

Office of Management and Budget and State Budget Agency Review of Agency Rulemaking – (FMC 5.1 – July 14, 2023)

Section 1 – Background: This Financial Management Circular (FMC) establishes the procedures the Office of Management and Budget (OMB) and State Budget Agency (SBA) will use to implement IC 4-3-22-13 and IC 4-22-2-22.8. 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 4-22-2-22.8 require OMB and SBA to review and approve the regulatory analysis performed by an agency on each proposed rule.

Section 2 – Procedure for Requesting OMB and SBA’s Approval: To receive approval from OMB and SBA, the agency head shall submit a request in writing addressed to OMB via e-mail, sent to sbarules@gov.in.gov with the phrase “Regular Rulemaking” in the subject line, which includes copies of the information required by this FMC. The agency head shall submit this request before filing the notice of public comment under IC 4-22-2-23 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.

Following review and analysis of the agency’s proposed rule and regulatory analysis, OMB and SBA may request additional information from the agency, approve the rule and analysis, suggest revisions to the rule and/or analysis, or reject the rule and analysis.

If the agency amends or modifies the proposed rule subsequent to OMB and SBA approval, pursuant to IC 4-22-2-22.8(e), the agency must resubmit the revised proposed rule with the revised regulatory analysis to OMB and SBA along with a discussion of the changes in the proposed rule language and/or the regulatory analysis from the previous version approved by OMB and SBA along with an explanation of the rationale for the changes. 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.

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

- a) Regulatory analysis as described in FMC 5.2;
- b) Copy of the proposed rule in Word;
- c) A redline of the changes made by the proposed rule from existing regulations, or an alternative form of identifying changes (please discuss alternative forms with OMB)

- in advance of submission);
- d) A family impact statement, if required by Executive Order 13-05;
- e) Any comments received from regulated entities or interested parties regarding the proposed rule, if the agency has received such comments;
- f) 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.

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 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.

The term includes a fee, a fine, a civil penalty, a financial benefit limitation, or another payment amount set by an agency that otherwise qualifies as a rule.

IC 4-22-2-3(b) (emphasis added).

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 regulatory 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 and SBA Review: If approved, OMB and SBA shall issue an approval in writing that can be provided to the Indiana Register. Under normal circumstances, OMB and SBA should respond to an agency with a determination or comments and questions regarding the proposed rulemaking within 45 days of submission. An agency may not file a notice of public comment period under IC 4-22-2-23 or a notice under IC 13-14-9 with the Indiana Register until it has obtained this approval.

Section 7 – Expedited Review: In addition to the documents listed above, the agency may also submit a request that OMB and 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 OMB and SBA.



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