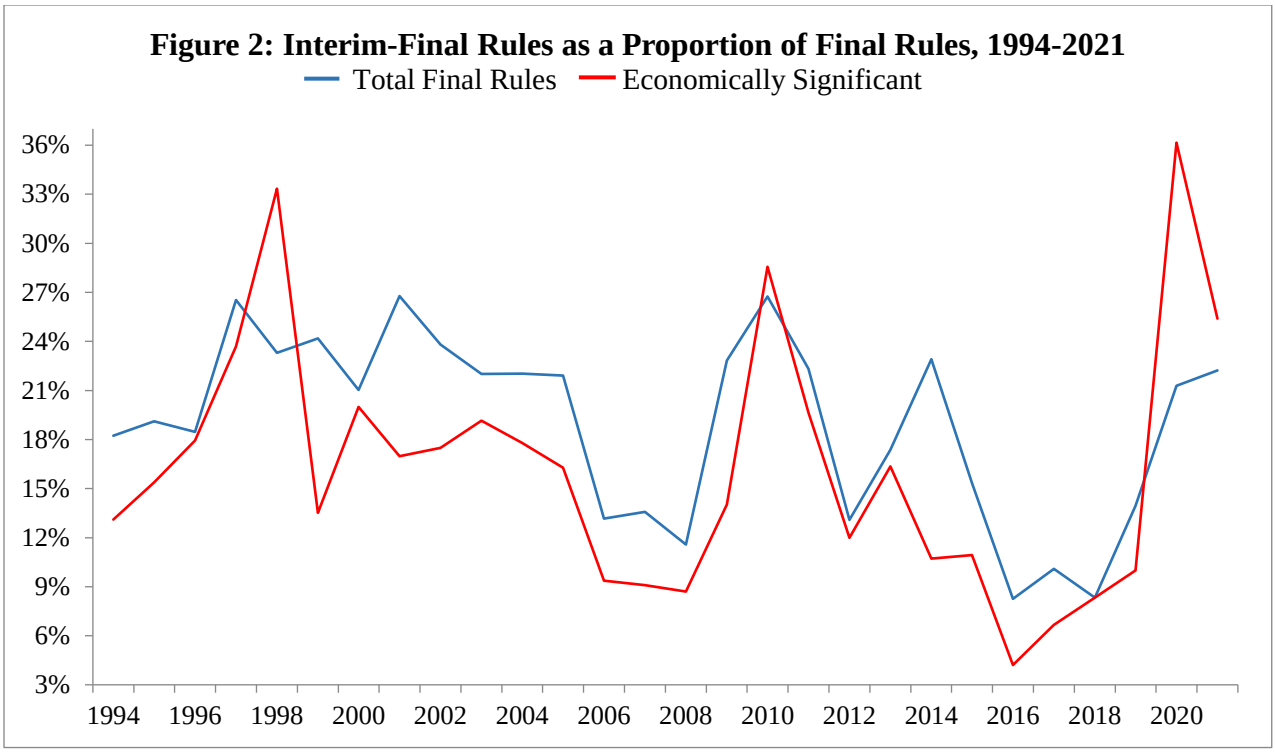


Figure 2 illustrates the variation in interim-final rules as a proportion of the total final rules (interim-final rules, final rules, and final rules no material change) and the variation in economically significant interim-final rules as a proportion of the total economically significant final rules. In 2016 and 2018, agencies issued the lowest proportion, with interim-final rules representing only 8% of the final rules published. Also on the low end, economically significant interim-final rules represented only 4% of the economically significant final rules published in 2016. Agencies issued the highest proportion in 2001 and 2010, with interim-final rules representing 27% of the final rules published. In 2020, agencies issued the highest proportion of economically significant interim-final rules, representing 36% of the economically significant final rules published. Much of the increase in economically significant interim-final rules in 2020 is attributable to interim-final rules published by the Small Business Administration implementing the CARES Act Paycheck Protection Program.

Although there is no apparent trend in the total number or proportion of interim-final rules issued across administrations, the Trump and Biden administrations issued fewer interim-final rules in the "sunrise" period, both in absolute numbers and as a proportion of all final rules, than the Bush and Obama administrations. The "sunrise" period is the early period of time in a new administration that is characterized by a high rate of regulatory suspensions and withdraws. This commentary uses data from the first six months of the new administrations for the purpose of including data from the Biden administration.

Figure 3:
Interim-Final Rules, First Six Months Across Administrations

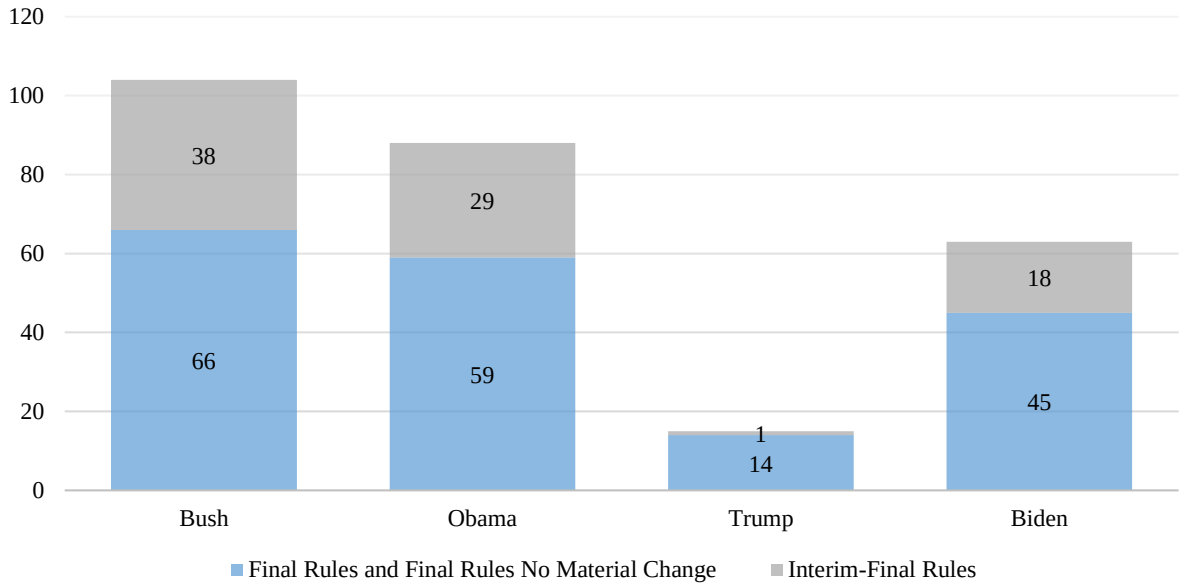
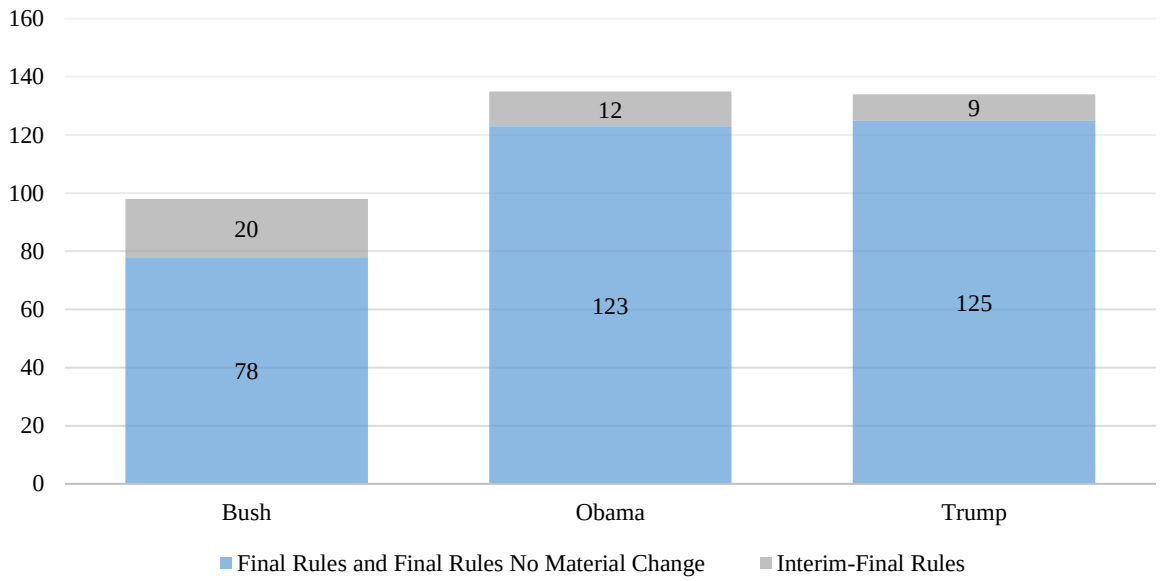


Figure 3 illustrates the variation in interim-final rules and other final rules released in the first six months across administrations. Since this analysis only captures rules that went through OIRA review, it may exclude actions that are common in the "sunrise" period, like regulatory suspensions. Mark Febrizio and Kekai Liu analyzed regulatory suspensions using Federal Register data and found that the Trump administration employed them at the highest rate, while the Obama administration employed them at the lowest rate.

Figure 4 illustrates the variation in interim-final rules and other final rules released in the "midnight" period across administrations. The "midnight" period is defined as the time period between the presidential election day in November and Inauguration Day on January 20th of the next year, and it is usually characterized by an increase in regulatory activity. Figure 4 shows that recent administrations actually issued fewer interim-final rules in absolute numbers and as a proportion of total final rules in the "midnight" period. During the "midnight" period in the Bush administration, interim-final rules represented 20% of the total final rules, while in the Obama and Trump administrations they only represented 8%, and 7% of the total final rules.

Figure 4:
Interim-Final Rules, Midnight Period Across Administrations



Tracking Actions that Bypass Notice and Comment

Although this commentary is not a comprehensive analysis of all the actions that bypass pre-promulgation notice and comment, it is intended to be a starting point. In the future, I anticipate analyzing data from the Federal Register, which could more fully capture the actions that rely on the APA "good cause" exceptions to skip notice and comment. For example, although the OIRA regulatory review data cannot provide a full picture of the "sunrise" period since agencies might be more likely to issue effective date delays that skip OIRA review during those periods, an analysis of Federal Register data might be able to shed light.