

Office of Management and Budget Review of Agency Rulemaking – (FMC 5.1 – January 1, 2022)

Section 1 – Background: This Financial Management Circular (FMC) establishes the procedures the Office of Management and Budget (OMB) will use to implement IC 4-3-22-13, IC 4-22-2-28, and Executive Order 13-03, including the review of claimed exceptions to the Regulatory Moratorium and requirements to report on the proposed or pending use of rulemaking authority whose source is not within IC 4-22-2 or IC 13-14-9 (including emergency rulemaking authority).

IC 4-3-22-1 tasks OMB with, among other duties, the responsibility to “[a]scertain whether the burdens imposed by laws and rules are justified by their benefits using a rigorous cost benefit analysis.” IC 4-3-22-13 and IC 4-22-2-28 require a cost-benefit analysis to be performed on each proposed rule and require OMB to provide an assessment of the impact on Indiana businesses of new rules to the Governor. “[W]herever possible, and without compromising the health and safety of Hoosiers, this review should result in the elimination or simplification of unnecessary or unduly burdensome rules and regulations so that private sector employment and new investment in Indiana increases and the quality of our Hoosier workforce improves.” EO 13-03.

Section 2 – Procedure for Requesting OMB Approval: As established in Executive Order 13-03, the Regulatory Moratorium does not apply to:

- a) Rules to fulfill an objective related to job creation and increasing investment in Indiana or to improve the quality of Indiana’s workforce;
- b) Rules that repeal existing rules or reduce their regulatory impact;
- c) Rules that implement a federal mandate and no waiver is permitted;
- d) Rules necessary to avoid a violation of a court order or federal law that would result in sanctions by a court or the federal government against the state for failure to conduct the rulemaking action;
- e) Rules to address matters pertaining to the control, mitigation, or eradication of waste, fraud, or abuse within a state agency or wasteful or abusive activities perpetrated against a state agency;
- f) Rules that reduce State spending; or
- g) Rules whose predominate purpose and effect are to address matters of emergency or health or safety, including the promulgation of an emergency rule under IC 4-22-2-37.1.

To receive a determination whether an exception applies to a proposed rule, the agency head shall submit a request in writing addressed to OMB via e-mail, sent to sbarules@gov.in.gov, which includes copies of the information required by this FMC. The agency head shall submit this request before filing a notice of intent to adopt a rule under IC 4-22-2 or a notice under IC 13-14-9.

OMB will provide a copy of the agency's submission to the Governor's Office and State Budget Agency (SBA) and coordinate with those entities to expedite their review and approval of the proposed rulemaking.

Section 3 – Required Information: In order to facilitate OMB's review of proposed rules, the request shall include the following information:

- a) Detailed summary of the proposed rule, including, but not limited to, the following:
 - i) a history and background of the rule;
 - ii) the reasons for the proposed rule;
 - iii) the statutory authority for the proposed rule;
 - iv) the statutory authority for the agency to promulgate the proposed rule;
 - v) a description of the existing legal framework governing the subject matter of the proposed rule with reference to all applicable statutes, regulations, and other legal provisions; and
 - vi) a description of any existing requirements regarding the subject matter of the proposed rule that are contained in agency policy, guidance, manual, contracts, or other sources outside of the legal provisions covered in subsection v above.
- b) Identification of the exceptions that the agency believes permit the agency to promulgate the rule notwithstanding the Regulatory Moratorium and a detailed explanation of why each identified exception applies;
- c) Fiscal Impact Analysis as described in FMC 5.2;
- d) Cost-Benefit Analysis as described in FMC 5.2;
- e) Copy of the proposed rule, if a draft is available;
- f) A redline of the changes made by the proposed rule from existing regulations, or an alternative form of identifying changes approved in advance by OMB;
- g) Any comments received from regulated entities or interested parties regarding the proposed rule if the agency received such comments;
- h) Contact information (name, phone number, email address) for an agency staff member who can answer substantive questions about the proposed rule and the underlying policy area.

This information will better equip OMB to review proposed rules to determine their eligibility for an exception under the Regulatory Moratorium and enable OMB to provide guidance to agencies as they navigate the process. This information will also expedite OMB review of proposed rules following publication of the notice of intent to adopt a rule in the Indiana Register by enabling OMB to provide substantive commentary on the proposed rule early in the rule-making process.

Section 4 – Items Required to be Contained in Regulation: The Administrative Rules and Procedures Act (ARPA) governs agency rulemaking, Ind. Code Art. 4-22. ARPA applies “to the addition, amendment, or repeal of a rule in every rulemaking action.” IC 4-22-2-13(a). ARPA defines a “rule” as:

the whole or any part of an agency statement of general applicability that:

- (1) has or is designed to *have the effect of law*; and
- (2) implements, interprets or prescribes:
 - (A) law or policy; or
 - (B) the organization, procedure, or practice requirements of an agency.

IC 4-22-2-3(b) (emphasis added). The procedural requirements of ARPA, however, do not apply to “[a] resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does *not have the effect of law*.” IC 4-22-2-13(c)(1) (emphasis added).

Case law has similarly defined an administrative rule as having the following four elements:

- (1) “an agency statement of general applicability to a class;”
- (2) that is “applied prospectively to the class;”
- (3) that is “applied as though it *has the effect of law*;” and
- (4) that “affect[s] the substantive rights of the class.”

Villegas v. Silverman, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005) (emphasis added) (citing *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984)).

Thus, whether an agency requirement carries the “effect of law” is a key question in determining whether the requirement must be contained in regulation, and subject to the formal rulemaking process in ARPA, or may merely be contained in an internal policy or procedure and exempt from the formal rulemaking process. The Indiana Supreme Court has explained the “effect of law” standard as follows:

Weaving together this federal and state precedent, we observe a common thread—a rule carrying the effect of law primarily affects individual rights and obligations by setting binding standards of conduct for persons subject to its authority. This ‘effect of law’ concept manifests in everyday situations where Hoosiers must conform their conduct to meet agency standards. To be sure, when an agency standard requires citizens to alter their behavior—i.e., when it regulates their conduct—it necessarily affects the citizens’ rights or obligations because it compels them to do something they would not do otherwise or face legal consequences for noncompliance. And so that agency standard carries the effect of law. We therefore settle on the following summation of the phrase ‘effect of law’ for Indiana

jurisprudence: An agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority.

Ward v. Carter, 90 N.E.3d 660, 665 (Ind.), *cert. denied*, 139 S. Ct. 240, 202 L. Ed. 2d 161 (2018).

OMB can assist agencies with evaluating whether requirements carry the effect of law and must be contained in regulation or if they are internal procedures and may be contained in policy or other non-legal guidance.

Section 5 – Authority for Rulemaking: A key component of OMB’s review of proposed rulemaking and cost-benefit analysis is the agency’s authority for the proposed rulemaking. For example, costs in the proposed rule that are expressly required by the statute authorizing the agency to adopt the rule or any other state or federal law are excluded from the cost-benefit analysis because they are not actually imposed by the proposed regulation itself.

To assist OMB’s review, the agency’s discussion of the authority for the proposed rulemaking should identify which requirements in the proposed rule are:


- a) Expressly required by state or federal law and the citation of the requirement;
- b) Required by court order, consent decree, or in response to litigation and include the relevant court orders or agreement;
- c) A mandatory topic of regulation under State or federal law and the citation of the requirement;
- d) A permissible topic of regulation under State or federal law and the citation for the source of the authority;
- e) Within the general rulemaking authority of the agency the citation for the source of the authority; or
- f) Within an implied or other source of rulemaking authority and identify the source of the authority and explanation why it applies to the rulemaking.

Section 6 – OMB Review: The OMB shall issue a determination in writing regarding the applicability of an exception. Under normal circumstances, OMB should respond to an agency with a determination or comments and questions regarding the proposed rulemaking within 45 days of submission.

If the OMB determines no exception applies to a proposed rule, the Regulatory Moratorium suspends any formal rulemaking activity with regard to the proposed rule. Under these circumstances, the agency must not file a notice of intent to adopt a rule (under IC 4-22-2) or a notice under IC 13-14-9 with regard to the proposed rule.

If the OMB determines an exception applies to a proposed rule, the agency may file a notice of intent to adopt a rule (under IC 4-22-2) or a notice under IC 13-14-9 with regard to a proposed

rule. For a proposed rule that qualifies for an exception under the Regulatory Moratorium, all other applicable procedures under statute, Executive Order 2-89, and FMC 5.2 govern the promulgation of the proposed rule.



Zachary Q. Jackson, Director
State Budget Agency