

Financial Management Circular: #2010-4
Effective Date: November 1, 2010
General Subject: Administrative Rulemaking
Specific Subject: Required Documents for Budget Agency Approval
Authority: IC 4-3-22-13; IC 4-12-1-13; Executive Order 2-89
Application: This Circular applies to all rules adopted by any state agency as defined in IC 4-22-2 and IC 13-14-9.

WHEREAS, pursuant to Executive Order 2-89, prior to the adoption of a rule by a state agency, the proposed rule or an amendment or modification to an existing rule must be approved by the Director of the State Budget Agency;

WHEREAS, IC 4-3-22-13 (as adopted in HEA 1001-2005, Section 38) requires a cost-benefit analysis to be performed on the promulgation of new rules and requires the Office Management and Budget (OMB) to provide an assessment of the impact on Indiana businesses of new rules to the Governor;

WHEREAS, prior to approval by the Director of the State Budget Agency, the agency proposing to promulgate the new rule or an amendment to an existing rule shall prepare a fiscal impact analysis and a cost benefit analysis;

WHEREAS, in the adoption of a rule or amendment, an agency shall determine the least intrusive and most efficient regulatory choice for the rule or amendment. A sound regulatory analysis is designed to inform the agency conducting the analysis and the public of the effects of regulatory actions.

This Financial Management Circular (FMC) is intended to establish the procedure that the State Budget Agency will use for its review and approval of the promulgation of new rules or amendments or modifications to existing rules. Beginning November 1, 2010, this Circular applies to all rules and amendments or modifications to existing rules adopted by any state agency under Indiana Code § 4-22-2 et. seq. and § 13-14-9 et. seq. In certain cases, the analyses required by this FMC will demonstrate that the proposed rules may not be necessary. In other situations, the analyses will validate that the rules are reasonable, necessary, and warranted.

In order to receive Budget Director approval under Executive Order 2-89 of a proposed rule or an amendment or modification to an existing rule, the agency must submit to the Budget Agency the following information:

- 1) **Fiscal Impact Analysis.** Prior to State Budget Agency approval of a rule under

Executive Order 2-89, the agency proposing the adoption of a new rule or the adoption of an amendment to an existing rule must complete and submit to the Budget Agency a fiscal impact analysis on state and local government. At a minimum, the fiscal impact analysis shall contain the following:

- a. A calculation of the estimated fiscal impact on state and local government;
- b. The anticipated effective date of the rule;
- c. Identification of any sources of revenue affected by the rule, the estimated increase or decrease in revenues or expenditures of state and local government that would result from the implementation of the rule, including the costs necessary to enforce the rule, and the related citation to the rule provision(s);
- d. Identification of any appropriation, distribution, or other expenditures of revenue affected by the rule and the related citations to the rule provision(s);
- e. Identification of the administrative impact to state and local governments, and the related citations to the rule provision(s);
- f. A determination concerning the extent to which the proposed rule creates an unfunded mandate on a state agency or political subdivision; and
- g. If the proposed rule is readopting an expiring rule, the agency shall also include the fiscal analysis relied upon at the time of its last adoption as well as a current review of the accuracy of that analysis.

2) **Cost-Benefit Analysis.** Prior to State Budget Agency approval of a rule under Executive Order 2-89, the agency proposing the adoption of a new rule or the adoption of an amendment to an existing rule must complete and submit to the Budget Agency a cost-benefit analysis of the proposed rule or amendment. All cost-benefit analyses will be reviewed by the agency's budget analyst and the Office of Management and Budget pursuant to IC 4-3-22-13 and IC 4-22-2-28. This cost-benefit analysis shall replace and be used for all purposes under IC 4-22-2 in lieu of the fiscal analysis previously performed by the Legislative Services Agency under IC 4-22-2. At a minimum, the cost-benefit analysis shall contain the following:

- a. **Statement of Need**, including:
 - i. An explanation as to whether the rule is intended 1) to address a federal or state statutory requirement; 2) to address an alleged market failure; and/or 3) to serve a public need, such as improving government processes or promoting public safety or health.
 - ii. An estimate of the number of individuals and businesses affected by the rule.
 - iii. An evaluation of the policy rationale or goal behind the proposed rule, including an analysis of the following:
 1. An identification of the conduct and its frequency of

- occurrence that the rule is designed to change;
- 2. The harm resulting from the conduct that the rule is designed to change and the likelihood the conduct will continue to occur absent a rule change; and
- 3. Whether and how the agency has involved regulated entities in the development of the rule.
- iv. A detailed description of the agency's methodology used in making the above determinations.

b. **Evaluation of Costs and Benefits.** The agency shall provide a comprehensive enumeration of the costs and benefits of the rule, including tangible and intangible costs and benefits. If costs and benefits cannot be monetized or quantified, the agency should explain why and include a thorough description of the non-quantifiable costs and benefits as well as a determination whether such costs and benefits will be significant. **The cost-benefit analysis should conclude with the agency's determination whether the benefits are likely to exceed the costs.** In reaching that determination, the agency should include the following factors in its analysis, or an explanation of why each factor is not applicable:

- i. An estimate of the primary and direct benefits of the rule, including the impact on consumer protection, worker safety, the environment, and business competitiveness;
- ii. An estimate of the secondary or indirect benefits of the rule and an explanation of how the conduct regulated by the rule is linked to the primary and secondary benefits;
- iii. An estimate of the compliance costs for regulated entities (including but not limited to individuals and businesses), including but not limited to the costs of fees, new equipment or supplies, increased labor and training, education, supervisory costs, and any other compliance cost imposed by the requirements of the rule;
- iv. An estimate of the administrative expenses, including but not limited to any legal, consulting, reporting, accounting or other administrative expenses imposed by the requirements of the rule; and
- v. An estimate of any cost savings to regulated entities (including but not limited to individuals and businesses) as a result of the proposed rule, however, the agency shall note whether such savings are from a change in an existing requirement or the imposition of a new requirement.

To aid in identifying costs and benefits, the agency should consult economic theory, previous academic or internal agency research, scenarios developed while defining the statement of need and policy rationale for the proposed rule; collaborate with colleagues within and outside the agency and consult with the public and regulated entities; and provide sufficient justification for the

agency's methodology in making the above determinations.

- c. **Examination of Alternatives.** The agency should include in its analysis an evaluation of alternatives to achieve the objectives of the proposed rule or amendment. The following list of additional alternatives shall also be considered:
- i. Alternatives defined by statute. Is the rule consistent with the specific statutory requirement and clearly within the agency's statutory discretion?
 - ii. The feasibility of market oriented approaches, including a determination whether the market could eventually remedy the alleged harm the rule is intended to regulate, rather than direct controls;
 - iii. Measures to improve the availability of information, as an alternative to regulation;
 - iv. If applicable, various enforcement methods, such as inspections, periodic reporting, and non-compliance penalties;
 - v. Performance standards rather than design standards. Performance standards express requirements in terms of desired outcomes. Design standards express requirements in terms of the specific means that must be satisfied without choice or discretion;
 - vi. Different requirements for different sized regulated entities. A variation of benefits and costs may exist depending on the mix of entities being regulated;
 - vii. Establish a baseline. It is often helpful to establish a baseline for the cost-benefit analysis as a source of comparison. Consider how the world would look without the proposed rule. Issues to consider when forming a baseline include evolution of the market, changes in external factors affecting expected costs and benefits, existing rules by the agency and other government entities, and the degree of compliance by regulated entities with other rules. Note that such an analysis cannot assume that the rule will be adopted;
 - viii. Different compliance dates; and
 - ix. Redundancy. Per IC 4-22-2-19.5, consider whether the proposed rule duplicates standards already found in state or federal law.
- d. A determination as to whether the proposed rule will have a total estimated impact greater than \$500,000 on all regulated persons (IC 4-22-2-28). The agency shall describe here the data used and assumptions made in making that determination.
- e. Independent verification or studies to support the policy rationale and types and quantifications of the costs and benefits.
- f. The sources relied upon in determining and calculating the costs and benefits.

- 3) **The Notice of Intent.** When the agency files its Notice of Intent with the Legislative Services Agency under IC 4-22-2-23 (or any notice under IC 13-14-9-3; IC 13-14-9-7; or IC 13-14-9-8, if applicable), the agency shall simultaneously provide the State Budget Agency with a copy of the Notice.
- 4) **Small Business Economic Impact Statement** under IC 4-22-2.1; and
- 5) **The proposed or draft rule.**

In addition to the documents listed above, the agency may also submit a request that SBA conduct an expedited review of the proposed rule. Such request may be granted under limited circumstances, including, but not limited to, adoptions or incorporation by reference of federal law, regulations or rules that are applicable to Indiana and contain no amendments that have a substantive effect on the scope or intended application of the federal law or rule; technical amendments with no substantive effect on an existing Indiana rule; or if the proposed rule has no fiscal impact to the state and local governments. The decision to expedite the review of a proposed rule shall be within the discretion of the SBA.

Following review and analysis of the agency's proposed fiscal impact statement and cost-benefit analysis, the OMB may accept the analyses for purposes of IC 4-3-22-13 and IC 4-22-2-28, suggest revisions to the analyses or reject the analyses.

If the agency amends or modifies the proposed rule subsequent to Budget Agency approval and the fiscal impact is altered, pursuant to Executive Order 2-89, the agency must resubmit the proposed rule with the revised fiscal impact statement to the Budget Director through the agency's budget analyst. Reapproval is required before the agency may continue with the rulemaking process.

This Circular does not alter the deadlines established for submission of proposed rules (or amendments or modifications to existing rules) to the Legislative Services Agency, for public hearings, or for submission to the Indiana Attorney General, the Indiana Register, and the Governor. If an agency provides information to the Legislative Services Agency or Indiana Economic Development Corporation concerning the fiscal impact of a proposed rule or an amendment or modification to an existing rule, the agency shall provide copies of such information to the State Budget Agency.

This Circular rescinds FMC #2006-1 and #2006-2.

Approved:



Adam M. Horst
Director, State Budget Agency

Date: 10/8/10