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A Table of Requirements for Administrative Rulemaking

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A TABLE OF REQUIREMENTS FOR FEDERAL ADMINISTRATIVE RULEMAKING

MARK SEIDENFELD*

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I. INTRODUCTION

The following table of requirements that an agency must consider when adopting a rule was prompted by the concern of the ABA Rulemaking Committee, Section of Administrative Law and Regulatory Practice, over the protracted nature of the current rulemaking process. When Congress adopted the Administrative Procedure Act (APA), the notice and comment requirement for rulemaking was viewed as a variant on the legislative process that would allow agencies to adopt and amend rules quickly in response to changing circumstances.¹ The early 1970s, an era that introduced statutorily mandated review of agency action to ensure adequate assessment of environmental impacts, together with judicial demands for adequately reasoned decisions,² began a transformation of the notice and comment process into one requiring extensive documentation of the information on which the agency relies and detailed explanation of the choices the agency made in deciding to adopt a rule.³

The late 1970s through the 1980s marked the White House's commencement of its own demands for rigorous regulatory impact analyses—potentially mammoth studies that attempt not only to identify but also to quantify the costs

* Professor of Law, Florida State University College of Law. B.A., Reed College, 1975; M.A., Brandeis University, 1979; J.D., Stanford University, 1983. I owe the idea for this table to Peter Strauss, who, as the chair of the ABA Rulemaking Committee, Section of Administrative Law and Regulatory Practice, had the insight to suggest that someone prepare a chart of requirements that agencies must consider when adopting rules. I am also indebted to Neil R. Eisner, who as Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, prepared an internal memorandum describing many of the rulemaking requirements identified and summarized in this table.

1. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265 (1986) (noting that the rulemaking provisions of the APA, which was passed in 1946, were based upon a legislative conception of rulemaking and are “notable primarily for the absence of constraint [that they place] on agency officials”).

2. See *id.* at 1297-1309 (describing the creation of the “hard look” doctrine and the Federal Courts’ increasing insistence upon detailed rationales for agency action in the public interest era).

3. See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 41-54 (Richard B. Russell Lecture Series No. 6, 1988) (describing how courts heightened review of the procedure and substance of agency rulemaking by imposing procedural requirements such as the “dialogue,” the “hard look,” and the creation of a rulemaking record of all public comments and agency responses).

and benefits of a rule.⁴ Not to be outdone, Congress increased the statutory demands on agencies' promulgation of rules, requiring analyses of impacts on such entities as small businesses and state, local and tribal governments. And the President continues to impose yet additional considerations by executive orders.⁵

This trend towards analysis has alarmed many scholars of the regulatory process.⁶ They have expressed fear that the regulatory apparatus of the federal government will suffer "paralysis by analysis."⁷ Even if one believes that analysis of regulatory impacts is salutary, the patchwork of statutes and executive orders by which these analysis requirements have been imposed and the interrelations between these various statutes and executive orders have created a confusing labyrinth through which agencies seeking to adopt rules must grope. Thus, the Chair of the Section's Committee on Rulemaking suggested that a

4. This method of Executive oversight, by formal request for an analysis of the costs and benefits of the regulation, traces its history to the Nixon White House's attempts to rein in the newly formed Environmental Protection Agency. See Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 133. The breadth of the demands on agencies for such analyses, and the willingness of the executive branch to rely on them to second-guess agency decisions, however, increased under Presidents Ford and Carter, and reached a zenith under Presidents Reagan and Bush, whose actual aims were to reduce regulation. See *id.* at 139-55. Although the Clinton administration has used regulatory impact analyses for less controversial ends than did the Reagan and Bush administrations, President Clinton has continued to require cost-benefit analyses for "major" rules. See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 41-47 (1994) (analyzing the impact of President Clinton's Executive Order 12,866).

5. Sidney Shapiro has suggested that the increased propensity to micromanage agencies results from competition between Congress and the President for influence over agency rulemaking. See Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 15-16 (1994).

6. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992) (expressing concern with "increasingly rigid and burdensome" procedures for informal rulemaking); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 26-27 (1991) (suggesting that courts increased the likelihood of electricity shortage in the United States by applying overly exacting standards of judicial review and insisting that the Federal Energy Regulatory Commission provide more elaborate justification for its rulemakings).

7. See Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996) (noting the criticism of some that time-consuming and costly requirements for detailed assessments reduce the number of rules an agency may promulgate in a year); Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 757 (1996) (suggesting that 1995 legislation requiring further cost-benefit analysis was motivated by a desire to create "paralysis by analysis"); Sydney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 317 (1996) (discussing fears of environmentalists that 1995 legislation would hamper efforts to promulgate important regulation).

one-page chart indicating all of the requirements that an agency seeking to adopt a rule must follow would be helpful, both to provide a roadmap through the maze of statutory and executive order mandates, as well as to illustrate the enormity of the analytic task facing agencies when they seek to promulgate rules. Following is such a chart, with one axis representing the steps in the rulemaking process and the other indicating all the statutes and executive orders that an agency must consider when adopting a rule.⁸

8. A one-page version is available on the World Wide Web for download and printing at <<http://www.law.fsu.edu/journals/lawreview/downloads/272/Seidtab.pdf>>

II. TABLE OF REQUIREMENTS FOR FEDERAL ADMINISTRATIVE RULEMAKING

	APA ^a	Authorizing Statute ^b	"Reg Neg" ^c	Regulatory Flexibility ^d	SBREFA ^e
Get an idea for a rule and/or establish a regulatory program	X ¹	X ²			X ³
Consider alternatives to usual development of rule			X ⁴		
Determine if analyses and/or procedures required before Notice of Proposed Rulemaking (NOPR) published			X ⁵	X ⁶	
Internal checks and/or procedures for determining whether analyses required			X ⁷	X ⁸	
External checks for the above determination				X ⁹	
Prepare draft (pre-NOPR) analyses				X ¹⁰	
Internal checks/procedures for draft analyses				X ¹¹	
External checks for draft analyses					
Analyze public input regarding analyses			X ¹²	X ¹³	
Prepare final analyses (if required prior to NOPR)			X ¹⁴		
Internal checks/procedures for final analyses			X ¹⁵		
External checks for final analyses					
Draft and issue Notice of Proposed Rulemaking	X ¹⁶	X ¹⁷		X ¹⁸	
Allow for public input on proposed rule	X ¹⁹	X ²⁰			
Internal checks and/or procedures for public input		X ²¹			
External checks regarding public input					
Prepare final analyses (if required after NOPR)				X ²²	
Internal checks and/or procedures for final analyses				X ²³	
External checks for final analyses				X ²⁴	
Analyze public input					
Draft and issue final rule	X ²⁵				
Procedural checks and/or requirements for final rule	X ²⁶			X ²⁷	X ²⁸
Substantive checks and/or requirements for final rule	X ²⁹				
Submit rules for mandatory review					
Defend rules against discretionary rule challenges	X ³⁰	X ³¹		X ³²	

A. Authorities

- a. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998).
- b. The agency's authorizing statute gives it authority to issue rules; the cite will depend on the agency and rule involved.
- c. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994 & Supp. IV 1998).
- d. Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994 & Supp. IV 1998).
- e. Small Business Regulatory Enforcement Fairness Act of 1996 §§ 201-224, 5 U.S.C. § 601 note (Supp. IV 1998) (Small Business Regulatory Fairness).
- f. 5 U.S.C. §§ 801-808 (Supp. IV 1998) (entitled "Congressional Review of Agency Rulemaking").
- g. Unfunded Mandates Reform Act of 1995 §§ 201-208, 401, 2 U.S.C. §§ 1531-1538, 1571 (Supp. IV 1998).
- h. Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3520 (Supp. III 1997). The agency must also consult the implementing regulations promulgated by the Office of Management and Budget (OMB), found at 5 C.F.R. pt. 1320 (1999).
- i. Federal Advisory Committee Act, 5 U.S.C. app. (1994 & Supp. IV 1998).
- j. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1994 & Supp. III 1997). The agency must also consult the implementing regulations promulgated by the Council on Environmental Quality (CEQ), found at 40 C.F.R. pts. 1500-1508 (1999). *See* Exec. Order No. 11,991, 3 C.F.R. 123 (1977), *reprinted in* 42 U.S.C. § 4321 note (1994) (making CEQ regulations binding on all Federal agencies).
- k. Trade Agreements Act of 1979 §§ 401-403, 19 U.S.C. §§ 2531-2533 (1994 & Supp. IV 1998).
- l. National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (Supp. IV 1998) (Utilization of Consensus Technical Standards by Federal Agencies).
- m. Exec. Order No. 12,889, 3 C.F.R. 707 (1993), *reprinted in* 19 U.S.C. § 3311 note (1994) (implementing the North American Free Trade Agreement, *done* Dec. 17, 1992, 32 I.L.M. 289 (1993) (pts. 1-3), 32 I.L.M. 605 (1993) (pts. 4-8), *approved* North American Free Trade Agreement Implementation Act § 101, 19 U.S.C. § 3311 (1994)).
- n. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 note (1994).
- o. Exec. Order No. 12,988, 3 C.F.R. 157 (1996), *reprinted in* 28 U.S.C. § 519 note (Supp. III 1997).
- p. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 note (1994).
- q. Exec. Order No. 12,898, 3 C.F.R. 859 (1994), *reprinted as amended in* 42 U.S.C. § 4321 note (1994 & Supp. III 1997).
- r. Exec. Order No. 13,045, 3 C.F.R. 198 (1997), *reprinted in* 42 U.S.C. § 4321 note (Supp. III 1997).
- s. Exec. Order No. 13,084, 3 C.F.R. 150 (1998), *reprinted in* 25 U.S.C.S. § 450 note (Law. Co-op. Supp. 1999).
- t. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (1999).

B. Notes

1. Consider action on petitions requesting initiation of rulemaking proceedings. *See* 5 U.S.C. § 553(e) (1994).
2. Ensure that the agency has authority to issue the rule. *See* 5 U.S.C. § 553(b)(2) (1994) (requiring the NOPR to reference the legal authority for the rule).
3. Establish a program to provide for the reduction or waiver of penalties for rule or statutory violations by small entities. *See* Small Business Regulatory Enforcement Fairness Act of 1996 § 223, 5 U.S.C. § 601 note (Supp. IV 1998) (Small Business Regulatory Fairness).
4. Determine if the rule is appropriate for negotiated rulemaking. *See* 5 U.S.C. § 563 (1994) (providing factors for consideration).
5. If the rule is to be negotiated, determine affected interests to be represented on the rulemaking committee. *See* 5 U.S.C. § 564(a)(3)-(4) (1994) (requiring lists of affected interests and persons to be included in the notice of intention to form the committee).
6. Determine if the rule will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. § 605(b) (Supp. IV 1998) (exempting the rule from the need for a regulatory flexibility analysis (RFA) upon certification that it will not have such an impact).
7. Publish in the *Federal Register* and other appropriate publications a notice of the intention to form a rulemaking negotiating committee. The notice must describe the subject and scope of the rule to be considered and the interests affected, propose representatives of interests for the committee, provide an agenda for negotiation of the proposed rule, and invite comments on the proposal. *See* 5 U.S.C. § 564(a) (1994).
8. If the agency concludes that the rule will not have a significant economic impact on a substantial number of small entities, certify and provide a factual basis for the conclusion. *See* 5 U.S.C. § 605(b) (Supp. IV 1998).
9. Judicial review of the agency's determination that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. § 611 (Supp. IV 1998).
10. Prepare an initial RFA, which must describe the impact of the proposed rule on small entities. *See* 5 U.S.C. § 603(a) (Supp. IV 1998).
11. Publish the initial RFA, along with the NOPR, in the *Federal Register*; submit the initial RFA to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a) (Supp. IV 1998).
12. Consider comments regarding the agency's intention to proceed by negotiation and the committee make-up. *See* 5 U.S.C. § 565(a) (1994) (requiring this consideration before determining whether to establish the committee).
13. Prepare the final RFA, addressing public comments on the initial RFA. *See* 5 U.S.C. § 604(a) (Supp. IV 1998).
14. Determine whether to establish a negotiating committee. *See* 5 U.S.C. § 565(a)(1) (1994).
15. Publish a determination not to establish a negotiating committee, if the agency decides not to proceed by negotiated rulemaking. *See* 5 U.S.C. § 565(a)(2) (1994).
16. Publish the NOPR in the *Federal Register*, giving legal authority for adopting the rule and either the text of the proposed rule or a description of the subjects and issues involved. *See* 5 U.S.C. § 553(b) (1994).
17. Comply with any statutory requirement of special notice (e.g., notice to another agency affected by the rule).
18. Prepare initial RFA prior to publication of NOPR; publish initial RFA along with NOPR. *See* 5 U.S.C. § 603(a) (Supp. IV 1998).

19. Invite public comments; provide formal, trial-type procedures if triggered by the authorizing statute. *See* 5 U.S.C. § 553(c) (1994).

20. If required by the authorizing statute, follow additional procedures, such as holding public hearings. Even formal, judicial-type procedures may be required if the statute requires a hearing on the record.

21. If required by the authorizing statute, respond to any comments of other affected agencies.

22. If the rule will have a significant impact on small entities, prepare final RFA, which must: estimate the number of small entities to which the rule will apply, describe required reports entities will have to prepare, explain measures to minimize burdens of the rule on small businesses, and explain why the rule was chosen and why alternatives were rejected. *See* 5 U.S.C. § 604(a) (Supp. IV 1998).

23. Publish a summary of the final RFA in the *Federal Register*; make the full, final RFA available to the public. *See* 5 U.S.C. § 604(b) (Supp. IV 1998).

24. Judicial review of the RFA accompanying the final rule. *See* 5 U.S.C. § 611 (Supp. IV 1998).

25. Publish in the *Federal Register* a concise general statement of the basis and purpose for the rule. *See* 5 U.S.C. § 553(c) (1994).

26. Publish the final rule in the *Federal Register* 30 days before the rule becomes effective. *See* 5 U.S.C. § 552(a)(1) (1994) (requiring publication in *Federal Register*); § 553(d) (requiring publication 30 days before effective date).

27. Publish an agency agenda of rules having a significant impact on small entities. *See* 5 U.S.C. § 602 (1994).

28. Publish compliance guides explaining the actions small entities must take to comply with the rule. *See* Small Business Regulatory Enforcement Fairness Act of 1996 § 212, 5 U.S.C. § 601 note (Supp. IV 1998) (Small Business Regulatory Fairness).

29. The rule must not be arbitrary, capricious, or otherwise contrary to law. *See* 5 U.S.C. § 706(2)(A) (1994) (providing that such rules are to be held unlawful and set aside).

30. Judicial review is authorized upon petition by any person aggrieved within the meaning of the agency's authorizing statute. *See* 5 U.S.C. § 702 (1994).

31. If the authorizing statute provides for citizen suits, entities not aggrieved within the meaning of the statute may challenge the rule on grounds set forth in the statute.

32. Defend the RFA against any judicial challenges (as part of an APA rulemaking challenge). *See* 5 U.S.C. § 611 (Supp. IV 1998).

33. Develop a plan to notify small governments of rules that may significantly or uniquely affect them, allow for meaningful input into the development of such rules by small governments, and educate governments about the requirements of such rules. *See* 2 U.S.C. § 1533(a) (Supp. IV 1998).

34. Include information collection costs for new rules, as well as existing rules, in the agency's information collection budget, which the agency must submit to OMB annually. *See* 5 C.F.R. § 1320.17 (1999).

35. Meet with the Vice President and other agency heads to prioritize and coordinate regulatory efforts. *See* Exec. Order No. 12,866 § 4(a), 3 C.F.R. 638, 642 (1993). Prepare an agenda of regulation under development or review. *See id.* § 4(b)-(c). Participate in an OIRA (Office of Information and Regulatory Affairs) working group on identifying and analyzing important regulatory issues. *See id.* § 4(d), at 643.

36. Identify and address any disproportionately adverse consequences of the agency's regulatory actions (e.g., proposed rules) on minorities, as part of the agency program on environmental justice. *See* Exec. Order No. 12,898 § 1-101, 3 C.F.R. 859, 859 (1994).

37. Allow for small government input into the development of any rule that will significantly or uniquely affect such governments. *See* 2 U.S.C. § 1534(a) (Supp. IV 1998).

38. If the agency meets with more than one person from outside the federal government for the purpose of obtaining consensus advice, register the meeting group as a FACA committee. *See* Federal Advisory Committee Act § 9(c), 5 U.S.C. app. (1994). Ensure, among other things, that the group is balanced with respect to the matters it addresses, *see* § 5(b)(2); meets in public, *see* § 10(a)(1); and takes minutes of its meetings, *see* § 10(c).

39. If the rule burdens foreign commerce, use performance rather than design standards, where appropriate; consider, and, where appropriate, use international standards. *See* 19 U.S.C. § 2532(2)-(3) (1994).

40. Consult with and, to the extent compatible with agency mission, authority, priorities and resources, participate with private sector bodies in adopting consensus standards; use private consensus standards to carry out the policy objectives of the rule, unless such use is inconsistent with applicable law or impractical. *See* National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (Supp. IV 1998) (Utilization of Consensus Technical Standards by Federal Agencies).

41. Seek the involvement of those intended to be benefitted or burdened by regulation prior to NPR. *See* Exec. Order No. 12,866 § 6(a), 3 C.F.R. 638, 644 (1993).

42. If the regulation would impose uniform national standards, consult with state and local officials about alternatives that would preserve state prerogatives and authority. *See* Exec. Order No. 13,132 § 3(d)(3), 64 Fed. Reg. 43,255, at 43,256 (1999).

43. Determine if the rule is "major" (i.e., has a significant impact on the economy or imposes costs of over \$100 million per year). *See* 5 U.S.C. § 801(a)(1)(A) (Supp. IV 1998) (requiring a report to Congress including this information before the rule can take effect); § 804(2) (defining "major rule").

44. Determine if the proposed rule will mandate more than \$100 million in costs by state, local or tribal governments, or by the private sector. *See* 2 U.S.C. § 1532(a) (Supp. IV 1998) (setting this threshold as the trigger for requiring an impact statement).

45. Determine if the rule requires submission of information by 10 or more persons. *See* 44 U.S.C. § 3507(d)(1) (Supp. III 1997) (setting forth special procedures required for "collections of information"); § 3502(3)(A) (defining "collection of information").

46. Determine if the rule will have a significant environmental impact. *See* 42 U.S.C. 4332(2)(C) (1994) (requiring an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment"). If the agency believes the impact of the rule is insignificant, and the rule does not fall within a categorical exclusion, prepare an environmental assessment (EA). *See* 40 C.F.R. § 1501.4 (1999).

47. Determine if the rule sets a standard that creates an unnecessary obstacle to foreign commerce. *See* 19 U.S.C. § 2532 (1994 & Supp. IV 1998) (prohibiting such unnecessary obstacles).

48. Determine if the rule has a significant impact on the economy or an overall social cost of more than \$100 million (i.e., "major"). *See* Exec. Order No. 12,866 § 3(f), 3 C.F.R. 638, 641-42 (1993) (defining this as one kind of "significant regulatory action"); § 6(a)(3)(B), 3 C.F.R. 638, 645 (1994) (requiring a regulatory impact analysis (RIA) for this kind of significant regulatory action). The term "regulatory impact analysis" is taken from Executive Order Number 12,291, which was effective during the Reagan and Bush administrations; however, "RIA" is used throughout this document to refer to the analysis currently required by Executive Order Number 12,866.

49. Determine if the proposed rule regulates private property for the protection of public health or safety. *See* Exec. Order No. 12,630 § 4(d), 3 C.F.R. 554, 557-58 (1988) (requiring analysis and record-creation for such regulation).

50. Determine if the proposed rule is economically significant as defined by Executive Order 12,866. *See* Exec. Order No. 13,045 § 2-202, 3 C.F.R. 198, 198 (1997) (defining covered regulatory actions).

51. Determine whether the rule will significantly or uniquely affect Indian tribal communities; if so, consult with representatives of the governments of those communities. *See* Exec. Order No. 13,084 § 3(a), 3 C.F.R. 150, 150 (1998).

52. Determine whether the proposed rule has federalism implications and either imposes significant direct compliance costs on states or preempts state law. *See* Exec. Order No. 13,132 § 6(b)-(c), 64 Fed. Reg. 43,255, at 43,257-58 (1999) (requiring a “federalism summary impact statement” for such rules).

53. Hold a public hearing as part of preparing an environmental assessment, in accordance with CEQ regulations. *See* 40 C.F.R. § 1506.6(c) (1999).

54. The OMB must make the final determination of whether a rule is “major.” *See* 5 U.S.C. § 804(2) (Supp. IV 1998) (defining a “major rule” as one found by the OMB Administrator to meet certain criteria).

55. After the rule is promulgated, challengers of the rule under the APA may obtain judicial review of the agency’s determination of no significant environmental impact; if the court finds the agency declaration to be erroneous, the rule will be remanded. *See* Administrative Procedure Act, 5 U.S.C. § 706 (1994) (setting forth scope of review); National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(2)(C) (1994) (requiring an EIS for every “major Federal action significantly affecting the quality of the human environment”).

56. OMB exercises final authority to determine if a rule constitutes “significant regulatory action.” *See* Exec. Order No. 12,866 §6(a)(3)(A), 3 C.F.R. 638, 645 (1993).

57. Analyze the costs and benefits of the rule. *See* 2 U.S.C. § 1532(a) (Supp. IV 1998) (requiring the agency to prepare a statement including an assessment of the costs and benefits of the Federal mandate). Also, identify alternative rules that would achieve the objective with the least burden. *See* 2 U.S.C. § 1535 (Supp. IV 1998) (requiring the agency to identify and consider alternatives, and to select the least burdensome).

58. Prepare a draft EIS evaluating the benefits and detriments of the rule on the human environment; include in the EIS an evaluation of alternatives to the rule. *See* 42 U.S.C. 4332(2)(C) (1994); 40 C.F.R. 1502.9(a) (1999).

59. Prepare a RIA, analyzing the costs and benefits of the proposed “significant regulatory action” and any alternatives to the rule. *See* Exec. Order No. 12,866 § 6(a)(3)(B)-(C), 3 C.F.R. 638, 645-646 (1993).

60. If the proposed rule regulates private property, identify the public health and safety risk created by property use; establish that: (i) the proposed rule substantially advances protecting the public from such risk, and (ii) the restrictions on property use are not disproportionate to the extent to which the property use contributes to the risk; estimate the potential cost to the U.S. government if a court were to find the restriction a taking. *See* Exec. Order No. 12,630 § 4(d), 3 C.F.R. 554, 557-558 (1988).

61. Whenever practicable and appropriate, collect and maintain data on the minority make-up of areas around particular sites or facilities subject to agency regulation (e.g., sites or facilities subject to the proposed rule). *See* Exec. Order No. 12,898 § 3-302, 3 C.F.R. 859, 861-862 (1994).

62. Prepare an evaluation of the environmental health or safety effects of the proposed rule on children, and explain why the proposed rule is preferable to other potentially effective and reasonably feasible alternatives. *See* Exec. Order No. 13,045 § 5-501, 3 C.F.R. 198, 200-201 (1997) (requiring the submission of of this analysis to OMB).

63. Prepare a statement including cost-benefit analysis of the rule, a description of consultations with state, local and tribal governments, and an explanation of why the agency could not propose the least burdensome alternative to the rule. *See* 2 U.S.C. § 1532(a) (Supp. IV 1998) (requiring cost-benefit

analysis and description of constultation); § 1535(b) (requiring explanation regarding least burdensome alternative).

64. Subject the draft EIS to public notice and comment. *See* 40 C.F.R. §§ 1502.9(a), 1503.1 (1999).

65. If the rule constitutes “significant regulatory action,” OMB has 10 days to review the draft RIA before the agency can publish the NOPR. *See* Exec. Order No. 12,866 § 6(b)(2)(A), 3 C.F.R. 638, 646 (1993).

66. Submit to OMB, as part of the analyses accompanying the proposed rule, an identification of takings implications of the rule and a statement regarding the merits of the rule in light of its takings implications. *See* Exec. Order No. 12,630 § 5(b), 3 C.F.R. 554, 558 (1988).

67. Submit the evaluation of the impact on the environmental health and safety of children to OMB (along with the RIA required by E.O. 12,866). *See* Exec. Order No. 13,045 § 5-501, 3 C.F.R. 198, 200-01 (1997).

68. The agency cannot publish a NOPR for a “significant regulatory action” if, within 10 days of receiving the RIA, OMB objects to the rule and states reasons for its objection. *See* Exec. Order No. 12,866 § 8, 3 C.F.R. 638, 648 (1993).

69. Consider comments on the draft EIS as part of the rulemaking docket. *See* 40 C.F.R. § 1503.4(a) (1999).

70. Consult with state and local officials regarding any rule requiring a “federalism summary impact statement.” *See* Exec. Order No. 13,132 § 6, 64 Fed. Reg. 43,255, at 43,257-58 (1999).

71. Prepare information necessary for OMB to determine if the information request (“collection of information”) in the proposed rule is necessary for the proper performance of the agency’s functions. *See* 44 U.S.C. § 3507(d)(1)(A) (Supp. III 1997) (requiring submission of this information).

72. OMB can disapprove any information request (“collection of information”) included in a rule for which notice of the request was not provided to OMB. *See* 44 U.S.C. § 3507(d)(4)(B) (Supp. III 1997).

73. Include a summary of the statement required by 2 U.S.C. § 1532(a) in the NOPR. *See* 2 U.S.C. § 1532(b) (Supp. IV 1998).

74. Give notice to OMB of the information requests in the proposed rule; submit to OMB information regarding those requests. *See* 44 U.S.C. § 3507(d)(1)(A) (Supp. III 1997).

75. Disclose contacts between OIRA and those outside of the agency regarding the rule. *See* Exec. Order No. 12,866 § 6(b)(4)(B)-(D), 3 C.F.R. 638, 647-48 (1993).

76. Review the proposed rule to ensure that it contains no drafting errors or ambiguity, provides a clear legal standard of conduct rather than a general standard, and promotes simplification of standards and regulatory burden reduction. *See* Exec. Order No. 12,988 § 3(a), 3 C.F.R. 157, 159 (1996).

77. In the NOPR, identify and discuss any significant takings implications of proposed rule. *See* Exec. Order No. 12,630 § 5(b), 3 C.F.R. 554, 558 (1988).

78. Work to ensure that the NOPR is concise, understandable and readily accessible to the public. *See* Exec. Order No. 12,898 § 5-5(c), 3 C.F.R. 859, 862 (1994).

79. OMB has 60 days to file public comments regarding information-collection burdens imposed by the rule. *See* 44 U.S.C. § 3507(d)(1)(B), (d)(3) (Supp. III 1997).

80. For technical regulations that have an impact on businesses in NAFTA countries, provide the NOPR at least 75 days prior to the “comment due date.” *See* Exec. Order 12,889 § 4, 3 C.F.R. 707, 708 (1993).

81. Respond to any comments by OMB. *See* 44 U.S.C. § 3507(d)(2) (Supp. III 1997).

82. OMB may disapprove information requests (“collections of information”) in the rule, if it deems the agency’s response to its comments unreasonable. *See* 44 U.S.C. § 3507(d)(4)(C) (Supp. III 1997).

83. Analyze the costs and benefits of the rule. *See* 2 U.S.C. § 1532(a) (Supp. IV 1998) (requiring the agency to prepare a statement including an assessment of the costs and benefits of the Federal mandate). Also, identify alternative rules that would achieve the objective with the least burden. *See* 2 U.S.C. § 1535 (Supp. IV 1998) (requiring the agency to identify and consider alternatives, and to select the least burdensome).

84. If information requests (“collections of information”) in the final rule differ from those in the proposed rule, prepare information necessary for OMB to determine if the information requests in the final rule are necessary for the proper performance of the agency’s functions. *See* 44 U.S.C. § 3507(h)(3) (Supp. III 1997) (requiring the agency to submit substantive or material modifications to OMB for review and approval).

85. Prepare a final EIS, which includes everything in the draft EIS and reacts to comments on the draft EIS. *See* 40 C.F.R. § 1502.9 (1999).

86. If the rule constitutes “significant regulatory action,” prepare a final RIA for the final rule as it will be adopted. *See* Exec. Order No. 12,866 §§ 3(f), 6(a)(3), 3 C.F.R. 638, 641-42, 645-46 (1993).

87. Identify the takings implications of the final rule. *See* Exec. Order No. 12,630 § 5(b), 3 C.F.R. 554, 558 (1988).

88. Prepare an analysis of the final rule’s effects on the environmental health and safety of children. *See* Exec. Order No. 13,045 § 5-501, 3 C.F.R. 198, 200-01 (1997) (requiring submission of this analysis to the OMB).

89. If the rule significantly or uniquely affects Indian tribal communities and imposes substantial direct compliance costs on those communities, prepare a statement describing the extent of consultation with the representatives of tribal governments, summarizing those representatives’ concerns, and describing the agency’s position supporting the need for the rule. *See* Exec. Order No. 13,084 § 3(b), 3 C.F.R. 150, 150-51 (1998).

90. Prepare a “federalism summary impact statement” including a summary of state and local officials’ concerns about the proposed rule and the agency’s position supporting the need for the regulation, and a statement of the extent to which state and local concerns have been met. *See* Exec. Order No. 13,132 § 6(b)-(c), 64 Fed. Reg. 43,255, at 43,257-58 (1999) (requiring such a statement to be included in the rule’s preamble and provided to OMB).

91. Prepare a statement including a cost-benefit analysis of the rule, a description of consultations with state, local and tribal governments, and an explanation of why the agency could not propose the least burdensome alternative to the rule. *See* 2 U.S.C. § 1532(a) (Supp. IV 1998) (requiring cost-benefit analysis and description of consultation); § 1535(b) (requiring explanation regarding least burdensome alternative).

92. If information requests (“collections of information”) in the final rule differ from those in the proposed rule, OMB may disapprove those requests if the agency fails to notify OMB of the new information requests. *See* 44 U.S.C. § 3507(d)(4)(D) (Supp. III 1997).

93. OMB has 90 days to review a rule constituting “significant regulatory action” before the agency can promulgate it. *See* Exec. Order No. 12,866 § 6(b)(2)(B), 3 C.F.R. 638, 647 (1993).

94. Submit to OMB identification of takings implications of the final rule. *See* Exec. Order No. 12,630 § 5(b), 3 C.F.R. 554, 558 (1988).

95. Submit analysis of environmental, health and safety effects of the final rule on children to OMB with the final RIA required by Executive Order 12,866. *See* Exec. Order No. 13,045 § 5-501, 3 C.F.R. 198, 200-201 (1997).

96. Have the official designated as responsible for implementing Executive Order 13,132 certify compliance with this executive order. *See* Exec. Order No. 13,132 § 8(a), 64 Fed. Reg. 43,255, at 43,258 (1999) (requiring such certification to be included with draft final regulation transmitted to OMB).

97. Judicial review of whether the agency prepared the required statement or adopted a small government plan. The court can compel preparation of the statement or the plan, but cannot invalidate or stay an otherwise valid rule. *See* 2 U.S.C. § 1571(a)(2)-(3) (Supp. IV 1998).

98. After the rule is promulgated, challengers of the rule under the APA may obtain judicial review of the EIS to ensure it is complete. *See* Administrative Procedure Act, 5 U.S.C. § 706 (1994) (setting forth scope of review).

99. Include the statement regarding the concerns of Indian tribal governments in the preamble to the rule, and provide that statement to OMB prior to adopting the rule. *See* Exec. Order No. 13,084 § 3(b), 3 C.F.R. 150, 150-51 (1998).

100. Include the federalism summary impact statement in the preamble to the final rule, and provide this statement to OMB with the draft of the final rule required by other executive orders (i.e., at least 60 days in advance of adopting the rule). *See* Exec. Order No. 13,132 § 6(b)-(c), 64 Fed. Reg. 43,255, at 43,257-58 (1999).

101. Include in the rule a statement to inform persons subject to information requests why the information is being collected and whether the information requested is voluntary, required to receive a benefit, or mandatory. *See* 44 U.S.C. § 3506(c)(1)(B)(iii) (Supp. III 1997).

102. Determine that the rule meets requirements of Executive Order 12,988 or that it is unreasonable for the rule to meet those requirements. *See* Exec. Order No. 12,988 § 3(c), 3 C.F.R. 157, 161 (1996).

103. Submit the final rule with supporting documents (i.e., cost-benefit, regulatory flexibility, and unfunded mandates analyses) to Congress for review. *See* 5 U.S.C. § 801(a)(1) (Supp. IV 1998).

104. Submit to OMB and the Attorney General an annualized itemized compilation of takings awards against the agency, which would indicate the takings implication of a past rulemaking. *See* Exec. Order No. 12,630 § 5(d), 3 C.F.R. 554, 558 (1988).

105. If Congress disapproves the rule, the agency may not promulgate substantially the same rule without subsequent statutory authorization. *See* 5 U.S.C. § 801(b)(2) (Supp. IV 1998). "Major rules" cannot take effect for at least 60 days after the rule is submitted to Congress for review and the rule is published in the *Federal Register*. *See* 5 U.S.C. § 801(a)(3) (Supp. IV 1998).

106. The agency cannot enforce an information request in a rule that has not received an OMB control number indicating that OMB has approved the request. *See* 44 U.S.C. § 3512 (Supp. III 1997).

107. APA challenges to the rule may be based on agency failure to comply with NEPA. NEPA imposes enforceable procedural requirements, and information in the EIS can be used to challenge agency decision as arbitrary and capricious under the APA. *See* Administrative Procedure Act, 5 U.S.C. § 706 (1994) (setting forth scope of review).

108. The president resolves any unresolved disagreements between OMB and the agency. *See* Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1993).

109. Rules burdening property rights should address only real and substantial threats to health and safety, and they should impose no greater restriction on property use than is necessary to achieve health and safety purposes of the rule. *See* Exec. Order No. 12,630 § 3(c), 3 C.F.R. 554, 557 (1988). The duration of permitting processes under a rule must be kept to a minimum. *See id.* § 4(c).

110. Congress reviews rules on a fast-track basis. *See* 5 U.S.C. § 802 (Supp. IV 1998) (describing streamlined procedures for the proposal and consideration of a joint resolution).