

## SBA Claims Broad Legal Authority to Preempt State and Local Building Requirements for Disaster Loan Borrowers

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On January 29, 2026, the Small Business Administration (SBA) issued an interim final rule preempting state and local building requirements that the agency determined delayed disaster rebuilding efforts.<sup>1</sup> As a result, states and local governments may be unable to enforce their building codes and other health and safety requirements following a disaster.

SBA published its rule without providing an opportunity for public comment and offered only four sentences of legal analysis to justify its preemption authority. The rule also cites minimal evidence to support its repeated assertions<sup>2</sup> that state and local building requirements materially delay disaster rebuilding efforts — a key factual premise for both its claimed preemption authority and its decision to bypass standard notice-and-comment rulemaking procedures.

This analysis summarizes SBA’s Disaster Loan Program, explains the new preemption framework, and describes the legal risks of the rule that may be raised if it is challenged in court.

### SBA’s Disaster Loan Program and Executive Order 14377

Since 1953, Congress has authorized SBA, under the Small Business Act, to administer loans to disaster victims.<sup>3</sup> Today, SBA’s Disaster Loan Program provides “low interest, fixed rate loans” to homeowners, renters, and businesses to repair and replace property after a qualifying disaster.<sup>4</sup> “Approximately 18,000 borrowers participate in the SBA Disaster Program each year, approximately 3,000 of which are small businesses.”<sup>5</sup> SBA’s Disaster Loans can be a more affordable alternative to financing options such as second mortgages or credit card debt.<sup>6</sup>

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<sup>1</sup> See Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813 (Jan. 29, 2026).

<sup>2</sup> *Id.* at 3814; see also *infra* notes 47-51 and accompanying text (cataloging SBA’s repeated assertions that state and local requirements cause rebuilding delays).

<sup>3</sup> See P.L. No. 83-163, Sec. 207(b) (July 30, 1953) (empowering SBA to “make such loans as [SBA] may determine to be necessary or appropriate because of floods or other catastrophes”).

<sup>4</sup> 13 C.F.R. § 123.2(a); 15 U.S.C. § 636(b)(1)(A). Several types of disaster declarations can make SBA Disaster Loans available to borrowers, including disaster declarations by the president under the Stafford Act and by the SBA Administrator under the Small Business Act. See 13 C.F.R. § 123.3(a) (listing seven ways that disasters declarations can make SBA Disaster Loans available). SBA also provides economic injury disaster loans, however, these loans are less focused on funding construction efforts and thus fall outside the scope of this paper. See 13 C.F.R. Subpart D.

<sup>5</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3816 (Jan. 29, 2026).

<sup>6</sup> Disaster Assistance Loan Program Changes to Maximum Loan Amounts and Miscellaneous Updates, 88 Fed. Reg. 39335, 39339 (June 16, 2023).

SBA offers home disaster loan recipients up to \$500,000 to repair or replace a primary residence and up to \$100,000 to repair or replace personal property.<sup>7</sup> Homeowners can also seek up to \$500,000 to fund post-disaster mitigation work to lessen the impacts of future disasters.<sup>8</sup> SBA generally offers business disaster loan recipients up to \$2 million.<sup>9</sup>

On January 23, 2026, President Trump signed Executive Order 14377, Addressing the State and Local Failures To Rebuild Los Angeles After Wildfire Disasters.<sup>10</sup> The order asserted that federal disaster aid programs, such as SBA’s Disaster Loan Program, were being frustrated by “overly burdensome” state and local permitting regimes that “delay[ed] or prevent[ed]” reconstruction projects from proceeding in a timely fashion.<sup>11</sup> The order directed SBA and the Federal Emergency Management Agency (FEMA) to issue regulations preempting state and local permitting processes that “unduly impeded the timely use of Federal emergency-relief funds.”<sup>12</sup> It further instructed the agencies to replace preempted permitting regimes with “a requirement that builders self-certify” to the federal government “that they have complied with all applicable substantive State and local health and safety standards.”<sup>13</sup>

On January 29, 2026, SBA published an interim final rule implementing President Trump’s order.<sup>14</sup>

### **SBA’s New Preemption Regulations**

SBA’s new preemption regulations apply to “Disaster-Related Activities” undertaken by SBA Disaster Loan borrowers and their contractors, subcontractors, and other agents.<sup>15</sup> “Disaster-Related Activities” are defined as “any real property repairs, rehabilitations, replacements, or any associated activities financed in whole or in part by an approved SBA Disaster Loan.”<sup>16</sup> The preemption rule thus does not apply to disaster rebuilding efforts funded solely by private funds, insurance, or other government programs.

*Which state and local requirements are preempted and how is this determined?*

SBA’s rule creates a two-pronged test for preempting state and local requirements.

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<sup>7</sup> 13 C.F.R. §§ 123.105(a)(1)-(2).

<sup>8</sup> *Id.* § 123.105(a)(4).

<sup>9</sup> SBA’s business disaster loans are typically capped at \$ 2 million, see *id.* § 123.202(a), however, SBA can waive the \$2 million limit if a borrower is a “major source of employment” and certain conditions are met, see *id.* § 123.202(b).

<sup>10</sup> Exec. Order No. 14377, Addressing State and Local Failures To Rebuild Los Angeles After Wildfire Disasters, 91 Fed. Reg. 3989 (Jan. 29, 2026).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3990.

<sup>13</sup> *Id.*

<sup>14</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813 (Jan. 29, 2026); see 13 C.F.R. Subpart I.

<sup>15</sup> See *id.* § 123.802 (describing the scope and applicability of SBA’s preemption framework).

<sup>16</sup> *Id.* § 123.801(a).

First, a state or local requirement may be preempted only if it requires a disaster loan borrower (or the borrower’s agents) to obtain a “permit” or “approval” before conducting disaster-related activities.<sup>17</sup> Second, if prong one is satisfied, SBA’s rule preempts a state or local requirement only if that requirement is the “but-for cause” of a delay greater than 60 days in conducting disaster-related activities under certain conditions.<sup>18</sup>

i. Prong one

Preemption may be triggered if a state or local requirement mandates a builder to receive a permit or approval before conducting disaster-related activities.<sup>19</sup> Notably, the rule does not preempt the “substantive underlying requirements that would form the basis of [a] permit or approval,” only the requirement to receive the permit or approval itself.<sup>20</sup> SBA’s rule does not define “substantive underlying requirements,” but states that these non-preempted requirements “include, but are not limited to, building codes, health and safety requirements, inspection requirements . . . and any other processes required to obtain a certificate of occupancy at the completion of Disaster-Related Activities.”<sup>21</sup>

For example, if a local building ordinance: (1) requires all three-story houses to have fire sprinklers and (2) requires the local fire department to approve all fire sprinkler designs before construction could begin, only the second requirement (an “approval” requirement) would be subject to preemption. The requirement that a three-story house have fire sprinklers — the substantive requirement underlying the approval — would not be at risk of preemption.

ii. Prong two

If the first prong is satisfied, preemption applies only if the state or local requirement is also the “but-for cause” of a delay of greater than 60 days in carrying out disaster-related activities after “all applicable complete applications or requests for approval” have been submitted to the relevant state and local authorities.<sup>22</sup> The rule does not define what constitutes a “complete” application or request for approval and does not explain how to determine whether a state or local requirement is the “but-for cause” of a delay.

Although SBA did not cite any specific state or local requirements that its rule could preempt, local government commenters suggested the rule could implicate permitting and

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<sup>17</sup> *Id.* § 123.801(c) (defining “State or Local Requirement[s]” subject to preemption); *id.* at § 123.803 (preempting certain state or local requirements).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* §§ 123.801(c), 123.803.

<sup>20</sup> *Id.* § 123.801(c).

<sup>21</sup> *Id.* § 123.805.

<sup>22</sup> *Id.* § 123.803.

approval processes associated with state and local building codes, fire codes, zoning ordinances, and floodplain management regulations, among other things.<sup>23</sup>

*What happens if a state or local requirement is preempted?*

If a state or local permit or approval requirement is preempted by SBA's rule, an SBA Disaster Loan borrower (or the borrower's agents) need not comply with it.<sup>24</sup> Instead, the borrower "may proceed with [their] Disaster-Related Activities" after completing SBA's new self-certification process.<sup>25</sup> Under that process, disaster loan borrowers submit to SBA "a certification by the borrower's builder(s) that the builder has so far, and will in the future, comply with and adhere to any applicable state and local rules and regulations *not* preempted [by SBA's rule]."<sup>26</sup> Once the borrower provides this certification to SBA, they may commence disaster-related activities.<sup>27</sup>

When a requirement is preempted, the relevant "State and local governments may not enforce stop-work orders, penalties, or enforcement actions" against the disaster loan borrower or the borrower's agents for failing to satisfy that requirement.<sup>28</sup> The rule further instructs state and local government officials that they "must not unlawfully interfere with, impede, or disrupt the otherwise lawful use of SBA Disaster Loan proceeds . . . in the name of enforcing a preempted State or Local Requirement."<sup>29</sup>

The fire sprinkler hypothetical illustrates how SBA's new preemption framework operates in practice. A builder using SBA Disaster Loan funds to rebuild a three-story house may disregard the local requirement that the fire department approve a fire sprinkler design before construction if: (1) a more-than-60-day delay occurs after the builder submits "all applicable complete applications or requests for approval to the applicable State or local

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<sup>23</sup> See MONROE CNTY., FLA., Comment Letter at 5-9 (March 2, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0019>; CHARLOTTE CNTY., FLA., Comment Letter at 2 (Feb. 27, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0017> (citing concerns that SBA's rule could undercut compliance with "zoning regulations, setback requirements, height limits, floodplain management standards, and building codes"); TRAVIS CNTY., TEX., Comment Letter at 3-5 (March 2, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0027> (asking for "clarity" that SBA's regulations preserve "floodplain management regulations, regulations that govern the construction and operation of septic systems, fire and building safety regulations, regulations regarding the safety and availability of water for homeowners and businesses, [and] requirements regarding safe ingress and egress in emergencies[.]"); WYO. OFF. HOMELAND SEC., Comment Letter at 1-2 (Feb. 26, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0013> (citing concerns that SBA's rule could undercut compliance with floodplain regulations); MO. STATE EMERGENCY MGMT. AGENCY, Comment Letter at 1 (March 2, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0018> (same).

<sup>24</sup> 13 C.F.R. § 123.804(a).

<sup>25</sup> See *id.* §§ 123.804(b), 123.805.

<sup>26</sup> *Id.* § 123.805 (emphasis added). At the time of publication, SBA's self-certification process consists of two two-page forms, available on their website. See SMALL BUS. ADMIN., *Options To Bypass Permitting Delays* (last updated Jan. 29, 2026), <https://perma.cc/7CDL-H3AB>.

<sup>27</sup> 13 C.F.R. § 123.805.

<sup>28</sup> *Id.* § 123.804(c).

<sup>29</sup> *Id.* § 123.806(a).

authorities” and (2) the fire sprinkler approval requirement was the “but-for cause” of that delay.<sup>30</sup> If these conditions are met, the builder need only certify to SBA that “the builder has so far, and will in the future,” comply with all non-preempted state or local laws before beginning construction.<sup>31</sup>

The local government could still issue stop-work orders, penalties, or other enforcement actions against the builder for violations of non-preempted requirements (e.g., the requirement that the three-story house have a fire sprinkler system), but it could not penalize the builder for starting construction without first obtaining the fire department’s approval.

### Legal Risks in SBA’s Rule

Following publication, numerous states, local governments, and non-governmental organizations (NGOs) submitted comments opposing SBA’s rule. Commenters disagreed with SBA’s legal authority to issue the interim final rule and highlighted the policy problems it would create for state and local permitting authorities.

#### *(1) SBA offered few facts to support its use of the good cause exception*

SBA’s decision to issue its preemption rule without first offering a notice-and-comment period may create legal risks for the rule.

Generally, the Administrative Procedure Act (APA) requires agencies to issue rules through notice-and-comment rulemaking, by which the agency provides notice of its proposed rulemaking and gives members of the public an opportunity to comment before issuing legally binding regulations.<sup>32</sup> This period “gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes.”<sup>33</sup> It also “affords the agency a chance to avoid errors and make a more informed decision.”<sup>34</sup>

The APA’s “good cause” exception allows agencies to bypass standard notice-and-comment procedures if the agency “for good cause finds” that those procedures are “impracticable, unnecessary, or contrary to the public interest.”<sup>35</sup> That finding is subject to judicial review. Courts apply a “meticulous and demanding” standard when reviewing an agency’s invocation of the APA’s good cause exception<sup>36</sup> and may reject good cause findings that are

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<sup>30</sup> *Id.* § 123.803.

<sup>31</sup> *Id.* § 123.805.

<sup>32</sup> See ADMIN. CONF. U.S., *Information Interchange Bulletin No. 014: Notice-and-Comment Rulemaking* (May 2021), <https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf>.

<sup>33</sup> *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019).

<sup>34</sup> *Id.*

<sup>35</sup> 5 U.S.C. § 553(b)(B).

<sup>36</sup> *Sorenson Comms., Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) (quoting *N.J. Dep’t of Env’t Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980)); see also *U.S. v. Dean*, 604 F.3d 1275, 1279 (11th Cir. 2010) (“[T]he good cause exception should be read narrowly . . . [t]he exception is, however, an important safety valve to be used where delay would do real harm.”) (citations omitted).

unsupported by the record.<sup>37</sup> Although there is no established minimum evidentiary threshold for establishing good cause, the D.C. Circuit has held that agencies must provide “something more than an unsupported assertion.”<sup>38</sup>

In its rulemaking, SBA claimed “good cause” to issue “an interim final rule without prior notice and comment” because delaying implementation “would be impracticable and contrary to the public interest.”<sup>39</sup> To support that finding, SBA made seven numbered assertions, including that:

1. Disaster recovery efforts are ongoing and currently being impeded;
2. [Disaster Loan] Borrowers are currently experiencing undue delays in the repair, rehabilitation, and replacement of their homes and businesses, frustrating the effectiveness of SBA loans . . . [and];
3. Continued delay of assistance would exacerbate housing and business instability, economic harm, and public safety and health risks in current and future disaster areas[.]<sup>40</sup>

SBA further made three closely related assertions regarding the harms that borrowers face when disaster rebuilds are delayed and a final assertion that “[i]mmediate regulatory clarity is necessary to ensure uniform administration” of the Disaster Loan Program.<sup>41</sup> As a coalition of state commenters observed, six of SBA’s seven “good cause” assertions lack any supporting evidence.<sup>42</sup>

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<sup>37</sup> For example, in *Sorenson Communications, Inc. v. Federal Communications Commission*, the D.C. Circuit rejected the FCC’s attempt to bypass notice-and-comment procedures when the agency provided “no factual findings” to support its invocation of “good cause.” 755 F.3d at 706-07. The FCC argued it had good cause to skip notice-and-comment procedures and issue several interim final rules because it alleged its Telecommunications Relay Service Fund risked being depleted if it did not act “promptly and decisively.” *Misuse of Internet Protocol (IP) Captioned Telephone Service*, 28 FC Rcd. 703 ¶ 1 (2013). The court rejected this argument, holding that “[t]he Commission’s record is simply too scant to establish a fiscal emergency.” *Sorenson Comms.*, 755 F.3d at 707. The court noted that FCC’s rulemaking record did not reveal “when the Fund was expected to run out of money, whether the Fund would have run out of money before a notice-and-comment period could elapse, or whether there were reasonable alternatives available to the Commission, such as temporarily raising Fund contribution amounts or borrowing in anticipation of future collections.” *Id.*; see also *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1145-46 (D.C. Cir. 1992) (rejecting an agency’s good cause finding for providing inadequate evidence); *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777-79 (9th Cir. 2018) (denying a good cause finding where an agency provided speculative reasoning and insufficient evidence); *Rivera Lujan v. Fed. Motor Carrier Safety Admin.*, 2025 WL 3182504, at \*1 (D.C. Cir. Nov. 13, 2025) (per curiam) (finding that petitioners were likely to prevail on argument that federal agency provided insufficient evidence to support its good cause finding).

<sup>38</sup> *Sorenson Comms.*, 755 F.3d at 707.

<sup>39</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026). In a similar vein, SBA’s rule noted that “prior consultation with State and local officials [was] impracticable given the emergency nature of this interim final rule.” *Id.* at 3815.

<sup>40</sup> *Id.* at 3814.

<sup>41</sup> *Id.*

<sup>42</sup> OFF. ATT’Y GEN., CAL., Comment Letter at 23-24 (March 2, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0031> [hereinafter States’ Comment Letter] (comment letter jointly submitted by the Attorneys General of California, Arizona, Colorado, Connecticut, Delaware, the

Although SBA cited evidence for its second assertion — that state and local permitting requirements cause “undue delays” in rebuilding — the evidence is flawed for several reasons. SBA stated that the agency “ha[d] authorized over \$3 billion with respect to the January 2025 wildfires in California . . . yet approximately only \$600 million ha[d] been disbursed” by January 2026.<sup>43</sup> State commenters noted that SBA did not causally link this disbursement lag to state and local permitting requirements, and the agency failed to account for “a number of [other] factors, including delayed or insufficient insurance payouts and high out-of-pocket costs . . . [that] contributed significantly to delays in reconstruction activities.”<sup>44</sup> And, although SBA’s interim final rule asserts an urgent need to preempt state and local permitting requirements “nationwide,”<sup>45</sup> its only empirical support concerns *California’s* response to the 2025 wildfires.

It is unclear if a reviewing court would find SBA’s statements sufficient to establish good cause.

*(2) SBA offered almost no evidence that state and local permitting requirements cause delays in disaster rebuilding*

In a similar vein, challengers may argue that SBA’s rule is unsupported by “substantial evidence.”<sup>46</sup>

As justification for its new preemption rule, SBA repeatedly asserted that state and local permitting requirements are impeding and delaying the use of disaster loan funds:

- “SBA has identified recurring delays to recovery caused by state and local permitting requirements or similar conditions precedent to construction.”<sup>47</sup>
- “SBA has identified instances where existing victims of Presidentially-declared disasters have suffered undue delays in their ability to use approved loan proceeds

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District of Columbia, Hawai’i, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington).

<sup>43</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026).

<sup>44</sup> States’ Comment Letter, *supra* note 42, at 23.

<sup>45</sup> See, e.g., Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026) (“Immediate regulatory clarity is necessary to ensure uniform administration of the SBA Disaster Loan Program nationwide.”).

<sup>46</sup> *Cigar Ass’n of Am. v. FDA*, 132 F.4th 535, 540 (D.C. Cir. 2025) (citation omitted). When issuing rules subject to APA review, federal agencies “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.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). For that reason, courts may set aside agency rules as arbitrary and capricious if they rest on “factual premis[es] that [are] unsupported by substantial evidence.” *Cigar Ass’n of Am.*, 132 F.4th at 540 (citation omitted).

<sup>47</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026).

because local and state authorities are delaying approvals and permits necessary to repair, rehabilitate, or replace their homes and businesses.”<sup>48</sup>

- “Disaster recovery efforts are ongoing and currently being impeded[.]”<sup>49</sup>
- “SBA has identified recurring delays to recovery caused by state and local requirements.”<sup>50</sup>
- “In administering the program, SBA has identified recurring delays to recovery caused by state and local requirements.”<sup>51</sup>

Yet SBA provides almost no evidence to support these claims. Most notably, the rule does not provide examples of: a state or local permitting requirement that has caused a delay; or a specific disaster recovery effort or rebuilding project that has been delayed or impeded. The rule also does not indicate the length of delays that state and local permitting requirements have allegedly caused.

Instead, SBA’s rule states that:

- by January 2026, only \$600M of disaster loan funds were disbursed in California out of \$3B authorized,
- only 15% of structures destroyed by the 2025 Los Angeles wildfires received rebuild permits within one year, and
- Denver had an average building permit approval time of ten months compared to only two months for Dallas.<sup>52</sup>

In response, state commenters explained that the first two facts do not causally link rebuilding delays to state and local permitting laws and can be explained by a “myriad of factors other than permitting speed . . . such as delayed or insufficient insurance payouts or out-of-pocket costs.”<sup>53</sup> As for the third fact, state commenters noted that SBA cited “a blog post from Hover Architecture, an architecture firm in Colorado with a portfolio primarily focused on car washes,” and it was unclear “where Hover Architecture received its data, the methodology it used to produce it, or its overall reliability as a source.”<sup>54</sup> Furthermore, the Hover Architecture blog post concerned only “building permit approval[s] for a subset of commercial properties” and did not “focus on permit approval timelines in the wake of disasters, which are often streamlined for affected properties.”<sup>55</sup>

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<sup>48</sup> *Id.*

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

<sup>50</sup> *Id.* at 3815.

<sup>51</sup> *Id.* at 3816.

<sup>52</sup> *See id.* at 3814-3815.

<sup>53</sup> States’ Comment Letter, *supra* note 42, at 8.

<sup>54</sup> *Id.* at 9.

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

### (3) SBA offered limited legal analysis to support its authority to preempt state and local laws

Challengers may also argue that SBA lacks the legal authority to preempt state and local laws. Under the U.S. Constitution’s Supremacy Clause, federal law can preempt state and local law in certain circumstances.<sup>56</sup> That preemptive power, however, is limited by Supreme Court precedent.<sup>57</sup> As a general matter, courts presume that federal law does not preempt state and local law unless “that was the clear and manifest purpose of Congress.”<sup>58</sup> This presumption against preemption is especially strong when the relevant federal statute concerns an area of law traditionally regulated by the states.<sup>59</sup>

Federal preemption can be “express” or “implied.”<sup>60</sup> One type of implied preemption, obstacle preemption, can be used when a state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>61</sup> SBA’s rule relies on obstacle preemption.<sup>62</sup>

In obstacle preemption cases, courts look to a federal statute’s “purpose and intended effects” to determine if a state (or local) law poses a “sufficient obstacle” to trigger preemption.<sup>63</sup> To discern Congress’s purpose and objectives in enacting a statute, courts examine the statute’s text, structure, and legislative history.<sup>64</sup>

SBA’s Disaster Loan Program is authorized and governed primarily by section 7(b) of the Small Business Act.<sup>65</sup> But SBA’s four-sentence preemption analysis neither addresses the structure of section 7(b) of the Small Business Act nor explains how its text or legislative history supports broad preemption of state and local permitting requirements.<sup>66</sup>

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<sup>56</sup> U.S. Const. art VI, cl. 2.

<sup>57</sup> See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98-99 (outlining different forms of preemption acknowledged by the Supreme Court).

<sup>58</sup> See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

<sup>59</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)).

<sup>60</sup> CONG. RSCH. SERV., *Federal Preemption: A Legal Primer* (May 18, 2023), <https://www.congress.gov/crs-product/R45825>. “First, federal law can expressly preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when Congress’s preemptive intent is implicit in the relevant federal law’s structure and purpose.” *Id.* (emphasis in original).

<sup>61</sup> See *Gade*, 505 U.S. at 98-99 (outlining the different forms of federal preemption).

<sup>62</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026) (“[F]ederal regulations preempt state and local laws when the latter stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

<sup>63</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

<sup>64</sup> See *Arizona*, 567 U.S. at 403-407 (analyzing the “text, structure, and history” of the Immigration Reform and Control Act of 1986 to determine whether a state law posed an obstacle to the Act’s purpose).

<sup>65</sup> See 15 U.S.C. § 636(b); Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026) (“The disaster loan program authorized by section 7(b) of the Small Business Act (15 U.S.C. 636(b)) is an important federal mechanism established to provide rapid financial assistance to homeowners, business owners, and other victims whose property is damaged or destroyed as a result of declared disasters.”).

<sup>66</sup> *Id.* Note, the Administrative Procedure Act requires agencies only to provide a “reference to the legal authority under which the rule is proposed” when issuing a notice of proposed rulemaking. 5 U.S.C.

Instead, SBA's rule cites only section 5(b)(6) of the Small Business Act for its statutory authority to preempt state and local requirements.<sup>67</sup> That provision authorizes the SBA Administrator to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to [the Small Business Act]." <sup>68</sup> This generic grant of regulatory authority to the SBA Administrator does not mention the Disaster Loan Program or consider how state and local processes should interact with SBA programs. Thus, it is unclear how the text of section 5(b)(6) shows a "clear and manifest purpose" by Congress to preempt state and local permitting laws that delay the use of disaster loan funds.

Additionally, SBA relied on a single item of legislative history to support its obstacle preemption analysis, citing a 2007 Senate report for the proposition that "Congress intended the Small Business Act's Disaster Loan Program to provide rapid, effective deployment of assistance."<sup>69</sup> That report criticized SBA's slow processing of disaster loans and found that the agency "failed in its mission to respond quickly and effectively" to victims of Hurricanes Rita and Katrina.<sup>70</sup> The report may support SBA's assertion that a central purpose of the Disaster Loan Program is the delivery of "rapid" relief to disaster survivors;<sup>71</sup> however, as noted in NGOs' comments, the report addresses "delays caused by *internal* SBA procedures," not by the "state and local permitting practices" that SBA seeks to preempt.<sup>72</sup> Moreover, "Congress did not pass the legislation associated with the cited report," further undermining its relevance to SBA's obstacle preemption analysis.<sup>73</sup>

If SBA retains and does not expand its preemption analysis, legal challenges may follow that point out its weaknesses. If a court upholds SBA's preemption authority, it is unclear what guardrails would restrain SBA's future claims of preemptive authority.

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§ 553(b)(2). Under that standard, SBA's four sentence preemption analysis and single citation to the Small Business Act may be sufficient. However, SBA's extreme brevity in explaining its authority to preempt state and local laws is outside the norms set by other agencies in their preemptive rulemakings. See, e.g., Preemption Determination: State Interest-on-Escrow Laws, 90 Fed. Reg. 61093, 61093-97 (Dec. 30, 2025) (Office of the Comptroller providing four pages of legal preemption analysis in a proposed rulemaking); Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 88 Fed. Reg. 47370, 47371-74 (July 24, 2023) (Department of Education providing four pages of legal preemption analysis in a final rulemaking).

<sup>67</sup> See Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (citing 15 U.S.C. § 634(b)(6)).

<sup>68</sup> 15 U.S.C. § 634(b)(6).

<sup>69</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 n.1 (Jan. 29, 2026) (citing S. Rept. 110-64 (2007) at 1).

<sup>70</sup> S. Rept. 110-64 (2007) at 1.

<sup>71</sup> Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3813-17 (Jan. 29, 2026) (mentioning "rapid" 13 times); see also 13 C.F.R. § 123.800 (stating Congress's goal in creating SBA Disaster Loans was the "rapid repair, rehabilitation and replacement of disaster-damaged real property financed through [SBA Disaster Loans.]" ).

<sup>72</sup> S. ENV'T L. CTR., Comment Letter at 3 (March 2, 2026) (emphasis added), available at <https://www.regulations.gov/comment/SBA-2026-0034-0028>.

<sup>73</sup> *Id.*; see also CONGRESS.GOV, S.163 - Small Business Disaster Response and Loan Improvements Act of 2007, <https://www.congress.gov/bill/110th-congress/senate-bill/163/all-actions?overview=closed&s=4&r=163#tabs> (tracking the progress of S.163 through the 110th Congress).

#### (4) Other policy concerns raised by commenters

Commenters also noted that the rule’s vague preemption trigger and siloed self-certification process may cause confusion and exacerbate rebuilding delays instead of speeding them up.

i. The meaning of “complete” is vague

SBA’s rule does not define what constitutes a “complete” application or request for approval — the submission of which starts the more-than-60-day-delay clock for preemption. As state commenters noted, this ambiguity “leaves [the] interpretation [of ‘complete’] to the self-certifying builder or the borrower.”<sup>74</sup> Several commenters stated that applicants often submit permit materials they believe to be complete, that contain errors or lack required documentation.<sup>75</sup> Thus, if state and local governments cannot gatekeep what qualifies as a “complete” application or request for approval, builders may wrongly treat incomplete submissions as “complete,” wait 61 days, then begin construction even though their application is missing crucial safety information or contains material errors.

ii. SBA’s self-certification process does not provide notice to state and local agencies

Commenters also noted that SBA’s rule does not require disaster loan borrowers to notify preempted state and local authorities that they plan to rely on SBA’s self-certification process.<sup>76</sup> As a result, “local agencies may have no information about which properties are proceeding with SBA self-certification,” undercutting their ability to correct non-compliant building plans *before* construction commences.<sup>77</sup> As Charlotte County, Florida explained in its comment, “[w]hen compliance deficiencies are discovered during construction rather than in advance, the result is costly and time-consuming mid-project corrections—exactly the type of delay [SBA’s] rule seeks to prevent.”<sup>78</sup>

#### Looking Ahead

It is unclear whether any SBA Disaster Loan borrowers have used the new self-certification process in the months since SBA issued its new rule. Beyond posting two self-certification forms to its website, SBA has not provided updates on implementation of the preemption

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<sup>74</sup> States’ Comment Letter, *supra* note 42, at 18.

<sup>75</sup> *Id.*; NAT’L EMERGENCY MGMT. ASS’N, Comment Letter at 2 (Feb. 27, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0012> (“In many cases, project review only goes beyond 60 days because the local authorities are still waiting to receive certain documentation from a builder . . . . The term ‘complete application’ should be rigorously defined to prevent automatic approval mechanisms from being triggered by incomplete submissions awaiting required documentation.”).

<sup>76</sup> States’ Comment Letter, *supra* note 42, at 20.

<sup>77</sup> *Id.*

<sup>78</sup> CHARLOTTE CNTY., FLA., Comment Letter at 2 (Feb. 27, 2026), available at <https://www.regulations.gov/comment/SBA-2026-0034-0017>.

program.<sup>79</sup> In the coming months, SBA may revise its interim final rule in response to public comments, however, the agency has not offered a timeline for that process.<sup>80</sup>

As of this publication, no party has filed suit challenging SBA's interim final rule. However, legal challenges remain possible as parties have up to six years from the date of injury to bring facial challenges to agency rulemakings.<sup>81</sup>

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<sup>79</sup> SMALL BUS. ADMIN., *Options to Bypass Permitting Delays* (last updated Jan. 29, 2026), <https://perma.cc/7CDL-H3AB>.

<sup>80</sup> See Improving SBA Disaster Loan Ability To Provide Meaningful and Timely Assistance, 91 Fed. Reg. 3813, 3814 (Jan. 29, 2026) (“SBA . . . invites post-promulgation public comment and will consider all timely submissions in determining whether revisions to this rule are warranted.”).

<sup>81</sup> 28 U.S.C. § 2401 (setting statute of limitations for civil actions against the United States as “six years after the right of action first accrues”); *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsv. Sys.*, 603 U.S. 799, 808-809 (2024) (holding that the statute of limitations from 28 U.S.C. § 2401 does not begin to run until a plaintiff suffers an injury from a final agency action).