

MSAPA Drafting Committee

Analysis of timing issue related to section 305 regulatory analysis

Memo prepared for June telephone conference call.

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Section 305

Section 305 provides for a regulatory analysis which contains:

- (1) a description of any person or class of persons that would be affected by the rule, and the cost and benefit to that person or class of persons;
- (2) an estimate of the probable impact of the rule upon affected persons;
- (3) a comparison of the probable costs and benefits of the rule to the probable costs and benefits of inaction; and
- (4) a determination of whether there are less costly or less intrusive methods for achieving the purpose of the rule.

When does a regulatory analysis prepared by an agency in rulemaking have to be completed: before the notice of the text of proposed rules is published by the agency, or at some later point of time, such as when the final rule is adopted?

If you know the statutory citation for this provision in your state's law, please provide it.

ARIZONA

- A preliminary summary accompanies the proposed rule or final rule.
 - Regarding the Proposed Rulemaking Form for whether the regulatory analysis is prepared before the notice is published or at some later point in time, see our Preamble. "Preamble" means:
 - (a) For any rule making subject to this chapter, a statement accompanying the rule that includes:
 - (i) Reference to the specific statutory authority for the rule.
 - (ii) The name and address of agency personnel with whom persons may communicate regarding the rule.
 - (iii) An explanation of the rule, including the agency's reasons for initiating the rule making.
 - (iv) A reference to any study relevant to the rule that the agency reviewed and either proposes to rely on in its evaluation of or justification for the rule or proposes not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study and any analysis of each study and other supporting material.
 - (v) The economic, small business and consumer impact summary, or in the case of a proposed rule, a preliminary summary and a solicitation of input on the accuracy of the summary....A.R.S. § 41-1001 (14)(v)
- <http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/41/01001.htm&Title=41&DocType=ARS>

- Re Final Rulemaking Form (also see our Preamble)
 - (d) For a final rule, except an emergency rule, the preamble also shall include, in addition to the information set forth in subdivision (a), [so also accompanying the rule] the following information:
 - (i) A list of all previous notices appearing in the register addressing the final rule.
 - (ii) A description of the changes between the proposed rules, including supplemental notices and final rules.
 - (iii) A summary of the comments made regarding the rule and the agency response to them.
 - (iv) A summary of the council's action on the rule.
 - (v) A statement of the rule's effective date.
 - A.R.S. § 41-1055. Economic, small business and consumer impact statement
<http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/41/01055.htm&Title=41&DocType=ARS>
 - An interesting side note: If rules affect or "impact" small businesses
 A.R.S. § 41-1035. Rules affecting small businesses; reduction of rule impact
<http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/41/01035.htm&Title=41&DocType=ARS>

CALIFORNIA

- In California, prior to submitting proposed regulations to OAL for review, a state agency must consider the proposal's impact on business, and assess the potential creation or elimination of jobs, businesses etc. (Government Code section 11346.3).
- State agencies are required to publish Notice to kick off the rulemaking process, and that Notice must include an estimate of the costs or savings impact on any state agency, local agency, school district, or federal funding source. (Government Code section 11346.5.) This information is contained in a Fiscal Impact Statement form provided by the Department of Finance. The FIS form used in California includes a section for the economic analysis referenced above. Here is a link to the form itself in case that might be of interest to you: <http://www.oal.ca.gov/pdfs/std399.pdf>

CALIFORNIA

- The California approach is similar to North Carolina's. See California government code Section 11346.3:
 - o (a) State agencies proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements. For purposes of this subdivision, assessing the potential for adverse economic impact shall require agencies, when proposing to adopt, amend, or repeal a regulation, to adhere to the following requirements, to the extent that these requirements do not conflict with other state or federal laws:
 - o (1) The proposed adoption, amendment, or repeal of a regulation shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.
 - o (2) The state agency, prior to submitting a proposal to adopt, amend, or repeal a regulation to the office, shall consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states. For purposes of evaluating the impact

on the ability of California businesses to compete with businesses in other states, an agency shall consider, but not be limited to, information supplied by interested parties.....

COLORADO

- A regulatory analysis, if requested, must be made available to the public five days before the public rulemaking hearing. Colorado's APA does not require that the regulatory analysis be published in the Register. Any member of the public can request that a regulatory analysis be prepared, but that rarely occurs. A few rulemaking agencies routinely prepare a regulatory analysis at the request of their governing board.
- The statutory citation is C.R.S. 24-4-103(4.5).
http://www.sos.state.co.us/pubs/bingo_raffles/admin_procedures_act.pdf

DELAWARE

- In Delaware it is not clear when the analysis is to be completed. The statute says:
 - o "§ 10405. Transmission of rule to General Assembly standing committees; comments. The agency prescribing such rule shall transmit such rule to, and obtain the comments, if any, of, the appropriate standing committees of the General Assembly with oversight responsibilities for legislation affecting that agency with respect to the impact on individuals and/or small businesses resulting from implementation of such rules. (64 Del. Laws, c. 51, § 1.)"
- That being said, agencies in Delaware have never complied with the chapter.
- The citation is 29 Del.C. Ch. 104.
<http://delcode.delaware.gov/title29/c104/index.shtml>

IDAHO

- In Idaho, the Division of Financial Management, a division of the Governor's Office, requires that a Proposed/Temporary Administrative Rules Form (PARF) be submitted prior to the notice of proposed rule (or temporary rule) being submitted to my office for publication in the Bulletin. This is not a statutory requirement but I will not publish a proposed or temporary rule without a copy of the PARF that has been signed by the DFM administrator.
- For the most part the PARF does address those issues listed in Section 305 of the MSAPA, but a subsequent review is done by the Legislative Services Office also. This is a statutorily required review that is done for the germane joint subcommittees of the legislature that oversee each agency. This LSO review provision is outlined in Idaho's APA under Section 67-5223, Idaho Code. This section was amended during this year's legislative session and the filing process was changed making it responsibility to file these rulemakings with LSO after I have reviewed and formatted them for publication in the Bulletin. In most cases the review is done prior to publication but not always and there is no statutory deadline for completing the review. However, once the analysis is forwarded to the members of the subcommittees, they do have a specific time period to request any or all of the information outlined in Section 305 from the agency if they feel it is necessary. These procedures are outlined in Section 67-454, Idaho Code.
- During the legislative session the germane committees review and approve agency rules and any concerns that have been raised during the joint germane subcommittee review are addressed by the germane committee during the formal review for final adoption. These review provisions are outlined in 67-5291, Idaho Code.

MICHIGAN

- In Michigan, the Regulatory Impact Statement must be submitted to our office (State Office of Administrative Hearings and Rules) 28 days prior to the hearing. Upon

approval, we immediately post the information on the web. The draft rule text is also published on the web in the Michigan Register before the public hearing.

MISSOURI

- The regulatory analysis has to be completed at the time the proposed rule, amendment or rescission is being filed for publication. Missouri law in sections 536.200, 536.205, 536.215 and 536.300, RSMo requires an analysis by the agency of the cost or impact on public entities, private entities as well as any impact on small business.
- These regulatory analysis documents are published in the Missouri Register with the rule text and a notice seeking public comment or hearing. Once comments are received and analyzed if the agency determines to make any change to the proposed rule text that would change the original estimated impact by more than 10%, for public or private entities, the agency has to prepare and file revised fiscal notes with their order of rulemaking for publication in the Missouri Register.

NEW HAMPSHIRE

- In New Hampshire the relevant document is called a "fiscal impact statement" (FIS), although it does not actually weigh costs and benefits but must state them, including the cost or benefit of the proposed rule to the state, its citizens, political subdivisions, or independently owned businesses. An FIS is required for all regular rulemaking (generally resulting in 8-year rules), and some interim rulemaking (180-day rules).
- The FIS must be obtained by an agency from the Office of Legislative Budget Assistant, based on information that the agency provides, before notice is published. The agency must then file the FIS with the proposed rule as part of its rulemaking notice, which is then published in the Rulemaking Register by our office, the Office of Legislative Services (OLS). The Register is also viewable on the web site of OLS.
- See NHRSA 541-A:5, NHRSA 541-A:6, I(i), and NHRSA 541-A:9, I(a) for regular rulemaking, and RSA 541-A:19, I and II for interim rulemaking.
- In regular rulemaking, if the proposed rule changes as a result of the public comment and hearing process, the agency must obtain an amended FIS, which is then filed as part of the final proposal but is not published again. Instead, this final proposal is subject to review by our rules oversight committee, the Joint Legislative Committee on Administrative Rules (JLCAR). The JLCAR may object to a final proposal on several grounds, one of which is that there is a substantial economic impact not recognized in the FIS (or amended FIS). See RSA 541-A:5, VI, RSA 541-A:12, II(d), and RSA 541-A:13, IV(d).
- Interim rules do not have a public comment and hearing process, except for a legislative hearing before the JLCAR. But the JLCAR's approval is required for an interim rule to be approved, and an inadequate FIS (if an FIS is required) may prevent that.

NEW JERSEY

- In New Jersey, the various impact statements and/or analyses in a rulemaking are part of the notice of proposal. The Federal Standards Statement or Analysis, which discusses whether there are any Federal requirements applicable to the proposal's subject matter and, if so, are those requirements exceeded by the proposal, appears in both the notice of proposal and adoption.
- N.J.S.A. 52:14B-4(a)(2) and 16 through 24 and Governor's Executive Order No. 4 (2002). See also N.J.A.C. 1:30-5.1.

NEW YORK

- For most rules, the regulatory impact statement (RIS), regulatory flexibility analysis for small businesses and local governments (RFA), rural area flexibility analysis (RAFA), and job impact statement (JIS) must be completed at the time the rule is

submitted to the Governor's Office of Regulatory Reform (GORR) for pre-approval prior to the publication in the New York State Register. For rules which do not require pre-approval by GORR, these statements would first appear at the time they are published with a notice of proposed rule making or emergency adoption in the State Register.

- Statutory citation:
RIS: State Administrative Procedure Act (SAPA) section 202-a
RFA: SAPA section 202-b
RAFA: SAPA section 202-bb
JIS: SAPA section 201-a

NORTH CAROLINA

- Prior to publication of notice of text of proposed rules
- NCGS 150B-21.4
Office of State Budget Manual:
<http://www.osbm.state.nc.us/osbm/RegulatoryAnalysis.html>

NORTH CAROLINA

- The way I read th[is] statute is that the regulatory analysis must be completed before the proposed text of new rules are published.
- The Wake forest article states at 699: The analysis of the proposed rule must be done and approved by OSBM prior to publication of the text of the proposed rule in notice and comment proceedings. [\[FN24\]](#) [§ 150B-21.4\(b1\) \(1995\)](#).
 - o b1) Substantial Economic Impact. -- As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least three million dollars (\$3,000,000) in a 12-month period.
 - o Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office.
 - o If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note.
 - o If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.
 - o If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review.
 - o The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review.
 - o If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

OKLAHOMA

- In Oklahoma, a "rule impact statement" for permanent rules must be prepared, and available to the public, within 15 days after publication of the notice of rulemaking intent in the Register. It can be revised as necessary, but all copies are filed with the proposed rules for review by the Governor and Legislature. For emergency rules, it must be prepared prior to filing the adopted rules for gubernatorial review (prior notice is optional for emergency rules).
- 75 O.S., Sections 303(D) and 253(B)(2) (see links below)
<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=436030>
<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=93494>

OREGON

- The analysis (Fiscal Impact Statement) is to be filed with the Notice of Proposed Rulemaking, prior to publishing.
- The statutory citation for this is Oregon Revised Statutes (ORS) 183.335(2)(a)(E)-(G).

SOUTH DAKOTA

- In South Dakota, the fiscal impact statement is served with the proposed rules at least 20 days prior to the date of the public hearing. In addition, when submitting a proposed rule that will have a direct impact on small business the agency must prepare a small business impact statement. This small business impact statement must be served with the proposed rules at least 20 days prior to the date of the public hearing.
- <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=1-26-4&Type=Statute>
- <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=1-26-2.1&Type=Statute>

TEXAS

- The analysis must be included when proposed rule is filed for publication.
- Texas Government Code, §2001.024. CONTENT OF NOTICE.
- Also, relevant is §2006.002. ADOPTION OF RULES WITH ADVERSE ECONOMIC EFFECT. This section applies to the notice of a proposed rule that may have adverse consequences for small or micro businesses, and requires a detailed regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.
- <http://tlo2.tlc.state.tx.us/statutes/gv.toc.htm>

VIRGINIA

- Virginia's response from Larry Getzler, Department of Planning and Budget, is provided below. I would only add that the economic impact analysis is published with the proposed regulation in the Virginia Register. The analysis and proposal are available on the Virginia Regulatory Townhall a few days prior to the VA Register publication date:
- In Virginia the regulatory analysis report is produced by economists at the Department of Planning and Budget, not by staff at the promulgating agency. Before the text of the proposed rules is published, the Department of Planning and Budget produces an economic impact analysis report based on the proposed text. The report includes all the information mentioned in the background paragraph describing the regulatory analysis requirement in the current draft of the Model State Administrative Procedure Act, plus some additional specifics.
- Unless the proposed rules are being promulgated through the fast-track rulemaking process, the Department of Planning and Budget, in coordination with the promulgating agency, must complete the report within 45 days. If the proposed rules are being promulgated through the fast-track rulemaking process, then the report must be completed within 30 days.
- Here is a link to Code of Virginia section § 2.2-4007.04:

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-4007.04>